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Issue Date: 15 September 2008

OALJ CASE NO.: 2008-TAE-00003

In the Matter of:

**ADMINISTRATOR, WAGE & HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,**

Prosecuting Party,

vs.

**GLOBAL HORIZONS MANPOWER, INC. and
MORDECHAI ORIAN, an individual,**

Respondents.

DECISION AND ORDER: (1) GRANTING PROSECUTING PARTY'S TERMINATING SANCTIONS MOTION AGAINST RESPONDENTS; (2) DENYING RESPONDENTS' AUGUST 14, 2008, MOTION FOR SANCTIONS; AND (3) ENTERING A DEFAULT JUDGMENT FOR PROSECUTING PARTY AGAINST RESPONDENTS ON ALL CLAIMS IN THIS CASE

I. Introduction

Respondent Global Horizons Manpower, Inc. ("Respondents" or "Global")[1] is an enterprise that formerly supplied agricultural labor to clients throughout the United States. Global recruited both American workers, and foreign workers who can be admitted to the United States temporarily under the provisions of the Immigration Act found at 8 U.S.C. § 1101(a)(15)(H)(ii)(a) ("H-2A program"). The Wage and Hour Division of the U.S. Department of Labor ("Prosecuting Party," the "WHD," or the "Administrator") grants a temporary alien agricultural labor certification when an employer shows there are not enough domestic workers to meet its agricultural production requirements, and satisfies other program requirements relating to the pay, housing, and other needs of the alien workers. The Administrator's

[1] Mordechai Orian is also a party to these actions. For the sake of simplicity, Mr. Orian and Global Horizons, Inc. will be referred to collectively as "Global" or "Respondents", except as noted.

certification permits an employer to apply to U.S. Homeland Security for visas to admit the alien workers to the United States as non-immigrants. 20 C.F.R. § 655.100(b) (2007).

This matter involves an action currently set for trial on October 20, 2008, in Long Beach, California. Global seeks review of the WHD's January 28, 2008, determination of violations of the H-2A program regulations, and assessment of back wage liability and penalties totaling $199,605.47 plus interest against Global.

This order resolves two motions currently pending in this case:

1. The Administrator's August 12, 2008, Motion for Sanctions based upon Global's alleged continued failure to comply with my June 23 and July 8, 2008, discovery orders (the "Terminating Sanctions Motion"), and
2. Global's August 14, 2008, "Application for an Order to Show Cause Why Sanctions Should Not Be Imposed for Violation of the Court's Pre-trial Order" ("Global's Motion for Sanctions").

For the reasons that follow, I grant the Administrator's Terminating Sanctions Motion, deny Global's motion, and enter a judgment for the Administrator on all claims in this case affirming the assessment of back wages, penalties, and interest against Respondents.

II. Background

The Administrator's determination alleges back wages owed by Global totaling $142,105.47 and penalties of $57,500.00 for violations of H-2A program regulations. The Administrator alleges that Global violated aspects of its certification once the H-2A workers arrived in Kern and Tulare Counties in California between August 1, 2003, and April 30, 2004. The alleged violations include providing U.S. workers different and more onerous terms and conditions of employment than would have been provided to H-2A workers, not providing H-2A workers living accommodations and cooking facilities, failing to provide them with the required transportation between the living accommodations and the work site, not paying workers for 3/4ths of expected daily wages after arriving at the place of employment, failing to maintain accurate and sufficient payroll records, failing to provide accurate and sufficient wage statements to the U.S. workers, failing to pay workers all wages when due, seeking a waiver of all claims, and making misrepresentations to ETA and WHD employees.

III. Relevant Facts

I take administrative notice of Global's history of bad faith, delay, and gross negligence in discovery in this case and in previous cases–both my own and those of my colleagues in this Office–most notably in OALJ Case Nos. 2005-TAE-00001, 2005-TLC-00006 (July 17, 2007, order by Judge Dorsey granting prosecuting party's motion to compel further discovery responses from Global and to deem matters admitted and denying Global's motion for a protective order), and 2007-TLC-00001 (I found that only Global's stubborn refusal to produce

easily obtainable payroll records in a timely manner had forced trial and that either Global's bad faith or gross negligence delayed the submission of newly-offered payroll records and had caused undue prejudice to the Administrator who had insufficient time to prepare for trial).

A. Summary of Events Leading to My July 7, 2008, Sanctions Order

The following is a summary of the events that led to my June 23, 2008, order granting the Administrator further time to depose Respondent Mordechai Orian and my July 7, 2008, order sanctioning Global for violating my May 15, 2008, discovery order.

On March 7, 2008, the Administrator served its initial set of discovery requests (the "Initial Requests") on Global.

On April 4, 2008, the Administrator served his second set of discovery requests (the "Second Requests") on Global.

On April 7, 2008, Global served a brief response to the Administrator's Initial Requests. Global refused to produce *any* of the requested documents, citing 29 C.F.R. subsection 18.14(c), a provision that limits the discovery of work product. However, Global did not assert that any of the requested documents were work product or privileged. Instead, Global adopted the frivolous position that it was not required to produce *any* documents until I ordered it to do so. Global also generalized the Initial Requests as "voluminous," but made no individualized objections.

On April 9, 2008, Global served a nearly identical response to the Administrator's Second Requests.

On April 15, 2008, the Administrator served a written meet and confer request to Global's counsel, explaining that Global's reliance on subsection 18.14(c) was misplaced as that subsection is limited to documents under the work product doctrine and Global failed to specifically tie a privilege or protection to a particular request.

On April 25, 2008, after unsuccessfully attempting to meet and confer with Global's counsel, the Administrator filed a motion to compel responses to the Initial Requests. On May 12, 2008, Global filed its opposition and moved for a protective order.

On May 15, 2008, I issued an order granting the Administrator's motion to compel responses to the Initial Requests (the "May 15th Order"). In the May 15th Order, I found that Global's invocation of subsection 18.14(c) was meritless, "either in bad faith or with gross negligence," and "further evidence of its pattern of bad faith stone-walling before this Office." I also found that any other objections to the Initial Request were waived by Global's failure to make specific objections within 30 days and further failure to demonstrate good cause for that delay.

I ordered Global to provide all documents responsive to the Initial Request "on or before Friday, May 30, 2008," and cautioned Global of imposing sanctions–including adverse findings of facts–if it failed to do so.

On May 30, 2008, Global mailed to the Administrator documents responsive to the two requests and a disk containing a useless, one kilobyte file in an unpenetrable proprietary format.

Also on May 30, 2008, the Administrator filed a Motion for Sanctions Due to Respondent's Obstruction of the Depositions of Mordechai Orian on March 28, May 20, and May 21, 2008, (the "Depo Motion"). In addition to the struggles already described, Global has repeatedly frustrated the Administrator's efforts to effectively depose Mr. Orian in both his individual capacity and his capacity as Global's Rule 30(b)(6) deponent. Mr. Orian has also failed to bring various requested documents to his depositions. On June 23, 2008, I issued an order denying the sanctions requested in the Administrator's Depo Motion, but granting the Administrator additional time for a fair examination of Mr. Orian, in his individual capacity, and also ordering Mr. Orian to produce the documents requested for his earlier deposition not later than June 30, 2008 (the "June 23, 2008, Depo Order"). In a conference call later that day, I extended that deadline to July 8, 2008.

On June 4, 2008, the Administrator filed a motion to compel responses to the Second Requests (the "Second Motion to Compel") because Global still refused to produce responsive documents, despite the fact that its objections were virtually identical to those I rejected in the May 15, 2008, Order.

On June 6, 2008, the Administrator filed a Motion for Sanctions for Respondents' Non-Compliance with the Court's May 15, 2008, Order (the "Administrator's June 6, 2008, Motion for Sanctions").

On June 6, 2008, Global provided some 650+ pages of documents, of which a substantial percentage were illegibly dark. Global also refused to provide documents responsive to RFPs 56-58, and 62-63, based upon the assertion that the Administrator already has the documents from another litigation–*despite the fact that my May 15, 2008, Order explained that Global had waived all objections to the Initial Requests*.

In a nutshell, Global first relied on a patently frivolous argument and refused to turn over any documents without making specific objections in a timely manner. After I issued an order to compel production of documents, Global waited until the very last day and sent the Administrator a couple of deposition transcripts and a useless disk, allegedly by accident. Approximately a week later, Global provided another disk with mostly legible files, but still refused to turn over some documents and also claimed that many others were non-existent, missing, or accidentally destroyed.

B. The July 7, 2008, Sanctions Order

On July 7, 2008, I issued an order sanctioning Global for violating my May 15, 2008, Order (the "July 7, 2008, Sanctions Order"). I took administrative notice of Global's history of bad faith, delay, and gross negligence in discovery in previous cases before me and my colleagues. I found that Global acted in bad faith in this case and substantially violated my May 15, 2008, order. I found that Global's discovery abuses had nearly paralyzed my docket,

prejudiced the Administrator–although to an unknown extent–and that Global's pattern of bad faith discovery tactics in this case and others demonstrated that Global would not be deterred by minor sanctions.

After considering the factors laid out in *Pagtalunan v. Galaza*, I determined that the appropriate sanctions were adverse factual findings on the two issues related to the documents Global failed to produce. *See* 291 F.3d 639, 642 (9th Cir. 2002). Accordingly, I made irrebuttable findings of fact that Global failed to employ and pay the workers the three-quarters guarantee, and that Global committed the misrepresentation violations. That sanction effectively foreclosed the factual issues underlying 92% of the entire monetary amount sought by the Administrator against respondents before interest.

In that same July 7, 2008, Sanctions Order, I also granted the Administrator's Second Motion to Compel, ruled that Global's objections to the Second Requests were either overruled or waived, and ordered Global to "deliver to the Administrator, in a legible and useable form, all documents responsive to the Second Requests by noon on Friday, July 18, 2008." I warned Global that "[f]ailure to comply punctually, fully, and completely will result in further sanctions, up to and including, entry of a default judgment for all claims in this case."

C. Events Subsequent to Those Described in the June 23 Depo. Order and July 7, 2008, Sanctions Order

The following findings of fact constitute a subset of the facts alleged by the Administrator. In an attempt to distill the facts into a digestible package, I have omitted the Administrator's allegations and Global's corresponding counter-arguments where I found the allegations unsupported or relatively unimportant.

(1) *Respondents' Waived Objections*

On June 25, 2008, the Administrator received Global's verified Responses to the Second Requests.[2] Terminating Sanctions Motion Ex. 16 at 1. The responses began with a blanket statement that 1) Global intended to "disregard sub parts to the extent they contradict or change the requests," 2) claimed that multiple previous counsel had lost portions of Global's files, and 3) disavowed control over files in the custody of Global's former counsel. *Id.* at 2-4.

In its Opposition, Global states without citation "[a]part from the usual inane moaning about alleged document delivery delays, the Administrator's argument here is that Respondents are not permitted to object to discovery requests on multiple grounds. This is a ridiculous and unsupported argument that needs no further discussion." Opposition at 18. It is not clear which alleged argument of the Administrator's allegations Global is referring to. More importantly, Global ignores my July 7, 2008, Sanctions Order in which I explicitly held that Global had waived all objections to the Second Requests by choosing to only make a frivolous refusal to timely produce any documents and also sanctioned Global–in part–for refusing to produce documents based on objections that I had earlier held waived to the Initial Requests. In other

[2] Subsequent responses from Global labeled as supplemental responses to the Second Requests were actually mistitled supplemental responses to the Initial Requests. *See* Motion at 5 n.3, Ex. 3, Ex. 11.

words, despite the fact that I have twice ruled that Global waived objections to the document requests, and that Global was already sanctioned for later relying on those waived objections, Global is still dredging up waived objections and expressing offense at the suggestion that such objections are foreclosed.

(2) *RFP 103*

RFP 103 is a request for "any and all documents that Mordechai Orian reviewed in preparation for the deposition that the [sic] attended on March 28, 2008." Terminating Sanctions Motion Ex. 16 at 17-18. Global responded by stating "The Department of Labor Investigative Report, and Respondent's Exhibit one, are already in the custody of the Administrator. There was one additional document that he reviewed during that deposition, but did not refresh his recollection. Responding party does not recall what that document was." *Id.* However, in his March 28, 2008, deposition, Mr. Orian testified that he reviewed more than the identified three documents-he had reviewed "[p]ayroll records, the clearance order, some emails," the Margarito Sandoval complaint, the Margorito Sandoval personnel file, the Taft Farm letter of intent, "photos from Taft Farm," time cards, the "no match list document," and Plaza Motel records. Terminating Sanctions Motion Ex. 14 at 17-18, 138, 207, 346-47, 367. The Administrator pointed out this disparity in a June 26, 2008, letter to the Court that was served on Global. Terminating Sanctions Motion Ex. 15 at ¶ 8.

In response to the instant Terminating Sanctions Motion, Global's counsel declared "[w]ith respect to the payroll records, the clearance order, some emails, Taft letter of intent, and Taft photos, time cards, all were previously produced to the Administrator pursuant to previous document requests and were in fact inquired of during Mr. Orian's deposition." Declaration of Chrystal Bobbitt [in support of the Opposition] ("Bobbitt Decl.") at ¶ 4. However, Global does not offer further evidence–for example the Bates numbers or a copy of the disk containing the files–that those documents were provided. Nor does Global argue that the Margorito Sandoval personnel file, "no match list document," or Plaza Motel records were provided to the Administrator. Nor is there any evidence that Global ever amended its response to RFP 103. Accordingly, I find by a preponderance of the evidence that Global willfully failed to provide most of the documents responsive to RFP 103.

(3) *RFP's 95, 96, 113, 114, and 117*

Global's response to RFPs 95, 96, 113, 114, and 117 all deny the ability to identify or produce documents based on the involvement of former counsel. *See* Terminating Sanctions Motion Ex. 16. Beyond Global's blanket assertion that it "made efforts" to retrieve lost portions of Global's files from former counsel, general disavowal of control over files in the custody of Global's former counsel, and vague assertion that diligent efforts were made for RFP 117, Global provides no evidence that it even tried to obtain the requested documents. *See id.* at 2-3, 21. Given Global's history of bad faith, I do not find the mere assertion that it "made efforts" to retrieve such files enough to relieve Global from the responsibility to produce documents in discovery. Therefore, I find Global's failure to provide documents responsive to RFPs 95, 96, 113, 114, and 117, a violation of my July 7, 2008, Order.

(4) *RFP's 96, 97, 107, and 108*

In response to RFP 76, Global states "Reasonable and diligent inquiries has [sic] been made and no such documents exist?" Terminating Sanctions Motion Ex. 16 at 7. In response to RFP 77, Global directs the Administrator to three pages produced in response to the Initial Requests, but "[b]eyond that, Respondents object on the grounds that the request if [sic] overbroad in time and scope, harassing, and not reasonably calculated to lead to admissible evidence." *Id.* at 8. Global's response to RFP 107 is blank. *Id.* at 19. Global's entire response to RFP 108 is "Already produced." *Id.*

(5) *Other Responses*

The remainder of the responses included references to documents already produced[3], claims that the requested documents did not exist, and/or claims that Global could not determine which documents met the RFP's criteria. There is no evidence that Global produced any new documents related to the Responses to the Second Requests until July 17 and 23, 2008 (discussed below).

On July 8, 2008, Global mailed to the Administrator "Mordechai Orian's Responses to Second Amended Notice of Deposition of Mordechai Orian" ("Mr. Orian's Depo Responses")– in other words, responses to the request I ordered Mr. Orian to comply with in the June 23, 2008, Depo Order and subsequent conference call. *See* Terminating Sanctions Motion Ex. 1. Global produced no new documents in response to my June 23, 2008, Depo Order. *See* Global's Opposition to the Administrator's Terminating Sanctions Motion (the "Opposition") at 7-8. Almost all of the responses contain the statement:

> Mr. Orian has never acted outside his corporate capacity in relation to any H2-A related issues. There are no documents in Mr. Orian's personal or individual possession relating to any H2-A related matter. Any and all documents that might relate to the requested subject matter, to the extent they exist, are solely in the possession of Global Horizons, Inc. To the extent these requests duplicate requests that have already been made to Global Horizons, requesting party should look to those responses already provided, as there are no additional responses that can be provided by Mr. Orian individually.

[3] Some of the responses explicitly refer to documents produced in response to the Initial Requests, others simply refer to documents by Bates number.

See Terminating Sanctions Motion Ex. 1 at 3. Additionally, in response to 4 of the 25 RFPs, Global directed the Administrator to previous responses in this case. *See e.g. id.* at 3 (response to RFP 2). In response to 8 RFPs, Global indicated that the requested documents do not exist. *See e.g. id.* at 5. (response to RFP 6). In response to the remaining RFPs, Global directed the Administrator to look in previous responses (per the quoted language above) and/or made individualized objections. For example, to the Administrator's request for "Any and all calendars Respondent Mordechai Orian used in 2003" (RFP 7), Global responded:

> Objection, vague and ambiguous, overbroad, and unduly harassing as to the term "calendars." What kind of calendar, pre-printed, personal, containing what information? This request is hopelessly overbroad and ambiguous, harassing, unduly burdensome, and not reasonably calculated to lead to discoverable information. Without waiving said objections, Mr. Orian responds as follows. A diligent inquiry has been made and no such document exists.

Terminating Sanctions Motion Ex. 1 at 5.

(6) *Global's July 18, 2008, Document Production*

On July 18, 2008, this Office received a letter from Global dated July 17, 2008, stating that, due to a "razor thin budget," "server issues," and printer problems, Global was unable to deliver all the documents responsive to the Second Requests by the July 18, 2008, deadline. Global indicated that it had scanned and labeled over 6600 documents, but "approximately 600 more pages" would be "numbered and emailed in multiple batches tomorrow when Global gets access to another scanner, but cannot be sent today." Global also indicated that some documents were dark because they were multiple-generation copies.

The promised 600 additional pages of documents were not received on July 18, 2008 as ordered. Garcia Decl. at ¶ 8. Global attempted to send documents in three separate email messages, and then attempted to resend at least one of the messages approximately 20 minutes later. Terminating Sanctions Motion Ex. 12. Because Global tried to resend the first message only 20 minutes after the initial transmission on July 18, 2008, I infer that Global either knew that one or more of the first attempts failed or at least suspected as much.

The Administrator did receive "over 6,500 pages of documents" on July 18, 2008. Declaration of Norman Garcia in Support of Administrator's Terminating Sanctions Motion ("Garcia Decl.") at ¶ 5. However, the Administrator's counsel declared that "[a]t least half of the documents produced were filler because they either did not relate to any request or they were multiple copies of the same document" and lists as an example 1,350 pages of documents related to H-2A applications unrelated to the Bakersfield certification. *Id.* at ¶ 6; Opposition at 5 n.4. In response, Global points out that the Administrator requested all documents that mentioned the Bakersfield certification. Opposition at 12. Global argues, but offers no evidence,[4] that its former counsel included the irrelevant documents in the Bakersfield files, thus they were properly responsive to the Administrator's broad request. *Id.* Global also argues with no

[4] Global's counsel's declaration does not include this assertion. Also, attached to the Opposition was a verification form with Mr. Orian's name, but it is unsigned.

supporting evidence that it made available for inspection and copying "litigation files created by Global's prior counsel to which the Administrator was already a party." Opposition at 11. Because Global's arguments are unsupported by any evidence, I find that Global's July 18, 2008, 6,500-plus document production was at least half filler.

(7) *Global's Withheld Documents*

The Administrator also argues that Global's July 18, 2008, production included previously unproduced documents responsive to the Administrator's Initial Requests (RFP 3, relating or referring to the Bakersfield Certification). *See* Terminating Sanctions Motion Ex. 34, Ex. 36 at 2231-40. Global argues that "the documents produced July 18 have nothing to do with the prior requests" and "RFP 3 requests documents to US agencies related to the Bakersfield certification." Opposition at 21. However, Terminating Sanctions Motion Ex. 34 is a letter from Global's former counsel to the U.S. Department of Justice ("DOJ"), defending a charge of citizenship status discrimination by Mr. Sandoval, who was hired under the Bakersfield certification. Terminating Sanctions Motion Ex. 36 at 2231-40 is a Non-Immigrant Worker Petition for Taft Farms in Bakersfield which the Administrator avers demonstrates one of the remaining violations at issue with the Bakersfield certification–that Global gave preferential treatment to foreign workers. Accordingly, I find that Global did withhold documents responsive to the Initial Requests.

As discussed above, Global has already been sanctioned for violating my May 15, 2008, Order. However, in that order I expressed skepticism about Global's numerous claims of non-existent and innocently destroyed documents, but expressly excluded such concerns from consideration in determining the appropriate sanctions. *See* July 7, 2008, Sanctions Order at 9. Therefore, Global's withholding of Ex. 34 and Ex. 36 at 2231-40 constitute separate, unpunished violations of my May 15th Order.

In its Opposition, Global provided copies of some of its responses that the Administrator identified as dark and difficult to read. *See* Opposition at 3, Ex. 1. I find that about 2/3rds of the exemplars Global provided were difficult to read because they are so dark, the other 1/3 is unremarkable. I will take Global at its word and assume that the nearly illegible copies were the result of multigenerational copies.

(8) *Mr. Orian's July 22, 2008, Resumed Deposition*

On July 22, 2008, Mr. Orian's deposition in his individual capacity resumed. Terminating Sanctions Motion Ex. 21. In excerpts provided by the Administrator, Global's counsel repeatedly instructed Mr. Orian not to answer questions and Mr. Orian did refuse to answer questions, rather than just state any objections for the record. *See id.* The refusals were not based upon any legitimate claims of privilege or compliance with a court order.[5] Terminating Sanctions Motion Ex 21. Nor has Global moved for a protective order based upon the deposition questions. Moreover, the Administrator reminded Global's counsel that those are the only proper bases for refusing to answer questions in a deposition. *See* Terminating

[5] Global's counsel did make three work product objections, but based upon the excerpts presented, those objections were frivolous. *See* Motion EX 21 at 309, 495, 499.

Sanctions Motion Ex. 21 at 123; *see also* Fed. R. Civ. P. 30(c)(2). At several points, Mr. Orian or his counsel took the position that, because Mr. Orian was testifying in his individual capacity, "he will not answer any questions about Global Horizons." *See e.g.,* Terminating Sanctions Motion Ex. 21 at 123.

(9) *More Untimely Produced Global Documents*

On July 23, 2008, the Administrator received three email messages from Global–apparently copies of the messages Global attempted to send on July 18, 2008. Terminating Sanctions Motion Ex. 10. The messages contained links to 1,080 pages of documents, including another response to the Initial Requests. *Id.*

The Administrator's counsel averred that Global "did not relate any of the documents produced on July 18, 2008, and July 23, 2008, to any production request except to RFPs 62 and 63 of the first document request." Garcia Decl. at ¶¶ 11, 19. Global denies that accusation and offers as an example Mr. Orian's Depo Responses, Response No. 2, which directs the Administrator to Bates Nos. "GHI 08 TAFT 174—197; 289-304; 340;-346; 373-381; 486-511; 518." However, the documents produced on July 18 and 23, 2008, had a different Bates identifier ("Taft Penalties") than the documents previously produced ("GHI 08 Taft"). Garcia Decl. at ¶ 12. Therefore, Global's example refers to earlier documents and does not rebut the Administrator's accusation. Global also offers as an example "Respondents' Supplemental Responses to Requests for Production of Documents Set Two Request no. 62 response (Administrator's Exhibit 3)" which directs the Administrator to documents "at Bates Numbers Taft Penalties 1-6634." Opposition at 16; *see* Terminating Sanctions Motion Ex. 3 at 6. However, that response is one of the two exceptions that the Administrator identified. Moreover, a review of Global's Response to the Second Requests reveals that the referenced Bates numbers do not distinguish between the "Taft Penalties" and "GHI 08 Taft" identifiers, but there is no reference to a Bates Number larger than "666." *See* Terminating Sanctions Motion Ex. 16.

Given that there were more than 7,000 documents produced on July 18, 2008, and July 23, 2008, but less than 700 produced in response to the Initial Requests, I infer that the relatively low Bates Numbers in the Global's Response to the Second Requests refer to documents previously produced in response to the Initial Requests. Therefore, Global has not rebutted the Administrator's accusation and I find that Global's July 18 and July 23, 2008, document production was unrelated to any production request except to RFPs 62 and 63 of the Initial Requests–a violation of my July 7, 2008, Order to deliver all documents responsive to the Second Requests "in a legible and *useable* form." July 7, 2008, Sanctions Order at 14 (emphasis added); *see also* Fed. R. Civ. P. 34(b)(2)(E)(i).

(10) *Further Filings With This Office*

On July 30, 2008, the Administrator submitted a motion to continue the hearing in this case, then set for Monday, August 18, 2008 (the "July 30, 2008, Motion to Continue"). The Administrator also moved for a continuance of the pre-trial deadlines, "such as the filing of pre-hearing statements. . . ." July 30, 2008, Motion to Continue at 1. The Administrator argued that a continuance was necessary because Global's Motion for Reconsideration of the Order Granting

Discovery Sanctions would not be resolved prior to the pre-hearing deadlines and his pre-hearing statement and trial preparation was dependent on the outcome of that motion. Moreover, the Administrator argued that he would shortly file a motion for terminating sanctions based on Global's alleged violations of my June 23, 2008, and July 7, 2008, orders.

On August 7, 2008, this Office notified both parties–Global via voicemail–that my tentative ruling on the Motion to Continue was to grant it and continue the trial and corresponding date to submit pre-trial documents. The ruling was tentative because Global did not make its position on the motion known until it filed an opposition on August 14, 2008.

On August 8, 2008, Global filed a pretrial statement. The Administrator did not.

On August 11, 2008, I issued on order denying Global's Motion for Reconsideration of the Order Granting Discovery Sanctions.

Also on August 11, 2008, Global's counsel called this Office and spoke with my clerk. During that conversation, she acknowledged receiving the August 7, 2008, voicemail message notifying her of my tentative ruling on the Motion for a Continuance.

On August 12, 2008, the Administrator filed the Terminating Sanctions Motion.

On August 14, 2008, Global filed an Application for an Order to Show Cause Why Sanctions Should Not Be Imposed for Violation for the Court's Pretrial Order ("Global's August 14, 2008, Motion for Sanctions"), arguing for dismissal of the Administrator's claims based upon his failure to timely file a pretrial statement. Respondents argued that the Administrator's failure to file a timely pretrial statement was willful and prejudiced Respondent because "[t]he pre-trial statement was Global's last opportunity to receive notice of what evidence the Administrator intended to offer to establish the alleged violations." Global's August 14, 2008, Motion for Sanctions at 4.

Disingenuously, Global's August 14, 2008, Motion for Sanctions contains no mention of my August 7, 2008, tentative ruling granting a continuance of the hearing and pretrial submissions in this case. Nor is there any indication of an effort to meet and confer with the Administrator to resolve the perceived problem.

On August 15, 2008, I granted the July 30, 2008, Motion to Continue and rescheduled trial for October 20, 2008.

Also on August 15, 2008, the Administrator filed an opposition to Global's August 14, 2008, Motion for Sanctions.

On August 26, 2008, Global filed an Opposition to the Administrator's Terminating Sanctions Motion (the "Opposition"). Global argues that the Administrator grossly misrepresented the facts and Global fully complied with the relevant orders, therefore no sanctions should be imposed.

On September 3, 2008, the Administrator filed a request for leave to file a reply to the Opposition. After reviewing the Terminating Sanctions Motion and Opposition, I find that the issues have been fully briefed and deny the Administrator's request to file a reply brief.

On September 12, 2008, Respondents' counsel filed a Notice of Withdrawal of Counsel and request for Trial Continuance stating that Respondents' counsel was withdrawing from this action effective on September 12, 2008, due to unspecified medical reasons.

IV. Discussion

A. The Requested Terminating Sanctions For Global's Violations of My June 23, 2008, and July 7, 2008, Orders

The Administrator seeks sanctions under Title 29, Code of Federal Regulations ("CFR"), subsection 18.29(b)(8) and Rule 37(b) of the Federal Rules of Civil Procedure based upon Respondents' violations of my June 23 and July 8, 2008, discovery orders. Terminating Sanctions Motion at 26.

In addition to various factual denials, Global argues that, even if true, Global's five day delay in delivering documents "cannot support a terminating sanction order," especially in light of its "good faith attempts at compliance." Opposition at 18.

However, viewing Respondents' entire conduct in this case and other in this Office, I cannot characterize Respondents' efforts as good faith. Moreover, as I found above, in addition to waiting until after Mr. Orian's July 22, 2008, deposition to resend the 600 pages of documents, Global violated my May 15th, June 23, and July 7, 2008, Orders by:

1. withholding until July 18, 2008, Ex. 34 and Ex. 36 at 2231-40 (separate, unpunished violations of my May 15th Order);
2. willfully failing to provide most of the documents responsive to RFP 103;
3. failing to provide documents responsive to RFPs 95, 96, 113, and 114;
4. baselessly refusing to answer questions rather than just stating any objections for the record at Mr. Orian's July 22, 2008, deposition and moving on with the deposition; and
5. engaging in a "document dump" by:
    a. including at least 3,250 irrelevant pages of "filler" in the 6,500-plus documents delivered on July 18, 2008; and
    b. failing to relate the more than 7000 pages of documents delivered on July 18, 2008, and July 23, 2008, to any production request except to RFPs 62 and 63 of the first document request.

When a party fails to comply with an administrative law judge's order, sanctions may be imposed. 29 C.F.R. § 18.6(d)(2); *see also* § 18.29(a)(8); Fed. R. Civ. P. 37(b)(2)(A). The available sanctions include drawing adverse inferences, deeming factual matters admitted,

excluding evidence, and entering a decision against the non-complying party. *Id.* In *Supervan, Inc.*, the Administrative Review Board explained:

> As the BSCA noted in *Aiken*, [i]f an ALJ is to have any authority to enforce prehearing orders, and so to deter others from disregarding these orders, sanctions such as dismissal or default judgments must be available when parties flagrantly fail to comply. . . . The *Aiken* rationale must be applied to all situations involving flagrant non-compliance with discovery requests and orders. To hold otherwise would render the discovery process meaningless and vitiate an ALJ's duty to conclude cases fairly and expeditiously.

Supervan, ARB No. 00-008, ALJ No. 94-SCA-14, p.5 (Sept. 30, 2004) (quoting *Cynthia E. Aiken, BSCA No. 92-06 (July 31, 1992));* see also *Canterbury v. Admin., Wage & Hour Div., U.S. Dept. of Labor*, ARB No. 03-135, ALJ No. 02-SCA-11 (2004); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-022, ALJ No. 2004-AIR-32 (Jan. 31, 2006). Furthermore, the authority to impose discovery sanctions also comes from an ALJ's inherent power to manage and control his or her docket and to prevent undue delays in the orderly and expeditious disposition of pending cases. *See Link v. Wabash R.R. Co*., 370 U.S. 626 (1962).

Here, Global's unrelenting and flagrant noncompliance with the terms of my orders, even after the imposition of serious sanctions, has forced me to consider as a sanction entering a judgment against Global on all claims in this case. In *Pagtalunan v. Galaza*, the Ninth Circuit reiterated the standard for such a severe sanction:

> In determining whether to dismiss a claim for failure to prosecute or failure to comply with a court order, the Court must weigh the following factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to [the moving party]; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits.

291 F.3d 639, 642 (9th Cir. 2002); *see also Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir.1987). Dismissal is a severe sanction, and is usually reserved for flagrant or repeated violations of orders. *See Supervan*, ARB No. 00-008 at 5.

1. The Public's Interest In Expeditious Resolution of Litigation

"The public's interest in expeditious resolution of litigation always favors dismissal." *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). Here, trial was initially set for April 2008 but has been continued multiple times, primarily due to Global's bad faith discovery conduct. In addition, Global's discovery abuses have caused an extreme time-drain on my time and that of my law clerk which has materially affected my ability to expeditiously resolve other cases on my docket to the prejudice of the litigants involved. This factor weighs in favor of entering a judgment against Global on all claims in this case.

2. The Court's Need to Manage Its Docket

"The trial judge is in the best position to determine whether the delay in a particular case interferes with docket management and the public interest." *Pagtalunan*, 291 F.3d at 642. Here, Global's tactics have dominated my work hours and those of my law clerk for almost six months. The barrage of motions, letters, faxes, phone calls and telephone conferences–not one of them related to the merits of this case–have nearly paralyzed my docket. Furthermore, the vast majority of this burden has been caused by Global's stonewalling, capricious arguments, and flagrant and repeated failure to conduct discovery in good faith. Accordingly, this factor weighs heavily in favor of entering a judgment against Global on all claims in this case.

3. The Risk of Prejudice to the Moving Party

To prove prejudice, the party seeking sanctions must establish that the non-moving party's actions impaired the moving party's ability to proceed to trial or threatened to interfere with the rightful decision of the case. *See Pagtalunan*, 291 F.3d at 642; *Malone*, 833 F.2d at 131. Global cites *Amersham Pharmacia Biotech, Inc. v. Perkin-Elmer Corp.*, 190 F.R.D. 644, 648 (N.D. Cal. 2000), and argues that undue prejudice to the moving party is a prerequisite to a terminating sanction. Opposition at 18. However, *Amersham*, a district court case that predates *Pagtalunan*, is not controlling and merely stands for the proposition that "exclusion sanctions based on alleged discovery violations are *generally* improper absent undue prejudice to the opposing side." 190 F.R.D. at 648 (emphasis added).

Here, that distinction is immaterial because the Administrator has shown undue prejudice. In the previous sanctions order I found that the Administrator had not proven that Global's actions "*seriously* impaired its [the Administrator's] ability to proceed to trial or *seriously* threatened to interfere with the rightful decision of the case." July 7, 2008, Sanctions Order at 12 (emphasis in original). However, it has now been shown that Global withheld Ex. 34 and Ex. 36 at 2231-40, most of the documents responsive to RFP 103, and documents responsive to RFPs 95, 96, 113, and 114. These missing documents, combined with the inference that other documents are likely being withheld, shift the evidentiary balance. I now find that Global's "document dump" tactics, repeated refusal to provide documents, refusal to answer deposition questions, and flagrant delay in providing documents until after the final deposition have combined to unduly impair the Administrator's ability to effectively prepare for trial. Accordingly, this factor weighs in favor of entering judgment against Global on all claims in this case.

4. The Availability of Less Drastic Alternatives

The availability of less drastic sanctions generally weighs against a severe sanction.

Here, however, Global has already been issued a less drastic sanction–one that effectively decided issues representing 92% of the total back wages and penalties sought in this case before interest. In response, Global largely abandoned one bad faith tactic–relying on waived objections relating to whether the Administrator had other access to certain documents. In most

respects, however, Global's discovery conduct after the first sanctions has not changed–delays, failures to produce documents, refusals to answer deposition questions, obfuscation, and frivolous objections, motions and arguments. Sanctions are designed to deter future bad faith tactics as well as cure existing violations. *See Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 763-64 (1980) (Rule 37 sanctions must be applied diligently both "to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent." (quoting *Nat'l Hockey League v. Metro. Hockey Club,* 427 U.S. 639, 643 (1976)). Global's continued bad faith actions after numerous sanctions in this case and others demonstrate that a more severe sanction is required to deter future misconduct.

Accordingly, after consideration of less drastic alternatives, I find that such are insufficient in this case. Therefore, this factor weighs in favor of entering judgment against Global on all claims in this case.

5. The Public Policy Favoring Disposition of Cases on Their Merits

Public policy always favors disposition of cases on the merits. *See Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir.1998). Thus, this factor weighs against entering judgment against Global on all claims in this case.

In summary, four factors weigh in favor of entering a decision against Global on all claims and one factor weighs against. Global's flagrant bad faith discovery conduct has unduly prejudiced the Administrator and nearly paralyzed my docket. While I am generally reluctant to forego a decision on the merits, I do not find that a lesser sanction will sufficiently protect the interests of the Administrator, the public, or the many other litigants seeking justice in other cases before me.

Therefore, as a sanction for Global's violation of my May 15th, June 23, and July 7, 2008, Orders, I enter judgment for the Administrator and against Global on all claims in this case and affirm the Administrator's determination of violations of the H-2A program regulations and assessment of wage liability and penalties totaling $199,605.47 plus interest against Global.

B. Sanctions for the Administrator's Failure to File a Pre-Trial Statement

On August 14, 2008, Global filed a Motion for Sanctions based upon the Administrator's failure to file a pre-trial statement by the deadline in place at that time. Global's Motion for Sanctions was filed two days after the Administrator's Terminating Sanctions Motion was filed and the conduct upon which Global's motion was based occurred after the conduct upon which the Administrator's Terminating Sanctions Motion is based. Because I grant the Administrator's Terminating Sanctions Motion and enter judgment for the Administrator on all issues, Global's Motion for Sanctions is now moot.

Moreover, although the Administrator technically violated my pre-trial order by failing to file a pre-trial statement, he only did so after the parties were informed that I tentatively granted his motion to postpone that deadline. Furthermore, the Administrator has not acted in

bad faith before me, nor has Global been prejudiced. For all these reasons, Global's Motion for Sanctions is denied.

IT IS HEREBY ORDERED that:

1. Respondents' August 14, 2008, Motion for Sanctions is **DENIED** as moot.

2. The Administrator's August 12, 2008, Terminating Sanctions Motion is **GRANTED**.

3. The October 20, 2008, trial date is **VACATED** and Respondents' September 12, 2008, motion for a further trial continuance is **DENIED** as moot given my entering a default judgment against Respondents herein.

4. As a sanction for Respondents' violation of my June 23, and July 7, 2008, Orders, the U.S. Department of Labor's Wage and Hour Division's January 28, 2008, determination of Respondents' violations of the H-2A program regulations and assessment of wage liability and fines totaling $199,605.47 plus interest against Respondents is **AFFIRMED** in its entirety.

5. Respondents Global Horizons Manpower, Inc. and Mordechai Orian are jointly and severally liable for that $199,605.47 in back wages and civil money penalties and shall pay that sum per the terms of Wage and Hour Division's January 28, 2008, determination.

6. The Administrator of the Wage and Hour Division, Employment Standards Division, DOL, is entitled to interest on the award of accrued unpaid salary at the applicable rate of interest which shall be calculated in accordance with 28 U.S.C. § 1961 and this Order.

7. The Administrator of the Wage and Hour Division, Employment Standards Division, DOL, shall forthwith make such calculations of interest necessary to carry out this Decision and Order, which calculations, however, shall not delay Respondent's obligation to make immediate payment to the Prosecuting Party.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 501.42(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* Administrator's Order 1-2002, ¶4.c.(17), 67 Fed. Reg. 64272 (2002). The Respondent, Administrator, or any interested party desiring review of the administrative law judge's decision may file a Petition. *See* 29 C.F.R. § 501.42(a). Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties to the case as well as the administrative law judge. *See* 29 C.F.R. § 501.42(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final agency action. *See* 29 C.F.R. § 501.42(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 501.42(a).