IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN, Petitioner, v. JEFFREY SEARLS, in his official capacity as Acting Assistant Field Office Director and Administrator, Buffalo Federal Detention Center, Respondent.	)	Case No. 1:19-cv-370

RESPONDENT'S BRIEF IN RESPONSE TO
THE COURT'S ORDER DATED JUNE 29, 2020

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INTRODUCTION

On June 29, 2020, the Court directed the parties to address two issues: "(1) the Court's continuing jurisdiction over Petitioner's pending motion for sanctions . . . in light of the Court's disposition of the Petition and the anticipated appeal thereof and (2) any additional steps that are necessary in order for the Court to finally determine the issues set forth in the motion for sanctions." Dkt. 258. Respondent respectfully submits that, under the circumstances of this case, the Court retains jurisdiction to impose sanctions, if appropriate. Respondent also submits that neither discovery nor further proceedings are necessary before the Court determines whether to impose sanctions on the government. If, however, the Court is considering imposing sanctions on individual government employees in their personal capacities, due process will require further proceedings to protect the rights of those individuals.

ARGUMENT

I. The Court retains jurisdiction over Petitioner's motion for sanctions even though the merits have been decided and the case is on appeal.

This Court retains jurisdiction to impose sanctions. Sanctions are a collateral issue, and the imposition of sanctions is not a judgment on the merits of a suit. *Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 141 (2d Cir. 2002). The determination of whether to impose sanctions "may be made after the principal suit has been terminated." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990); *see also Willy v. Coastal Corp.*, 503 U.S. 131, 137-39 (1992) (affirming imposition of Rule 11 sanctions even when it had been determined, after sanctions had been imposed, that the district court lacked subject-matter jurisdiction over the case). So although the Court has issued final judgment and the case is on appeal, the Court has jurisdiction to rule on sanctions. Nevertheless, Respondent maintains that sanctions are not appropriate in this case.

II. The record is sufficient for the Court to determine whether to impose sanctions against the government on the grounds urged by Petitioner—no further proceedings are either necessary or appropriate.

No further proceedings are necessary in this case because both Petitioner and the government have had a full and fair opportunity to address the issue of sanctions. In his motion, Petitioner identified both the conduct he believes to be sanctionable and the authority under which he believes the Court should impose sanctions. Dkt. 263-1 at 23-37. The government then responded to Petitioner's allegations explaining why sanctions should not be imposed. Dkt. 184 at 5-26. No extraordinary circumstances exist. Because the parties have defined the contours of the dispute before it, the issue is now ripe for the Court to determine whether to impose sanctions on the government on the basis of the current record.

A. In general, sanctions-related discovery is disfavored.

Allowing sanctions-related discovery runs the substantial risk of creating tangential proceedings that increase the cost of litigation and unnecessarily consume the resources of both the parties and the Court without providing any benefit to the process of ligation. With regard to Rule 11, the Advisory Committee for the Federal Rules of Civil Procedure has noted that:

> To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, *the court must to the extent possible limit the scope of sanction proceedings to the record.* Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Fed. R. Civ. P. 11 advisory committee's note, 1983 amendment (emphasis added). The particular format for sanctions proceedings "should depend on the circumstances of the situation and the severity of the sanction under consideration." *Id.* "[I]n many situations," however, "the judge's participation in the proceedings provides . . . full knowledge of the relevant facts and little further inquiry will be necessary." *Id.*

Several courts of appeals have endorsed this approach. *See Burbidge Mitchell & Gross v. Peters*, 622 F. App'x 749, 758 (10th Cir. Aug. 17, 2015) (affirming district court's decision to deny further discovery of the sanctionable conduct) (citing the notes); *In re Kunstler*, 914 F.2d 505, 521 (4th Cir. 1990) ("the court must to the extent possible limit the scope of the sanction proceedings to the record") (citing the notes); *Indianapolis Colts v. Mayor & City Council of Balt.*, 775 F.2d 177, 183 (7th Cir. 1985) ("the record in the case, and the surrounding circumstances afford the court an adequate basis to determine whether sanctions are necessary") (citing the notes). And the Second Circuit has expressed disapproval of evidentiary hearings for sanctions proceedings "absent disputed facts or issues of credibility." *Chemiakin v. Yefimov*, 932 F.2d 124, 130 (2d Cir. 1991).

Rule 11 is not at issue here. Petitioner limited his motion to a request for sanctions under Rule 37 and the Court's inherent power. Dkt. 263-1 at 24, 28, 35. But at least one court has found the Rule 11 commentary to be "instructive" when addressing "the question of allowing discovery incident to motions filed [under Rule 37]." *Fairchild Semiconductor Corp. v. Third Dimension Semiconductor, Inc.*, No. 08-158, 2009 WL 536917, *2 (D. Me. Feb. 25, 2009). The *Fairchild* court reached its conclusion that the Rule 11 principle of strictly limiting sanctions discovery should apply to Rule 37 as well after relying on two circuit court decisions discussing the relationship between the two rules. *Id.* (citing *Olcott v. Del. Flood Co.*, 76 F.3d 1538, 1554 (10th Cir. 1996) ("[T]he texts and plain meaning of Rule 16(f) and Rule 37(b) complement Rule 11. The three rules share a common purpose, which they seek to achieve by employing substantially similar operative language.") (footnote omitted); *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 394 (1st Cir. 1990) ("Sanctions, under both Rules 11 and 37, serve dual purposes of deterrence and compensation.")). Respondent respectfully suggests that the committee's

advice to restrict sanctions-related discovery to cases involving extraordinary circumstances is relevant to both Rule 37 sanctions motions and proceedings under the Court's inherent power as well.

The litigation in this case has been extensive. The Court's familiarity with the facts and issues in this case, coupled with the fact that the parties have already had the opportunity to brief the sanctions issue, makes further proceedings unnecessary.

B. Petitioner's demand for further inquiry or discovery is not cognizable under Rule 37.

Before sanctions can be imposed, the non-moving party must be informed of "the specific conduct or omission" for which the sanctions are being sought and "the source of authority" for imposing sanctions. *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 334 (2d Cir. 1999). Here, as noted above, Petitioner invoked only Rule 37 and the Court's inherent power as the authority for sanctions. Dkt. 263-1 at 35. As part of his request for sanctions, Petitioner sought an order admonishing Respondent's counsel and various federal agencies, and he further sought an order directing Respondent's employees to either provide declarations or submit to depositions regarding the initial non-disclosure of the documents sought in the motion to compel. Dkt. 263-1 at 26. The applicable subsections of Rule 37 do not allow for such an admonishment or for the extra discovery, and Petitioner has failed to demonstrate the necessary bad faith to support an invocation of the Court's inherent powers to order such penalties.

The various subsections of Rule 37 provide an array of potential sanctions for specific misconduct, but Petitioner invoked only subsections (a) and (e). Dkt. 263-1 at 28, 31. Neither provides for discovery, declarations, or depositions in the manner Petitioner seeks. Subsections 37(a)(3) and (a)(4) allow a party to bring a motion to compel a disclosure or a discovery response, including requiring a correction of an evasive or incomplete response. Fed.

R. Civ. P. 37(a)(3) & (a)(4). Subsection (a)(5) provides that, if the motion to compel is granted, "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, . . . to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees" unless the movant failed to confer with opposing counsel prior to filing the motion, or the non-moving party's conduct was "substantially justified" or "other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A). Alternatively, if the motion to compel is granted only in part, the Court may "apportion the reasonable expenses." Fed. R. Civ. P. 37(a)(5)(C). Subsection (a)(5) does not provide for any other sanction. Fed. R. Civ. P. 37(a)(5).

Here, Petitioner filed his motion under Rules 37(a)(3) and (a)(4) and he sought sanctions under Rule 37(a)(5). Dkt. 263-1 at 27. The Court has granted the motion to compel and under Rule 37 may award the reasonable expenses that Petitioner incurred in bringing that motion unless the Court finds that Respondent's actions were substantially justified. *Hassoun v. Searls*, --- F. Supp. 3d ----, 2020 WL 3286961, *9 (W.D.N.Y. June 18, 2020); Fed. R. Civ. P. 37(a)(5)(A). No further sanctions are available under Rule 37(a). The government made its arguments to support a finding of substantial justification in its opposition to Petitioner's motion. Dkt. 184 at 17-19. No further proceedings are required before the Court can make a determination of whether to award "reasonable expenses" under Rule 37(a)(5).

Rule 37(e) is also unavailing for Petitioner. Rule 37(e) provides sanctions for the failure to preserve electronically stored information. Fed. R. Civ. P. 37(e). If the loss results in prejudice to the movant, the Court "may order measures no greater than necessary to cure the prejudice." Fed. R. Civ. P. 37(e)(1). But if the Court finds that the non-movant acted with the intent to deprive the movant of the use of the information, then in a bench trial such as this one,

the Court may grant an adverse inference finding that the lost information was unfavorable to the non-movant, or the Court may enter a dismissal or a default judgment as appropriate. Fed. R. Civ. P. 37(e)(2). Under Rule 37(e), further discovery regarding the spoliation, as demanded by Petitioner, is not an option. Dkt. 263-1 at 37. Fed. R. Civ. P. 37(e)(1) & (e)(2).

The party seeking a spoliation sanction has the burden to establish that sanctions are appropriate. *See Leidig v. Buzzfeed, Inc.*, No. 16-542, 2017 WL 6512353, *7 (S.D.N.Y. Dec. 19, 2017) (party must prove a spoliation claim). Petitioner's counsel has already acknowledged that because "the allegation [that Mr. Hassoun threatened Mr. Ramsundar in visitation] is no longer being relied on, and Mr. Ramsundar is no longer being called as a witness," Petitioner "cannot show there is any prejudice to him" as a result of the alleged spoliation. Dkt. 218 at 30-31. If Petitioner still wishes to proceed on a theory of intentional spoliation, he has had the opportunity to present that theory in his motion. He did not, and thus, the government had no opportunity to address that theory in its opposition. Dkt. 184 at 19-26. Again, no further proceedings are required before the Court can determine whether to impose sanctions under Rule 37(e).

C. The Court should not invoke its inherent authority to grant discovery.

The Court should not rely on its inherent authority to order discovery before adjudicating the motion for sanctions. "Because of their very potency," as well as the fact that the court "may act as accuser, fact finder, and sentencing judge," a court's inherent powers "must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); *Schlaifer Nance & Co.*, 194 F.3d at 334. Chief among these restraints is the requirement that before exercising its inherent power to impose sanctions a court must find "that the challenged actions are *entirely without color*, and are taken for reasons of harassment or delay or for other improper purposes." *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78 (2d Cir. 2000) (emphasis in original) (quotation omitted). Such "bad faith may be inferred only if actions are so completely

without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Enmon v. Prospect Capital Corp*., 675 F.3d 138, 143 (2d Cir. 2012) (quotation omitted). In addition, the requisite finding of bad faith must be based on "clear evidence" and possess "a high degree of specificity." *Wilson v. Citigroup, NA*, 702 F.3d 720, 724 (2d Cir. 2012) (quotation omitted); *Crown Awards, Inc. v. Trophy Depot, Inc*., No. 15-1178, 2017 WL 564885 at *10 (S.D.N.Y. Feb. 13, 2017) ("clear and convincing evidence" required to impose inherent-power sanctions for a "fraud on the court"). Additionally, to the extent that the Court were to consider sanctions on its own accord, the Second Circuit has emphasized that such proceedings "would be used only in more egregious circumstances" and that an "'akin to a contempt' standard is applicable to sanction proceedings initiated by a court." *In re Pennie & Edmonds LLP*, 323 F.3d 86, 90 (2d Cir. 2003). The Court should decline to use its inherent powers in this instance because Petitioner has not established, and the record does not show, that the government has acted in bad faith.

1. The Petitioner's motion provides no basis for discovery.

Petitioner failed to meet his burden of demonstrating bad faith. In his memorandum supporting his motion, Petitioner admitted that he "is not presently in a position to determine" whether any government employees in this case "acted intentionally or otherwise in bad faith." Dkt. 263-1 at 24. In its opposition, the government provided the declarations of three agency employees who described when they received Petitioner's discovery requests and what measures they took to search for responsive documents, including distribution of the requests to various field offices and key-word searches of multiple electronic databases and email accounts. Dkts. 184-6, 184-7, 184-8. The government also explained the positions it took in its discovery responses and why. Dkt. 184 at 14-19. In his reply, Petitioner makes contradictory assertions. Without identifying any act by a specific individual as an act of bad faith, he first asserts that

"[t]he government acted in bad faith—or was at least grossly negligent," but then insists that "additional discovery" is needed to determine "whether the government's failure to identify and disclose this information was the result of intentional or bad faith actions." Dkt. 205 at 8.

This Court should decline that request for more discovery. Petitioner has not presented the clear and convincing evidence of bad-faith actions necessary to support his call for the Court to invoke its inherent power. Instead, he has asked for an open-ended opportunity to obtain discovery on the matter. That use of the Court's and parties' resources is not appropriate. That point is particularly true when such discovery could implicate the due-process rights of individual government employees and thereby multiply the number of participants in this litigation. *See infra* Section III. No such proceedings are required or appropriate. The parties have had their opportunities to present their case on this issue. As Respondent has explained, sanctions are not appropriate. The Court should rule on Petitioner's motion.

2. The government did not act in bad faith in its dealings with the Court or the parties.

At the June 12, 2020 hearing, the Court noted that by April 2, 2020, the government's litigators "knew or should have known that there were questions raised concerning the accuracy of Ramsundar's claims," regarding an alleged threat made by Mr. Hassoun. *Hassoun*, 2020 WL 3286961 at *10 n.1. The Court further noted that the government filed a document on April 8, 2020, that relied on Mr. Ramsundar's accusation, but without the updated information to indicate that there was reason to question the accuracy of Mr. Ramsundar's statement that the alleged threat occurred on February 27, 2020, vice some other day. *Id.* at *10; *see also* Dkt. 140 at 36.

The government acknowledges the Court's clearly expressed concerns about the April 8 filing and wishes that the matters above had proceeded much differently. The government, as the Court is aware, uncovered significant grounds for concern about Mr. Ramsundar's credibility

as it related to his claims against Mr. Hassoun in the weeks following the April 8 submission, specifically that Mr. Ramsundar used details related to allegations against Hassoun in an earlier incident not apparently related to Hassoun. Dkts. 218 at 15-16, 21-22; 184-1 at 5, 98-101. Those revelations were of sufficient magnitude that on May 13, 2020, two days before Petitioner filed his motion to compel, counsel for respondent indicated he was continuing to collect additional documents and "Respondent would produce any responsive materials he found." Dkt. 184-1 at 6. The government ultimately produced over 10,000 additional pages of documents regarding Mr. Ramsundar and other witnesses, Dkts. 184-1 at 8-9, 188 at 1, and decided to withdraw Mr. Ramsundar as a witness. Dkts 173, 184 at 24. At the time of the April 8 submission, however, the importance of information suggesting that the alleged threat could not have happened on February 27 was not apparent in the way that it appears now. The government at the time was faced with an accusation that on the whole seemed credible and very important to this Court's consideration of this case. The litigators were working to investigate and verify the accuracy of the accusation, including determining whether Mr. Ramsundar had merely been confused about the date on which the alleged threat occurred. The concerns about Mr. Ramsundar have now come into starker relief, but things were different in early April. There is no evidence that the government litigators acted in bad faith. Further discovery is not warranted.

The relevant timeline supports the absence of bad faith. The government first heard about Mr. Ramsundar's allegation on March 12, 2020, when Mr. Ramsundar reported it to ICE officials. Dkts. 184 at 2, 184-5 at 3. The government informed the Court of Mr. Ramsundar's allegation on March 16, 2020. *Hassoun*, 2020 WL 3286961 at *10. On March 18, 2020, Mr. Hassoun denied the incident in a declaration. Dkt. 263-2 at 5. On March 19, 2020, the Buffalo Federal Detention Facility was tasked to investigate the allegation. Dkt. 184-2 at 2-3. Due to

escalating responsibilities arising out of the COVID-19 pandemic, the ICE investigation did not occur until March 24, 2020, Dkt. 184-2 at 3, and the investigator's conclusions were not reported to the trial team until April 2, 2020.[1] *See* Dkt. 218 at 22. The trial team then asked the facility to check other possible dates that the incident may have occurred. *Id.* at 23. On April 15, 2020, a second ICE investigator concluded that Mr. Hassoun and Mr. Ramsundar were both in the visitation center on February 26, 2020, thereby establishing a date—just a day before the originally reported date—for the alleged incident. Dkts. 184-2 at 3; 218 at 23; 263-10. The trial team provided this information to opposing counsel on April 20, 2020, in response to an email request. Dkts. 263-9 at 2; 263-10 at 2-6. Exhibit F to the government's motion for sanctions contained the same information. Dkt. 154, Ex. F (under seal); *see also* Dkt. 263-2 at 10.

This timeline shows that at the time the government litigators were preparing their April 8, 2020 filing, the government was actively seeking to corroborate the accuracy of Mr. Ramsundar's account. They were doing so at a time when their other litigation responsibilities in this case were substantial. (The government notes those responsibilities not as an excuse, but to provide context to explain the circumstances faced by the trial team at the time.) In the 24 days from March 16, 2020, when the government informed the Court of Mr. Ramsundar's allegation, through April 8, 2020, when the government filed its Memorandum in Opposition to the Emergency Motion for Transfer, the Court issued 10 orders, and the parties made 17 substantive filings. *See* Dkt. 104–141. In the 7 days from April 2 through April 8 alone, the Court issued 4 orders and the parties made 11 substantive filings. *See* Dkt. 122–141. The government's actions

[1] That communication did not mention that the investigator based his conclusions, at least in part, on video recordings. Dkt. 218 at 22-23. Regardless, the communication was irrelevant to the issue of evidence preservation because April 2, 2020, was more than 30 days after the alleged event and thus was after any video evidence would have been automatically overwritten. *Id.*

relating to the April 8, 2020 representation should thus be considered in the context of this flurry of events. Given that the litigators' efforts to investigate the accuracy of Mr. Ramsundar's accusation was one of among a great many tasks they were undertaking at the time, the context confirms that they did not act in bad faith when they referenced Mr. Ramsundar's claim, that he had been threatened by Mr. Hassoun, in the April 8 filing.

Respondent acknowledges that, knowing what is known now, it would have been prudent to alert the Court that it had information calling into question the reported February 27 date. *See Hassoun*, 2020 WL 3286961 at *10. Respondent regrets the confusion and issues caused by the delay in apprising the Court and opposing counsel and apologizes to the Court. Respondent submits, however, that in full context, the circumstances presented reasonably explain how this type of omission could have been made, and made without bad faith. As there is thus no clear and convincing evidence that the government acted with bad faith, the Court should not order further discovery. The government is committed to vigilance to address important concerns that the Court has identified, and appreciates the Court's consideration.

III. If the Court is considering imposing sanctions against individual government employees in their personal capacities, further proceedings are required.

Respondent is filing this brief solely in his official capacity, not in his individual capacity and not on behalf of any of Respondent's attorneys or other government employees in their personal capacities. This is a critical distinction. *Cf. Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (explaining "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity" because "the real party in interest is the entity," so that "a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself," whereas a damages award in a personal capacity suit "can be executed only against the

official's personal assets"). Because the Court has not stated otherwise, Respondent assumes it is contemplating the imposition of sanctions against him only in his official capacity.

If that understanding is incorrect—if the Court is considering the imposition of sanctions against Respondent in his personal capacity, or against any of his attorneys or other government employees personally, including any kind of admonishment that may need to be reported to a state bar, office of professional responsibility, or similar entity—it is respectfully requested that the Court enter a specific show-cause order, identifying each person by name who must show cause why sanctions should not be imposed, which particular sanctions are being contemplated, and what standards will be applied. The government also respectfully requests, given the sensitivity of the matter, that this order be filed under seal. *Accord* L.R. Civ. P. 83.3(b) ("complaints or grievances" against any person admitted to practice in this Court "shall be treated as confidential").

Such an order would be necessary for several reasons. First, a show-cause order is necessary to provide adequate due process in the form of notice and an opportunity to be heard. "Due process requires that courts provide notice and an opportunity to be heard before imposing *any* kind of sanctions." *Reilly v. Natwest Mkts. Grp.*, 181 F.3d 253, 270 (2d Cir. 1999) (emphasis in original) (quotation omitted). The Second Circuit has emphasized that it finds "particularly instructive" a sister court of appeals holding "that, for due process purposes, 'a Rule 37 fine is effectively a criminal contempt sanction, requiring notice and the opportunity to be heard.'" *Satcorp Int'l Grp. v. China Nat'l Silk Imp. & Exp. Corp.*, 101 F.3d 3, 6 (2d Cir. 1996) (quotation omitted). "[S]uch notice should alert the party to the 'particular sanction' under consideration." *Funk v. Belneftekhim*, 861 F.3d 354, 369 (2d Cir. 2017); *see SEC v. Razmilovic*, 738 F.3d 14, 24 (2d Cir. 2013) ("No sanction should be imposed without giving the disobedient

party notice of the particular sanction sought and an opportunity to be heard in opposition to its imposition."). At this point, it is unclear which particular sanctions the Court might be considering, or whether the Court might level any such sanctions against a non-party. Thus, if the Court is considering imposing sanctions against anyone other than the Respondent in his official capacity, due process requires that it provide such individual(s) with proper notice via a detailed show-cause order.

Second, if the Court were to enter such a show-cause order against any specific individuals, those individuals would be entitled, and would need time, to secure counsel to represent them. That process would be particularly complicated and time consuming here. Presumably any individual who might be subject to a show-cause order in this case would be a government employee. Under federal regulations, any government employee who is "sued, subpoenaed, or charged in his individual capacity" may seek representation from the Department of Justice. 28 C.F.R. § 50.15(a). That includes situations where government employees have been ordered to show cause why sanctions should not be entered against them personally. *Id.*

The process for requesting representation involves several steps, which make clear the need for notice and time. The employee must submit a representation request to the employing agency. *Id.* § 50.15(a)(1). The employing agency or component then must submit to the Civil Division of the Department of Justice "a statement containing its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation." *Id.* That statement must be "accompanied by all available factual information." *Id.* The Civil Division then must "determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States." *Id.* § 50.15(a)(1) & (2).

In some cases, where necessary, the Department may pay for a private attorney to represent an individual employee rather than represent the employee directly. *See id.* § 50.16. This sometimes occurs when it is otherwise in the interest of the United States to represent the individual employee(s) but there are either conflicts among the employees themselves, such that a single attorney could not ethically represent all of them, or there is a conflict between the interests of the United States and those of the individual employees. *See id.* § 50.15(a)(8)(ii), 50.15(a)(10). Appointing private counsel at Department expense requires higher-level approval within the Department of Justice, which in turns involves a more time-consuming process.[2]

If any government employee needs to retain private counsel in this matter, they would of course also need additional time to find such counsel. Such counsel would then need still more time to become familiar with the proceedings and all of the relevant background information to mount an adequate defense of those employees. That is on top of the time it would take for the Department to determine if representation is appropriate in the first instance.

Finally, to the extent the Court orders any specific individual(s) to show cause, any further discovery or proceedings in this case should be stayed until such individual(s) have obtained his or her own counsel. It would be improper for discovery or other proceedings regarding possible sanctions to move forward if individuals who may be subject to such sanctions are not allowed to have their counsel participate in such discovery or proceedings so they can protect their individual client's interests. *See Reilly*, 181 F.3d at 270 ("Due process requires that courts provide notice and an opportunity to be heard before imposing any kind of

[2] It is for many of these reasons—e.g., the time it takes for the Department to make a determination about representation—that the Federal Rules of Civil Procedure give government employees who are sued in their individual capacity a full sixty days to respond to a complaint filed against them (beginning on the date they are properly served). *See* Fed. R. Civ. P. 12(a)(3).

sanctions."). Those individuals can put forward any of their own evidence or make any discovery requests that would be in their own interests.

For all of these reasons, it is critical that the Court clarify whether it is contemplating sanctions against any individual government employee personally. If so, it should enter a show-cause order, under seal, naming the particular employees who must show cause, which particular sanctions are being considered against each of them, and the standards that will be applied. In that event, the Court should stay all further proceedings and provide such employees with a reasonable amount of time—but no less than sixty days—to obtain their own counsel.

CONCLUSION

The Court has jurisdiction to impose sanctions against the government in this matter, if appropriate. No further proceedings are necessary before the Court can make that determination. If, however, the Court is considering imposing sanctions on individual government employees, further proceedings will be necessary to satisfy due process.

Dated: July 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2020, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States District Court for the Western District of New York by using the appellate CM/ECF system. All parties are users of the CM/ECF system and will be served electronically.

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