UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

v.

JEFFREY SEARLS, in his official capacity Acting Assistant Field Office Director and Administrator of the Buffalo Federal Detention Facility,

Respondent.

Case No. 1:19-cv-00370-EAW

PETITIONER'S MEMORANDUM REGARDING PETITIONER'S PENDING MOTION FOR SANCTIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

In its June 18, 2020 decision, this Court issued a preliminary opinion on Petitioner's motion for sanctions. The Court expressed "serious concerns about governmental conduct in this case" and that "[i]t may well be that sanctions and/or further relief are in order as a result of this conduct." ECF No. 225, at 24, 27. The Court chose to "reserve decision" and determined that "further inquiry and/or discovery may be warranted" following the evidentiary hearing. *Id*. at 27. After that hearing was cancelled on the government's motion and the government took its appeals, the Court ordered the parties to answer two questions: (1) whether the Court continues to have jurisdiction of the motion for sanctions and (2) what additional steps necessary to finally adjudicate that motion. ECF No. 258. With respect to the first question, the Court plainly has jurisdiction under applicable authority. With respect to the second question, the Court can impose certain sanctions immediately but further inquiry is necessary, as spelled out below, to determine the appropriate remedy for the most serious sanctionable conduct that transpired in this case.

I. The Court has jurisdiction over Petitioner's pending motion for sanctions.

It is well settled that district courts retain jurisdiction over collateral matters, including the imposition of sanctions, even when they no longer have jurisdiction over the merits of an action. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395–96 (1990) (after entering final judgment, court retains jurisdiction to impose sanctions under Rule 11); *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 225 (2d Cir. 2004) ("Whenever a district court has federal jurisdiction over a case, it retains ancillary jurisdiction after dismissal to adjudicate collateral matters such as attorney's fees." (quotation and alteration omitted)); *Heinrichs v. Marshall & Stevens Inc.*, 921 F.2d 418, 421 (2d Cir. 1990) ("[T]he district court's award of Rule 37 sanctions . . . was not precluded by its earlier dismissal of the case on the merits . . . .").

The Supreme Court's decision in *Cooter & Gell* ruled specifically that courts retain collateral jurisdiction to adjudicate sanctionable misconduct even when a court otherwise lacks jurisdiction. 496 U.S. at 395–398. The Court in that case was considering Rule 11 sanctions imposed after dismissal of an action and wrote that "[l]ike the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action" but instead "requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." *Id.* at 396. The Court held that "[s]uch a determination may be made after the principal suit has been terminated." *Id.* And in *Heinrichs v. Marshall & Stevens Inc.*, the Second Circuit affirmed that the holding of *Cooter* applies equally to sanctions for other misconduct, including Rule 37 discovery sanctions. 921 F.2d at 421 ("The Court's reasoning that the determination of Rule 11 sanctions is a collateral issue that can be considered after an action is voluntarily dismissed . . . applies with no less force to discovery sanctions imposed under Rule 37 following a dismissal [on the merits].").

In this case it is particularly clear that the Court continues to have jurisdiction to adjudicate sanctions and related relief. The sanctionable conduct all occurred while the case was pending in this Court and was intimately connected with the Court's case management leading up to the planned evidentiary hearing. Indeed, before that hearing was cancelled, the Court issued a preliminary decision on sanctions in which it explicitly determined that "[i]t may well be that sanctions and/or further relief are in order" but reserved judgment until after the planned evidentiary hearing. ECF No. 225, at 27; Tr. of June 12, ECF No. 218, at 31:13–32:13. After that decision, the government moved to cancel the evidentiary hearing and sought entry of judgment in Respondent's favor while conceding that it could not establish the factual predicate for

Petitioner's detention by even a preponderance of the evidence. ECF No. 256, at 7, 10. The Court granted judgment in favor of Petitioner without holding the evidentiary hearing. *Id.* at 8, 11, 42; ECF No. 264.

It would be particularly inequitable to hold that the Court has lost jurisdiction over Respondent's sanctionable misconduct because Respondent moved to cancel the evidentiary hearing. The government cannot avoid an inquiry into its conduct simply by beating a strategic retreat from this Court to take an appeal on a narrow set of legal issues. Moreover, the questions that need to be resolved on the pending sanctions motion are entirely collateral to those presently on appeal because they have to do with the government's candor toward this Court, its representations to opposing counsel, and its compliance with the rules in the course of the proceedings that this Court managed. In these circumstances, the Court plainly has collateral jurisdiction to adjudicate and impose appropriate sanctions for litigation misconduct that occurred in this Court, even while the court of appeals has jurisdiction over the merits.

II. Sanctions against the government are warranted for its litigation misconduct and ethical violations, and further proceedings are necessary to establish certain facts and to provide fair notice and a hearing.

Petitioner has moved for sanctions on several grounds: failure to disclose exculpatory evidence, failure to timely produce responsive records, and spoliation of evidence, as well as opposing counsel's related violations of ethical rules imposing duties of candor to the Court and fairness to opposing counsel. The status of each basis for sanctions is summarized here, along with Petitioner's view of the further proceedings and appropriate relief with respect to each.

A. Sanctions are warranted as a result of Respondent's failure to identify and produce records responsive to Petitioner's discovery requests.

1. Attorney's fees under Rule 37(a)(5)(A) for Petitioner's successful motion to compel.

Petitioner seeks to recover attorney's fees and expenses incurred litigating his motion to compel. ECF No. 263-1, at 24, 28. The Court granted Petitioner's motion to compel and ordered Respondent to produce the documents Petitioner sought. *See* Tr. of June 12, 2020, ECF No. 218, at 31:4–32:12 (ruling from the bench); ECF No. 225, at 24. Under the Federal Rules of Civil Procedure, "[i]f the motion [to compel] is granted," as it has been here, "the court *must*, after giving an opportunity to be heard, require the party . . . whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Rule 37(a)(5)(A) (emphasis added). Under the plain language of the rule, attorney's fees against Respondent are required, and further proceedings are necessary only to give the government "an opportunity to be heard," should it wish to argue that one of the enumerated exceptions in Rule 37(a)(5)(A)(i)–(iii) applies. *Id*.

With respect to this sanction, Petitioner notifies the Court that Respondent completed its production of responsive records only three days ago, on Friday July 17. On that date, Respondent produced 116 additional responsive documents regarding Ahmed Abdelraouf, and it produced a privilege log withholding in full 2,132 pages of documents related to the government's evaluation of Shane Ramsundar's credibility after Petitioner presented the government with the exculpatory information in his A-File on May 7, 2020.[1] On June 22, 2020—

[1] These late-breaking documents contain significant new impeachment evidence. For example, the documents regarding Mr. Abdelraouf, who was slated to testify remotely from Egypt, reveal for the first time that his green card was denied for marriage fraud not simply because the marriage was not bona fide, but because he had actually created and submitted a fraudulent marriage license to a woman who did not exist. *See* Respondent's Document Production at DEF23801, 23874, 23891, 23906. Respondent's counsel did not inform Petitioner that these

after the evidentiary hearing was cancelled and ten days after the Court's order granting the motion to compel—the government produced documents for the first time documents showing that one of its potential trial witnesses, Mohammed Al-Abed, had sought immigration benefits as a condition for his testimony. *See infra* § II.A.3. In addition, nearly 11,000 additional pages of documents were disclosed after Petitioner filed his motion to compel on May 15, 2020, in advance of the Court's ruling on June 12, 2020.[2] In all, well over half of the documents produced throughout this entire litigation were not disclosed until after Petitioner filed his May 15 motion.

2. Respondent's failure to disclose evidence regarding Shane Ramsundar.

The government failed to disclose evidence that fatally undermined Shane Ramsundar's credibility and was directly responsive to Petitioner's discovery requests. In response to that failure, this Court has observed that, first, "the facts on which the government relied to certify Petitioner for potentially indefinite detention flowed in large part from a witness who a cursory investigation revealed to be unreliable, yet Respondent repeatedly urged the Court to resolve this matter without making any further inquiry"; second, that "[t]he record before the Court raises serious concerns about governmental conduct in this case"; and third, "further inquiry and/or

documents were forthcoming until July 16, the day before they were produced. Respondent has provided no explanation why these documents were not identified earlier, or why Respondent's counsel represented to the Court on the record on June 12, 2020 (falsely, as it turns out) that it had already produced "all additional documents showing the government is aware of significant credibility issues" with any witness or "any other exculpatory evidence or records that tend to undermine the credibility" of witnesses. *See* Tr. of June 12, ECF No. 218, at 14:12–22. This is of a piece with Respondent's pattern of misrepresentations to the Court and opposing counsel. *See infra* 5, 8–12, 14 (discussing other false or misleading statements). Petitioner can submit these newly-disclosed documents into the record if relevant to further sanctions proceedings.

[2] In a declaration filed in opposition to Petitioner's motion to compel, Respondent's counsel stated that "Respondent expects to fully complete [their] review and any associated production [of documents related to witnesses] on or before June 3, 2020." ECF No. 184-1 ¶ 31. As it turned out, Respondent produced or withheld 9,896 pages of documents after June 3 and did not complete its production for a month and a half past Respondent's own deadline.

discovery may be warranted" to determine whether, and to what extent, the government is subject to sanction. ECF No. 225, at 24–27.[3]

Here, Petitioner seeks sanctions in the form of official admonishments, reprimands, or censure addressed to both Respondent's counsel and the government agents or officials responsible for the government's discovery failures. To that end, Petitioner respectfully submits that further development of the record, including through the testimony of government agents or officials (taken by deposition or during a hearing), is necessary is necessary to answer the following questions:

1. On what date did government agents or officials first review Mr. Ramsundar's A-File in relation to the compilation of the administrative record, the decision to recommend Petitioner's certification, or the litigation of Petitioner's habeas claim?
2. Did any government agents, officials or counsel involved in identifying information responsive to Petitioner's discovery requests or preparing the case against Mr. Hassoun ever review Mr. Ramsundar's A-File? If no, why not? If yes, who and when?
3. Were counsel for Respondent aware of any of the exculpatory information in Ramsundar's A-File or other reasons to doubt Mr. Ramsundar's credibility before May 7, 2020? If yes, who and when? If not, why not?
4. At what point did counsel for the government become aware that Mr. Ramsundar had, in letters personally addressed to ICE officers, explicitly requested relief from the government in exchange for making accusations against Petitioner? *See* Pet. Reply in Supp. of Sanctions, ECF No. 205, at 7–8, and Ex. A–B (letters from Ramsundar to ICE Buffalo Field Office Director Thomas Feeley and ICE officers

[3] Remarkably, the government has continued to argue on appeal that the original FBI letter from February 2019, which this Court found "was based in significant part on allegations by Ramsundar," ECF No. 225, at 24, suffices to "satisf[y] the . . . elements of the regulation providing for Hassoun's continued detention," Emerg. Mot. for Stay Pending Appeal, at 13–14 (2d Cir. filed June 30, 2020), *id.* at 20–21. On appeal the government does not so much as mention that it abandoned Mr. Ramsundar's allegations and "determined not to call Ramsundar as a witness" because there were "'concerns about [Ramsundar's] credibility and ability to truthfully testify.'" ECF No. 225, at 24 (quoting ECF No. 180, at 2). Respondent is thus continuing to "urge[] the Court"—this time on appeal—"to resolve this matter without making any further inquiry" into allegations it has already conceded it cannot support with evidence. ECF No. 225, at 25; *cf.* Tr. of June 19, ECF No. 241, at 6:19–7:7 (discussing original FBI letter).

> Kirchmeyer, Oliver, and Talaveras). And how is it that those requests, separate and apart from the information in Mr. Ramsundar's A-File, were not disclosed in discovery?[4]

Obtaining answers to these questions is important for at least two reasons: First, to determine whether formal admonishments, reprimands, or censure are warranted here—and, if they are, to determine their content, scope, and appropriate addressees. *See Wolters Kluwer Fin. Servs., Inc. v. Scivantage*, 564 F.3d 110, 117–18 (2d Cir. 2009) (discussing procedural requirements for imposition of "nonmonetary disciplinary sanctions for litigation misconduct"). Second, to determine whether the government's extended reliance on Mr. Ramsundar's allegations to justify Petitioner's detention, despite its possession of evidence devastating to Mr. Ramsundar's credibility, *combined* with its failure to disclose that evidence in discovery, constitutes bad faith or an abuse of the judicial process. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991) (inherent authority to impose sanctions may be imposed when a party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980) ("Bad faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." (quotation and alteration omitted)). If there is sufficient evidence of bad faith or abusive conduct, then further sanctions—such an award of attorney's fees incurred by Petitioner as a result—may be warranted. *See generally Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (confirming that courts possess inherent power to assess attorney's as fees a sanction).

[4] The declarations of government agents or officials currently in the record do not answer the questions listed here. *See* ECF No. 184-7 (Declaration of Cornelius O'Rourke discussing document searches of ICE Homeland Security Investigations); ECF No. 184-8 (Declaration of Gregory Conwall regarding ICE Enforcement & Removal Operations; ECF No. 184-6 (Declaration of Nancy Wiegand regarding Federal Bureau of Investigation).

3. Respondent's failure to disclose evidence regarding Mohammed Al Abed.

Further proceedings and imposition of sanctions are also warranted because Respondent's counsel concealed exculpatory evidence regarding another witness, Mohammed Al Abed. On June 22, 2020, after the Court had already granted Respondent's motion to cancel the evidentiary hearing, Respondent's counsel disclosed three separate documents showing that Mohammed Al-Abed had insisted on benefits from the government as an explicit quid pro quo in exchange for information and testimony about Mr. Hassoun. *See generally* Pet. Opp. to Resp. Motion to Stay, ECF No. 248, at 12–15. The first document, a memo dated March 24, 2020, was written by Respondent's counsel and summarizes a phone call with Mr. Al Abed in the following terms: "Prior to giving us a full account of what he knows, Al Abed would like an offer from ICE/DHS," and "They also would like to hear what, if anything, ICE can offer in exchange for Al Abed's testimony." ECF No. 248-17, at DEF21656–58. In the second document, an email dated April 15, 2020, Respondent's counsel writes that "Al Abed . . . has indicated that he will not assist unless the government will take action regarding his removal." ECF No. 248-17, at DEF21658. In the third document, an email dated June 16, 2020 with the subject heading "Al Abed update," Respondent's counsel writes that "[Al Abed] would still testify if the government can provide a letter documenting his cooperation in this case." ECF No. 248-17, at DEF21644.

Respondent's counsel failed to disclose this information even though it was in Respondent's counsel personal possession as early as two months before the final deadline to disclose trial witnesses and exhibits and despite Petitioner's motion to compel filed May 15. Counsel also concealed Mr. Al Abed's demand for benefits by failing to correct its responses and objections to Petitioner's Requests for Production. On March 5, 2020, Respondent issued its third supplemental response, in which it stated, regarding Petitioner's request #2 that

"Respondent is unaware of any . . . requests for relief or special treatment, or any benefits offered or granted to a confidential informant before or after he provided a statement against Petitioner." ECF No. 263-5, at 4. That discovery response was signed by Respondent's counsel, yet counsel did not update it until June 12, 2020, when it issued a supplemental response to request #2 omitting that false statement but still affirming that "Respondent has produced all documents within his possession, custody, or control which are responsive to this request except for information withheld" on the basis of privilege or other authorities. But even this statement was false: Petitioner did not learn that Mr. Al-Abed had sought relief in exchange for statements against Mr. Hassoun until the government's disclosure of additional documents ten days later, June 22, 2020.5

Respondent's counsel's failure to disclose these documents and its decision to leave its false discovery response uncorrected are particularly remarkable because on April 30, 2020—after it had created two documents memorializing Mr. Al Abed's demand for a quid pro quo—Respondent filed a declaration from Mr. Al Abed in support of its motion for sanctions seeking dismissal of this case or, at minimum, an order allowing Mr. Al Abed and others to testify without Mr. Hassoun ever learning the content of their testimony. See ECF No. 172. That motion was premised on the notion that Mr. Al Abed would be willing to testify at the evidentiary hearing but for his supposed fears of Petitioner. See Resp. Motion for Sanctions, ECF No. 172, at 10–11, 17. The declaration that the government procured from Mr. Al Abed, who was then known as "John Doe Charlie," made exactly this point. The government quoted it in its brief: "John Doe Charlie further states that '[w]hile [he] wants to testify about [Petitioner], [he is]

[5] As far as Petitioner can tell, the documents in question were never identified in privilege logs produced by Respondent. Petitioner had no inkling that Mr. Al Abed had sought benefits until the belated June 22, 2020 disclosure.

worried about what [Petitioner] and his people would do to [him] . . . . [Petitioner] has threatened others who have spoken against him and I am certain that I would not be safe if [Petitioner] knew [he] was testifying against him.'" Id. at 10–11 (quoting Declaration of "John Doe Charlie" Mohammed Al Abed, ECF No. 172-9) (alterations in original) (emphasis added)). In fact, the government knew that Mr. Al Abed had told them that he would not testify unless promised immigration relief.

Respondent counsel's conduct raises grave concerns that it made an intentional, strategic decision to conceal that Mr. Al Abed had demanded benefits as a condition for testifying because disclosing that fact would have undermined Respondent's pending motion for sanctions and would have cast doubt on credibility and completeness of Mr. Al Abed's declaration. ECF No. 172-9. The evidence now disclosed shows that Mr. Al Abed's fundamental concern with testifying was receiving benefits, not his safety. Indeed, after the Court denied the government's motion for sanctions, thereby making clear that Mr. Al Abed would have to testify in Mr. Hassoun's presence, see Tr. of June 12, 2020, ECF No. 218, at 13:7–20, Mr. Al Abed told Respondent's counsel that he remained willing to testify, but still only on the condition that the government give him some benefit in exchange, see Email from Anthony Bianco to Various Recipients (June 16, 2020) ECF No. 248-17, at DEF21644 ("[Al Abed] would still testify if the government can provide a letter documenting his cooperation in this case.").

Respondent's counsel also appears to have directly misled the Court about the existence of records documenting Mr. Al Abed's request for a quid pro quo. At the hearing on June 12, 2020, the Court asked Respondent's counsel directly whether they had already provided "any additional documents that show Mr. Ramsundar or any other witness who sought benefits in exchange for testimony or has ever received such benefits at any time." Tr. of June 12, 2020,

ECF No. 218, at 15:12–15 (emphasis added). Respondent's counsel answered "Yes, your honor." Id. at 15:16. That statement was false; the responsive documents were in counsel's own files. That Respondent's counsel made this false representation (and left it uncorrected) during the hearing is particularly remarkable because counsel had just spent several minutes discussing Respondent's motion for sanctions and, specifically, the supposed reasons Mr. Al Abed was reluctant to testify. Id. at 6:4–12:3.

This failure to disclose exculpatory evidence warrants sanctions on at least three grounds. First, it plainly violates the rules governing discovery. "A party who has . . . responded to an interrogatory [or] request for production . . . must supplement or correct its disclosure or response in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Rule 26(e)(1)(A). The rules provide that "payment of . . . attorney's fees" and "other appropriate sanctions" may be imposed for failing to correct disclosures in violation of Rule 26(e). Rule 37(c)(1)(A), (C). Such relief is appropriate here, including attorney's fees for the time that Petitioner spent preparing to respond to Mr. Al Abed's testimony—and actually responding to Respondent's motion for sanctions—while the government concealed damaging evidence.

Second, Respondent's conduct appears to violate counsel's ethical duty of fairness to opposing counsel, which requires lawyers not to "suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce" and not to "conceal or knowingly fail to disclose that which the lawyer is required by law to reveal." N.Y. Rules of Prof'l Conduct 3.4; Local Civil Rules 83.3(a) ("Attorneys practicing in this Court shall faithfully adhere to the New York Rules of Professional Conduct."). Counsel had personal knowledge that Mr. Al Abed was

conditioning his testimony on the government's agreement to provide immigration benefits, yet it suppressed that information for months—until after the evidentiary hearing was cancelled—despite discovery requests on point, despite naming Mr. Al Abed as one of its potential witnesses, and despite relying on Mr. Al Abed's misleading declaration in support of a motion. The Court may wish to impose formal disciplinary sanctions, such as a public reprimand or censure, for this ethical violation. Further proceedings are necessary in order to consider whether discipline is appropriate. See Local Civil Rule 83.3(a)–(b) (setting forth procedures for attorney discipline); Wolters Kluwer Fin. Servs., Inc., 564 F.3d at 117 (with respect to attorney discipline "notice and a hearing suffice for due-process purposes").

Third, Respondent's appears to have misled the Court, both by giving a false answer to a direct question about the completeness of its discovery responses and by filing a motion asserting that Mr. Al Abed "wants to testify" but for concerns about his safety when counsel well knew that he was only willing to testify if the government agreed to provide immigration relief. ECF No. 172, at 10. Both of these statements implicate Respondent's duty of candor to the Court, which requires that "[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." N.Y. Rules of Prof'l Conduct 3.3(a)(1).

Formal discipline in the form of a public reprimand or censure may be warranted for this violation, too, not least because this is not the only instance in which Respondent's counsel made false representations to the Court. See supra § I.A.2; ECF No. 225, at 25–26. Further proceedings are necessary to give Respondent's counsel notice and an opportunity to be heard before imposition of disciplinary sanctions for violating its duty of candor. *See* L. Civ. Rule 83.3(a)–(b).

B. Sanctions are warranted as a result of Respondent's spoliation of evidence and related misrepresentations to the Court.

Petitioner seeks sanctions for spoliation of video evidence related to Respondent's allegation that Petitioner threatened Mr. Ramsundar in the visitation area of the detention facility. Specifically, Petitioner respectfully requests that the Court issue a formal admonishment directed to Respondent's counsel and all relevant agencies and officials regarding their duty to preserve evidence even when it is unfavorable to their case; Petitioner also seeks attorney's fees for the time spent responding to Petitioner's motion for sanctions based on the supposed threat.

The Court has authority under Rule 37(e)(1) to issue an admonishment as part of its authority to "order measures no greater than necessary to cure the prejudice" from destruction of electronically-stored evidence. Petitioner continues to suffer prejudice to the extent that he has been deprived of video evidence that would have conclusively proven that the incident in question did not happen. As it stands, the government has only stated that it does not intend to rely on the allegation, *see* Tr. of June 12, ECF No. 218, at 30:1218, but it has never admitted the allegation is false and in fact suggested in its papers that the allegation might well be true, *see* ECF No. 184, at 21 ("[T]he allegation made by Ramsundar is plausible. And even if the Court were to accept Petitioner's contention that Ramsundar lied . . . ."); ECF No. 205, at 32. The remedy of an admonishment to the agency and counsel would help cure the prejudice Mr. Hassoun continues to suffer from being deprived of the evidence to clear his name.

This Court also has authority to impose attorney's fees as a sanction. "In addition to sanctions contemplated by the Federal Rules of Civil Procedure, courts have an inherent power at common law, to 'protect their institutional integrity and to guard against abuses of the judicial process with contempt citations, fines, awards of attorneys' fees, and such other orders and sanctions as they find necessary.'" *Parsi v. Daioleslam*, 778 F.3d 116, 130 (D.C. Cir. 2015)

(quoting *Chambers*, 501 U.S. at 44). "[A] finding of bad faith is required for an award of attorney's fees under the court's inherent power," *id.* at 131, and can be imposed even though Rule 37(e) does not itself provide for fees, *see Chambers*, 501 U.S. at 49 ("[T]he inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct."); *CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 498 (S.D.N.Y. 2016)*L*.

To determine the appropriate content of a judicial admonishment—or the imposition of attorney's fees—it is necessary to determine whether the spoliation that occurred here was the result of bad faith. The current record provides only a partial answer. It is clear that investigating agents failed to preserve video evidence from February 27 because it contradicted Mr. Ramsundar's account. ECF No. 184-3 ¶ 5. But it remains unclear why the government failed to preserve video evidence from other days during that week in February even though it apparently continued to investigate whether the incident described by Mr. Ramsundar could have occurred on some other day. Further factual inquiry—through testimony at deposition or in court—is necessary to determine how this occurred and whether it is attributable to bad faith.

Relatedly, further proceedings are necessary to determine whether, in pressing Mr. Ramsundar's allegations and failing to correct representations they knew to be false, counsel for Respondent violated their ethical duties. As the Court stated, "much remains unclear" about what counsel knew and when they knew it. ECF No. 225, at 25 n.1. Three attorneys for Respondent provided conflicting responses to the Court about when they learned the results of the March 24 investigation showing that the incident did not occur, as alleged, on February 27, 2020. *Id.*

The following questions thus warrant further inquiry:

5. When exactly counsel learned that the investigation showed that the supposed incident did not occur on February 27 as alleged;
6. Whether, and when, counsel asked for further inquiry into the truth of the allegation after learning that it was false as alleged;

7. What steps were taken to investigate the truth of the allegations (including, for example, whether Mr. Ramsundar was ever confronted with the evidence that his statement was inaccurate) and when those steps were taken;

8. When counsel learned the results of any further inquiries;

9. Whether counsel ever instructed their clients to preserve video evidence or other evidence;

10. Whether counsel acted knowingly, negligently, or otherwise when it failed to disclose the results of the March 24 investigation in response to Petitioner's April 13, 2020 discovery demand letter seeking disclosure of information regarding the supposed incident, s*ee* ECF No. 263-7.

Answers to these questions are necessary to determine whether and to what extent Respondent's counsel pressed allegations to the Court in violation of their ethical duty of candor to the Court and failed to disclose evidence in violation of its duty of fairness to opposing counsel. To develop the factual record in relation to these matters, Petitioner asks the Court to authorize Petitioner to take depositions and then to hold a hearing before the Court. With respect to disciplinary proceedings, the Court may appoint a Magistrate Judge or independent attorney to conduct all necessary investigation. *See* Local Civ. Rule 83.3(b). Government counsel are entitled to notice and an opportunity to be heard before such discipline is imposed. *Id*. [6]

CONCLUSION

This Court has jurisdiction to adjudicate the pending motion for sanctions and to issue appropriate relief, including awards of attorney's fees, formal judicial admonishments, and professional discipline in the form of reprimand or censure. The Court should hold further proceedings, as described above, in order to fill significant gaps in factual record and to give Respondent notice and a fair opportunity to be heard before sanctions or discipline are imposed.

[6] This Court also has authority under Rule 11(c)(3) to issue an order to show cause why sanctions should not be imposed for violation of Rule 11(b)(3), which requires that "the factual contentions [in any filing] have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."

Respectfully submitted,

/s/ *Jonathan Manes*

Jonathan Manes
Roderick & Solange MacArthur Justice Center
160 E. Grand Ave., 6th Floor
Chicago, IL 60611
312-503-0012
jonathan.manes@law.northwestern.edu

A. Nicole Hallett
Mandel Legal Aid Clinic
University of Chicago Law School
6020 S. University Avenue
Chicago, IL 60637
773-702-9611
nhallett@uchicago.edu

Counsel for Petitioner

Jonathan Hafetz
Brett Max Kaufman
Charles Hogle (*pro hac vice*)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2500
jhafetz@aclu.org

Judy Rabinovitz
Celso Perez
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2616
jrabinovitz@aclu.org

Dated: July 20, 2020
Chicago, IL