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 REPLY MEMORANDUM REGARDING PETITIONER'S PENDING MOTION FOR SANCTIONS

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INTRODUCTION

The parties agree that this Court retains jurisdiction over Petitioner's pending Motion for Sanctions. *See* Resp.'s Brief in Response to the Court's Order Dated June 29, 2020, ECF No. 273, at 1 (hereinafter "Resp.'s Br."). Moreover, the government concedes that the Court must award Petitioner attorney's fees he incurred litigating his motion to compel under Rule 37(a)(5)(A) unless the Court finds that the government's nondisclosure was substantially justified. *See* Resp.'s Br. at 5. Petitioner further agrees with the government that no further proceedings are necessary for the Court to determine that the government's nondisclosure was not substantially justified: plainly, it was not. Petitioner disagrees with the government, however, that further proceedings are not necessary on some of the remaining sanctions issues, including whether to award attorney's fees for spoliation of evidence and whether to formally admonish or impose other sanctions on individual government actors involved in the misconduct in their individual capacities. Finally, the Court should admonish, reprimand, or censure Respondent's counsel for failure to disclose exculpatory evidence in counsel's possession and for misrepresentations to the Court based on the current record.

I. The government's non-disclosure of documents was not substantially justified and the Court should award attorney's fees for Petitioner's Motion to Compel without further proceedings.

As the Court held in its initial decision on sanctions, "the information contained in Ramsundar's A-file was plainly responsive to Petitioner's discovery demands and should have been turned over." Decision and Order, ECF No. 225, at 23. The Court found that the government failed to turn over responsive documents in the A-file "despite the fact that Respondent's counsel had the A-file readily available and could have examined it at any

time." *Id.* at 24. The Court likewise found that documents in the six categories identified by Petitioner in his motion to compel "are responsive and should be produced." *Id*. In other words, the Court has already rejected the government's argument that it was reasonable for it to fail to search Ramsundar's and other informants' A-files for responsive documents. Attorney's fees must therefore be awarded under Rule 37(a)(5)(A).[1]

II. Further proceedings are necessary to determine whether the Court should award attorney's fees for spoliation of evidence.

Petitioner continues to seek discovery and/or further proceedings to establish whether the government's spoliation of evidence related to Shane Ramsundar's threat allegation was in bad faith, and therefore, whether punitive sanctions are appropriate pursuant to the Court's inherent authority. The government faults Petitioner for not advancing the theory that the government acted in bad faith in its Motion to Compel, but Petitioner stated clearly that "the evidence shows that Respondent 'acted with intent' to deprive Petitioner" of the February 27 video evidence. Pet.'s Mem. in Support of Mot. For Sanctions, ECF No. 263-1, at 25. Petitioner did admit that the current record was insufficient to ascertain whether the February 26 video evidence was deleted in bad faith. Pet.'s Reply Memo. in Support of Sanctions, ECF No. 205, at 34 (hereinafter "Pet.'s Reply Mem."). But discovery or further proceedings would elucidate whether this spoliation of evidence was merely grossly negligent or whether it was intentional. *See* Pet.'s Mem., ECF No. 274, at 14. In order to make that determination, the agents involved in the investigation—George Harvey, William Kirchmeyer, and Christopher Lemmo—must be deposed or required to testify at a hearing. *See* Govt.'s Opp'n to Pet.'s Mot. for Sanctions, ECF

[1] If the Court disagrees that the current record establishes that the government's nondisclosure was not substantially justified, then Petitioner would not object to further proceedings on this question.

No. 184, Exhs. B, C, E. If the inquiry shows that the spoliation was in bad faith, Petitioner seeks an award of attorney's fees for his response to the government's Motion for Sanctions, which was largely premised on the false threat allegation.

The government argues that "sanctions-related discovery is disfavored," Resp.'s Br. at 2, but the cases it cites do not support that proposition. For instance, in *Chemiakin v. Yefimov*, a sanctioned party argued that the Court was required to hold a hearing before levying sanctions. 932 F.2d 124, 130 (2d Cir. 1991). The Second Circuit rejected that argument, holding that "there is no such requirement, absent disputed facts or issues of credibility." *Id*. This, of course, implies that a court *should* hold further proceedings when, like here, the record does not contain sufficient evidence to decide the motion. The other cases the government cites either hold that a hearing is not required in the particular circumstances of those cases or explain the circumstances in which a hearing may be necessary. *See Burbidge Mitchell & Gross v. Peters*, 622 F. App'x 749, 758 (10th Cir. 2015) (sanctions hearing not required in this case); *In re Kunstler*, 914 F.2d 505, 520 (4th Cir. 1990) ("[A]n evidentiary hearing may well be necessary to resolve the issues" in a sanctions motion); *Indianapolis Colts v. Mayor & City Council of Baltimore*, 775 F.2d 177, 183 (7th Cir. 1985) (district courts have "wide discretion with respect to discovery matters."). At bottom, "[w]hether exercising its inherent power, or acting pursuant to Rule 37, a district court has wide discretion in sanctioning a party for discovery abuses." *Reilly v. Natwest Markets Grp. Inc*., 181 F.3d 253, 267 (2d Cir. 1999). District courts thus likewise have wide discretion in determining whether to investigate the nature of sanctionable conduct. Indeed, it would be nonsensical for courts to have wide discretion in imposing sanctions but little discretion to authorize discovery or hold a hearing to determine if sanctions are appropriate.

The government further argues that discovery is not appropriate because Petitioner has not presented clear and convincing evidence that the government acted in bad faith.[2] Resp.'s Br. at 7-8. But that argument is circular—it would mean that Petitioner would need to *prove* bad faith before being given an opportunity to gather evidence necessary to prove bad faith. If that were true, then sanctionable conduct would always go unaddressed as long as the offending party managed to keep some important piece of evidence out of the public record. This is not a case in which a party seeks discovery in order to go on a fishing expedition for improper conduct. Rather, Petitioner has presented ample evidence that misconduct occurred and needs additional discovery to obtain evidence that it cannot obtain any other way. Such discovery is well within the discretion of the Court to order.

III. Further proceedings are necessary to determine whether to impose sanctions against government agents in their individual capacities for spoliation of evidence and nondisclosure of documents.

The record contains abundant evidence of the government's bath faith in this case. *See* Pet.'s Reply Mem. at 5-13, 25-29. However, further questions as to the culpability of individual actors remain. *See* Pet.'s Mem. at 6-7, 14-15 (listing outstanding questions regarding conduct of government actors). Petitioner respectfully requests that this Court authorize Petitioner to conduct depositions of the key actors responsible for responding to Petitioner's discovery requests and conducting an investigation into Mr. Ramsundar's threat allegations—or,

[2] The D.C. Circuit requires clear and convincing evidence of bad faith before a district court imposes punitive sanctions under its inherent authority, *Parsi v. Daioleslam*, 778 F.3d 116, 131 (D.C. Cir. 2015), while the Second Circuit applies a "clear evidence" standard, *Wolters Kluwer Fin. Servs., Inc. v. Scivantage*, 564 F.3d 110, 114 (2d Cir. 2009). Petitioner notes with some irony that the government argues for a clear and convincing evidence standard for the imposition of non-monetary sanctions not involving a loss of liberty of any kind, while simultaneously maintaining that it did not need to meet any standard of proof in order to detain Petitioner for the rest of his life.

alternatively, hold a hearing at which these individuals must testify.[3] At a minimum, the individuals who provided declarations regarding the government's misconduct in support of the government's opposition to Petitioner's motion for sanctions should be required to further explain their conduct. *See* Govt.'s Opp'n to Pet.'s Mot. for Sanctions, Exhs. B, C, E, G, H (Declarations from George Harvey, William Kirschmeyer, Christopher Lemmo, Gregory Conwall, and Cornelius O'Rourke). In addition, ERO Director Thomas Feeley should be required to testify regarding the letter personally addressed to him from Shane Ramsundar that was produced only after the filing of Petitioner's Motion to Compel. *See* Pet.'s Reply Mem. at 7.

The declarations submitted by the government are insufficient to resolve the question of bad faith. As Petitioner has previously explained, these declarations are artfully drafted to avoid answering key questions regarding the sequence of events and individual actors' culpability for the non-disclosure of documents and spoliation of evidence. Pet.'s Reply Mem., at 13. And the government's bald assertion that it did not act in bad faith does not fill in the missing pieces: a party cannot escape sanctions by stating in a conclusory fashion that it had pure intentions.

IV. The Court should admonish Respondent's counsel for their failure to disclose evidence and for their misrepresentations to the Court.

Petitioner continues to seek admonishment, reprimands, or other sanctions against Respondent's counsel in this case, both for their failure to disclose plainly responsive documents in their possession even after representing to the Court that all documents had been disclosed,

[3] Petitioner does not object to a brief delay so that individuals who face possible sanctions can obtain outside counsel, if necessary, nor does Petitioner object to the issuance of an Order to Show Cause in order to ensure that these individuals receive due process as required by law. While the reputational interest at issue in the sanctions inquiry cannot compare to the potentially life-long deprivation of liberty that Petitioner faced, Petitioner believes strongly that every person has a right to due process, even those individuals who unjustly and unlawfully detained him.

and also for their repeated misrepresentations to the Court regarding both Mr. Ramsundar's threat allegation and Mr. Al Abed's unwillingness to testify against Mr. Hassoun. Petitioner recognizes the difficulty of seeking further discovery into Respondent's counsel's misconduct because of the potential implication of the attorney-client privilege. However, Petitioner takes the position that Respondent's counsel's misconduct is apparent on the current record and is deserving of sanctions, notwithstanding the fact that other misconduct protected by the privilege may also have occurred. *See* Decision and Order, ECF No. 225, at 24-27; Pet.'s Mem. at 8-10.

Respondent appears to admit that ethical violations occurred, stating in his latest brief that "Respondent regrets the confusion and issues caused by the delay in apprising the Court and opposing counsel and apologizes to the Court." Resp.'s Br. at 11. Counsel appears to blame the mistake on counsel's busy litigation schedule, while at the same time conceding that a busy schedule is no excuse for ethical lapses. *Id*. at 10. The government has not yet provided an explanation for either its failure to timely disclose the responsive documents showing that Mr. Al Abed had requested immigration relief for testifying, or for counsel's false and misleading representations in court that no such documents existed and that Mr. Al Abed's reluctance to testify was rooted solely in fear of Mr. Hassoun. *See* Pet.'s Mem. at 8-11.

Nothing in the government's brief explains the ethical lapses that occurred in this case. Sanctions are important to deter Department of Justice attorneys from engaging in similar misconduct in future cases and to protect the integrity of the legal profession as a whole. "[T]he duty of candor is so basic, and so important to proceedings before the Court" that serious sanctions "should be considered in every case involving violation of that duty." *In re Gordon*, 780 F.3d 156, 161 (2d Cir. 2015). Moreover, the duties of government attorneys are greater, not lesser, than those of private attorneys. "A government lawyer 'is the representative not of an

ordinary party to a controversy,' the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, 'but of a sovereignty whose obligation ... is not that it shall win a case, but that justice shall be done.'" *Freeport-McMoRan Oil & Gas Co. v. F.E.R.C.*, 962 F.2d 45, 47 (D.C. Cir. 1992) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *see also DaCosta v. City of New York*, 296 F. Supp. 3d 569, 600 (E.D.N.Y. 2017). The stakes of this case could not have been higher, and Respondent's counsel allowed injustice to be done in the name of the U.S. government. Disciplinary sanctions in the form of admonishments, reprimands, or censure are more than justified in this case.

CONCLUSION

For the foregoing reasons, the Court should (1) award attorney's fees under Rule 37(a)(5)(A) for Respondent's non-disclosure of documents; (2) order more discovery and/or further proceedings to determine whether additional attorney's fees should be awarded for Respondent's spoliation of evidence; (3) order more discovery and/or further proceedings to determine whether the Court should formally admonish, reprimand, or censure individual government actors involved in the misconduct; and (4) formally admonish, reprimand, or censure Respondent's counsel for failure to disclose exculpatory evidence in their possession and for making misrepresentations to the Court.

Respectfully submitted,

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