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

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

**RESPONDENT'S BRIEF REPLYING TO PETITIONER'S 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. The parties agree that the Court retains jurisdiction to impose sanctions. Dkts. 273 at 6, 274 at 4-6.[1] The parties also agree that, if the Court is considering imposing sanctions against individual government employees in their personal capacities, those employees are entitled to notice and an opportunity to defend themselves. *See* Dkts. 273 at 16-20, 274 at 18. The parties further agree that additional proceedings are warranted on the narrow issue of attorneys' fees related to parts of Petitioner's motion to compel.

Respondent disagrees with Petitioner as to the need for discovery and evidentiary hearings. See Dkt. No. 274. Respondent submits that the Court can resolve the sanctions motion on the basis of the existing record and should deny that motion for the reasons set forth in Respondent's opposition to the motion. *See* Dkt. No. 184 (opposition to Petitioner's sanctions motion). The mere fact, that Petitioner cannot support his call for sanctions under the Court's inherent power on the record as it stands, is not a sufficient reason for allowing limitless further proceedings. Neither the interests of justice nor the interests of judicial economy support such action. Dkt. No. 273 at 7-16.

Respondent also notes that Petitioner's response sets forth multiple new allegations. *See* Dkt. 274 at 7 n.1, 8 n.2, 11-15. As explained below, these new allegations are not responsive to the Court's specific questions directed to the parties. To the extent Petitioner seeks to add new

[1] Page references for docket entries are made to the ECF page numbers for each document.

allegations justifying sanctions, he should seek leave to file a supplemental brief in normal motion practice complete with meet and confer obligations that would provide Respondent an opportunity to potentially eliminate issues, and then have an appropriate length of time to respond (and without a 10-page limitation) to any new allegations that cannot be resolved through meet and confer.

## ARGUMENT

### I. Petitioner has failed to establish a legitimate need for further proceedings in this case.

#### A. Petitioner has failed to establish that Respondent acted in bad faith. Therefore, there is no basis on the record for imposing sanctions on Respondent under the Court's inherent authority.

Petitioner has not identified any evidence establishing that any action by the government in this case was taken for an improper purpose and thereby taken in bad faith. Before the Court can impose sanctions under its inherent authority, the Court must find that the subject of the sanctions acted in bad faith. *See Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78 (2d Cir. 2000) (inherent power sanctions require "that the challenged actions are entirely without color, and are taken for reasons of harassment or delay or for other improper purposes") (emphasis in original) (quotation omitted); *see also Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 143 (2d Cir. 2012) ("[T]o impose sanctions pursuant to its inherent power, a district court must find that: (1) the challenged claim was without a colorable basis and (2) the claim was brought in bad faith, *i.e.*, motivated by improper purposes such as harassment or delay.") (internal quotations and citation omitted).[2] No evidence of bad faith is present here.

[2] The Second Circuit recognizes a limited exception to the bad faith requirement. "When a district court invokes its inherent power to impose attorney's fees or to punish behavior by an attorney in the actions that led to the lawsuit or conduct of the litigation . . . which actions are taken on behalf of a client, the district court must make an explicit finding of bad faith." *United States v. Seltzer*, 227 F.3d 36, 41-42 (2d Cir. 2000) (quotations omitted). "But, when the district

A finding of bad faith also requires clear proof. *Wilson v. Citigroup, NA*, 702 F.3d 720, 724 (2d Cir. 2012) (finding of bad faith must be based on "clear evidence" and possess "a high degree of specificity" regarding the conduct at issue) (quotation omitted); *Crown Awards, Inc. v. Trophy Depot, Inc.*, No. 15 Civ. 1178 (LAK) (AJP), 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"). Bad faith may not be inferred unless the actions at issue "are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Enmon*, 675 F.3d at 143 (quotation omitted).

Furthermore, bad faith is an extreme concept, and not every misstep constitutes bad faith. *See Va. Props., LLC v. T-Mobile Ne. LLC*, 865 F.3d 110, 123 (2d Cir. 2017) (reversing in part an award of sanctions pursuant to inherent authority and 28 U.S.C. § 1927 where there was no evidence of deceit and the remaining evidence of bad faith was "at best inconclusive").[3] Mere negligence is not sufficient to establish bad faith. *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272 (RPP), 2005 WL 1804233, at *6, *8 (S.D.N.Y. Aug. 1, 2005) (court declines to invoke inherent power to sanction violation of the magistrate's order, because conduct indicated "a failure of new counsel to adequately review the case materials and orders of Court" rather than an act of bad faith). Even unreasonable conduct is not per se bad faith conduct. *Doe v. Quest Diagnostics, Inc.*, No. 15 Civ. 8992 (LGS), 2017 WL 3447899, at *3

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court invokes its inherent power to sanction misconduct by an attorney that involves that attorney's violation of a court order or other misconduct that is not undertaken for the client's benefit, the district court need not find bad faith before imposing a sanction under its inherent power." *Id.* at 42 (attorney sanctioned for tardiness in court). Because all the conduct identified in Petitioner's motion relates to the conduct of discovery, the preservation of evidence and advocacy before the Court, this exception is not relevant to this case. *See generally* Dkt. 263-1.

[3] "The showing of bad faith required to support sanctions under 28 U.S.C. § 1927 is similar to that necessary to invoke the court's inherent power." *Enmon*, 675 F.3d at 143.

(S.D.N.Y. Aug. 11, 2017) (attorney conduct which "unreasonably multiplied the proceedings and wasted Defendant's and the Court's time [was] insufficient to merit sanctions under § 1927" as it was "not clear that [attorney's] actions constitute[d] bad faith as opposed to badly misguided lawyering"). While, an intentionally misleading statement in a declaration combined with an intentionally misleading explanation of that statement may "suffice[] to constitute subjective bad faith," *S.E.C. v. Smith*, 798 F. Supp. 2d 412, 433 (N.D.N.Y. 2011), no such conduct has occurred in this case.

Petitioner has identified no specific act of Respondent or his counsel as an act of bad faith. This latest filing is no exception. *See generally* Dkt. 205, 263-1, 274. In fact, in his motion, Petitioner acknowledged that he "is not presently in a position to determine which government officials are responsible for [the allegedly sanctionable conduct] and whether they acted intentionally or otherwise in bad faith." Dkt. 263-1 at 24. Furthermore, in his July 20, 2020 memorandum, Petitioner proposed ten separate areas for further inquiry so he can determine whether the government's actions are "attributable to bad faith." Dkt. 274 at 9-10, 17-18. Such statements underscore that Petitioner has never had the evidence to justify his call for the Court to impose sanctions under its inherent authority. The Court thus should reject, as a matter of law based on the conceded lack of evidence here, Petitioner's call for sanctions under the Court's inherent authority, including sanctions related to Shane Ramsundar, Mohammed Al Abed, and spoliation. *See* Dkt. No. 274 at 8-18.

**B. Petitioner's arguments do not justify his requests for further discovery.**

Because of his lack of proof, Petitioner has insisted that he must be permitted to "take additional discovery or hold other proceedings as necessary . . . to determine whether the government[]" has acted in bad faith. Dkt. 205 at 8. As noted above, his latest memorandum maintains that assertion, arguing that he requires "further development of the record, including

through the testimony of government agents or officials" to determine whether their actions "constitute[] bad faith or an abuse of the judicial process." Dkt. 274 at 9-10. Petitioner's call for further discovery is misplaced and should be rejected.

"[D]iscovery must ultimately be 'proportional to the needs of the case.'" *New York v. U.S. Dep't of Commerce*, --- F. Supp. 3d ----, 2020 WL 2564933, at *6 (S.D.N.Y. May 21, 2020) (quoting Fed. R. Civ. P. 26(b)(1)). "Discovery serves the goals of litigation, not the other way around." *Id.* The need for further discovery must be weighed against the current posture of the case. *Id.* The instant case has lasted more than one year, and the litigation has been extensive. *See* Dkts. 1 – 275. The merits have been decided, and Petitioner obtained all the relief that he sought when he was ordered released from detention and then removed. *Hassoun v. Searls*, --- F. Supp. 3d ----, 2020 WL 3496302, at *1 (W.D.N.Y. June 29, 2020); Dkt. 275. Further discovery will not change that fact.

In *New York v. U.S. Dep't of Commerce*, a case arising out of a dispute over the 2020 census questionnaire, the court declined to impose sanctions under its inherent authority because the plaintiffs could not demonstrate bad faith on the current record, and the court declined to authorize further discovery because discovery was no longer proportional to the needs of the case, in large part because the plaintiffs had already obtained all the relief they had sought. 2020 WL 2564933 at *6. The court made the decision to forego further discovery despite the plaintiffs' allegations of untruthfulness, recognizing that the issues raised by the plaintiffs would not be resolved. *Id*. The court further noted that "a federal court is not an investigative body charged with government oversight," and it concluded that "'restraint and discretion' counsel against the further expense of judicial resources in pursuit of these matters." *Id.* (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)).

In this case, the alleged conduct is far less serious, as there is no evidence of intentionally untruthful testimony. Moreover, even in the face of such an allegation, the merits have been decided; the Petitioner has been awarded all the relief he sought, and the resolution of the sanctions motion will not change the outcome of the case. Respondent respectfully submits that, as in the census case, the result should be that the Court should deny the motion for further discovery. Tellingly, Petitioner cites no precedent for his elaborate proposal, which would include depositions and another evidentiary hearing *See* Dkt. 274 at 8-18. The Court should thus decline to permit further discovery on the sanctions issue.

**C. The Court should not reopen discovery on its own initiative.**

Respondent understands that the Court's inherent authority is extensive and that it exists to enable the Court to supervise and exercise control over "its own proceedings." *Eisemann v. Greene*, 204 F.3d 393, 395 (2d Cir. 2000). As discussed in his prior briefing, Respondent also recognizes that the Court has expressed concern regarding Respondent's April 8, 2020 filing. Dkt. 273 at 13-16. Again, 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 in the Ramsundar allegation. *See Hassoun v. Searls*, --- F. Supp. 3d ----, 2020 WL 3286961, at *10 (W.D.N.Y. June 18, 2020). Respondent regrets the confusion and issues caused by the delay in apprising the Court and opposing counsel and apologizes to the Court. However, as discussed in his previous filing, Respondent submits that in full context, the circumstances presented, including the intense pace of the litigation, the trial team's concurrent efforts to investigate and verify the accuracy of the accusation, and the impact of the COVID-19 pandemic, reasonably explain how this type of omission could have been made, and made without bad faith. Dkt. 273 at 13-16. Furthermore, as noted above, nothing in Petitioner's recent memorandum identifies any specific evidence of bad faith regarding those actions. In the

absence of a legitimate allegation of bad faith, and one rooted in fact and not mere speculation, the Court should decline to reopen discovery.

Additionally, no further proceedings are necessary regarding Petitioner's claim for sanctions based on the alleged spoliation of the video records for the visitation room. Dkt. 274 at 16-18. As Petitioner's counsel acknowledged at the June 12, 2020 hearing, Petitioner's spoliation claim requires a showing of prejudice, and because of Respondent's decision to withdraw Mr. Ramsundar from his witness list, Mr. Ramsundar's allegation of a threat made by Petitioner is no longer at issue. Dkt. 218 at 30-31. Thus, Petitioner "cannot show there is any prejudice to him" as a result of the alleged spoliation of the video record. *Id.* Petitioner's recent assertion that the Court should issue "an admonishment to the agency and counsel" to cure the prejudice of not being able to clear his name in the absence of video evidence is unsound: it ignores his counsel's prior admission of no prejudice, and it runs counter to the intent of Rule 37(e)(1). Dkts. 218 at 30-31, 274 at 16. Although Rule 37(e)(1) permits the Court to "order measures no greater than necessary to cure the prejudice," it "does not require the court to adopt measures to cure every possible prejudicial effect." Fed. R. Civ. P. 37 advisory committee's note, 2015 amendment. Furthermore, by emphasizing remedies such as excluding certain evidence, allowing the parties to present evidence and argument regarding the missing information, etc., and by noting that the "severity of given measures must be calibrated in terms of their effect on the particular case," the commentary makes clear that the prejudice at issue is the impact on the movant's ability to litigate his case and not on some perceived prejudice to his reputation. *Id.* Accordingly, no basis exists for the court to order discovery and have an evidentiary hearing related to spoliation, and these requests should likewise be denied.

## II. Petitioner's new allegations are not responsive to the Court's order.

Petitioner, in his July 20, 2020 memorandum, raises multiple new allegations regarding the government's representations made in the course of various proceedings during this litigation as well as its general handling of discovery. Dkt. 274 at 7 n.1, 8 n.2, 11-15. These new allegations are not responsive to the Court's June 29, 2020 Order, which directed the parties to brief their positions as to whether the Court retains jurisdiction over the motion for sanctions, and to provide the parties' views on "any additional steps that are necessary in order for the Court to finally determine the issues set forth in [Petitioner's] motion for sanctions." Dkt. 258. The new allegations—raised for the first time in his July 20 filing—were not "set forth in [Petitioner's May 15, 2020] motion for sanctions"; rather, they are a whole new set of allegations that Respondent has not had the opportunity to investigate and address in normal motion practice.[4] The allegations are therefore outside the scope of what the Court's Order requested.

As Respondent explained above, although Petitioner has pointed out some alleged missteps or errors in the government's litigation conduct that he alleges to be *indicators* of bad faith, he has not directly alleged, let alone shown clear evidence, that the government litigators and/or agency officials *acted in bad faith*. *See, e.g.*, Dkt. 274 at 8 n.1 (alleging "pattern of misrepresentations"); at 11, 12, 14 (alleging "fail[ure] to disclose"); at 13 (citing "grave concerns" about litigation conduct, and an "appear[ance]" of "directly misl[eading] the Court");

[4] Fed. R. Civ. P. 37(a)(1) requires the movant in a motion for sanctions to confer or attempt to confer in good faith with a party accused of a discovery failure to potentially eliminate disputes that can be resolved without court action. *See, e.g.*, *Woodward v. Holtzman*, No. 16-CV-1023A(F), 2018 WL 5112406, at *2 (W.D.N.Y. 2018) (noting that the "purpose of Rule 37(a)(1) is to avoid, wherever feasible, unnecessary litigation of discovery disputes"). Moreover, the applicable rules for responding to motions, including motions for sanctions, permit the party accused of a discovery violation 14 days to respond and more than the 10-page limitation ordered by the Court for this brief.

14 (alleging an "appear[ance]" of "violat[ing] counsel's ethical duty of fairness to opposing counsel"); 15 (alleging misleading statements and false representations). To the extent that Petitioner seeks to file a supplemental brief to his motion for sanctions to add these new allegations, he must seek the Court's leave to do so. However, as the government pointed out in its initial brief, due process requires that Respondent have sufficient time to respond to Petitioner's new claims. Dkt. 273 at 17 and cases cited therein. These claims must be raised, if at all, in a properly filed motion that complies with appropriate meet-and-confer requirements so that Respondent can adequately investigate and respond to the claims, especially as they implicate multiple government agencies and their employees. *Id.* Plainly, the briefing requested by the Court for determining future and appropriate process with respect to a previously filed motion is not the place for Petitioner to raise new sanctions allegations that leave Respondent with insufficient time and space to respond.[5]

**III. The Court should set a briefing schedule on attorneys' fees.**

Finally, Petitioner seeks to recover attorney's fees and expenses associated with his motion to compel, which the Court granted. Dkt. 274 at 7; Dkt. 225. Respondent agrees that under Rule 37(a)(5)(A), he is responsible for such reasonable fees and expenses as to the successful parts of Petitioner's motion, unless Respondent can show that an exception exists under Rule 37(a)(5)(A)(i)-(iii). Should the Court decide to award reasonable fees and expenses, Respondent proposes additional steps on this point as follows, *cf.* L.R. Civ. P. 5.5(g): Petitioner

[5] Respondent's decision not to respond in this brief to Petitioner's multiple new allegations in point-by-point detail should not be interpreted as admissions to the allegations. Rather, as expressed above, the new allegations are outside the scope of what the Court requested the parties brief. To the extent Petitioner raises these allegations in a supplemental brief to his motion for sanctions after an appropriate meet and confer, Respondent will address the allegations in his response to that supplemental brief.

must serve any petition for fees on Respondent within 30 days of the Court's order in response to this briefing. The petition must contain an itemization of the time expended by counsel representing Petitioner incurred in making the motion, including a statement as to the effective hourly rate (as calculated by dividing the total amount requested by the number of hours expended). Within 30 days of service of the petition, Respondent must respond to the petition. The Court would then adjudicate the petition. *Cf.* L.R. Civ. P. 5.5(g)(4).

**CONCLUSION**

For all the foregoing reasons, the Petitioner's motion for sanctions and for further discovery should be denied.

Dated: July 27, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 27, 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 district court CM/ECF system. All parties are users of the CM/ECF system and will be served electronically.

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