

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

ADHAM AMIN HASSOUN, )

Petitioner, )

v. )

Case No. 1:19-cv-370

JEFFREY SEARLS, in his official capacity )  
as Acting Assistant Field Office Director and )  
Administrator, Buffalo Federal Detention )  
Center, )

Respondent. )  
\_\_\_\_\_ )

**RESPONDENT'S RESPONSE TO  
THE COURT'S ORDER DATED AUGUST 11, 2020**

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## BACKGROUND

On August 11, 2020, the Court directed Respondent “to provide a specific, detailed explanation concerning the circumstances surrounding” the production of Volume 17 on June 22, and Volumes 18 and 19 on July 17, including, (1) “why the documents had not previously been discovered and produced”; (2) “when and how it was discovered that additional responsive documents existed that had not been produced”; and (3) “why it was represented to the Court on June 12, 2020, that all responsive documents to the identified categories had been produced when, in fact, that was not true.”<sup>1</sup> ECF No. 281 at 2. Respondent submits this Response and the attached declarations to answer the Court’s questions.

## INTRODUCTION

Respondent’s trial team,<sup>2</sup> and the agencies assisting them, participated in discovery in good faith. Prior to the Court’s June 18 order, Respondent’s trial team produced and identified documents while carefully considering the requirements of Rule 26 and applicable legal authority. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Court’s June 18 order clarified the need to search for and produce, or

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<sup>1</sup> The Court further ordered Respondent to provide the Court copies of these productions. Those documents will be sent to the Court by email.

<sup>2</sup> As used in this brief, the term “trial team,” unless otherwise qualified in the text, includes Anthony Bianco, lead counsel, John Inkeles, Steven Platt, Joseph Carilli, and AUSA Daniel Moar. [REDACTED]

[REDACTED] Regardless, each attorney has provided a description of his role in this litigation in their respective declarations.

<sup>3</sup> This belief was reasonable: The Federal Rules of Civil Procedure and the Local Rules are silent on any distinction between attorney work product created before the commencement of

identify on a privilege log, many of these documents that were previously withheld because they were believed to be privileged or non-responsive. As a result of the order, Respondent broadened his approach to responsiveness, and the June 22 and July 17 productions followed. The Abdelraouf Alien File, produced on July 17, was simply overlooked during an intensive discovery period.

As the declarations submitted with this Response show, Respondent and counsel have endeavored to comply with discovery in accordance with the Federal Rules of Civil Procedure, the Court's instructions, and guiding legal authority. When members of the trial team represented to the Court on June 12 that all responsive documents had been produced, they honestly and reasonably believed that to be the case. After the Court's June 18, 2020 order, members of the trial team realized their beliefs were mistaken and then understood the order as directing them to produce or identify documents they previously believed were either non-responsive or not discoverable. This understanding led to the additional disclosures in Volumes 17 and 18 and parts of Volume 19. As for the part of Volume 19 that contained the delayed production of Ahmed Abdelraouf's Alien File, as soon as Respondent identified its mistake, counsel remedied the oversight.

None of these actions amounts to bad faith. *See Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 143 (2d Cir. 2012) ("bad faith may be inferred only if actions are so completely

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litigation and post-commencement work product. Fed. R. Civ. P. 26(b)(3)(A); Local Rule 26(d)(1). But several decisions within this Circuit hold that post-commencement work product and post-commencement attorney-client communications are not discoverable and do not need to be listed in a privilege log. *See Harleysville Worcester Ins. Co. v. Sharma*, No. CV 14-2474 LDW, 2015 WL 3407209, at \*2 (E.D.N.Y. May 26, 2015); *United States v. Bouchard Transp.*, No. 08-CV-4490 NGG ALC, 2010 WL 1529248, at \*2 (E.D.N.Y. Apr. 14, 2010). *See also Capitol Records, Inc. v. MP3tunes, LLC*, 261 F.R.D. 44, 51 (S.D.N.Y. 2009) (attorney-client communications made during the litigation are not required to be logged).

without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay”). To the contrary, the evidence shows that Respondent and counsel were open and honest at all times and took care to satisfy their discovery obligations. All disclosures after the Court’s order were the product of Respondent and the trial team’s decision to be transparent and broadly inclusive, producing or identifying documents that were previously thought to be non-responsive or non-discoverable.

## DISCUSSION

### I. Representations at the June 12, 2020 hearing

Mr. Carilli’s representation to the Court at the June 12, 2020 hearing that Respondent had completed discovery of documents Petitioner demanded in his May 7, 2020 letter was based on his good-faith belief on the state of Respondent’s production at that time.” Ex. A, Declaration of Joseph F. Carilli (Carilli) at ¶ 8. Petitioner demanded that Respondent produce:

- (1) All additional documents that suggest Mr. Ramsundar or *any* other government witness has previously described similar allegations against other people;
- (2) all additional documents showing that the government is aware of significant credibility issues with Mr. Ramsundar or any other witnesses;
- (3) any other exculpatory evidence or records that tend to undermine the credibility of Mr. Ramsundar or other witnesses;
- (4) all documents relating to Mr. Ramsundar or other witnesses’ work as a government informant, at any time, that tend to show untruthfulness, other misconduct, or that the government has at any time not credited the informant’s information;
- (5) all documents relating to any admonishments, reprimands, discipline, termination, or similar consequences in relation to Mr. Ramsundar’s CI work, or that of any other witness; and
- (6) any additional documents that show Mr. Ramsundar or any other witness has sought benefits in exchange for testimony, or has ever received such benefits at any time.

Carilli ¶ 6 (quoting Mem. in Support of Pet’r’s Mot. for Sanctions & to Compel Discl., at 24, ECF No. 164). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Mr. Carilli's belief was not unreasonable, and it represented Respondent's intent to fully respond to RFP 2. With two minor exceptions, Respondent's Opposition to Petitioner's Motion for Sanctions and to Compel Disclosure, which Mr. Carilli authored, did not object to Petitioner's assertion that the six categories outlined in his May 7 letter were encompassed within RFP No. 2.<sup>4</sup> *See generally* ECF No. 184. Furthermore, during meet-and-confer conversations, "[c]ounsel for Respondent indicated that . . . Respondent would produce any responsive materials he found." ECF No. 184 at 4. Between May 21 and May 29, 2020 alone, Respondent produced 3,077 pages of documents, which included records relating to Petitioner, files related to detainees Mohammad Al Abed and Muhamed Hirsi, documents related to informant Shane Ramsundar's time as a confidential informant, and responsive portions of the

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<sup>4</sup> During meet-and-confer conversations, Respondent took the position that having acted as an informant in the past did not automatically impugn a witness's credibility. ECF No. 184 at 4. Respondent also indicated that he would not produce documents related to any new possible witnesses until the day the final witness lists were due, May 22, 2020. *Id.* at 5.

Alien Files for Ramsundar, Hector Rivas Merino, and Mohammad Al Abed. *See* Declaration of Steven A. Platt, ECF No. 184-1 at pp. 9-10, ¶¶ 25-30. These productions are evidence of Respondent’s intent to provide a complete response by producing “any responsive materials he found.” ECF No. 184 at 4.

[REDACTED]

Despite the desire of Respondent and counsel to provide complete responses to Petitioner’s request for production, subsequent events have established that Mr. Carilli’s assertions that Respondent had produced the documents responsive to Petitioner’s six categories were incorrect. There were two supplemental productions of responsive documents on June 22 and July 17, 2020. Nevertheless, Mr. Carilli’s statements regarding completeness were not made in bad faith. [REDACTED]

[REDACTED]

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<sup>5</sup> Regarding RFP No. 2, the Supplemental Response asserted that “Respondent has produced all documents within his possession, custody, or control which are responsive to this request, except for information withheld because the information is: (a) protected from disclosure under a claim of privilege; or (b) withheld because the information is protected from disclosure under a court order, a statute, or a regulation.” Ex. H, June 12, 2020 Supplemental Response at 3.



[REDACTED]

None of these acts demonstrates the “improper purpose” necessary for a finding of bad faith.

*Enmon*, 675 F.3d at 143. The Federal Rules explicitly contemplate that responsive documents might be uncovered after a production deadline, by obliging parties to timely make supplemental discovery productions. *See* Fed. R. Civ. P. 26(e).

**II. The effect of the Court’s June 12 and June 18 Orders**

At the June 12 hearing, the Court ordered the Respondent “to produce evidence responsive to these six categories of documents.” ECF No. 218, June 12, 2020 Hr’g Tr. at 31:10-

11. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
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6 [REDACTED]



[REDACTED]

**IV. Volume 18, produced on July 17, 2020 – Ramsundar Credibility Documents**

Respondent produced Volume 18 to Petitioner on July 17, 2020. Volume 18 is a privilege log that lists over 450 documents that were withheld in their entirety under various privileges. Vol. 18. The documents listed were created between May 8 and June 10, 2020, and relate to a credibility assessment of Ramsundar that began after Petitioner’s May 7, 2020 demand letter. Carilli ¶ 26; Platt ¶¶ 21, 23.

[REDACTED]

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[REDACTED]

[REDACTED]

8 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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9 [REDACTED]

[REDACTED]

**V. Volume 19, produced on July 17, 2020**

Volume 19, which Respondent produced to Petitioner on July 17, 2020, consists of two types of documents—an email regarding allegations made by Ramsundar and excerpts from Abdelraouf’s Alien File. Vol. 19 Docs. The documents are redacted, and the justifications for the redactions are explained in a privilege log. Vol. 19 Log. These documents are discussed in the following two subsections.

**A. Ramsundar Allegation Email**

The final two pages of Volume 19 are a redacted May 19, 2020 email from Mr. Bianco to the trial team and agency counsel in which he wrote that Ramsundar made allegations against another individual that were similar to allegations made against Petitioner. Vol. 19 Docs at 115-16. [REDACTED]

[REDACTED]

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10 [REDACTED]

[REDACTED]

**B. Abdelraouf's Alien File**

Respondent produced excerpts from Abdelraouf's Alien File and a privilege log to Petitioner on July 17, 2020 in Volume 19. Vol. 19 Docs; Vol. 19 Log. The failure to produce the Abdelraouf Alien File previously was an oversight that was corrected as soon as it was discovered. Respondent had already produced documents regarding Abdelraouf's criminal convictions and his application for a "green card" in Production Volumes 1 and 2. [REDACTED]

[REDACTED]

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<sup>11</sup> [REDACTED]

[REDACTED]

**CONCLUSION**

The attached declarations demonstrate that Respondent and the trail team endeavored to comply with discovery in accordance with the Federal Rules of Civil Procedure, the Court’s instructions, and guiding legal authority. As a result of the Court’s June 18 order, Respondent’s counsel appropriately modified their interpretation of what documents were responsive, which led to the additional disclosures in Volumes 17 and 18 and parts of Volume 19. Respondent’s original position and its subsequent revision do not amount to bad faith. As for the delay in producing Abdelraouf’s Alien File, Respondent made a simple mistake by allowing the request for that Alien File to go unaddressed during the heavy litigation proceeding throughout May and June. But once the issue was identified, Respondent and agency counsel expeditiously produced the Alien File to Petitioner. Again, although the Alien File should have been produced earlier, Respondent’s delayed production was not the result of bad faith. Finally, Respondent believed that the representations to the Court on June 12 were accurate and complete at that time. Neither Respondent nor his counsel meant to mislead the Court or conceal information from it. The productions on June 22 and July 17 were not caused by prior bad faith. They were the result of a good-faith attempt to comply with the Court’s holding that “any documents falling within the



categories [Petitioner] has enumerated in his motion to compel are responsive and should be produced.” ECF No. 225 at 24. Respondent and his counsel have always acted in good faith and will continue to do so.

Dated: September 15, 2020

JAMES P. KENNEDY, JR  
United States Attorney  
Western District of New York

Respectfully submitted,

JEFFREY BOSSERT CLARK  
Acting Assistant Attorney General  
Civil Division

DAVID MCCONNELL  
Director  
Office of Immigration Litigation

/s/ Matthew A. Connelly  
MATTHEW A. CONNELLY  
Senior Litigation Counsel  
Office of Immigration Litigation  
U.S. Department of Justice, Civil Division  
P.O. Box 878, Ben Franklin Station  
Washington, DC 20044  
Telephone: (202) 616-4040 | Fax: (202) 616-4923  
Email: matthew.connelly@usdoj.gov

Counsel for Respondent