

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

v.

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

Respondent.

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

**MOTION FOR A PROTECTIVE ORDER STAYING RESPONDENT'S
SUBPOENA FOR THE DEPOSITION OF A NON-PARTY AND
COMPELLING PRODUCTION OF RECORDS**

A mere week in advance, without updating its responses to Petitioner's interrogatories or seeking leave of this Court, the government issued a Rule 45 subpoena for the deposition of a previously unidentified witness, [REDACTED] on Friday, February 7. The government subsequently re-noticed the deposition for Monday, February 10.¹ Since then, counsel for Petitioner have worked diligently with counsel for the government to find some way for the deposition to go forward without gravely prejudicing Petitioner. Those efforts are detailed in the accompanying declaration of Jonathan Hafetz (the "Declaration").

Despite counsel's efforts, the government has failed to provide Petitioner with all documents relevant to [REDACTED] testimony—even though the Court's deadline for *all*

¹ This late-noticed deposition violates Local Rule of Civil Procedure 30(a), which provides that "[a]bsent agreement of the parties or Court order, each notice to take the deposition of a party or other witness shall be served at least twenty-one (21) days prior to the date set for examination."

discovery production has passed.² Many of the government's discovery responses will not arrive at Petitioner's offices until Monday morning, the very day of the deposition, and Petitioner has no way to determine whether any of those documents will include matters about which they would like to examine ██████████

The government's late-noticed deposition poses an especially profound problem because the government apparently intends for ██████████ deposition testimony on Monday to take the place of live testimony during the evidentiary hearing. The government has represented that ██████████ deposition cannot be delayed because he intends to leave for ██████████ on February 12 and will be out of the country through the April 28 evidentiary hearing. The government does not intend to have him participate in the evidentiary hearing, but instead to use this deposition testimony in lieu of live testimony. Consequently, if the deposition goes forward, it will represent Petitioner's *only* opportunity to cross-examine ██████████. But the late notice of the deposition, combined with the government's ongoing failure to produce all records of its interviews with ██████████ makes it practically impossible for Petitioner's counsel to prepare for effective cross-examination. The circumstances of the deposition are therefore acutely prejudicial to Petitioner—who, it bears repeating, faces indefinite and potentially lifelong confinement.

Counsel for the government have refused to continue the deposition beyond Monday, whether by either securing ██████████ attendance at a later date or by arranging for his

² For instance, during the parties' telephonic meet-and-confer on February 7, 2020 at 11:00 a.m., Anthony Bianco, counsel for the government, represented that he intended to provide Petitioner's counsel with a recording of his recent interview with ██████████ but that he did not intend to provide Petitioner's counsel with the written report prepared by the law-enforcement agent who accompanied him. The government also has not determined whether there are notes from ██████████ concerning any interview of ██████████.

testimony from [REDACTED], even though [REDACTED] is a lawful permanent resident of the United States and has substantial and voluntary connections to the United States, [REDACTED]

[REDACTED].

As detailed in the Declaration, counsel for the government have failed to provide Petitioner with all of the discovery required under this Court's order. Even as to the discovery that has been produced, the scheduled deposition gives Petitioner's counsel too little time to conduct a meaningful review, let alone challenge the government's extensive redactions.

Counsel for the government have, to be sure, made various efforts to address Petitioner's urgent concerns, as set forth in the Declaration. Petitioner's counsel readily acknowledge those efforts.

Nevertheless, to conduct what amounts to a trial examination of a government witness on such a compressed timeline is extremely prejudicial and unfair. At the time of this writing, Petitioner's counsel have approximately three days, including the weekend, to prepare for cross-examination—yet the government *still* has yet to produce all of its records of [REDACTED] own prior statements, and only produced an audio recording of one prior interview of [REDACTED] [REDACTED] by government agents this morning. Moreover, at least one entire volume of the government's general discovery productions are not projected to reach Petitioner's counsel until Monday, February 10, via courier at 10:30 a.m.—the very date on which the deposition is scheduled.

Quite simply, there is not enough time for Petitioner's counsel to fairly prepare for this deposition. Petitioner's counsel need time to: (1) examine the records produced by the government, which are voluminous, detailed, and contain data and names not previously disclosed; (2) investigate the facts to determine whether [REDACTED] might be able to testify

about any of them; (3) confer with their client—who remains detained at Batavia and can only be accessed via pre-scheduled phone call or in-person visit—about the newly produced documents, which number into the hundreds of pages; (4) conduct an independent investigation into ██████████ ██████████ and related detainees—a particularly important task, given that ██████████ appears to have ██████████, which necessarily call into question his credibility and warrant meaningful probing; and (5) prepare its strategy for cross-examination.

Forcing Petitioner’s counsel to proceed with this deposition—which presents the sole opportunity for Petitioner to confront and cross-examine his accuser—without full discovery or adequate time for consultation and investigation would be extremely unfair. While Petitioner’s counsel recognizes that the government wishes to preserve this witness’s testimony, there are fairer ways to do so, including the possibility of securing ██████████ testimony via videolink from ██████████ or otherwise. (As noted above, ██████████ is a lawful permanent resident of the United States.) Inadvertently or not, the government’s scheduled deposition of ██████████ ██████████ short-circuits the schedule carefully developed by the Court in order to ensure an orderly proceeding. It also undermines the fundamental purpose of this habeas proceeding: to ensure that Petitioner receives the fair process to which he is entitled.³

RELIEF SOUGHT

Petitioner respectfully requests that this Court issue a protective order staying the Rule 45 deposition of ██████████ currently scheduled for February 10, 2020 at 3pm, and ordering the government to show cause why ██████████ testimony cannot be obtained via videolink or otherwise at the evidentiary hearing scheduled for April. In the alternative, Petitioner respectfully requests that this Court order the deposition to be rescheduled for a date that gives Petitioner’s

³ It is worth noting that the government also has had years to investigate the allegations against Petitioner—years in which it has known of ██████████. Indeed, the government has represented throughout this litigation that no evidentiary hearing was necessary because it had *already* conducted a thorough investigation.

trial counsel sufficient time to prepare. Additionally, Petitioner respectfully requests that this Court order the immediate production of all remaining discovery, especially records pertaining to [REDACTED] including his prior statements to the government and all records, including written notes and reports, from any interviews or conversations between [REDACTED] and government agents.

Dated: February 7, 2020

Respectfully submitted,

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