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

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR SANCTIONS AND TO COMPEL DISCLOSURE

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PRELIMINARY STATEMENT

Petitioner brings this motion seeking sanctions because the government failed to disclose documents that directly undermine the most serious and specific allegations upon which it has based Mr. Hassoun's continued detention, and because it destroyed evidence that would disprove the central allegation at issue in the government's recent motion for sanctions. Petitioner's motion also seeks to compel the government to comply with his discovery requests served on December 23, 2019, because within the past several days he has learned that the government has construed them so narrowly as to exclude plainly relevant evidence that is potentially devastating to the government's case. Under no circumstances, moreover, should the requested relief delay the hearing scheduled to commence on June 24, 2020. Mr. Hassoun has been detained far, far too long without a shred of credible evidence.

First, the government has withheld relevant evidence from Petitioner in appalling ways. For 15 months, the government has maintained that Mr. Hassoun's detention is lawful on the basis of allegations in a letter written by the FBI stating, in its most serious and specific parts, that Mr. Hassoun was supposedly plotting attacks on port in South Florida where "ships traveling from Trinidad and Tobago transfer 'liquid nitrile gas'" and that he was communicating with a terrorist recruiter named "Faroud Abubaker" who was "a recruiter for ISIS in Trinidad and Tobago." Decl. of Jonathan Manes ("Manes Decl."), Ex. 13 at 3. The FBI Letter attributed those allegations to a "fellow detainee" but discovery in this case has revealed that those two allegations originated from a single source: Shane Ramsundar.

What the government failed to disclose, however, is that it possesses documents that strongly support Petitioner's contention that these allegations are fabrications—products of Mr. Ramsundar's own malevolent imagination, and apparently recurring ones at that. In particular, the

government failed to disclose documents showing that Mr. Ramsundar's allegations against Mr. Hassoun precisely match the details of plots that Mr. Ramsundar himself has bragged about developing and then informing the FBI about as a confidential informant *in the 2000s*. The documents strongly suggest that Mr. Ramsundar has effectively cut-and-pasted a decade-old story related to completely different people and repurposed it to use against Mr. Hassoun. The government also failed to disclose documents showing that Mr. Ramsundar has personal and intimate knowledge of the terrorist organization in Trinidad and Tobago, including the Abu Bakr family that leads it, with which he accuses Mr. Hassoun of conspiring.

In other words, Mr. Ramsundar was squarely in the position to fabricate the very allegations that he now levels against Mr. Hassoun. The government knew it. Regardless, the government has maintained the legality of Mr. Hassoun's detention for 15 months, including by repeatedly arguing that the Court lacked the authority even to inquire into the truth of those allegations; and it disregarded its legal obligations by refusing to turn over this devastating information until Petitioner discovered it and brought it to its attention. This conduct is abhorrent.

The government also failed to disclose documents showing that the government knew or should have known they could not trust Mr. Ramsundar, its star witness, to tell the truth at all. In particular, government documents now in Petitioner's possession, but not produced during discovery, show that Mr. Ramsundar served as an FBI informant for eight years in the 2000s, until he was prosecuted and convicted for engaging in egregious frauds by impersonating a federal official to swindle fellow immigrants out of $1.8 million—actions the prosecutor said had "double-crossed and betrayed the FBI." Manes Decl. Ex. 21, at 17:7–8. Although the government did disclose Mr. Ramsundar's criminal conviction, it did not reveal that the conviction was related to Mr. Ramsundar's prior work as a federal informant. The government also failed to disclose

documents in which Mr. Ramsundar acknowledges receiving immigration benefits in exchange for his work as an informant in the past, and in which he now explicitly seeks immigration relief at the Buffalo Federal Detention Facility ("BFDF") in exchange for serving as an informant—direct evidence of his motive to lie against Mr. Hassoun.

All of this information is contained in Mr. Ramsundar's A-file, the Department of Homeland file that serves as the centralized location for all information pertaining to non-citizen individuals, and public court filings. But even though the information was plainly covered by Petitioner's discovery requests, the government did not share it with him. Instead, Petitioner found those documents through independent investigation. Had it been left to the government to honor its obligations by itself, this information would never have come to light. Indeed, the government formally assured Petitioner and the Court that "Respondent has produced all documents . . . responsive to" Petitioner's request for "documents and other evidence that tend to contradict the government's asserted basis for detaining Petitioner," or that "tend to undermine the credibility of witnesses/informants." *See* Manes Decl. Ex. 3 (Respondent's Third Supplemental Response to Petitioner's Requests for Production)**.** Those representations were simply false.

The notion that the government would subject Mr. Hassoun to 15 months of imprisonment while pressing allegations it knows or should have known, at minimum, undermined its justification for indefinite detention, is shocking. It bears repeating that the government has consistently "maintain[ed] a standing objection to the convening of an evidentiary hearing" even to test its allegations because, in its view "all relevant factual information necessary for judicial review is contained within the administrative record"—*i.e.* contained in the FBI Letter's anonymized recitation of Mr. Ramsundar's fabrications. Manes Decl. Ex. 3, at 1. The

government's cavalier approach to the sweeping detention powers that the PATRIOT Act purports to grant is deeply troubling.

Petitioner thus asks the Court to order the government to immediately release any and all additional undisclosed evidence that undermines its case. But, perhaps even more important, the government should have to answer to the Court for how it failed to disclose these documents and pressed this case this far without apparently reckoning with (let alone disclosing) evidence that directly contradicts its most specific and alarming allegations.

Second, in addition to withholding evidence that it has had all along, the government has also destroyed new evidence that has come into existence more recently. In particular, the government deleted video footage related to Mr. Ramsundar's newest (false) allegation: that Petitioner threatened him while Petitioner was on a lengthy phone call with his attorneys in a BFDF visitation room. On the basis of this allegation, the government is currently seeking to dismiss Mr. Hassoun's petition and avoid any evidentiary hearing at all in this case. *See* Pet. Mem. in Opp. to Mort. for Sanctions. Yet Petitioner has now learned that the government viewed some video footage to investigate the allegation and concluded that the footage was inconsistent with Mr. Ramsundar's accusation—yet *failed to preserve it*. Weeks later, well after presenting this allegation to the Court, the government determined that the incident in question may have happened on a different day than the one Mr. Ramsundar had identified. But by that point its investigation had taken so long that all of the potential videotape evidence had been overwritten. The government allowed this key evidence to be deleted even though it knew early on that it was relevant and even though Petitioner had unambiguously demanded it. Moreover, the government appears to have presented Mr. Ramsundar's allegation to the Court without conducting any independent investigation into its truth beforehand—and then failed to correct the record once it

discovered that Ramsundar's accusation couldn't have happened on the day alleged. This misconduct also merits sanctions.

FACTS

I. The government failed to disclose evidence in its possession that directly controverts the central allegations against Mr. Hassoun.

The government's decision to detain Mr. Hassoun indefinitely under the PATRIOT Act is based on allegations in an unsworn letter from the FBI Director ("FBI Letter"), which is the only document in the Administrative Record that includes any allegations post-dating Mr. Hassoun's arrest in 2002. *See* Manes Decl. Ex. 13 (FBI Letter).[1] The most specific and serious allegations against Mr. Hassoun relate to alleged plans to blow up a "liquid nitrile gas" facility in Florida and to join up with a terrorist organization in Trinidad and Tobago to plot further attacks on the United States. Manes Decl. Ex. 13 at 3-4. Documents previously disclosed by the government show that those allegations originate from Mr. Ramsundar. *See* Manes Decl. ¶¶ 60–61, 67, Ex. 12.

Documents in Mr. Ramsundar's A-File seriously, even fatally, undermine these allegations. Petitioner's counsel obtained a 766-page copy of Mr. Ramsundar's A-File, apparently redacted by federal immigration authorities for release. Manes Decl. ¶ 52–53. Included in this file is a document handwritten by Mr. Ramsundar attached to his I-602 Application by Refugee for Waiver of Grounds of Excludability, submitted to the government on April 2, 2018. Manes Decl. Ex. 11, ("Ramsundar I-602").[2] In the handwritten document, written approximately one month prior to his first allegations against Mr. Hassoun, *see* Manes Decl. ¶ 61, Mr. Ramsundar describes his years of work as an undercover FBI informant in the 2000s and describes specific criminal

[1] All references to exhibits in this brief refer to the exhibits attached to the Declaration of Jonathan Manes submitted in support of this motion.

[2] Counsel for respondent have informed Petitioner that they do not dispute the authenticity of the documents, which match what is in the copy of Mr. Ramsundar's A-File that they have now reviewed. Manes Decl. ¶ 76.

investigations in which he was supposedly involved at that time, Manes Decl. Ex. 11, at 4-5. Remarkably, Mr. Ramsundar claims that during this period in the 2000s he "discussed blowing up an LNG installation in South Florida with" with certain "terrorism related individuals" that he had been conspiring with while working as an informant for the FBI under an assumed name. Manes Decl. ¶ 57, Ex. 11, at 5. This, of course, is precisely the same allegation that Mr. Ramsundar has now leveled against Mr. Hassoun and is the centerpiece of the government's FBI Letter. *See* Ex. 13, at 4 ("Hassoun plans to observe when ships traveling from Trinidad and Tobago transfer 'liquid nitrile gas' [LNG] to mobile extraction ships in the open port waters. In or about early 2018, Hassoun stated that should he be released, 'I [will] make that port and dock go boom.'" (first alteration added; second in original)). The document directly undercuts this allegation by showing that Mr. Ramsundar appears to have recycled the claim and fabricated its connection to Mr. Hassoun. The government never disclosed it.

Mr. Ramsundar's A-File is also full of descriptions of his long history with Jamaat-al-Muslimeen ("JAM"), a terrorist organization in his native Trinidad and Tobago. Manes Decl. ¶¶ 65–72, Exs. 14–17. The documents show that Mr. Ramsundar's original asylum claim to the United States was based on alleged persecution at the hands of JAM and that he continues to base his claims for relief on alleged fears of that organization. *Id*. The documents also show that when he worked as an informant for the INS from 1996 to 2000 and with the FBI from 2000 to 2009, he focused on targeting people supposedly involved in JAM, including people in Miami. Manes Decl. Ex. 17. They show, more generally, that he has an intimate familiarity with JAM and its leadership. Manes Decl. ¶¶ 14–17; Exs. 14–17. That includes detailed knowledge about the Abu Bakr family—the leaders of JAM who appear by name in Mr. Ramsundar's false allegations against Mr. Hassoun and reappear in the FBI Letter. Manes Decl. Exs. 12–13.

Mr. Ramsundar's personal and independent knowledge of these matters relating to terrorists in Trinidad and Tobago mirror the fabrications that he has falsely attributed to our client and which feature prominently in the FBI Letter. Manes Decl. ¶ 66. The documents suggest, at the very least, that Mr. Ramsundar had independent knowledge of the individuals and organizations that he now accuses Mr. Hassoun of having connections to, and that Mr. Ramsundar could have concocted these allegations based solely on his personal knowledge and without ever speaking to Mr. Hassoun. Yet, while the government's disclosures may make slight reference to the connection Mr. Ramsundar has to JAM, they pale in comparison to the newly discovered, undisclosed documents which much more clearly describe the extent of Mr. Ramsundar's interactions and familiarity with the terrorist organization in both Trinidad and Tobago and South Florida.

The undisclosed documents also undermine other claims made by Mr. Ramsundar. The documents reveal that Mr. Ramsundar worked in South Florida dating back to 1993 and served as an informant for the federal government there, which further explains the false details he provided to the government about Mr. Hassoun's supposed plots in Florida. Manes Decl. Ex. 11, at 5,10; 17, at 1-2. In the FBI Letter, FBI Director Wray stated that "[t]he FBI assesses that Hassoun's knowledge of Port Everglades stems from his time in that area previous to his incarceration." Ex. 13, at 3. But these undisclosed documents show that Mr. Ramsundar had independent knowledge of the area going back decades. In a sworn affidavit in his A-File, he describes business dealings in Miami going back at least to 1993 and interactions with Trinidadian terrorists in Miami that far back as well. *See* Manes Decl. Ex. 15. The government failed to disclose many documents showing the extent of Mr. Ramsundar's time in Florida and his work as an informant there.

Moreover, in one of several documents filed in Mr. Ramsundar's daughter's immigration appeal at the Second Circuit that were written by Mr. Ramsundar himself, Mr. Ramsundar details

his work as an informant for the FBI and INS from 1996 to 2009. Manes Decl. Ex. 17. Attached to this handwritten document are formal "admonishment" letters from the FBI reminding Mr. Ramsundar about his obligations as an FBI informant. Ex. 18. Mr. Ramsundar was subsequently convicted of impersonating federal officials during that same time period, as part of a scheme to defraud fellow immigrants to the tune of $1.8 million by making corrupt promises for immigration relief. Manes Decl. Exs. 19-21. As sentencing, the prosecutor stated that Mr. Ramsundar has "double-crossed and betrayed the FBI," and, moreover, that this was apparently not the first time Mr. Ramsundar had abused his position as an informant. Manes Decl. Ex. 21, at 17:7–8. The prosecutor informed the judge that Mr. Ramsundar had been arrested three times "for an almost identical fraud scheme" while he was an INS informant in 1999 and 2000 by "pretending to be an Immigration and Naturalization Services agent who could get them green cards." *Id.* at 16:14–24. Yet the government did not disclose documents revealing the extent of Mr. Ramsundar's prior status as a federal informant, let alone his serial misconduct in those roles.[3] That the FBI or DHS would have no records detailing Mr. Ramsundar's work as an informant and his simultaneous fraudulent conduct abusing his relationship with law enforcement beggars belief.

All of this is shocking on its own. Yet, astoundingly, there is more.

Elsewhere in Mr. Ramsundar's handwritten I-602 filing, Mr. Ramsundar explicitly offers to provide informant services for the government at the Buffalo Federal Detention Facility in exchange for immigration relief. Manes Decl. ¶¶ 63–65, Ex. 11 at 7-8. Mr. Ramsundar explicitly premised his application to be considered for asylum relief on a promise to serve as an informant:

[3] While the redacted copy of Mr. Ramsundar's A-File that Petitioner obtained did not contain the FBI admonishment letters or other materials relating to his work as an informant, counsel for Respondent has now acknowledged to Petitioner's counsel that the unredacted copy of his A-File does contain at least the admonishment letters and has also stated that the FBI is reviewing other files. *See* Manes Decl. ¶ 78.

"On behalf of the USA, I am willing to work again. Therefore, on the basis of public interest I am asking that I be granted my stay." *Id*. This offer came approximately one month before Mr. Ramsundar began informing on Mr. Hassoun. In another attachment to the same application, he dangled an offer to provide information about certain criminal activities he supposedly knew about—but only if "HSI are willing to grant some concessions to my family." Manes Decl. Ex. 11, at 10. HSI, or Homeland Security Investigations, is the investigatory arm of ICE, which also operates BFDF. Mr. Ramsundar's first contact with BFDF officials regarding Mr. Hassoun happened approximately one month later. Manes Decl. ¶ 61, Ex. 12 The government never disclosed any documents showing that Mr. Ramsundar has sought immigration relief at BFDF in exchange for information.

The documents also show that Mr. Ramsundar had good reason to believe that providing information would reap rewards. In his handwritten I-602 application, Mr. Ramsundar asserts that the FBI interceded on his behalf in 2006 to make sure that he was allowed to enter the United States from Toronto. *See* Manes Decl. ¶ 65, Ex. 11, at 6 ("I ask that this Court reviews the document about my 'PAROLE' into the USA at Toronto in 2006! The FBI (see their phone number on the photocopy) took care of it!"). In the same document Mr. Ramsundar describes other benefits the FBI offered, but apparently did not end up providing. *See* Manes Decl. Ex. 11 at 5-6 ("[T]he FBI held on to my family's and I [sic] Adjustment of Status documents from 2002 to 2009, constantly promising me, for these 8 years – 'WE ARE TAKING CARE OF IT'!"). The government did not disclose this document, nor any other documents showing that Mr. Ramsundar has obtained benefits in exchange for serving as an informant, or that he sought to obtain further benefits in the future by informing on Mr. Hassoun. To the contrary, in the government's most recent full response to Petitioner's Requests for Production it wrote, "Respondent states that he is

unaware of any . . . requests for relief or special treatment, or any benefits offered or granted to a confidential informant before or after he or she provided a statement against Petitioner." Manes Decl. Ex. 3, at 4. That representation was false.[4]

The government failed to produce *any* of these undisclosed documents in response to Petitioner's discovery request, even though they are all squarely and obviously responsive. Petitioner's Request for Production sought, in relevant part:

> All documents and other evidence that tend to contradict the government's asserted basis for detaining Petitioner, including, but not limited to, all documents and other evidence that would tend to undermine the credibility of all witnesses/informants against Petitioner or that would be considered exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), including prior inconsistent statements, requests for relief or special treatment, and any benefit offered or granted to such witnesses/informants before or after they provided the statements against Petitioner. Manes Decl. Ex. 1 at 3.

All of the undisclosed documents described above—and any similar still-undisclosed documents—fall within this request. In particular, documents tending to show that Mr. Ramsundar previously leveled similar allegations against others "tend to contradict" the government's claims, "undermine the credibility" of Mr. Ramsundar, and are otherwise "exculpatory evidence." Manes Decl. Ex. 1. Documents showing that Mr. Ramsundar worked as an informant in South Florida

[4]Mr. Ramsundar's efforts to obtain government favors in exchange for information appear to go back at least to the very beginning of his work as an FBI informant in 2000. At sentencing in Mr. Ramsundar's felony case in 2010, the prosecutor explained how, in exchange for agreeing to serve as an informant for the FBI, Mr. Ramsundar apparently received a lenient disposition of earlier charges for engaging in a similar fraud while serving as an informant for the INS from 1996 to 2000. "[Mr. Ramsundar] stole over $34,000 from five different West Indian families in Richmond Hill by pretending to be an Immigration and Customs Enforcement Agent who could get them green cards. However, because it was his first arrest, and because Shane Ramsundar offered to pay his debts to society by working them off as a confidential informant for the FBI against Islamic terrorism, he was able to get out of it to the extent he was able to receive only a misdemeanor and have those other arrests cleared at least from his technical record." Ex. 21, at 16:21 to 17:5. It is no surprise, therefore, that Mr. Ramsundar would try to avoid deportation by serving up fabrications about Mr. Hassoun that are evidently of great value to the government officials who control his fate.

and had intimate, decades-long dealings with the terrorist organization in Trinidad and Tobago that appear in his allegations against Mr. Hassoun are responsive for the same reason. Documents showing that Mr. Ramsundar was an FBI and INS informant and abused those roles, that he was previously dismissed by the FBI or INS, or otherwise misbehaved in those roles is evidence that obviously "undermine[s] the credibility" of Mr. Ramsundar's work as an informant now. *Id.* The fact that Mr. Ramsundar explicitly sought immigration benefits at BFDF in exchange for serving as an informant against various possible targets is a "request for relief or special treatment" and direct evidence of Mr. Ramsundar's motive to lie—*i.e.* evidence that "undermines his credibility." *Id.* Likewise, the fact that he believes the FBI has in the past interceded on his behalf—or suggested it might—is evidence of a "benefit offered or granted to [a] witness[]/informant[] before . . . they provided the statements against Petitioner." *Id.*

Respondent previously asserted various objections to this discovery request, but stated that "notwithstanding the above objections, Respondent has produced all documents within his possession, custody, or control which are responsive to this request, except for privilege redactions, which have been logged." Manes Decl. Ex. 3, at 4. That statement was false.

Remarkably, the government still maintains that it was entitled not to disclose much of this material. As discussed below, *see* § III, the government admits that it should have disclosed the I-602 form showing the identical allegation from the 2000s. Manes Decl. ¶ 79. But the government appears to maintain that any documents relating to Mr. Ramsundar's work as an informant against others—including documents tending to show his untruthfulness in those matters or that otherwise tend to undermine his credibility—are completely non-responsive because they do not pertain *specifically to the allegations he has now made against Mr. Hassoun*. Manes Decl. ¶ 82. That position rewrites the plain language of Petitioner's discovery requests in such a way as to willfully

conceal evidence that devastates the credibility of its key witness. It also raises a serious question about whether the government has withheld similarly damning (and responsive) evidence about its other witnesses, at least several of whom have prior convictions that similarly suggest a proclivity to fabricate and lie.

II. The government destroyed video evidence that could have shown Mr. Ramsundar's latest allegation to be false.

Almost incredibly, given the above, Respondent has recently doubled down on Mr. Ramsundar's centrality to this case. In the Motion to Enforce the Protective Order, filed March 16, 2020, Respondent relied on an affidavit from Mr. Ramsundar alleging that, on February 27, 2020, Mr. Hassoun directly threatened Mr. Ramsundar while he was walking by the attorney visitation room in which Mr. Hassoun was speaking with his attorneys by telephone. *See* ECF No. 104, Ex. D. (filed under seal at ECF No. 117-4). Now, on the basis of this allegation, the government has asked this Court to dismiss Mr. Hassoun's constitutional challenge to his ongoing indefinite detention, effectively confining him forever without any judicial review. *See* Mot. for Sanctions (ECF No. 154); Pet. Opp. to Mot. for Sanctions (May 15, 2020).

Mr. Hassoun denied this allegation categorically in a sworn declaration filed two days after the government made it. *See* Decl. of Adham Admin Hassoun ¶¶ 13–14, ECF No. 110 (filed under seal at ECF No. 118) ("First Hassoun Decl."). Mr. Hassoun expressly denied having seen Mr. Ramsundar in months. *Id.* ¶ 14. Mr. Hassoun affirmatively asked the government to investigate video evidence so he could clear his name, writing that "[t]he government should be able to check whether Mr. Ramsundar and I were in the visitation area at the same time during that week and to investigate this allegation through video recordings or other evidence. I would respectfully request that the government check its records so that I can clear my name from this false accusation." *Id.* ¶ 17. Video evidence of the incident is also plainly responsive to Petitioner's original requests for

production, which seek "all documents related to statements made by witnesses/informants against and/or about Mr. Hassoun," where "documents" is defined to include "video recordings." Manes Decl. Ex. 1 at 1, 3.

Petitioner's counsel has now learned from Respondent's counsel that sometime toward the end of March—after the government filed its motion and put Mr. Ramsundar's allegations before the Court—a government investigator actually did review video footage from February 27. Manes Decl. ¶ 44. The investigator apparently discovered that the footage did not show either Mr. Ramsundar or Mr. Hassoun, directly contradicting the allegation that Mr. Ramsundar had levelled. *Id.* ¶ 46–47. Despite reviewing that footage, the government failed to preserve it. *Id.* ¶ 47. The government states that it was overwritten as a matter of course weeks later by the facility's electronic video system. *Id.* ¶ 46. Moreover, after reviewing the video evidence that contradicted Mr. Ramsundar's allegation, the government did not correct the record on its pending Motion to Enforce the Protective Order in which it had inaccurately alleged that an incident occurred on February 27, 2020. *Id.* ¶ 48. The government, it claims, also did not then review video footage from even the preceding or following day, despite Petitioner's express request to review video footage from the same time-frame during that week. *Id.* ¶ 46; First Hassoun Decl. ¶ 17. Neither did the government appear to have checked the movement logs at that point to determine whether the incident could have occurred on a different day.

Instead, the government apparently took no action to resolve the discrepancy between Mr. Ramsundar's serious allegation that Mr. Hassoun threatened his life and the video evidence for about two weeks until around April 2, 2020, when, according to Respondent's counsel, a government investigator pulled the movement logs from the facility—supposedly for the first time—to see whether Mr. Hassoun and Mr. Ramsundar both were in the visitation area on some

other day. Manes Decl. ¶¶ 46, 49. According to the government, the logs show that on February 26, 2020, Mr. Hassoun was in a visitation room speaking with his attorneys for three hours and that Mr. Ramsundar briefly passed through the visitation area in the middle of that period. Ex. 8. Respondent's counsel stated that the government investigator decided at that point—or perhaps some time later, the timeline is unclear—to try to pull video footage from February 26, 2020. Manes Decl. ¶¶ 46, 49. But by that point so much time had passed that the video—as well as the footage from the 27th—had been overwritten automatically. Manes Decl. ¶ 46.

The government failed to preserve that video even though it evidently knew that it intended to investigate whether the incident allegedly occurred on some other day. And it failed to preserve the video despite Petitioner's specific request for the government to check for video evidence with respect to any potential incidents "during that week." First Hassoun Decl. ¶ 17.

After reviewing the movement logs, the government did not notify the Court (or Petitioner) that it now believed the incident in question took place on a different day, even though its motion remained pending. On April 7, 2020, the Court issued its Decision denying the Motion to Enforce the Protective Order as moot. The opinion specifically noted that there was a dispute of fact regarding Mr. Ramsundar's claims regarding "an alleged incident on February 27, 2020" and stated that "the Court does view this incident as relevant to the underlying issues to be resolved at the evidentiary hearing." Decision and Order, at 4 n.1, ECF No. 138. Respondent did not correct the record until it filed a new Motion for Sanctions on May 1, 2020. ECF No. 154.

On April 13, 2020, having received no supplemental disclosure from Respondent regarding the February 27 allegation, Petitioner's counsel emailed Respondent's counsel affirmatively demanding any discovery relating to Mr. Ramsundar's new allegation regarding a supposed threat, including, among other things, "any and all surveillance video" and "any documents relating to

any investigation into Mr. Ramsundar's new allegations." *See* Manes Decl. ¶¶ 14–16, Ex. 5. Two days later, Petitioner's counsel made a similar request for "all discovery related to" a statement in a declaration signed personally by Respondent Jeffrey Searls in another filing that asserted Mr. Hassoun had made unspecified "threats toward another detainee following the February 14, 2020 religious service." Manes Decl. ¶¶ 17–18, Ex. 6.

In response to these emails, the government produced only two documents relevant to the February 27 Ramsundar allegation: (1) a memo from ICE Deportation Officer Christopher Lemmo to Respondent Jeffrey Searls dated April 15, 2020, that was prepared specifically in response to Petitioner's discovery request (subject line: "Discovery Request") explaining that, according to his reading of the facility's movement logs, Mr. Ramsundar and Mr. Hassoun were both in the visitation area at the same time for a brief period on February 26, not February 27; and (2) the movement logs themselves. Manes Decl. ¶ 20, Ex. 8. With respect to the video, Mr. Lemmo stated only that "[t]here is no video evidence available as this happened over 30 days ago and facility video is saved for approximately 30 days." Manes Decl. Ex. 8, at 1.

Respondent's counsel's cover email stated that this constituted a full response to Petitioner's discovery requests: "Nothing is being withheld, including on the ground of privilege." Manes Decl. Ex. 7. That response suggested that there were no documents whatsoever relating to any investigation into Mr. Ramsundar's allegation before Petitioner's April 13 email demanding supplemental discovery. The response also left it entirely ambiguous whether anyone had reviewed any video evidence before it was destroyed. The government never supplemented its discovery response.

Weeks later, in response to the threat of this motion for sanctions, Respondent's counsel has now admitted that it *did* conduct an investigation; that the investigation involved government

review of footage from February 27; that the footage was destroyed even though it contradicted Mr. Ramsundar's sworn allegation; that the government did nothing to prevent footage from the relevant cameras being overwritten for that day or that week; and that the government's subsequent review of facility movement logs was delayed so long that by the time the government settled on February 26 as the new date of the alleged incident, the video evidence had been overwritten. Manes Decl. ¶¶ 44–50. Respondent still has not supplemented its discovery with any documents or other records relating to all of this prior investigation of the new Ramsundar allegation. *Id.* ¶ 51.

III. The parties conferred regarding the government's failure to produce exculpatory evidence and spoliation.

After discovering the undisclosed, exculpatory evidence, Petitioner's counsel sent Respondent a letter on May 7, 2020, disclosing that evidence, detailing the government's discovery violations, demanding the government immediately turn over any additional material that it had failed to disclose with respect to *all* of the informants or witnesses on whom it intends to rely in any way, and notifying the government of the grounds for Petitioner's impending spoliation claim. *See* Declaration of Jonathan Manes ¶ 41, Ex. 10. The letter informed Respondent that Petitioner intended to take these matters up with the Court to seek appropriate relief and requested a meet-and-confer pursuant to Rule 37.

Counsel for the parties conferred by telephone on Monday, May 11, 2020. Manes Decl. ¶¶ 43, 75. On that call, Respondent's counsel acknowledged that at least some of the undisclosed documents were responsive and that they should have been produced. *Id.* ¶ 76. Respondent's counsel indicated that there were likely additional responsive yet unproduced documents in the non-redacted version of Mr. Ramsundar's A-File. *Id.* Petitioner's counsel emphasized that it would not suffice simply to review Mr. Ramsdundar's A-File, but that (as requested in Petitioner's RFPs) the government must search for records about Mr. Ramsundar—and all other

witnesses/informants—in the files of all relevant agencies, including for example, the FBI's files regarding Mr. Ramsundar's work as an informant. *Id.* ¶ 77. Counsel for Respondent appeared to agree that the search should not be confined to the A-File and indicated that they had instructed their "client" agencies to conduct a thorough search and go through their files with a "fine toothed comb," at least with respect to all witnesses upon which the government intends to rely at the evidentiary hearing. *Id.* ¶ 78.

In a subsequent call two days later, Respondent's counsel appeared to change the government's position. *Id.* ¶¶ 79–84. Mr. Bianco indicated that its position was that, among all of the documents Petitioner had discovered in the A-File and Administrative Record, only the I-602 document was responsive and would be disclosed. *Id.* ¶ 79. He contended that other documents Petitioner had discovered—including the evidence showing Mr. Ramsundar's prior work as an informant and his extensive personal knowledge of JAM—were not responsive to Petitioner's requests. *Id.* ¶ 80.¶ Respondent's counsel appeared to take the position that any material that undermined the credibility of Mr. Ramsundar with respect to his work as an informant in *other cases*—or material showing that he had sought or received benefits in exchange for informing against *other people*—were categorically non-responsive to Petitioner's request. *Id*. ¶ 82.

Petitioner's counsel explained that this was an incorrect reading of their own discovery requests. *Id.* ¶¶ 81, 83. Counsel explained that information showing that Mr. Ramsundar had lied or engaged in other misbehavior in other cases—or had sought or received benefits in exchange for testimony in other instances—would obviously undermine his credibility in this case and were responsive to the discovery requests. *Id.* ¶¶ 81, 83. Petitioner also reiterated that while Petitioner understood Respondent's position that *Brady v. Maryland* and its progeny did not apply in this case, Respondent had previously committed to turning over all such exculpatory material

irrespective of that position, and then later, Respondent represented that it had in fact done so. Manes Decl. ¶ 81.[5] Respondent refused to change its position. *Id.* ¶¶ 83–84. Respondent also confirmed that it was taking a similarly narrow construction of its disclosure obligation with respect to all other witnesses or informants. *Id.* ¶ 83.

Separately, the parties failed to reach agreement with respect to the timing of Respondent's disclosure of any additional undisclosed documents that it may concede are responsive. *Id.* ¶ 85. On the May 11 call, Respondent's counsel took the position that it did not need to disclose additional documents until May 22, 2020, the date set by the Court for pre-trial submissions because, in their view, the government is under no obligation to disclose its witnesses until that date and therefore under no obligation to disclose discovery responses related to those witnesses. *Id.* Respondent's counsel also indicated that they may choose to add additional, previously undisclosed witnesses on May 22, 2020, and that they regarded themselves as under no obligation to disclose discovery with respect to such witnesses before that date. *Id.* On counsel's Wednesday, May 13, phone call, Respondent's counsel indicated that they intended to provide some additional discovery on a "rolling basis," between then and May 22, but did not otherwise change their position. *Id.* ¶ 89.

Petitioner's counsel expressed their strong disagreement with these positions. *Id.* ¶ 86–87. Petitioner's counsel explained that responses to discovery requests were due months ago, very soon after the requests were served, per the Court's order governing discovery. *Id.* ¶ 86; *see* ECF

[5] Petitioner understands that the Court has held that *Brady* does not apply in this case and does not itself impose any constitutional obligations on the government here. Petitioner's Requests for Production, however, included—among many other things—a request for any records that would be considered exculpatory evidence under *Brady* or *Giglio*. *See* Ex. 1. Respondent's obligation to disclose such evidence is thus a simple matter of compliance with a duly-promulgated discovery request, not an independent constitutional obligation. Respondent has offered no generalized objection to that request as overly burdensome, irrelevant, or overbroad.

No. 58 ("[R]esponses to discovery demands shall be served on or before January 6, 2020."). Respondent's schedule means that any disputes over late-breaking discovery disclosures will somehow have to be litigated *after* the pre-trial submissions are filed, which makes little sense.

Petitioner also explained that Respondent's position conflicts with the Court's order regarding pretrial submissions. *Id.* ¶ 87. Petitioner's counsel explained that this manner of proceeding severely prejudices their client, because it leaves insufficient time to conduct an independent investigation into the government's witnesses in order to develop impeachment evidence before pretrial submissions are due. *Id.* ¶ 87. Petitioner underscored the importance of such investigations—without them, after all, Petitioner never would have discovered the remarkable evidence, described above, that will severely undermine the credibility of the government's star witness.[6]

[6] Petitioner's counsel explained that their interrogatories specifically asked Respondent to disclose its witnesses and that Petitioner believes Respondent is under a continuing obligation to update that response with any people it may call. *See* ECF No. 65-1, at 3 ("Identify all witnesses Respondent intends to call at the evidentiary hearing to be set by the Court in this Matter."). Respondent's counsel took the position that it was under no obligation to disclose the identities of its witnesses until its pre-trial submission on May 22, 2020.

It is important to note that Respondent's most recent response to Petitioner's interrogatories only names one detainee/informant as a witness, Ahmed Abdelraouf. It does not disclose Mr. Ramsundar or anyone else as a potential witness, indicating only that it may call unspecified "Informant John Doe(s)." Respondent has not supplemented its interrogatory response to specify any additional witnesses, even informants whose names are no longer confidential. As a result, Petitioner is left simply to guess at which detainees/informants appearing in the government's document disclosures may actually be called to testify. This makes it very difficult for Respondent to identify the relevant impeachment evidence for its May 22, 2020 submission.

Moreover, Respondent has still not disclosed the identity of one of the confidential informants upon whom it is relying in its Motion for Sanctions. Specifically, John Doe Alpha is not named in any unsealed filings, including those produced for "attorneys' eyes only." *See* Mem. of Law in Supp. of Resp's Mot. for Sanctions at 5 (filed under seal Apr. 30, 2020) (identifying John Doe Alpha by reference to March 17 declaration of Gregory Conwall); Ex. D Declaration of Gregory Conwall (March 17, 2020) (filed under seal Apr. 30, 2020) (discussing detainee John Doe Alpha without disclosing his identity). Respondent has not separately disclosed his name to Petitioner's counsel nor has Respondent disclosed any underlying interview notes or other

ARGUMENT

I. The Court should impose sanctions for the government's egregious failure to disclose exculpatory evidence that is central to its case.

This court has "'well-acknowledged' inherent power to levy sanctions in response to abusive litigation practices." *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 135 (2d Cir. 1998) (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). "[T]he court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs" "even in the absence of a [prior] discovery order" that was violated. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106–07 (2d Cir. 2002) (citing *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124, 135–36 (2d Cir.1998). This power encompasses discovery violations, including where "the nature of the alleged breach of a discovery obligation is the non-production of evidence." *Id.* at 107.

Sanctions are warranted here because the government failed to produce evidence that is responsive to Petitioner's discovery requests and goes to the heart of its allegations. The failure is egregious because much of the evidence in question was sitting in plain sight in Mr. Ramsundar's A-File. Either the government failed to review the A-File, which would be, at minimum, grossly negligent, or it did review the A-File and nevertheless failed to turn over clearly responsive material—some of which it is now not even contesting it should have disclosed.

The violation is especially egregious because the material would never have come to light if Petitioner had not managed to obtain it independently. In that event, the government would have simply proceeded to trial while concealing evidence that severely damages its key witness. The

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discoverable materials related to John Doe Alpha's allegations. Respondent has indicated it will provide disclosure of some sort on or before May 22.

fact that the government has recently put Mr. Ramsundar at the center of its case—asking the Court to dismiss the Petition on account of his most recent allegation—only underscores the seriousness of the violation.

The violation here also reflects a pattern. The government not only failed to turn over the exculpatory evidence regarding Mr. Ramsundar, it has also failed to turn over other more mundane information that is unequivocally responsive. For example, it failed to produce any documentation of its investigation into Mr. Ramsundar's February 27 allegation until Petitioner reminded Respondent of its obligation and, even then, it omitted any materials regarding the investigation it had conducted before the date of Petitioner's reminder, Manes Dec. ¶¶ 14, 24, and carefully avoided disclosing that it had in fact reviewed some video before it was deleted. *Id.* ¶¶ 22–23, 39, 49. To take another example, Petitioner failed to turn over interview notes or similar materials regarding John Doe Alpha's allegations against Mr. Hassoun, even though those interviews are specifically referenced in declarations that the government filed in Court. *Id.* ¶¶ 30, 33.

In these circumstances, it is plain that the government has flouted its discovery obligations. Petitioner is not presently in a position to determine which government officials are responsible for these lapses and whether they acted intentionally or otherwise in bad faith. The circumstances suggest, however, that the government's failure to turn over evidence regarding Mr. Ramsundar, in particular, may well have been at least knowing, or even deliberate. Mr. Ramsundar has been detained at BFDF for nearly as long as Mr. Hassoun and evidently has had extensive interactions with investigators there. He worked for 4 years as an INS informant and for 9 as an FBI informant and was apparently prosecuted for abusing those positions both times. Manes Decl. Exs. 19–21. It is difficult to imagine that FBI or DHS investigators were unaware of materials that would tend to undercut his allegations against Mr. Hassoun or undermine his credibility more broadly. And the

evidence was not difficult to locate. Yet they failed to disclose any of the damaging materials described here.

Perhaps the most troubling aspect of the government's misbehavior, however, is that it has abused the extraordinary authority that the PATRIOT Act purports to vest. As this Court has recognized, "[t]he liberty interest at stake in this case is of the highest order, inasmuch as Petitioner . . . faces the possibility of indefinite civil detention." *Hassoun v. Searls*, 427 F. Supp. 3d 357, 370 (W.D.N.Y. 2019). Throughout this case, the government has maintained that it should be able to detain Mr. Hassoun on the basis of the Administrative Record alone—i.e. based on the anonymous allegations in the FBI Letter. This Court, of course, has disagreed, holding that the government must prove its case by clear and convincing evidence at an evidentiary hearing, with a provision for supervised discovery beforehand. And yet, the government would have proceeded to that hearing without disclosing evidence that directly undermines the most specific and alarming allegation in the FBI Letter and casts enormous doubt on every other allegation that traces back to Mr. Ramsundar.

Petitioner has argued that 8 U.S.C. § 1226a is unconstitutional because it is simply too broad, too ripe for abuse, and too devoid of procedural safeguards to comport with the Due Process Clause of the Fifth Amendment. *See* ECF Nos. 28, 32 (challenging constitutionality of 8 U.S.C. § 1226a). However the Court may ultimately rule on that issue, the government's conduct here demonstrates precisely that risk of abuse. Sanctions are warranted to ensure that, should the government ever use this detention authority again, it does not so cavalierly launder the allegations of an unscrupulous informant into an FBI recommendation and then refuse at every turn to disclose evidence that would expose the weaknesses of its case.

In these circumstances, Petitioner believes the following sanctions are appropriate to remedy the government's failure to disclose exculpatory evidence:

(1) An order admonishing both Respondent's counsel and the FBI, ICE, and any other agencies involved in gathering evidence in this matter regarding their duty to identify and disclose evidence unfavorable to its case where required and, with respect to attorneys, their duties to abide by the rules of court with respect to disclosure. Such admonishment should be required to circulate throughout the relevant agencies. *Cf. Wolters Kluwer Fin. Servs., Inc. v. Scivantage*, 564 F.3d 110, 116–18 (2d Cir. 2009) (discussing court's power to issue reprimands as a non-punitive sanction).

(2) An order requiring the government investigators or other officials at the FBI and DHS with personal knowledge of the conduct of the investigation in this case to explain how it came to pass that such information was not disclosed and whether the violation was done intentionally or with some other state of mind. In the alternative, an order permitting Petitioner to take discovery from such officials—through depositions if necessary—in order to answer these questions. *Cf. Residential Funding Corp.*, 306 F.3d at 112–13 (ordering the district court, on remand, to permit discovery and, if necessary, hold an evidentiary hearing to determine whether more severe sanctions were warranted).

Additionally, Petitioner requests leave to seek further relief in the event that the Court's inquiry into these matters reveals that the government's violations were deliberate, grossly negligent, made in bad faith, or otherwise worthy of additional sanction, including but not limited to an award of attorney's fees for all time spent litigating this sanctions motion.

To be clear, Petitioner does not believe the imposition of any of these sanctions need or should in any way delay the evidentiary hearing in this case. Any judicial inquiry or discovery into the violations perpetrated by the government should follow the evidentiary hearing. Mr. Hassoun's detention should not be further prolonged in order to reckon with the government's misconduct in these proceedings.

II. The Court should order Respondent to immediately disclose all additional undisclosed discovery with respect to any and all witnesses on which it may rely.

Respondent has failed to disclose documents requested by Petitioner, and has provided evasive and incomplete disclosure, in violation of Rule 37(a). Petitioner moves pursuant to Rule 37(a)(3)(iv) and (a)(4) for an order compelling immediate production of all responsive documents, as detailed above and summarized below. *See supra*, at 5–12. Petitioner also asks this court to order the "party or attorney" responsible for these violations to pay Petitioner's counsel's "reasonable expenses incurred in making th[is] motion, including attorney's fees," as required by Rule 37(a)(5)(A). .

There are at least three areas in which Respondent has failed to disclose records in response to Petitioner's discovery requests, or has made evasive and incomplete disclosure. First, Respondent failed to disclose evidence regarding its witnesses/informants, including Mr. Ramsundar. Respondent has conceded that it failed to produce the I-602 showing that Mr. Ramsundar had made identical accusations against others in the past and had sought immigration relief for providing information about other detainees at BFDF, but it has not disclosed any additional documents that would similarly undermine Mr. Ramsundar's testimony or that of its other witnesses or information.

In particular, Petitioner demands immediate disclosure of the following documents:

(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.

See Manes Decl. Ex 8. All of these categories of documents are encompassed in Petitioner's original request for documents that "tend to contradict the government's asserted basis for detaining petitioner;" that "tend to undermine the credibility of all witnesses/informants against Petitioner;" or that otherwise constitute "exculpatory evidence" including "requests for relief or special treatment" or prior "benefit[s] offered or granted to such witnesses/informants before or after they provided the statements against Petitioner." *See* Manes Decl. Ex 1, at 3. As detailed above, Respondent's disclosures thus far have been incomplete and evasive, and they have refused to correct their error by willfully misconstruing Petitioner's discovery request and contending that documents that plainly undermine the credibility of Mr. Ramsundar are not responsive. *See supra* 11–12; Manes Decl. ¶¶ 80–84. This Court should order immediate, comprehensive disclosure with respect to all of the witnesses or informants upon whom it may rely at the evidentiary hearing, whether it intends to call such witnesses to testify, to introduce their allegations by other means such as hearsay, or if those witnesses' allegations are otherwise relevant to allegations the government intends to prove.

Second, Respondent should be ordered immediately to disclose all evidence relating to its investigation of Mr. Ramsundar's new allegation regarding the supposed "February 27" incident while Mr. Hassoun was on a phone call with his attorneys. The government has not disclosed a single document relating to the investigation that it has now admitted it conducted toward the

end of March and the beginning of April, except for the movement logs from February 26, 2020. That investigation apparently involved review of the video evidence from February 27; discovery that the video did not corroborate Mr. Ramsundar's account; then, weeks later, review of the movement logs resulting in the determination that the incident could only have occurred on February 26, and then the discovery that all video evidence had been deleted. By email dated April 13, Petitioner specifically asked Respondent for the following materials, as relevant now:

> (1) any documents relating to any investigation into Mr. Ramsundar's new allegation regarding events on February 27, 2020;
>
> (2) any and all surveillance video of the locations in question on the day in question (Mr. Ramsundar's affidavit describes the event as taking place in "Room 11" while Ramsundar was "on [his] way back to the bullpen" from "room 110");
>
> (3) any other evidence that tends to support the statements Mr. Ramsundar has made regarding this new allegation, or that tends to contradict the allegations.

Manes Decl. Ex. 5. All of these materials are responsive because they are "documents related to statements made by any witness/informant against and/or about Petitioner;" documents "that tend to contradict the government's asserted basis for detaining Petitioner; or "documents and other evidence that would tend to undermine the credibility of" Mr. Ramsundar, given that the details of his allegation were directly contradicted by the government's investigation. Manes Decl. Ex. 1, at 3.

Respondent has not disclosed any such material regarding the investigation that it now concedes it conducted before receiving Petitioner's email demanding disclosure. Respondent disclosed the existence of that prior investigation only at the parties' most recent meet-and-confer. Petitioner communicated that all such documents should already have been disclosed and that it expected disclosure immediately. Respondent has not yet disclosed those documents and has not committed to disclosing them before March 22, 2020. Manes Decl. ¶ 51.This Court should order immediate disclosure.

Moreover, as described below, Petitioner is entitled to whatever information the government has about the content of the destroyed February 27 video, and is further entitled to discovery in order to understand how it came to pass that the video from February 26 was allowed to be deleted.

Third, Respondent has not disclosed interview notes or other documents regarding statements from one or more of the new "John Doe" informants that it is relying upon in its Motion for Sanctions. Specifically, ICE agent Gregory Conwall has described at least two interviews with unidentified detainees that occurred on March 12 and March 16. *See* Conwall Declaration (Mar. 13, 2020); Conwall Declaration (Mar. 17, 2020). Those detainees' statements are now being used against Petitioner. Yet the government has not disclosed any "documents related to [the] statements made by" those witnesses, aside from the hearsay declarations Mr. Conwall filed in support of various motions. It is also likely that interview notes or other responsive documents exist with respect to John Doe Bravo and John Doe Charlie, who submitted their own declarations making statements against Petitioner that the government is pressing against him. *See* ECF No. 154, Exs. H and I (filed under seal). Petitioner is entitled to immediate disclosure of such responses as well.

Given the government's serially evasive and incomplete discovery, it is difficult for Petitioner to determine whether there are other documents related to its witnesses or informants. The government's failure to make timely disclosures has also unfairly and improperly compressed the schedule to the detriment of Petitioner and the Court. In these circumstances it would be appropriate not only to order immediate disclosure, but also to demand formal assurances from Respondent's counsel, under express penalty of contempt of Court, that the government is not withholding additional documents relating to its witnesses, and to demand

further that Respondent's counsel explain how it has construed Petitioner's requests and whether it has refused to disclose potentially responsive documents because it has construed those requests narrowly. In addition, if this "motion is granted—or if the disclosure requested is provided after the motion was filed," then Rule 37(a)(5)(A) provides that, absent circumstances not present here, "the court *must*, after giving an opportunity to be heard" order Respondent to pay "reasonable expenses incurred in making the motion, including attorney's fees." Rule 37(a)(5)(A) (emphasis added).

III. The Court should impose spoliation sanctions because Respondent knowingly deleted video footage directly relevant to a new allegation that it is pressing against Mr. Hassoun.

Respondent's failure to preserve relevant video evidence—despite a clear and continuing obligation—is textbook spoliation of evidence, and Petitioner is entitled to curative measures. *See* Fed. R. Civ. P. 37(e). "Spoliation is the destruction . . . of evidence, or failure to preserve property for another's use as evidence in pending . . . litigation." *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 148 (2d Cir. 2008) (internal quotation omitted). The Federal Rules of Civil Procedure make parties responsible not only for evidence in their immediate possession, but also evidence within their "control." Fed. R. Civ. P. 34(a)(1); *Leser v. U.S. Bank Nat. Ass'n*, 2010 U.S. Dist. LEXIS 47365, 2010 WL 1945806, *1 (E.D.N.Y. May 13, 2010). And, as is particularly salient here, there is "no doubt that a video depicting the time before, during, and after an incident is relevant to determine what actually happened . . . ." *Essenter v. Cumberland Farms*, 2011 WL 124505, *7 (N.D.N.Y Jan. 14 2011).

Rule 37(e) applies when, like here, "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." Fed. R. Civ. P. 37(e).

Under Rule 37(e) "the Court must consider

> (1) whether electronic information that should have been preserved has been lost;
>
> (2) whether defendants took 'reasonable steps' to preserve that information;
>
> (3) whether the information can be restored or replaced through additional discovery;
>
> (4) whether [Petitioner] has been prejudiced by the loss of the information; and,
>
> (5) whether [Respondent] acted with the intent to deprive [Petitioner] of the information's use."

Moody v. CSX Transportation, Inc., 271 F. Supp. 3d 410, 426 (W.D.N.Y. 2017). If the first four elements are met, the Court "may order measures no greater than necessary to cure the prejudice." Fed R. Civ. P. 37 (e)(1). If, however, the Court also finds that the party acted "with intent" and the fifth factor is met, the Court may order more serious measures, including a presumption that the lost information was unfavorable to the party; or entry of a default judgment. Fed. R. Civ. P. 37(e)(2).

All factors are met here. First, there is no question that Respondent was under a duty to preserve the video evidence and did not do so. "A party is obligated to preserve evidence when it has 'notice that the evidence is relevant to litigation.'" *Moody*, 271 F. Supp. 3d at 426 (citing *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001). "[T]he obligation to preserve evidence arises… most commonly when suit has already been filed, providing the party responsible for the destruction with *express notice*." *Kronisch v. United States,* 150 F.3d 112, 126 (2d Cir. 1998) (emphasis added). The video was direct evidence of Mr. Ramsundar's new allegation, and therefore plainly "relevant." Indeed, Petitioner repeatedly and specifically put Respondent on notice that it demanded disclosure of the video evidence. *See supra* 12–13.

Second, it is equally clear that defendants did not take "reasonable steps" to preserve the video. The government's investigator actually *reviewed* the video footage from February 27 and

found that it directly contradicted their witness's statement. Manes Decl. ¶ 44. . The government went on to investigate whether the incident had occurred on another day. *Id.* ¶ 46. Petitioner specifically asked for the footage in order to clear his name—and did so well within the 30-day video destruction window. First Hassoun Decl. ¶ 17. He also requested that the government review footage not only for the day Mr. Ramsundar claimed the incident occurred but for that entire week. *Id.* Yet the government failed at any point to take any steps to preserve any of the video even though the evidence it had reviewed directly contradicted the sworn statement of its own witness. Manes Decl. ¶¶ 44–51. This unquestionably violates Respondent's duty, which includes preventing the destruction of evidence that would otherwise be destroyed in the normal course of business. *See Moody*, 271 F. Supp. 3d at 428–29 ("[A] party's discovery obligations include taking 'affirmative steps' to 'ensure that all potentially relevant evidence is retained."); *see also Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 221 (S.D.N.Y. 2003) (holding that the defendant was grossly negligent in failing to preserve backup tapes when the defendant was "unquestionably on notice of a duty to preserve").

Third, Respondent has told Petitioner and the Court unequivocally that the video evidence was destroyed. Manes Decl. ¶ 46; Ex. 8; ECF No. 154, Ex. F (Lemmo Declaration). Given Respondent's unqualified admission and the fact that Respondent has not since represented to Petitioner that the video is recoverable, this Court is entitled to conclude that the information provided by the destroyed video is irrevocably lost. *See Moody*, 271 F. Supp. 3d at 429–30.

Fourth, Petitioner has clearly been prejudiced by Respondent's failure to preserve relevant evidence. As Petitioner immediately explained when confronted with the allegation, the video could have exonerated him of this false allegation by showing that no threat occurred. First Hassoun Decl. ¶¶ 13–14. The video would have conclusively determined a key issue as to the

underlying allegation. It was "critical and irreplaceable data [that] was within defendants' complete control to review and produce, but they failed to take simple, reasonable steps to preserve it." *Id*. at 430. Without the video evidence, Mr. Ramsundar's allegation from January 27 becomes, to a greater extent, a he-said/he-said dispute.[7] This is especially true because it appears that the government failed to undertake basic investigative steps that could have generated additional exculpatory evidence—like promptly reviewing the movement logs to determine if the date was possible, or doing timely interviews of the officers in the area at the time to ask them if they observed the incident.

Finally, the evidence shows that Respondent "acted with intent" to deprive Petitioner of the information here. The government failed to preserve directly exculpatory video footage from February 27 despite *actually reviewing it*. Manes Decl. ¶¶ 44–51. The government simply let the video be deleted even though it knew at least some of it was damaging. *Id.* Moreover, the government's subsequent investigation somehow took so long that by the time the government identified February 26 as a possible date, *all* of the video evidence had been deleted. *Id.* This, despite the fact that Petitioner explicitly and directly put the government on notice that it should review footage for the entire "week" in question in order to exonerate him. First Hassoun Decl. ¶ 17.

[7] Despite the fact that Petitioner has been deprived of this video evidence, the circumstances of the allegation and the setup of the attorney visitation area show Mr. Ramsundar's allegation to be implausible. As explained in Petitioner's declaration attached to his opposition for the government's Motion for Sanctions, filed today, Petitioner had no way of knowing that Mr. Ramsundar had entered the area and in order to make the threat he would have had to stand up, pivot around, and peer through the small window at precisely the time Mr. Ramsundar happened to walk by. Third Declaration of Adham Amin Hassoun ¶¶ 9–12 (May 15, 2020). He would have had to do this despite the fact that Mr. Hassoun was in a wheelchair at the time. *Id.* ¶ 11. Mr. Ramsundar, however, would have been able to see Mr. Hassoun as he walked by and could have, based on that sighting, concocted the allegation. *Id.* ¶ 13.

This Court is entitled to "infer an intent to deprive from [Respondents'] actions." *Moody*, 271 F. Supp. 3d at 431. As in *Moody, "*no question exists that the lost evidence was highly relevant—if not the most important objective evidence" regarding the supposed incident. *Id.* "While knowing they had a duty to preserve the [video], defendants allowed the original data . . . to be overwritten." *Id.* "[T]heir failure to make any effort" to confirm that the video would remain accessible even while they were actively conducting an investigation likewise indicates "an intent to deprive" Petitioner of the evidence.

It is also relevant to the Court's analysis of spoliation that the government apparently failed to conduct any independent investigation into Mr. Ramsundar's allegation before presenting it to the Court and that, even after discovering that the event could not have occurred on February 27 as alleged, it failed to correct the inaccuracies in Mr. Ramsundar's allegation. While Petitioner does not at this time bring a motion for sanctions under Rule 11, the government's uncritical reliance on Mr. Ramsundar's inaccurate allegation, without any investigation beforehand or prompt correction afterwards, implicates the obligation of attorneys to conduct "an inquiry reasonable under the circumstances" to determine whether "factual contentions have evidentiary support" before presenting any "written motion or other paper" to the Court. Fed. R. Civ. P. 11(b); *see Moody*, 271 F. Supp. 3d at 427 (finding possible violation of Rule 11 was relevant to imposition of spoliation sanctions). The government's conduct here may also implicate counsel's ethical duties to the Court. N.Y. Rules of Professional Conduct 3.3(a)(3) ("If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.").

Because all of the elements in Rule 37(e) are met, this Court is entitled to consider the most serious sanctions available under the Federal Rules. In this instance, Petitioner believes that the appropriate sanction is a presumption that the deleted video evidence was favorable to Mr. Hassoun. An adverse inference is "a severe sanction that is reserved for egregious conduct or for situations in which the loss of relevant evidence has so prejudiced the moving party that . . . an adverse inference is necessary to restore the moving party to its pre-loss position." *Riley v. City of New York,* No. 10-CV-2513 MKB, 2015 WL 541346, at *12 (E.D.N.Y. Feb. 10, 2015). (quotation marks omitted). Even so, courts in similar circumstances—i.e., where a party with direct control over critical evidence has destroyed it—have determined that "an adverse instruction appropriately addresses the evidentiary gap caused by defendants' loss of such material evidence." *Moody*, 271 F. Supp. 3d at 432. This remedy is appropriate because "[t]he prophylactic and punitive rationales [for an adverse inference instruction] are based on the . . . commonsensical proposition that the drawing of an adverse inference against parties who destroy evidence will deter such destruction" and also because it "properly place[s] the risk of an erroneous judgment on the party that wrongfully created the risk." *Id.* (quoting *Kronisch*, 150 F.3d at 126).

The Court should also order the government immediately to turn over *all* information regarding its investigation of the new Ramsundar allegation, including all internal notes, emails, or other materials documenting the steps that were taken, why they were taken, and in what sequence. Given the fact that the government appears to have maintained precious few records documenting the investigation, however, *see* Manes Decl. ¶¶ 20–25, depositions or an evidentiary hearing are likely necessary in order to determine what happened and why. This inquiry would clarify precisely who was responsible for the spoliation and how it occurred. This is necessary in

order for the Court to determine whether additional sanctions are appropriate and against whom they should be directed.[8]

Finally, Petitioner believes it would be appropriate for the Court to issue an order admonishing the government—including both counsel and FBI/DHS officials—about their obligations to preserve evidence and to act promptly in order to avoid spoliation. The Court should also require the relevant officials to review their policies and training to ensure that it does not happen again, to make revisions as necessary, and to report on such steps to the Court. *Cf. Am. Civil Liberties Union v. Dep't of Def.,* 827 F. Supp. 2d 217, 231 (S.D.N.Y. 2011) (finding remedial measures including policy changes and formal acknowledgment by a federal agency of policy failures sufficient, in part, to remedy destruction of video evidence).

CONCLUSION

For the foregoing reasons, Petitioner asks the court to impose sanctions for the government's failure to disclose relevant evidence, for spoliation of evidence, and for related misconduct. Petitioner also requests that this Court order the government to disclose all responsive documents – about Mr. Ramsundar and any other witness – immediately so that the government's misconduct does not delay justice for Mr. Hassoun.

Respectfully submitted,

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[8] Petitioner again requests leave to move for additional sanctions, including attorneys' fees, pending further development of the factual record.

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