IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al., Petitioners and Plaintiffs, v. **REBECCA ADDUCCI**, et al., Respondents and Defendants.	Case No. 2:17-cv-11910 Hon. Mark A. Goldsmith Mag. David R. Grand Class Action

PETITIONERS' MEMORANDUM REGARDING SANCTIONS FOR RESPONDENTS' DISCOVERY VIOLATIONS

STATEMENT OF ISSUES PRESENTED

1. Should this Court bar consideration of the Government's written submissions in opposition to Petitioners' motion for a preliminary injunction and/or deem certain facts as established in support of Petitioners' motion where Respondents have repeatedly failed to comply with discovery obligations and this Court's orders?

Petitioners Answer: Yes.

2. Should this Court order Respondents to pay Petitioners' fees associated with (a) discovery Petitioners conducted that was necessary for their renewed motion for relief under *Zadvydas* and motion for sanctions, and (b) this motion for sanctions?

Petitioners' Answer: Yes

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Chambers v. NASCO, Inc., 501 U.S. 32 (1991)

First Bank of Marietta v. Hartford Underwriters Ins. Co., 307 F.3d 501 (6th Cir. 2002)

Metz v. Unizan Bank, 655 F.3d 485 (6th Cir. 2011)

Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater, 465 F.3d 642 (6th Cir. 2006)

Plastech Holding Corp. v. WM Greentech Auto. Corp.n, 257 F. Supp. 3d 867 (E.D. Mich. 2017)

Fed. R. Civ. P. 37(b)

INTRODUCTION

Respondents have, since this case began, engaged in a course of conduct that can be summed up as delay, deny, and deceive. Respondents possess virtually all the information Petitioners need to prosecute their *Zadvydas* claim and that this Court needs to reach a fair adjudication. Petitioners have had to drag that information out, bit by bit, being repeatedly compelled to turn to this Court for assistance. Deadlines, set either by the rules or by orders of this Court, have been brazenly ignored. Respondents have not only hidden key facts from Petitioners, but have repeatedly taken advantage of Petitioners' limited access to those facts to paint false pictures of the state of affairs. As a result, the hearing on Petitioners' claim under *Zadvydas v. Davis*, 533 U.S. 678 (2001), a ruling that protects persons from unnecessary detention, has been needlessly pushed back nearly a year, resulting in the very evil *Zadvydas* sought to prevent: prolonged incarceration without justification. And even after all this time, Respondents have not made a complete document production, blowing through yet more Court-ordered deadlines.

This Court requested briefing on appropriate sanctions for Respondents' misconduct. ECF 452. Rule 37 presents a starting point, because much of Respondents' misconduct involves violation of discovery orders. *See* Fed. R. Civ. P. 37(b)(2)(A). But the focus of that rule is, frankly, too narrow to capture the scope of Respondents' transgressions, which have permeated this action. Where, as

here, conduct is taken in bad faith, or is "tantamount to bad faith," the Court has the inherent authority to impose sanctions necessary to provide relief to the aggrieved litigant and deter future misconduct. *Marrietta v. Hartford Underwriters Ins. Co*., 307 F. 3d. 501, 517 (6th Cir. 2002). Under either or both of Rule 37 and this Court's inherent authority, the remedies this Court has identified in its orders of June 22, 2018, ECF 320, and October 22, 2018, ECF 452—some combination of barring Respondents' opposition to the *Zadvydas* motion and deeming matters admitted for purposes of that motion—are appropriate and just. Indeed, still more severe sanctions would be justified.

To be clear, Petitioners have presented a motion for preliminary injunction on their *Zadvydas* claim that is meritorious without any assistance from a sanctions order from this Court, notwithstanding all the hurdles thrown in their way by Respondents. Petitioners intend to press that argument, and believe the Court's opinion should make clear that the Court would find for the Petitioners irrespective of any evidentiary sanctions imposed. What the history of this case has shown that Respondents have again and again claimed that Iraq, at long last, has turned the corner, and will now accept planeloads of deportees. And again and again, once Petitioners have gotten the documents, that has turned out to be untrue. There is no repatriation agreement, and it remains utterly unclear when or whether Petitioners can be repatriated. At this late stage, after the presumptively reasonable detention

period has passed almost thrice over, uncertainty is not enough to justify further detention. *See Rosales-Garcia v. Holland*, 322 F.3d 386, 415 (6th Cir. 2003).

But even though Petitioners prevail on the existing record (despite the distortions and omissions caused by Respondents' discovery abuses), an order addressing Respondents' conduct is necessary. Respondents' conduct is unbecoming of any litigant. But Respondents are not just any litigant. They are agencies of the federal government, represented by the Justice Department. Win at any cost is not a motto they should be allowed to adopt.

FACTS AND BACKGROUND[1]

The Amended Petition sought two forms of relief. First, it requested a stay of removal proceedings to allow the class to assert claims for relief from removal before the appropriate body in the Immigration Court system. Second, it sought release from detention for subclasses, advancing challenges against prolonged detention without bond hearings and a claim under *Zadvydas*.

Petitioners moved for a preliminary injunction on the detention claims on November 7, 2017, ECF 138, almost a year ago. They had previously sought to pursue discovery from Respondents in order to have information relevant to the

[1] There are many abuses by Respondents, and this brief is limited by both the short deadline and page limit. The facts section here is complemented by the accompanying chronology (Exhibit 1), laying out Respondents' history of non-compliance.

preliminary injunction motions. ECF 111. The government promised that it "would [] disclos[e] in its response to Petitioners' motion … information that may be of utility to Petitioners[] to meet the Government's response," ECF 153, PgID 3936, and convinced this Court to deny discovery. ECF 153, PgID 3936 ("the Government's response to Petitioners' motion for preliminary injunction may supply information that would obviate the need" for discovery). But the promised information was not forthcoming. Instead, having left Petitioners in the dark, Respondents spun a false narrative of a harmonious relationship with Iraq ground to a halt by this Court's stay orders. Petitioners' Motion for Sanctions, ECF 381, more fully sets out the false and misleading information presented to the Court.

Respondents thus beat back the preliminary injunction on *Zadvydas*. While many class members were released after the bond hearings this Court ordered, over a hundred remain incarcerated. After this Court's January 2nd Order, ECF 191, the *Zadvydas* claim was the only one subject to discovery. The accompanying timeline lays out the details of Respondents' efforts to render discovery a nullity. The discussion below puts the detailed timeline into necessary context.

Discovery has been limited to a single issue: Is removal significantly likely in the reasonably foreseeable future under *Zadvydas*? There is a relatively discrete group of individuals within the government with discoverable information; indeed the government identified only three witnesses for the planned evidentiary hearing

or for a trial on the merits. *See* ECF 443, 444. Interrogatories, presumably, can be answered by consulting those individuals, or a few others. It appears that all, or virtually all, of the documents produced have been maintained electronically. Two agents of Respondents have been deposed. In short, while this is a class action, Respondents' discovery burden should have been easily manageable.

Interrogatories and production requests were served on Respondents on January 14, 2018, although the government knew the contours of those requests much earlier, because the January requests were more narrowly tailored versions of those promulgated in October 2018. Two months after discovery was served, after no responses at all, this Court ordered compliance, the first of many such orders. ECF 254. The March 13 order required that production begin by March 30. *Id*. at PgID 6230. Respondents "complied" with that order by producing four pages, one page from DHS and three from ICE.[2] The government's interrogatory responses omitted key information; for example in responding to questions about Iraq's criteria for repatriation, the government conveniently neglected to mention that Iraq required returnees to attest in writing to their acquiescence to repatriation, a fact Petitioners learned only later, after ICE officers threatened class members with prosecution if they did not sign the form. ECF 307.

[2] Two of the three ICE pages were not actually ICE business records but documents prepared by its lawyers to supposedly to support its defenses in this action.

Respondents got through April with DHS producing only a small batch of non-responsive documents and ICE producing nothing more than conflicting status reports about when it might actually provide documents. In May, Respondents moved to stay discovery, seeking to reflect de jure what they had accomplished de facto. ECF 284. They lost. ECF 345. Towards the end of May, Respondents for the first time identified the need for an amended protective order as a condition precedent to production.

Respondents' continuing non-compliance forced this Court to issue yet another order on June 12. ECF 304. Among other things it set dates for a rolling production, required Respondents to supplement interrogatory answers, and warned that "[i]f Respondents fail to conduct a reasonable inquiry, respond with information within their control or otherwise obtainable by them, provide an appropriate verification, or fully and completely respond to the interrogatories, Respondents may be sanctioned, including the exclusion of that information in motions, in hearings, at any evidentiary hearing, and at trial." *Id*. at PgID 7242. The Court also warned that a failure to comply with the order "will be construed, presumptively, as bad faith, unless Respondents can establish by clear and convincing evidence that there is exceptional good cause for not meeting the schedule." *Id.* at PgID 7240. This Court's warnings were not heeded: Respondents did not comply with the first rolling production date, providing only 150 of the

1,000 pages required on June 19.

Rather than comply with this Court's schedule, Respondents sought to amend it. This Court rejected that attempt. In so doing it summarized Respondents' conduct to that point:

> The Court finds that ICE has not demonstrated exceptional good cause for failing to meet the Court's production deadline. A review of the Government's conduct in response to Petitioners' document requests make plain why the Government should not be further excused from its discovery obligations. Petitioners' document requests were served on January 14, 2018; under Federal Rule of Civil Procedure 34, production of the documents, as well as any written responses or objections, were due by February 13, 2018. This deadline was not met in light of the Government's insistence that [the] Court's "meet and confer" process altered the typical discovery schedule. After the Government's failure to respond was discussed at a March 7, 2018 status conference, the Court ordered the Government to being document production by March 30, 2018. See 3/13/2018 Order (Dkt. 254). On March 30, 2018, the day document production was ordered to begin, the Government informed the Court that it could not produce documents due to technological issues with its e-discovery platform (Dkt. 266). Petitioners state that on that same day, the Government provided them with four pages of documents. * * * The Court [] conducted a status conference on May 25, 2018, during which the Government stated that it would begin producing a significant number of documents following entry of the second amended protective order. Petitioners state that since that order was entered on June 19, ICE has only produced 150 pages of documents, well short of the 1,000 page requirement set forth in the Court's June 12, 2018 order. * * * While the Government now insists that its production was delayed until the second amended protective order was entered, the Court does not find this justification persuasive. As noted by Petitioners, the language of the protective order is meant to address a small subset of documents at issue; nothing was preventing ICE from conducting its review of documents that would not be designated as confidential. * * * The Court also

> declines to adopt ICE's proposed amended schedule for future document production. The Court issued its production order in response to the Government's continued failure to meaningfully respond to Petitioners' longstanding discovery requests. Any burden faced by ICE in producing documents can be alleviated by temporarily designating additional personnel to meet the Court's deadline, or temporarily increasing the hours for those already assigned to the project in order to comply with the Court's order. ICE has stated that it has assigned twelve individuals to work ten hours per week; this is insufficient given the significance of the issues at stake, and the five months that Petitioners have already waited for production. The failure to assign a sufficient number of personnel and hours to this discovery indicates to the Court that other matters have been prioritized over this case. It is worth noting that any burden faced in complying with the Court's requirement is far outweighed by Petitioners' right to basic discovery.

ECF 320, PgID 7606-08. This Court closed with another warning against continued non-compliance:

> Failure to comply with the Court's order may be cause for the Court to direct that the facts necessary to support Petitioners' *Zadvydas* claim are established, or prevent the Government from opposing the *Zadvydas* claim, or issue other appropriate relief.

Id. at PgID 7608.

On July 17, seven months after service of the first document requests, Respondents completed production. ICE's production totaled 1,508 records, which would mean processing at the rate of about seven records a day. DHS's production was 123 pages, including the non-responsive dump of April. Very few records were produced for the February-March, 2018 time frame, and none after March.

As is typical, Respondents' discovery responses led to new areas of inquiry,

and Petitioners filed a second set of interrogatories and production requests on July 6, 2018. Petitioners informed the Court and the government at a hearing on July 19, that they would file their *Zadvydas* motion "some time in August," ECF 351 at 124. The second set of discovery requests was thus timed to ensure discovery was completed and the Court would have current information in deciding the issue. On the day the responses were due, the government sought an extension, despite knowing the timeline for the *Zadvydas* motion. The Court granted more time, but with a warning: "Respondents shall serve their responses to Petitioners' second set of discovery requests, including production of documents, on or before August 20, 2018. No further extension shall be granted." ECF 366, PgID 8323.

On August 20, Respondents served written responses to the production requests, but no documents. And they refused to answer any of the interrogatories—which they had previously claimed they needed additional time to answer—on the ground that they exceeded the limit of 25 per party.[3] After a September 6 status conference, the Court overruled the government's interrogatory

[3] The interrogatories were from a party who had not previously filed interrogatories, and hence did not exceed the number permissible. But most galling is that Respondents asked for extra time to *answer*, only to then submit a blanket objection and no information after receiving an extension. Nevertheless, because Petitioners had to follow meet-and-confer rules and bring a motion, Respondents secured for themselves an extension until September 19 to answer interrogatories that this court had earlier ordered them to answer by August 20. *See* ECF 366, Order of August 14, 2018 and ECF 385, Order of September 6, 2018.

objections. ECF 385. But when the Respondents finally answered the interrogatories on September 19, 2018, they provided inadequate and evasive answers to some questions, and untimely and meritless objections to others. After yet another status conference and a motion to compel, ECF 403, the Court ordered the government to answer the interrogatories. ECF 412. On October 5, less than 18 days before the scheduled hearing, the government finally answered, and disclosed for the first time that the process for repatriations had allegedly changed yet again in September, and that there are significant obstacles to repatriation—separate and apart from whether Iraq will issue travel documents—that apparently relate to the logistics of commercial and charter travel through third countries.

While Petitioners' persistence had secured the October 5 interrogatory supplementation, not a single document had been produced in response to the second document request served three months prior, despite the order requiring them to be produced by August 20, with no extensions. In the meantime, however, the government had asked the Court to hold an evidentiary hearing on both the *Zadvydas* and sanctions motions, which was set for October 23. After yet another status conference, the Court ordered the government to produce the documents by October 16, and—in light of the new information disclosed in the government's interrogatory responses and the upcoming hearing—granted Petitioners leave to take the depositions of James Maddox and Rule 30(b)(6) witnesses (later identified

as Katrina Kane and Michael Bernacke). ECF 431.

The timing was extraordinarily tight: Petitioners would have to review what Respondents estimated to be tens of thousands of pages of documents received on October 16 to prepare for the depositions scheduled for October 18 and 19 in Phoenix, Arizona and Washington, D.C., and then turn around and digest that information in time for the October 23 evidentiary hearing.

But the government ignored the October 16 deadline, just as it had ignored the earlier August 20 deadline. October 16 came and went, and no documents were produced. At an emergency status conference on Wednesday, October 17, the Court ordered production of the documents in an electronic format that day. The depositions scheduled for the following Thursday and Friday, were reset for Monday, October 22.

When the government finally produced a tranche of documents on the evening of October 17—a production intended among other things to bring matters current since the initial production did not have record past early March—it contained only 680 documents, some redacted. The Technology Assisted Review (TAR) process used had pulled 22,275 documents; although Petitioners had been requested the parameters of the TAR for days, those were not provided. (When the parameters were later produced, it was clear that they were entirely inadequate, omitting obvious search terms like “Hamama.” The documents used to train the

software used to conduct the TAR have still not been produced, despite a subsequent Court order requiring their production. ECF 449, PgID 11246.)

It was quickly apparent that the document production was woefully incomplete, and not just because of its paltry size. Only a handful of documents were produced dated after mid-July, and none after August 31, 2018 (even though the government submitted later-dated documents to the Court as proposed exhibits for the upcoming hearing). There was no privilege log (and the government later revealed at a status conference that approximately half of the documents that TAR identified as responsive were withheld). And some documents were redacted, marked only "third party."

After two more emergency status conferences on October 18 and 19, the Court ordered interim relief, warning that this relief was "without prejudice to any future relief that may be ordered" and stating that the "issue of monetary sanctions will be addressed at later proceedings." ECF 449, PgID 11244, 11247. Most importantly, the Court ordered all of the 22,275 documents, excepting those withheld for assertions of attorney-client or work product privilege, to be produced by noon on Friday, October 19, and documents for the period from August 31, 2018 to September 30, 2018, to be produced by 5 p.m. Saturday, October 20, 2018. *Id*. at PgID 11245. Petitioners would have had the weekend (or Sunday for the more recent documents) to cull through tens of thousands of records for the

depositions starting Monday at 9 a.m., and the hearing on Tuesday.

But again, the government missed the deadline. At the fourth emergency status conference in as many days, the Court indicated it would be available on Sunday if the productions were not forthcoming. They were not. Rather, the government filed a notice of non-compliance seven hours after the deadline. An accompanying declaration stated that the government would meet neither the Friday deadline for production of the 20,000 records through August, nor the Saturday deadline for the September records. The declaration pled fiscal and staffing constraints as an excuse for the government's noncompliance, but failed to explain what steps the government has taken to comply since the discovery was issued in July or even to indicate how many individuals are assigned to work on the project and for how many hours. The declaration also revealed that an additional 20,000 records had been omitted from the TAR review, and stated that the government had produced 7,000 records, even though that production had failed, as the government knew when the declaration was submitted and as the government itself later acknowledged.

The government did, in response to the Court's order, reproduce the same documents previously produced on October 17 without the third party redactions (although it failed to provide a privilege log for any of the documents withheld). The unredacted documents revealed multiple copies of the same email from July

10, 201 [redacted]

[redacted] Ex. 3. This document, like others Petitioners have managed to pry out of the government, once again contradicts the representations that the government has made to this Court, and in its interrogatories, about Iraq's purported longstanding agreement to accept all returnees.

The Court made itself available on Sunday morning, October 21, for another status conference. After hearing from the parties, the Court struck the evidentiary hearing[4] and requested this brief on appropriate sanctions. ECF 452.

ARGUMENT

I. THIS COURT HAS TWO INDEPENDENT SOURCES OF AUTHORITY TO IMPOSE APPROPRIATE SANCTIONS AGAINST THE GOVERNMENT FOR ITS HISTORY OF MISCONDUCT.

A. Fed. R. Civ. P. 37(b) Warrants Discovery Sanctions

Fed. R. Civ. P. 37 provides the Court with the authority to impose sanctions on a party who abuses the discovery process or who fails to obey an order to

[4] The Court notified the parties by email on Sunday, October 21. Petitioners cancelled the depositions scheduled for the following morning. Petitioners' witness, Daniel Smith, who was en route from Iraq, arrived in the U.S. that afternoon.

provide discovery. Fed. R. Civ. P. 37(b)(2)(A); *Nat'l Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam). Rule 37 sanctions (1) "ensure that a party will not benefit from its own failure to comply," (2) serve as "specific deterrents ..." and "obtain compliance with the particular order issued," and (3) "serve a general deterrent effect on the case at hand and on other litigation, provided that the party against whom they are imposed was in some sense at fault." *Update Art, Inc. v. Modiin Publishing, Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988) (internal citations omitted).

Specifically, Rule 37(b)(2)(A) provides that if a party fails to obey a discovery order the court may issue orders:

> (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
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> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
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> (iii) striking pleadings in whole or in part;
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> (iv) staying further proceedings until the order is obeyed;
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> (v) dismissing the action or proceeding in whole or in part;
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> (vi) rendering a default judgment against the disobedient party[5]; or

[5] When considering whether to impose the harsher default judgment or dismissal as a sanction under Rule 37(b)(2), courts consider four factors: "(1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and *Continued on next page.*

> (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

The Court has broad discretion to impose the particular sanction warranted. The Court "may, within reason, use as many and as varied sanctions as are necessary to hold the scales of justice even." Wright & Miller, 8A FED. PRAC. & PROC. 2D, § 2284 (3d ed.) "[T]he application of sanctions is entrusted to the discretion of the trial judge, and overleniency is to be avoided where it results in inadequate protection of discovery." *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1127 (5th Cir. 1970), cert. denied, 400 U.S. 878, 91 S. Ct. 118, 27 L. Ed. 2d 115 (1970).

Appropriate sanctions include prohibiting a party from supporting or opposing claims or defenses and striking pleadings in whole or in part. Fed. R. Civ. P. 37(b)(2)(A)(ii)-(iii). *See also Fencorp Co. v. Ohio Kentucky Oil Corp.*, 675 F.3d 933, 942 (6th Cir. 2012) (court did not abuse its discretion by making adverse factual finding as sanction under Rule 37(b)(2) after party violated three separate discovery orders to produce documents related to the subject, notwithstanding the

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(4) whether less drastic sanctions were imposed or considered before dismissal was ordered." *Universal Health Grp. v. Allstate Ins. Co.*, 703 F.3d 953, 955–56 (6th Cir. 2013) (quoting *United States v. Reyes*, 307 F.3d 451, 458 (6th Cir. 2002)); *see also Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6th Cir. 1995) ("[D]ismissal is an appropriate sanction where the party's failure to cooperate with the court's discovery orders is due to willfulness.").

fact that the sanction rendered their defense void); *Chopra v. Physicians Med. Ctr., LLC*, No. 16-13915, 2017 WL 2602957, at *9-11 (E.D. Mich. June 15, 2017) (deeming certain facts established as sanction for untimely and incomplete response to discovery order); *Martin Cty. Coal Corp. v. Universal Underwriters Ins. Servs., Inc.*, No. CIV.A. 08-93-ART, 2011 WL 836859, at *3–5 (E.D. Ky. Mar. 4, 2011) (holding facts as established for failure to produce documents); *Update Art*, 843 F.2d at 71 ("although preclusion of evidence and dismissal of the action are harsh remedies and should be imposed only in rare situations, they are necessary to achieve the purpose of Rule 37 as a credible deterrent rather than a 'paper tiger'") (internal citations omitted).

Finally under Rule 37, the Court "must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure. . ." Fed. R. Civ. P. 37(b)(2)(C).[6]

B. The Court Has Inherent Authority to Award Sanctions

In addition to the authority granted under Rule 37, "[f]ederal courts possess certain 'inherent powers . . . to manage their own affairs so as to achieve the

[6] Respondents' failure to timely respond to the First and Second Interrogatories is grounds for sanctions under Fed. R. Civ. P. 37(d). *Norris v. MK Holdings, Inc.*, 734 F. App'x 950, 956–57 (6th Cir. 2018) (Court did not abuse its discretion by imposing Rule 37(d) sanctions for failure to timely respond to interrogatories). Under Rule 37(d), the Court may grant sanctions available under 37(b)(2)(A)(i)-(iv) and award fees under the standard in 37(b)(2)(C).

orderly and expeditious disposition of cases'" and to prevent the abuse of the judicial process. *Goodyear Tire & Rubber Co. v. Haeger*, 137 S.Ct. 1178, 1186 (2017), *quoting Link v. Wabash R. Co.*, 370 U.S. 626, 630-631 (1962); *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124, 135 (2d Cir. 1998) (federal courts have "well-acknowledged inherent power to levy sanctions in response to abusive litigation practices.") (internal quotation marks omitted); *Laukus v. Rio Brands, Inc.*, 292 F.R.D. 485, 502 (N.D. Ohio 2013). Courts are vested with power to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991), *quoting Link v. Wabash R. Co.*, 370 U.S. 626, 630-631 (1962). This includes the inherent authority to sanction discovery violations with "[e]xclusion of evidence, continuance, or other action deemed appropriate by the court . . . . even where . . . no court order has been issued." *Toth v. Grand Trunk R.R.*, 306 F. 3d 335, 344 (6th Cir. 2002) (internal quotation marks and citations omitted), *holding mod. by Roberts ex rel. Johnson v. Galen of Va., Inc.*, 325 F.3d 776 (6th Cir. 2003)

A court's inherent power to sanction extends to "acts which degrade the judicial system," *Chambers*, 501 U.S. at 41-42; where "fraud has been practiced upon [the court]", *id.* at 46; where a litigant is "misleading and lying to the Court," *id*. at 42; or where a litigant engages in bad-faith conduct or conduct that is

"tantamount to bad faith." *Metz v. Unizan Bank*, 655 F.3d 485, 489 (6th Cir. 2011)(internal quotation marks and citation omitted). *See also Railway Exp., Inc. v. Piper*, 447 U.S. 752, 767 (1980); *Murray v. City of Columbus*, 534 F. App'x 479, 484 (6th Cir. 2013); *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 511-12 (6th Cir. 2002); *Plastech Holding Corp. v. WM Greentech Auto. Corp.*, 257 F. Supp. 3d 867, 878 (E.D. Mich. 2017). Sanctionable bad faith conduct can include refusal to comply with a court order. *Youn v. Track, Inc.*, 324 F.3d 409, 420 (6th Cir. 2003) (collecting cases).

While courts should exercise inherent powers with restraint and discretion, "[t]he exercise of inherent authority is particularly appropriate for impermissible conduct that adversely impacts the entire litigation." *Marietta*, 307 F.3d at 516. The Court should also consider "the impact or effect that the [improper] conduct had on the course of the litigation" when fashioning an appropriate remedy. *Fuery v. City of Chicago*, 900 F.3d 450, 464 (7th Cir. 2018). Here, the prejudice cannot be overstated. Over 100 people have languished in detention as a direct result of the government's discovery abuses, with the Petitioners unable to present and the Court unable to decide their *Zadvydas* claim.[7]

[7] In addition, Petitioners' counsel have had to spend hundreds and hundreds of hours on discovery compliance. Every hour spent in pointless meet-and-confer conferences, or drafting motions to compel, or attending status conferences necessitated by yet another act of non-compliance by Respondents, is an hour *Continued on next page.*

II. THIS COURT HAS THE AUTHORITY AND DISCRETION TO BAR CONSIDERATION OF THE GOVERNMENT'S WRITTEN SUBMISSIONS AND TO DEEM CERTAIN FACTS AS ESTABLISHED IN SUPPORT OF PETITIONERS' MOTION.

That sanctions are warranted here is beyond question. The issue is what form of sanctions should be imposed. Rule 37 expressly identifies directing "facts be taken as established for purposes of the action" and "prohibiting the disobedient party from supporting or opposing designated claims or defenses." Fed. R. Civ. P. 37(b)(2)(A)(i)-(ii). With regard to inherent authority, the Supreme Court has emphasized that "[a] primary aspect of [the court's] discretion is the ability to fashion an *appropriate* sanction for conduct which abuses the judicial process." *Chambers*, 501 U.S. at 44-45 (emphasis added). While "the less severe sanction of an assessment of attorney's fees" is most common, the Court has discretion to impose "a particularly severe sanction" where that is the appropriate remedy. *Id.* at 45. Severe sanctions include "outright dismissal of a lawsuit," *id.*; vacating prior judgments, *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993); barring witness testimony, *Beard v. City of Southfield*, 2016 WL 6518490 (E.D. Mich. Nov. 3, 2016); or striking claims or defenses, *Robert Bosch LLC v. A.B.S. Power Brake, Inc.*, 2011 WL 1790221 (E.D. Mich. May 10, 2011)[8].

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counsel could not dedicate to the merits.

[8] *See also, e.g., Barnhill v. United States*, 11 F.3d 1360, 1367 (7th Cir. 1993) ("Moreover, pursuant to this power, a court may impose the severe sanction of dismissal with prejudice (or its equivalent, judgment) if the circumstances so

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All the discovery abuses and related misconduct have involved Petitioners' *Zadvydas* claim. The central factual issue is whether removal is significantly likely in the reasonably foreseeable future. All discovery sought by Petitioners relates, in one way or another, to that issue. It is the issue that Respondents have sought to obfuscate from the outset. Using the Rule 37 construct, either for sanctions under that rule or adopted for use under this Court's inherent authority, two paths are apparent. And they lead to essentially the same result[9].

This Court can deem established the fact that removal is not significantly likely in the reasonably foreseeable future, or alternatively it can strike Respondents' opposition papers to the preliminary injunction motion. It can also do both. In each case the consequence is that Petitioners will prevail on their motion for preliminary injunction. Because Petitioners have languished in detention for well over six months and Petitioners have provided good reason to believe their removal is not significantly likely in the reasonably foreseeable future, it is Respondents' burden to "respond with evidence sufficient to rebut that

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warrant."); *Monsanto Co. v. Ralph*, 382 F.3d 1374, 1382 (Fed. Cir. 2004) (entering judgment); *Oliver v. Gramley*, 200 F.3d 465, 466 (7th Cir. 1999) (dismissal).

[9] A related alternative is to draw an adverse inference. *Flagg v. City of Detroit*, 715 F.3d 165, 177 (6th Cir. 2013). Specifically, the Court could infer that the documents not timely produced, which are in the exclusive custody of Respondents, would establish facts adverse to Respondents' assertion that they have in place a process for removal to Iraq of persons with final orders such that removal is significantly likely in the reasonably foreseeable future.

showing." *Zadvydas*, 533 U.S. at 701. If the unlikelihood of removal is deemed established, or if Respondents' submissions attempting to meet their burden are stricken, Petitioners must prevail.

This remedy is tied directly to the failure to comply with discovery orders, as required by Rule 37. Respondents have violated multiple orders relating to the second set of discovery requests, as highlighted above and in the accompanying timeline. The remedy is also appropriate as an exercise of this Court's inherent authority. Respondents' misconduct led, directly, to the denial of Petitioners' original motion for a preliminary injunction under *Zadvydas*. Respondents wrongfully secured the continuing detention of many members of the class, and then used delay upon delay to maintain that detention. While the government will claim that these delays are the result of resource constraints, the history of this case shows that they the government's discovery abuses are part of a litigation strategy of hiding the truth from the Petitioners and the Court in the hopes that, someday, Iraq will succumb to U.S. pressure to accept involuntary detainees, or that the detainees themselves will succumb under the pressure of prolonged incarceration and agree to deportation. This approach explains the government's litigation games like asking for more time to answer interrogatories and then claiming that too many interrogatories were served.

The remedy for the discovery abuses of Respondents is here more closely

attuned to the harm that misconduct caused than in any of the cases cited above, where sanctions were applied. But it is worth noting that, in this action, the powerful sanctions identified above, while appropriate, actually impose a less significant penalty than in the typical case. The relief Petitioners seek is limited and focused. They request an injunction that grants the class freedom except for persons that Respondents are actually able to remove in the near future. Respondents' only legitimate interest in detention is to effect removal, and the relief requested does not interfere with that process. If Respondents obtain the means to remove a particular class member, they can detain and then remove him or her. Thus while the remedies for Respondents' discovery abuses may be outcome-determinative for the *Zadvydas* claim, those remedies are not prejudicial to the legitimate interests of Respondents.

III. THE COURT SHOULD AWARD PETITIONERS THEIR ATTORNEYS' FEES AND COSTS INCURRED FROM RESPONDENTS' MISCONDUCT.

In addition, the Court should grant attorneys' fees and expenses. Indeed, this is required under Fed. R. Civ. P. 37(b)(2)(C) for violations of discovery orders. The Court "must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C). There is no justification for the government's repeated efforts to delay and obfuscate. Moreover, it was

Respondents who insisted on an evidentiary hearing, but then failed to produce the documents necessary for that hearing to be properly conducted. Petitioners' counsel—who are working pro bono or for the nonprofit ACLU—spent hundreds of hours preparing for the hearing that Respondents demanded, which the Court was required to cancel at the very last minute due to Respondents' refusal to comply with their obligations.

Under the Court's inherent authority, fees and costs are also an appropriate sanction for bad-faith conduct. *Chambers*, 501 U.S. at 45-46; *Metz*, 655 F.3d at 489. The Court has inherent authority to impose attorneys' fees where a litigant's "actions were taken, at the very least, in the face of an obvious risk that he was increasing the work on the other party without advancing the litigation." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 647 (6th Cir. 2006). Attorney's fees serve the dual purposes of "vindicat[ing] judicial authority" and "mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy." *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978). But the order must be "limited to the fees the innocent party incurred solely from the misconduct," *i.e.*, "the fees that party would not have incurred but for the bad faith." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S.Ct. at 1184 (2017)[10]. The district court, however,

[10] *Government Employees Insurance Co. v. Nealey*, 262 F. Supp. 3d 153, 177-78 (E.D. Pa. 2017) (dismissing complaint with prejudice and noting that

Continued on next page.

"has broad discretion to calculate fee awards under that standard." *Id.*

Here, Respondents' misrepresentations, their failure to provide information known exclusively to the government and promised in lieu of discovery, and their delays, concealment, and obstruction when discovery finally commenced forced Petitioners to engage in protracted discovery. The government's actions also necessitated this motion. None of this labor should have been necessary. All fees and expenses incurred as a result of the government's misconduct should be awarded to Petitioners.

CONCLUSION

The Court should sanction Respondents' repeated failures to comply with their discovery obligations and with this Court's orders by deeming the fact that removal is not significantly likely in the reasonably foreseeable future to be established, or alternatively by striking Respondents' opposition papers to the preliminary injunction motion. The Court should also order Respondents to pay Petitioners' fees associated with (a) discovery Petitioners conducted that was necessary for their renewed motion for relief under *Zadvydas* and motion for sanctions, and (b) this motion for sanctions.

Goodyear limitation on fee sanctions as compensatory had nothing to do with 'sanctions' generally, but was limited to the specific sanction of attorney's fees.)

Respectfully submitted,

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Dated: October 23, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2018, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

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