IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUHAIL ABDU ANAM, *et al.*,	)	
Petitioners,	)	
v.	)	Civil Action No. 04-1194 (TFH)
BARACK H. OBAMA, President of the United States, *et al.*,	)	
Respondents.	)	

RESPONDENTS' MEMORANDUM IN REPLY TO PETITIONER ISN 256'S OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO AMEND FACTUAL RETURNS FOR ISNs 256, 564, 569, AND 839 TO INCLUDE ADDITIONAL DECLARATIONS AND NEWLY DISCOVERED INCULPATORY EVIDENCE

Respondents respectfully submit this reply memorandum in response to Petitioner Riyad Atiq al-Haj (ISN 256)'s opposition to Respondents' motion for leave to amend the factual return concerning his case. (Dkt. 448). For the reasons that follow, and for the reasons stated in Respondents' opening memorandum (Dkt. 434), Respondents respectfully request that this Court grant their motion for leave to amend the factual returns.

ARGUMENT

Leave to amend is a matter committed to the sound discretion of the district court, *World Wide Minerals, Ltd. v. Republic of Kazakhstahn*, 116 F. Supp. 2d 98, 102 (D.D.C. 2000); however, a refusal to grant leave to amend needs to be justified by factors such as futility, undue delay, undue prejudice to the non-moving party, or bad faith of the moving party. *Building Indus. Ass'n of Superior California v. Babbit*, 70 F. Supp. 2d 1, 3 (D.D.C. 1999) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). "Courts require a sufficient basis for denial of leave to amend because the purpose of pleading . . . is 'to facilitate a proper decision on the merits,' not

to set the stage for 'a game of skill in which one misstep by counsel may be decisive to the outcome.'" *Williams v. Savage*, 569 F. Supp. 2d 99, 105 (D.D.C. 2008) (quoting *Foman*, 371 U.S. at 181-82). Here, Petitioner has failed to demonstrate that any factor justifies a denial of Respondents' request.

I. RESPONDENTS HAVE ACTED IN GOOD FAITH AND THERE HAS BEEN NO UNDUE DELAY.

As set forth more fully in the opening memorandum in support of their motion, Respondents seek to amend the factual returns to facilitate the Court's review of the lawfulness of petitioners' detention by ensuring that this habeas court has a full and complete record containing all of the facts that bear on the legality of petitioners' detention. *Williams*, 569 F. Supp. 2d at 105 ("'If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.'") (quoting *Foman*, 371 U.S. at 182); *In re: Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH) (D.D.C., Nov. 7, 2008) (Dkt. 65) (order permitting the Government to amend factual returns filed prior to the *Boumediene* decision to include evidence that was not before the Combatant Status Review Tribunal); *cf. Wallace v. Heinze*, 351 F.2d 39, 40 (9th Cir. 1965) (explaining in a case where a state government had not filed its return within the time specified by statute, "[i]t is readily apparent that a *full and complete* return made in the first instance will in fact hasten a final determination on the merits").

In addition, Respondents were diligent in identifying, reviewing, and clearing for production to cleared counsel and the Court the classified materials pertinent to their amendment determination. Petitioner fails to credit Respondents for having dedicated their efforts to the production to petitioners of *exculpatory* material and information concerning the circumstances of the statements relied upon in the factual return before turning their attention to the additional

inculpatory exhibits that are the subject of this motion. Pursuant to the CMO, Respondents were required to provide exculpatory information under Section I.D.1 and, if requested, certain discovery under Section I.E.1. Between December 16, 2008, the date the Court amended the CMO, and April 7, 2009, the date Respondents moved to amend the factual returns, Respondents were diligent in disclosing such materials to Petitioners.[1] Respondents promptly moved to amend the factual returns only after their obligations under CMO Sections I.D.1 and I.E.1 were largely satisfied, their responses to Petitioners' additional I.E.2 discovery requests were filed, and the inculpatory documents were cleared for attachment to the motion to amend.[2] Accordingly, there has been no "undue delay."

II. PETITIONER WILL NOT BE UNDULY PREJUDICED BY THE GRANTING OF LEAVE TO AMEND FACTUAL RETURNS.

"Prejudice" in the context of Federal Rule of Civil Procedure 15 "means undue difficulty in prosecuting [or defending] a lawsuit as a result of a change of tactics or theories on the part of the other party." *Deakyne v. Comm'rs of Lewes*, 416 F.2d 290, 300 (3d Cir. 1969). The party opposing the amendment has the burden of showing prejudice. *Lover v. District of Columbia*, 248 F.R.D. 319, 322 (D.D.C. 2008). Petitioner fails to specifically articulate how he will be

[1] Respondents provided disclosures under Sections I.D.1 and I.E.1 to ISN 256 on January 30, 2009, February 13, 2009; April 2, 2009; to ISN 569 on January 30, 2009, March 20, 2009, and April 3, 2009; and to ISN 839 on March 16, 2009, and April 1, 2, 3, 2009. Subsequent disclosures have been made pursuant to Respondents' continuing obligation to provide exculpatory evidence under CMO Section I.D.2. Moreover, Respondents recently submitted, on April 1, 2009, comprehensive responses to Petitioners' numerous requests for additional discovery under CMO Section I.E.2. (Dkts. 404-409).

[2] Indeed, had Respondents moved to amend their factual returns prior to this time, it is entirely possible that Petitioners would have protested that Respondents were seeking to bolster their allegations at the expense of dedicating resources to produce the exculpatory and circumstances information required by CMO Sections I.D.1 and I.E.1.

prejudiced if the Respondents' motion is granted. Consequently, he fails to meet his burden of showing undue prejudice.

Petitioner, it is true, will need to respond to the newly added inculpatory documents and declarations if Respondents' motion for leave to amend is granted. However, as Respondents articulated in their opening memorandum, none of the declarations or newly discovered inculpatory documents introduces new allegations of wrongdoing or new justifications for Petitioner's continued detention. Nor do these documents contradict the information Respondents have provided in the factual returns. Rather, the newly identified evidence provides additional support for the allegations already included in the factual returns, and the declarations provide useful contextual information that is important to an understanding of the factual framework set forth in those returns. Moreover, Respondents sought to add these documents more than a month before the deadline for the filing of petitioners' Traverses, and, as stated in their opening memorandum (Resp.'s Mem. at 7), Respondents will consent to a brief extension of time to file the Traverses to the extent petitioners need additional time to review and respond to the newly discovered evidence. As such, Petitioner has not explained how he would be *unduly* prejudiced if the Court grants leave to amend.

III. RESPONDENTS WILL PROVIDE REQUIRED DISCOVERY IN A TIMELY MANNER, AND PETITIONER IS NOT ENTITLED TO BYPASS THIS COURT'S PROTECTIVE ORDER WITH RESPECT TO AMENDMENT DOCUMENTS.

With respect to Petitioner's request that discovery concerning the newly discovered documents be handled expeditiously, Respondents represent to the Court that discovery pursuant to CMO Section I.D.1 is completed. With respect to Section I.E.1, Respondents have initiated their search for responsive documents concerning four petitioner statements that are the subject

of this motion.[3] Further, Respondents will provide Petitioners with any responsive documents in a timely manner. However, to the extent Petitioner's counsel seeks to discuss the contents of any classified statements with Petitioner, should the Court grant Respondents' motion, such a request is improper. Petitioner's counsel must abide by the requirements of Paragraph 29 of the this Court's September 11, 2008 Protective Order (Dkt. 235) regarding the newly discovered evidence just as counsel must with regards to all other classified statements. Petitioner articulates no basis for his extraordinary request to bypass these requirements.

CONCLUSION

For the reasons set forth above and in Respondents' opening memorandum, the Court should permit Respondents to amend the factual returns for ISNs 256, 564, 569, and 839 to add the declarations and exhibits identified on Exhibit A (Dkt. 434-2) and submitted in the classified supplement to Respondent's opening memorandum (Dkt. 434).

[3] Two are statements of ISN 569, and two are statements of ISN 839.

Date: April 29, 2009

Respectfully submitted,

MICHAEL F. HERTZ
Deputy Assistant Attorney General

TERRY M. HENRY
Assistant Branch Director

s/ Ryan G. Lee
ANDREW I. WARDEN
PAUL E. AHERN
PAUL CIRINO
RODNEY PATTON
DAVID AVILA
PAUL DEAN
TIMOTHY A. JOHNSON (Va. Bar No. 73077)
RYAN G. LEE
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
Washington, DC 20530
Tel.: 202-305-8900
ryan.lee2@usdoj.gov