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SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE
LAW DIVISION - CIVIL PART

DOCKET NO. ESX-L-6496-22

ERIC INSELBERG,

Plaintiff,

v.

MORGAN STANLEY SMITH BARNEY, LLC, CHRISTOPHER P. ARNELLA, WILLIAM D. ARD, WILLIAM BRONSTEEN, and JOHN DOES A-Z,

Defendants,

and

STOCKTWITS, INC.,

Nominal Defendant.

OPINION

Decided: September 20, 2024

Michael S. Kasanoff, LLC, Bois Schuller Flexner, Arsenault & Fassett, LLC, and Bondarowicz & Asso., LLC, attorneys for Plaintiff (Michael S. Kasanoff, Esq. on the brief)

Davis + Gilbert LLP and Kennedys CMK LLP, attorneys for Defendant William Bronsteen (Ina B. Scher, Esq. on the brief)

Marino, Tortorella & Boyle, P.C., attorneys for Defendants Morgan Stanley Smith

Barney, LLC, Christopher P. Arnella and William D. Ard

SANTOMAURO, D., J.S.C

Plaintiff Eric Inselberg moves to compel discovery from defendant William Bronsteen ("Bronsteen"). Specifically, plaintiff seeks an order requiring Bronsteen to execute, and provide to plaintiff, a United States Department of Homeland Security ("DHS") Authorization Form consenting to DHS disclosing records relating to an investigation it performed concerning Bronsteen, a DHS agent. Bronsteen opposes the motion. For the reasons set forth below, plaintiff's motion is denied without prejudice.

I. BACKGROUND

Plaintiff's discovery application, as well as the background of this dispute, are anything but straightforward. Plaintiff filed this action against various John Doe defendants on November 1, 2022, alleging that plaintiff is a victim of identity theft by the John Doe defendants. Specifically, plaintiff claimed that the John Doe defendants illegally stole his identify and committed multiple invasions of privacy by posting multiple false, disparaging posts under the names "EricInselberg" and "JoeSkibaGiants" on a stock message board site known as StockTwits owned by nominal defendant StockTwits, Inc. Complaint (Transaction Id. No. LCV20223830341) at ¶¶ 3-5, 7-11.

Thereafter, plaintiff issued subpoenas to further investigate the alleged identify theft. Plaintiff learned from the responses to subpoenas to StockTwits that the "EricInselberg" and "JoeSkibaGiants" accounts were established with two phony email addresses. See First Amended Complaint ("FAC") (Transaction Id. No. LCV20233117855) at ¶¶ 41-45. Plaintiff then filed his FAC on October 13, 2023. See id.

The FAC asserted claims against defendant Morgan Stanley Smith Barney, LLC ("Morgan Stanley"), defendant Christopher P. Arnella ("Arnella"), who is a licensed securities financial advisor, licensed insurance agent, and First Vice-President, Senior Portfolio Manager, Financial Advisor with Morgan Stanley, and defendant William D. Ard ("Ard"), a former Morgan Stanley licensed securities financial advisor (Morgan Stanley, Arnella, and Ard collectively, the "Morgan Stanley defendants"). Id. at Nature of the Action; ¶¶ 10-13. Plaintiff claimed that he had previously initiated an arbitration against the Morgan Stanley defendants relating to their role in plaintiff's investment in Amarin Corporation ("Amarin") that was filed with the Financial Industry Regulatory Authority ("FINRA") (the "Dispute"). Id. at Nature of the Action; ¶¶ 30, 144. Specifically, plaintiff alleged that he had been wrongfully indicted for alleged fraud concerning sports memorabilia (the indictment was ultimately dismissed by the government), and thereafter sued the New York Giants for causing the wrongful indictment. When

plaintiff settled the lawsuit against the Giants, Ard contacted plaintiff about managing plaintiff's money at Morgan Stanley and introduced plaintiff to Arnella. Plaintiff invested moneys with the Morgan Stanley defendants – with the bulk of his account ultimately invested in Amarin. Amarin's stock price ultimately plunged, which resulted in plaintiff suffering financial losses and initiating the Dispute. Id. at ¶¶ 24-30.

Plaintiff's FAC alleged that while the Dispute, which ultimately settled, was pending, Morgan Stanley, Arnella, and Ard engaged in a scheme to adversely impact plaintiff's claim in the Dispute by stealing his identify and posting information on StockTwits as if it were plaintiff posting. Id. at Nature of the Action; ¶¶ 31-35, 65-82, 92-97. The FAC also asserted claims against certain of Anrella's relatives, a "Jeffrey Bronski," who was alleged to be the Director of IT at the New York branch of Oversea-Chinese-Banking-Corporation Ltd. ("OCBC"), and OCBC, all of whom plaintiff alleged were part of the scheme. Id. at ¶¶ 14-17, 42-43, 62-63.

Plaintiff's FAC also named John Doe individuals as defendants, alleging that these individuals posted under the names "EricInselberg" and "JoeSkibaGiants." Id. at ¶ 18. Although identified as separate John Doe defendants in the FAC, it appears that plaintiff knew, at the time the FAC was filed, that the separate John Doe defendants were a single individual, as well as the identity of that individual (i.e. Bronsteen). Specifically, prior to plaintiff filing the FAC, the John Doe defendants

filed a motion for a protective order and a motion to quash in connection with two of subpoenas issued by plaintiff in this action. See Motion for a Protective Order (Transaction Id. No. LCV20231403829), Motion to Quash (Transaction Id. No. LCV20231490820). The motion for a protective order stated that plaintiff knew the names of the John Doe defendants identified in the Complaint (and their employer) because plaintiff or plaintiff's counsel had filed a grievance against them with their employer. See Certification of Ina B. Scher, Esq. (Transaction Id. No. LCV20231403829) at ¶¶ 8-12. In addition, the motion to quash noted that the John Doe defendants' counsel had previously identified them to plaintiff's counsel. See Certification of Ina B. Scher, Esq. (Transaction Id. No. LCV20231490820) at ¶¶ 7-10. Moreover, even though the FAC named separate John Doe defendants, it asserted factual allegations alleging that a single John Doe defendant was a DHS agent, admitted on tape that he authored all of the StockTwits posts, and claimed that he acted alone and does not know the other defendants. FAC at Nature of the Action; ¶¶ 18, 44-48.

The court ultimately allowed the disclosure of the John Doe defendant's name (i.e. Bronsteen) and employer (i.e. the DHS). Plaintiff then filed a Seconded Amended Complaint ("SAC") on March 19, 2024. The SAC, which is plaintiff's current operative pleading, asserts that Bronsteen, a DHS agent and a friend of plaintiff's brother-in-law, posted under the names "EricInselberg" and

"JoeSkibaGiants" on StockTwits, and schemed with the Morgan Stanley defendants to injure plaintiff. SAC (Transaction Id. No. LCV2024716163) at ¶¶ 47-86. The SAC, which does not include the other Arnella family members, Bronski, or OCBC as defendants, asserts a number of causes action against Bronsteen and the Morgan Stanley defendants, including a violation of N.J.S.A. § 2A:38A-3 (New Jersey Computer Related Offenses Act), invasion of privacy, intentional infliction of emotional distress, violation of N.J.S.A. § 2C:41-2 (racketeering), and civil conspiracy. Id. at pp. 36-46. In summary, plaintiff alleges:

> 1. Plaintiff Eric Inselberg believed he could trust Morgan Stanley and his long-time friend and investment advisor, Defendant Bill Ard. Plaintiff thought his money would be managed wisely and his personal information safeguarded. He thought Morgan Stanley would do right by him. He was wrong.
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> 2. After Ard and Defendant Chris Arnella lost Plaintiff's wealth on a risky bet in a one-drug biotech company, Plaintiff initiated an arbitration against them and their employer, Morgan Stanley, with the Financial Industry Regulatory Authority ("FINRA"). Rather than play fair in the arbitration, Defendants sought to fabricate a record from which they could argue that Plaintiff was a sophisticated investor who instructed Ard and Arnella to put all of his wealth in one speculative stock. Defendants sought to hurt and take advantage of Plaintiff a second time.
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> 3. To do this, Defendants stole Plaintiff's identity and established fake social media accounts while the arbitration was pending. Defendants posted a string of messages online, targeting Plaintiff not only to support their arbitration defense but also to cause Plaintiff severe emotional distress. Defendants knew deeply personal information about Plaintiff, including a history of trauma from a wrongful indictment where perjured testimony was used to falsely implicate Plaintiff, who was innocent, in a criminal scheme. Defendants misused this

> information to create and post content based on Plaintiff's personal and financial history, exploiting his emotional vulnerabilities.
>
> 4. Then, Morgan Stanley affirmatively used this fake social media history to discredit Plaintiff in the arbitration, writing directly to the arbitration panel and describing Plaintiff's allegations of identity theft as "preposterous." Morgan Stanley claimed that Plaintiff's identity theft allegations "show that [Plaintiff] is not credible and will do and say anything he believes to be in his interest, regardless of the truth."
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> 5. Plaintiff's ability to litigate the arbitration was destroyed. He was forced to settle on terms favorable to Morgan Stanley. The theft of Plaintiff's personal information and the impersonation of his identity triggered Plaintiff's posttraumatic stress disorder ("PTSD"), and he suffered and will continue to suffer severe emotional distress from Defendants' conduct for which he is receiving ongoing psychiatric treatment.
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> [Id. at ¶¶ 1-5.]

Bronsteen and the Morgan Stanley defendants filed separate answers to the SAC. Both answers assert that Bronsteen admits he was acting alone. See Bronsteen Answer (Transaction Id. No. LCV20241345009) at ¶ 76; Morgan Stanley defendants' Answer (Transaction Id. No. LCV20241231165) at ¶ 76.

The instant motion relates to a DHS investigation into Bronsteen after plaintiff's counsel contacted DHS's Office of Professional Responsibility ("OPR") regarding the alleged scheme to injure plaintiff. Specifically, on March 7, 2023 (prior to plaintiff filing the FAC), plaintiff's counsel sent a letter to OPR purporting to alert OPR that evidence implicated Bronsteen in a conspiracy with the Morgan Stanley defendants to "misappropriate [plaintiff's] personal information for

purposes of establishing fraudulent online accounts designed to harass, defame, and discredit" plaintiff in connection with the Dispute. Certification of Michael S. Kasanoff, Esq. ("Kasanoff Cert.") (Transaction Id. No. LCV20241900409) at Ex. B. On November 14, 2023, plaintiff's counsel made a request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for OPR's file relating to the Bronsteen investigation. Id. at Ex. C. The Immigration and Customs Enforcement ("ICE") FOIA Office responded on January 2, 2024, stating in relevant part:

> While processing your request, the U.S. Citizenship & Immigration Services (USCIS) located records that fall under the purview of the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE). Accordingly, your request was referred to this office for processing and direct response to you.
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> Please be advised that DHS regulations require, in the case of third party information requests, a statement from the individual verifying his or her identity and certifying that individual's agreement that records concerning him or her may be accessed, analyzed and released to a third party. See 6 C.F.R. § 5.21(g). Because you have not provided this documentation with your request, we are unable to initiate a search for responsive records.
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> Please provide the requested documentation within 30 days from the date of this letter, or we will assume you are no longer interested in this FOIA/PA request, and the case will be administratively closed. This is not a denial of your request. Upon receipt of a perfected request, you will be advised as to the status of your request.
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> [Id. at Ex. D (emphasis added).]

On April 24, 2024, plaintiff's counsel wrote Bronsteen's counsel to request that Bronsteen execute an Authorization Form for plaintiff's counsel to submit to DHS in connection with its FOIA request. Specifically, the request stated:

> As you are aware, Plaintiff requested through our co-counsel the disclosure of DHS's investigative file with respect to Mr. Bronsteen. Attached is a copy of that FOIA requested dated November 10, 2023. Also attached is the response from DHS dated January 2, 2024, confirming that DHS likely has responsive documents, but that DHS requires your client to authorize their disclosure. The third attachment is the Authorization Form provided by DHS.
>
> We ask that your client voluntarily complete and return the Authorization Form so that we may re-submit the FOIA Request. The December 20, 2023 Letter of Closure that you submitted to the Court in this action confirms that the DHS Office of Human Capital, Employee Relations opened Management Inquiry Case No. 202306176 "regarding an allegation of unprofessional use of social media to create fictitious stocktwits accounts." That file unquestionably contains documents and/or information that is relevant to this action within the broad scope of R. 4:10-2.

[Id. at Ex. G.]

Bronsteen's counsel responded in a May 1, 2024 letter stating in relevant part:

> As we notified your client and the Court, the Investigation "did not reveal actionable misconduct" and was closed on December 20, 2023 without further action. My client does not consent to the disclosure of the information sought in your proposed FOIA request and declines to voluntarily sign the authorization you seek and that is required by 6 C.F.R. § 5.21(g).

[Id. at Ex. H.[1]]

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[1] The motion record confirms the outcome of the investigation reported by Bronsteen's counsel. Specifically, ICE sent a December 20, 2023 letter to Bronsteen stating:

> On October 26, 2023, the Office of Human Capital, Employee Relations (ER), received Management Inquiry Case # 202306176 regarding an allegation of unprofessional use of social media to create fictitious stockwits accounts.

Following receipt of this response, plaintiff served document requests on Bronsteen. Id. at Ex. I. The document requests include a request for: "All Documents and Communications relating to facts in paragraph 73 of Your Answer including, but not limited to, Documents relating to the investigation undertaken by Your employer's Office of Professional Responsibility." Id. On July 31, 2024, plaintiff filed the instant motion to compel discovery, which seeks an order compelling Bronsteen to execute the federal Authorization Form.

II. ANALYSIS

Plaintiff's motion asserts that the Bronsteen should be ordered to authorize the release of the federal investigation file in accordance with his discovery obligations because the file and documents are relevant to plaintiff's claims and within Bronsteen's possession, custody, or control. The court declines to do so. While any documents that Bronsteen possesses relating to the federal investigation are subject to plaintiff's discovery requests, the court does not agree that, on this record, it can compel Bronsteen to assent to the federal government producing the

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> This is notice that the above referenced action was reviewed by me, and it was determined that no action will be taken as the investigative file did not reveal actionable misconduct on your part.
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> Accordingly, this investigation is administratively closed without further action.
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> [Kasanoff Cert. at Ex. F.]

federal government's documents relating to the investigation – particularly where it is not even clear that the federal government has or would produce such documents.[2]

As an initial matter, the court has concerns regarding the nature of relief sought by plaintiff here – an order compelling a party to sign an authorization for a third-party to release that third-party's records in the possession, custody, or control of the third-party. Typically, a party seeking discovery from a third-party utilizes the subpoena process authorized by the Court Rules. See Lipsky v. N.J. Ass'n of Health Plans, Inc., 474 N.J. Super. 447, 465 (App. Div. 2023) ("Regarding non-parties, Rule 4:18-1(d) states: 'This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.' The Court Rules also provide for subpoenas to be issued to non-parties, see Rules 1:9-1 to 1:9-6, and 4:14-7, including subpoenas for the production of documents, Rules 1:9-2 and 4:14-7(a) and (c). Indeed, the use of subpoenas is preferred to a proceeding under Rule 4:18-1(d)."). Further, although a party can be compelled to provide authorization for a third-party to release medical records, that

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[2] The federal government's response to plaintiff's FOIA request states "the U.S. Citizenship & Immigration Services (USCIS) located records that fall under the purview of the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE)." Kasanoff Cert. at Ex. D (emphasis added). Nowhere does the federal government's response indicate that the records are "responsive" to plaintiff's FOIA request. Indeed, the federal government's response specifically states that it was "unable to initiate a search for responsive records." Id. (emphasis added).

compulsion is specifically required by Court Rule. R. 4:17-4(f) ("Release of Medical Records. Subject to the issuance of a protective order for good cause under R. 4:10-3, a plaintiff or a counterclaimant in any action in which damages are sought for personal injuries shall serve, contemporaneous with his or her answers to interrogatories, an executed form authorizing disclosure to the opposing party or parties, for purposes of the litigation, of the plaintiff's or counterclaimant's medical records pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1301 et seq., as to each health care provider named in his or her answers to interrogatories excluding non-treating expert witnesses.").

The court acknowledges that the absence of any Court Rule directly on point for the type of records at issue here is not, however, dispositive. Further, the court can envision there might be circumstances where a party might be compelled to authorize the release of certain records held by a third-party – for example, tax returns – if the party has placed the information in those records at issue. However, that is not what transpired here. Rather, plaintiff instigated the investigation of Bronsteen by his employer that created any records that may exist, and now seeks to compel Bronsteen to authorize the federal government to release those records.

Notwithstanding the court's preliminary concerns, the court has evaluated plaintiff's motion to determine whether there is a basis to grant the relief requested. The parties expend large portions of their submissions addressing the impact of the

Privacy Act, 5 U.S.C. § 552a, and the DHS regulation at 6 C.F.R. 5.21. However, the court must begin its analysis with applicable New Jersey law regarding plaintiff's discovery requests.

New Jersey's discovery rules are to be construed liberally in favor of broad pretrial discovery." Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997). Indeed, "[o]ur court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts." Jenkins v. Rainner, 69 N.J. 50, 56 (1976). Notwithstanding the foregoing,"parties' discovery rights are not unlimited." Piniero v. N.J. Div. of State Police, 404 N.J. Super. 194, 204 (App. Div. 2008). Rule 4:18-1(a) governs document requests and states:

> (a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on behalf of that party, to inspect, copy, test, or sample any designated documents (including writings, drawings, graphs, charts, photographs, sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, by the respondent into reasonably usable form), or to inspect, copy, test, or sample any designated tangible things that constitute or contain matters within the scope of R. 4:10-2 and that are in the possession, custody or control of the party on whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party on whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of R. 4:10-2.
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> [R. 4:18-1(a) (emphasis added).]

Here, Plaintiff argues that the federal investigation file and documents are within Bronsteen's "possession, custody, or control" because he "possesses the legal right to obtain OPR's investigation files and to permit others – such as Plaintiff – to have access as well." Plf. Brf. (Transaction Id. No. LCV20241900409) at p. 8.

There is not a significant amount of New Jersey case law analyzing the issue of "possession, custody, or control." There is certainly authority finding that a subsidiary's documents may, under appropriate circumstances, be considered in the control of a parent corporation. See, e.g., D'Agostino v. Johnson & Johnson, 242 N.J. Super. 267, 274 (App. Div. 1990); Gross v. Kennedy, 15 N.J. Super. 118, 121 (Law Div. 1951) (considering prior rule requiring "possession, custody, or control," and stating: "Where, as in this case, the books in question are not those of a party but of corporations not a party to the suit, it would seem that three elements should be considered by the court in determining as a matter of discretion whether the defendant should be subjected to the order here sought: (a) whether good cause has been shown for the examination; (b) whether one not a party to the suit may be unduly affected by revelation of its private affairs; and (c) whether the books and records are within the possession, custody or control of the other party."). In addition, the Appellate Division recently suggested in Lipsky that documents need to "belong" to a party in order for the party to be deemed to have possession, custody, or control over the documents. 474 N.J. Super. 447. There, the court held that the

Department of Health was not required to produce data on its employee's personal phones because such data was not in the Department of Health's possession, custody, or control. As the court stated:

> The Department cannot be obligated to produce data from employees' personal electronic devices unless it has 'possession, custody or control' over that data. R. 4:18-1(a). And it cannot be deemed in possession, custody or control of any data that does not belong to the government. Cf. N.J.S.A. 47:1A-1 to -13 (Open Public Records Act (OPRA) requiring public access to 'government records'). That is, when interpreting Rule 4:18-1, the Department cannot be deemed to have "possession, custody or control," over any electronic data on employees' personal electronic devices unless the data comprises government records.
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> [Id. at 471-72.]

In construing the phrase "possession, custody, or control" in Rule 4:18-1(a) the court also finds federal law interpreting Federal Rule of Civil Procedure 34(a) instructive as that rule states "[a] party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: (A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form . . . ." Fed. R. Civ. P. 34(a) (emphasis added). "In the Rule 34 context, control is

defined as the legal right to obtain required documents on demand." Mercy Catholic Med. Ctr. v. Thompson, 380 F.3d 142, 160 (3d Cir. 2004). See also In re Benicar (Olmesartan) Prods. Liab. Litig., 319 F.R.D. 139, 142 (D.N.J. 2017) ("Control exists where a party has the legal right or ability to obtain the documents from another source upon demand.").[3] The mean of "control" under Federal Rule of Civil Procedure 34 – with its focus on a party's legal right to obtain the documents – is essentially the meaning ascribed by plaintiff in his moving papers

Here, there is no evidence that Bronsteen has the legal right or ability to obtain the federal investigation file and documents upon demand. First, with respect to plaintiff's prior FOIA request, the January 2, 2024 letter from the ICE FOIA Office indicates only that the Authorization Form would trigger a search for responsive records, not that any such records – assuming they exist – would automatically be produced on demand.[4] See Kasanoff Cert. at Ex. D ("Because you have not provided

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[3] Federal courts have applied a similar approach in construing "possession, custody, or control" under Federal Rule of Civil Procedure 45, which governs subpoenas. See, e.g., In re Novo Nordisk Sec. Litig., 530 F. Supp. 3d 495, 502 (D.N.J. 2021) ("A Rule 45 subpoena may require a person to produce documents in that person's 'possession, custody, or control.' For purposes of this rule, control has been found where a party has the legal right to obtain the documents required on demand." (internal quotation marks and citation omitted)).

[4] Based on the record before the court, plaintiff's prior FOIA request is closed. Plaintiff would, therefore, need to initiate a new FOIA request even assuming it obtained an Authorization Form executed by Bronsteen. See Kasanoff Cert. at Ex. D ("Please provide the requested documentation within 30 days from the date of this

this documentation with your request, we are unable to initiate a search for responsive records. . . . Upon receipt of a perfected request, you will be advised as to the status of your request"). Moreover, even if potentially responsive records exist, FOIA includes a number of statutory exemptions available to the federal government that, if applicable, could preclude disclosure. 5 U.S.C. 552(b). See also Davin v. United States DOJ, 60 F.3d 1043, 1049 (3d Cir. 1995) ("FOIA requires governmental agencies to make promptly available any records requested unless the requested information is exempt from disclosure under one of the nine specific exemptions set forth in the FOIA statute itself."). The court cannot predict whether any such exemptions would be asserted – or if asserted would be found applicable if challenged – because the ICE FOIA Office's January 2, 2024 letter makes clear that the ICE FOIA Office had not even undertaken any analysis of potential exemptions because plaintiff's FOIA request was not perfected.[5] Nevertheless, that the federal

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letter, or we will assume you are no longer interested in this FOIA/PA request, and the case will be administratively closed.").

[5] For this reason the court is not persuaded by plaintiff's argument that "[t]he only obstacle DHS has raised is the need for Bronsteen's consent." Reply Brf. (Transaction Id. No. LCV20242088809) at p. 3. The federal government raised Bronsteen's consent as the only obstacle to "initiat[ing] a search for responsive records," Kasanoff Cert. at Ex. D (emphasis added) – which is a far cry from saying that it is the only obstacle to producing all such records. In short, the court does not read the January 2, 2024 letter from the ICE FOIA Office as reflecting that the federal government undertook any analysis of whether any of the requested documents are exempt from disclosure much less made a determination that no such exemptions

government can assert exemptions that preclude disclosure belies plaintiff's claim that the federal investigation file and documents would be disclosed if Bronsteen would only execute the Authorization Form.

Second, the court does not find that the Privacy Act demonstrates that Bronsteen has possession, custody, or control over the federal investigation file and documents as asserted by plaintiff. The Privacy Act "authorizes the government to keep records pertaining to an individual only when they are 'relevant and necessary' to an end 'required to be accomplished' by law. NASA v. Nelson, 562 U.S. 134, 142, 131 S. Ct. 746 (2011) (quoting 5 U.S.C. § 552a(e)(1)). "Individuals are permitted to access their records and request amendments to them." Id. (citing 5 U.S.C. §§ 552a(d)(1), (2)). "Subject to certain exceptions, the Government may not disclose records pertaining to an individual without that individual's written consent." Id. Specifically, 5 U.S.C. § 552a(b) provides:

> "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
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> (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
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> (2) required under section 552 of this title [5 USCS § 552];

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apply and production of all of the requested documents is simply awaiting receipt of Bronsteen's consent.

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office [Government Accountability Office];

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31 [31 USCS § 3711(e)]."

[Id.]

The statutory definitions included in the Privacy Act reflect that Bronsteen does not have possession, custody, or control over the federal government's investigation file and documents. First, the Privacy Act governs an "agency," which is defined as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency). 5 U.S.C. § 552(f).[6] Second, "record" is defined as "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." 5 U.S.C. § 552a(a)(4) (emphasis added). Third, a "system of records" is defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5) (emphasis added). Collectively, these definitions demonstrate that the

[6] 5 U.S.C. § 552a(a)(1) defines "agency" by reference to the definition of agency in FOIA, 5 U.S.C. § 552(f).

Privacy Act applies to records that are in the possession, custody, and control of the applicable federal agency – in this case DHS. There is nothing in these definitions to suggest that the individual to whom the records relate also has possession, custody, and control over the records that are subject to the Privacy Act.[7]

Nevertheless, plaintiff asserts that the Privacy Act compels the relief sought by plaintiff, and that "[i]n order to withhold information, an agency must show that the document falls within a FOIA exemption and does not fall within an exception to the Privacy Act." Plf. Brf. at p. 11. This argument, however, seemingly ignores that the Privacy Act independently permits agencies to exempt records from disclosure. Indeed, the Privacy Act expressly authorizes federal agencies to promulgate regulations exempting certain records from disclosure. 5 U.S.C. § 552a(j) and a(k).[8]

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[7] The Privacy Act would seemingly not apply to records possessed by the individual or third-parties not subject to the Privacy Act. See Lohrenz v. Donnelly, 187 F.R.D. 1, 10 (D.D.C. 1999) ("In general terms, the Privacy Act prohibits a government agency from disclosing without the subject's consent any item, collection, or grouping of information about an individual that is maintained by an agency in a system of records. The Privacy Act applies only to federal government 'agencies.' Therefore, records within the possession or custody of plaintiff are not covered by the Privacy Act, even if a government agency houses copies of the same material." (internal citations omitted)).

[8] These statutory provisions in the Privacy Act state:

> (j) General exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title [5 USCS § 553],

to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title [5 USCS § 553(c)], the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title [5 USCS § 553], to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to provisions of section 552(b)(1) of this title [5 USCS § 552(b)(1)];

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege,

or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

See Mobley v. CIA, 806 F.3d 568, 586 (D.C. Cir. 2015) ("Also like FOIA, the Privacy Act carves out exemptions from disclosure when a system of records meets certain criteria."); Porter v. United States Dep't of Justice, 717 F.2d 787, 798 (3d Cir. 1983) ("In some instances under the Privacy Act an agency may (1) exempt a system of records (or a portion thereof) from access by individuals in accordance with the general or specific exemptions (subsection (j) or (k)) … . In a few instances the exemption from disclosure under the Privacy Act may be interpreted to be broader than the Freedom of Information Act."). Pursuant to these provisions, DHS has promulgated regulations exempting various systems of its electronic and paper records from certain provisions of the Privacy Act and has exempted certain categories of records within those systems. See 6 C.F.R. Appendix C to Part 5 (DHS Systems of Records Exempt From the Privacy Act).

Because the federal government can exempt records from disclosure under the Privacy Act, the court cannot conclude that Bronsteen's ability to "request" from

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> At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title [5 USCS § 553(c)], the reasons why the system of records is to be exempted from a provision of this section.
>
> [5 U.S.C. § 552a(j) and a(k).]

DHS (or "consent" to DHS releasing), 5 U.S.C. § 552a(b), records relating to the federal investigation establishes that he has possession, custody, or control over such records. On the contrary, similar to the court's analysis of FOIA, that the federal government has the statutory and regulatory power to potentially preclude such disclosure indicates Bronsteen does not have the legal right to obtain such record on demand, and, as such, Bronsteen lacks possession, custody, or control of the federal government's investigation file and documents. Plaintiff has not provided any authority to the contrary.[9]

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[9] Plaintiff asserts that "[c]ourts in similar situations have ordered a party to consent to the release of information in the possession of a third party, including in the context of the Privacy Act." Plf. Brf. at p. 9. The court reviewed the cases cited by plaintiff – Doherty v. Purdue Props. I, LLC, 153 N.E.3d 228 (Ind. Ct. App. 2020) and Freeman v. Lincoln Beach Motel, 182 N.J. Super. 483 (Law Div. 1981). Both cases involved consent to release medical records where the plaintiffs had sued for personal injuries and placed their medical condition at issue. See Doherty, 153 N.E.3d at 238 (concluding that plaintiffs could not decline to request that the Social Security Administration release materials relevant to one of the plaintiff's "medical history on the basis that their production would be 'involuntary' when they themselves put her medical history in issue"); Freeman, 182 N.J. Super. at 486 ("Where a party controls records which contain factual material by the granting or withholding of consent, the court may require that party to execute authorizations supplied by opposing counsel. Such authorizations shall not be in blank, but shall state specifically the particular hospital or doctor from whom the records are sought as well as the relevant dates to which discovery shall be confined."). As noted above, discovery of a party's medical records is a separate issue under New Jersey law and is now governed by Rule 4:17-4(f). In addition, the investigation here was placed at issue by plaintiff's initiation of the investigation and subsequent FOIA request. Finally, the court's decision is premised on a finding that Bronsteen does not have possession, custody, or control over the federal government's investigation file and documents because DHS can exemption, under both FOIA and the Privacy Act, documents regardless of whether their release is requested or consented to by

The court also addresses plaintiff's assertion that the Privacy Act authorizes the court to include an "instruction that the documents Plaintiff requested should be released by DHS to Plaintiff." Plf. Brf. at p. 11. In support of this argument, plaintiff relies on the exception in the Privacy Act that permits disclosure by the federal government "pursuant to the order of a court of competent jurisdiction" regardless of whether the release is requested or consented to by the individual to whom the record pertains. 5 U.S.C. § 552a(b)(11). The court has reviewed this statutory provision and the decisions from other jurisdictions relied upon by plaintiff,[10] and is not persuaded by plaintiff's argument.

Bronsteen. The court in Doherty – the only decision of the two addressing the Privacy Act – did not discuss or consider the import of a federal agency's potential exemptions under the Privacy Act.

[10] Further, while reported federal court opinions interpreting federal law may be persuasive authority, Glukowsky v. Equity One, Inc., 180 N.J. 49, 64 (2004) ("[m]oreover, the principle of comity instructs state courts to give due regard to a federal court's interpretation of a federal statute"), neither they, nor reported opinions from other states' courts are binding or controlling on a New Jersey court, Meadowlands Basketball Assocs. v. Director, Div. of Taxation, 340 N.J. Super. 76, 83 (App. Div. 2000) ("While New York's sales tax statute served as the model for our statutory scheme, its interpretive decisions are, of course, not binding or controlling."). Moreover, as many of the opinions relied upon by plaintiff are unreported, they possess even less utility. As Rule 1:36-3 states:

> No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in New Jersey Tax Court Reports or an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited

The court finds that "order of a court of competent jurisdiction" exception set forth in 5 U.S.C. § 552a(b)(11) applies to the federal government where the records have been subpoenaed or the applicable federal agency is a party to the litigation. See, e.g., Laxalt v. McClatchy, 809 F.2d 885, 888 (D.C. Cir. 1987) (discussing the application of the exception to records that were subpoenaed, stating: "Neither the statute nor anything in its legislative history specifies the standards for issuance of such a court order. We therefore find no basis for inferring that the statute replaces the usual discovery standards of the [Federal Rules of Civil Procedure] -- in particular, Rules 26 and 45(b) -- with a different and higher standard."); Bruce v. United States, 621 F.2d 914, 916 n.3. (8th Cir. 1980) ("[I] t is clear that the Privacy Act will prevent disclosure in this case of the subpoenaed documents unless the court specifically orders them produced pursuant to section 552a(b)(11)"); Gutierrez v. Benavides, 292 F.R.D. 401, 406 (S.D. Tex. 2013) (granting motion to compel against

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> by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel."
>
> [Id.]

See also In re Application for Change of name Bacharach, 344 N.J. Super. 126, 133 (App. Div. 2001) (noting that "[a]s an unpublished opinion, [an unreported out-of-state opinion] lacks authority" pursuant to Rule 1:36-3). The also court notes that plaintiff did not comply with the procedural requirements of Rule 1:36-3 in citing to the unpublished opinions relied upon by plaintiff here because plaintiff failed to attach the required certification with plaintiff's motion papers.

defendant United States, but directing parties to work out a protective order in light of the Privacy Act concerns regarding information relating to records indicating official misconduct, abuse of power, or constitutional violations by individual defendants); Johnson v. Folino, 528 F. Supp. 2d 548, 552 (E.D. Pa. 2007) (denying motion to compel unredacted copies of memorandum provided by Federal Bureau of Investigation in response to subpoena in light of Privacy Act concerns notwithstanding that the court can order it pursuant to 5 U.S.C. § 552a(b)(11)); Mary Imogene Bassett Hosp. v. Sullivan, 136 F.R.D. 42, 49 (N.D.N.Y. 1991) (ordering defendant United States Department of Health and Human Services to produce Medicare patient records to plaintiff hospital over Privacy Act concerns, which court determined could be addressed in a protective order).

This makes logical sense. As noted above, the Privacy Act applies to records maintained by a federal agency, which is simultaneously subject to various disclosure requirements, exceptions to withholding, and exemptions to disclosure under FOIA and the Privacy Act. It would be odd for Congress to have enacted a statute allowing a court of competent jurisdiction to compel that federal agency to produce records without that federal agency having the opportunity to weigh in on the records and the potentially applicable disclosure obligations, exceptions, and exemptions. These concerns are obviated when the federal agency is a party. But where, as is the case here, the federal agency is a stranger to the litigation (and indeed

may be completely unaware of the litigation), prudence dictates that the federal agency should have the opportunity to express its view on its disclosure obligations under the specific facts that may be at issue. Under such circumstances, a subpoena to the applicable federal agency for records subject to the Privacy Act is required for disclosure of such records via an "order of a court of competent jurisdiction."

The issues raised by the positions taken by plaintiffs under the circumstances presented here are perhaps best illustrated by one of the cases relied upon by plaintiff – Tootle v. Seaboard C. L. R. Co. 468 So. 2d 237 (Fla. 5th Dist. Ct. App. 1984) (qualified by subsequently enacted Florida statute protecting medical communications as set forth Pic N' Save v. Singleton, 551 So. 2d 1244, 1245 (Fla. 1st Dist. Ct. App. 1989). See Plf. Brf. at p. 13. There, the defendant subpoenaed the psychologist that had met with plaintiff for the the social security administration to determine the plaintiff's potential rights to benefits under the administration's disability program. The federal government intervened and filed a motion to quash, which the trial court denied. The trial court then issued an order compelling the plaintiff to execute a written authorization to be filed with the social security administration allowing the plaintiff's psychologist's deposition to move forward. In rejecting a challenge to the trial court's decision, the Florida Court of Appeals stated:

> [T]he purpose of the federal privacy act and the privacy provisions of the social security act is to prevent government records on individuals

from being freely disclosed to other bodies that express an interest in the information contained therein. The social security act allows an individual to gain release of government records pertaining to him by means of a written authorization. Although this exception contemplates that the individual's request for disclosure will be voluntarily made, the instant case involves a plaintiff (Tootle) who has made a claim in a tort action regarding his mental and emotional condition, and the social security administration's records and the psychologist have information relevant to that claim. In this situation, the privacy interests claimed by Tootle must give way to the function of the discovery process, which is the discovery of facts relevant to the subject matter of the pending action. The plaintiff in a civil suit must cooperate in the discovery process, even if it means that he must authorize the disclosure of potentially prejudicial information which is not shielded from the reach of discovery by an overriding privilege.

Even if we held that the court acted improperly by ordering the written authorization, such action by the trial court would not compel this court to quash the order since the psychologist's deposition could be taken pursuant to the subpoena duces tecum and subsequent court order without Tootle's written authorization. The federal privacy act states that no agency of the federal government shall disclose any records pertaining to an individual unless that individual files a written request to have the records disclosed. See 5 U.S.C.A. § 552a(b). However, the statute under discussion contains twelve exceptions, one of them being that disclosure is "pursuant to the order of court of competent jurisdiction." 5 U.S.C.A. § 552a(b)(11). This broad exception should be strictly construed in favor of disclosure, especially in this type of situation where a state court rules on discovery matters in a state civil trial. . . .

In the instant case, the trial court order in question fits within this exception because it specifically reaffirmed the court's previous order compelling the psychologist to give his deposition, and stated that the psychologist's deposition may well lead to material and relevant discovery.

[Tootle, 468 So. 2d at 239 (emphasis added).]

The contrast between Tootle and the facts here is stark. In Tootle the court upheld the trial court's order compelling disclosure (ruling that the "written authorization" or "court of competent jurisdiction" exceptions in the Privacy Act would both be applicable) only after noting that: (1) defendant sought the subject discovery pursuant to a subpoena; (2) the federal government had an opportunity to offer its position; (3) the plaintiff had placed the subpoenaed evidence at issue; and (4) any overriding privileges would shield the records from disclosure. See id. Conversely, here, plaintiff seeks a court order compelling Bronsteen to execute a written authorization and compelling the federal government to release its records regarding the investigation of Bronsteen even though: (1) plaintiff is responsible for initiating that investigation and placing it at issue in this litigation by including allegations concerning the investigation in plaintiff's pleading, see FAC at ¶¶ 44-45; (2) plaintiff did not subpoena the records; and (3) the federal government has not had an opportunity to offer its position – including, without limitation, as to any overriding privileges that the federal government possesses that may shield the records from disclosure. In short, the circumstances here are anathema to the relief sought by plaintiff.

III. CONCLUSION

For the foregoing reasons, plaintiff's motion to compel is denied. The court's denial is without prejudice to plaintiff seeking the subject file and documents relating

to the investigation of Bronsteen via subpoena to the applicable federal agency(ies). The court further notes that nothing in this decision addresses whether such records must be disclosed pursuant to a subpoena, and the court has not made any ruling as to the discoverability of all such records or any potentially applicable basis to withhold production. The court's ruling is limited to the narrow issues raised by plaintiff's motion – i.e. whether, in the circumstances presented herein, the court can compel Bronsteen to consent to the release of such records to plaintiff or order the federal government to produce the records to plaintiff. The court rules that it cannot.