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OFFICE OF THE ATTORNEY GENERAL

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LITIGATION BUREAU

September 21, 2021

**BY ECF**

The Honorable Marcia M. Henry  
United States Magistrate Judge  
United States Courthouse  
225 Cadman Plaza East  
Brooklyn, New York 11201

Re: *Wilson v. Cheng, et al.*, 15-cv-0023 (CBA) (MMH)

Dear Judge Henry:

This Office represents the remaining three Defendants in this action, Terrence Cheng, Paisley Currah and Marcia Isaacson (“Defendants”). Defendants write in opposition to Plaintiff’s letter motion, dated August 20, 2021 (ECF No. 136), requesting that the Court “so order” Plaintiff’s proposed subpoena to nonparty Office of the New York State Attorney General’s (“OAG”) Public Integrity Bureau seeking its “Investigation File concerning plaintiff Dr. Joseph Wilson.” *See* ECF No. 136-1. For several reasons, Plaintiff’s letter motion should be denied in all respects.

As a preliminary matter, Plaintiff’s letter motion does not address Defendants’ two main objections to the nonparty discovery that Plaintiff seeks. As described in the parties’ Joint Status Report, filed on June 18, 2021, Defendants objected to Plaintiff’s attempt to obtain this nonparty discovery because (i) Plaintiff has not acted diligently or in a timely manner in seeking the nonparty discovery; and (ii) an investigation by a nonparty law enforcement agency has no relevance to Plaintiff’s three remaining claims—a claim of a Fourth Amendment violation by individual Defendants Currah and Isaacson; a common-law conversion claim against individual Defendants Currah and Isaacson; and a defamation claim against individual Defendant Cheng. *See* ECF No. 135, at 5-7, 9. Thus, Plaintiff’s motion, which focuses entirely on the law enforcement privilege, effectively ignores the primary bases for Defendants’ opposition to the proposed nonparty subpoena. As described below, and further detailed in the June 18<sup>th</sup> Status Report, each of the two independent grounds raised by Defendants warrants rejection of Plaintiff’s application.

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With respect to Plaintiff's lack of diligence, it is undisputed that Plaintiff *first* sought to obtain discovery of the OAG's Public Integrity Bureau's investigation file on October 14, 2020, more than a year after the close of the March 22, 2019 discovery deadline in this case. *See* ECF No. 135, at 5. Moreover, Plaintiff's efforts to obtain the investigation file (as well as several other discovery items now at issue) appear to be motivated by the fact that on April 28, 2020 -- long after the close of discovery -- new counsel appeared for Plaintiff (*see* ECF No. 118), and these new attorneys, who were not involved in the original discovery, apparently want an opportunity to re-do much of the discovery that Plaintiff's prior counsel already has taken or had the opportunity to take. *See* ECF No. 135, at 5. Finally, it is indisputable that, even before Plaintiff commenced this action, he knew that the OAG was investigating him, as reflected in Plaintiff's original complaint, filed on January 5, 2015, which contains allegations about a "criminal" investigation by the "NY AG." *See* ECF No. 1, ¶¶ 61(f) and (p), at 34-35.

In short, despite knowing about the OAG's investigation for more than *five years*, Plaintiff never sought to subpoena nonparty OAG for the Public Integrity Bureau's Investigation File until more than a year after discovery closed in this case. Plaintiff does not even attempt to explain, much less justify, this lengthy delay in any way. Having failed to pursue the Public Integrity Bureau's Investigation File diligently or in a timely manner, Plaintiff should not be afforded the opportunity to obtain that File now. *See* ECF No. 135, at 6-7 (citing cases). For this reason alone, Plaintiff's letter motion requesting that this Court "so order" the proposed subpoena should be denied in all respects.

In addition to Plaintiff's failure to act in a diligent and timely manner, Plaintiff's requested nonparty subpoena should be denied because Plaintiff's letter motion fails to demonstrate that an investigation conducted by the OAG is relevant to the claims or defenses in this case. "The party issuing the subpoena must demonstrate that the information sought is relevant and material to the allegations and claims at issue in the proceedings. . . . Essentially, the subpoenaed information must be both relevant and proportional to the needs of the case." *Sky Med. Supply Inc. v. SCS Support Claim Servs., Inc.*, No. 12-cv-6383, 2017 WL 1133349, at \*8 (E.D.N.Y. Mar. 24, 2017) (citations omitted). Plaintiff fails to meet his burden.

As Defendants stated in the Joint Status Report (*see* ECF No. 135, at 9), Plaintiff *never* previously even attempted to explain why the OAG investigation is relevant to the claims in this case. Now, in his August 20, 2021 letter motion, Plaintiff -- for the first time -- attempts to justify discovery of a nonparty, law enforcement agency file on the ground that the investigation file supposedly will reveal "whether defendants were acting at the direction of law enforcement," and also "who conducted the search, how it was conducted, what property belonging to Plaintiff was taken, and what happened to that property." *See* ECF No. 136, at 3. However, the investigation has no relevance to any of the claims in this case.

Specifically, the "search" that is at issue in Plaintiff's Fourth Amendment claim against individual Defendants Currah and Isaacson is the "search" conducted in January 2012 by CUNY at Plaintiff's former office at the CUNY Brooklyn College Graduate Center for Worker Education ("GCWE"). *See* Plaintiff's Fourth Amended Complaint, ECF No. 129, ¶ 48 ("In approximately January 2012, CUNY raided Plaintiff's office at the GCWE."). Plaintiff has never suggested that the OAG had any involvement whatsoever in that January 2012 "search." Rather, as Plaintiff's

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*own* pleading in this case acknowledged, the OAG Public Integrity Bureau’s involvement began *after* the January 2012 “search,” when Brooklyn College referred “criminal allegations against Plaintiff on or about [sic] April 2012, with the NY AG serving a subpoena on Defendant Brooklyn College on or about June 8, 2012, which subpoena was served as a result of the criminal allegations against Plaintiff.” *See* ECF No. 1, ¶ 61(p), at 35. Thus, as Plaintiff himself acknowledges, the OAG Public Integrity Bureau’s *first* involvement with any investigation of Plaintiff took place at least three months after the January 2012 “search” at issue in this action.

In short, the OAG Public Integrity Bureau did not conduct the “search” about which Plaintiff complains and, as Plaintiff himself acknowledged in his original complaint, CUNY was not acting at the “direction” of the OAG Public Integrity Bureau when it conducted its January 2012 “search” of Plaintiff’s GCWE office at 25 Broadway. Accordingly, the purported rationale for Plaintiff’s untimely attempt to obtain discovery from nonparty OAG is wholly unsupported, and the requested nonparty discovery is not relevant to the claims in this case.

In addition to providing an independent basis for rejecting the subpoena at issue, the lack of relevance of the OAG investigation also precludes Plaintiff from overcoming the law enforcement privilege that protects the requested discovery from disclosure (whether or not Defendants have standing to assert that privilege). Indeed, Plaintiff himself concedes that, in order to overcome that privilege, he must show, *inter alia*, that he has a “compelling need” for the investigation file. *See* ECF No. 136, at 2. Given the irrelevance of the OAG investigation to the claims in this action, Plaintiff cannot establish that he has any need for the discovery whatsoever, much less a “compelling need” sufficient to overcome the interests in its non-disclosure. *See* ECF No. 135, at 9.

For all the foregoing reasons, Defendants respectfully request that Plaintiff’s letter motion asking this Court to “so order” the proposed subpoena to subpoena nonparty OAG be denied in all respects.

I thank the Court for its attention to this matter.

Respectfully submitted,

*/s/ Mark E. Klein*

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