IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YANPING CHEN,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF DEFENSE, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants.

Civil Action No. 1:18-cv-3074-CRC

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO GOVERNMENT'S MOTION TO DISMISS

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INTRODUCTION

In response to illegal leaks to Fox News of personal information gathered during a criminal investigation, Plaintiff Yanping Chen brought this original civil action under the Privacy Act, 5 U.S.C. § 552a(g)(1)(D), against Defendants Federal Bureau of Investigation, Department of Justice, Department of Defense, and Department of Homeland Security (collectively, the "Government").

The Government does not challenge the sufficiency of the Complaint. Instead, in a ploy to escape accountability for the harm inflicted on Dr. Chen, its Motion to Dismiss argues only that her action is barred because of issues supposedly decided in *In re Search of 2122 21st Road North Arlington, Va.*, 17-cr-00236 (E.D. Va. 2018) (the "Search Warrant Proceeding"). In the Search Warrant Proceeding, the United States argued—and the court agreed—that Dr. Chen's Privacy Act claims could not be adjudicated until she filed a civil action under the Act. But now that Dr. Chen has done exactly that, the Government has reversed course, arguing that Dr. Chen's Privacy Act claims were fully adjudicated in the Search Warrant Proceeding, supposedly barring this civil action.

The Government cannot avoid responsibility through this bait and switch. It should not be permitted to argue in one proceeding that decisions on the Privacy Act must be deferred to a separate and subsequent lawsuit, and then argue that the later lawsuit is prohibited because of what supposedly happened in the earlier proceeding. In its attempt to invoke the doctrine of issue preclusion, the Government has both ignored the limits of the doctrine—which make it inapplicable here—and twisted the record of the previous proceeding. Because the Search Warrant Proceeding did not resolve any question of fact or law presented by the Complaint in this action, issue preclusion does not apply and the Motion to Dismiss should be denied.

BACKGROUND

Dr. Yanping Chen is a naturalized citizen of the United States who became the subject of an FBI investigation in 2010. Compl. ¶¶ 12, 15. In 2012, the FBI executed search warrants on Dr. Chen's home and the university she founded, seizing dozens of boxes of documents and personal items. Compl. ¶ 18. The FBI also interviewed her family, deployed a confidential informant, recorded her private conversations, and seized her computer at the airport. Compl. ¶ 16. After six years of investigation, the U.S. Attorney's Office for the Eastern District of Virginia informed Dr. Chen in March 2016 that no charges would be filed. Compl. ¶ 22.

In February 2017, Fox News published the first of three televised reports that relied heavily on leaks of government files about Dr. Chen, including many records collected or generated by the FBI in its investigation. Compl. ¶ 25. The leaked records and information disclosed in the reports included an FBI memorandum of an interview with Dr. Chen's daughter and Dr. Chen's immigration and naturalization forms. Compl. ¶ 26. Fox News also displayed personal photographs seized from Dr. Chen's home during the FBI search, including photos of Dr. Chen with her minor daughter, with her husband, and at the grave of her father. Compl. ¶ 31. These leaks damaged Dr. Chen personally and professionally. Compl. ¶¶ 38-42.

Following the first Fox News report, on March 10, 2017, Dr. Chen sought relief from Magistrate Judge John Anderson of the U.S. District Court for the Eastern District of Virginia, who had issued the search warrant for Dr. Chen's home. Specifically, she filed—within the docket from which the search warrant issued—a Motion to Show Cause Why Sanctions Should Not Issue (the "Show Cause Motion"). In that motion, Dr. Chen argued that the disclosure of investigative materials to Fox News by government agents violated Federal Rule of Criminal Procedure 6(e), as well as a sealing order previously issued by the magistrate. Show Cause Motion at 3-4, *In re Search*, No. 12-sw-1002 (E.D. Va. Mar. 10, 2017) (Defs.' App'x 4a-5a).

The Show Cause Motion sought a hearing to identify and sanction the government agents responsible for the unlawful disclosures. *Id.* at 4 (Defs.' App'x 5a). Magistrate Judge Anderson issued an initial ruling regarding the Show Cause Motion on May 8, 2017, determining that his sealing order had expired and that Dr. Chen had not established a *prima facie* violation of Rule 6(e). Order, *In re Search*, No. 12-sw-1002 (E.D. Va. May 8, 2017) (Pl.'s App'x 2a).

On May 22, 2017, Dr. Chen filed an addendum to the Show Cause Motion in which she asserted that government agents had leaked fruits of the search warrant in violation of the Privacy Act. Second Addendum to Mot. to Show Cause Why Sanctions Should Not Issue, *In re Search*, No. 12-sw-1002 (E.D. Va. May 22, 2017) (Defs.' App'x 21a). In response, the Government argued that Magistrate Judge Anderson lacked jurisdiction to consider any violation of the Privacy Act because the Act "limits the remedy of any claimant to a civil action" and restricts jurisdiction to "the district courts of the United States." Gov't's Response to Second Mot. to Show Cause at 2, *In re Search*, No. 12-sw-1002 (E.D. Va. June 5, 2017) (Defs.' App'x 26a). The Government expanded on that argument at a hearing, stating that Dr. Chen "has no standing in this context to raise the [Privacy Act] issue before this Court in the context of the issuance of a search warrant," that "[t]here is no remedy that the Court could provide to Dr. Chen in this hearing," that "this is not the right forum" for pursuing a Privacy Act claim, and that the magistrate "should do nothing … because jurisdiction here lies with the District Court." Tr. of Sept. 5, 2017 Mots. Hearing at 24:11-13, 25:3-5, 26:3-4, 21:7-8, *In re Search*, No. 12-sw-1002 (E.D. Va. Oct. 30, 2017) (Pl.'s App'x 26a, 27a, 28a, 23a) ("Sept. 5 Tr.").

In a Memorandum Opinion and Order, Magistrate Judge Anderson denied Dr. Chen's Show Cause Motion. Regarding Dr. Chen's allegations that the Government had violated the Privacy Act, Magistrate Judge Anderson agreed with the Government that "a proceeding for the

issuance of a search warrant cannot provide the relief sought by the movant under the Privacy Act." *In re Search of 2122 21st Road North Arlington, Va.*, 2017 WL 4295414, at *4 (E.D. Va. Sept. 26, 2017) (Anderson, M.J.). He instead identified an original civil complaint for damages as the appropriate means by which to address Privacy Act violations. *Id.* at *3. Magistrate Judge Anderson labeled the leak of Dr. Chen's personal information "a troubling and potentially improper course of conduct," but ruled that a "search warrant proceeding is not the proper forum for [Dr. Chen] to seek relief." *Id.* Magistrate Judge Anderson went out of his way to make clear that his ruling regarding the proper form and forum for Dr. Chen's Privacy Act arguments was not an adjudication of the merits of such claims. *Id.* at *3-4. Indeed, he specifically noted that his determination "is not to say that [Dr.Chen]'s allegations are without merit," and that she "may have a claim for civil remedies under the Privacy Act." *Id.*

Dr. Chen sought review of Magistrate Judge Anderson's denial of her Show Cause Motion by filing objections with the district court. Objs. to U.S. Magistrate Judge's Denial of Mot. to Show Cause Why Sanctions Should Not Issue, *In re Search*, No. 17-cr-236 (E.D. Va. Oct. 11, 2017) (Defs'. App'x 48a). The first and second grounds for the objections pertained to Rules 6(e) and 41 of the Federal Rules of Criminal Procedure. *Id.* at 4-7 (Defs.' App'x 51a-54a). Approximately one page at the end of the objections discussed Dr. Chen's concerns regarding the Government's Privacy Act violations. *Id.* at 7-8 (Defs.' App'x 55a-56a). Among other things, the objections explained that the hearing she was seeking within the context of the Search Warrant Proceeding "would not constitute a remedy" under the Privacy Act, but instead would be a means "to inform the Court's consideration of the Government's abuse of its authority to search and seize." *Id.* at 7 (Defs.' App'x 55a).

In its opposition to Dr. Chen's objections, the Government argued that neither the magistrate nor the district judge, in the context of the Search Warrant Proceeding, had jurisdiction to entertain any claims or contentions regarding the Privacy Act. In particular, the Government asserted that "[t]he Magistrate Judge found that neither the Privacy Act nor the federal rules provided jurisdiction for a Magistrate Judge to consider such a claim in the context of a proceeding relating to the issuance of a search warrant," and that, "[b]ecause the Magistrate Judge lacked jurisdiction, this Court too lacks jurisdiction to consider the matter." Gov't's Opp. to Yanping Chen's Obj. to U.S. Magistrate Judge's Denial of Her Mot. to Show Cause at 2, *In re Search*, No. 17-cr-236 (E.D. Va. Nov. 16, 2017) (Defs.' App'x 59a) ("Obj. Opp."). The Government also argued to the district court that, "[i]f Chen wishes to seek relief under the Privacy Act, the only avenue is a civil action brought as an original action filed in the district court." *Id.* at 7 (Defs.' App'x 64a).

U.S. District Judge Liam O'Grady approved and adopted Magistrate Judge Anderson's decision in full. *In re Search*, 2018 WL 534161, at *1 (E.D. Va. Jan. 23, 2018). Judge O'Grady's order endorsed the magistrate's finding of "no jurisdiction to pursue the Privacy Act's implications because a show cause hearing is not an enumerated remedy of the Act," *id.* at *4, and agreed that, "if there were a violation of the Privacy Act arising from an alleged disclosure of information obtained in a search warrant, jurisdiction would arise from that statute, which requires an original civil action filed with the district court." *Id.* at *5. Finding that "[a] hearing before the magistrate judge who authorized the warrant would not be an appropriate forum" for resolving any matters related to the Privacy Act, Judge O'Grady recommended that "[Dr. Chen] would better pursue the avenues for civil relief provided by the Privacy Act, such as a civil complaint in which [Dr. Chen] could be entitled to obtain discovery." *Id.* Like the magistrate,

Judge O'Grady recognized that Dr. Chen had "alleged a troubling series of events in which information seized during a Court-authorized search may have been wrongfully disclosed to news organizations." *Id.*

Dr. Chen sought review of Judge O'Grady's affirmance of Magistrate Judge Anderson's denial of her Show Cause Motion through an appeal to the Fourth Circuit. On appeal, the Government continued to emphasize the courts' lack of jurisdiction to consider Dr. Chen's Privacy Act concerns. Specifically, the Government argued to the Fourth Circuit that Dr. Chen was "not a party to any pending criminal or civil action" and therefore "lack[ed] Article III standing to appeal the district court's denial of her motions." Brief of the United States at 8, *In re Search*, No. 18-6132 (4th Cir. Apr. 17, 2018) (Defs.' App'x 134a) ("U.S. App. Br."). The Government further asserted that Dr. Chen "can always secure judicial review by filing her own lawsuit," including "a civil claim under the Privacy Act." *Id.* at 25 (Defs.' App'x 151a). It emphasized that "a motions hearing arising from the authorization of search warrants is simply not the appropriate vehicle for litigating the [Privacy] Act's scope." *Id.* at 35-36 (Defs.' App'x 161a-162a). The Government explicitly assured the Fourth Circuit that "[i]f Chen wishes to avail herself of the [Privacy] Act, or wants to establish that the Act applies to investigative disclosures like those purportedly at issue here, the proper route is for her to file a civil action. … If Chen wants to pursue [] discovery here, she need only file her own suit under the Act." *Id.* at 36 (Defs.' App'x 162a). Without hearing oral argument, the Fourth Circuit summarily affirmed the district court in an unpublished, non-precedential order. *In re Search*, 735 Fed. App'x 66 (Mem.) (4th Cir. Aug. 20, 2018) (Defs.' App'x 168a).

Four months later, heeding the Government's instruction that she present her Privacy Act claims in a separate, original civil action in a federal district court, Dr. Chen filed her Complaint

in this Court on December 21, 2018. After requesting and receiving a 45-day extension, the Government moved to dismiss. The Government's motion makes no argument that it did not violate Dr. Chen's statutory rights under the Privacy Act, that Dr. Chen's claims are without merit, or that Dr. Chen did not suffer grave injury from those violations. Instead the motion rests on one narrow proposition: that this original civil action is barred by issue preclusion due to the supposed adjudication of Dr. Chen's Privacy Act claims in the Search Warrant Proceeding by judges who concluded (at the Government's urging) that they had no jurisdiction to adjudicate those claims. Mot. at 1-2.

LEGAL STANDARD

Courts in the D.C. Circuit apply a three-part framework for determining whether litigation of an issue is precluded: (1) "the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case;" (2) "the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case;" and (3) "preclusion in the second case must not work a basic unfairness to the party bound by the first determination." *Fulbright v. McHugh*, 67 F. Supp. 3d 81, 90 (D.D.C. 2014) (Cooper, J.) (citing *Martin v. Dep't of Justice*, 488 F. 3d 446, 454 (D.C. Cir. 2007)). Where "a judgment does not depend on a given determination, relitigation of that determination is not precluded," *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (citing Restatement (Second) of Judgments § 27 (1980)), with "the burden of showing that the same issue was actually and necessarily determined" on the party seeking to apply preclusion, *Connors v. Tanoma Min. Co.*, 953 F.2d 682, 684 (D.C. Cir. 1992) (internal quotation marks omitted). "If the basis of a prior decision is unclear, and it is thus uncertain whether the issue was actually and necessarily decided in [the prior] litigation, then relitigation of the issue is not precluded." *NextWave Pers. Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 254 F.3d 130, 147 (D.C. Cir. 2001) (internal quotation marks

omitted). Furthermore, "the doctrine of collateral estoppel is not applicable where, as in this case, one ground of the judgment does not finally adjudicate the case on its merits." *Stebbins v. Keystone Ins. Co*., 481 F.2d 501, 508 (D.C. Cir. 1973).

ARGUMENT

When Dr. Chen sought a hearing on the Government's illegal disclosure of her personal records and cited the Privacy Act, the Government argued vociferously that the courts presiding over the Search Warrant Proceeding lacked jurisdiction to consider Privacy Act claims. *See supra*. Those Privacy Act claims could only be heard, the Government repeatedly asserted, once Dr. Chen filed a complaint to bring an original civil action in district court. *See id*. Magistrate Judge Anderson and District Judge O'Grady agreed, recommending that Dr. Chen file an original action in a district court pursuant to the Privacy Act and holding that her charges that the Government had violated the Privacy Act could not be adjudicated in the Search Warrant Proceeding. *In re Search*, 2017 WL 4295414, at *3; *In re Search*, 2018 WL 534161, at *5. But now, in a complete flip-flop, the Government asserts that what it once called the "proper route" for litigation of Dr. Chen's Privacy Act claims is actually a dead end.

The Government now argues that Dr. Chen's Privacy Act claims cannot be heard because they were already resolved in the Search Warrant Proceeding. In doing so, the Government ignores black letter law regarding issue preclusion and grossly distorts the rulings made in the Search Warrant Proceeding. It also fails to grapple with the manifest unfairness of asserting in that proceeding that Dr. Chen could get her day in court by filing an original civil action, and then turning around to argue before this Court that such an action is barred. The Motion to Dismiss should be denied.

I. No Adjudication Occurred In The Search Warrant Proceeding That Could Preclude This Action

A. Issue Preclusion Does Not Apply Because The Courts That Presided Over The Search Warrant Proceeding Lacked Jurisdiction To Address Privacy Act Violations

Under controlling D.C. Circuit precedent, a court's decision on an issue cannot have preclusive effect unless that court had jurisdiction to decide the issue. Preclusion cannot occur unless the issue was "actually and necessarily *determined by a court of competent jurisdiction* in that prior case." *Martin*, 488 F. 3d at 454 (emphasis added). The Government entirely ignores this requirement, which compels denial of its Motion to Dismiss because—as the Government successfully argued throughout the Search Warrant Proceeding—the courts in that proceeding lacked jurisdiction to decide Privacy Act issues.

Throughout the Search Warrant Proceeding, the Government urged at every level that the courts had no jurisdiction to address Privacy Act violations.[1] Magistrate Judge Anderson and Judge O'Grady agreed, unequivocally holding that Dr. Chen's contention that the Government had violated the Privacy Act could not be decided in the Search Warrant Proceeding because there was no jurisdiction outside the context of an original civil action in a district court. *See In re Search*, 2018 WL 534161, at *4-5 (O'Grady, J.) (finding that there was "no jurisdiction to pursue the Privacy Act's implications" in the context of the Search Warrant Proceeding because "if there were a violation of the Privacy Act arising from an alleged disclosure of information obtained in a search warrant, jurisdiction would arise from that statute, which requires an original civil action filed with the district court"). No preclusive effect can be given to any Privacy Act

[1] Gov't's Response to Second Mot. to Show Cause at 2, *In re Search of 2122 21st Road North Arlington, Va.*, No. 12-sw-1002 (E.D. Va. June 5, 2017) (Defs.' App'x 26a); Gov't's Opp. to Yanping Chen's Obj. to U.S. Magistrate Judge's Denial of Her Mot. to Show Cause at 2, *In re Search*, No. 17-cr-236 (E.D. Va. Nov. 16, 2017), ECF No. 8, (Defs.' App'x 59a); U.S. App. Br. at 10-27, (Defs.' App'x 136a-153a).

determination by those courts because they lacked competent jurisdiction to address Privacy Act violations.

As Judge O'Grady noted, the courts lacked jurisdiction over Dr. Chen's assertions that government agents had violated the Privacy Act because no statute authorized her to obtain relief for such violations in that form and forum. Congress created only one means for aggrieved citizens to seek redress for Privacy Act violations: an original civil action brought in one of a defined group of district courts. *See* 5 U.S.C. §§ 552a(g)(1)(D), (g)(5). Without any other statutory basis to adjudicate Privacy Act violations, the courts had no jurisdiction to do so. *See Anderson v. Carter*, 802 F.3d 4, 8 (D.C. Cir. 2015) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."); *Franklin-Mason v. Mabus*, 742 F.3d 1051, 1054 (D.C. Cir. 2014) ("To bring a claim against the United States, a plaintiff must identify an unequivocal waiver of sovereign immunity. … But '[e]ven when suits are authorized[,] they must be brought only in designated courts.'"); *Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003) ("Because sovereign immunity is jurisdictional in nature, the terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit.") (citations omitted, alteration in original).

B. Issue Preclusion Does Not Apply Because The Courts In The Search Warrant Proceeding Rejected Dr. Chen's Motion On Jurisdictional Grounds

A related but distinct bar to application of issue preclusion here is that, at every level, Dr. Chen was refused relief related to Privacy Act violations in the Search Warrant Proceeding because the courts held that they lacked jurisdiction to address such violations. When "a first decision is supported both by findings that deny the power of the court to decide the case on the merits and by findings that go to the merits, preclusion is inappropriate as to the findings on the

merits." Wright & Miller, 18 Fed. Prac. & Proc. Juris. § 4421; *see Stebbins*, 481 F.2d at 508; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("[J]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). Because the courts in the Search Warrant Proceeding held that they had no power to consider Privacy Act violations, preclusion is not appropriate as to any Privacy Act finding.

Issue preclusion may apply only where "an issue of fact or law is actually litigated and determined by a valid and final judgment, *and the determination is essential to the judgment*." *Consol. Edison Co. of N.Y. v. Bodman*, 449 F.3d 1254, 1258 (D.C. Cir. 2006) (emphasis added). "The rationale for the principle that preclusive effect will be given only to those findings that are necessary to a prior judgment is that a collateral issue, although it may be the subject of a finding, is less likely to receive close judicial attention …" *United States v. Hussein*, 178 F.3d 125, 129 (2d Cir. 1999) (internal quotation mark omitted). Issue preclusion therefore cannot arise from any passing remarks made in the Search Warrant Proceeding about whether any Privacy Act violation had occurred. *See Nat'l Ass'n of Home Builders v. Envtl. Prot. Agency*, 786 F.3d 34, 41 (D.C. Cir. 2015) ("[A] jurisdictional dismissal does not involve 'an adjudication on the merits' …."); *see also* Wright & Miller, 18 Fed. Prac. & Proc. Juris. § 4421 ("A court that admits its own lack of power to decide should not undertake to bind a court that does have power to decide.").

Even if the district court had made express merits-based adjudications relating to Dr. Chen's Privacy Act arguments, Dr. Chen would be free to relitigate those issues because the refusal to grant her relief in the Search Warrant Proceeding rested on the determination that Magistrate Judge Anderson and Judge O'Grady lacked jurisdiction to consider Privacy Act

violations. For this reason, any ruling in the Search Warrant Proceeding regarding the *merits* of Dr. Chen's arguments or positions regarding the Privacy Act would not have been essential to the outcome of that proceeding, and therefore could not have any preclusive effect in the present action. *See* Restatement (Second) of Judgments § 27 comment h ("If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded."); *see also Bies*, 556 U.S. at 835 ("A determination ranks as necessary or essential only when the final outcome hinges on it").

The only determination essential to the Privacy Act-related rulings in the Search Warrant Proceeding was that the Act does not entitle a person injured by a leak of search warrant materials to a hearing before the magistrate who issued the warrant compelling the Government to show cause whether it violated the Act. Dr. Chen is now precluded from relitigating that *jurisdictional* issue, but not the *merits* of her Privacy Act claims. *See Nat'l Ass'n of Home Builders*, 786 F.3d at 41 ("a jurisdictional dismissal … will not bar relitigation of the cause of action originally asserted, but it may preclude … relitigation of the *precise issues of jurisdiction* adjudicated.") (emphasis added).

The Government erroneously argues (Mot. at 8) that a prior judgment based on two independently sufficient determinations is binding as to both for issue-preclusion purposes, relying on *Yamaha Corp. of Am. v. United State*s, 961 F.2d 245, 255 (D.C. Cir. 1992). To begin, there is grave doubt as to whether the rule announced by the Government is actually governing law. *See, e.g.*, *Lavergne v. U.S. House of Representatives*, 2018 WL 4286404, at *7 (D.D.C. Sept. 6, 2018) (describing the division of cases and commentators). To the contrary, the general rule is the opposite of that supplied by the Government: when judgments are based on two

independently sufficient determinations, neither—not both— are given preclusive effect.[2] *See* Restatement (Second) of Judgments § 27 comment i (when "a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone"); *see also B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) (noting that the Supreme Court "regularly turns to the Restatement (Second) of Judgments for a statement of the ordinary elements of issue preclusion").

Regardless, even if the parenthetical that the Government quotes from *Yamaha* remains good law, it does not apply here for two reasons. First, unlike *Yamaha*, which involved two merit-based determinations, issue preclusion on a merits issue cannot apply when the court also determines that it lacks jurisdiction. *See Stebbins*, 481 F.2d at 508 (preclusion of merits issues inappropriate where action resolved by determination that court lacked power to hear claim). Second, as further discussed in Part I.C, the record here makes clear that neither Magistrate Judge Anderson nor Judge O'Grady ever made the Privacy Act determinations that the

[2] There appears to be one narrow circumstance, very different from the present dispute, where issue preclusion may operate where the proceeding was resolved on two independently sufficient, non-jurisdictional grounds: i.e., where both grounds for the earlier decision were challenged on a direct appeal and the appeal was then "explicitly rejected *on both grounds*." *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983) (emphasis in original). That exception is inapposite here for many reasons. First, as already discussed, the court resolved the Privacy Act component of the Search Warrant Proceeding based on its lack of jurisdiction. Second, the only Privacy Act-related question Dr. Chen pursued on appeal was "[w]hether a District Court has the authority to explore a possible violation of the Privacy Act occurring in the context of a criminal investigation or is precluded from doing so absent a Civil Complaint." Corrected Br. of Appellants at 2, *In re Search*, No. 18-6131 (4th Cir. Mar. 28, 2018) (Defs.' App'x 93a). Third, the Fourth Circuit summarily affirmed, without making any determination regarding the merits of Dr. Chen's argument that government agents had violated the Privacy Act.

Government claims. *In re Search*, 2017 WL 4295414, at *3-4; *In re Search*, 2018 WL 534161, at *1, *4-5.

C. The District Court Made No Determinations With Respect To The Merits Of Dr. Chen's Privacy Act Claims

Setting aside the black-letter-law principles that decisions do not have preclusive effect when a tribunal lacks jurisdiction (Part I.A, *supra*) and that a merits determination is not preclusive when accompanied by a determination of no jurisdiction (Part I.B, *supra*), there is yet another reason why the Government's issue-preclusion theory fails: neither the magistrate, the district judge, nor the Fourth Circuit actually made *any* ruling on the merits of Dr. Chen's Privacy Act allegations. The Government has "the burden of proving all the elements of issue preclusion," including that the supposedly precluded issue was actually decided in the earlier case. *Lans v. Adduci Mastriani & Schaumberg L.L.P.*, 786 F. Supp. 2d 240, 303 (D.D.C. 2011); *see Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) ("Claim preclusion, like issue preclusion, is an affirmative defense. … [I]t is incumbent on the defendant to plead and prove such a defense").

In claiming that Dr. Chen's Privacy Act arguments were adjudicated by Judge O'Grady (Mot. at 5), the Government misstates what he actually held. Even cursory review of Judge O'Grady's January 2018 ruling (and the magistrate order that it adopted in full) demonstrates that Judge O'Grady did not purport or intend to rule on the merits of any Privacy Act claim and in fact believed that Dr. Chen might be able to assert a viable Privacy Act claim. Most importantly, it cannot be said with certainty that Judge O'Grady determined the opposite—i.e., that Dr. Chen could *not* assert a Privacy Act claim in the ordinary course—and that lack of certainty by itself bars application of issue preclusion. *See NextWave Pers. Commc'ns, Inc.*, 254 F.3d at 147 (D.C. Cir. 2001); *Milton S. Kronheim & Co. v. D.C.*, 91 F.3d 193, 197 (D.C. Cir.

1996) ("[L]ogically there is a fair probability of unfairness in estopping the relitigation of an issue where the fullness of its first litigation is uncertain.").

The Government now erroneously contends that Judge O'Grady and the Fourth Circuit "determined that the information on which the Fox News reports were based was not 'contained in a system of records' as required [for a claim under] the Privacy Act." Mot. at 9. This characterization is just wrong. Judge O'Grady[3] did not determine as a factual or legal matter that the records leaked to Fox News did not come from a system of records; instead, he stated only that Dr. Chen had "*failed to show* that evidence seized during a search conducted in a criminal investigation constitutes records that are 'contained in a system of records' under the Privacy Act." *In re Search*, 2018 WL 534161, at *4 (emphasis added). Judge O'Grady expressed no opinion on whether the seized materials were actually contained in such a system, instead noting that Dr. Chen "has made no showing" in the Search Warrant Proceeding and would need to conduct discovery—which he said could occur in a civil action—to substantiate her claims. *Id*.

The Government further errs in claiming that the judges who presided over the Search Warrant Proceeding "determined that, even if the [leaked] information had come from a system of records, disclosing evidence collected in a search does not violate the Privacy Act." Mot. at 9. Once again, no court made any such determination. Judge O'Grady stated in dicta that he was "unable to find any prior case in which the disclosure of an item seized during the execution of a search warrant was found to constitute a violation of the Privacy Act," and mused that "[a]s the Government notes, applying the requirements of the Privacy Act to evidence sought by a search warrant would lead to illogical results." *In re Search*, 2018 WL 534161, at *4. Despite these

[3] Because the Fourth Circuit summarily affirmed the District Court's opinion, there can be no valid argument that the Fourth Circuit adjudicated any issue other than those adjudicated by Magistrate Judge Anderson and Judge O'Grady.

remarks, Judge O'Grady did not rule that a Privacy Act violation may never arise from leaks by government officials of private records seized in a search of the home of an American citizen who has never been charged with any crime.[4]

Both Magistrate Judge Anderson and Judge O'Grady clearly contemplated that Dr. Chen would be able to pursue her Privacy Act claims through an original civil action filed in a district court, and that the district court presiding over that action would determine how the Privacy Act applies to these leaks of personal information. *In re Search*, 2017 WL 4295414, at *3 (Anderson, M.J.); *In re Search*, 2018 WL 534161, at *5 (O'Grady, J.). It plainly mischaracterizes the record to suggest that those courts held that the materials seized from Dr. Chen's home were not contained in a system of records or that the disclosure of such materials could never violate the Privacy Act.

[4] Because the Government's Motion to Dismiss eschews any challenge to the merits of Dr. Chen's claims, the reasoning behind Judge O'Grady's dicta need not be assessed now. Nevertheless, Judge O'Grady's assumption that application of the Privacy Act to records collected during execution of a search warrant might lead to "illogical results" was faulty. The Privacy Act's text reflects that Congress understood that the Act, as a general matter, *does* cover records—such as those seized during a search—compiled in the course of a law enforcement activities. In particular, the Act contains a "[s]pecific exemption" allowing agencies to promulgate rules exempting any system of records from the access and inspection components of the Act if the system comprises "investigatory material compiled for law enforcement purposes." 5 U.S.C. § 552a(k)(2). This exemption provides the mechanism for avoiding the "illogical results" that concerned Judge O'Grady, and its existence confirms that, absent an exempting rule, records collected during law enforcement searches may fall within the scope of the Act. That Judge O'Grady's dicta may have overlooked the (k)(2) exemption is understandable given the (at best) truncated consideration afforded to the *substance* of the Privacy Act in the Search Warrant Proceeding. *See* Wright & Miller, 18 Fed. Prac. & Proc. Juris. § 4421 (key rationale for restricting preclusion to issues that were necessary to the prior judgement is that "the tribunal that decided the first case may not have taken sufficient care in determining an issue that did not affect the result").

D. The Prior Proceeding Did Not Address Other Unlawfully Leaked Records

Even if Judge O'Grady's dicta somehow could be construed to preclude litigation of the issues identified by Defendants, Dr. Chen still would have a viable Privacy Act claim to be adjudicated in this Court. That dicta, at most, pertained only to whether violations of the Privacy Act could arise from disclosures by the Government of "items seized during the search of [Dr. Chen's] home." *In re Search*, 2018 WL 534161, at *4. Dr. Chen's Privacy Act claims in the present case, however, extend beyond those materials. The dicta did not pertain in any way to the Government's illegal disclosure to Fox News of Dr. Chen's immigration and naturalization forms, her certificate of U.S. citizenship, or her immigration application, Compl. ¶ 27, nor did it address the Government's disclosure of the FBI FD-302 Form purporting to memorialize an interview with Dr. Chen's daughter, Compl. ¶ 26. Even if this Court were to conclude (contrary to Dr. Chen's many other arguments) that rulings made in the Search Warrant Proceeding preclude her Privacy Act claims arising from the Government's disclosure to Fox News of materials seized from her home, she still should be allowed to pursue her claims related to other illegally disclosed records. *Consol. Edison Co.*, 449 F.3d at 1257 ("[I]ssue preclusion analysis requires comparing the issues actually litigated and determined in an earlier lawsuit with the issues that the Claimants seek to litigate in their [subsequent] complaint.").

II. Barring Plaintiff's Privacy Act Claims Based On Issue Preclusion Would Be Fundamentally Unfair

Even if all of the foregoing did not doom the Government's preclusion gambit, its Motion to Dismiss would still have to be denied based on the third element of the D.C. Circuit's issue preclusion test, which bars applications of issue preclusion that would be fundamentally unfair.

First, issue preclusion is fair only when the affected litigant had a full and fair "opportunity procedurally, substantively and evidentially to pursue" her claim in the previous

litigation. *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 333 (1971). The "full and fair" opportunity inquiry "includes the question of, whether without fault of [her] own, the party against whom collateral estoppel is to be invoked was deprived of crucial evidence or witnesses in the first litigation." *Jack Faucett Assocs., Inc. v. Am. Tel. & Tel. Co.*, 744 F.2d 118, 126 (D.C. Cir. 1984). "Collateral estoppel should not be applied in situations where important, material evidence can be introduced in the current trial that was unavailable in the previous trial." *Id.*

Before filing the present Complaint, Dr. Chen had no opportunity to develop or present evidence on any issue relating to the Privacy Act, including the issue of whether the leaked materials were contained in a "system of records" as defined in the Act. Judge O'Grady specifically acknowledged that lack of opportunity, stating that "[Dr. Chen] would better pursue the avenues for civil relief provided by the Privacy Act, such as a civil complaint in which [she] could be entitled to obtain discovery." *In re Search*, 2018 WL 534161, at *5. Applying preclusive effect to Judge O'Grady's comment that Dr. Chen had not established that the search warrant materials were contained in a system of records would prevent her from ever obtaining the evidence necessary to do so. "Preclusion is designed to limit a plaintiff to one bite at the apple, not to prevent even that single bite." *Hurd v. D.C., Gov't*, 864 F.3d 671, 679 (D.C. Cir. 2017).

Second, the D.C. Circuit has recognized that issue preclusion is unfair when "the party to be bound lacked an incentive to litigate in the first trial, especially in comparison to the stakes of the second trial." *Otherson v. Dep't of Justice*, 711 F.2d 267, 273 (D.C. Cir. 1983) (citing *Blonder-Tongue Labs.*, 402 U.S. at 333); *see also B & B Hardware*, 135 S. Ct. at 1309 ("Issue preclusion may be inapt if the amount in controversy in the first action [was] so small in relation

to the amount in controversy in the second that preclusion would be plainly unfair."); *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 306 (D.C. Cir. 2015) (considering whether "the stakes of the second trial are of a vastly greater magnitude" than the first); *see also Hurd*, 864 F.3d at 679 ("Cases applying claim preclusion where a different amount of damages was available in the second action compared to the first can hardly support preclusion where no damages whatsoever were available in the first action.") (citation omitted). As Judge O'Grady recognized, Dr. Chen's aim in raising Privacy Act concerns in the Search Warrant Proceeding was not to recover damages, but rather to "particularize the Government's violation." *In re Search*, 2018 WL 534161, at *4. Dr. Chen sought to have the government sanctioned for its violations of grand jury secrecy and a hearing to determine how her private records had ended up on Fox News. *In re Search*, 2017 WL 4295414, at *3; *In re Search*, 2018 WL 534161, at *4-5. As both Magistrate Judge Anderson and Judge O'Grady observed, the remedies she sought in the Search Warrant Proceeding were not Privacy Act remedies. In sharp contrast, in the present case Dr. Chen for the first time seeks to fully vindicate her rights under the Privacy Act. Dr. Chen did not seek any damages in the Search Warrant Proceeding, but here she seeks extensive damages under the Privacy Act due to the significant financial harm that she suffered. It would be fundamentally unfair to deny her the opportunity to pursue such damages.

Third, the Government's conduct should be taken into account. Throughout the Search Warrant Proceeding, the Government consistently argued that the proper mechanism for Dr. Chen to litigate her Privacy Act claims would be an original lawsuit brought in a district court. Obj. Opp. at 7 (Defs.' App'x 64a); U.S. App. Br. at 24-26 (Defs.' App'x 150a-152a). Counsel for the Government expressly represented to Magistrate Judge Anderson that the Government took no position on whether Dr. Chen had a viable Privacy Act claim. Sept. 5 Tr. at 31:7-10

(Pl.'s App'x 33a). And on appeal, the Government told the Fourth Circuit that Dr. Chen could obtain review of her claims simply by pursuing a civil action under the Privacy Act. U.S. App. Br. at 25-26 (Defs.' App'x 151a-152a). It would be profoundly unfair to allow the Government to successfully argue in one proceeding that Dr. Chen's allegations can only be brought through a civil action under the Privacy Act and then to subsequently bar Dr. Chen from litigating dispositive issues when she brings the recommended Privacy Act case.

CONCLUSION

For all of the foregoing reasons, the Government's motion to dismiss should be DENIED.

Dated: May 1, 2019

Respectfully submitted,

/s/ *Matthew T. Jones*

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Appendix of Filings from Prior Case

Magistrate Judge Filing (E.D. Va. No. 12-sw-01002)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN THE MATTER OF THE SEARCH OF 2122 21st Road North Arlington, Virginia; and	)	Case Nos. 1:12-sw-1002 1:12-sw-1003
IN THE MATTER OF THE SEARCH OF University of Management and Technology	)	

ORDER

On Monday, May 8, 2017, counsel for the parties appeared before the court to present argument on movant's Motion to Show Cause Why Sanctions Should Not Issue ("motion to show cause"). Based on a review of the pleadings and for the reasons stated from the bench, the undersigned finds that there has been no violation of the court's Order entered on December 3, 2012, sealing certain documents until March 4, 2013, and that movant has failed to establish a *prima facie* violation of Fed. R. Crim. P. 6(e). Accordingly, it is hereby

ORDERED that movant's motion to show cause is denied. This ruling does not address the Privacy Act violation that movant raises in its addendum to its motion to show cause.

Entered this 8th day of May, 2017.

/s/
John F. Anderson
United States Magistrate Judge
John F. Anderson
United States Magistrate Judge

Alexandria, Virginia

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN THE MATTER OF THE SEARCH OF 2122 21st Road North Arlington, Virginia	
and	Case No. 1:12-sw-1002 1:12-sw-1003
IN THE MATTER OF THE SEARCH OF University of Management and Technology	

MOTIONS HEARING

September 5, 2017

Before: John F. Anderson, Mag. Judge

APPEARANCES:

James P. Gillis, Counsel for the United States

John C. Kiyonaga, Counsel for the Movant

NOTE: The case is called to be heard at 10:14 a.m. as follows:

THE CLERK: In reference to search warrant numbers 12-sw-1002 and 12-sw-1003.

MR. KIYONAGA: Good morning, Your Honor. John Kiyonaga, here with Dr. Chen.

THE COURT: Thank you, Mr. Kiyonaga.

Good morning, Dr. Chen.

MR. GILLIS: Good morning, Your Honor. Jim Gillis for the United States.

THE COURT: Thank you, Mr. Gillis.

Okay, Mr. Kiyonaga, I've gone back and reread all the material -- yeah, please have a seat -- all the materials that you've filed. And I'm trying to get a little bit better of a handle as to why you think the Privacy Act would apply in this matter. And I think there are three areas that you need to address, two of which the Government raised and one of which I'm curious about.

One has to do with the system of records issue as to whether the documents obtained in a search warrant would be -- would be or could be categorized as a system of records.

The next is the issue of whether we actually have an agent involved here as opposed to Rhoads, who was, obviously, just a former employee of University of Management.

And the other has to do with the Privacy Act applies

to individuals. The search warrant, at least one of the search warrants, was to the university. Much of what is discussed in these Fox News articles and other things talk about an investigation of the university. And I think the Privacy Act is pretty clear that it only deals with individuals. I mean, individuals are the ones who have right to privacy, not corporations.

So I also want you to kind of explain to me a little bit more why you think the Privacy Act would apply as to that issue.

I don't need to hear any more about the jurisdictional issue. I think I have the -- this issue is properly in front of me, so I'm going to deal with the issue, but I want to deal with the issue relating to those -- deal with this question and those three issues. Okay?

So I've teed it up for you, now it's your turn.

MR. KIYONAGA: Thank you, Your Honor. I appreciate the opportunity to augment the record.

Your Honor, first of all, at this point I don't think there's any question but that the Fox News articles, pieces, included information that was seized in the search. You have the affidavit from Dr. Chen that there were but one copy of each of the images that were published, and those copies were in her home, and they were seized, as acknowledged by the Government at the last hearing, during the search.

So you have without question items from a search disclosed from the Government to the media. Now --

THE COURT: Now, the from the Government --

MR. KIYONAGA: And by the Government, Your Honor.

THE COURT: Well, I mean, that's an issue.

MR. KIYONAGA: I understand the Court sees it -- sees it as an issue, and I will address that, sir.

Your Honor, in all candor, I could not understand the Government's argument about a system of records. I think -- as the Government describes system of records, it used the word "probably" -- "presumably" six times and "might" four times. In other words, it was notably opaque in its description of what might transpire here.

And I think what transpired here is abundantly clear. Dr. Chen was being investigated by the FBI and other agencies under a 200d investigation, which is a national security investigation, presumably for espionage. That's an investigation of an individual for the purpose of collecting evidence for a possible criminal prosecution. That's as sensitive and as particularized as to an individual as it can get.

Now, I cited to the Court the Gerlich case out of the D.C. Court of Appeals, which says that the operative factor in determining the applicability of the Privacy Act is the purpose for which information is gathered, not whether or not it's --

the locus of the -- of the information qualifies as a system of records.

Personally, I don't see how this information can qualify other -- let's talk about the fruits of the search and the larger investigative file. It beggars my imagination to see how you could -- anyone could describe the investigative file as records that are not -- that do not contain an identifying particular attributable to Dr. Chen. It was an investigation of Dr. Chen. It was designed specifically to determine whether evidence could be gleaned to prosecute her for a crime. Clearly --

THE COURT: Why do you see it was an investigation of Dr. Chen and not an investigation of the university?

MR. KIYONAGA: Your Honor, the university is the expression of Dr. Chen. That was one of the causes for concern. But if the Court harkens back to the search warrant affidavit, it was all about her childhood and her youth in China, her supposed tenure as a Chinese military officer, and her supposed fraud upon the immigration system in occluding that tenure as a military officer.

And I'm bleeding into the second point that the Court mentioned, but the university is a hook, if you will, for purposes of national security importance. But the crime, the alleged crime of immigration fraud exists irrespective of that.

And the Fox News certainly informed its coverage or

its treatment of the university with personal information that was seized in the search. How else do you explain those photos? What they're saying is, look, we've got a former Chinese Colonel who is running this university with all sorts of active and former U.S. military, and she lied about being a Colonel. And here is a picture of her, you know, as a 20-year-old in a uniform, and here she is front of her father's grave. And by the way, he was number three under Mao. And here she is, you know, saluting -- having her husband salute her uniform.

The whole point, the whole premise of Fox News is that this is a former Chinese communist military officer, and that the Government and the public at large should be concerned about the operation of her university.

In order to --

THE COURT: Well, I'm going to --

MR. KIYONAGA: In order to -- in order to propound that completely unwarranted and unsupported accusation, they relied on personal information. And Gerlich is clear, Your Honor, it doesn't need to be a system of records.

I cannot understand how it could be other than a system of records. But even putting that issue aside, it doesn't need to be a system of records. If it's collected for the purpose of making a determination about an individual, in this case Dr. Chen, it's a record on the individual.

And the Henke case says it very clearly, Privacy Act concerns are at their zenith. And "zenith" is the word that the D.C. Circuit used. They are at their zenith when the FBI conducts a criminal investigation on an individual.

The Kelley case, also out of D.C., is in many senses a mirror image of this one. That arose out of the General Petraeus scandal, and the couple in Tampa had sued because they maintained that the FBI and/or the DoD had leaked aspects or items from the investigatory file on the Petraeus scandal that were embarrassing to them. And the D.C. Circuit held -- or it might have been the D.C. District Court, held that they had stated a claim for a violation of the Privacy Act.

So I think we're on all fours here, Your Honor, that the investigatory file and the search warrant fruits in particular constitute a "record" that needs to be protected under the Privacy Act.

Furthermore, the search warrant fruits were acquired through an order of this court. And the court well realizes that its role in issuing and okaying a search warrant is to safeguard the Fourth Amendment rights of the individual being searched. And when the Government takes the fruits of the search warrant, holds them for four-plus years, decides that it's not going to file any manner of charge, but somebody within the Government decides that they don't like that result because they don't like Dr. Chen so they're going to see her

ruined and disclose this stuff out of pure vindictiveness, they are basically playing with the Court's authority, Your Honor. They're abusing it. They're turning it to a personal convictive end.

And Mr. Rhoads was clearly a de facto agent of the FBI, Your Honor. He stated to Fox News, I worked with them. More than two years after --

THE COURT: Well, he says he was an informant in other places.

MR. KIYONAGA: But, Your Honor, an --

THE COURT: He worked with them. An informant -- being an informant doesn't make one an agent of the FBI.

MR. KIYONAGA: Your Honor, I would submit that under Schmitt it does. If somebody is following the instruction of a Government agent or of a Government official, and serving as an interlocutor for the Government, he or she is an "agent" for purposes --

THE COURT: Well, providing information to the Government doesn't make one an agent of the Government.

MR. KIYONAGA: Your Honor, he stated that he affirmatively assisted the FBI. He stated that he was instructed by the FBI to tell Dr. Chen that he had been subpoenaed to appear before a grand jury. That's being instructed.

More than two years after the search, he's getting

e-mail updates on the case from the FBI saying how disgusted they are that DoD has renewed her contract. Clearly he has a relationship with the FBI. They have instructed him to do things. He has complied. He is voluntarily working with them against Dr. Chen. And he is being informed about it up to two years after the fact.

Now, we at the very least, Your Honor, have a picture that causes grave concern and requires a hearing so that we can have Mr. Rhoads up there and ask him under oath, exactly what did you do? When did you do it? How did you do it? And ask Ms. Brown and Ms. Harris, who gave you the information?

I hesitate to use the term a second time, but this is the only -- this is the only case in my 30-plus years of lawyering that I've used it in, but this is res ipsa loquitur, it speaks for itself. Very, very, very sensitive, confidential information protected by the Privacy Act was disseminated either by somebody who ought to be a considered an agent of the Government or by somebody who gave it to him, somebody within the Government, it only could have been somebody on the inside privy to this investigation.

THE COURT: Well, help -- you say, very sensitive information. There is the statement that Rhoads was told by your client that she was a Colonel, right?

MR. KIYONAGA: Correct.

THE COURT: Okay. So that information was told by

your client to Rhoads absent any-- before any investigation was begun by the FBI.

MR. KIYONAGA: I'm not sure we know that, Your Honor.

THE COURT: Okay.

MR. KIYONAGA: I would submit that if the Court is going to ----

THE COURT: Well, it's while he was an employee. He said while he was an employee, I think.

MR. KIYONAGA: I believe he was -- he was recruited or he began working with the FBI while he was an employee. But the fact of the matter is, the Court right now is drawing conclusions about that passage --

THE COURT: But you're talking about sensitive information. So I'm trying to understand what information that you're saying is sensitive information. And one, if she voluntarily told Rhoads that she was a Colonel, then, you know, the fact that she was a Colonel or the statements that she was a Colonel in the Chinese military, isn't really sensitive information, right?

MR. KIYONAGA: Your Honor, I would submit that Mr. Rhoads saying that doesn't establish it as a matter of law in this court, but it does illustrate the fact that he ought to be on the --

THE COURT: It being print -- it being printed in Fox News doesn't, you know, establish it as true either. I mean --

MR. KIYONAGA: Of course it doesn't establish it, Your Honor, but it does -- its being printed in Fox News does a lot to ruin somebody's livelihood and reputation.

But your point about Agent Rhoads or Mr. Rhoads is illustrating my point that he ought to be under oath answering questions as to exactly how that supposed conversation took place.

But the disclosures included immigration records, Your Honor. Those -- the statute doesn't use the word "sensitive." It uses --

THE COURT: No, you used the word, that's why I'm asking.

MR. KIYONAGA: I used the word because it is in fact sensitive. Pictures of her family with the names next to each one. Pictures of her standing in front of her father's grave. Pictures of her, you know, she and her husband in a jocular moment. Those are personal, those are private. And they don't -- they should not have been disclosed. They are certainly within the ambit of the Privacy Act's protection, especially given the fact that this was a criminal investigation of her.

THE COURT: The Pappa affidavit --

MR. KIYONAGA: Yes, sir.

THE COURT: -- is in the public record. How does that impact your argument that this is sensitive or private information?

MR. KIYONAGA: Your Honor, first of all, the Pappa affidavit at the time Fox first publicized it was still being treated as sealed by this Court. I understand the Court has ruled that the seal has not been violated and that there has been no violation of grand jury secrecy. I'm not addressing those today, I will stand by our position on both of those issues.

But the affidavit doesn't include pictures of her as a young woman. Doesn't include pictures of her whole family with their names. Doesn't include pictures of her husband. Doesn't include her immigration records with the actual answers written there. Doesn't include the 302 of her or of her daughter. All of which was exposed by Fox News.

THE COURT: Okay. What about the Fourth Circuit's decision in Williams versus Department of Veteran Affairs? I was trying to find what other decisions following the Henke decision that you cited on -- I mean, in the Williams case, and I can't say it's all on point, but in the Williams case -- and again, this is Fourth Circuit, so it plays more -- plays more to our -- what we have to deal with. I mean, Judge Ellis' decision and the Fourth Circuit I think are both more things that I need to look at more closely than some others.

But, you know, the Fourth Circuit in that decision talks about that you have to construe system of records, that 552a(5), narrowly. And it's important to make sure that it

really -- the definition of systems of records makes coverage under the act dependent upon a method of retrieval of a record rather than its substantive content. It refers to that decision positively.

I'm -- the Fourth Circuit says that one should construe system of records narrowly. And so, I'm -- I have to understand why you're argument is you don't even have to look to system of records.

MR. KIYONAGA: Your Honor, I'm not saying you don't have to look at system of records. I'm simply quoting the D.C. Circuit that says that the physical or virtual manner in which information is archived is secondary importance to the purpose for which it was gathered in the first place.

That said, I don't believe that Williams is at odds with the position that we take here today. If you had -- it would be a lot simpler, Your Honor, if we could have somebody from the Government under oath to explain exactly how these records were kept and how exactly specific items from within the record could be retrieved.

The Government has been coy, to put it mildly, about everything having to do with this case. We don't know whether there was a grand jury. We don't know whether Mr. Rhoads was called to appear before it. We don't know how these records were kept. We've got, you know, presumably this and might that.

But, Your Honor, I think it beggars credulity to assume that these records are not retrievable under Dr. Chen's name or under some identifier that is uniquely attributable to Dr. Chen. This is in a criminal investigation, a national security investigation by the FBI of an individual and the information that was gathered reposed in a file. What the file was called, what portion it comprised of a greater file, and what name that greater file bore, I have no way of knowing. And I would submit neither does the Court. The only party that knows is the Government.

So really -- and at this point, it's incumbent on the Government to shed light on these. The Government has provided absolutely no transparency. When we have a situation for which the only logical explanation is that somebody on the inside of this investigation leaked protected information to the press, and all we have is, it's not protected. We're not saying -- you haven't established that it happened.

Well, how can we establish? We have access to none of the core facts, the specific facts that the Court is asking about. But the larger facts are undeniable, and they point to a leak of Privacy Act information.

THE COURT: Okay. And I take it your argument about it being an agent of the Government, is it happened, so it had to be, res ipsa loquitur, as you've said. It's --

MR. KIYONAGA: No, Your Honor. Res ipsa loquitur

refers to the appearance of the information in the Fox News pieces, and the fact that the information had to come from within the investigative file in part because Dr. Chen -- and she can certainly confirm or augment her affidavit. But she has stated in her affidavit that those photos were held nowhere else but in her home. And the Government has conceded that they were seized from the home pursuant to the search warrant.

I guess, Your Honor, I agree with the Court, the status of Mr. Rhoads is also a matter of res ipsa loquitur. He has told Fox News that he was working with the FBI. He has indicated that he received instructions from Fox News about what he should tell Dr. Chen. And he is being updated by the FBI more than two years after the execution of the search.

So I would say, I would say that those facts do speak for themselves. He is an interlocutor, as per the Schmitt case, on behalf of the FBI. And he is not a special agent, he is a de facto agent of the FBI, and the FBI should be held responsible for his conduct.

THE COURT: Why -- and, you know, I'm not saying that this -- I'm just curious about this. Why haven't you just filed a Privacy Act complaint as opposed to trying to pursue this in the context of a -- under the umbrella of a violation of some duty pursuant to a search warrant?

MR. KIYONAGA: Your Honor, that's a good question. And it may come to a Privacy Act complaint. But this is more

than a Privacy Act matter. This is -- this is an abuse of the Court's authority to conduct a search. The Court authorized the Government to search Ms. Chen's house. They did. They seized documents as part of a criminal investigation, and then they leaked them.

So this is -- the Fourth Amendment implications, I would submit, are more stronger in this particular context than they are in a regular Privacy Act case. Privacy Act, it could be -- it could be the information that the UMT has provided to different agencies as part of its contract.

This is information that was gleaned by the Government as part of a criminal investigation pursuant to a search warrant. It used the power of the Court to authorize a search warrant to gather all this personal information. And then when they didn't like the result because they weren't able to bring a charge, they decided to leak it so they could -- they could ruin her reputation in the public eye.

So it's more than a Privacy Act. The Privacy Act informs -- should inform the Court's deliberation about whether or not the Government has breached its responsibility as to that information, as to that -- as to those documents and items that were seized.

But it's not the whole picture. The fact of the matter is, they also breached the Court's authority to conduct a search.

The Court is ultimately responsible for the -- for the property that is seized in a search because under Rule 41, the Court returns that property to its rightful owner. The Court maintains legal custody and control over that property, even though it may reside in a vault somewhere in the FBI or in the U.S. Attorney's Office. And the Government did more than violate the Privacy Act. It violated your order, Your Honor, in giving the Government the authority to conduct that search.

So that's why we're here today.

THE COURT: Well, let me hear from Mr. Gillis.

MR. GILLIS: Your Honor, I understand, or at least I think I understand what the Court said about the jurisdictional issue. But just for purposes of appeal, if necessary, I would like to flesh out the record on that a little further.

THE COURT: It was only two or three sentences in your response, so maybe you should try and explain it a little bit more then.

MR. GILLIS: Well, Your Honor, the -- although the movant, Ms. Chen, or Dr. Chen initially made certain claims and threw in a sentence about the Privacy Act somewhere near the end, the Court has ruled on all the other issues that were raised here, including whether the disclosure of information or the alleged disclosure of information obtained in a search warrant violates 6(e) or constitutes any other violation --

THE COURT: No, my earlier ruling was pretty clear.

It was only the 6(e) issue.

So, you know -- and Mr. Kiyonaga had raised in the brief that was filed right before we had the hearing the Privacy Act issues and some other arguments. And I thought my order was pretty clear that I was dealing with the 6(e) issue having to do with grand jury proceedings.

MR. GILLIS: Yes.

THE COURT: And so --

MR. GILLIS: I read the Court's order to say, Your Honor, that it denied the motion except to the extent that the movant wanted to bring some additional argument under the Privacy Act.

THE COURT: Okay. Well --

MR. GILLIS: But in any case, Your Honor, he says that it's more than the Privacy Act. I don't know what that means in this context. But the -- but the Privacy Act provides -- and that's the basis upon which this motion is made. The Privacy Act provides certain requirements, and then it provides a specific provision having to do with what occurs if there is a violation by the Government of any of those provisions.

It provides two, and only two. One is a civil action brought in the District Court for damages that are resulting from the violation. And that is -- so the provision that I'm speaking of with respect to civil remedies is in 552a(g)(1).

And there it says: Whenever an agency fails to comply with any other provision of this section, the individual may bring a civil action against the agency and the District Courts of the United States shall have jurisdiction in the matter under the provisions of this section.

Then it goes on later --

THE COURT: It says "may bring." It doesn't say --

MR. GILLIS: I beg your pardon.

THE COURT: It says "may bring." It doesn't say "shall," right? Whenever an agency -- it says "may." So it's not like -- "shall" and "may" are different words and have different meanings.

MR. GILLIS: Well, no, it doesn't require them to bring an action, Your Honor. But statutory construction, I submit, in this context says "may" rather than "shall" because it doesn't require everybody who happened to have been a victim of a Privacy Act violation to actually bring a lawsuit. It says it may bring an action, it may bring a civil action, and it may bring that action in a District Court, but it doesn't provide for jurisdiction in any other place.

THE COURT: Well, it doesn't say, this is the only manner of enforcing it either, does it?

MR. GILLIS: It's the only, any action -- any statute, Your Honor, that provides for a remedy states where that remedy may be obtained. In this case, it says it may be

obtained through a civil action in the District Court.

Now, apparently Mr. Kiyonaga is trying to have two bites at the apple here by seeking some relief that is not clear in his -- in his motions he's not even made clear what relief he is seeking here. Apparently, it has to do with --

THE COURT: Well, he's seeking to have a hearing, that's what he wants. He wants a show cause hearing so that he can -- I take it that's what the motion was for, was a motion for me to order a show cause hearing whereby we can have evidence on these issues.

MR. GILLIS: But to show cause what, Your Honor?

THE COURT: Show cause, in essence, who leaked this information, how the information was maintained. And, I assume, you know, you would want to come in and explain the meticulous track of the locations from which evidence is seized during a search and the scrupulous records that you maintain to establish a chain of custody.

So that in any hearing we would have, the FBI would come in and explain how it tracked the locations of the evidence and the scrupulous records that they kept to establish the chain of custody.

MR. GILLIS: But that, Your Honor -- those things are not relevant to the question of whether we violated some obligation. This is a privacy --

THE COURT: Why not? Why not? If you -- if you

obtained records pursuant to a search warrant --

MR. GILLIS: Yes.

THE COURT: -- and you have an obligation to maintain those records in a confidential manner and not disclose them to the public, and if the Government violated that duty, then what should I do?

MR. GILLIS: You should do nothing, Your Honor, because jurisdiction here lies with the District Court.

THE COURT: Well, this is the District Court, Mr. Gillis. This is a District Court.

MR. GILLIS: It is a District Court, Your Honor, but the statute does not define the difference between a District Court and a Magistrate Court.

THE COURT: This is the -- there is no such thing as a Magistrate Court, Mr. Gillis. You need to understand that. I am part of the District Court.

MR. GILLIS: Your Honor, you are part of the District Court, but if you were to make a ruling here that was to be appealed, the rules specifically say that the ruling of a Magistrate Judge is appealed to the District Court.

And so, if we wanted to appeal a Court's ruling in this context, we would appeal to the District Court, Your Honor.

THE COURT: Correct.

MR. GILLIS: This is not the -- so in this context,

Your Honor, in a civil remedy, could not be brought in a magistrate -- before a Magistrate Judge.

THE COURT: Sure. Well, it would be filed in the District Court. It could be referred to a Magistrate Judge for an evidentiary hearing.

MR. GILLIS: It could, Your Honor.

THE COURT: We do that all the time in civil cases.

MR. GILLIS: Of course, Your Honor. But the --

THE COURT: So the idea that I couldn't order a show cause hearing to take evidence and make a recommendation to a District Judge for action, I don't understand.

MR. GILLIS: Well, Your Honor, I would just, if you would permit me to digress for one moment because I sense the Court's annoyance with me, and I want to make two things perfectly clear.

One, I do not condone in any respect the disclosure of anything having to do with an FBI investigation, whether it has anything to do with the grand jury or not. I think it is deplorable, it's reprehensible, and it should never be done. If the Government has anything to say about an investigation, it should say it in charging documents.

THE COURT: Well, has it -- it has the ability to pursue civil criminal -- civil penalties against any officer or employee who by virtue of his employment has possession of information and discloses that information.

So, I mean, that is certainly one of the remedies under the Privacy Act.

MR. GILLIS: A criminal violation, Your Honor.

THE COURT: Correct.

MR. GILLIS: Well, the Court has no jury instruction to initiate --

THE COURT: No, but you, being part of the U.S. Attorney's Office here --

MR. GILLIS: Yes, Your Honor.

THE COURT: -- has said that, you know, you don't condone, or agree, or think that it's appropriate for anyone to disclose information that has been obtained during a search warrant.

MR. GILLIS: Yes, Your Honor. Yes. And in that respect, I speak for myself. I don't have the authority to speak for the U.S. Government because, obviously, in certain instances that point of view has not been universally held.

Nonetheless, and the second point I want to make clear, Your Honor, is that I hold the Magistrate Judges in this district, and you in particular, in the highest esteem. And I don't for a moment intend to suggest anything to the contrary by making the argument that this Court does not have jurisdiction. It's an argument that I must make. It's one that I think the law supports. But it's an argument that I must make, and it in no way impugns my regard for this Court.

So I do want to make that perfectly clear. I'm trying to make the argument.

THE COURT: I understand that. And I know you have to make arguments. But as I indicated earlier, the jurisdictional argument -- and I think Mr. Kiyonaga has, based on what we had in our earlier hearing, you know, renewed his motion for a motion to show cause and has submitted additional evidence that he believes that the Government has violated the Privacy Act. This isn't a Privacy Act complaint.

MR. GILLIS: Your Honor, this is based entirely upon the Privacy Act. And, Your Honor, he has no standing in this context to raise the issue before this Court in the context of the issuance of a search warrant.

Your Honor, whatever remedy this Court could provide does not deal with -- could not provide any benefit to Dr. Chen. Whoever was the source of the leak, that cat is out of the bag.

And the Court might, conceivably, I suppose, if that's what -- again, none of this relief has been asked for by Mr. Kiyonaga, but I suppose the Court might decide to hold the Government in contempt of something, which Mr. Kiyonaga does not make clear what that something is. It's not in contempt of any order of the Court. And the Court speaks through its orders. We have done nothing, even with the alleged leak, we have done nothing that is in contempt of any order of this

Court.

But in any case, Your Honor, he has no standing because he truly does not have a dog in this fight. There is no remedy that the Court could provide to Dr. Chen in this hearing. You cannot in this hearing give civil remedies, whether that action could be brought before a Magistrate Judge or a District Judge. And you have no authority to order us to pursue criminal -- to pursue criminal charges. It's an Executive --

THE COURT: No, you're right on all that.

MR. GILLIS: So --

THE COURT: What I do have the ability to do would be to order a hearing on this issue to find out more information about what happened.

And, you know, that could provide Mr. Kiyonaga with sufficient information to decide what to do for his next step if he decided to do a next step.

I think you're right, the remedy -- you know, I could, if I do find that under the authority of issuing a search warrant, I probably could fashion some sort of remedy for -- if I have found that there was a violation of my granting of a search warrant, and what I believe to be the obligations of the Government when it obtains information pursuant to a search warrant --

MR. GILLIS: But, Your Honor -- I'm sorry.

THE COURT: But that wouldn't be something that would inure to the benefit of the moving party here.

MR. GILLIS: But, Your Honor, this is not the right forum for that. The civil action that he might file, if he chooses to, would allow him discovery, all the discovery that he seeks from a hearing.

He doesn't get two bites at the apple, to cross-examine witnesses here in this context for a purpose that can lead to nothing that the Court can do for him. If he wants some benefit from discovery of some kind, the place for that is in a civil action before -- whether it's before you or before the District Judge, we may disagree upon. But the hearing itself, I submit, Your Honor, you have no jurisdiction to conduct.

So because it's based upon a privacy -- fundamentally it is based upon a Privacy Act violation, not whether -- not whether there has been some leak of evidence obtained from a search warrant.

So I think I've made as much as I can of that jurisdictional argument, Your Honor.

I would like to pass to the question of whether Mr. Rhoads could be considered an agent of the Government at this point. And for the reasons I say in my -- in my pleading, there could be no basis upon which either Mr. Rhoads or any third party could believe that he was acting as an agent of the

Government if he ever were one, which we certainly do not concede.

But even if he were at some time an agent of the Government, that was years ago. And if he chooses to speak to the media years later, he's not and no one could believe he was acting as an agent of the U.S. Government. That's just -- that's just completely at odds with the case law that says that agency, even in the criminal context, is to be decided by the Restatement Third of Agency. And those provisions make perfectly clear that he is not an agent of the U.S. Government.

THE COURT: Well, let's go to the bigger issue. The information was obtained by the Government through a search warrant --

MR. GILLIS: Well --

THE COURT: These photographs.

MR. GILLIS: They may -- well, photographs --

THE COURT: And I have evidence through the affidavit of the movant that there was one and only one copy of those photographs, and they were in her home, and were seized during the search. So that's the evidence that I have in the affidavit.

MR. GILLIS: All right. And I --

THE COURT: So --

MR. GILLIS: -- would concede for argument, Your Honor, that that is sufficient for the Court to make a finding

of that.

I do not concede it as a matter of fact, but she has alleged it, and I concede for the purposes of argument that that's sufficient for the Court to make a finding in that regard.

THE COURT: Okay. So those photographs have now been disclosed to the public.

MR. GILLIS: Yes, Your Honor.

THE COURT: So whether it was Mr. Rhoads or whether it was someone else who either gave Mr. Rhoads access without appropriate restrictions or guarantees of further disclosure, or someone else within the Government had to have disclosed that information; is that right?

MR. GILLIS: If the Court's finding is correct, then I would concede for purposes of the hearing that that's true.

THE COURT: Okay.

MR. GILLIS: But if I may go on to the question of whether the Privacy Act applies at all here -- even if the Court has jurisdiction. The take from a search warrant is not part of a system of records that can be searchable in the way that the -- that the Privacy Act contemplates.

And for all the hypothetical reasons that I set forth in our brief, the structure of this -- of the Privacy Act just cannot admit of that -- of that construction. It would -- all of the provisions in the Privacy Act are geared toward a civil

action, again.

But leaving that aside as a jurisdictional issue, it has to do with the statute construction of the Privacy Act. And it simply does not constitute a system of records.

And indeed the Girsh, I believe it's -- pardon me, the Gerlich case upon which -- upon which Ms. Chen, Dr. Chen relies, has to do specifically with provisions that are not applicable here. Those stem from (e).

THE COURT: (e).

MR. GILLIS: And pardon me, Your Honor. Underlying that civil suit, by the way, Your Honor, was an alleged violation of (e), of (e)(5) and (7) -- (e)(5). And (7) has to do with the maintaining of records. And (7) has to do with prohibition on retaining certain records having to do with the Fifth Amendment -- First Amendment rather. Neither of those provisions is at issue here.

So whether those records, those types of records might or might not be part of a system of records, that has no relevance here when he's basing his claim entirely upon a disclosure of records contained in a system of records. And he -- as the movant, he bears the burden of proof. He might not like that, but he bears the burden of proof here on all of these issues.

And this is not the forum to get discovery. And as to that point, Your Honor, we are being accused of being coy

about this investigation and what was done.

Believe me, Your Honor, we'd be happy to disclose everything that we found in this investigation if that's what they are asking for, including much more than is in the record and including the things that go into a prosecutive decision.

But, Your Honor, those decisions are based upon whether we believe can prove our case beyond a reasonable doubt. It has nothing to do with the other strength of the evidence or the other assessment of the evidence, which may be relevant in this hearing, Your Honor, if that's what we're asking for, to put on the agent and draw out all of the evidence we found, if that's what they want. Or they can go about it in a civil action and get whatever discovery they're entitled to.

So I submit that when they say, we're being coy, that's exactly what we should be. They're complaining that we haven't been coy enough, but it's their obligation. They have, as the Court may have found, a sufficient basis upon which to bring a civil action. In that civil action, they would be entitled to discovery. And they would be entitled to depositions, interrogatories, requests for document productions, and eventually they would be entitled to request for whatever information that I am blessedly now unaware of having left civil practice 25 years ago. But these, these mechanisms are provided for this person, for this situation.

THE COURT: All right.

MR. GILLIS: And so, this is not the right forum for this, Your Honor. It's not the right proceeding. And they have no remedy that this Court could provide that -- that would then allow them to go on with an entirely different proceeding in an entirely different case under a civil docket number.

I'm not suggesting -- Your Honor, they might or might not have an action under the Privacy Act. I take no position on that. That's a problem for the people that are one floor above me. So I take no position on that.

THE COURT: Well, you certainly seem to be taking a position on that. I mean, you keep staying it's not a system of records and the Privacy Act doesn't apply. So you're not saying -- I mean, you seem to be making a lot of the arguments that even if he did bring a Privacy Act complaint, that the Government wouldn't recognize that as a viable claim.

MR. GILLIS: Your Honor, no. What I'm, -- the argument I'm making is that if the Court were to pass by the jurisdictional argument and other arguments that we've made, then I'm arguing to this Court that the Privacy Act does not apply to give them whatever remedy they might seek.

So I'm not taking a position with respect to what my friends upstairs might take, but I'm making all the arguments that I can make in this proceeding, Your Honor.

THE COURT: Okay. Thank you.

MR. GILLIS: Thank you.

THE COURT: Let me --

MR. KIYONAGA: Your Honor, could I be heard briefly?

THE COURT: Just briefly.

MR. KIYONAGA: Your Honor, we've heard -- we've heard the Government state that it's not being coy, but that if -- if Dr. Chen wants to live with everything in that investigation, by God they can put it out there. That is rank bullying, Your Honor.

And let me state for the record that if the Government wants to lay out everything in that investigation, let's have a hearing and do it. That's not the point of the motion, and it would be beyond the issue properly before the Court.

But Dr. Chen is not going to be intimidated by these remarks of the Government and take this standing silent.

THE COURT: I understand that.

MR. KIYONAGA: She has nothing to hide, sir. Nothing. I'm angry when I hear that. And I apologize. I don't apologize for being angry. I apologize for my tone before the Court. It is not intended to -- as being directed at the Court.

Your Honor, the Government is trying to cabin this motion in a way that the movant hasn't. The Privacy Act informs the Government's -- the Court's -- the decision before

the Court. It is not the entirety of it.

The fact that these photos and probably other documents were seized in a search is relevant, and it stands separate and apart from the Privacy Act.

Imagine, Your Honor, a search. And the Government -- FBI breaks into a dwelling at 6 in the morning, and they take a flash shot of the subject of the search naked in bed stretched out for the whole world to see. And that photo doesn't make itself into the -- doesn't make its way into the file. It doesn't really have any -- any investigatory value, but it's pretty personal.

It's a picture of this, you know, adult stark naked, splayed out asleep in bed. And it doesn't make it into the files. Say it falls off a desk in some conference and it's sitting on the floor in the U.S. Attorney's Office. And somebody comes along who is not even part of the investigation, but he knows the subject and he doesn't like that subject. And he picks it up and he says, you know what, this is going to Fox News, or this is going to the Daily News, or the Daily Mirror, whomever, because I don't like this guy and I want to see, I want to see that photo splayed all over, you know, the Sunday page 6, or whatever it is called.

Is the Government seriously contending that that would not be a matter for concern? Or that the Court that authorized the search should not have a concern about how that

photo made its out at -- made it's way out into the media?

I've heard the Government say that it considers reprehensible and deplorable the fact that items from the search were -- were conveyed to the media. What I haven't heard is the Government say that they have done anything about it, that they've taken a single step to determine how it happened.

Everything that Mr. Gillis has said here today in response to the Court's questions points out the need for a hearing.

THE COURT: Thank you. Well, this is a matter -- and I think it is of significant importance that I write something on it as opposed to deciding it here in open court.

I suspect, however way I go, it may find its way up to -- and Mr. Gillis is right, my authority is limited as a Magistrate Judge. And any rulings I make are subject to review by a District Judge.

And so, I think in order to give the District Judge, if the need arises for a party to have my decision reconsidered to a District Judge, then it's probably better that it be in writing. So it will be awhile. It won't be this week or next week before I get a decision out, but I will consider the issues, including, you know, whether this is in fact the appropriate forum for this issue to get resolved or not.

I don't want any additional briefing or anything like

that, but I will write something up on this and then you will get it through the CM/ECF filings. Okay? Thank you, counsel.

MR. KIYONAGA: Thank you, Your Honor.

MR. GILLIS: Thank you, Your Honor.

NOTE: The hearing concluded at 11:06 a.m.

C E R T I F I C A T E of T R A N S C R I P T I O N

I hereby certify that the foregoing is a true and accurate transcript that was typed by me from the recording provided by the court. Any errors or omissions are due to the inability of the undersigned to hear or understand said recording.

Further, that I am neither counsel for, related to, nor employed by any of the parties to the above-styled action, and that I am not financially or otherwise interested in the outcome of the above-styled action.

/s/ Norman B. Linnell
Norman B. Linnell
Court Reporter - USDC/EDVA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YANPING CHEN,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF DEFENSE, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants.

Civil Action No. 1:18-cv-3074-CRC

[PROPOSED] ORDER

The Court has considered the motion to dismiss filed by defendants Federal Bureau of Investigation, United States Department of Justice, United States Department of Defense, and United States Department of Homeland Security (collectively, the "Government"), plaintiff Yanping Chen's opposition thereto, any reply filed by the Government, and the entire record herein. It is hereby

ORDERED that the motion to dismiss is denied.

Dated: _____

_____
Hon. Christopher R. Cooper
United States District Judge