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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRIENDS OF THE RIVER,

 Plaintiff,

 v.

NATIONAL MARINE FISHERIES
SERVICE, et al.,

 Defendants.

No. 2:16-cv-00818-DJC-JDP

ORDER

This matter is before the Court on Plaintiff Friends of the River’s motion to partially lift the stay of this action. (Pl’s Mot. (ECF No. 111).) Federal Defendants, National Marine Fisheries Service (“the Service”), United States Army Corps of Engineers (“the Corps”), Thomas P. Bostick, and Penny Pritzker, oppose this motion. (Fed. Defs.’ Opp’n (ECF No. 112).) Defendant-Intervenor Yuba County Water Agency also opposes the motion to lift stay and joins Federal Defendants’ opposition. (Def. Yuba County Water Agency Opp’n (ECF No. 113).)

For the reasons set forth below, the Court will deny Plaintiff’s Motion to Lift Stay.

BACKGROUND

The Corps operates and maintains the Daguerre Point and Englebright Dams on the Yuba River. (First Amended Compl. (ECF No. 25) at 12.) In 2014, the Service issued a Biological Opinion and Letter of Concurrence regarding the Daguerre Point

1 and Englebright Dams. (*Id.* at 26.) The 2014 Biological Opinion found that the Corps'
2 activities at the Daguerre Dam were unlikely to jeopardize the survival or recovery of
3 three species of fish listed as threatened under the Endangered Species Act. (*Id.*)
4 Similarly, the 2014 Letter of Concurrence concurred with the Corps' assessment that
5 its activities at the Englebright Dam were unlikely to adversely affect the listed species.
6 (*Id.*)

7 Plaintiff, Friends of the River, initially brought the present action in 2016,
8 challenging these decisions under the Administrative Procedure Act and the
9 Endangered Species Act. (ECF No. 1) On February 22, 2018, the Court denied
10 Plaintiff's motion for summary judgment and granted Defendants' motions for
11 summary judgment. (ECF No. 62.) Plaintiff appealed this decision. (ECF No. 68.)

12 On review, the Ninth Circuit reversed the District Court's decision finding, as to
13 Plaintiff's Section 7 claims, that the 2014 Biological Opinion and Letter of Concurrence
14 were not arbitrary and capricious and remanded to the District Court "with directions
15 to remand to the Service to reassess its 2014 [Biological Opinion] and [Letter of
16 Concurrence] in light of this opinion." *Friends of the River v. National Marine Fisheries*
17 *Service*, 786 Fed. Appx. 666, 669-70 (9th Cir. 2019). The Ninth Circuit also reversed
18 and remanded "the district court's summary judgment in favor of the Corps on FOR's
19 Section 9 'take' claim" on the grounds that the District Court failed to address the
20 argument raised by Plaintiff. *Id.* at 670. The District Court's determination that the
21 Service and the Corps were not required to reinitiate consultation based on a
22 purported change of circumstance was affirmed. *Id.* at 671.

23 Following the Ninth Circuit's ruling and remand, the District Court remanded to
24 the Service to reassess the 2014 Biological Opinion and Letter of Concurrence. (ECF
25 No. 92.) As requested by the Plaintiff, the Court stayed Plaintiff's Section 9 claims
26 during the remand period until the reassessment occurred. (ECF No. 92; *see also* ECF
27 No. 85 ("[FOR] requests that the Court stay [the Section 9] claim until NMFS has
28 completed its reassessment of the 2014 [Biological Opinion] and [Letter of

1 Concurrence] and issued its reasoned explanation of the new biological opinion(s).”))
2 As to the Section 7 claims, the Service was given the option to either “provide a more
3 reasoned explanation of the 2014 Biological Opinion and Letter of Concurrence” or to
4 reinstate consultation with the Corps and subsequently issue a new Biological
5 Opinion and Letter of Concurrence. (See ECF No. 94.) Federal Defendants elected to
6 provide a more reasoned explanation as to the Englebright Dam (ECF No. 100 at 2)
7 but to reinstate consultation with the Corps and issue a new Biological Opinion as to
8 Daguerre Point Dam (ECF No. 103 at 2). The Court subsequently stayed the entirety
9 of this action until the reinstated consultation on the Daguerre Point Dam was
10 complete and a new Biological Opinion could be issued. (ECF No. 106.)

11 On May 28, 2022, Plaintiff filed the present Motion to Lift Stay. Federal
12 Defendants filed an opposition to the motion on June 13, 2022. Defendant Yuba
13 County Water Agency joined that opposition and filed a supplemental opposition to
14 the motion on June 13, 2022. Plaintiff filed a reply on June 22, 2022, and the motion
15 was submitted without oral argument. (ECF No. 117.) This case was reassigned to the
16 undersigned on April 4, 2023. (ECF No. 123.)

17 **MOTION TO LIFT STAY**

18 **I. Legal Standard**

19 The power to stay proceedings is “incidental to the power inherent in every
20 court to control the disposition of the causes on its docket with economy of time and
21 effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254-
22 55 (1936); see also *Pet Milk Co. v. Ritter*, 323 F.2d 586, 588 (10th Cir. 1963); *CMAX v.*
23 *Hall*, 300 F.2d 265, 268 (9th Cir. 1962). A court may enter a stay “pending resolution
24 of independent proceedings which bear upon the case... whether the separate
25 proceedings are judicial, administrative, or arbitral in character,” and granting the stay
26 “does not require that the issues in such proceedings are necessarily controlling of the
27 action before the court.” *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857,
28 863-64 (9th Cir. 1979) (citations omitted) (citing *Kerotest Mfg. Co. v. C-O-Two Fire*

1 *Equip. Co.*, 342 U.S. 180 (1952)). “The corollary to this power is the ability to lift a stay
2 previously imposed.” *Boyle v. Cty. of Kern*, No. 1:03-cv-05162-OWW-GSA, 2008 WL
3 220413, at *5 (E.D. Cal. Jan. 25, 2008); see also *Johnson v. JP Morgan Chase Bank*,
4 N.A., No. 5:17-cv-02477-JGB-SP, 2019 WL 2004140, at *2 (C.D. Cal. Jan. 25, 2019).

5 Three factors guide this Court’s determination of whether a stay is appropriate:
6 “[1] the possible damage which may result from the granting of a stay, [2] the hardship
7 or inequity which a party may suffer in being required to go forward, and [3] the
8 orderly course of justice measured in terms of the simplifying or complicating of
9 issues, proof, and questions of which could be expected to result from a stay.” *CMAX*,
10 300 F.2d at 268. A court must “balance the length of the stay against the strength of
11 the justification given for it.” *Yong v. I.N.S.*, 208 F.3d 1116, 1119 (9th Cir. 2000). “If a
12 stay is especially long or its term is indefinite,” a court should “require a greater
13 showing to justify it.” *Id.*

14 **II. Analysis**

15 Plaintiff is seeking to partially lift the March 15, 2022 stay of this action so that
16 they may file a motion for preliminary injunction.¹ (Pl’s Mot. at 2.) The parties disagree
17 as to whether a continuation of the current stay is warranted.

18 **A. Harm to Plaintiff**

19 Plaintiff claims they are harmed by the continued stay as it prevents them “from
20 seeking relief urgently needed to avoid the irreparable harm to the Yuba’s threatened
21 fish species that will occur in the next two or more years while Federal Defendants
22 consult.” (Pl’s Reply at 3.) Plaintiff argues that the Ninth Circuit’s ruling did not
23 prevent Plaintiff from seeking preliminary injunctive relief and thus the fact that they
24 are currently precluded from doing so causes harm. (*Id.*) Defendants assert that

25 ¹ Plaintiff’s motion specifically seeks to lift the March 15, 2022 stay of the entire action. (Pl. Mot. at 2
26 (“Plaintiff Friends of the River (“FOR”) hereby moves this Court for an order partially lifting the stay of
27 this litigation (Dkt. 106)(Stay Order)...”) Nothing in Plaintiff’s motion suggests that they are requesting
28 the Court’s prior stay of Plaintiff’s Section 9 claims (see ECF No. 92) be lifted. Accordingly, though there
are two stays in the present action, this order will only address Plaintiff’s motion as a request to lift the
March 15, 2022 stay (ECF No. 106).

1 Plaintiff cannot assert harm based on a prospective motion for preliminary injunction
2 that is not yet before the Court. (Fed. Defs.' Opp'n at 9.)

3 Though much of Plaintiff's argument focuses on the inability to seek preliminary
4 relief itself as a harm, Plaintiff also suggests that "irreparable harm to the Listed
5 Species" would occur without an injunction. Though the Motion to Lift Stay contains
6 very little information about this alleged harm (see Pl's Mot), the proposed Motion for
7 Preliminary Injunction, which Plaintiff included with the present motion, contains a
8 more robust explanation of the harm Plaintiff asserts will occur if the stay remains.²
9 (ECF No. 111-5 at 26-28.)

10 In the proposed Motion for Preliminary Injunction, Plaintiff claims that "Listed
11 Species" are suffering irreparable harm while Defendants perform their reassessment.
12 (*Id.* at 26.) In particular, Plaintiff notes seven specific alleged harms: (1) The
13 Englebright Dam causes harm by preventing accessing the "Upper Yuba habitat", thus
14 increasing inbreeding of the Chinook and steelhead populations; (2) The lack of
15 access for Chinook and steelhead populations also prevents them from being able to
16 take refuge in upstream tributaries "during catastrophic events in the Yuba [River]...";
17 (3) The Englebright Dam "traps gravel needed to create a healthy spawning
18 substrate" downstream. (4) The Englebright Dam "traps large woody material which
19 would provide shade, refuge from predators, and flow velocity refuge needed for
20 juvenile spring Chinook and steelhead rearing[;]" (5) The Daguerre Dam hampers
21 Chinook and steelhead migration and spawning due to fish ladders that are
22 inadequately designed and operated; (6) The Daguerre Dam reduces species

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24 ² The proposed motion is not presently before the Court as this action is stayed. The Court is cognizant
25 of the fact that parties have not had the opportunity to fully brief or present argument on the issues
26 present in this motion. However, the basis of Plaintiff's present motion is inherently linked with the
27 harms claimed in Plaintiff's proposed preliminary injunction motion. (See ECF No. 111 at 10 ("The stay
28 causes FOR substantial hardship by precluding it from seeking relief urgently needed to avoid the
irreparable harm to the Yuba's threatened fish species that will occur in the next two or more years[.]")
As such, while it is premature for the Court to consider the injunction on the merits, and nothing in this
Order should be interpreted as a decision as to whether Plaintiffs will ultimately be entitled to relief,
the Court will consider whether the underlying claims of irreparable harm are sufficient to justify lifting
the present stay.

1 abundance by “hampering spring Chinook and steelhead juveniles from successfully
2 migrating downstream and by promoting predation on these juveniles[;]” (7) The
3 Daguerre Dam blocks green sturgeon from spawning and rearing in the Yuba River
4 above the Dam. (*Id.* at 26-27.) Plaintiff claims that all of the above issues result in
5 “harm to the Listed Species in the form of death, physical injury, loss of genetic
6 distinctiveness, decreased productivity, loss of spatial diversity, and significant habitat
7 modification-resulting in significant impairment of essential breeding, feeding,
8 migration, and sheltering behaviors.” (*Id.* at 28.)

9 As an initial matter, this evidence is stale. Notably, the above-alleged harms are
10 all based on the 2014 Biological Opinion, the 2014 Letter of Concurrence, and a
11 declaration prepared by an expert signed on May 9, 2017. (See ECF No. 111-5 at 26-
12 28; see also ECF No. 34.) This means the factual basis for the harm Plaintiff is claiming
13 is, at a minimum, over five years old at the time of this Court’s review.³ In cases where
14 the 2014 Biological Opinion and Letter of Concurrence are relied on, the information
15 may be closer to nine or more years out of date. Plaintiff themselves have previously
16 noted that “since 2014 there have been several changes in conditions and
17 circumstances on the Yuba River potentially affecting the Listed Species.” (ECF No. 85
18 at 6.)

19 Moreover, this action was initiated on April 20, 2016. (See ECF No. 1.) Plaintiff
20 did not file a motion seeking preliminary injunctive relief at any point from the time of
21 filing the original complaint to the Court’s prior grant of summary judgment on
22 February 22, 2018 (ECF No. 62). Even after this case was remanded to the District
23 Court by the Ninth Circuit on November 25, 2019, Plaintiff did not seek a preliminary
24 injunction from this Court until May 2022. (See ECF Nos. 108, 111.) While the Ninth
25 Circuit denied injunctive relief filed in that Court, Plaintiffs acknowledge that nothing
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27 ³ The Court recognizes that the present motion was filed on May 28, 2022, almost a year prior to the
28 Court’s present decision. (See ECF No. 111.) However, even at that time, the information Plaintiff relies
upon was many years old and likely outdated.

1 in the Ninth Circuit’s decision prohibited them from seeking injunctive relief in this
2 Court. (Pl’s Reply at 2.)

3 Plaintiff’s choice to not previously seek preliminary injunctive relief from this
4 Court undercuts Plaintiff’s argument about the harm that will result if the stay remains.
5 This is particularly true given that nothing in Plaintiff’s motion or reply indicates that
6 circumstances have changed such that Plaintiff now believes preliminary injunctive
7 relief is necessary where it previously was not. (See ECF Nos. 111, 118.) Further, and
8 as discussed above, in alleging these harms, Plaintiff relies upon information that they
9 were aware of for many years prior to the present motion being filed. (See e.g., ECF
10 No. 34.) It is thus challenging to accept Plaintiff’s claim that the alleged harm is
11 concrete and significant enough to justify lifting the present stay with seemingly only a
12 few months remaining before a new Biological Opinion is issued when Plaintiff’s
13 previous actions do not suggest this to be the case.

14 In light of the above, Plaintiff has failed to show the stay would cause harm if it
15 were to remain in effect.

16 **B. Hardship to Defendants**

17 The Federal Defendants argue that lifting the stay would cause them substantial
18 hardship as it would require Defendants to divert resources from completing the new
19 Biological Opinion in order to respond to Plaintiff’s motion. (Fed. Defs.’ Opp’n at 9.)
20 In both the original motion and their reply, Plaintiff only briefly addresses the hardship
21 Defendants might suffer were the stay lifted. (Pl’s Mot. at 10; Pl’s Reply at 6-7.)
22 Relying on *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005), Plaintiff
23 dismisses Defendants’ claim of hardship suggesting that no hardship exists (Pl’s Mot.
24 at 10) and that Defendants’ need to “divert[] staff...does not equate to the
25 requisite ‘clear case of hardship or inequity’” (Pl’s Reply at 5-6 (citations omitted))

26 *Lockyer* is distinct from the present action. In *Lockyer*, Ninth Circuit vacated a
27 stay imposed by the district court pending the outcome of bankruptcy proceedings in
28 Texas. 398 F.3d at 1100. There, the district court stayed proceedings based “in

1 substantial part” on erroneous legal determinations that it did not have the ability to
2 determine the scope of an automatic stay and that the applicability of the “police or
3 regulatory power” exception to the automatic stay under 11 U.S.C. § 362(b)(4). 398
4 F.3d at 1105. In addition to these legal errors, the Ninth Circuit noted that it was
5 “highly doubtful” that the bankruptcy court proceedings would provide a legal
6 resolution to the claims that were stayed in the district court. *Id.* at 1112.⁴ In this case,
7 the actions of the Federal Defendants will form the entire basis of the stayed action
8 going forward. Indeed, a stay was imposed so that Defendants could comply with
9 orders in this case from the Ninth Circuit and the District Court. (See ECF Nos. 74,
10 106.) Thus, unlike *Lockyer*, the actions Defendants are undertaking during this stay
11 will have a significant impact on the legal resolution of the Section 7 claims in this
12 action.

13 Moreover, Defendants’ argument is not that they would suffer hardship if
14 required to defend this suit. Instead, Defendants claim that lifting the stay would
15 cause them substantial hardship as they are already engaged in complying with Court
16 orders in this action and, if Plaintiff’s motion were granted, they would be required to
17 split resources between “completing the reinitiated Daguerre Point consultation and
18 complying with the Ninth Circuit’s remand order and...responding to [a preliminary
19 injunction] motion.” (Fed. Defs.’ Opp’n at 9.) The suggestion that this will place
20 additional strain on Defendants and hamper their ability to quickly complete the new
21 Biological Opinion is well founded. See *S. Yuba River Citizens League v. Nat’l Marine*
22 *Fisheries Serv.*, No. 2:13-cv-0042-MCE, 2013 WL 4094777, at *9 (E.D. Cal. Aug. 13,
23 2013) (“Forcing Defendants to proceed in the instant litigation, when it is already clear
24 that the outcome of the [administrative proceedings] will impact the final resolution of
25 this case, would be prejudicial.” (citation omitted)). If the stay in this action were lifted
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27 ⁴ While *Lockyer* suggested the possibility of injunctive relief was a factor to be considered in
28 determining the propriety of a stay, 398 F.3d at 1112, as discussed above Plaintiff’s failure to seek such
relief for much of the duration of this case weighs against lifting the stay.

1 to allow for a motion for preliminary injunction, Defendants would be required to
2 address that motion and simultaneously produce a new Biological Opinion that may
3 substantially impact the resolution of this action. This would be prejudicial to the
4 Defendants and present a substantial hardship. *Id.*

5 Accordingly, Defendants have shown that they will suffer hardship as a result of
6 the stay in this action being lifted. As discussed above, Plaintiff has not shown that
7 they will suffer harm as a result of the stay remaining in place. Thus, Defendants
8 would suffer greater prejudice and hardship if the stay in this action were lifted.

9 **C. Judicial Time and Resources**

10 The Court has a clear interest in keeping the current stay in place so as to
11 conserve judicial resources. Defendants are currently in the process of producing a
12 new Biological Opinion in response to the Ninth Circuit's instructions on remand as
13 well as this Court's orders. (See Fed. Defs.' Opp'n at 4.) The results of this
14 undertaking will impact the Court's analysis of the Plaintiff's Section 7 claims, which are
15 based in large part on the final agency action of the Federal Defendants. (See First
16 Am. Compl. (ECF No. 25) at ¶¶ 97, 101, 107, 112, 115.) Regardless of whether the
17 actions render the suit moot (see Pl's Reply at 9), the nature of the new Biological
18 Opinion will, in large part, control whether Plaintiff is entitled to relief.

19 Plaintiff argues that the Federal Defendants have effectively already made their
20 determinations in response to the Ninth Circuit's remand, such that a continued stay is
21 no longer warranted. (Pl's Motion at p. 6; Pl's Reply at 1 ("Federal Defendants have
22 already decided to adhere to the 2014 BiOp's determination of the [U.S. Army Corps
23 of Engineers'] discretionary authority over Daguerre. Thus, the reassessment of the
24 Corps' discretionary authority over Daguerre that the Ninth Circuit remand order
25 required is now done.")) However, even if the Service intends to use the same
26 approach used in the 2014 Biological Opinion and does not consider the continued
27 existence of the Dams and the associated operations of hydroelectric facilities and
28 water diversions to be agency actions attributable to the Corps, the issue remains how

1 the Service justifies any change from its position prior to the 2014 Biological Opinion.
2 The Ninth Circuit did not reject the Service’s determination as to what constitutes
3 agency action on the merits, but rather concluded the Service failed “to provide a
4 reasoned explanation for why it changed positions on whether the continued
5 existence of the dams and the hydroelectric facilities abutting Englebright constitute
6 agency action.” *Friends of the River*, 786 Fed. Appx. at 669. Thus, the Court is unable
7 to resolve Plaintiff’s claims on the merits or assess the Federal Defendant’s compliance
8 with the Ninth Circuit’s mandate until the Service’s consultation is complete and a
9 more reasoned explanation is provided.

10 The Federal Defendants have maintained a consistent expected timeline for
11 completion of the new assessment and Biological Opinion. (See ECF No. 114 at 2;
12 ECF No. 119 at 3-4; ECF No. 120 at 3-4; ECF No. 122 at 4.) As stated by the Federal
13 Defendants, the “final Biological Assessment” will be transmitted by the Corps to the
14 Service no later than April 2023 and a new Biological Opinion will be completed no
15 later than January 2024. (See *Id.*) A roughly nine-month wait, from the date of this
16 order, is a relatively short delay that will potentially save significant judicial time and
17 resources. Lifting the stay so that the Court may order briefing, hear argument, and
18 rule on motions that may soon be rendered moot by the new Biological Opinion does
19 not serve the orderly course of justice.⁵ *CMAX*, 300 F.2d at 268.

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26 ⁵ The Court is cognizant that at the time this motion was filed, the expected delay occasioned by the
27 stay would have been on the order of 20 months, and that the equities at that time may have been
28 different. The Court regrets the delay in resolving Plaintiff’s motion that was caused by reassignment of
this action to two different judges, including the undersigned on April 4, 2023. However, the Court
must resolve the motion to lift the stay in the current context, which includes that the Federal
Defendants have indicated that they will complete the Biological Opinion in relatively short order.

1 **CONCLUSION**

2 Given the above, the Court finds that a continued stay is appropriate as Plaintiff
3 has not shown a concrete harm in the stay remaining in effect for the next ten months
4 as the Defendants complete their actions in compliance with the Ninth Circuit's
5 mandates. Conversely, the Defendants would suffer greater hardship and prejudice if
6 the stay were lifted, and judicial time and resources would be conserved by
7 maintaining the present stay.⁶

8 However, on re-examination of the CMAX factors above, the Court finds that
9 the current indefinite length of the stay is not supported by the justifications given.
10 *Yong*, 208 F.3d at 1119. Accordingly, the Court will modify the current stay to
11 terminate on February 29, 2024. This aligns with Federal Defendants' current
12 representations about their expected date of completion (see ECF No. 114 at 2; ECF
13 No. 119 at 3-4; ECF No. 120 at 3-4; ECF No. 122 at 4) and places a clear limit on the
14 duration of the stay. If Defendants anticipate renewal will be required, they must
15 notice any such request as a formal motion at least one month in advance of the
16 expiration of the stay.

17 In accordance with the above and good cause appearing, IT IS HEREBY
18 ORDERED that:

- 19 1. Plaintiff's Motion to Lift Stay (ECF No. 111) is DENIED.
20 2. The current stay of this action, originally issued on March 15, 2022, is

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22 ⁶ Defendant Yuba County Water Agency's opposition argues that Plaintiff's motion should be denied
23 under a "change in circumstances" standard. (Def. Yuba County Water Agency Opp'n at 2.) Courts
24 have inconsistently applied such a standard when reviewing motions for a stay to be lifted. See e.g.,
25 *Digital Software Services, Inc. v. Entertainment Programs, Inc.*, No. 2:09-cv-02763-TLN-DAD, 2014 WL
26 5816929, at *3 (E.D. Cal. Nov. 7, 2014) (considering whether there was a change of circumstances to
27 warrant lifting a stay); see also *Acoustic Technology, Inc. v. Silver Springs Networks, Inc.*, No. 17-cv-
28 02176-SK, 2018 WL 11470959, at *2 (N.D. Cal. Feb. 27, 2018) (same); but see *St. Paul Fire and Marine
Insurance Company v. Kinsale Insurance Company*, No. 1:20-cv-00967-JLT-CDB, 2023 WL 2466404, at
*3-4 (E.D. Cal. Mar. 10, 2023) (reconsidering the factors for imposing a stay when considering a motion
to lift a stay). The Court has already found that Plaintiff's Motion to Lift Stay should be denied under a
review of the CMAX factors. However, to the extent a change of circumstances analysis would be more
appropriate, Plaintiff's motion should also be denied as Plaintiff has not presented any change of
circumstances that would justify lifting the present stay. (See Pl's Mot.; Pl's Reply.)

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modified to expire on February 29, 2024. Any applications for renewal of this stay must be made by formal motion at least one month in advance of the expiration of the stay.

IT IS SO ORDERED.

Dated: May 3, 2023


Hon. Daniel J. Calabretta
UNITED STATES DISTRICT JUDGE

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