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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID SCOTT HARRISON,
Plaintiff,
v.
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS,
Defendant.

Case No.: 16-CV-1310 JLS (BGS)

**ORDER GRANTING DEFENDANT’S
RENEWED MOTION FOR
SUMMARY JUDGMENT**

(ECF No. 21)

Presently before the Court is Defendant Executive Office for United States Attorneys’ Renewed Motion for Summary Judgment. (“Renewed MSJ,” ECF No. 21.) Also before the Court are Plaintiff David Scott Harrison’s Response in Opposition to Defendant’s Renewed MSJ, (“Renewed MSJ Opp’n,” ECF No. 23), and Defendant’s Reply in Support of its Renewed MSJ, (“Renewed MSJ Reply,” ECF No. 24). The Court vacated the hearing on the matter and took it under submission pursuant to Civil Local Rule 7.1(d)(1). (ECF No. 25.) After considering the parties’ arguments and the law, the Court **GRANTS** Defendant’s Renewed Motion for Summary Judgment.

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BACKGROUND

1
2 Plaintiff filed suit against Defendant for improper withholding of public documents,
3 records, and writings pursuant to the Freedom of Information Act (“FOIA”).¹ (*See*
4 *generally* Compl., ECF No. 1.) On February 10, 2015, Plaintiff wrote a letter to Judge Larry
5 A. Burns. (*Id.* ¶ 3, Ex. A.) The letter addressed Plaintiff’s belief that his federal conviction
6 was invalid, and Plaintiff sent a copy of this letter to the Office of the United States
7 Attorney, Southern District of California, San Diego County Office. (*Id.*) On March 10,
8 2015, Assistant United States Attorney (“AUSA”) Michael G. Wheat responded to the
9 letter, noting that Plaintiff’s letter to Judge Burns served “no legitimate purpose” and that
10 Plaintiff has a long “history of engaging in various forms of harassing and threatening
11 communications.” (*Id.* Ex. B.) Wheat concluded the letter by stating that he was “sending
12 a copy of [Plaintiff’s] letter and this response to the appropriate investigative agencies so
13 that they are aware of, and can monitor your activities.” (*Id.* ¶ 4, Ex. B.) Plaintiff responded
14 to Mr. Wheat’s letter by asserting that he would file a FOIA request “concerning acts you
15 claim in your letter to have taken against me” and that he would contact United States
16 Attorney Laura E. Duffy concerning the same. (*Id.* ¶ 5, Exs. C, D.) Plaintiff filed his FOIA
17 request with Duffy, requesting four categories of records. (*Id.* ¶ 6, Ex. E.) Specifically,
18 Plaintiff requested

19
20 all records, documents, information, writings, and tangible
21 things, including electronically stored and/or transmitted:

- 22
- 23 1. that identify each and every one of the “appropriate
24 investigative agencies” suggested in the March 10, 2015,
25 letter; provide also street addresses;
 - 26 2. that identify each and every other agency that was provided
27 information about me due to my letter of February 10, 2015

28 ¹ 5 U.S.C. § 552 *et seq.*

1 (copy attached), as addressed to Judge, Larry A. Burns;
2 provide also street addresses;

- 3
- 4 3. that identify each and every law enforcement agent, non-law
5 enforcement and other persons, department/agency
6 employees, heads, functionaries, office holders, officials,
7 public servants, and all other persons and citizens, to whom
8 were sent information, at the identified agencies (see, #1 and
9 #2, above) and to any other location; identify also, the agency
10 and location each identified individual is attached to; provide
11 also the street address for each identified individual; and
- 12
- 13 4. from November 14, 1988 through March 10, 2015, provide
14 copies of all “harassing and threatening
15 communications, . . . vexing, harassing, or threatening
16 letters[]” suggested by the March 10, 2015, letter that I have
17 ever sent. Identify in each communication and/or letter the
18 offending part, and identify to whom, and the address sent to,
19 of any communication and/or letter I am accused of sending.

20 (*Id.* Ex. E.²)

21 On March 30, 2015, Plaintiff was notified that his FOIA request had been rerouted
22 to the Freedom of Information/Privacy Act Unit at the Executive Office for United States
23 Attorneys (“EOUSA”) in Washington, D.C. (*Id.* ¶ 7, Ex. F.)

24 On April 9, 2015, the EOUSA rejected Plaintiff’s FOIA request, finding that “[t]he
25 Freedom of Information Act only applies to records already in existence and does not
26 require an agency to conduct research, create new records, or answer questions presented
27 as FOIA requests.” (*Id.* ¶ 8, Ex. G.) Plaintiff appealed the denial of his FOIA request to the
28 Director, Office of Information Policy on April 16, 2015. (*Id.* ¶ 9, Ex. H.) On August 31,
2015, the Office of Information Policy affirmed, on partly modified grounds, the denial.

² As Defendant notes, Plaintiff “abandoned request number 4 in correspondence with EOUSA.” (Renewed MSJ 6 n.2 (citing Compl. Ex. M, at 2).) Thus, Defendant did not search for responsive documents for request number 4. (*Id.*)

1 (*Id.* ¶ 10, Ex. I.) The letter suggested contacting the Office of Government Information
2 Services (“OGIS”) for mediation services to resolve FOIA disputes as a non-exclusive
3 alternative to litigation. (*Id.*) On September 16, 2015, Plaintiff wrote to the OGIS for help
4 resolving the dispute. (*Id.* ¶ 10, Ex. J.) But on October 7, 2015, Plaintiff received a letter
5 from the EOUSA notifying him of its receipt of his “Freedom of Information Act/-Privacy
6 Act request dated September 16, 2015.” (*Id.* ¶ 12, Ex. K.) And on October 8, 2015, the
7 OGIS notified Plaintiff of receiving his request for mediation services. (*Id.* ¶ 13, Ex. L.)
8 On October 30, 2015, Plaintiff notified the OGIS that the EOUSA was processing the FOIA
9 request, and thus Plaintiff no longer needed mediation services. (*Id.* ¶ 15, Ex. N.)

10 On November 16, 2015, the EOUSA informed Plaintiff that “[a] search for records
11 located in the United States Attorney’s Office(s) for the Southern District of California has
12 revealed no responsive records regarding the above subject.” (*Id.* ¶ 16, Ex. O (emphasis in
13 original).) Plaintiff appealed this decision on November 21, 2015. (*Id.* ¶ 17, Ex. P.) The
14 Office of Information Policy affirmed the denial of Plaintiff’s FOIA request on January 6,
15 2016, and again offered mediation services through the OGIS. (*Id.* ¶ 18, Ex. Q.) On January
16 15, 2016, Plaintiff again sought mediation services through the OGIS. (*Id.* ¶ 19, Ex. R.)
17 And on April 14, 2016, the OGIS informed Plaintiff that the “EOUSA confirmed the field
18 office completed a search and determined there were not responsive records.” (*Id.* ¶ 20, Ex.
19 S.)

20 Plaintiff filed this FOIA case against Defendant on May 31, 2016. (ECF No. 1.)
21 Defendant answered on September 28, 2016. (ECF No. 8.) Defendant filed its original MSJ
22 on November 3, 2016. (ECF No. 11.) On March 30, 2017, the Court denied Defendant’s
23 original MSJ on the grounds that Defendant failed to conduct an adequate search in
24 response to Plaintiff’s FOIA requests. (*See generally* “MSJ Order,” ECF No. 20.)
25 Specifically, the Court found inadequate (1) a single phone call to the target of the FOIA
26 request asking for responsive documents and (2) a conclusory statement that there were no
27 other searches that could possibly yield responsive documents. (*Id.*)

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1 Defendant filed its Renewed MSJ on April 28, 2017, attaching a declaration in
2 support of its argument that it has conducted an adequate search. (ECF No. 21.) The Court
3 now considers this Renewed MSJ and the supporting evidence.

4 LEGAL STANDARD

5 I. Summary Judgment

6 Under Federal Rule of Civil Procedure 56(a), a party may move for summary
7 judgment as to a claim or defense or part of a claim or defense. Summary judgment is
8 appropriate where the Court is satisfied that there is “no genuine dispute as to any material
9 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a);
10 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are those that may affect
11 the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A
12 genuine dispute of material fact exists only if “the evidence is such that a reasonable jury
13 could return a verdict for the nonmoving party.” *Id.* When the Court considers the evidence
14 presented by the parties, “[t]he evidence of the non-movant is to be believed, and all
15 justifiable inferences are to be drawn in his favor.” *Id.* at 255.

16 The initial burden of establishing the absence of a genuine issue of material fact falls
17 on the moving party. *Celotex*, 477 U.S. at 323. The moving party may meet this burden by
18 identifying the “portions of ‘the pleadings, depositions, answers to interrogatories, and
19 admissions on file, together with the affidavits, if any,’” that show an absence of dispute
20 regarding a material fact. *Id.* When a party seeks summary judgment as to an element for
21 which it bears the burden of proof, “it must come forward with evidence which would
22 entitle it to a directed verdict if the evidence went uncontroverted at trial.” *See C.A.R.*
23 *Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (quoting
24 *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)).

25 Once the moving party satisfies this initial burden, the nonmoving party must
26 identify specific facts showing that there is a genuine dispute for trial. *Celotex*, 477 U.S. at
27 324. This requires “more than simply show[ing] that there is some metaphysical doubt as
28 to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,

1 586 (1986). Rather, to survive summary judgment, the nonmoving party must “by her own
2 affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’
3 designate ‘specific facts’” that would allow a reasonable fact finder to return a verdict for
4 the non-moving party. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 248. The non-
5 moving party cannot oppose a properly supported summary judgment motion by “rest[ing]
6 on mere allegations or denials of his pleadings.” *Anderson*, 477 U.S. at 256.

7 **II. Summary Judgment in FOIA Cases**

8 “The Freedom of Information Act was enacted to facilitate public access to
9 Government documents.” *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991). The
10 purpose of the Act is “to pierce the veil of administrative secrecy and to open agency
11 action to the light of public scrutiny.” *Id.* (quoting *Dep’t of Air Force v. Rose*, 425 U.S.
12 352, 361 (1976)). “Consistently with this purpose, as well as the plain language of the Act,
13 the strong presumption in favor of disclosure places the burden on the agency to justify the
14 withholding of any requested documents.” *Id.*

15 Courts faced with a motion for summary judgment in a FOIA case generally must
16 conduct a two-step inquiry. *Berman v. CIA*, 501 F.3d 1136, 1139 (9th Cir. 2007). The first
17 step assesses whether the agency involved met its investigative obligations under FOIA.
18 *Zemansky v. U.S. EPA*, 767 F.2d 569, 571 (9th Cir. 1985). An agency can prove that it met
19 its obligations by showing that it conducted a search “reasonably calculated” to uncover
20 all relevant documents requested under FOIA. *Hamdan v. U.S. Dep’t of Justice*, 797 F.3d
21 759, 770 (9th Cir. 2015). “An agency can demonstrate the adequacy of its search through
22 reasonably detailed, nonconclusory affidavits submitted in good faith.” *Id.* (internal
23 quotation marks omitted). “Affidavits submitted by an agency to demonstrate the adequacy
24 of its response are presumed to be in good faith.” *Id.* (quoting *Ground Saucer Watch, Inc.*
25 *v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)). “In evaluating the adequacy of the search, the
26 issue ‘is not whether there might exist any other documents possibly responsive to the
27 request, but rather whether the search for those documents was adequate.” *Id.* (emphasis
28 in original) (quoting *Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 987 (9th Cir. 2009)).

1 10. Following the Court's March 30, 2017 Order, I engaged in
2 additional efforts to determine whether my office maintains any
3 records responsive to Plaintiff David Scott Harrison's FOIA
4 request.

5 11. For example, on April 11, 2017, I met with AUSA Michael
6 Wheat in my office. Mr. Wheat and I discussed Mr. Harrison's
7 FOIA request, to discuss what additional searches might yield
8 responsive documents.

9 12. During my April 11, 2017 conversation with Mr. Wheat, I
10 inquired whether Mr. Wheat had forwarded Mr. Harrison's letter
11 to any other employees of the U.S. Attorney's Office. He stated
12 that he had not. I therefore determined that reaching out to other
13 employees of my office would not be likely to yield responsive
14 documents. Nevertheless, on April 24, 2017, I emailed every
15 employee of the U.S. Attorney's Office, asking if anyone had or
16 was aware of communications between the USAO and
17 investigative agencies regarding David Scott Harrison from
18 February 2015 to the present. I received only two responses, both
19 from individuals who do not have any responsive documents. A
20 true and correct copy of my office-wide email is attached to this
21 declaration as Exhibit A.

22 13. During my April 11, 2017 conversation with Mr. Wheat, I
23 also inquired whether he had opened a case file related to
24 Harrison's February 10, 2015 letter to Judge Burns, or his own
25 March 10, 2015 letter to Harrison. He told me that he had not.
26 Nevertheless, in an abundance of caution, I coordinated a search
27 for responsive documents in my office's case files. Case files in
28 the U.S. Attorney's Office are tracked in a database called
LIONS. Each case is given a USAO case number, which is
different from the Court's case numbering system. The USAO
case number begins with the four-digit year in which the case file
was opened, and the USAO number contains the letter "V" for
civil cases and the letter "R" for criminal cases. Case files are
searchable by the name of an individual who is the plaintiff,
defendant, or target.

14. On April 24, 2017, I requested that Sr. Docket Specialist
Mary Wiggins search the entire LIONS database using Plaintiff's

1 name. She then explained to me that she had conducted that
2 search using the first name "David" and last name "Harrison,"
3 and there were 10 responsive files. Reviewing the list of files, I
4 determined that most of them related to previous civil suits that
5 Mr. Harrison had filed against federal employees and agencies.
6 Ms. Wiggins, who maintains all case files in the U.S. Attorney's
7 Office civil division, explained to me that only two files that
8 mention Mr. Harrison's name are still physically located in the
9 USAO (the rest were previously closed and sent to the federal
10 records center). One is case file 2015V00121, the file that was
11 opened when my office received Mr. Harrison's 2015 FOIA
12 request. I reviewed the entire contents of that file, and it does not
13 contain any responsive records, rather, it contains records related
14 to the FOIA request itself, and the processing of that FOIA
15 request. The other case file maintained in the civil division is the
16 case file pertaining to this FOIA litigation, USAO number
17 2016V00425 (Dist. Ct. Number 16-cv-1310). I reviewed the
18 entire contents of that file, and it does not contain any responsive
19 records. Rather, it contains copies of the court's docket entries in
20 this case.

21 15. The only criminal case files that contain Plaintiff's name are
22 the district court and appeals files related to District Court case
23 no. 88-cr-0200. Ms. Wiggins informed me that, according to the
24 LIONS system, the criminal file had been closed in 2003.
25 Nevertheless, on April 24, 2017, I asked Ernesto Magana, Jr.,
26 Records Management Specialist in the criminal division,
27 whether any records related to David Scott Harrison are
28 maintained in the USAO criminal division. Three hours later, Mr.
Magana informed me that after conducting a thorough search of
the criminal division's files and file storage room, he determined
that these closed files are no longer physically located at the
USAO.

16. Also during my April 11, 201[7] meeting with Mr. Wheat, he
volunteered to search his emails and electronic files for records
regarding Mr. Harrison. In a follow up conversation on April 24,
2017, Mr. Wheat informed me that he had searched all of his
emails and all of his electronically stored folders using the name
"Harrison" and did not locate any records responsive to Mr.
Harrison's FOIA request.

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2 17. Also on April 24, 2017, I asked Mr. Wheat whether his legal
3 assistant maintains all of his correspondence and he stated that
4 she does. He said that she likely could perform additional
5 searches for records, and that his legal assistant is Jenna Ruiz de
6 Chavez. On April 26, 2017, I spoke with Ms. Ruiz de Chavez on
7 the phone. She told me she has been Mr. Wheat's legal assistant
8 for four years. She told me that she maintains an electronic folder
9 on a network drive for each of her attorneys, and that each
10 attorney folder has subfolders such as "correspondence" and
11 "pleadings." While I was on the phone with Ms. Chavez, she
12 explained to me that she was searching Mr. Wheat's
13 correspondence subfolder for "Harrison," and that search did not
14 yield any results. She then explained that she was searching all
15 of Mr. Wheat's subfolders for "Harrison," and that search did not
16 yield any results.

17 18. None of the search efforts described above yielded any
18 records responsive to Mr. Harrison's FOIA request.

19 (Supp. Parker Decl. ¶¶ 10–18.)

20 Based on these additional search efforts, the Court concludes that Defendant has met
21 its investigative obligations under FOIA. For one, these searches were reasonably
22 calculated to locate responsive documents. *See, e.g., Hamdan*, 797 F.3d at 771 (concluding
23 that the FBI's search was reasonably calculated to locate responsive records where it
24 searched relevant databases even though plaintiff claimed more could have been done).
25 Specifically, Defendant went far beyond its original search efforts (consisting of a single
26 phone call), and (1) conversed with Mr. Wheat several more times; (2) sent an office-wide
27 email to all employees of the U.S. Attorney's Office seeking responsive records; (3)
28 searched the U.S. Attorney's Office case file system and reviewed the files containing Mr.
Harrison's name; (4) searched Mr. Wheat's electronic files and emails; and (5) searched
Mr. Wheat's legal assistant's electronic files. (Renewed MSJ 7.)

In addition, Plaintiff has not offered, and the Court cannot find, any reason to doubt
the good faith of Ms. Parker's declaration that despite all of these search efforts no

1 responsive records were found. *See, e.g., Hamdan*, 797 F.3d at 771 (concluding that the
2 State Department’s search was adequate where, among other things, the court found “no
3 reason to doubt the good faith of the Department’s declaration that there [was] no apparent
4 connection between [plaintiff] and the military matters within the Bureau’s purview”).
5 While Plaintiff argues that these records *might* exist because Mr. Wheat is otherwise trying
6 to cover up his actions,³ (*see generally* Renewed MSJ Opp’n), his “[s]peculative claims
7 about the existence of additional documents are insufficient to rebut the presumption of
8 good faith” to which Ms. Parker’s declarations are entitled. *See Freedom of the Press*
9 *Found. v. U.S. Dep’t of Justice*, — F. Supp. 3d —, No. 15-CV-03503-HSG, 2017 WL
10 952885, at *4 (N.D. Cal. Mar. 13, 2017) (quoting *Coleman v. Drug Enforcement Admin.*,
11 134 F. Supp. 3d 294, 301 (D.D.C. 2015)); *see also Lahr*, 569 F.3d at 987–88 (concluding
12 that an agency had conducted an adequate search in response to a FOIA request after
13 finding that there was “no evidence of either agency’s bad faith in conducting their
14 searches, and [that], aside from his general allegations of government cover-up, [plaintiff]
15 presents no evidence [to the contrary]”).

16 Nor does it matter that this search produced no responsive documents since “the
17 adequacy of a FOIA search is generally determined not by the fruits of the search, but by
18 the appropriateness of the methods used to carry out the search.” *Coleman*, 134 F. Supp.
19 3d at 303 (citing *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir.
20 2003)); *see also D’Angelica v. IRS*, No. Civ. S-9401998 WBS/GGH, 1996 U.S. Dist.
21 LEXIS 6681 (E.D. Cal. Apr. 25, 1996) (granting summary judgment where no responsive
22

23
24 ³ Specifically, Plaintiff muses that

25 [i]f, as Mr. Wheat now prays this Court will believe, he did not follow through on his
26 oppression and retaliation, then wouldn’t he have notified Ms. Duffy, notified Plaintiff,
27 and later have notified the Executive Office for United States Attorneys? Isn’t that what a
28 not guilty person would have done? Mr. Wheat took a different course; one might argue
that course of action was to erase all evidence of his oppression and retaliation.

(Renewed MSJ Opp’n 6.)

1 documents existed).

2 In sum, under FOIA Plaintiff was “entitled to a reasonable search for records, not a
3 perfect one. And a reasonable search is what [he] got.” *Hamdan*, 797 F.3d at 772.
4 Accordingly, Defendant has met its burden under FOIA and thus the Court **GRANTS**
5 Defendant’s Renewed Motion for Summary Judgment.

6 As before, Plaintiff argues that this case cannot be decided without discovery.
7 (Renewed MSJ Opp’n 7.) The Court again disagrees. As previously explained above and
8 in the Court’s prior Order, “[c]ourts are permitted to rule on summary judgment in FOIA
9 cases solely on the basis of government affidavits describing the documents sought.” *Lion*
10 *Raisins*, 354 F.3d at 1082. Moreover, “in [FOIA] cases courts may allow the government
11 to move for summary judgment before the plaintiff conducts discovery.” *Lane v. Dep’t of*
12 *Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) (collecting cases). While discovery may be
13 appropriate in some cases, *see, e.g., id.* at 1135 (discussing possibility of discovery for
14 violation of a separate act by improperly accessing a personnel file), Plaintiff fails to
15 demonstrate that discovery is appropriate in this case. Specifically, Plaintiff argues that
16 discovery is necessary to assess “Mr. Wheat’s conflicting and irreconcilable actions . . . and
17 his later self-serving statements that he did not follow through on his earlier oppression
18 and retaliation against Plaintiff.” (Renewed MSJ Opp’n 7.) In other words, Plaintiff seeks
19 to discover whom Mr. Wheat contacted regarding Plaintiff’s letter. But this is exactly what
20 Plaintiff unsuccessfully sought in his three FOIA requests. Thus, Plaintiff fails to convince
21 the Court that discovery is appropriate, much less necessary, in this case. *Cf. Lane*, 523
22 F.3d at 1135 (“[T]his circuit has affirmed denials of discovery where, as here, the plaintiff’s
23 requests consisted of ‘precisely what defendants maintain is exempt from disclosure to
24 plaintiff pursuant to the FOIA.’” (quoting *Pollard v. FBI*, 705 F.2d 1151, 1154 (9th Cir.
25 1983))).

26 At core, it seems that Plaintiff wants this Court to determine why Mr. Wheat first
27 stated that he was sending Plaintiff’s letter to various investigative agencies, and then
28 apparently did not actually send the letter to those agencies. (*See generally* Renewed MSJ

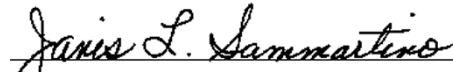
1 Opp'n.) But, as Defendant correctly explains, there is no basis under FOIA for the Court
2 to reach that issue. (Renewed MSJ Reply 3.) Rather, the Court's jurisdiction is limited to
3 determining whether the agency has (1) improperly (2) withheld (3) agency records.
4 *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) (citing
5 5 U.S.C. § 552(a)(4)(B)). Once Defendant has demonstrated an adequate search for
6 responsive documents and has found none, it has met its burden and summary judgment is
7 appropriate. *See, e.g., Zemansky*, 767 F.2d at 574 (noting that agencies do not have an
8 obligation to respond to questions posed as FOIA requests, and that the district court
9 "properly limited itself to a determination of the responsibilities of the EPA under the
10 FOIA").

11 CONCLUSION

12 For the reasons stated above, the Court **GRANTS** Defendant's Renewed Motion for
13 Summary Judgment (ECF No. 21). This Order ends the litigation in this matter. The Clerk
14 of Court **SHALL** close the file.

15 **IT IS SO ORDERED.**

16 Dated: July 6, 2017

17 
18 Hon. Janis L. Sammartino
United States District Judge