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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 CAITLIN KELLY HENRY and JESSE)
14 STOUT,)

15 Plaintiffs,)

16 v.)

17 DEPARTMENT OF JUSTICE,)
18 Defendant.)

) Case No.: 13-cv-5924 DMR

) **PLAINTIFFS' NOTICE OF MOTION,**
) **OPPOSITION AND CROSS-MOTION FOR**
) **SUMMARY JUDGMENT, AND**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF OPPOSITION**
) **AND CROSS-MOTION FOR SUMMARY**
) **JUDGMENT**

) Date: January 22, 2015

) Time: 11:00a.m.

) Place: Courtroom 4 – 3rd Floor

) Magistrate: Hon. Donna M. Ryu

NOTICE OF OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT

1
2 TO DEFENDANT AND ITS COUNSEL OF RECORD: PLEASE TAKE NOTICE that on
3 January 22, 2015, at 11:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 4- 3rd
4 floor, United States District Court, 1301 Clay Street, Oakland, California, the Honorable Donna M. Ryu
5 presiding, Plaintiffs Caitlin Kelly Henry and Jesse Stout will, through one another as counsel, appear
6 and move this Court for an order granting summary judgment pursuant to Federal Rule of Civil
7 Procedure 56 in this Freedom of Information Act (“FOIA”) and Privacy Act (“PA”) action in favor of
8 Plaintiffs and against defendant United States Department of Justice (“DOJ”). Plaintiffs seek an order
9 for defendant to conduct new searches pursuant to Plaintiffs’ FOIA/PA requests on the grounds that the
10 initial searches were inadequate. Plaintiffs seek an order in which the court retains jurisdiction to
11 evaluate the adequacy of future searches. This motion is based on this Notice of Cross-Motion, the
12 following Memorandum of Points and Authorities, the pleadings on file in this matter, and such oral
13 argument and additional evidence as the Court may permit.

14 **RELIEF SOUGHT BY PLAINTIFFS**

15 Plaintiffs move for an order granting summary judgment in favor of Plaintiffs and against
16 defendant United States Department of Justice (“DOJ”) thereby mandating new searches pursuant to
17 Plaintiffs’ FOIA/PA requests and retaining the Court's jurisdiction to evaluate the adequacy of future
18 searches.

19 **ISSUES TO BE DETERMINED**

20 Whether defendant conducted adequate searches in response to Plaintiffs’ FOIA/PA requests.

21 DATED: November 6, 2014

/s/

22
23 CAITLIN KELLY HENRY
Attorney for Plaintiff Jesse Stout

24 DATED: November 6, 2014

/s/

25
26 JESSE STOUT
Attorney for Plaintiff Caitlin Kelly Henry

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Caitlin Kelly Henry and Jesse Stout (collectively, “Plaintiffs”) in this FOIA and Privacy Act matter are attorneys and legal scholars specializing in criminal justice reform. Plaintiffs seek records regarding themselves for the purpose of determining the type and extent of government surveillance of individuals and causes they study and advocate for. On May 1, 2013, Plaintiffs submitted FOIA/PA requests to the Federal Bureau of Investigation (“FBI”) and DOJ. Acting as counsel, attorney Stout sought documents related to Plaintiff Henry. Acting as counsel, attorney Henry sought documents related to Plaintiff Stout. The requests sought records of “emails, Complaint Forms, Memorandums of Investigation, Reports of Investigation, Field Operation Worksheets, Arrest Reports, Agents’ notes, arrest evaluations, and investigation.” Plaintiffs provided a list of key terms¹ to be searched in conjunction with his or her name. The request cited examples of surveillance of groups and individuals Plaintiffs associated with and reasons Plaintiffs believe they are of investigative interest to the FBI and USAO.

Defendant DOJ claims that FBI and USAO searches yielded no responsive records, or that to the extent Plaintiffs’ names were on a government watch list, that the FBI was exempt from disclosure under FOIA exemption (b)(7)(E) and Privacy Act exemption (j)(2). Defendant DOJ claims to have fulfilled obligations under FOIA/PA. On December 21, 2013 Plaintiffs filed suit to challenge the

¹ Hardy Decl. (ECF No. 26) Ex. A, I. Henry’s key terms are: “Alameda County Sheriff, Alameda County District Attorney, Anarchy, Anarchist, Animal Enterprise Terrorism Act, Asian Law Caucus, California Appellate Project, California Department of Corrections and Rehabilitation, California Prison Focus, Center for Constitutional Rights, Chiapas, Communication Management Units, Demonstration, DePaul University, Ella Baker Center, Grand Juries, Immigrant Legal Resource Center, Joint Terrorism Task Force, Legal Observer, Moral Character, National Lawyers Guild, New York University, NoFly List, Oaxaca, Occupy, Office of Foreign Assets Control, San Francisco Sheriff, San Quentin State Prison, Pelican Bay State Prison, Protest, Prisoner Legal Services, Radical, Secure Housing Units, Terrorism and the Law, University of California Hastings College of the Law, Watchlist, Zapatistas.” Stout’s key words are: “Alexander Muss High School in Israel, Americans for Safe Access, Board of Directors, Bradford Group, Brown University, California Corrections Crisis, California Department of Corrections and Rehabilitation, California State Assembly, Clarendon Group, Coalition for Cannabis Policy Reform, Council on Crime Prevention, Demonstration, Dorchester Publishing, Drug Policy Alliance, Drug Policy Committee, Evan Marshall Literary Agency, Legal Observer, Marijuana Policy Project, Moishe House, Multidisciplinary Association for Psychedelic Studies, National Lawyers Guild, National Organization for the Reform of Marijuana Laws, NoFly List, Occupy, Office of Legal Affairs, Public Defender, Public Safety Committee, Right to Vote Campaign, San Francisco Sheriff, San Quentin State Prison, Protest, Radical, Rhode Island Patient Advocacy Coalition, Students for Sensible Drug Policy, University of California Hastings College of the Law, Watchlist.”

1 adequacy of the searches. Complaint, ECF No. 1.

2 **II. BACKGROUND: PLAINTIFFS' FOIA AND PRIVACY ACT REQUESTS**

3 FOIA jurisprudence requires Defendant to search “agency records for the purpose of locating
4 those records which are responsive to a request” 5 U.S.C. § 552(a)(3)(D). Defendant bears the burden to
5 justify non-disclosure, and must show that its search was reasonable. *See* 5 U.S.C. § 552(a)(4)(B). In
6 satisfying its burden its declarations cannot be “so general as to raise a serious doubt whether the ...
7 U.S. Attorney’s Office [or other agency] conducted a reasonably thorough search of its records.”
8 *Steinberg v. U.S. Dept. of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994). However, in the Ninth Circuit
9 limited precedent exists to define the extent and method of search required to fulfill the reasonableness
10 standard. The leading case on the Circuit’s definition of reasonableness, *Zemansky*, is a 1985 case, and
11 the subsequent case, *Lahr*, is unpublished. *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985); *Lahr v.*
12 *Nat’l Transp. Safety Bd.*, 569 F.3d 964, 989 (9th Cir. 2009). There are scant published decisions in the
13 Ninth Circuit detailing the multitude of records management techniques available to Defendant, and
14 what methods of search amount to a reasonable search. To assist the Court in appreciating the
15 multiplicity and functionality of these systems, the following memorandum seeks to establish a factual
16 record that, in particular, details lesser-known electronic systems such as IDW and Sentinel. To assist
17 the Court in evaluating what constitutes a reasonable search, Plaintiffs will describe in great detail the
18 searches Defendant avers that it conducted. Plaintiffs will also detail the systems and methods
19 Defendant failed to use despite their inclusiveness of records and more sophisticated search methods that
20 are likely to result in responsive records.

21 **A. FBI’s Search Efforts**

22 The FOIA statute tasks Defendant to avail itself of all methods reasonably likely to result in
23 locating responsive records, including electronic methods.² Attempting to satisfy its burden of showing
24 reasonable efforts, in its Motion for Summary Judgment, Defendant provided a cursory outline of the
25 basic organizational structures of the record management systems it utilized to perform searches in this

26 _____
27 ² FOIA requires an agency to make “reasonable efforts to search for the records” including “in electronic form or format.” 5
28 U.S.C. § 552(a)(3)(C).

1 case. First, it explained the Central Records System (“CRS”), its automated and manual General Indices,
 2 and how main entries and reference entries (also known as “cross references”) are organized.
 3 (Defendant's Mot. for Summ. Judgment, at 3-4. ECF No. 25 at 9-10.) Second, it explained the Electronic
 4 Surveillance (“ELSUR”) indices, which is a separate system of records from the CRS. *Id.* Defendant
 5 indicated that it conducted searches using these two systems and failed to locate responsive files for
 6 either Plaintiff. *Id.* at 2, 8 (ECF No. 25).

7 Defendant's motion and declaration are devoid of an adequate explanation as to why, when
 8 Plaintiffs’ request indicated their associates were under surveillance³ and provided reasons Plaintiffs
 9 would be of investigatory interest to Defendant, the FBI failed to utilize other search methods such as
 10 CRS's Electronic Case File (ECF) application. Other search methods, such as a “full text” search capable
 11 of searching key terms provided in Plaintiffs’ requests and not merely names, are more comprehensive
 12 and are thus more likely to result in responsive records.

13 **1. Plaintiff Henry**

14 As Defendant is obligated to “conduct a reasonable search for responsive documents using
 15 methods which can reasonably be expected to produce the information requested” its declarations should
 16 show that it searched all locations reasonably likely to produce records. *Hiken v. Dep’t of Def.*, 521 F.
 17 Supp. 2d 1047, 1054 (N.D. Cal 2007). Defendant states, that in response to Henry's initial request, the
 18 FBI conducted two different searches using two different systems. Defendant's Mot. for Summ.
 19 Judgment (ECF No. 25) at 5, 11. First, the FBI used its CRS system to conduct a search of its automated
 20 indices. *Id.* It did not identify any responsive main file records. *Id.* 8 (ECF No. 25). The initial query

21 ³ Plaintiffs’ requests (Hardy Decl. (ECF No. 26) Ex. A, I.) indicated they requested documents to publicize surveillance of
 22 advocates and activists who advocate for prisoners and racial, criminal, and social justice. The request contended that
 23 publicizing Defendant’s methods of monitoring advocates would contribute significantly to a public understanding of how to
 24 perform lawful advocacy on behalf of marginalized populations. Plaintiffs emphasized that attorneys would particularly
 25 benefit from understanding of how traditionally legally privileged communications have been monitored. The request listed
 26 the following documents to support the contention that the FBI monitored them and their associates: “The Public Is Left in
 27 the Dark When Courts Allow Electronic Surveillance, New York Times, 7/23/2012
[http://www.nytimes.com/2012/07/24/us/politics/sidebar-public-in-the-dark-about-surveillance-orders.html?_r=3& FBI](http://www.nytimes.com/2012/07/24/us/politics/sidebar-public-in-the-dark-about-surveillance-orders.html?_r=3&FBI%20Surveillance%20Of%20Occupy%20Wall%20Street%20Detailed)
 28 Surveillance Of Occupy Wall Street Detailed, Huffington Post, 01/05/2013 [http://www.huffingtonpost.com/2013/01/05/fbi-](http://www.huffingtonpost.com/2013/01/05/fbi-occupy-wall-street_n_2410783.html)
 The FBI Treated Occupy Like a Terrorist Group, Atlantic Wire, 12/23/2012
<http://www.theatlanticwire.com/national/2012/12/fbi-treated-occupy-terrorist-group/60289/> Revealed: how the FBI
 coordinated the crackdown on Occupy, Guardian, 12/29/12 [http://www.guardian.co.uk/commentisfree/2012/dec/29/fbi-](http://www.guardian.co.uk/commentisfree/2012/dec/29/fbi-coordinated-crackdown-occupy)
 coordinated-crackdown-occupy.”

1 method consisted of a search for main investigatory files indexed to Henry's name, using phonetic
2 breakdowns of variations of Henry's name, date of birth, and social security number. *Id.* This indicates
3 the FBI searched the CRS using a system called ACS, and the ACS's application known as the Universal
4 Name Index (UNI). This limited search method only included Plaintiff's name, as opposed to name and
5 key term. Defendant noted its policy that "unless a person specifically requests cross-references or
6 requests information regarding a very specific event, which are contained in a cross reference file, the
7 FBI does not search these records at the administrative stage." Hardy Decl. (ECF No. 26) ¶ 30, fn. 9.

8 Plaintiff Henry's May 29, 2013 appeal put the FBI on notice to search additional systems and use
9 additional search methods, indicating a search of "only the Central Records System was inadequate,"
10 and "request[ed] . . . a more thorough and adequate search in the Central Records System." Hardy Decl.
11 (ECF No. 26) Ex. D ¶ 10. Henry also requested that the FBI conduct a "cross-reference search." *Id.* The
12 OIP affirmed FBI's actions on August 6, 2013 stating that the FBI "conducted an adequate, reasonable
13 search." Hardy Decl. (ECF No. 26) Ex. F ¶ 12. This affirmation of the deficient initial search was
14 improper because the FBI refused to conduct a new search using other methods and locations that may
15 result in responsive records.

16 The FBI's subsequent search continued to omit potentially responsive systems and ignore
17 alternative search methodologies. The FBI states that as a result of the present lawsuit, it conducted two
18 searches. Defendant's Mot. for Summ. Judgment (ECF No. 25) at 12. First it duplicated the initial CRS
19 search, searching its main files and cross-references using the automated and manual indices. *Id.* The
20 method of three-way phonetic name search was likewise identical. *Id.* Second, the FBI performed what
21 it termed a "discretionary" search of its Electronic Surveillance system (ELSUR).⁴ Hardy Decl. (ECF
22 No. 26) ¶ 37. This "discretionary" method consisted of a search for documents indexed to various
23 phonetic breakdowns of Henry's name, date of birth and SSN. *Id.* Neither search identified responsive
24 records. Defendant did not utilize any other systems or methods despite their potential for locating
25 responsive records. Hardy Decl. (ECF No. 26) ¶ 30.

26 ⁴ Defendant's Motion for Summary Judgment states that the FBI initially searched its Electronic Surveillance system
27 (ELSUR). (ECF No. 25) at 8. However, the Hardy Declaration indicates that the FBI only conducted an ELSUR search as a
28 result of the present litigation. Hardy Decl. (ECF No. 26) ¶ 37.

2. Plaintiff Stout

The FBI initially conducted a superficial search for Stout's records. By letter dated May 6, 2013, the FBI notified Stout that it executed a CRS search for main investigative files. Hardy Decl. (ECF No. 26) ¶ 32. This method consisted of a phonetic name search in conjunction with Stout's SSN and date of birth. *Id.* The search did not identify any main file records responsive to Stout's request. *Id.*

Plaintiff Stout's May 29, 2013 appeal put the FBI on notice to search other systems, and use additional methods to investigate previously searched systems. Plaintiff Stout's appeal noted that the "search of only the Central Records System was inadequate" and requested that the FBI "perform a more thorough and adequate search of the Central Records System." Hardy Decl. (ECF No. 26) Ex. K. Plaintiff Stout also requested that the FBI conduct a "cross-reference search." *Id.* The FBI improperly responded to Stout's appeal when, on September 10, 2013, it affirmed its initial search and refused to conduct a new search though other locations and methods could have yielded responsive records.

The FBI states that, as a result of the present lawsuit, it conducted two searches. Defendant's Mot. for Summ. Judgment (ECF No. 25) at 14. First, the FBI duplicated its CRS system search of main files and cross-references using the automated and manual indices. Hardy Decl. (ECF No. 26) ¶ 32. The method was identical to the same three-way phonetic name search previously performed by the FBI. *Id.* This search method found no responsive records in the CRS system. *Id.* Second, the FBI performed what it termed a "discretionary" search of its Electronic Surveillance system (ELSUR). *Id.* at ¶ 37. This method consisted of a search for documents indexed to various phonetic breakdowns of Stout's name, date of birth, and SSN. *Id.* It did not identify any main file records. *Id.* This subsequent search failed to use available methods that could reasonably be expected to produce the information requested.

B. United States Attorney's Office Search Efforts

To satisfy its burden of demonstrating that it availed itself of all methods reasonably likely to result in locating responsive records, Defendant's outlined the United States Attorney's Office (USAO) methods for conducting searches responsive to Plaintiffs' FOIA/PA requests. Defendant's Mot. for Summ. Judgment (ECF No. 25) at 16. Defendant primarily utilized the Legal Information Office Network System ("LIONS") system and electronic dockets, searched by Lexis Nexis Courtlink. Margen

1 Decl. (ECF No. 26) ¶ 5. Similar to the FBI, the USAO staff possess other systems and methods that
 2 reasonably could be expected to produce the information requested, but these systems were not used to
 3 search for Plaintiffs' records.

4 **1. Plaintiff Henry**

5 All three USAO searches failed to search locations reasonably likely to contain records.⁵

6 The USAO Northern District of California (NDCA) initially conducted a search of the following
 7 two systems: LIONS and the jurisdiction's electronic docket. Defendant's Mot. for Summ. Judgment
 8 (ECF No. 25) at 16. The LIONS search method employed a name search using variations of Henry's
 9 name to search whether Henry was a party or an attorney. *Id.* It returned no responsive records. *Id.* As a
 10 result of the present lawsuit, in September 2014 the NDCA conducted a second search. *Id.* It expanded
 11 the method of search in LIONS to include the "associated key words" listed in Henry's request.⁶ Margen
 12 Decl. (ECF No. 26) ¶ 5(c). The NDCA maintains records on several of Henry's key terms: "records
 13 showed matters in the USAO/NCDA involving several of the organizations."⁷ *Id.* However, after Ms.
 14 Margen reviewed case information on LIONS and communicated with the Assistant United States
 15 Attorney assigned to the case, she did not locate any responsive records regarding Henry. *Id.*

16 The USAO Central District of California (CDCA) initially searched the LIONS system on July
 17 9, 2013. Salazar Decl. (ECF No. 31) ¶ 9(a). Second, the CDCA searched the PACER system. *Id.* at ¶
 18 9(c). Both searches were limited to the name search method and returned no results. *Id.* Third, the
 19 CDCA searched the civil and criminal dockets. *Id.* at ¶ 9(d). It utilized a name search to determine if

20 _____
 21 ⁵ Defendant's Motion for Summary Judgment addresses the following requests made by Plaintiff Henry: (1) Northern District
 22 of California, Request Number 13-1987, response to Plaintiff sent January 10, 2104; (2) Central District of California,
 23 Request Number 13-1989, response to Plaintiff sent August 27, 2014; (3) and Western District of New York, Request
 24 Number 13-1993, response to Plaintiff sent September 25, 2014.

25 ⁶ See Fn. 1.

26 ⁷ Through process of elimination Plaintiffs presume the USAO is investigating one or more of the following themes (the
 27 organizations are underlined because the affidavit described matters involving several "organizations"): California Prison
 28 Focus, Center for Constitutional Rights, Chiapas, Communication Management Units, DePaul University, Ella Baker Center,
Grand Juries, Immigrant Legal Resource Center, Joint Terrorism Task Force, Moral Character, New York University,
Oaxaca, Office of Foreign Assets Control, Pelican Bay State Prison, Prisoner Legal Services, Secure Housing Units,
Terrorism and the Law, Zapatistas. Plaintiffs eliminated these shared key terms as Stout's key terms did not correlate with an
 investigation: California Department of Corrections and Rehabilitation, Demonstration, Legal Observer, National Lawyers
 Guild, NoFly List, Occupy, San Francisco Sheriff, San Quentin State Prison, Protest, Radical, University of California
 Hastings College of the Law, Watchlist,

1 Henry was a party or subject in a matter purged from LIONS. *Id.* It did not locate records. *Id.* As a result
 2 of the present lawsuit, on September 22, 2014 the CDCA conducted another search. *Id.* at ¶ 9(b). It
 3 redeployed LIONS but expanded the method of search to include the “associated key words” listed in
 4 the request. “None of these searches on LIONS returned any matters in the USAO-CDC regarding the
 5 subject matters of the FOIA/PA requests, Ms. Henry and Mr. Stout.” *Id.*

6 The USAO Western District of New York (NYW) conducted a search of two systems on July 16,
 7 2103. First it searched LIONS. Venetian Decl. (ECF No. 33) ¶ 7(a). Its method consisted of a name
 8 search using variations of Henry’s name and Stout’s name. *Id.* Second, it searched the jurisdiction’s
 9 manual card catalog file. *Id.* It revealed no responsive records. *Id.* In response to this suit, NYW
 10 replicated the searches and again uncovered no responsive records. *Id.*

11 **2. Plaintiff Stout**

12 The four USAOs failed to search locations reasonably expected to produce records.⁸

13 The USAO New Jersey (DNJ) office initially conducted a search of three systems in June 2014.
 14 On June 2 and June 3, 2014 it utilized LIONS. Bryant Decl. (ECF No. 28) ¶ 6(a). The method for the
 15 search included a search by name variations and associated key words. *Id.* On June 2, 2014 the DNJ
 16 searched the PACER system. *Id.* at ¶ 6(c). The method of search was a name search to determine if
 17 Stout was a party or attorney. *Id.* Third, on June 3, 2014, the DNJ searched an index of archived cases.
 18 *Id.* at ¶ 7. In response to this suit on September 11, 2014 it used the LIONS system to conduct another
 19 name search. *Id.* Then on September 24, 2014 it used LIONS to conduct an “associated key words
 20 search.” *Id.* at ¶ 6(b). Second, on September, 201[4]⁹, DNJ searched an index of archived cases. *Id.* at ¶
 21 7. None of these methods exposed any responsive records.

22 The USAO Rhode Island (DRI) office first utilized the LIONS system on July 9, 2013. Mascola
 23 Decl. (ECF No. 30) ¶ 7(a). DRI’s methods included a name search and associated key word search for

24 _____
 25 ⁸Defendant’s Motion for Summary Judgment addresses the following requests made by Plaintiff Stout: (1) New Jersey,
 26 Request Number 13-1996, response to Plaintiff sent September 25, 2014; (2) Rhode Island, Request Number 13-1997,
 27 response to Plaintiff sent September 25, 2014; (3) Northern District of California Request Number 13-1999, response to
 28 Plaintiff sent January 14, 2014; (4) Central District of California, Request Number 13-2000, response to Plaintiff sent August
 27, 2014.

⁹ In the declaration the year was mistyped as 2013 instead of 2014.

1 terms listed in Plaintiff Stout's request. *Id.* Second, on July 9, 2013 the DRI searched the PACER
2 system. *Id.* It used a name search to discover if Stout was a party or attorney. Third, on July 9, 2013 and
3 October 29, 2013 the DRI FOIA/PA contact Sandra Mascola emailed staff to see if staff knew of any
4 records associated with Stout's name and key words. *Id.* This method generated no records. *Id.*

5 The USAO Northern District of California (NDCA) office performed two searches in November
6 2013. It initially searched using the LIONS system. Margen Decl. (ECF No. 29) ¶ 9. It employed the
7 name search to determine if Stout was a party or attorney. Second, the CDCA searched the civil and
8 criminal dockets using the Courtlink system. As a result of the present lawsuit, on November 14, 2014
9 the NDCA conducted another search. It used the LIONS system and expanded the search method to
10 include “associated key words”¹⁰ listed in the request. *Id.* at ¶ 7(c). Unlike in Plaintiff Henry's case
11 where the NDCA indicated that it maintained records and at least one active case regarding several of
12 the organizations listed as key words, Ms. Margen's Declaration provided no indication that there were
13 records or cases regarding Stout's key words. *Id.* Thus none of NDCA’s methods revealed records.

14 The USAO Central District of California (CDCA) office initially searched with LIONS on July
15 9, 2013. Salazar Decl. (ECF No. 31) ¶ 9(a). It conducted a name search. *Id.* Second, it searched PACER.
16 *Id.* at ¶ 9(c). It conducted a name search. *Id.* Third, it searched the civil and criminal dockets. *Id.* at ¶
17 9(d). It used a name search to determine if Stout was a party or subject matter in a matter purged from
18 LIONS. *Id.* As a result of the present lawsuit, on September 22, 2014 it conducted another search. *Id.* at
19 ¶ 9(b). This time it expanded use of LIONS system to a method of search that included the “associated
20 key words” listed in the request. *Id.* “None of these searches on LIONS returns any matters in the
21 USAO-CDC regarding the subject matters of the FOIA/PA requests, Ms. Henry and Mr. Stout.” *Id.*
22 Thus none of the CDCA methods discovered responsive records.

23 **III. BACKGROUND: RECORD MANAGEMENT AND RETRIEVAL METHODS**

24 Defendant’s electronic and non-electronic records maintenance methods are numerous. Following
25 is an outline of locations and methods likely to bear fruit in a search for Plaintiffs’ records.

26
27

¹⁰ See Fn. 1.

1 **A. FBI: Non-Electronic Files and Personal Relationships**

2 A National Archives report indicates that personal relationships and non-electronic files are
3 critical FBI record retrieval mechanisms, yet are systematically underutilized in FOIA searches:

4 Currently, the FBI's official record keeping system is paper-based and decentralized. The
5 FBI has several electronic record-keeping systems, but none of these systems meet the
6 National Archives and Records Administration's (NARA) standards of a system of
7 records. Only the costly and inefficient paper-based system has been approved by NARA.
8 Thus, the FBI must maintain tens of millions of paper files. These papers are maintained
9 and stored at 265 different locations including FBI Headquarters, field offices, large
resident agencies, some Legal Attaché offices, Investigative Technology Centers, and
various other off-site locations. These files consist of open, active investigative and
administrative files, as well as closed, inactive files.¹¹

10 The FBI's non-electronic files are primarily accessed through personal relationships: “The primary way
11 information gets shared is through personal relationships. There does not appear to be any recognition
12 that [the ACS electronic] system fails in the absence of good personal relationships.”¹² If personal
13 relationships are the primary information sharing technique, then a reasonable search would include
14 speaking with employees in departments or field offices to locate records, many of which are only
15 available in paper format or on local computers. Conversations and paper files are crucial to an adequate
16 search because many items that should constitute a “record” are not properly classified as records and/or
17 are never entered into electronic storage. The National Archives states that the electronic systems are
18 inadequate because:

19 FBI employees generally do not understand exactly what constitutes a record even though
20 most systems provide for the capability to designate information as records (either
21 manually or automatically). When dealing with electronic information, FBI employees
22 have even more difficulty understanding what constitutes a record and, if declared a
record, what to do with it. The process for capturing and declaring email messages as
records is too complicated.¹³

23 The National Archives further explains why standard FBI FOIA “administrative searches” will not yield
24 results involving external media and data the agency does in fact possess:

25 ¹¹ FBI Records Management Architecture: Current State Evaluation, National Archives and Records Administration Toolkit
26 For Managing Electronic Records. at p. 3, attached hereto as Ex. A

27 ¹² Reforming Law Enforcement, Counter-terrorism, and Intelligence Collection in the United States, National Commission on
Terrorist Attacks Upon The United States, Staff Statement No. 12, 2003, at p. 6, attached hereto as Ex. B.

28 ¹³ Ex. A, FBI Records Management Architecture, at pp. 9-10.

1 Processes are not well defined nor consistently applied due to the many different record
 2 keeping systems, media, and formats. Capability to provide process and policy
 3 information to employees in an efficient and effective manner does not currently exist
 4 within FBI. Most external media and data are not captured and then managed as an FBI
 5 record. Records from desktop applications (e.g., Word documents and emails) often are
 6 not properly declared and managed. This creates vulnerabilities from records
 7 management, FOIA, and discovery perspectives.¹⁴

8 In conclusion, conversations and non-electronic or not yet uploaded records are valuable search
 9 locations of data the FBI under-utilizes in FOIA searches. The search of Plaintiffs' records may yield
 10 responsive records should these methods be utilized.

11 **B. FBI: Electronic Search Tools**

12 In order to evaluate what would constitute an adequate search, it is crucial to understand the
 13 available systems and methods for search that were not detailed in the FBI's affidavit. Though David
 14 Hardy's declaration suggests that only the CRS and ELSUR repositories exist, more advanced systems
 15 such as IDW and Sentinel also exist. In other cases, including *Rosenfeld*, Hardy's declarations detail
 16 numerous other records management systems: Criminal Law Enforcement Application; Integrated
 17 Intelligence Information Application; Criminal Intelligence Support Program; and the FBIHQ Human
 18 Intelligence Division and Field Office Confidential Human Source information, which are searched by
 19 separate "Confidential Indices."¹⁵ In Plaintiffs case, Hardy's declaration implies that the FBI uses the
 20 index search method because it is most likely to lead to responsive results, but as the following systemic
 21 architectural analysis will show, the affidavit is over-simplified and misleading.

22 **1. Central Records System (CRS)**

23 The FBI's Central Records System (CRS) is a paper-based system in a Virginia warehouse that
 24 consists of boxes of files accessed and moved with pallets and a forklift. Hardy's declaration explains
 25 that the "mechanism that the FBI uses to search the CRS is the Automated Case Support System
 26 ("ACS") Hardy Decl. (ECF No. 26) ¶ 24. The Automated Case Support (ACS) system is the decades-old
 27 antiquated computerized application used to access the CRS:

28 ¹⁴ Ex. A, FBI Records Management Architecture, at p. 10.

¹⁵ *Rosenfeld v. FBI*, Case No. 07-cv-03240 (N.D. Cal. 2010) Decl. Of David Hardy (ECF No. 83) ¶ 77, attached hereto as Ex. C.

1 Deployed in 1995, ACS is one of several applications residing on the Bureau's
 2 investigative mainframe and is intended to contain information ranging from unclassified
 3 to Secret. ACS is the FBI's investigative system of records and is comprised of three
 subsystems: a case indexing system; a case management system; and a system to store
 and retrieve text documents.¹⁶

4 ACS "employs 1980s-era technology that is by all accounts user-unfriendly. More troubling, the system
 5 cannot be used to store or transmit top secret or sensitive compartmentalized information."¹⁷ The FBI's
 6 former Chief Technology Officer Jack Israel described ACS as:

7 ...based on old technology. It's based on an IBM mainframe with legacy database and
 8 programming technology, and I would say one of the main things that strikes you as a
 9 user of ACS is that you're dealing with old IBM green screens. You're not dealing with a
 10 web-based environment, which everyone is used to from the Internet. Not only is the
 interface archaic, but the way that you search data, the way you input data, all of those
 are archaic... There's no such thing as indexing. There's no Google index of the case
 file.¹⁸

11 As one former FBI executive explained at a Congressional hearing in 2002, "there's no mouse, there's
 12 no icon, there's no year 2000 look to it, it's all very keyboard intensive."¹⁹ The same report noted that
 13 this "user-unfriendliness" caused some personnel to avoid using the system altogether. *Id.* This can
 14 result in a FOIA/PA search that yields no responsive records despite their existence and obtainability.

15 The ACS is utilized to locate either main file or cross-reference index entries stored in the CRS;
 16 "Because the CRS cannot electronically query the case files for data such as an individual's name or
 17 social security number, the required information is duplicated and moved to the ACS so that it can be
 18 searched." Hardy Decl. (ECF No. 26) ¶ 24. Hardy's declaration identifies three applications then used to
 19 access ACS: the Universal Name Index (UNI), Electronic Case File (ECF), and Investigative Case
 20 Management (ICM). *Id.* at ¶ 27. However neither CRS nor ACS are designed to contain all records
 21 relevant to investigations. These systems only contain records classified up to the "Secret" classification
 22 level and some users are restricted from submitting data. Furthermore, some users refuse to share paper
 23

24 ¹⁶ A Review of FBI Security Programs, Commission for the Review of FBI Security Programs, Mar. 2002, at p. 38, 48,
 attached hereto as Ex. D.

25 ¹⁷ Ex. B, Reforming Law Enforcement, Counter-terrorism, and Intelligence Collection in the United States, at p. 6.

26 ¹⁸ Q&A Jack Israel on FBI Sentinel and Federal IT Development Shortcomings, David Perera, Jul. 1, 2012, at p. 3, attached
 hereto as Ex. E.

27 ¹⁹ The Federal Bureau of Investigation's Management of the Trilogy Information Technology Modernization Project, U.S.
 Department of Justice Office of the Inspector General, Audit Division, Audit Report 05-07, Feb. 2005 at p. 15, attached
 hereto as Ex. F.

1 files, or do not properly designate information as a record, so records such as word documents and
2 emails are not captured and managed properly:

3 For a variety of reasons, significant information collected by the FBI never gets uploaded
4 into the Automated Case Support system, or it gets uploaded long after it is learned. One
5 of the reasons for this is the traditional approach to cases, in which information is treated
6 as “owned” by the case agent and maintained in a paper case file.²⁰

7 **a. Universal Name Index (UNI)**

8 The Universal Name Index (UNI) operates as an index that can be searched for the name of
9 someone who is the main subject of a FBI investigation or someone referenced in an investigation. If
10 records are properly categorized and indexed, a search of the UNI should reveal the existence of records
11 in other systems. If the UNI search does not indicate that a name will be found in either of the two ACS
12 systems, no subsequent search will be performed in the other two ACS systems, despite the potential for
13 the name to be located in other case files. The FBI’s method for searching the ACS is typically limited
14 to a UNI index search. However this index is not an automated “Google-like index, what the FBI does is
15 manually build an index of all the people, places and things” by manually circling paper case file names
16 or addresses with red ink.²¹ “Under the ACS process, Special Agents marked paper documents with the
17 information they wanted to be indexed and OSTs indexed the documents in ACS.”²² ACS is designed in
18 such a way that if Special Agents are not sufficiently diligent in marking names on each sheet of paper
19 and then submitting them for upload, a subsequent UNI search will not locate responsive records even
20 though records may exist.

21 **b. Electronic Case File (ECF)**

22 The second ACS application, Electronic Case File (ECF), “serves as the central electronic
23 repository of the FBI's official text-based documents.” Hardy Decl. (ECF No. 26) ¶ 27(b). In other cases,
24 including *Shapiro v. DOJ*, Mr. Hardy admits that searching for keywords in text documents via ECF
25

26 ²⁰ Ex. B, National Commission on Terrorist Attacks Upon The United States, Staff Statement No. 12, at p. 6.

27 ²¹ Ex. E, Q&A Jack Israel on FBI Sentinel and Federal IT Development Shortcomings, at p. 4.

28 ²² Audit of the Status of the Federal Bureau of Investigation's Sentinel Program, U.S. Department of Justice, Office of the
Inspector General Audit Division, Audit Report 14-31, Sept. 2014 at p. 15, attached hereto as Ex. G.

1 may locate records that would not be found through an index search of ACS.²³ When the FBI fails to
2 discover records in an initial UNI search, it may find records in a subsequent ECF search because:

3 ECF provides the capability of uploading word processing documents to the mainframe
4 where they are filed and serialized, parsing uploaded documents for structured document
5 fields and lead information, searching documents by both structured (i.e., formatted fields
6 such as From/To) and unstructured (i.e., full text) means, and downloading documents in
7 their original word processing format. ECF also handles the serialization of non-textual
8 records.²⁴

9 Thus, information an agent failed to manually mark as a record for indexing, and then upload into ACS,
10 will not be located in a UNI search but would potentially be found during an ECF search.

11 **c. Investigative Case Management (ICM)**

12 The third ACS application, Investigative Case Management (ICM), is used to designate a
13 Universal Case File Number and “provides the ability to open, assign, and close investigative and
14 administrative cases, as well as set, assign, and track leads.” Hardy Decl. (ECF No. 26) ¶ 27(a).

15 **2. Electronic Surveillance (ELSUR)**

16 The second electronic records storage system described by Hardy is the Electronic Surveillance
17 (ELSUR) system, a separate system of records from the CRS. The ELSUR indices are “used to maintain
18 information on subjects whose electronic and/or voice communications have been intercepted as the
19 result of a consensual electronic surveillance or a court-ordered (and/or sought) electronic surveillance
20 conducted by the FBI.” Hardy Decl. (ECF No. 26) ¶ 33-34. These are records of “individuals who were
21 (a) the targets of direct surveillance, (b) participants in monitored conversations, and (c) owners, lessors,
22 or licensors of the premises where the FBI conducted electronic surveillance.” Hardy Decl. (ECF No.
23 26) ¶ 34. The records may be located in FBIHQ or local field offices. Hardy Decl. (ECF No. 26) ¶ 36.

24 **3. Sentinel**

25 Hardy fails to mention the FBI’s Sentinel system, a web-based “electronic information and case
26 management system that includes records management, workflow management, evidence management,
27 search and reporting capabilities, and information sharing with other law enforcement agencies and the
28

²³ *Shapiro v. DOJ*, No. 13-0729, 2014 WL 1280275 (D.D.C. Mar. 31, 2014) Decl. of David Hardy (ECF No. 5-3) ¶ 8,
attached hereto as Ex. H.

²⁴ Records Management (RM) Manual, FBI, Revised Aug. 24, 2007, at p. 30, attached hereto as Ex. I.

1 intelligence community.”²⁵ Sentinel launched in July 2012 and FBI employees now routinely use it to
2 perform daily investigative activities. *Id.* According to the FBI, Sentinel has made it easy for personnel
3 to retrieve and share information: “Sentinel allows the FBI’s law enforcement, intelligence, and support
4 personnel to take advantage of the new opportunities created by the arrival of a modernized global case
5 management system. Information now flows from person to person without the need to generate or mail
6 paper records.”²⁶ According to a July 2012 FBI report, “the search function is both flexible and powerful
7 enough to accommodate the substantial volume and wide variety of information available for retrieval in
8 Sentinel.”²⁷ Sentinel has more sophisticated search and indexing functionalities than ACS, including the
9 ability to limit searches to specific cases and case sub-files. *Id.* at 27. “The purpose of the indexing
10 function is to designate, modify, and delete the relationship between any two identifiers, such as the
11 relationship between a person and that person’s address.”²⁸ “The identifiers that can be indexed include
12 persons, organizations, locations, incidents, property, and communication accounts.” *Id.*, at ii, fn. 4.
13 Despite the breadth of records and ease of search, the FBI did not utilize Sentinel in Plaintiffs’ searches.

14 **4. Investigative Data Warehouse (IDW)**

15 Hardy also fails to mention the FBI’s Investigative Data Warehouse (IDW) or “uber-Google,” a
16 “one stop shopping” computer system launched in 2004 to combine fifty previously separate datasets.²⁹
17 Four years after its founding IDW contained over a billion unique items; for comparison, the Library of
18 Congress contains just over one hundred fifty eight million items.³⁰ With the exception of a small
19 number of extremely sensitive documents, electronic documents and materials kept in an FBI case file
20
21

22 ²⁵ Ex. G, Audit of the Status of the Federal Bureau of Investigation’s Sentinel Program, at p. i.

23 ²⁶ New Information/Case Management System Enhances FBI Mission, FBI, January 2013, Last Visited October 30, 2014
<http://www.fbi.gov/about-us/itb/news-features/new-information-case-management-system-enhances-fbi-mission>, attached
24 hereto as Ex. J.

25 ²⁷ Ex. G, Audit of the Status of the Federal Bureau of Investigation’s Sentinel Program, at p. i. (citing U.S. Department of
Justice, Congressional Report on The Federal Bureau of Investigation’s Next Generation Information and Case Management
Program (July 2012)).

26 ²⁸ Ex. G, U.S. Department of Justice, Office of the Inspector General Audit Division, Audit Report 14-31, at ii.

27 ²⁹ FBI’s New Data Warehouse A Powerhouse, Robb Todd, CBS, Aug. 30, 2006, at pp. 1-2, attached hereto as Ex. K.

28 ³⁰ General Information, Library Of Congress, at p. 1, Last Accessed Oct. 22, 2014 at http://www.loc.gov/about/general-information/#2007_at_a_glance, attached hereto as Ex. L.

1 are available through the IDW.³¹ This includes almost all of the data in ACS, as well as dozens of other
2 FBI systems. *Id.* The IDW also contains millions of scanned paper records converted into computer text,
3 and a large amount of information ingested from other agencies. *Id.* at 16. Not only is the IDW a more
4 comprehensive system than ACS or ELSUR, its search functionalities are far more sophisticated and
5 thus more likely to retrieve records. IDW has greater search capabilities than an internet search,
6 including the ability to do multi-word searches and structured queries for terms within a defined
7 parameter of one another, similar to a Westlaw or Lexis Nexis search. *Id.* at 21. The software can also
8 search for variants of birthdays or words and names by using the partially incorporated Language
9 Analysis Services. *Id.* at 21, 24.³² The IDW can conduct “structured queries” in which the results are
10 limited to a certain date range or FBI classification code. Ex. M. at 21. It also has the ability to extract
11 names from unstructured text, which allows concept-based searched. The system is so fast that it can
12 search 1,000 names across 50 databases in 30 minutes, a process which previously would have taken
13 over 32,000 hours.³³ Despite the sophistication of this system making it likely to contain responsive
14 records, the FBI did not search IDW for plaintiffs’ names or key words.

15 **C. USAO: Non-Electronic Search Tools**

16 Regional USAOs do not maintain searchable, central electronic records.³⁴ The USAO maintains
17 paper records, organized by internal file numbers (known as a “USAO numbers”), for matters,
18 investigations, and cases opened by the office. Ex. O, Kenney Decl, ¶ 2. In the NDCA, for example,
19 closed matters, investigations or cases are stored for approximately six months before being sent to the
20 Federal Records Center. *Id.* at ¶¶ 2, 5. Some matters such as search warrants and pen registers are not
21 indexed in LIONS or filed separately, but are preserved in the paper file specific to that investigation. *Id.*
22 For example, at NDCA there is no uniform local office file maintenance practice. *Id.* at ¶ 6. The

23
24 ³¹ Responses of the Federal Bureau of Investigation Based Upon the Aug. 19, 2004 Hearing Before the Senate Committee on
the Judiciary Regarding “The 9/11 Commission and Recommendations for the Future of Federal Law Enforcement and
Border Security” at p. 14, attached hereto as Ex. M.

25 ³² See also “FBI Shows Off Counterterrorism Database,” Ellen Nakashima, Washington Post, Wednesday Aug. 30, 2006,
attached hereto as Ex. N.

26 ³³ Ex. K, FBI’s New Data Warehouse A Powerhouse, at p. 2.

27 ³⁴ *ACLU v. DOJ*, Case No. 3:12-cv-04008 (N.D. Cal. 2013), Decl. of Patricia Kenney (“Kenney Decl.”) (ECF No. 43-1) ¶ 4,
attached hereto as Ex. O.

1 methods vary significantly from section to section, and even attorney to attorney. *Id.* at ¶ 8. Some
2 attorneys obtain a new USAO number when filing applications for location tracking information,
3 whereas others use a number already assigned to an investigation. *Id.* Thus only a limited number of
4 records are properly coded by name to be responsive in a LIONS search or a docket search. Overall,
5 electronic searches appear less likely to uncover responsive records than interpersonal relationships or
6 paper file searches.

7 **D. USAO: Electronic Search Tools**

8 **1. LIONS**

9 USAOs use an electronic case management system known as the Legal Information Office
10 Network System (“LIONS”), which tracks cases and investigative matters but does not maintain
11 substantive records. Margen Decl. (ECF No. 29) ¶ 5(a). LIONS is “more akin to an indexing system; it
12 does not store electronically the actual documents from matters assigned a USAO number.” Ex. O,
13 “Kenney Decl.” ¶ 4. The system can search civil, criminal, appellate, and investigative records. Margen
14 Decl. (ECF No. 29) ¶ 5. This system can be searched by case/matter name or number as well as by name
15 or associated key words or the name of a subject of investigation. *Id.* It is also searchable by various
16 fields including a “caption” field (required for all AUSAs to fill out to obtain a USAO number), and
17 “comment” field (used based on individual discretion, and not used by most AUSAs). Ex. O, Kenney
18 Decl., ¶¶ 11-12, 14. However, like the FBI’s ACS system it is designed in a manner such that, if staff
19 fail to manually enter a name into particular fields in LIONS, “the search would not identify that matter
20 as containing potentially responsive information.” Each regional office used LIONS in this case.

21 **2. Docket Search**

22 The USAO uses Lexis Nexis Courtlink to search records maintained by state and federal court
23 staff, and did so in this case. Margen Decl. (ECF No. 29) ¶ 5.

24 **3. Other Search Methods**

25 The USAO possesses other regional and national-level search methods not used in this case. This
26 includes the EOUSA systems and Federal Records Center where regional records are ultimately stored.
27 It also uses the Master Index Application, a system that “provides automated data consolidation from

1 multiple information sources, indexes key information to enable complex searches and queries, provides
 2 investigators and prosecutors the ability to link multiple crimes and cases.”³⁵

3 IV. ARGUMENT

4 PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT BASED ON 5 THE INADEQUACY OF THE SEARCH

6 For the FBI’s search to be adequate, the FBI should conduct a search of the following electronic
 7 systems: Sentinel, IDW, and a full-text search of the CRS system using ECF. The FBI should also
 8 search paper files in headquarters and regional offices, as well as consult with agents in the relevant
 9 offices, including the San Francisco Field Office, the Joint Terrorism Task Force, and Counter-
 10 Terrorism Units. For the USAO’s search to be adequate, the USAO should search paper files in
 11 headquarters and regional offices, as well as consult with agents in the relevant offices, particularly
 12 NDCA where there are records responsive to at least one of Plaintiff Henry’s key terms. A reasonable
 13 search would include variations on Plaintiffs’ names and other personal information (email address, date
 14 of birth, SSN) as well as the initially supplied keywords or other keywords likely to return records. As
 15 the Defendant agencies failed to complete searches using these locations and methods the searches
 16 should be deemed unreasonable and inadequate and the Court should order new searches.

17 A. Legal Standard: Summary Judgment

18 “FOIA cases are typically and appropriately decided on motions for summary judgment.” *Light*
 19 *v. United States Dep’t of Justice*, Case No. 1:12-cv-1660-RMC, 2013 U.S. Dist. LEXIS 100461, at *9-
 20 *10 (D.D.C. July 17, 2013). FRCP 56(c) establishes that summary judgment is proper if the parties’
 21 papers “show that there is no genuine issue as to any material fact and that the moving party is entitled
 22 to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Though, “the underlying facts and possible
 23 inferences are construed in favor of the FOIA requester.” *Nat’l Res. Def. Council v. U.S. Dep’t of Def.*,
 24 388 F. Supp. 2d 1086, 1095 (C.D. Cal. 2005) (citing *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344,
 25 1350 (D.C. Cir. 1983)).

26
 27 ³⁵ EOUSA, Privacy Impact Assessment for the Master Index Application, May 25, 2006, at p. 2, attached hereto as Ex. P.

1 Here, the facts regarding the searches (and lack thereof) are undisputed and already established
2 by the parties' pleadings' exhibits. "Where the non-moving party will bear the burden of proof at trial on
3 a dispositive issue, a summary judgment motion may properly be made in reliance solely on the
4 'pleadings...'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The pleadings indicate additional
5 searches could locate responsive records if the agencies are ordered to conduct a more thorough and
6 reasonable search. "Where the agency's responses raise serious doubts as to the completeness of the
7 search or are for some other reason unsatisfactory, summary judgment in the government's favor would
8 usually be inappropriate." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). Because the
9 government's response to Plaintiff's FOIA/PA requests are unsatisfactory and raise doubts about their
10 completeness, summary judgment for Plaintiffs as to the issue of the adequacy of the search is
11 appropriate in this case.

12 **B. Legal Framework Under FOIA: Adequacy of Search**

13 The government agency's burden, on summary judgment, is to "show beyond material doubt ...
14 that it has conducted a search reasonably calculated to uncover all relevant documents." *Weisberg v.*
15 *United States Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); see also *Zemansky v. United*
16 *States EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (adopting *Weisberg* standard). The court must apply a
17 "'reasonableness' test to determine the 'adequacy' of a search methodology, consistent with
18 congressional intent tilting the scale in favor of disclosure." *Campbell v. United States Dept. of Justice*,
19 164 F.3d 20, 27 (D.C. Cir. 1998) (internal citations omitted).

20 In evaluating whether an agency's search was reasonable, and therefore adequate, "the issue to be
21 resolved is not whether there might exist any other documents possibly responsive to the request, but
22 rather whether the *search* for those documents was *adequate*." *Zemansky*, 767 F.2d at 571. The
23 reasonableness standard focuses on the scope of the search, not its results: "[w]hile the results of the
24 search are not the focus, they are not entirely irrelevant. Where the scope of the request is broad and the
25 government fails to produce any responsive documents, it may raise a question as to the reasonableness
26 of the search." *Hiken v. Dep't of Def.*, 521 F. Supp. 2d 1047, 1054 (N.D. Cal 2007). "The adequacy of
27 the agency's search is judged by a standard of reasonableness, construing the facts in the light most

1 favorable to the requestor.” *Citizens Comm’n on Human Rights v. Food & Drug Admin.*, 26 F.3d 1325,
2 1328 (9th Cir. 1995) (citing *Zemansky*, 767 F.2d at 571).

3 To meet the reasonableness standard, an agency must pursue search methods that are likely to
4 produce records that may not be located in other systems; “an agency cannot limit its search to only one
5 record system if there are others that are likely to turn up the information requested.” *Campbell v.*
6 *United States Dep’t of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998) (internal citations and quotation marks
7 omitted). If an agency’s search uncovers information that may lead to responsive records, it is obligated
8 to pursue that lead, within reason. In *Campbell*, the court found that the FBI’s limiting its search to the
9 CRS system was unreasonable because the agency “discovered information suggesting the existence of
10 documents that it could not locate without expanding the scope of its search.” *Id.* The standard for a
11 search’s adequacy is case-specific; adequacy is:

12 measured by a standard of reasonableness and depends on the individual circumstances of
13 each case. The question is not whether other responsive documents may exist, but
14 whether the search itself was adequate. . . . There is no requirement that an agency must
15 search every record system, but the agency must conduct a good faith, reasonable search
16 of those systems of records likely to possess the requested information.

17 *Lardner v. FBI*, 852 F. Supp. 2d 127, 133 (D.D.C. 2012).

18 An agency must fulfill its burden of demonstrating, beyond a material doubt, that its search was
19 adequate by drafting “reasonably detailed, nonconclusory affidavits submitted in good faith.” *Zemansky*,
20 767 F.2d at 571. To satisfy its burden, in these affidavits an agency must “aver[] that all files likely to
21 contain responsive materials (if such records exist) were searched.” *Nation Magazine v. United States*
22 *Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (internal quotation marks, citation omitted) (emphasis
23 added).

24 **C. The FBI and USAO Failed to Perform Adequate Searches**

25 Here, both government agencies, the FBI and USAO, failed to meet the *Weisberg/Zemansky*
26 standard that requires the agency demonstrate “beyond material doubt” that the agency conducted a
27 search “reasonably calculated to uncover all relevant documents.” *Supra.* As in *Hiken*, the scope of
28 Plaintiffs’ request is “broad.” In that case, the plaintiffs sought Rules of Engagement from the

1 Department of Defense and a wide swath of related documents; here, the scope includes any and all
2 documents related to either or both of the Plaintiffs. In that case, the plaintiffs' initial request was
3 denied. Here, similar to *Hiken*, the Defendant not only failed to produce "any responsive documents" to
4 a broad request, but also failed to use many of the broad search methods available. *Hiken* at 1054.

5 Defendant's declarations are conclusory and fail to provide explanation of available systems,
6 such as Sentinel and IDW, and available search methods within those systems or LIONS, such as multi-
7 word searches, structured queries, word variant searches, and concept-based searches, that are superior
8 to a mere index search for a name. The *Zemansky* precedent requires "reasonably detailed,
9 nonconclusory affidavits." *Supra*. Here the Defendant submitted a boilerplate declaration virtually
10 identical to those previously rejected by the Northern District as too conclusory in another line of FOIA
11 cases filed against Defendant. See *Rosenfeld v. United States Dep't of Justice*, 2008 WL 3925633 *14
12 (N.D. Cal. Aug. 22, 2008) (rejecting search declaration as inadequate); *Rosenfeld v. United States Dep't*
13 *of Justice*, 2010 WL 3448517 at *7 (N.D. Cal. Sept. 1, 2010) (same). As in the *Rosenfeld* case in this
14 district, the FBI should have conducted a more thorough search or explained in its affidavit why, in
15 Plaintiffs' case, other systems and methods would have been unlikely to produce responsive records. In
16 *Rosenfeld*, the court found the FBI's declaration inadequate, and wrote in its order that while "the FBI's
17 decision to stop its search for responsive files prior to the search of every database in its possession does
18 not render their search unreasonable, the FBI must provide some basis for the court to evaluate whether
19 its decision to not search additional databases was reasonable." *Id*.

20 Defendant's searches, largely restricted to searches of Plaintiffs' names, are insufficient and
21 unreasonable given the fact that other systems and search methods exist and have been ordered in a
22 similar case. Meanwhile with some electronic systems and many non-electronic locations unsearched, it
23 remains impossible for defendant to verify that "all files likely to contain responsive materials (if such
24 records exist) were searched." *Nation Magazine* at 890. Defendant should be ordered to perform
25 searches utilizing the additional systems and additional search methods.

1. Why FBI Systems and Methods Of Search Were Inadequate In This Case

a. CRS

Per *Campbell* (at 28), an agency cannot limit its search to only one record system (or by extension in the FBI's case, CRS and ELSUR) if there are others that are likely to turn up the information requested, such as IDW and Sentinel. It was not reasonable for the FBI to limit its search to its antiquated CRS system when more sophisticated systems are likely to produce responsive records and even include all the ACS system's records. First, Sentinel and IDW are likely to contain records because the sheer number of records they contain appears to be in the billions.³⁶ Furthermore, as IDW includes all the records in ACS, the FBI would not miss any ACS records by using a more comprehensive and easily searchable system to retrieve the records.

Furthermore it was unreasonable for the FBI to limit its CRS search to a UNI search when other methods, such as the ECF search available within CRS, are likely to produce responsive records. In this case, the FBI relied on only one of the three programs in the ACS system, a search utility called the Universal Name Index (UNI) to search for main and cross-reference index entries. The FBI has the capability to conduct a full-text search, but the FBI does not conduct such a search in every case, and did not do so for either Plaintiff here. Instead of conducting a full-text search of all text-based documents, the FBI merely searched for records that were indexed by Plaintiffs' names. The significance of the FBI's failure to conduct a full-text ECF search for Plaintiffs' names is that non-indexed mentions of their names would not be located. Thus, the FBI's failure to conduct a full-text ECF search eliminated the possibility of locating non-indexed mentions of Plaintiffs' names.

To appreciate the important of conducting a full-text ECF search, consider the search results in the *Shapiro* cases. In one case, plaintiff Shapiro sought records relating to Aaron Swartz, a prominent activist and subject of known FBI investigations. *Shapiro v. DOJ*, No. 13-0729, 2014 WL 1280275 (D.D.C. Mar. 31, 2014) The facts are as follows: initially in February 2014 Defendant searched CRS with the UNI method and found only 23 responsive pages. Ex. H. Hardy Decl. (ECF No. 5-3) ¶ 8. Subsequently, the plaintiff learned that another FOIA request for records on Mr. Swartz yielded

³⁶ Ex. L General Information, Library Of Congress.

1 “hundreds of pages of responsive records” because they asked for the records by case file number and
2 not merely by name. The other requester’s method located responsive records because, though Mr.
3 Swartz was the subject of the investigation, he was not listed as the subject in the record management
4 caption, and the records were not part of a main file indexed to his name. Plaintiff’s Response to
5 Supplemental Memorandum (ECF No. 28) at 9-10, attached hereto as Ex. Q. In this case the court
6 agreed with the plaintiff that the FBI’s affidavits did not adequately explain why the FBI did not
7 perform a full text search, and ordered the FBI to perform an ECF full text search. The court denied
8 Defendant’s motion for summary judgment and the search resulted in the discovery of hundreds of
9 pages of responsive documents. This case demonstrates why, for the FBI’s search to be considered
10 adequate here, the FBI should go beyond the name index search method and look at case files to
11 determine whether there are responsive records that may not be properly indexed.

12 In’s second case he, like Plaintiffs, sought records about the Occupy movement. In his case
13 initially “the FBI conducted a search of the CRS to identify all potentially responsive main and cross-
14 reference files indexed” under 43 different search terms yet located no records. *Shapiro v. United States*
15 *Dep’t of Justice*, Case No. 1:13-cv-00595 (D.D.C. 2013). Decl. of David Hardy (ECF No. 9-1) ¶ 36
16 attached hereto as Ex. R. Later FBI staff spoke to field agents and conducted an ECF text search. This
17 located 454 potentially responsive records, of which a number were in fact responsive to the FOIA
18 request. *Id.* This case illustrates what steps the government should take to satisfy its burden to perform
19 thorough and compressive searches, as more superficial searches fail to locate records that prove to be
20 easily locatable at a later date or with a different method. Plaintiffs contend their request is analogous to
21 Shapiro’s request, where documents have not yet been found, but there is reason to believe that
22 documents exist, and that a more thorough search using ECF or IDW and Sentinel would uncover these
23 documents.

24 **b. ELSUR**

25 The FBI’s search of ELSUR, limited to consist only of a name search for main file records, was
26 unreasonable. The declaration indicates only a superficial search was conducted; that search would only
27 result in records where Plaintiffs were the targets of direct surveillance. Reasonable search methods

1 would include a search for electronic surveillance records where Plaintiffs were participants in
2 monitored conversations or associated with premises where surveillance was conducted.

3 In conclusion, the Hardy Declaration states only that the agency performed superficial name
4 searches in CRS and ELSUR, but does not provide sufficient facts in reasonable detail to support the
5 conclusion that this search was adequate in light of the availability of more robust and comprehensive
6 electronic and non-electronic systems and methods. Plaintiffs contend a reasonable search in their case
7 would include a consultation of staff. This includes the regional offices where Plaintiffs resided,
8 particularly the San Francisco Field Office. It also includes the Joint Terrorism Task Force and Counter-
9 Terrorism units, as staffs are known to conduct surveillance on Plaintiffs' clients and associates, political
10 activists, and Plaintiffs' research areas.

11 **2. Why USAO Systems and Methods Of Search Were Inadequate In This Case**

12 **a. LIONS**

13 The USAOs initially limited their LIONS searches to name searches. In response to this suit
14 most of the USAOs did perform searches utilizing key words in Plaintiffs' request. However, as there is
15 no uniform protocol, it is unclear how local users enter data into LIONS, and whether the practices are
16 designed to capture data in a manner that is aligned with the FOIA search method used in this case.
17 Furthermore, the declarations are unclear as to whether these local searches were conducted with the
18 required caption field, the discretionary comment field, or with another methodology.

19 Notably, NDCA "records showed matters in the USAO/NCDA involving several of the
20 organizations" cross-referenced as key words in Henry's request. Margen Decl. (ECF No. 26) ¶ 5(c). As
21 the key word search method suggested the existence of documents, the agency appropriately pursued the
22 lead and asked the AUSA to conduct a further search. This method did not produce records. Though this
23 key word search and staff consultation represented the most thorough search method in this case, it
24 would be reasonable for NDCA staff to further search paper files and additional locations by key word
25 because staff know that failure to correctly enter data in LIONS fields will yield a non-responsive search
26 despite existence of records.

1 **b. Other USAO Search Tools**

2 Searching the regional Lexis Nexis Courtlink electronic dockets for cases in which Plaintiffs
 3 were either parties or attorneys did not yield responsive records. As there is no uniform electronic or
 4 non-electronic regional records maintenance protocol or practice, a reasonable search should not be
 5 limited to a regional search, but should also include a national search. It should use key words and
 6 search other available records storage methods, such as the EOUSA records and the Federal Records
 7 Center where regional records are ultimately stored. However, the EOUSA did not perform a search, nor
 8 did any regional office conduct a national-level search. Francis Decl. (ECF No. 27) ¶ 27. Because other
 9 systems and methods of search are available and may result in production of records, searches that failed
 10 to utilize them should be deemed unreasonable and deficient.

11 **V. CONCLUSION**

12 As a result of the FBI and USAO's deficient searches for records in this case, defendant may
 13 have failed to locate records found by employing one or more obvious and readily available search
 14 techniques, including ECF, Sentinel, IDW, paper files, and staff consultations. The Court should
 15 therefore grant Plaintiffs' Cross-Motion for Summary Judgment based on the inadequacy of the search,
 16 order defendant to conduct new searches, and maintain jurisdiction over the case.

17 DATED: November 6, 2014

/s/

18 CAITLIN KELLY HENRY
 Attorney for Plaintiff Jesse Stout

19 DATED: November 6, 2014

/s/

20 JESSE STOUT
 Attorney for Plaintiff Caitlin Kelly Henry

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