

9th Circ. Asked To Boot Tweeting Judge From Wildfire Case

By **Juan Carlos Rodriguez**

Law360, New York (December 1, 2015, 6:01 PM ET) -- Logging company Sierra Pacific Industries told the Ninth Circuit that a federal judge's tweets about a \$122.5 million wildfire settlement are so out of line that he should not be allowed to have anything to do with the case if it's remanded.

The company has appealed U.S. District Judge William B. Shubb's April refusal to unwind a deal over the 2007 Moonlight Fire in the Sierra Nevada mountains. It claims prosecutors committed a fraud upon the court in pursuit of a "payday" for the government, allowing investigators from the California Department of Forestry and Fire Protection to lie under oath and falsely pin blame for the fire on the defendants after a "sham" probe.

As part of the appeal, the company has asked the appeals court to judicially notice that Judge Shubb is followed on Twitter by, and follows the account of, the U.S. Attorney's Office for the Eastern District of California, which they say creates an appearance of bias.

In addition, the company said that on April 17, after refusing to reconsider the deal, judge posted an "inaccurate and prejudicial" tweet about Sierra Pacific on his @nostalgistl public Twitter account: "Sierra Pacific still liable for Moonlight Fire damages." The company maintains it was never found liable and has paid no damages.

The federal government has challenged the company, and in a Nov. 27 brief, the company mocked its efforts.

"As is the case with its refusal to acknowledge gross malfeasance in both the investigation and prosecution of this 'corrupt and tainted' matter, the government predictably refuses to acknowledge yet another truth — that @nostalgistl is Judge Shubb's Twitter account," Sierra Pacific said. "The government offers an evidence-free hypothesis that the Twitter account might be the work of a hacker. Its diversion is without merit."

The company said that if @nostalgistl were created by a hacker, Judge Shubb would have made it immediately known in order to preserve the integrity of the judicial system. Instead, the company said alleged that it's a well-known fact that the judge maintains an active online presence and posts regularly from that Twitter account, including photographs, one of which was taken with one of the government's attorneys.

According to Sierra Pacific, all this adds up to "extraordinary circumstances" that dictate

supplementation of an appellate record.

“Where the trial court is engaged in conduct immediately following the issuance of the appealed-from order, inclusion of that conduct in the record is not an unauthorized augmentation but, rather, ‘reflects what actually occurred in the district court,’ ” the company said.

It has asked the Ninth Circuit to reverse Judge Shubb’s decision and recuse him from further proceedings.

The dispute stems from a \$122.5 million settlement in 2012 of a civil case over the wildfire that destroyed 65,000 acres of forest near Sacramento. The government claimed a contract logger hired by Sierra Pacific negligently started the Moonlight Fire after his bulldozer struck a rock and created sparks that ignited the surrounding dry ground fuels.

Sierra Pacific moved to set aside the deal in October 2014, arguing that state and federal investigators made up their official fire origin points after finishing their examination of the scene and suppressed information about a “secret point of origin” they had actually examined. The investigators then lied about the report under oath, which federal prosecutors knew about, according to Sierra Pacific.

But Judge Shubb said in April that setting aside the settlement requires evidence of fraud on the court, not only of an imperfect investigation.

Sierra Pacific is represented by William R. Warne, Michael J. Thomas, Annie S. Amaral and Meghan M. Baker of Downey Brand LLP and Richard C. Beckler and Jennifer T. Lias of Bracewell & Giuliani LLP. The contract logger is represented by Phillip R. Bonotto of Rushford & Bonotto LLP.

The government is represented by Benjamin B. Wagner, David T. Shelledy, Kelli L. Taylor and Colleen M. Kennedy of the U.S. Department of Justice.

The case is U.S. v. Sierra Pacific Industries et al., case number 15-15799, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Keith Goldberg and Matt Sharp. Editing by Patricia K. Cole.