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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SIERRA PACIFIC INDUSTRIES, et al.,

Defendants.

AND ALL RELATED CROSS-ACTIONS.

Case No. 2:09-CV-02445-WBS-AC

DEFENDANTS' REPLY IN SUPPORT OF SUPPLEMENTAL BRIEFING REGARDING THE MOONLIGHT PROSECUTORS' FRAUD ON THE COURT

Date: April 13, 2015
Time: 2:00 p.m.
Dept: Courtroom 5, 14th floor
Judge: Hon. William B. Shubb

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I. INTRODUCTION

The government has constructed the perfect companion piece to the rest of its misconduct in the Moonlight Fire matter. During the investigation of this fire, the government found what it wanted to find and either covered up or destroyed contrary or harmful evidence. During the drafting of its opposition to Defendants' briefing, the government collected a pile of unanalyzed legal fragments and pieced them together to create a version of reality that has little relationship to the truth. As was the case with the investigation and prosecution of this matter, the government has again left behind and failed to reveal critical elements of what this Court deserved – in this instance, a thoughtful a discussion of what actually constitutes fraud on the court. As Judge Nichols found after his thorough review of the jointly prosecuted state actions, this case has long been (and today remains), an effort to "steamroll the truth." Cal. Dep't Forestry v. Howell, No. GNCV0900205, 2014 WL 7972097, *10 (Cal. Super. Ct. Feb. 4, 2014). The government has now turned that effort on the law itself.

With respect to those limited portions of the government's opposition that facially comply with the Court's order that the parties first identify "the test for fraud upon the court," the government has manufactured a set of rules and tests that do not exist as framed under controlling Ninth Circuit authority. And, with respect to the Court's order that the government then assess whether Defendants' allegations would constitute fraud on the court, the government has (1) ignored the Court's order that it assume Defendants' allegations as true and (2) has then misread the import of Ninth Circuit authority, cobbling together extraneous and untethered fragments of language from courts that assessed factual circumstance far different from those presented by this matter. Perhaps most notably, the government contorts itself in an effort to avoid the actual rationale of Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1131 (9th Cir. 1995). Any good faith explication of its facts and holding provide a clear path for what the Ninth Circuit would expect a trial court to do with the Moonlight Fire matter, as do a host of other Supreme Court and Ninth Circuit cases. In the end, the government's brief is not so much an analysis as it is a misleading fragmentation of Ninth Circuit and Supreme Court authority.

On November 24, 2014, this Court ordered of the parties before it the following: "Before evaluating the merits of Sierra Pacific's accusations, the court will resolve the threshold issue of whether the alleged conduct giving rise to Sierra Pacific's Rule 60(d)(3) motion constitutes "fraud on the court." The Court instructed the parties to submit "focused briefing limited to . . . addressing whether, assuming the truth of Sierra Pacific's allegations, each alleged act of misconduct separately or collectively constitutes 'fraud on the court' within the meaning of Rule 60(d)(3)." (Docket No. 618.) Further emphasizing the limitations imposed on the parties by its order, the Court then instructed that "Sierra Pacific shall file its brief limited to the aforementioned issues by no later than January 15, 2015. The government shall file an opposition limited to these issues no later than February 17, 2015. Sierra Pacific shall then file a reply similarly limited to the identified issues no later than March 9, 2015." (Id.) On January 15, 2015, Defendants timely complied with this court's instructions. On February 17, 2015, the government filed its brief, paying little if any real attention to the Court's instructions and arguing the merits of nearly every contention while filing over 3500 pages of material, including three declarations, three separate appendices, and, among other things, lodging the full transcript of each of the depositions they cite in their expansive merit based arguments. As discussed below, there is no excuse for having creatively spun the facts while ignoring the Court's order.

While the government used its "limited" opposition to roam freely through the expansive record in this matter – unchecked by this Court's order or by what the record actually states – the government also found ways to use its "focused" briefing to: (1) besmirch the reputations of two seasoned federal prosecutors who, at least before they disclosed the government's misconduct, were deemed sufficiently competent to lead the office's wildland fire cost recovery unit and to join the Moonlight Fire team from another state. Today, however, the government belittles their qualifications, apparently the price to pay for daring to speak the truth about gross misconduct perpetrated by the government. To the extreme credit of former Assistant United States Attorneys Eric Overby and E. Robert Wright, they did so regardless.

Moreover, and perhaps most disturbingly, the government's opposition demeans a highly respected member of California's judiciary, specially appointed California Superior Court Judge

Leslie C. Nichols, when it dismissively and repeatedly refers to His Honor as "the county judge"[1] and then fails to even acknowledge one of Judge Nichols's two orders issued on February 4, 2014. The government then falsely suggests to this Court that Judge Nichols abdicated his duty by not thoroughly considering all of the evidence before him, by allowing Defendants to put thoughts in his head, and by inattentively executing a draft order submitted to him by Defendants. These charges are wholly without merit, and they are shameful.

But the government's extracurricular efforts do not stop there. In what appears to be another misguided effort to have its misconduct excused, the government has chosen to target its false narrative against a single party – defendant timber company Sierra Pacific Industries – apparently because it believes that the government's gross misconduct against what it evidently sees as a moneyed and unsympathetic defendant might therefore be forgiven. But doing so is yet another insult to this Court and our system of justice. All parties are of course entitled to equal justice, and justice evaporates for everyone if the government can corruptly pursue a company simply for the promise of collecting a large money judgment. As Judge Nichols noted in his first termination order regarding the companion state court actions he adjudicated, "corrupt intent knows no stylistic boundaries." Cal. Dep't Forestry v. Howell, No. GN CV09-00205, 2014 WL 7972096, *10 (Cal. Super. Ct. Feb. 4, 2014) (quoting Slesinger v. The Walt Disney Co., 155 Cal. App. 4th 736 (2007)).[2]

Defendants' allegations are not focused on the abuse these prosecutors heaped upon a single defendant. Instead, their allegations are focused on a scheme which defiled the Court and damaged the integrity of our judicial system. Moreover, the effort to shine light on the prosecutors' conduct here is brought by eighteen Defendants – fifteen individuals and/or trusts who own land in the Sierra Nevada mountains, a small timber management company, a small

[1] The government does so on seven occasions, mentioning His Honor's last name just once in a footnote. (Opp. at 43 n.47.)

[2] Judge Leslie C. Nichols's decision was clearly the consequence of significant factual review and legal research. Indeed, the Slesinger quote cited above comes from a case involving, like here, "deliberate and egregious misconduct." 155 Cal. App. 4th at 763. But the court in Slesinger took this same quote from a First Circuit decision, Aoude v. Mobile Oil Corp., wherein the First Circuit wrote, "Because corrupt intent knows no stylistic boundaries, *fraud on the court can take many forms*." 892 F.2d 1115, 1118 (1st Cir. 1989) (emphasis added).

timber harvesting company, and Sierra Pacific Industries. Each of these parties were sued and wrongly prosecuted. Each was exposed to one billion dollars in damages. Each of these parties hired counsel to defend themselves against this "egregious" and "corrupt and tainted" matter for years. Cal. Dep't Forestry v. Howell, 2014 WL 7972096, at *10. Each of the Defendants and each of their counsel have brought this motion to expose the reprehensible conduct that has defrauded not just one court, but two. As Judge Nichols stated in "the portion of the order that speaks in the Court's own voice"[3] the "misconduct in this case is so pervasive that it would serve no purpose to recite it all here." Id. Judge Nichols also found that the discovery abuses were so egregious that they "threatened the integrity of the judicial process." 2014 WL 7972097, at *16. While the reality of this matter is nowhere to be found in the government's briefing, it has become perfectly clear over the course of the last five years that the notorious Moonlight Fire matter is highly unusual, exhibiting a trail of fraud that has resulted in rare legal decisions, as well as disclosures from federal prosecutors who worked on the Moonlight Fire.

The Moonlight Fire matter began with a fateful decision by federal and state investigators to cook their investigation and their resulting report so as to frame what they believed were the right Defendants. Thereafter, this key act of corruption only grew, as it became the basis of the complaint, the focal point of extensive perjury, the springboard for the prosecutors' equally fateful decision to attempt to protect it and cover for it, while then adding to it through egregious efforts to protect the amount of money it might deliver through the lookout cover-up. These facts, and the extraordinary order from the only judge who has had the ability to review these facts, do not readily align with existing legal authority pertaining to fraud on the court, as each case is largely a consequence of its own facts. These cases do, however, provide this Court with ample authority to deal with this extraordinary matter. There will never be another huge wildland fire matter (1) that is jointly investigated by both Cal Fire and USFS investigators, (2) that is then jointly prosecuted by both state and federal prosecutors, (3) that is handled in a

[3] The government's fails to mention Judge Nichols's extremely thoughtful and well-written initial decision written in his own voice, which His Honor read from the bench on February 4, 2014. In fact, the government creates the impression that it does not exist. Defendants attach it hereto as Exhibit A. Defendants attach the second order he signed that day hereto as Exhibit B.

manner that compels two federal prosecutors – including the prosecutor who investigated and filed the matter – to report on serious ethical violations in the office and on the case, (4) that results in two former United States Attorneys from the Eastern District urging the government to dismiss the matter on moral and legal grounds, (5) that causes the State Auditor to investigate and publically disclose the existence of an illegal Cal Fire slush fund in which the lead Moonlight Fire investigator had a financial interest, and (6) that then resulted in a respected Superior Court Judge issuing a termination order for Cal Fire's jointly prosecuted state action, along with what is one of the largest discovery sanction awards in our nation's history.

Defendants have correctly cited both Supreme Court and Ninth Circuit authority and the Defendants allegations easily describe what the Ninth Circuit has repeatedly found constitutes a fraud on the court:"an unconscionable plan or scheme that is designed to improperly influence the court in its decision." Pumphrey, 62 F.3d at 1131. That is precisely what has happened here. Defendants have more than alleged a colorable claim of fraud upon the court.

II. JUDGE NICHOLS'S TERMINATION AND SANCTION DECISIONS ARE RELEVANT TO THIS COURT'S ASSESSMENT OF DEFENDANTS' ALLEGATIONS

The government argues the Judge Nichols's findings "add nothing." (Opp. at 59.) The government then states, "with the exception of one footnote, the county judge's order is not about any alleged misconduct of the United States." (Id.) It also argues, "[a]s can be seen from the first page of the order, it was written by Sierra Pacific's lawyers . . . ." (Id. at 60.) Later, the government provides, "Sierra Pacific's lawyers even took the liberty of telling the county judge his inner feelings, writing in a footnote that he was 'deeply troubled' that Reynolds denied in a deposition that he could see a white flag in a photograph after saying 'to a table of friends' in the U.S. Attorney's Office that he could see a white flag in the photos." (Id.) With respect to each of these assertions, the government is mistaken.

As a preliminary matter, the government's references to Superior Court Judge Nichols as "the county judge" are not only an attempt to denigrate Judge Nichols, they are also false.[4]

[4] There are no longer "county judges" in the State of California. In 1998, California voters passed a constitutional amendment that provided for voluntary unification of superior courts and municipal courts in each county into a single State Superior trial court system. Following consolidation, the superior court assumed jurisdiction over all

(Opp. at 1, 59-61.) Judge Leslie C. Nichols is a Superior Court Judge who served as a judge in Santa Clara County for twenty-five years. 2014 WL 7972096, at *3. Highly respected, for six years he has served as a member the Assigned Judges Program, a committee chaired by California's Chief Justice Tani Cantil-Sakauye, which provides for the temporary assignment of judges based on factors such as a judge's experience and expertise. Id.

Next, though Defendants have not argued that the government is collaterally estopped by Judge Nichols's orders, the government argues the issue anyway, perhaps in an effort to neutralize the importance of His Honor's orders suggesting that, regardless of the outcome of Cal Fire's state appeal, these orders can never have a preclusive effect. This is not necessarily the case, as it turns on an analysis regarding the connection between both matters, a question which is beyond the scope of this brief. But this Court can still consider Judge Nichols's decisions in assessing the government's fraud on the court.

Moreover, the government would have this Court believe that Judge Nichols entered only one order on February 4, 2013. Of course, as with so many other representations the government makes in its brief, its suggestion is not accurate. Judge Nichols, in fact, signed not only the proposed order submitted by Defendants, 2014 WL 7972097, but also wrote and signed an order addressing identical issues, 2014 WL 7972096. With respect to Judge Nichols's decision to also sign Defendants' proposed order, His Honor included within the order written in his own a passage explaining the nature of his decision.[5] Because this passage is so directly on point with respect to countering the government's baseless assertions, Defendants reproduce it in its entirety here:

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matters handled by superior courts and municipal courts, municipal court judges became superior court judges, and the municipal courts were abolished. Snukal v. Flightways Mfg., Inc., 23 Cal. 4th 754, 763, n.2 (2000) (discussing Proposition 220). This enactment was just one of four major reforms in the late 1990s and early 2000s aimed at transferring the decentralized function of trial court operation to the State of California. In 1997, the California state legislature enacted the Lockyer-Isenberg Trial Court Funding Act, which created a statewide mechanism for trial court funding. Cal. Gov. Code §§ 77200 et seq. In 2001, the Trial Court Employment Protection and Governance Act mandated the transfer of all court employees from the counties to the state superior courts. Id. §§ 71600 et seq. Finally, the Trial Court Facilities Act of 2002 shifted the responsibility of all trial court facilities from the counties to the State of California. Id. §§ 70301 et seq. In sum, there are no "county courthouses" in the State of California, no "county court employees," and certainly no "county judges."

[5] Well before the February 4, 2014, hearing on Defendants' termination order, Judge Nichols issued a minute order directing both sides to submit a proposed order for the court's review and consideration. Defendants did so, as did Cal Fire.

> On occasions, appellate courts have questioned court orders that appeared to merely 'sign off' on the proposed orders submitted by counsel. Because this Court is doing just that, in part, a few words of explanation are in order. As has been made abundantly clear in previous orders of this Court, and as shown by the circumstances of this case, this is a complex litigation matter. The undersigned has undertaken to personally review each of thousands of pages of written briefs, exhibits, submissions, deposition transcripts and video submissions of the same, motions, objections, and proposed orders. This list is not exhaustive. . . . [T]he Court asked counsel to submit in advance proposed orders which set forth findings and orders. The Court informed counsel that these orders would be subject to critical Trial Court and perhaps Appellate Court review, so they should set forth those matters which could be fully supported by the record. Counsel had the proposed orders before them during oral argument, so there were no surprises. The same is true concerning the proposed orders submitted for these hearings.
>
> This portion of the order speaks in the Court's own voice. It is not practical for the Court to scour the voluminous record to set forth every finding that would support the orders made here, nor does the law require anything like that degree of specificity. In the Court's view, however, each party is entitled to submit detailed orders, which, if granted, can be defended on appeal. The good news is also the bad news. Every aspect of review, research, evidence evaluation, writing, and decision-making has been undertaken by the undersigned Trial Judge, and by no one else. The fact that the Court has signed Defendants' proposed orders with few changes reflects only the reality that those orders are supportable in all respects. This document, which speaks in the Court's own voice, and the other orders signed and filed today, are to be taken together as orders of the Court. To the extent there are any inconsistencies in those orders, the Court deems them immaterial.

2014 WL 7972096, at *7. Accordingly, the order that the government asserts Judge Nichols signed as the result of trickery, and without any serious reflection, was instead signed because Judge Nichols found it "supportable in all respects" after "personally review[ing] each of thousands of pages of written briefs, exhibits, submissions, deposition transcripts and video submissions of the same, motions, objections, and proposed orders." Id. Judge Nichols also made notations and changes to the proposed order, further evidencing that he did not simply sign the order without thought and reflection as to the truth of the statements and findings contained therein. (See Docket No. 596-26 at 10, 24, 58.)

Judge Nichols actually refutes many of the arguments the government now launches at Defendants and, indirectly, at Judge Nichols. Judge Nichols muses whether Cal Fire thought

him a "gullible judge," and squarely rejects that claim, stating "[i]t takes more time and effort for the Court to scrutinize Cal Fire's papers for any persuasive arguments and evidence that may be found. The Court has undertaken that extra effort. The rights and interests of the parties require no less." 2014 WL 7972096, at *5. Later, the Court "provides assurance that none of the evidence considered, in bulk or in particular, has overborne the Court's critical faculties." Id. at *6. Judge Nichols then states: "[t]he Court's review of the whole record confirms that Defendants' characterization of the misconduct is well established." Id. at *10. These statements should more than sufficiently dissipate the government's baseless and insulting accusations that Defendants "tricked" and "bamboozled" a respected and experience trial court judge such as Judge Nichols. (Opp. at 43 n.47.)

These statements similarly serve to refute the government's contention that Defendants were so bold, and Judge Nichols so gullible and so lacking in contemplation, that they were able to tell Judge Nichols his own feelings. On this point, the government again chooses to ignore the portion of the opinion, written in Judge Nichols's own words, that makes clear his feelings on the issue. He states that "[t]he sense of disappointment and distress conveyed by the Court is so palpable, because it recalls no instance in experience over forty seven years as an advocate and as a judge, in which the conduct of the Attorney General so thoroughly departed from the high standards it represents, and, in every other instance, has exemplified." 2014 WL 7972096, at *9. Judge Nichols went on to find, in his own words, that "[t]he Court finds that Cal Fire's actions initiating, maintaining, and prosecuting this action, to the present time, is corrupt and tainted. . . . Cal Fire's conduct reeked of bad faith." 2014 WL 7972096, at *10. Thus, contrary to the government's reckless assertion, when Defendants employed the phrase "deeply troubled," for the court's consideration in its draft order, they actually fell far short of the court's actual feelings about Cal Fire's conduct in this case.

The court ultimately left that language untouched when it signed Defendants' proposed order, located at 2014 WL 7972097, at *10, but it was fairly simple for Defendants to predict that Judge Nichols would find these words appropriate in light of the egregious nature of the conduct at the United States Attorney's Office in preparing Reynolds for his deposition when

compared to what Reynolds was allowed to testify to during his deposition. As it turned out, Defendants' proposed language was especially appropriate given the level of distress Judge Nichols's expressed in the order that he carefully crafted and read from the bench. Defendants can only guess that the government chose not to acknowledge the existence of the order Judge Nichols's wrote in his "own voice" because His Honor's order so thoroughly and exquisitely refutes each and every one of the accusations the government now lodges against not only Defendants, but also against Judge Nichols. Defendants attach Judge Nichols's order to this reply directly for the convenience of this court's review and consideration.

III. WHY THE TRUTH MATTERS

Before responding to the government's discussion of the law and the legal standards that actually govern this motion or complaint, Defendant must first reply to one of the more shocking elements of the government's opposition: the government's repeated assertions that, because Sierra Pacific is obviously responsible for the fire, none of Defendants' allegations about the white flag or moving the point of origin or their allegations about the numerous lies that emanate from the investigator's multifaceted effort to cover up their actions have ever mattered. Not only are such arguments from federal prosecutors' appalling, they are perfectly aligned with the mentality that began on September 3, 2007. A grave miscarriage of justice occurred here because the investigators and the prosecutors ignored the importance of a scientific and systematic investigation and a fair adjudicative process. Winning was the goal, regardless of whether it led to the actual fire starter. Once that decision was made, evidence did not matter, the truth did not matter, and the fair administration of justice did not matter. Defendants begin at this spot because the importance of their allegations, and the wrongful nature of the government's prosecution and its opposition, cannot be properly understood without some sense of these critical issues.

Throughout its brief, the government contends that neither the investigators nor prosecutors engaged in acts of deceit. But in various instances, the government seems to tacitly acknowledge that they did so, by virtue of the fact that following such denials the government's brief immediately transitions to a "so what?" or "why does it matter?" defense. Thus, for

instance, the government contends that with respect to the abandoned point of origin marked with a white flag, and the alleged points of origin E-2 and E-3, that "[a]ll three locations were in Bush and Crismon's work area." (Opp. at 36.) Elsewhere, the government claims that, "[p]erhaps the greatest insult to the jury would have been that Sierra Pacific did not even claim the fire started at the white flag. To do so would have ensured a verdict for the United States, since the flag was in Bush and Crismon's work area and they saw no one else there all day." (Id.) Elsewhere, the government argues that the events that transpired at Red Rock lookout were ten miles from the origin and therefore had nothing to do with how the fire started. (Id. at 10, 85, 101.) Thus, so what if the government's lead investigator suppressed what was actually happening at Red Rock when the fire started?

In essence, the government argues: so what if White, Reynolds, and Welton are all lying under oath about the most important aspects of their investigation? In the government's view, even the abandoned point of origin which the investigators spent the morning of September 5, 2007, documenting (while ignoring altogether what they now claim were their only two points origin) was still where Bush and Crismon were working. What difference does it make if the investigators lied? The answer, of course, is that it makes all the difference because in this tribunal, truth means everything.

While this is not something that attorneys working for our Department of Justice are apparently willing to concede in this matter, a willingness to lie repeatedly under oath with a camera rolling and attorneys present, whether about Red Rock, the white flag, the secret sketch, or other matters, reveals a propensity towards dishonesty that would likely be even more adventurous with no attorneys present. These investigators had exclusive access to the scene and conducted their investigation with no one else watching. Their dishonesty, a fact finally acknowledged by the government's lead expert well after the federal settlement, is potentially (1) a willingness to ignore footprints 200 feet further up the hill; (2) a willingness to destroy evidence of a gasoline spill from a person cutting firewood on the western ridge; (3) a willingness to suppress a delayed-fuse arson device timed to go off at 2:00 p.m. and set by a suspected arsonist working for the USFS and who just moved into the area; (4) a willingness to

overlook witness interview information pointing to a different cause; (5) a willingness to cover-up a confession from a third party who started the fire; and (6) a willingness to manufacture a confession from someone they wanted to blame, as happened here.

Once an investigation is discovered to have been infused with dishonesty, it becomes more than just lies about critical distances regarding the very foundation of the investigators work, and more than about planting evidence. It is immediately about everything, making the investigation worse than merely useless. Indeed, the Defendants allegations are centered on a profoundly disturbing reality, which has now been corroborated, that this investigation was simply a vehicle to affirmatively create or destroy evidence so as to frame these Defendants, with an illegal slush fund creating the financial motive to do just that.

The investigators' deception regarding this central issue is far more meaningful than 10 feet, and it certainly does not mean that the investigators were 10 feet from being correct. Indeed the plume of smoke seen in the air attack video demonstrates that the investigators' secret point of origin and their fabricated but official points of origin all existed in an area too far down the hill, roughly 150 to 200 feet from the smoke plume. Given the investigators' mindset, their error is not surprising. As these investigators quickly processed the scene, the entire point of that exercise was to pin blame on chosen defendants, not to find the truth. Thus, because they were not engaged in a scientific exercise they were way off from where the fire actually started. Once the mindset of these investigators is exposed, it is easy to also imagine that their "initial" and secret point of origin may not have even been their first point of origin. Since this matter clearly and convincingly demonstrates a willingness by these investigators to move their point of origin in a failed effort to "strengthen" their case, it also demonstrates the distinct possibility that the investigators suppressed other points of origin as well, that the white-flagged point of origin is not their only other point, but perhaps their second or third, which they abandoned in favor of a point more "connected" to their target defendants. Perhaps the investigators initially placed a completely different point of origin near the area where the plume of smoke is shown in the video, and thought better of it because it implicated the wrong party, a possibility suggested by the testimony of Sierra Pacific employee Mike Mitzel, who saw another flagged area farther up

on the ridge a few days after the fire started.

That the Moonlight Fire investigators repeatedly demonstrated their willingness to testify falsely regarding key issues going to the core of their conclusions is critical for broader reasons. As reflected in the origin and cause report, the investigators, jointly led by Cal Fire's Joshua White, purported to have "excluded" all other potential causes of the fire based on the alleged absence of evidence of such causes. Thus, for instance, the report states, "there was no evidence of any incendiary devices found in the origin" and "there were no cans, bottles, or other refractive objects [which might focus sunlight and ignite a fire] found in the origin" and "there was no evidence of smoking in the area."

All of these conclusions have but a single source of support, the testimony of Cal Fire's Joshua White and the USFS's David Reynolds. The only "evidence" of the absence of evidence, is Joshua White and David Reynolds' word. Thus, the government's suggestion that White and Reynolds should be believed about the absence of such evidence regarding other causes, when they have demonstratively lied under oath about the central aspects of their investigation is absurd. There is a reason why the government's origin and cause expert Larry Dodds spent more than a thousand hours examining the evidence, finally conceding in May of 2013 (after the conclusion of the federal action) that the white flag raises "a red flag," creates a "shadow of deception" over the investigation, and caused him to admit "I will give you that it's more probable than not that there was [sic] some act of deception associated with testimony around the white flag." That was an understatement.

Of course, Cal Fire Unit Chief Bernie Paul also admitted that the investigators' testimony denying they knew anything about the white flag was "alone enough to cause you [Paul] to what to toss the whole report out." Chief Paul's after-settlement testimony underscores some central truths. When law enforcement officers are willing to prepare false reports, to testify falsely about their investigation, to tell witnesses what they can and cannot say, to bury and conceal evidence while manufacturing other evidence, it means the origin and cause report is simply a work of fiction. Even worse, because wildfire evidence is fleeting, and because the investigators have sole and exclusive control over the evidence while it exists and can be collected, the chance

to conduct a proper origin and cause investigation of the Moonlight Fire was lost forever, thus forever and permanently interfering with the proper administration of justice.

Defendants have neither illusions nor pride with respect to what they have uncovered regarding this corrupt investigation. A number of pieces to this puzzle are now in place, but Defendants' realize those in control of the pieces might be congratulating themselves on what Defendants failed to unearth. Indeed, Defendants realize that there are most likely numerous pieces of critical evidence which have been destroyed, or which the investigators have not revealed and, with the passage of time, will never be found. Such is the power of a process where a financially motivated Cal Fire investigator takes charge of a fleeting crime scene and where he and his USFS partner have the ability to close their eyes or the ability to simply never report what they actually found and did.

Of course, the situation becomes far worse when our "gatekeepers" of justice, these federal prosecutors, advise their investigators while preparing them for depositions that their hidden photographs of their sole white flag (and all that it entailed) is a "a non-issue." The fact that Reynolds ultimately revealed that the federal prosecutors showed him the photographs of this key marker and told him it was "non-issue" is profoundly disturbing. The fact that these same prosecutors have used their opposition to this complaint *for fraud on the court* to admit that they did so is dumbfounding. This is the story of the Moonlight Fire.

IV. THE GOVERNMENT VIOLATED THIS COURT'S ORDER

This Court's order asking for "focused" and "limited" briefing was clear and specific. It expressly directed the parties to analyze the acts of government misconduct Defendants alleged while "**assuming the truth of . . . [those] allegations**." (Docket No. 618 at 2:11-20 (emphasis added).) The government not only violated this Order in its briefing, it openly defied it stating:

> **We do not assume the truth of what Sierra Pacific says about this Court's record**, including the content of our prior briefs or the Court's prior orders or transcripts of depositions alleged to show perjury.

(Opp. at 34:19-20 (emphasis added).)

It then proceeded to file three declarations and 202 documents comprising over 3,300

pages of deposition excerpts, exhibits, and expert witness reports. It also lodged some unknown number of original deposition transcripts. The government justifies this disregard of the Order by suggesting that it is simply relying on judicially noticeable documents or those necessarily incorporated into the complaint. But, even if the Order mentioned judicially noticeable documents (which it did not), the government's own authority and its Request for Judicial Notice demonstrate that the vast majority of facts it relies upon are not judicially noticeable. First, such notice was never requested. Second, no documents were "attached" to the defense brief. The documents referenced in Defendants' brief are not the same as those now offered by the government. Most importantly, the facts the government relies upon in the documents it offers are clearly "subject to reasonable dispute" – indeed, that is the whole reason that the government wants them considered. Fed. R. Evid. 201(b).

Not only did the government refuse to assume the truth of Defendants' allegations, it inappropriately proceeded to ask the Court to weigh disputed facts and make credibility determinations. (Opp. at 38:9-11; 39:4-5; 39 n.45; 41:6-9; 41:17-19; 41:21-42:4; 42:11; 42:13-45:2; 43 n.47; 45:5-6; 53:14-16; 54:1-2; 54:6-12; 54:18-24; 60:1-25; 63:25-64:12; 64:21-23; 65:4-6; 65:21-23; 65 n.62; 68 n.68; 70:1-5; 72:2-24; 78:8-12; 78:21-79:9; 82:2-84:17, 86:3-11; 89:10-90:13; 93:24-94:13; 97:16-26; 99:12-26; 100:21-101:4; 104:2-105:10; 105:27-15; 107:8-109:19; 109 n.97; 110:21-112:22; 113:13-20.). Indeed, even the headings on the first page of its table of contents assert that Defendants' "accusations" are false. (Opp. at i:26-38.) Rather than assuming truth and addressing whether the allegations, if true, would amount to fraud on the court, the government instead submits volumes of extrinsic evidence, attempts to contradict the allegations and argues from there. This is certainly not what the Court ordered.

The government suggests that it is appropriate to consider this bounty of extrinsic evidence because Federal Rule of Civil Procedure 12(b)(6) allows such consideration where the evidence is either "subject to judicial notice" or because "the document's contents are alleged in or form the basis for the complaint." (Opp. at 35:1-4.) However, for the vast majority of the documents and facts the government proffers, neither of these propositions are true.

Judicial notice is appropriate where a fact is not subject to reasonable dispute because it

is generally known within the trial court's territorial jurisdiction or can be accurately determined from a source whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). The 1972 Advisory Committee Notes to Rule 201 state that because the usual method of establishing adjudicative facts is through the introduction of evidence "[a] high degree of indisputability is the essential prerequisite" for judicial notice. The Ninth Circuit tends to be strict with its application of Rule 201(b). Von Grabe v. Sprint PCS, 312 F. Supp. 2d 1285, 1311 (S.D. Cal. 2003). Significantly absent from the government's Request for Judicial Notice is any request that the Court judicially notice the 146 deposition excerpts, nineteen expert witness reports or the three declarations that the government submitted in support of its opposition. (Compare United States' Document Index in Support of Opposition to Rule 60(D) Motion, Docket No. 629-1 (listing 202 documents), with United States' Request for Judicial Notice in Support of Opposition to Motion for Relief from Judgment ("RJN"), Docket No. 631 (listing approximately nine documents).) The government's failure to include these items in its Request suggests that it knew full well that disputed facts contained within depositions and declarations are not the type that are appropriately judicially noticed.

The government relies on United States v. Richie, 342 F.3d 903, 907-08 (9th Cir. 2003) for the proposition that documents attached to the complaint or incorporated into the complaint may be considered on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss without converting the motion into one for summary judgment. However, Richie makes clear that items such as affidavits and declarations are not appropriate subjects of judicial notice. Id. at 908. In Richie, the government asked the court to consider a declaration, eighteen exhibits attached to the declaration, notice published in newspapers, letters sent by the Drug Enforcement Agency to the defendants, and an envelope allegedly handwritten by the defendant. Id. at 906. The court rejected all of this evidence, first noting that declarations are typically not allowed as pleading exhibits. The court also noted that while it may take judicial notice of the "records and reports of administrative bodies," the adjudicative facts in those records must be "indisputable." Id. The fact that the DEA is an administrative body does not mean that the handwriting on an envelope mailed to it fits within the judicial notice exception. Id. Likewise, the fact that the deposition

testimony of the Moonlight fire investigators may be contained in a record previously filed with a court does not make it truthful.

The government also relies on In re Stac Electronics Securities Litigation, 89 F.3d 1399, 1405 (9th Cir. 1996), for the proposition that documents whose contents are alleged in a complaint, and whose authenticity no party questions, may be considered in ruling on a Rule 12(b)(6) motion. Id. 1405 n.4. This rule is not as broad as the government suggests. Indeed, Richie notes that "the mere mention of the existence of a document is insufficient to incorporate the contents of the document by reference." 342 F.3d at 908. And, this rule is also subject to the Rule of Evidence prohibition on taking judicial notice of a fact that is "subject to reasonable dispute." Fed. R. Evid. 201(b); Lee v. City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001) (indicating that it is error to resolve disputed facts in public records). For this reason, the government's reliance on Stac Electronics is unavailing. Unlike Stac Electronics, where the court considered a prospectus quoted in the complaint to evaluate the Plaintiffs allegations of omissions in an action for securities fraud, the government is asking this Court to rely on documents not even mentioned in Defendants' papers to resolve disputed factual questions. Under the plain language of Federal Rule of Evidence 201(b), judicial notice is inappropriate.[6]

V. THE GOVERNMENT MISSTATES THE LEGAL STANDARD

Unfortunately, in the context of assessing the law relating to Rule 60(d)(3), the government's arguments are a collection pieces and components of cases, taken out of context, that ignore Supreme Court and Ninth Circuit authority regarding fraud on the court in favor of creating a series of false rules and limitations on this Court's inherent power. Properly understood, the law under Rule 60(d)(3) and this Court's inherent power to do justice confirm

[6]For instance, the government falsely contends that Defendants utilized "parlor tricks" to fool Cal Fire law enforcement officer White and David Reynolds to give testimony that upon close scrutiny is not perjurious at all; and the government cites to portions of White and Reynolds' testimony to cobble together an argument that a small piece of their testimony might not be false and that Defendants' characterization of it is incorrect, while ignoring later testimony that proves Defendants' version of the facts is correct. On these issues and others improperly argued in the opposition, the government's version of the facts is not aligned with the truth, as will be demonstrated during any evidentiary hearing on this matter. To whatever extent this Court would like Defendants to respond to any of the government's improper and unsupported factual contentions, they are prepared to do so upon this Court's direction.

that Defendants[7] have more than sufficiently alleged conduct that, if true, would easily constitute a fraud upon the court. The grave matters set forth in these allegations require Court supervised discovery and/or the appointment of a special master and a subsequent hearing.

A. The Definition of Fraud Upon the Court Arises from This Court's Inherent Powers to Effectuate Justice.

The Supreme Court and Ninth Circuit cases teach that there is no bright line test for determining whether conduct constitutes "fraud on the court." Instead, "fraud on the court remains a 'nebulous concept' . . . ." In re Levander, 180 F.3d 1114, 1119 (9th. Cir. 1999) (quoting Broyhill Furniture Indus. Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080, 1085 (Fed. Cir. 1993).) As noted by the Ninth Circuit,

> We have struggled to define the conduct that constitutes fraud on the court. Because the power to vacate for fraud on the court is so great, and so free from procedural limitations, we have held that not all fraud is fraud on the court[.] The line between mere fraud and fraud on the court has been difficult to draw. [M]ost attempts to state it seem to us to be merely compilations of words that do not clarify. Perhaps the principal contribution of all [the] attempts to define 'fraud on the court' and to distinguish it from mere 'fraud' is as a reminder that there is a distinction.

United States v. Estate of Stonehill, 660 F.3d 415, 444 (9th Cir. 2011) (internal citations and quotation marks omitted). Indeed, as noted by the Ninth Circuit in Levander, the court's "inherent power, which is based on equity, not only springs forth from courts' traditional power 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases,' but also 'furthers the pursuit of achieving complete justice by enabling the court to suspend those judgments whose enforcement.'" 180 F.3d at 1118 (citations omitted).

It is well-settled that "'fraud upon the court' should . . . embrace only that species of fraud which does or attempts to, defile the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its

[7] Defendants will generally refer to themselves when referencing their allegations, even when the government distorts the record by referring to those same allegations as belonging only to Sierra Pacific.

impartial task of adjudging cases that are presented for adjudication." 7 *Moore's Federal Practice* ¶ 60.33, at 515 (2d ed. 1978)) (adopted by Ninth Circuit in Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989)). Of course, any assessment of fraud on the court begins with "deference to the deep-rooted policy in favor of the repose of judgments" and recognition that "in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944) (discussing rules of equity, which still apply, and the "term rule," which was later abolished by the Federal Rules of Appellate Procedure). However, as also noted by the Supreme Court:

> This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. Out of deference to the deep rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments. But where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable', they have wielded the power without hesitation.

Hazel-Atlas, 322 U.S. at 244-45 (internal citations omitted).

Defendants' Moonlight Fire allegations clearly address what would be, once demonstrated at a hearing, a "manifestly unconscionable" action. As discussed throughout this reply, the government's suggestions to the contrary are entirely without merit.

B. The Government's Effort to Restate Ninth Circuit Authority so as to Render Defendants' Allegations Irrelevant Is Not Supported by the Actual Law of Fraud on the Court.

Defendants allege that the Moonlight prosecutors engaged in numerous egregious discovery abuses and intentional nondisclosures. To counter these charges, the government attempts to construct a wall around such conduct and its prosecutors, and informs the Court it cannot look at any of it. Repeatedly it argues that discovery violations and nondisclosures, even if the facts should have been disclosed to the Court itself, are not a fraud upon the court. (See,

e.g., Opp. at 18, 47, 54, 78.) Therefore, the government contends, Defendants' allegations in these areas are beyond the reach of this Court's review under Rule 60(d)(3).

Unfortunately, the government's brief is a half-inch deep and a mile wide. It cites to 94 cases, but that effort merely reflects a process focused on finding a collection of disjointed quotes to string together into an argument, with no real effort at serious legal analysis. In doing so, the government provides little but a case name, and a sentence fragment. This method of briefing is not helpful to the process set up by this Court, and it has required these Defendants to look behind the curtain of the government's numerous cases so as to provide the Court with an actual legal analysis. While laborious and lengthy due to the sheer number of cases the government cited in its exercise, this process by Defendants has demonstrated that the government's assertions regarding what this Court can review in exercising its inherent power in this complaint for fraud on the court are almost entirely without merit. It also demonstrates that Defendants' allegations are more than sufficient to constitute an action for what has been a most egregious fraud on this Court.

1. The Government Improperly Attempts to Draw the Curtains on Any and All of Its Discovery and Nondisclosure Abuses.

As further discussed below, in order to create distance between this Court and the discovery and nondisclosure abuses of its prosecutors, the government creates from whole cloth what it calls "binding precedent" from the Supreme Court's decision in United States v. Beggerly, 524 U.S. 38 (1998) (Opp. at 105), flatly stating that "it is settled law that a nondisclosure is not a fraud on the court – even if the facts should have been disclosed to the court itself." (Opp. at 34 (citing Beggerly, 524 U.S. at 47).)[8] The government creates this "binding precedent" despite the fact that even the most cursory reading of Beggerly reveals that it actually stands for close to the opposite proposition, at least with respect to the allegations in this case, as will be discussed below.

[8] The government then wrongly extends the false rule it manufactures from Beggerly to the issue of whether Brady applies in a civil context. Just after the government announces its Beggerly rule, it finishes a syllogism: "A Brady violation is a nondisclosure to a criminal defendant of material exculpatory evidence. Therefore, even if Brady applied (sic) in civil cases, it could not establish a fraud on the court." (Opp. at 34.)

In any event, having created this "binding precedent" through its reading of Beggerly and other cases, the government then undertakes what it must view as an absolutely essential effort – to do whatever it can to clear away existing case support confirming this Court's inherent power to consider discovery violations and failures to disclose when assessing a complaint for fraud upon the court. On this front, the government goes all out. It begins by ridiculing Judge Donald Lee's well-reasoned Derzack case, which holds that "stonewalling, bad faith and lack of candor" in discovery can be part of the fraud on the court assessment because "the discovery process is an integral part of the judicial process." Derzack v. Cnty. of Allegeny, Pa., 173 F.R.D. 400, 416 (W.D. Pa. 1996), aff'd sub nom Derzack v. Cnty. of Alleghany Children & Youth Servs., 118 F.3d 1575 (3d Cir. 1997). The government makes no effort to refute the logic or sensibility of Derzack's analysis. Instead, it resorts to ridicule, scoffing at Derzack by stating "the source of [Defendants'] constructions is an old decision of a district court in Pennsylvania." (Opp. at 12.) The government then sagely observes that the Derzack decision is from "a faraway district." (Id. at 13.) Perhaps the government would accord more weight to a district court in New Mexico or Utah? The government then confidently concludes, "whatever the law may be in Pennsylvania, the lax standard applied in Derzack does not apply here." (Opp. at 12.)

To answer the question posed by the government's dismissal of Derzack – "what then is the standard in the Ninth Circuit regarding what a trial court can and cannot consider when exercising its inherent powers" – the government provides a ready answer: it points to a piece of language from the opinion in Coleman-Worthington Prods., Inc v. Schuller, 914 F.2d 1496 (9th Cir. 1990) (unpublished opinion), which states "[a] finding of fraud on the court is justified only by the most egregious misconduct *directed at the court itself*." (emphasis added by government). Not only does the government cite to Coleman immediately after tearing down Derzack, it uses the same limiting language – "only by the most egregious misconduct *directed at the court itself*" – repeatedly throughout its brief. (See Opp. at 12, 33, 54, 63, and 71.) It even includes Coleman's "directed to the court itself" limitation in its first argument heading, (id. at 11), and it thereafter asserts that "it is settled law that fraud on the court requires 'egregious misconduct *directed to the court itself.*'" (Id. at 33 (quoting Coleman, emphasis by government)).

In any event, through using and elevating Coleman in this manner, the government apparently believes it can take out whole swaths of Defendants' allegations because, according to the government, not all of them were directed at the court itself. On so many fronts, the government is mistaken. Most obviously, in its zeal to construct some support for reigning in this Court's inherent powers on such matters (and shielding its prosecutors from the consequences of their wrongdoing), the government has raced to pronounce as "settled law" what is actually an "Unpublished Disposition." See Coleman, 914 F.2d at 1496. Coleman thus has no precedential value of any kind, settles nothing, and the government violates Circuit Rule 36-3 by citing this pre-2007 case at all,[9] let alone on four separate occasions for a cornerstone of its argument.[10] (Opp. at 12, 33, 63, 71.)[11]

Moreover, the government is wildly wrong about what "the law is here." While it is certainly true that Defendants have referenced the well-reasoned (and, actually, relatively recent) Derzack case from a district court in the State of Pennsylvania, they did so because Derzack contains a fraud on the court analysis involving significant discovery abuses and because Derzack's analysis, contrary to what the government asserts, is in line with both Supreme Court

[9] Defendants cite and discuss Coleman only because they believe it is necessary to refute the government's contention that Coleman is Ninth Circuit precedent that has any bearing on this Court's analysis of this case. Defendants do not intend to suggest that citation to a case in contravention of Circuit Rule 36-3 is permissible.

[10] As it turns out, the government's favorite language from Coleman – "directed to the court itself" – was taken by Coleman without analysis from the faraway land of the Eighth Circuit, in America's heartland, from the ancient decision of In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180, 195 (8th Cir.1976), which, without analysis employed the language in its definition. But then it also turns out that the Eighth Circuit grafted this "directed to the court itself" construct from the even more faraway state of Connecticut and the positively archaic decision of United States v. International Telephone & Telegraph Corp., 349 F. Supp. 22, 29 (D. Conn.1972), aff'd sub nom. Nader v. United States, 410 U.S. 919 (1973).

[11] The government also cites In re Napster, Inc. Copyright Litig., 479 F.3d 1078, 1097 (9th Cir. 2007), which in turn quotes Appling for the proposition that "fraud on the court requires 'an intentional, material misrepresentation directly aimed at the court[.]'" (See, e.g., Opp. at 54 n.19, 33 n.36, 54 n.53, 63 n.60, 71 n.72, 81 n.82 (emphasis added).) Not surprisingly, the In re Napster court never actually says that to find fraud on the court a party is "required" to show an "intentional, material misrepresentation directly aimed at the court." The court only says that even if it were to credit the evidence given in that case, "we would not conclude that this evidence establishes an intentional, material misrepresentation directly aimed at the court." 479 F.3d at 1097. Moreover, and perhaps more importantly, the parties in Napster were arguing the standard under the crime-fraud exception to the attorney-client privilege; although one of the theories advanced by appellees related to appellants' purported attempt to defraud the court, see id. at 1084, 1096-97, the case does not address a motion to vacate judgment for fraud on the court, see id. at 1082, 1090 (stating that the issue to be decided is "whether the district court properly ordered the disclosure of privileged attorney-client communications under the crime-fraud exception" and then engaging in that same analysis). Thus, Napster does not establish any standards for what this Court should consider with respect to a Rule 60 motion.

and Ninth Circuit authority. Indeed, as discussed infra, the Ninth Circuit's Pumphrey decision confirms that intentional non-disclosure and other discovery abuses are well within this Court's review of whether Defendants' allegations, once proven, amount to a fraud upon the court. See 62 F.3d at 1132 (concluding that "the use of misleading, inaccurate, and incomplete responses to discovery requests, the presentation of fraudulent evidence, and the failure to correct the false impression created by [an expert's] testimony" was sufficient to show a scheme to defraud the court).

2. The Government Repeatedly Misstates Beggerly and Fails to Comprehend That Its Holding Supports Defendants' Arguments Regarding the Scope of This Court's Review.

The government argues that Defendants cannot rely on Pumphrey and the "old Derzack case from Pennsylvania" for the proposition that "discovery violations – or even failure to disclose – are enough for a fraud upon the court." (Opp. at 18.) In support, the government cites to what it calls the "the leading case" of Beggerly, 524 U.S. 38, and then summarizes its facts and holding with a single sentence, stating that the Supreme Court held that "the United States' failure to produce documents allegedly showing it did not own contested land, which had been requested in discovery, would "at best" form the basis for a motion alleging a fraud on the opposing party, not a fraud on the court which could be challenged years later." (Opp. at 18 (citing 524 U.S. at 46).) Later, the government takes the holding in Beggerly up a notch, stating "it is settled law that a nondisclosure is not a fraud on the court – even if the facts should have been disclosed to the court itself." (Opp. at 34 (citing 524 U.S. at 47).)

Apparently confident in its analysis, the government makes Beggerly one of the pillars of its opposition. Indeed, it cites only two cases in its opposition with more frequency. On seven occasions throughout its brief, the government claims that Beggerly stands for the proposition that non-disclosure cannot serve as a basis for fraud upon the court. So confident is the government regarding Beggerly's "binding precedent" on the irrelevancy of non-disclosures that it showcases Beggerly to support its strong criticism of these Defendants and their "legal lapses," musing aloud that "one rarely encounters so many assertions of law that are precluded by binding precedent. Beggerly is not even acknowledged." (Opp. at 105.) The government then

bitingly concludes its criticisms by stating, "the most charitable interpretation of all these legal lapses is that Sierra Pacific fundamentally misunderstands the law." (Id.)

Notwithstanding the government's posturing, the reality is that it completely misreads Beggerly, perhaps not a surprising fact since its legal research on these important cases is a collection of fragments as opposed to any real effort to understand the import of what is being said through a focused analysis of the cases themselves.[12] In fact, the government has no basis whatsoever to claim that Beggerly creates "settled law" regarding how the non-disclosures in this matter should be assessed. It has no basis whatsoever to declare that Beggerly creates "binding precedent" which precludes this Court from considering its prosecutors' egregious and pervasive misconduct during discovery in this matter. Moreover, aside from getting caught up in a moment of misguided lecturing regarding Defendants' "legal lapses," it has no reason whatsoever to intimate that these Defendants intentionally did not "acknowledge its existence."[13] In any event, because Beggerly is such a large part of the government's effort to prevent a hearing on this matter, it is deserving of a full explication, as it actually stands for a proposition that is nearly 180 degrees from what the government attempts to foist upon this process.

In 1950, Clark Beggerly, purchased two tracts of land on Horn Island off the coast of Mississippi. Beggerly, 524 U.S. at 40. Thereafter, Congress and the government decided to create a federal park on Horn Island, authorizing the Secretary of the Interior to begin buying private tracts of land within the park's boundary. Rightful owners would of course be entitled to

[12] Regarding Beggerly, the government essentially limits its "analysis" of this oft-cited decision to what is found on page 23 of its opposition, where it provides: "Beggerly arose from a settled case. The Supreme Court held that a judgment entered upon the settlement could not be vacated for fraud upon the court, even though the government had failed to produce to the opposing party and the court documents allegedly showing it could not have owned the land." Actually, as discussed below, that is not even close to the ruling in Beggerly. Instead, the Supreme Court held that a judgment entered upon the settlement could not be reversed by an inadvertent failure to disclose based on an erroneous assumption by the government, despite a diligent and good faith search, that the document did not exist.

[13] The government suggests that "Sierra Pacific" tried to avoid the import of this decision, stating, "this leading Supreme Court decision is not acknowledged in Sierra Pacific's brief." (Opp. at 18.) But there is no truth to that assertion. Indeed, Beggerly is a relatively easy case to miss, as it employs the phrase "fraud upon the court" just once, uses the old "Rule 60(b)" nomenclature for fraud on the court as opposed to "Rule 60(d)(3)" and cites to Hazel-Atlas only once, and for the commonly accepted proposition that overturning a case is reserved for "injustices which . . . are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata." Beggerly, 524 U.S. at 46. In fact, Defendants should have used the Beggerly decision and discussed it liberally in their own briefing; because the government raises it, Defendant do so in reply here.

payment. Id. With respect to Beggerly's claimed ownership of two tracts, an issue arose as to whether Horn Island had ever been granted to a private landowner. If it had not, Beggerly would not have title, and the National Park Service could avoid paying anything. Id. Litigation ensued. The Beggerly opinion states that during discovery in then underlying case, "respondents sought proof of their title to the land." Id. at 41. Thereafter, "Government officials searched public land records and told respondents that they had found nothing proving that any part of Horn Island had ever been granted to a private landowner." Id. In 1982, in view of this lack of proof, the Beggerlys settled their action with the government. In 1991, still unsatisfied with the government's earlier response, the respondents went to great lengths to find the documents the government searched for but failed to produce. As stated in the Supreme Court's opinion:

> Even after the settlement in the Adams litigation, however, respondents continued to search for evidence of a land patent that supported their claim of title. In 1991 they hired a genealogical record specialist to conduct research in the National Archives in Washington. The specialist found materials that, according to her, showed that on August 1, 1781, Bernardo de Galvez, then the Governor General of Spanish Louisiana, granted Horn Island to Catarina Boudreau. If the land had been granted to a private party prior to 1803, title presumably could not have passed to the United States as a result of the Louisiana Purchase. Respondents believed that the Boudreau grant proved that their claim to the disputed land was superior to that of the United States.
>
> Armed with this new information, respondents filed a complaint in the District Court on June 1, 1994. They asked the court to set aside the 1982 settlement agreement and award them damages of "not less than $14,500 per acre" of the disputed land. The District Court concluded that it was without jurisdiction to hear respondents' suit and dismissed the complaint.

Id. at 41-42 (internal citations omitted).

Thereafter, additional litigation took place regarding issues associated with statutes of limitation and jurisdiction. Ultimately, the matter made its way to the Fifth Circuit as an independent action for fraud upon the court. After reviewing the factual and procedural history, the appellate court vacated the Beggerly settlement as unjust. The matter was then taken up by the Supreme Court, where – in the context of *this* factual backdrop – it overturned the appellate court's decision. Relying upon its earlier decision in Hazel-Atlas, the Supreme Court stated,

"[i]ndependent actions must, if Rule 60(b)[14] is to be interpreted as a coherent whole, be reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure.'" Id. at 46. Thereafter, the Supreme Court ruled as follows:

> The sense of these expressions is that, under the Rule, an independent action should be available only to prevent a grave miscarriage of justice. In this case, it should be obvious that respondents' allegations do not nearly approach this demanding standard. Respondents allege only that the United States failed to "thoroughly search its records and make full disclosure to the Court" regarding the Boudreau grant. Whether such a claim might succeed under Rule 60(b)(3), we need not now decide; it surely would work no "grave miscarriage of justice," and perhaps no miscarriage of justice at all, to allow the judgment to stand. We therefore hold that the Court of Appeals erred in concluding that this was a sufficient basis to justify the reopening of the judgment in the Adams litigation.

Id. at 47 (internal citations omitted).

Thus, as can be seen, the Supreme Court in Beggerly was more focused on the *innocent nature* of the government's non-disclosure under the facts of *that* action, as opposed to the fact that there was a non-disclosure. The Supreme Court in fact highlights that the respondents were merely alleging that the government did not "thoroughly search its records and make a full disclosure." Id. at 38-39. Moreover, the underlying Fifth Circuit opinion further confirms what is clear in the Supreme Court's opinion – that the non-disclosure in this matter was unintentional and that it followed a good faith effort by the government to find the document in the first instance. "Government officials reportedly had searched the National Archives during the quiet title suit but had not discovered this document and thereafter erroneously advised the court and the Beggerlys that Horn Island had never been privately disposed." See Beggerly v. United States, 114 F.3d 484, 486 (5th Cir. 1997), rev'd, 524 U.S. 38. It was only after an "exhaustive search" that the respondents eventually found the document, and then only after they retained an archival record specialist. The fact that the Supreme Court unanimously held that an innocent failure to disclose does not constitute a gross or grave injustice is not only unsurprising, it "should be obvious," as the Court noted. There is not a shred of bad faith revealed in the record.

[14] In 1998, when Beggerly was decided, Rule 60 had not yet been amended or renumbered so the Court correctly references Rule 60(b) to refer to an independent action for fraud upon the court.

There is not one single allegation that comes close to suggesting there was any intentional misconduct. There is nothing to suggest that there was an effort to conceal relevant information. As noted by the Court, the worst that could be said was that the government failed to conduct what the respondents claimed was a "thorough search." But even there, the appellate court decision reveals that the respondents' sense of what constituted a "thorough search" was apparently to move heaven and earth.[15]

In sum there is nothing remarkable about Beggerly. Unfortunately, what is remarkable is that the government would assert that Beggerly is "binding precedent" for this matter "that a nondisclosure is not a fraud on the court – even if the fact should have been disclosed to the court itself." (Opp. at 34.) Why would they do so? The prosecutors well know that Defendants' allegations are brimming with charges of intentional misconduct and bad faith nondisclosure with the intent to frame these Defendants. To nevertheless repeatedly tell this Court that assessing such conduct is precluded by the "binding precedent" of Beggerly is just wrong. Moreover, to engage in such clear misstatements while lecturing these Defendants about their legal lapses is, we guess, something that simply must be endured as we move towards justice.

3. The Government Fails to Recognize that Beggerly Actually Confirms This Court's Power to Assess Nondisclosures in Its Fraud on the Court Analysis.

Unfortunately, however, the government's use of Beggerly is even worse than what is revealed by the discussion above. In addition to the Supreme Court confirming the "obvious" fact that an innocent failure to produce and disclosure after a thorough search was most decidedly not a "gross" or "grave" injustice, the Court in Beggerly immediately thereafter made a point of confirming that bad faith (as, for instance, alleged in this action) might very well constitute a gross or grave injustice that warrants departure from the doctrine of res judicata. In

[15] As noted in the underlying Fifth Circuit opinion, the effort that the respondents went through to eventually find this document after the government could not find it was significant. "Their disappointment with the results of the settlement led the Beggerlys to mount an exhaustive search for a land patent to support their claim of title. They wrote letters to public officials, made Freedom of Information Act requests, and searched land records in Alabama, Mississippi, Louisiana, and Washington, D.C. Finally, in 1991 the Beggerlys hired a genealogical record specialist who conducted research in the National Archives and discovered the Boudreau Grant which supported the Beggerlys' claim of title." 114 F.3 at 486.

addressing this aspect of its opinion, the Court said "such a case was Marshall v. Holmes, 141 U.S. 589 (1891), in which the plaintiff alleged that judgment had been taken against her in the underlying action as a result of a forged document."[16] Beggerly, 524 U.S. at 47.

Thus, in addition to easily finding that an innocent non-disclosure, without bad faith or intent, would not constitute a grave miscarriage of justice, the Supreme Court felt compelled to immediately thereafter confirm that the loss of property through a discovered forgery would likely constitute a grave miscarriage of justice. While the Court in Beggerly does not expressly state that the bad faith withholding of a document causing a loss of property would necessarily be a grave miscarriage of justice, that consequence can certainly be inferred from the Court's "sense of expression" on the matter (see id. at 47), and one can certainly expect that the Supreme Court's opinion would have been a far different affair if there had been any evidence that the United States knew about the document sought by the Beggerlys, hid the document, and failed to reveal to the court that it existed. In many ways of course, that type of factual pattern is similar to the Moonlight Fire action, where, for instance, the fraudulent origin and cause report engineered the loss of Defendants' property through a settlement engendered by a constellation of bad faith conduct; thus, the conduct here is more than similar to a forgery that causes the loss of property, as in Marshall. And, for instance, that type of factual pattern is similar to burying the existence of a critical third party's false claim of a two million dollar bribe just before a

[16] In Beggerly, the Supreme Court then further highlighted its decision in Marshall, identifying the following language: "According to the averments of the original petition for injunction . . . the judgments in question would not have been rendered against Mrs. Marshall but for the use in evidence of the letter alleged to be forged. The case evidently intended to be presented by the petition is one where, without negligence, laches or other fault upon the part of petitioner, [respondent] has fraudulently obtained judgments which he seeks, against conscience, to enforce by execution." Beggerly, 524 U.S. at 47.

In Marshall, the Court addressed the petitioner's claim that the respondent had obtained multiple judgments against her in Louisiana state court based on a forged document and numerous lies relating to that document. 141 U.S. 589. The Court found that, through its equitable powers, it could properly grant relief against judgments obtained by means of fraud. Id. at 596. Finding that the judgment was fraudulently obtained, the Court reversed the judgment of the Louisiana trial court. Id. at 601. The Court reached this conclusion even though the petitioner could not "plead ignorance of the evidence introduced at trial," because "relief could be granted by reason of the fact . . . that some of the necessary proof establishing the forgery . . . was discovered after the judgments at law were rendered, and after the legal delays within which new trials could have been obtained, and could not have been discovered sooner." Id. Thus, although Marshall did not discuss fraud on the court per se, it nonetheless used its equitable power to vacate a judgment obtained by a fraud that the petitioning party had at least some knowledge of at the time, and, as now discussed, the Supreme Court in Beggerly's fraud on the court analysis made a point of referencing its important analysis.

critical motion in limine. Again, the fact that the Supreme Court went through the exercise of clarifying what its holding does not mean is important, especially when contrasted with the government's willingness to use, counterfactually, Beggerly as "binding precedent" that precludes this Court's consideration of numerous allegations of bad faith regarding the withholding of documents and concealment of information. Beggerly does no such thing.

4. The Government Misstates a Number of Other Cases in Its Misguided and Ill-Fated Effort to Render Defendants' Allegations Irrelevant.

Case by case, the government builds a wall around the conduct of its prosecutors, but its wall is nothing but a house of cards. The cases cited to this Court in the government's opposition simply do not stand for the propositions the government advances.

a. England v. Doyle

The government repeatedly cites to England v. Doyle, 281 F.2d 304 (9th Cir. 1960), for the proposition that "the failure to produce evidence, without more, does not constitute fraud on the court." (Opp. at 13, 18, 34.) Indeed, in its section entitled "Discovery Violations and Failures to Disclose Cannot Establish a Fraud on the Court," the government cites to England and then proclaims, "Sierra Pacific's argument is thus foreclosed." (Opp. at 18.) However, as with essentially every case decision it employs, the government engages in no effort to examine just what the England decision actually teaches, nor does it explore the context of its pronouncement. Defendants therefore will.

In England, 281 F.2d 304, a bankruptcy trustee name England initiated an action which involved, among other things, an argument that Doyle had committed a fraud upon the court. The story is complicated, but trustee England essentially claimed that a woman named Mansfeldt delivered a significant sum of cash to her appointed agent Doyle, and that Doyle later damaged a creditor by giving the money back to Mansfeldt (who fled to Europe and spent it) before England could be appointed as bankruptcy trustee. The court's involvement arose when Doyle insisted that his agency relationship be terminated by the court before he would comply with Mansfeldt's instruction to him that he return her money. After receiving the termination order, but before the final adjudication of the bankruptcy and the appointment of the trustee, Doyle complied with

Mansfeldt's demands. Mansfeldt then went to Europe and came back broke. Thereafter, the trustee filed an action against Doyle, claiming that he harmed the creditor and defrauded the court.

The Ninth Circuit's rejection of this fraud upon the court argument is highly relevant here. First, the Ninth Circuit went through the exercise of explaining the legal limitations of the agent, that the money was not his, and that the trustee had no claim to it at the time of Doyle's ex parte application to be terminated as Mansfeldt's agent. Stymied there, England argued he had rights against Doyle because Doyle failed to reveal to the court during his ex parte application the existence of a "binding and enforceable" stipulation that he would keep Mansfeldt's money or give notice to the creditor that he would not. Id. at 308-10. On this front, England claimed that the stipulation arose in the context of a hearing where Mansfeldt's counsel, the creditor's counsel, and Doyle were all present. But the court rejected the existence of any such stipulation, noting, among other things, that this "colloquy" had not even involved Doyle, who "was not called upon during the discussion and made no statement of any kind," id. at 307, and, most importantly, that there was also "no evidence that Mansfeldt had granted her attorney authority to act on her behalf." Id. at 308. Thus, the Ninth Circuit merely held that these in-court statements "did not amount to a binding stipulation, and therefore [Doyle], if he remembered the statement at all, was not required to disclose it." Id. at 310. England also argued that appellee Doyle committed a fraud upon the court by failing to disclose the bankruptcy referee's notice of decision declaring Mansfeldt bankrupt. The court disagreed, but its reason for disagreeing is what's important here. In particular, it found since there was no final bankruptcy adjudication, Doyle "was not bound to disclose" something that "had no effect on the existing rights of the parties." Id. at 311. Finally, and importantly, the Ninth Circuit concluded its review on both issues by stating: "Thus, no material fact was concealed from the court; appellee had disclosed all that was necessary to effect a judicial termination of his agency." Id.

Obviously, therefore, England has nothing to do with the proposition that the government trumpets in its opposition. It is clearly not the case that "failures to disclose cannot establish a fraud on the court" (Opp. at 18), as they most certainly can. Similar to the Supreme Court's

holding in Beggerly, the Ninth Circuit's decision in England demonstrates nondisclosures may very well constitute a fraud on the court, *unless* they are innocent and/or immaterial. But the government does *not* use its opposition to proclaim the actual law, that *innocent mistakes cannot establish a fraud on the court*, or that *nonmaterial disclosures don't create a fraud on the court*. Instead, the government's opposition tries to shield this reality from the Court for a reason: *because* defendants have alleged that the government has engaged in a scheme to hide the truth from these defendants and the Court through a blizzard of intentional efforts to conceal material information at the heart of this matter. That is the essence of fraud upon the court, and the government's willingness to actually flaunt England so as to suggest a contrary reality suggests that it might be doing the same with a whole host of cases. It is.

b. Valerio v. Boise Cascade Corp.

The government also relies on Valerio v. Boise Cascade Corp., 80 F.R.D. 626 (N.D. Cal. 1978). In the government's own language, it claims that Valerio stands for the proposition that "a party's failure to 'make full disclosure to the Court' does not constitute a fraud on the court." (Opp. at 95 n.87 (emphasis added).) On at least six separate occasions, and with neither context nor analysis, it uses Valerio's language: "nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud upon the court." (See Opp. at 15, 54, 92, 101 nn. 37, 87.) Once again, because Valerio comprises such a large part of the government's argument, Defendants have no choice but to discuss what Valerio actually holds.

In Valerio, participants in a settlement resolving a class action filed a complaint seeking to vacate the judgment approving the settlement. They did so based on various claims, including that the private attorneys and Attorney General of California committed a fraud on the court. 80 F.R.D. at 630 (1978). Ultimately, the district court found that no fraud on the court had been committed. The district court reasoned that the class action participants had not alleged any actual fraud on the court, but instead had merely alleged that their attorneys had "exercised poor judgment in recommending approval of the settlement." 80 F.R.D. at 642. On appeal, the Ninth Circuit adopted the opinion of the district court. See Valerio v. Boise Cascade Corp., 645 F.2d 699, 700 (9th Cir. 1981).

In evaluating whether the allegations against the attorneys were sufficient to support a finding of fraud on the court, the district court noted that the "precise parameters" of fraud on the court "remain undefined." Valerio, 80 F.R.D at 641. The court then stated that based "largely upon the leading case of Hazel-Atlas . . . Professor Moore has suggested" that the definition of fraud on the court "embrace only that special species of fraud which does or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases." Id. (quoting 7 *Moore's Federal Practice* ¶ 60.33 at 512-13 (2d ed. 1970)). The court further clarified that "[g]enerally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute fraud on the court" and that "[l]ess egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court." Id. (quoting Int'l Tel. & Tel., 349 F. Supp. 22).

Based on this definition of fraud on the court, the Valerio court went on to find that the allegations of the class action participants did not rise to the level of fraud on the court. Importantly, however, the court noted that "the allegation that the class attorneys misrepresented Boise Cascade's financial condition, if proven, would establish that fraud on the court had been committed," as "deliberate misrepresentations of Boise Cascade's financial condition would constitute an 'unconscionable plan or scheme which is designed to improperly influence the court in its decision." Id. at 642 (quoting England, 281 F.2d at 309). While the class action plaintiffs did eventually allege that the attorneys misrepresented Boise's financial condition (in response to a motion to dismiss and not in the initial complaint regarding fraud on the court), the court found that the plaintiffs did not actually prove that there had been any misrepresentation regarding the financials. Id. at 643, 645.

In sum, Valerio's holding is essentially meaningless with respect to the proposition posed by the government here. Indeed, Valerio actually confirms that deliberate misrepresentations to the Court do constitute a fraud on the court. See 80 F.R.D. at 641("Deliberate misrepresentations [to the court] of Boise Cascade's financial condition would constitute an

"unconscionable plan or scheme which is designed to improperly influence the court in its decision.") And, of course, "misrepresentations can be affirmative or based on omission." Crowe v. County of San Diego, 608 F.3d 406, 435 (9th Cir. 2010). Additionally, despite relying on Valerio extensively throughout its brief, the government fails to acknowledge that Valerio adopts Professor Moore's definition of fraud on the court, a definition that the government fails to enunciate a single time in its brief, despite the fact that the definition has been recognized by the Ninth Circuit in numerous opinions. See, e.g., Stonehill, 660 F.3d at 444; In re Intermagnetics, 926 F.2d at 916; Alexander, 882 F.2d at 424.

c. Phoceene v. Sous-Marine

In another effort to restrain this court's ability to review the breadth of the government's misconduct, the government cites Phoceene Sous-Marine, 682 F.2d 802, England, 281 F.2d 304, and Valerio, 645 F.2d 699, for a proposition not supported by Ninth Circuit authority. (See Opp. at 11, 13.) On page 11, the government writes: "As defined by the Ninth Circuit, a 'fraud on the court' is 'an unconscionable plan or scheme which is designed to improperly influence the court' in its 'ultimate decision on the merits.'" (Opp. at 11 (citing Phoceene, 682 F.2d 805) (internal citation omitted).) To create this additional limitation on what this court can review in the context of using its inherent powers, the government engages in a subtle deception. First, it declines to inform this Court that the entirety of the Ninth Circuit's discussion regarding any standard for fraud on the court in that case is as follows:

> Lecocq's conduct clearly does not constitute a "fraud on the court" as that term has previously been defined in this Circuit. A "fraud on the court" is "an unconscionable plan or scheme which is designed to improperly influence the court in its decision." Lecocq's deception was clearly not an attempt to influence the court's ultimate decision on the merits. Rather, it was apparently designed solely to delay trial of the matter. Accordingly, we conclude that Lecocq's conduct does not constitute a "fraud on the court."

Phoceene, 682 F.2d at 805 (quoting England, 281 F.2d at 309). Thus, the government has excised the essence of the Ninth Circuit's language so as to arrive at and deliver the "ultimate decision" piece to their construction effort. Once completed, it peppers its brief with the results

of its handiwork. (Opp. at 11, 41, 53, 77, 78.)

Next, and perhaps more importantly, the government avoids any analysis. Conducting an analysis, however, reveals that the Ninth Circuit's actual holding – or even the government's crafted version of its holding – cannot be read for the narrow proposition the government needs to advance. In Phoceene, one of the defendants, Lecocq, travelled to France nine days prior to the start of trial; while there, he had his sister, a nurse, send a telegram to the court stating that Lecocq was under significant stress and needed to rest for forty-five days. 682 F.2d at 804. His sister sent the telegram in the name of a physician affiliated with the hospital where his sister worked, and by whom Lecocq had not yet been seen or examined. Id. Subsequently, Lecocq repeatedly lied to the court about the origins of the telegram and whether he had been seen by the doctor prior to the time it was sent. Id. Ultimately, "[t]he District Court found that in falsely sending the . . . telegram, Lecocq had willfully deceived the court" and entered default judgment against the defendants. Id. at 805. While the Ninth Circuit agreed that Phoceene's conduct was deceitful, it overturned the district court, holding that default judgment as a sanction was not appropriate for conduct unrelated to the merits of the case. Id. at 807.

What the Phoceene court precisely meant by "ultimate decision" is somewhat unclear, but when considered in its factual context – something the government fails to provide for any of the cases that it proclaims represent the settled law of the Ninth Circuit – it is clear that Phoceene ultimately required no more than the Stonehill court did nearly thirty years later. That is, the fraud on the court must relate to issues that are not merely "tangential" to the "fundamental question" of the case. Stonehill, 660 F.3d at 452. As the Ninth Circuit further explained in Phoceene when discussing its inherent powers to enter a default judgment as a sanction, the court stated that "Lecocq's deception related not to the merits of the controversy but rather to a peripheral matter: whether Lecocq was in fact too ill to attend trial on October 10." 682 F.2d at 806. That the government attributes more meaning to this phrase than it is entitled serves as simply another, albeit subtle, example of the deception that emanates from every page of its brief. And the government's willingness to do so when Defendants' allegations here are all focused on anything but a peripheral matter – whether the government and its prosecutors

assisted Cal Fire in framing these Defendants by fabricating their claimed origin, hiding key photos and diagrams, allowing and/or encouraging witnesses to lie under oath, and burying evidence of alternative causes – makes its misuse of Phoceene even worse.

5. In Its Use of Selective Quotes From England, Valerio, and Phoceene, the Government Fails to Report Settled Law On the Actual Parameters for Assessing Fraud On the Court.

In addition to misreading England, Valerio, and Phoceene, the government also ignores what the Ninth Circuit actually expects of trial courts when assessing fraud on the court. While Defendants do not disagree that the Ninth Circuit continues to cite to Phoceene and England for the proposition that fraud on the court may include conduct amounting to "an unconscionable plan or scheme which is designed to improperly influence the court in its decision," the government avoids entirely the Ninth Circuit's additional and critical clarifications regarding what actually might constitute fraud on the court.

Contrary to what the government would like this Court to believe, the Ninth Circuit's law regarding fraud on the court did not freeze in the year 1960, when it decided England, or even in 1981 when it affirmed Valerio. The government is silent about the fact that its favored language predates the Ninth Circuit's adoption in 1989 of Professor Moore's definition of fraud on the court in Alexander v. Robertson. 882 F.2d 421; see also In re Intermagnetics America, Inc., 926 F.2d 912, 916 (9th Cir. 1991). Thus, in Intermagnetics, the Ninth Circuit stated:

> This Court recently approved the following definition of fraud upon the court proposed by Professor Moore: "Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.

926 F.2d at 916 (citing 7, *Moore's Federal Practice* ¶ 60.33, at 515 (2d ed. 1978)). Moreover, since 1982, when Phoceene was decided, the Ninth Circuit has decided Levander, Pumphrey, Stonehill, and a bevy of other cases making clear that there is no one finite, precise definition of fraud on the court. The government does not acknowledge this substantial clarification of what

constitutes fraud on the court in the Ninth Circuit.[17] Regardless, this is the law as it applies to this complaint.

C. The Ninth Circuit Encourages and Expects Trial Courts to Use Their Inherent Power to Review the Full Record Of Conduct Exhibited by a Party Accused of Fraud on the Court.

The Ninth Circuit has been clear: discovery nondisclosure and misrepresentations are in fact relevant to the inquiry of whether a fraud on the court has been committed.

1. Pumphrey v. K.W. Thomson Tool Company

As discussed in Defendant's Supplemental Brief, Pumphrey, 62 F.3d 1128, involved a wrongful death action wherein the defendant gun manufacturer participated in a scheme to defraud the court by withholding evidence. The wrongful death issue in Pumphrey focused on whether a gun would fire upon hitting the ground even though its safety was on. Id. at 1130. Gun manufacturer Thompson had conducted some videotaped "drop tests" to assess and document this safety issue. Id. Thompson's general counsel and vice president Edward Bartlett was present, as was Thompson general manager, French. Id. In one video ("the trial video"), the gun did not fire when dropped with the safety on; in another video ("the original video") the gun did fire. Id. at 1131. Thereafter, the defendant's general counsel took steps to ensure that plaintiffs in one wrongful death matter never discovered the condemning original video during litigation. Id. at 1130.

The government's opposition dismisses Pumphrey as having no bearing on whether out of court conduct should be considered by this court. It states: "Contrary to Sierra Pacific's argument, Pumphrey was not about discovery violations or failures to disclose, but affirmative "deception" of the jury "at trial." (Opp. at 18 (emphasis added).) Not true.

In Pumphrey, the Ninth Circuit's fraud on the court analysis *begins* with its focused assessment on Thompson's (the gun manufacturer) failure to properly respond to a request for production that should have included the original video and that its general counsel then

[17] In fact, as discussed herein, Professor Moore's definition, adopted by the Ninth Circuit and used in numerous fraud on the court cases, appears nowhere in the government's brief. There is a reason for its conspicuous absence.

"mischaracterized the drop-tests" when answering interrogatories. [18] After thoroughly discussing these discovery abuses, the Ninth Circuit noted in a single sentence Barlett's willingness to allow general manager French to testify falsely during the underlying trial. Thereafter, the Ninth Circuit made a point of returning to additional discovery abuses, noting that Bartlett was present during depositions at two additional wrongful death cases, where he sat on his hands while his general manager (French) lied again on these issues.[19] After conducting this broad analysis, a single sentence of which pertained to trial, the Ninth Circuit laid out the fraudulent nature of Thompson and Bartlett's conduct, focusing on the *entirety* of the scheme,

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[18] The Ninth Circuit's discussions regarding the critical relevance of these issues to its analysis are not easily missed, as they comprise the first two paragraphs of the Court's opinion immediately following its introduction of its fraud upon the court analysis. First, it defines fraud upon the court as including "both attempts to subvert the integrity of the court and fraud by an officer of the court. Furthermore, it 'must involve an unconscionable scheme which is designed to improperly influence the court in its decision.'" Pumphrey, 62 F.3d at 1131 (citations omitted). Next, it agrees with the "district court's conclusion that Thompson, through Bartlett, perpetrated a fraud upon the court." The court then launched into its reasoning, beginning as follows:

> Prior to filming the videos, Thompson answered a request for production by stating that "defendant is not presently aware of any records relating to the testing of the Thompson Contender handguns. If records are later discovered, they will be made available pursuant to this request." Contrary to that statement, however, the original video was never disclosed to Sparks at any time, despite the fact that Bartlett participated in filming the video, had possession of the video, and drafted later discovery responses.

Id. And immediately thereafter the Ninth Circuit considers *additional* discovery abuses, noting:

> Barely one month after the drop-tests were conducted, Bartlett drafted an answer to Sparks' interrogatories which mischaracterized the drop-tests. The answer admitted that during one test the Contender fired when dropped, but misstated that the drop was from five feet rather than three feet. The answer further misstated that both safeties were intentionally disengaged, when in fact the internal safety was unintentionally disengaged. The answer also misstated that there was no record of the test.

Id. at 1132.

[19] Again, it is difficult to understand why the government ignores this analysis. (Indeed, the government directly contradicts it, writing, "Pumphrey was not about discovery violations or failures to disclose, but affirmative deception of the jury "at trial" on the central case. (Opp. at 18 (citing Pumphrey, 62 F.3d at 1132).) In actuality, the Ninth Circuit continues to hammer on the importance of discovery abuses to the scheme it is reviewing. It writes:

> Bartlett attended the trial at which French testified several times, without qualification, that he had never seen the Contender fire when dropped during tests. Additionally, French was deposed in two cases subsequent to *Sparks* involving the same gun. Bartlett was present at both depositions. In one case, French stated that he had never been able to engage the internal safety, disengage the external safety, and then drop the gun and have it fire. In another case, French stated that he had been able to jar the safety out of place when dropping the gun but had not been able to make it fire.

Pumphrey, 62 F.3d at 1132.

stating:

> These undisputed facts reveal that Thompson, through Bartlett, engaged in a scheme to defraud the court, and Sparks, through the use of misleading, inaccurate, and incomplete responses to discovery requests, the presentation of fraudulent evidence, and the failure to correct the false impression created by French's testimony. The end result of the scheme was to undermine the judicial process, which amounts to fraud upon the court.

Pumphrey, 62 F.3d at 1132 (citing Hazel–Atlas, 322 U.S. at 245-46, 250 (1944) (deliberately planned scheme to present fraudulent evidence constitutes fraud upon the court)).[20]

While at this stage of the decision it is perfectly clear that discovery abuses are well within the parameters of this court's power to assess fraud on the court, the Ninth Circuit goes on to make the point even more clear by expressly referencing the importance our discovery rules play in protecting the administration of justice, stating:

> As the district court noted, Bartlett, as a licensed attorney, is aware of the necessity for compliance with the rules of discovery and the rules of professional responsibility. He is aware of the damage failure to abide by these rules can wreck in the specific case at hand and the larger framework of confidence in the adversary trial system.

Id. at 1113.

The government has no answer to Pumphrey's careful analysis and decision, so it dismisses it.[21] In fact, without regard to the language in Pumphrey, the government concludes,

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[20] Having concluded that there was a fraud upon the court under these facts – the failure to produce, the false interrogatory, the false trial testimony, and the subsequent willingness of Bartlett to allow his manager to testify falsely in subsequent deposition – the Ninth Circuit then addressed Thompson's argument "that there was no fraud on the court because Bartlett believed the original video was taped over, and in 1982, no one at Thompson thought that a videotape was a "document" or "record." Pumphrey, 62 F.3d at 1132. The Ninth Circuit responded, "even taking the above as true, we nevertheless conclude that there is ample evidence of fraud on the court." Id. The Ninth Circuit then recounted two specific instances of trial deception and Bartlett's provision of false answers in subsequent depositions and "a misleading answer to the interrogatory regarding a drop-test." Id.

[21] At one point, however, the government appears to state that Pumphrey is not sound law because it conflicts with the Supreme Court's decision in Beggerly. In particular, the government argues the point as follows:

> Relying on Pumphrey v. K.W. Thompson Tool Co. and the old Derzack case from western Pennsylvania, the defendants assert that discovery violations – or even a "failure to disclose" – are enough for a fraud on the court. That argument cannot be reconciled with Supreme Court's subsequent decision in Beggerly, holding that the United States' failure to produce documents allegedly showing it did not own contested land, which had been requested in discovery, would "at best" be the basis for a motion alleging fraud on the opposing party,

"Pumphrey was not about discovery violations or failures to disclose." (Opp. at 18.) It does so despite the fact that a large portion of the court's opinion in Pumphrey is devoted to describing the discovery and disclosure violations in the case, not all of which has even been recited here. Regardless of the governments' opposition, Pumphrey disposes of page after page of arguments in the government's opposition, where the government employs a patchwork of untethered sentence fragments to pitch false rules or tests, and where, ironically, the government lectures Defendants for their misunderstanding of the Pumphrey analysis. (See Opp. at 105.)

2. Dixon v. C.I.R.

Pumphrey is not the only decision where a failure to abide by discovery can have a significant impact on a court's assessment of whether there has been a fraud on the court. In Dixon v. C.I.R, 316 F.3d 1041(9th Cir. 2003), the Ninth Circuit addressed an appeal by a group of taxpayers who alleged fraud on the court.[22] These 1300 taxpayers had participated in a complex investment scheme which was sold as a legitimate investment that would allow the taxpayers to claim interest deductions on their individual tax returns. Id. at 1042. The IRS ultimately disagreed, finding the investments a sham and issuing notices of deficiency. Id. The investment advisor (Kersting) brought an action in Tax Court. Because of the number of taxpayers affected, the majority of the taxpayers entered into an agreement with the IRS. Therein, they agreed "to be bound by the decision of a test case trial involving representative taxpayers." Id. at 1043. Two of the test case representatives were chosen by the taxpayers' counsel, and five were chosen by the IRS. Id. Thereafter the test case proceeded to trial before the Tax Court, and the judge concluded that the taxpayers would all be liable for deficiencies.

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not a fraud on the court which could be challenged years later.

(Opp. at 18) (citations omitted).) But, as discussed above, the government misstates the holding in Beggerly, and there is nothing about that holding – finding that innocent nondisclosures after an exhaustive search – which even remotely contradicts the holdings in either Pumphrey or Derzack, which hold that bad faith discovery tactics are clearly relevant for assessing fraud on the court.

[22] Although the government misread Pumphrey, it cited it on a number of occasions. That cannot be said about the Ninth Circuit's critical decision in Dixon as it relates to this Court's analysis. Although Defendants cited Dixon in their Supplemental Brief on seven occasions (Def. Supp. Brief at 6, 22, 60, 89, 104, 105, 135), the government fails to address it a single time in its opposition. That glaring omission is unfortunate, as Dixon is relevant to this motion for fraud on the court for two important reasons, and certainly warranted discussion from both sides.

Thompson, one of the taxpayers, gave the government critical testimony, stating that "he believed that instruments creating the claimed interest would not be enforced," as did Cravens, another one of the test case representatives, "because his payment of capital gains taxes upon exiting the Kersting investment program made him a particularly good representative." Id. at 1044.

In reviewing the taxpayers' complaint for fraud upon the court after the Tax Court's denial of it, the Ninth Circuit noted, "as it turns out, that which the Tax Court and other participants believed to be a legitimate, representative proceeding, binding on the test case petitioners and all those waiting in the wings, was anything but." Id. Specifically, and among other things, both Thompson and Craven had in fact entered into secret settlements with two IRS attorneys on the action – McWade and Sims.[23] Id. After the IRS secured their victory on the test case, and therefore against the remaining taxpayers by way of their agreement with them, the IRS's case began to fall apart when Thompson and Cravens began to pressure McWade and Sims for the benefit of their secret agreements – special treatment more favorable than the class. Id. at 1045. The Ninth Circuit writes, "This is when the McWade-Sims house of cards began to

[23] With respect to these secret settlements, the Ninth Circuit noted that:

> A condition of their settlements required Thompson and Cravens to remain test case petitioners. McWade also convinced Cravens, who mistakenly believed his liability was finalized by the settlement, to proceed *pro se*. With respect to Thompson, McWade agreed to have Thompson's tax deficiencies reduced in proportion to his attorney's fees, which exceeded $60,000. At no point did McWade or Sims reveal to the Tax Court or to any other taxpayer representative that two of the test case petitioners' cases had been settled, much less reveal the conditions imposed on them. The deception continued with a cover-up, which was carefully designed to prevent the Tax Court and other taxpayers from learning of the secret settlement agreements. At Kersting's deposition, which McWade attended, Kersting's lawyer objected to the presence of Thompson's attorney because of rumors that Thompson was attempting to settle. Knowing that Thompson had, in fact, already settled, McWade remained silent. McWade then misled the Tax Court by failing to disclose the settlement when he moved to set aside the Thompson piggyback agreement, a pre-trial motion necessary to ensure Thompson's status as a test case petitioner. Deceptive silence matured into overt misconduct when, during the course of the test case trial, it became apparent that Thompson was going to testify about his settlement. McWade quickly shifted his questions to unrelated matters.

Dixon, 316 F.3d at 1044.

collapse." Id. Thereafter, senior IRS officers took over the case, found that McWade and Sims had engaged in misconduct, and asked the Tax Court to determine the extent of the damage. Id. When the Tax Court refused and proceeded to enforce the terms of the Thompson and Craven settlements, the taxpayers appealed, and the Ninth Circuit remanded with instructions to hold an evidentiary hearing. Id. Thereafter, incredibly, the Tax Court concluded that what had occurred was harmless error, and so the taxpayers appealed the case again to the Ninth Circuit. Id. at 1046.

In its review of this conduct, the Ninth Circuit in Dixon noted that the IRS failed to disclose their secret agreements to the court or the taxpayers. The Ninth Circuit also made a point of highlighting and considering the deposition conduct of McWade and Sims, wherein they failed to reveal that Thompson had in fact settled and wherein McWade remained silent about Thompson's deal when opposing counsel raised concerns about whether Thompson was considering a deal. Id. at 1044. The Ninth Circuit also focused on the fact that McWade "misled the Tax Court" during a pre-trial motion when he failed to disclose the settlement "when he moved to set aside the Thompson piggyback agreement, a pre-trial motion necessary to ensure Thompson's status as a test case petitioner." Id. It is of course Defendants' allegation that the government in this matter also misled the court by filing the primary fraudulent document in this matter – the Moonlight Fire origin and cause report – with the court, by relying on and filing White's false declarations with the court, by allowing the matter to go forward even though its investigators were lying under oath, and by filing, as discussed infra, a Rule 403 motion to exclude argument that Ryan Bauer started the fire without complying with its duty of candor to the Court and to these Defendants about its possession of critical evidence tending to prove just that.

Thus, in finding a fraud on the court, the Ninth Circuit in Dixon assessed the IRS lawyers' decision to cover up critical evidence during depositions, during pre-trial motions, and during the trial. Due to this conduct, and more, the Ninth Circuit found: "Here, the factual findings of the Tax Court support the conclusion that a fraud, plainly designed to corrupt the legitimacy of the truth-seeking process, was perpetrated on the trial court by McWade and

Sims." Id. at 1046. Moreover, some of the Ninth Circuit's concluding language in Dixon can be seen as prescient in terms of its application to this matter. In discussing the fraud upon the court in Dixon, the Ninth Circuit said,

> The Tax Court believed it was hearing a legitimate adversarial dispute when, in fact, the proceeding was a charade fraught with concealed motives, hidden payments, and false testimony. What did occur was clearly designed to defile the court itself, and there is no question that it was carried out by an officer of the court.

Id.

That is also what happened here. While the trial court was led to believe by federal prosecutors that it was hearing a legitimate adversarial dispute (an understandable assumption in light of the assumption made about federal prosecutors, as noted by the Supreme Court in Berger v. United States, 295 U.S. 78, 88 (1935)), the court was in reality presiding over a charade, as the Moonlight Fire matter was a case fraught with concealed motives and hidden payments (WiFITER), false testimony, and so many other acts of misconduct that the only judge who has assessed the evidence in this jointly investigated and prosecuted matter found that the misconduct was too extensive to fully recount. Had these prosecutors done their jobs and, among other things, prevented perjury, exposed the fraud in the origin and cause report, revealed the cover-up at Red Rock, allowed their investigators to supplement their reports, investigated and disclosed the existence of WiFITER and its impact on the findings in this jointly investigated matter, the Court in this matter would not have signed any settlement and would have dismissed the case instead.

D. Under the Ninth Circuit's decisions in *Dixon* and *Pumphrey*, Prejudice to Defendants Is Not an Element of this Court's Assessment of these Allegations.

While not addressed as such in the government's opposition, the Ninth Circuit's decisions in Pumphrey and Dixon are highly relevant to this Court's assessment of the threshold issues presented by Defendants' Supplemental Brief. In particular, the government spends a significant number of pages attempting to mislead this Court into thinking that prejudice is an important element of its decision here. The government's "no-prejudice" arguments take on

several forms, and it weaves each of them throughout dozens of pages of its opposition. For instance, the government argues that (1) Defendants knew most of what they now complain about; (2) Defendants were not diligent in uncovering the alleged fraud; (3) Defendants decided to settle despite what they knew; and (4) there has not been a grave miscarriage of justice because "there is no evidence that anyone but the defendants caused this fire that destroyed so much of the Plumas and Lassen National Forests. There will never be such evidence."[24] With respect to each of these issues, the government argues again and again that these deficiencies should result in the Court dismissing Defendants' allegations. The government is wrong.

The Ninth Circuit's decision in Pumphrey strongly confirms that prejudice is irrelevant in a fraud on the court analysis. In Pumphrey, similar to what the government attempts to do here, Thompson argued that "interrogatory answers regarding the drop-test contained only immaterial and technical inaccuracies, and thus are insufficient to support a finding of fraud." 62 F.3d at 1133. And, similar to what the government attempts to do here, Thompson also argued "that Sparks' failure to uncover the alleged fraud, after receiving Thompson's interrogatory answers admitting the gun fired during a drop-test, should bar the action." Id. at 1133.

The Ninth Circuit rejected these arguments, stating, "even assuming that Sparks was not diligent in uncovering the fraud, the district court was still empowered to set aside the verdict, as the court itself was a victim of the fraud." Id. 1133. Not surprisingly the Ninth Circuit quoted Hazel-Atlas when stating, "Sparks' failure to uncover the fraud during Sparks [litigation] does not bar this action." Id.[25]

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[24] That the government would even make such an argument in the face of these allegations is strange. First, it is a violation of this Court's order to argue such allegations. Moreover, as stated in the allegations, Defendants did not start this fire. They allege that they were framed by corrupt Cal Fire and USFS investigators, and by prosecutors who brought that effort into the realm of our system of justice, advancing it forward in violation of the rules of discovery, their ethical obligations as officers of the court, and their duties of candor. In addition to uncovering egregious and pervasive fraud by Cal Fire and the USFS, Defendants also found evidence – in keeping with the investigators' effort to frame Defendants – that the investigators buried and ignored evidence of other culprits. For instance, as discussed infra in the context of the concealed $2 million bribe, the government had such information as well, but it withheld that information from the Court and from these Defendants, despite filing a motion stating that the party who it inculpated was irrelevant to this action. Finally, to the extent the government today claims that there "will never be such evidence" of other culprits, that was never the case, but there was clearly much more evidence that will never be recovered in view of the nature of the investigation itself.

[25] The Ninth Circuit stated: "In Hazel–Atlas the Supreme Court reasoned that:

Pumphrey also forecloses the government's argument that, at the end of the day, everyone can just go home because the Defendants still started the fire. (See Opp. at 103-105.) Thompson argued in Pumphrey that its nondisclosure was not material to whether Sparks prevailed or not, but the Ninth Circuit squarely rejected this argument. "Thompson's argument misses the point. The issue here is not whether Sparks would have prevailed had the original video been produced. As we noted in Intermagnetics, 'the inquiry as to whether a judgment should be set aside for fraud upon the court under Rule 60(b) focuses not so much in terms of whether the alleged fraud prejudiced the opposing party but more in terms of whether the alleged fraud harms the integrity of the judicial process.'" Pumphrey, 62 F.3d at 1132-33 (quoting Intermagnetics, 926 F.2d at 917). The government is making the exact same argument that Thompson made and which the Ninth Circuit rejected as irrelevant. The question for this Court is not whether Defendants would have prevailed at trial, but whether the government "undermined the judicial process" by committing the misconduct alleged by the defense. See id. at 1133.

Dixon v. United States, is also highly instructive in terms of rebutting the government's no-prejudice arguments. In Dixon, the Ninth Circuit flatly rejected the IRS's argument that no fraud upon the court occurred because the taxpayers were not prejudiced by the conduct, stating that "[t]he Tax Court, however, applied the wrong law when it imposed a requirement that taxpayers show prejudice as a result of the misconduct." Dixon, 316 F.3d at 1046 (quoting Dixon v. Comm'r, 77 T.C.M. (CCH) 1630 (1999)). The court explained: "**Prejudice is not an element of fraud on the court.**" Id. (citing Hazel–Atlas, 322 U.S. at 238; Pumphrey, 62 F.3d at

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> even if Hazel did not exercise the highest degree of diligence [the] fraud cannot be condoned for that reason alone. This matter does not concern only private parties.... [and] tampering with the administration of justice in the manner indisputably shown here involves far more than injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of the litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Pumphrey, 62 F.3d at 1133.

1132-33) (emphasis added). Thus, according to the Ninth Circuit, "[f]raud on the court occurs when the misconduct harms the integrity of the judicial process, regardless of whether the opposing party is prejudiced." Id. (quoting Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989)). "**Furthermore, the perpetrator of the fraud should not be allowed to dispute the effectiveness of the fraud after the fact.**" Id. (citing Hazel-Atlas, 322 U.S. at 247; Pumphrey, 62 F.3d at 1133) (emphasis added). Thus, the Ninth Circuit found, [b]ecause the Tax Court applied the wrong legal standard, it abused its discretion." Id. (citation omitted).

Thus, under controlling Ninth Circuit authority, any alleged lack of prejudice to these Defendants – whether it is called prejudice or something else by the government (i.e., "miscarriage of justice") – is entirely irrelevant to this Court's analysis. Id. Despite the government's overarching efforts to suggest otherwise, this Court's focus is properly placed on "the integrity of the judicial process, regardless of whether the opposing party is prejudiced." Id.

E. While the Court Was In Fact Defrauded in This Matter, It Is Not Precluded from Also Assessing Attempts to Defraud the Court in Reaching Its Ultimate Determinations.

Early in its opposition, the government fashions a "rule" and then relies upon it throughout its brief. This rule appears first as a heading on page 19; it reads: "Mere attempts cannot establish a fraud upon the Court." Underneath the heading, the government further explains, "mere attempts [to defraud the court] cannot be sufficient, for that would be irreconcilable with the Supreme Court holding in Beggerly that relief from judgment for fraud on the court is 'available only to prevent a grave miscarriage of justice.'" (Opp. at 19.) The government then puts an even finer point on its rule, proclaiming: "the controlling rule is that there can be no fraud on the court unless an attempt succeeded and the court was deceived." (Id. at 20.) Once created, the government proclaims, "this rule defeats every accusation made by Sierra Pacific." (Id.) It is in this context that the government criticizes Defendants for their reliance on the Ninth Circuit's decision in Pumphrey for the proposition that attempts to defraud can be sufficient. Specifically, the government argues, "Sierra Pacific is even more clearly wrong when it cites Pumphrey for the proposition that "under controlling Ninth Circuit authority mere "attempts" to defraud the Court is (sic) sufficient to establish fraud on the Court." (Id. at

19.) On all of this, the government is mistaken.

First, assuming the government's rule can even be understood in the context of the Moonlight Fire matter, there is no such "rule" in the Ninth Circuit and the government's "attempts-don't-count" rule certainly does not stem from the Supreme Court's decision Beggerly, which simply states, "an independent action should be available only to prevent a grave miscarriage of justice." Beggerly, 524 U.S. at 47; see also Appling v. State Farm Mut. Auto Ins. Co., 340 F.3d 769, 780 (9th Cir. 2003). From that unremarkable conclusion, the government simply fashions its own rule because, it claims, a "mere attempt" cannot work a grave miscarriage of justice. (Opp. at 19.) The government also concludes that a "mere attempt" cannot "satisfy the requirement that deception be 'critical to the outcome of the case,' as required by Stonehill, 660 F.3d at 452." (Id.)

But none of these sentence fragments has any particular relevance to this case or prevents this Court's assessment of whether an attempt to subvert or defile the administration of justice could constitute a fraud on the court under Rule 60(d)(3). Under controlling case authority and common sense, the mere attempt to defraud a court can easily constitute a gross injustice, and this determination never turns on whether there was only an effort to defile the court or complete success in doing so.[26] It is easy to see that a matter with dozens of shameless attempts to deceive on numerous fronts may be far more egregious (and "grave") than a case with a single effort that

[26] The government's reliance on Stonehill, 663 F.3d 415, to make or enhance its "attempts-don't-count" rule is misplaced, as the quote fragment it relies on from that case – "critical to the outcome of the case" – comes from the Ninth Circuits' analysis as applied to Stonehill's peculiar facts regarding the "silver platter doctrine." In particular, the facts of that matter arose when the government was found to have withheld documents and made misrepresentations under oath regarding the extent of its involvement in a Philippine government agency's illegal (under Philippine law) search and seizure of Stonehill's financial records in the Philippines. In finding no fraud upon the court, the Ninth Circuit found that "the government's misrepresentations were relatively few and were largely tangential to the fundamental question of U.S. participation." Stonehill, 663 F.3d at 452.

Indeed, Ninth Circuit actually said: "First, in nearly all fraud-on-the-court cases, the misrepresentations went to the central issue in the case. For example, in Levander and Pumphrey we vacated for fraud on the court when the litigants intentionally misrepresented facts that were critical to the outcome of the case, showing the appropriate "deference to the deep rooted policy in favor of the repose of judgments." Id. (citing Hazel-Atlas, 322 U.S. at 244-45). Stonehill therefore only confirms in the context of its own complex case analysis that fraud upon the court must go to critical issues in the case, not tangential matters. Indeed, read in full, the Ninth Circuit's analysis in Stonehill confirms that attempts to defraud a court can establish fraud upon the court, as it cites favorably to Moore's Federal Practice "definition" of fraud upon the court – a definition (as discussed infra) which expressly enshrines the sufficiency of "attempts" when assessing whether conduct establishes fraud upon the court. Id.at 444.

succeeded. Indeed, framing the "rule" so as to require that a court actually be deceived does violence to the court's inherent power to vacate an action if, after reviewing the truth of matter, it finds by clear and convincing evidence that there was an serious attempt to defile the administration of justice.[27] In the end, where a court is attempting to exercise its inherent powers to dispense justice, assessing whether an egregious fraud "does or attempts to, defile the court itself," Stonehill, 633 F.3d at 444, must always be left to the discretion of the court, not to rules conveniently constructed by the government when it has been accused of attempting to defraud (and actually defrauding) the court.

Second, notwithstanding the government's characterizations, Defendants' Supplemental Brief on this issue actually reads as follows:

> Although under controlling Ninth Circuit authority mere "attempts" to defraud the Court is sufficient to establish fraud on the Court under Rule 60(d)(3), Pumphrey, 62 F.3d at1131, the Moonlight Prosecutors succeeded in their attempt by actually misleading the Court, and through their misconduct procured a favorable and erroneous legal ruling that was a substantial factor in forcing Defendants to settle the action.

(Supp. Brief at 130.) Defendants argued as such because the Ninth Circuit in Pumphrey ruled that "fraud upon the court includes both attempts to subvert the integrity of the court and fraud by an officer of the court." Pumphrey, 62 F.3d at 1131 (quoting Intermagnetics, 926 F.2d at 916). The government devotes but a footnote to attempting to explain away the holding in Pumphrey, arguing that its clear use of "attempt" language is dicta and then arguing, in the alternative, that "the word only modifies 'to subvert the integrity of the court' – 'not fraud by an officer of the court.' It thus appears to refer to attempted bribery of a judge and the like." (Opp.

[27] Moreover, as discussed infra, Defendants have alleged, and ultimately will prove at a hearing, that the government's conduct did in fact deceive the Court. As set forth and alleged in the Defendants' supplemental brief, the government, among other things, aided and abetted the investigators' perjury on key issues; it concealed from the Court a critical third-party's false claim of a massive bribe as the Court engaged in careful balancing associated with granting the government's motion in limine regarding that third-party, and it submitted to the Court what it knew was a blatantly false origin and cause report. The government did not "attempt" these acts, it committed them, and its lack of candor and gamesmanship regarding the truth caused this Court to preside over a matter where the government's egregious misconduct prevented the "judicial machinery" from performing "its impartial task." Stonehill, 660 F.3d at 444. In other words, here, the court "believed it was hearing a legitimate adversarial dispute when, in fact, the proceeding was a charade fraught with concealed motives, hidden payments, and false testimony." Dixon, 316 F.3d at 1047.

at 19 n.25.) But the government's argument is not only baseless, it misrepresents the very thrust of the Ninth Circuit's opinion in Pumphrey. Contrary to what the government would have this court believe, the language in Pumphrey is not the musings of a court that has gone off topic, but instead an effort by the Ninth Circuit to restate the language it used in its earlier holding regarding fraud upon the court in In re Intermagnetics America, Inc., 926 F.2d 912, 916 (9th Cir.1991). It did not do so as dicta, but so as to rebut any suggestion by Bartlett that he had not defrauded the Court.

Third, regarding the government's strange effort to limit what the word "attempts" must be modifying (see Opp. at 19 n.25), the court's analysis in Pumphrey is actually consistent with the concept that an attempt alone is sufficient for purposes of finding fraud on the court. The Ninth Circuit in Pumphrey was focused on a conduct "which undermined the judicial process." 62 F.3d at 1132. In this regard, it quoted the district court judge in the matter with favor: "As the district court noted, Bartlett, as a licensed attorney, 'is aware of the necessity for compliance with the rules of discovery and the rules of professional responsibility.'" Id. at 1133. Additionally, and perhaps even more importantly, in addressing Bartlett's argument that his effort (or attempt) to defraud was ineffectual and therefore could not constitute a fraud upon the court, the Ninth Circuit invoked the Supreme Court, finding that "Thompson is in no position to dispute the effectiveness of the scheme in helping to obtain a favorable jury verdict." Id. (quoting Hazel-Atlas, 322 U.S. at 246-47 (holding that party who presented fraudulent evidence cannot disclaim its effectiveness after the fact)).

Fourth, reading the government proclaim – based on its own misreading of Ninth Circuit authority – that it has created a rule "that defeats every accusation" in a motion for fraud on the court is a painfully revealing boast for the government to make here. Moreover, that assessment rests with the sound discretion of this Court, flowing directly from its inherent powers of equity. The distinction between attempting to defraud a court and actually pulling it off is rather meaningless in view of what is at stake – the proper administration of justice. The government steps on remarkably thin ice when it claims that a federal prosecutor in the employ of our Department of Justice and working with federal and state law enforcement officers can "attempt"

to defraud a federal judge (as Defendants have most certainly alleged) and not be subject to the Court's inherent powers if such efforts fail. Obviously, the integrity of our system of justice is degraded whenever officers of the court engage in conduct designed to interfere with the orderly and equitable administration of justice, regardless of whether it succeeds. Finding otherwise would only encourage such efforts, especially if permitting the destruction of evidence and extracting a settlement from the victims of such conduct permanently cuts off the court's power to intercede and punish the perpetrators. In this regard, as the Supreme Court found, "tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." Hazel-Atlas, 322 U.S. at 247.

Fifth, perhaps because the conduct in this case appears to stem from an attitudinal posture that ultimately also drafted the opposition, the government's brief is strangely silent regarding a specific stanza of language that populates numerous briefs and cases relating to fraud upon the court, including numerous Ninth Circuit cases. The language comes from Moore's practice guide. A quick Westlaw search will reveal, however, that this language has been adopted frequently by a variety of Circuit courts, including by the Ninth Circuit on numerous occasions. It may even be one of the more common and accepted quotes regarding fraud upon the Court, and it can even be found in numerous cases cited in Defendants' brief. It reads as follows: "Fraud upon the court' should, we believe, embrace only that species of fraud which does or attempts to, defile[28] the court itself, or is a fraud perpetrated by officers of the court so that the

[28] As discussed earlier, the government creates its 'attempts-don't-count' rule by arguing that it can avoid the implication of Stonehill's version of this same language "to subvert the integrity of the court" because that language must only modify the word "subvert," which must mean bribing a judge. (Opp. at 19 n.25). That argument is lacks any real analysis and is specious. But the government would be precluded from making the same argument regarding this more favored definition. Because this language has been adopted by a variety of opinions, courts have had the chance to apply it to the type of conduct found here. For instance, in Dixon, the Ninth Circuit concluded by stating the IRS lawyers' broad misconduct is "noteworthy, not only **because it defiled the sanctity of the court** and the confidence of all future litigants, but also because it violated the rights of the test case petitioners and more than 1300 taxpayers who agreed to be bound by the outcome of the Tax Court proceeding." Dixon, 316 F.3d at 1047. Thus, Dixon confirms that defilement is not focused on bribery and the word "attempt," therefore, is not in fact limited in the manner suggested by the government.

judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Intermagnetics, 926 F.2d at 916 (quoting 7 *Moore's Federal Practice* ¶ 60.33, at 515 (2nd ed. 1978)); see also Levander, 180 F.3d at 1119; Alexander, 882 F.2d at 424; Stonehill, 660 F.3d at 444. Defendants cited to this definition in their opening Rule 60(d)(3) brief. The government has read and cited the numerous cases in its brief which employ this language. Moore's adopted definition of fraud upon the court cannot, however, be found on a single page of the government's lengthy opposition. Nevertheless, the Ninth Circuit's most common definition of fraud on the court itself confirms that the government's rule is baseless, and that "Sierra Pacific's misguided claim" (Opp. at 19 n.25) is anything but.

F. The Fourth Circuit's Decision in Shaffer Remains Helpful to This Court's Analysis.

The government analyzes United States v. Shaffer Equipment Company, 11 F.3d 450 (4th Cir. 1993), in the section of its brief arguing that government attorneys are held to a standard of conduct no higher than that applicable to attorneys for private litigants. But its discussion of Shaffer in this section seems oddly out of place, as Shaffer does not contain such a holding. Moreover, the gravamen of the government's discussion of Shaffer focuses not on the standards applicable to government attorneys, but on Defendants' misunderstanding, and thus incorrect description, of the procedural context and posture of Shaffer. Defense counsel regret their initial misunderstanding and misstatement regarding the procedural posture of Shaffer in their opening papers, but it was not intentional and, importantly, Shaffer remains instructive. While not binding on this Court, it still strongly supports Defendants' request for relief here.

At bottom, Shaffer involved the misrepresentation and concealment of the "academic credentials and qualifications" of one EPA environmental consultant/expert, and the actions of two government attorneys in aiding and abetting his effort to conceal the true facts about his education during the course of discovery in a cost recovery action brought by the United States under CERCLA. The EPA consultant at issue (a Mr. Caron) had been responsible for decisions associated with the clean-up, including a decision to implement what ultimately was an unsuccessful solvent extraction remediation plan, which exacerbated by over $1 million the government's overall damage claim of some $5 million. 11. F.3d at 453. While both the trial

court and the court of appeals observed that the consultant's qualifications were relevant to the propriety of the administrative record and whether certain clean-up expenditures were reimbursable, nothing in Shaffer suggests that the question of the defendant's liability altogether turned on the "academic credentials and qualifications" of the consultant. Moreover, as the defendants began probing deeper into the issue of the consultant's qualifications, the Fourth Circuit understood that the government itself brought the issue directly to the court's attention. Id. at 453-54.

On these facts, the Fourth Circuit reversed the trial court's imposition of a terminating sanction, and remanded the case for imposition of a sanction short of outright dismissal. Citing to Chambers, 501 U.S. 32, the Fourth Circuit found that there is a "broader general duty of candor and good faith required" of officers of the court "to protect the integrity of the entire judicial process." Shaffer, 11 F.3d at 458. The court cited to Hazel-Atlas for the rule that there is a "general duty to preserve the integrity of the judicial process" which the government attorneys in Shaffer violated. Id. The court found that, in repeatedly failing to advise the court of "the Caron problem and the civil and criminal investigations relating to it," and in "continuing to litigate the matter unabated," the government attorneys sufficiently "undermine[d] the integrity of the judicial process" and violated "the general duty of candor that attorneys owe as officers of the court." Id. at 459. The court of appeal repeatedly referred to the issue as "fraud" and held that "Caron's conduct amounted to a fraudulent act by the EPA." See id. at 461.

The Fourth Circuit nevertheless reasoned that lesser sanctions were sufficient in view of the fact that "the orderly administration of justice and the integrity of the process have not been permanently frustrated." Id. at 463 (emphasis added). Through this ruling, the court of appeals clearly agreed that the conduct of the federal attorneys had in fact threatened the integrity of the judicial process. It merely observed that the threat had not permanently damaged this integrity because the trial court could ameliorate the extent of the harm through limiting orders pertaining to government's available damages. Id. That conclusion is, in context, clearly a consequence of the fact that the court of appeals did not seriously question that the defendants were liable. The circuit court observed that "[e]vidence revealed that while some of the [transformer] fluid was

simply poured onto the ground, the predominant practice was to store the fluid drums and containers at the site, some of which later deteriorated and leaked fluid onto the ground," and that the "EPA removed 4735 tons of contaminated soil" from the defendants' facility, which involved the "storing and disposing of transformers and capacitors on its property" and that the defendants "modified transformer for customers, which often involved disposing of residual fluid." Id. at 453. In apparent recognition that the defendants were clearly liable in some respect, the circuit court expressed concern that "through an outright dismissal, the defendants receive the benefit of a total release from their obligations under the environmental protection laws." Id. at 463 (emphasis added).

On remand, the district court evaluated the propriety of the parties' proposed consent decree resolving the matter, but used the opportunity to reiterate its findings that the government's attorney had engaged in gross misconduct. United States v. Shaffer Equip. Co., 158 F.R.D. 80 (S.D.W.V. 1994). In this subsequent ruling, the district court confirmed its finding that the government's attorney had violated their duty of candor to the court, and cited Ninth Circuit authority for the proposition that "[t]he duty of candor to the tribunal is a widely recognized one within the legal profession." Id. at 87 (citing United States v. Assoc. Convalescent Enters., Inc., 766 F.2d 1342, 1346 (9th Cir. 1985)). The district court also explained the close nexus between the duty of candor to the court and the government attorneys' discovery obligations under the Federal Rules:

> [W]hen Mr. Hutchins and Mr. Snyder breached their duty of candor to the Court they also flagrantly abused the discovery process. In failing to supplement Defendants' discovery requests regarding Mr. Caron's credentials with information that Mr. Snyder admitted was relevant, Mr. Snyder and his immediate supervisor, Mr. Hutchins, violated Rule 26(e) of the Federal Rules of Civil Procedure. Mr. Snyder and Mr. Hutchins violated Rule 26(e)(1) and Rule 26(a)(2)(C) by failing to supplement information on an expert witness. Rule 26(e)(2) was ignored when Mr. Snyder failed to amend his prior objection to an interrogatory regarding Mr. Caron after he learned that the matter was indeed relevant and his previous objection to the questions was incorrect.

Id. at 87.[29]

[29] Within this context, it is no wonder that the district court in Shaffer found no need to explain the higher duty that is undoubtedly owed by government lawyers charged not with winning, but with seeking justice. Just as in the

The district court also expressed "shock" upon learning that the Department of Justice's Office of Professional Responsibility ("OPR") had done nothing to censure the government attorneys for their transgressions. The district court quoted in full a letter containing OPR's finding that while the government attorneys "engaged in repeated exercises of poor judgment in their handling of aspects of Shaffer[,][it did not] however, find they engaged in intentional misconduct" and that it was "closing our file on this matter." Id. at 88. This so-called "finding" by OPR drew the following response from the district court:

> With such perfunctory treatment, two complete sentences, given to matters of ethics found to be worthy of at least a dozen paragraphs by the Fourth Circuit, it is no small wonder, but no excuse, that these attorneys behaved as they did. Quite frankly, it shocked this Court to learn of the Department of Justice's superficial investigation and evaluation of the conduct of these attorneys. We are dealing here with a hodgepodge of bureaucratic bungling and cover up of abysmal proportions.

Id.

The facts in Shaffer and OPR's response to them were certainly shocking and rightly characterized by the district court as a cover-up of "abysmal proportions." But the "cover-up" in Shaffer involved the misrepresentations of one EPA environmental consultant concerning one issue – his educational background – which was first brought to the trial court's attention by the government itself.

It is difficult to overstate just how much worse the conduct of the Moonlight Prosecutors is compared to that of the Shaffer prosecutors. As explained in detail throughout its briefing, the Moonlight Prosecutors engaged in a broad stratagem of obfuscation and acts of treachery that infected virtually every corner of the case, and which entailed, among so many other things: demonstrably perjurious written discovery responses prepared by the Moonlight Prosecutors themselves; perjury by law enforcement officers on the core question of liability (concerning the origin and cause of the fire) as the Moonlight Prosecutors sat on their hands, having previously instructed these witnesses it was a "non-issue"; concealment of critical facts from Defendants

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Moonlight Fire case, the standards applicable to all lawyers were more than sufficient in Shaffer to establish the breach of ethics by the government attorneys in question.

and the Court about a false bribe allegation (known only to the Moonlight Prosecutors) by Edwin Bauer which generated a devastating pre-trial ruling prohibiting defendants from arguing to the jury that the Bauers or anyone else started this fire; false discovery responses and proffering false witness statements in an effort to cover up the facts of Red Rock, which are critically relevant to key questions affecting comparative fault by the government itself; submission of a perjured declaration on dispositive Rule 56 motions; submission of false origin and cause investigation reports for other fires as a component of what the Moonlight Prosecutors designated as "Trial Exhibit No. 1"; and the fact that the lead investigator from Cal Fire had an undisclosed contingent financial interest in the outcome of his investigation through an illegal off-books skimming operation kept hidden from state regulators by Cal Fire, as well as other publicly disclosed problems.

Unlike in Shaffer, none of these facts were brought to this Court's attention by the government. Moreover, the Moonlight Prosecutors were not (like in Shaffer) attempting to protect an at least partially meritorious damage claim of some $5 million, but were instead engaged in an effort to frame parties as liable for the Moonlight Fire, to extract not $1 million, but $1 billion from these Defendants, which include children, the elderly, and family owned businesses built over generations through hard work and dedication. That liability exposure threatened the very existence of one of the largest employers across many Northern California rural communities (responsible collectively for as many as 10,000 direct and indirect jobs), and thus threatened the potential economic collapse of various communities. If the transgressions by the prosecutors in Shaffer were properly characterized as having been of "abysmal proportions," there may be no relative means to adequately describe what happened here. For his part, Judge Nichols (the only neutral arbiter to have considered the record[30]) could only describe his own "palpable" "sense of disappointment and distress." Cal. Dep't of Forestry v. Howell, 2014 WL

[30] The government's concealment from the Court and from Defendants of the false bribe allegation by Edwin Bauer was not brought to Judge Nichols's attention, as Cal Fire's involvement in that abuse is not yet known since Defendants have never had any ability to conduct discovery on that front. The point here is that the misconduct by the Moonlight Prosecutors is even worse than their joint prosecution partners at Cal Fire and the Office of the California Attorney General.

7972096, at *9. In the end, the Moonlight Prosecutors focus upon Defendants' mistaken description of Shaffer's procedural posture, while ignoring the import of its facts and legal analysis, does nothing to excuse the fraud they have perpetrated upon this Court.

G. The Government Fails to Acknowledge Its Higher Standard of Conduct.

The government does not dispute that attorneys representing the United States play a unique role within the judicial system as "representative[s] not of an ordinary party to a controversy, but of a sovereignty . . . [whose] interest in a . . . prosecution is not that it shall win a case, but that justice shall be done." Berger, 295 U.S. at 88. The government also does not dispute that attorneys representing the United States are held to "higher standards of behavior." United States v. Young, 470 U.S. 1, 25-26 (1985) (Brennan, J., concurring) (emphasis in original). Left with no other avenue, the government resorts to arguing that the unique role and the higher standard of behavior applicable to its attorneys have "nothing to do" with the fraud on the court analysis. (Opp. at 16.) If that assertion was credited, then what purpose would the heightened obligations applicable to government lawyers serve? Our government lawyers are tasked with ensuring "that justice shall be done," and that task is obliterated when government attorneys engage in fraud that defiles the court or prevents the judiciary machinery from functioning in the usual manner its impartial task of adjudicating cases. The higher standards of behavior for government lawyers are thus even more incompatible and irreconcilable with perverting justice through fraud on the court.

To be clear, Defendants have not taken the position that a different legal standard or a different burden of proof applies on a Rule 60(d)(3) motion when government attorneys are accused of fraud on the court. Defendants do contend, however, that the heightened standards applicable to government attorneys should inform the analysis and serve as the lens through which this Court views the numerous instances of misconduct. In other words, the heightened standard of conduct serves as a measure of whether the government prosecutors engaged in conduct that constitutes "a wrong against the institutions set up to protect and safeguard the public." Pumphrey, 62 F.3d at 1133 (quoting Hazel-Atlas, 322 U.S. at 246). Anything less would render the heightened duties of government lawyers meaningless.

The government attempts to ignore this critical and common sense conclusion through citation to Stonehill, 660 F.3d 41, which involved allegations that government attorneys had engaged in a fraud on the court. (See Opp. at 16.) Specifically, the government contends that Stonehill demonstrates that no "separate standard" applies to government attorneys because Stonehill only discusses the standard for fraud on the court under the traditional Rule 60(d)(3) matrix. As a preliminary matter, Stonehill did not consider the issue of whether a "separate standard" applies to government attorneys, or how the Rule 60(d)(3) standard relates to the higher standards of behavior applicable to government attorneys. Cases do not stand for propositions not considered by the court. Moreover, this argument again misses the point. The question is not whether a separate standard applies on this motion, but whether the conduct of the government attorneys, viewed through the lens of their heightened obligations, constitutes a fraud on the court within the meaning of Rule 60(d)(3). It most certainly does.

VI.
BRADY IMPOSES ADDITIONAL DISCLOSURE OBLIGATIONS AND SUPPORTS THE FINDING OF A FRAUD ON THE COURT

Brady v. Maryland, 373 U.S. 83 (1963), is yet another disclosure requirement that the government violated in this case. Brady is by no means the lynchpin of the fraud on the court argument, as Defendants clearly show that the government committed a fraud on the court regardless of whether Brady applies to the facts of this case. Nonetheless, Brady provides yet another basis for this Court to grant relief under Rule 60(d)(3) because the government's failure to produce critical exculpatory and impeachment evidence not only violated Defendants' due process rights, but ultimately contributed to the fraud on the court.

A. Brady Should Apply in Civil Cases with Potential Criminal Implications and Potential Liability of a Billion Dollars

In attempting to refute the applicability of Brady, the government relies first and foremost on a rigid reading of due process. Under its version of due process, there are certain clear-cut requirements in criminal cases and other certain clear-cut requirements in civil cases. In offering this artificially constricted reading of due process, the government ignores the

recognized "truism . . . that 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)). Thus, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." Id. (quoting Morissey v. Brewer, 408 U.S. 471, 481 (1971)). The determination of whether due process is satisfied in a civil case "requires analysis of the governmental and private interests that are affected." Id. (citing Arnett v. Kennedy, 416 U.S. 134, 167-68 (1975) (Powell, J., concurring in part); Goldberg v. Kelley, 397 U.S. 254, 263-66 (1970); Cafeteria Workers, 367 U.S. at 895).

Recognizing that due process is a flexible and fact-specific standard, the Supreme Court has repeatedly articulated a three-part test used to determine "what specific safeguards are needed to make a civil proceeding fundamentally fair." Turner v. Rogers, 131 S. Ct. 2507, 2510 (2011) (citing Mathews, 424 U.S. at 335). These factors are: "(1) the nature of 'the private interest that will be affected,' (2) the comparative 'risk' of an 'erroneous deprivation' of that interest with and without 'additional or substitute procedural safeguards,' and (3) the nature and magnitude of any countervailing interest in not providing 'additional or substitute procedural requirement[s].'" Id. (quoting Mathews, 424 U.S. at 335).

First, the stakes of this litigation are incredibly high and criminal liability is a real risk. All told, the government sought to recover over $1 billion from these Defendants -- a recovery that might have bankrupted Defendants and left thousands of people out of jobs. Further, while government contends that Defendants only "claim" to have regarded this litigation as "one with criminal implications," this statement is belied by the government's own complaint, which plainly sets forth causes of action premised on Title 36 of the Code of Federal Regulations, section 261.5(c), and section 4435 of the California Public Resources Code, each of which provide for criminal penalties. (Am. Compl., Oct. 22, 2009, Docket No. 5 at 3.)[31]

[31] The government's contention that this case had no potential criminal implications because Bush and Crismon chose not to exercise their privilege against self-incrimination is absurd. As countless criminal cases make clear, that the right against self-incrimination is not exercised has no bearing on whether criminal liability may be, or is, imposed.

Second, the "comparative 'risk' of an 'erroneous deprivation'" of the private interests that will be affected "with and without 'additional or substitute procedural safeguards" is high, as evidenced by the facts of this case and the documents withheld from Defendants. Of course, at this point, Defendants do not know the entirety of what was not produced to them, and firmly believe that discovery and an evidentiary hearing will make even more obvious the high risk of an erroneous deprivation of their interests without Brady requirements in place.

Finally, "the nature and magnitude of any countervailing interest in not" requiring the government to make Brady disclosures is entirely lacking. See Turner, 131 S. Ct. at 2510. Indeed, the government's sole argument as to why such disclosures should not be required is that this case is not criminal; they are unable to provide any countervailing interest, and instead argue only about what this case is not. The circumstances, risks, and interests present in this type of litigation thus compel the conclusion that Brady's disclosure requirements should apply.

The "truism" recognized by the Supreme Court, along with these three factors, reveal the gross over-generalization by the government regarding the requirements and strictures of due process. In light of such a circumstantially-dependent inquiry, there can hardly exist a hard and fast rule that due process *never* requires Brady disclosures in a civil case. As evidenced by Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), no such rule exists.

Indeed, the prospective Attorney General, Loretta Lynch, recently confirmed that due process may require Brady's application in certain civil cases. See Nomination of Loretta E. Lynch to be Attorney General of the United States, Questions for the Record, S. Comm. on the Judiciary, 114th Cong. 3 (Feb. 9, 2015) (questions from Sen. Vitter (R., Louisiana)). In so stating, Ms. Lynch cited to Demjanjuk , which rightly found that Brady applied although the case was a civil action brought by the government. Ms. Lynch's statement evidences not only the importance of due process in civil litigation, just as in criminal litigation, but also the growing recognition that additional protections are needed in civil cases to protect against the overreaching power, and sometimes deceit, of the government.

Although the government later spends considerable time attempting to explain why Demjanjuk is distinguishable, the government remains silent on Demjanjuk when asserting that

the Federal Rules of Civil Procedure make Brady superfluous in a civil case. (Opp. at 31, 33.) The government ignores Demjanjuk on this point, of course, because the Sixth Circuit, in finding that Brady applied, obviously did not agree with this proposition. To the contrary, the court reasoned that the government attorneys' failure to comply with their civil discovery obligations only increased the need for Brady's application to certain civil cases.[32] Based solely on the government's discovery violations, Demjanjuk found that the government's "attitude . . . was not consistent with [its] obligation to work for justice rather than for a result that favors its attorneys' preconceived ideas of what the outcome of the legal proceeding should be." Id. at 350. These preconceived ideas, and the attorneys' "personal conviction that they had the right man provided an excuse for recklessly disregarding their obligation to provide information specifically requested by Demjanjuk" under the Federal Rules of Civil Procedure. Id.

The Sixth Circuit's commentary in Demjanjuk fits the Moonlight Fire litigation perfectly. Here, the government sought to hold Defendants liable for the Moonlight Fire from day one because the government could obtain a potentially enormous recovery from them.[33] The rules of discovery, which presuppose that parties will participate in discovery fairly and honestly, did nothing to alter this course. Instead, the government's belief that Defendants were responsible informed all of its decisions regarding not only what evidence to produce but what evidence to conceal. As a direct result, any evidence – such as the evidence of the alleged bribe – suggesting that anyone but Defendants might be responsible for the Moonlight Fire was not disclosed. The government's failure to engage fairly in the civil discovery process in this case makes painfully obvious that Brady is anything but superfluous in ensuring due process in certain civil litigation. Accordingly, for the same reasons the Sixth Circuit found that the circumstances of Demjanjuk

[32] On this point, the government's citation to Degen v. United States, 517 U.S. 820 (1996), is inapposite. (Opp. at 33.) Degen addresses the concern that a party who is the defendant in simultaneous civil and criminal cases brought by the government will be able to use civil discovery to gain an advantage in the criminal case. 517 U.S. at 826-27. While the Court addressed the differences between Brady and the Federal Rules of Civil Procedure, id. at 825-26, the Court made no absolute finding that the availability of one precludes the other. In any event, the concern addressed in Degen is the opposite of the concern at issue here – namely, that the government took advantage of the fact that Defendants had only the civil rules, and not Brady, available to conduct discovery and used this advantage to commit a fraud on the court.

[33] This belief is confirmed by the fact that Sierra Pacific was listed as a defendant by the Moonlight Investigators within twenty-four hours after the investigation began.

warranted the application of Brady in a civil case, this Court should find that Brady applies here.

The government focuses on attempting to distinguish the facts and the fact-specific conclusions of Demjanjuk, and subsequent Sixth Circuit cases, from the facts of this case. But Defendants do not take the position that Demjanjuk's facts are the same as those here, and the government's argument therefore misses the mark. Instead, Defendants contend that here, as in Demjanjuk, in light of the import, magnitude, and potential criminal liability of this case, and the clear lack of effectiveness of other mechanisms including the Federal Rules of Civil Procedure, due process required the government to disclose all evidence favorable to the defense, "irrespective of the good or bad faith of the prosecution." Brady, 373 U.S. at 87. The government does not meaningfully explain why due process does not require it to produce such evidence here, nor can it.[34] Such a requirement would clearly doom not only the government's position with respect to much of the evidence it wrongfully withheld in this case, but also its argument that its discovery violations and other misconduct was committed in good faith and is thus excusable.

B. The United States Interjected Its *Brady* Violations Into This Court to Influence Its Adjudicative Process

The United States contends that Brady violations are "violations of a personal due process right," and from that premise, argues that all such violations "occur outside of court" and none are "directed to the court itself." (Opp. at 33-34.) Notably, the United States analyzes this issue in the abstract, without acknowledging the facts demonstrating that the United States intentionally injected its Brady violations into this Court and its adjudicative process.

As Defendants noted in their supplemental brief, the United States brought a motion in limine styled "Motion to Exclude Argument of Government Conspiracy and Cover Up," in which it claimed Defendants were advancing a "conspiracy theory" based in part on the fact "that Cal Fire has a fire cost recovery program . . . ." (Docket No. 487 at 2-4.) The United

[34] For the same reason, the government's citation to the numerous cases contained in footnote 35 offer no assistance to the government's position. (Opp. at 32 n.35.) In light of the fact that due process depends on circumstances, the fact that other cases have rejected a civil Brady requirement does nothing to meaningfully explain why due process does not impose such requirements in this case.

States characterized the allegations regarding this program as "flimsy," suggested that this program served a legitimate and altruistic purpose, and argued that the existence of the program "does not support an inference that investigators concealed evidence." (Id. at 3.) At the time the United States advanced this motion, Defendants had received extraordinarily little information regarding the cost recovery program, and that which Defendants did have was based on their own discovery efforts. Critically, Defendants had not obtained the documents revealing that Cal Fire had established the illegal WiFITER[35] slush fund or the documents showing the motivational bias it instilled in those involved with the Moonlight Fire investigation, including Joshua White. Without this key information that should have been disclosed by the government under Brady, Defendants lacked the means to demonstrate any conspiracy to pin the blame on well-heeled defendants. Thus, as the government points out in its opposition, Defendants told the Court that they would not argue a conspiracy based on "a program that encourages agents to blame fires on companies who are most likely able to pay for them," which is precisely what counsel should do where there is insufficient evidence to support a particular theory at trial. (See Docket No. 531 at 2.) With Defendants hamstrung by the lack of Brady disclosures, the Court granted the motion in limine and foreclosed Defendants from arguing that government investigators were part of any conspiracy concerning the handling, retention, or expenditure of wildland fire monies collected.[36]

Additionally, the United States filed various motions in limine in a calculated effort to

[35] The government refuses to call WiFITER by its name, instead opting to use the euphemism "the State Fund." (Opp. at 86 ("Sierra Pacific calls the account 'WiFITER.' This brief calls it what it is: 'the State Fund.'").) This nomenclature is not accurate, and even worse, it is misleading. As found by the California State Auditor, WiFITER was not a state-sanctioned account, but rather an "outside account" that, contrary to state law, was not subject to oversight by the Legislature. Therefore, it was not a state account as the government suggests, but rather an outside account created in order to circumvent state fiscal controls.

[36] The government contends that because Defendants told the Court that they would not argue a conspiracy regarding the cost recovery program at trial, Defendants cannot complain about the resulting ruling. (Opp. at 91 ("The Court's ruling only held Sierra Pacific to its word . . . the court ruled exactly how Sierra Pacific requested.").) This circular argument misses the point. Defendants were forced to concede this aspect of the motion because the government failed to provide Defendants with the information necessary to oppose the motion.

In a similar vein, the government suggests Defendants were not "forthright" when stating that this in limine ruling "contributed to the increased risks of trial and was a substantial factor in causing Defendants to settle." (Opp. at 91 & fn. 86.) Most unfavorable pretrial rulings contribute to the increased risks of trial, and thus contribute to the settlement calculus. This in limine ruling was no different. Defendants were in a position where, despite evidence suggesting there was motivational bias, they lacked the means to prove it before a jury.

keep much of the evidence relating to the Bauers away from the jury and to preclude Defendants from arguing that someone else started the fire. In these motions, the United States misrepresented to the Court that there was not a "shred" of evidence tending to show Ryan Bauer may have started the Moonlight Fire, even though the United States knew that Edwin Bauer had made false statements to federal investigators regarding an alleged bribe that tended to demonstrate his son's potential involvement in the ignition of the fire. Defendants opposed these motions in limine by providing the facts known to them at that time, which did not include any of the evidence of the false bribe since the United States had purposefully withheld this information from the defense and this Court despite an obligation to produce it under Brady as well as its duty of candor. Based on the incomplete record resulting from the lack of Brady disclosures, the Court precluded Defendants from eliciting evidence to argue that someone else started the fire.

Critically, the government largely premised its arguments in these motions in limine on the lack of evidence supporting the defense theories. But that evidence was lacking only because the government had withheld it from Defendants in violation of Brady as well as its civil discovery obligations. Thus, through these motions in limine, the government utilized and capitalized on its Brady violations to secure favorable pretrial rulings from the Court, rulings that significantly influenced the settlement calculus. Consequently, this is not a situation where the Brady violations remained isolated "outside the court" as the United States suggests, but rather a situation in which the government directly injected its Brady violations into this Court, and in doing so, manipulated the adjudicative process to its benefit.

C. The Government's Discussion of Brady v. Giglio Material Is Irrelevant

The government suggests that its duty to disclose with respect to the cost recovery program and WiFITER does not arise under Brady, but rather under Giglio v. United States, 405 U.S. 150 (1972), because it is (according to the government) "at most impeachment evidence." (Opp. at 94 ("Of course, Sierra Pacific really means Giglio not Brady.").) Notably, the government makes no such claim with respect to the evidence that Edwin Bauer concocted a false $2 million bribe, as such evidence is also clearly exculpatory in nature. Regardless, the

distinction between Giglio and Brady, as well as the distinction between impeachment and exculpatory evidence, are distinctions without a difference for the purpose of the analysis here.

In United States v. Bagley, 473 U.S. 667 (1985) the Supreme Court noted that it had previously "rejected any such distinction between impeachment evidence and exculpatory evidence." Id. at 676. Further, the Supreme Court observed that evidence that could be used to impeach a government witnesses "by showing bias or interest" is "evidence favorable to an accused." Id. (citing Brady, 373 U.S. at 87); see also Horton v. Mayle, 408 F.3d 570, 578 (9th Cir. 2005) (noting that Bagley extended duty to disclose evidence favorable to the accused to include impeachment evidence showing bias or interest). For this reason, the Supreme Court held that "impeachment evidence . . . as well as exculpatory evidence, falls within the Brady rule." Id. (citing Giglio, 405 U.S. at 154); see also United States v. Cerna, 633 F. Supp. 2d 1053, 1055 (N.D. Cal. 2009) ("Brady material is normally understood to include Giglio material as well.").

Thus, under Supreme Court precedent, the failure to disclose impeachment evidence can constitute a Brady violation. See United States v. Gordon, 844 F.2d 1397, 1403 (9th Cir. 1988) ("Under Brady, the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or innocence . . . . Favorable evidence includes impeachment evidence."); Benn v. Lambert, 283 F.3d 1040, 1058 (9th Cir. 2002) ("In determining whether the suppression of impeachment evidence is sufficiently prejudicial to rise to the level of a Brady violation, we analyze the totality of the undisclosed evidence 'in the context of the entire record.'") (quoting United States v. Agurs, 427 U.S. 97, 112 (1976)). The government's characterization of the cost recovery program and WiFITER as mere Giglio "impeachment evidence" is therefore not determinative.

D. The Federal Government Cannot Avoid Its Brady Violation by Claiming Its State Counterpart Had the Information.

Regardless of whether defined as Brady material, Giglio material, or both, the government contends that its failure to disclose WiFITER information (but not the Bauer bribe)

does not constitute a Brady violation "because the state files are not in possession of the United States." (Opp. at 95.) The government confidently states that even when "information in state control might be helpful to the defendant," the federal "prosecution is under no obligation to turn over materials not under its control." (Id. (quotation marks and citation omitted).)

In support of this contention, the government primarily relies on four cases: United States v. Aichele, 941 F.2d 761 (9th Cir. 1991), United States v. Dominquez-Villa, 954 F.2d 562 (9th Cir. 1992), United States v. Gatto, 763 F.2d 1040 (9th Cir. 1985), and United States v. Chen, 754 F.2d 817 (9th Cir. 1985). (See Opp. at 95-96.) Two of these cases do not even mention Brady or Giglio. Indeed, Gatto is a case about the duties to disclose material pursuant to discovery requests under Federal Criminal Procedure Rule16(a)(1), a rule that by its very terms only applies to material in the "government's possession, custody, or control." See Fed. R. Crim. P. 16(a)(1). Similarly, Dominguez-Villa is not about duties to disclose under Brady or Giglio. The third case, Aichele, is distinguishable on its facts,[37] and the fourth, Chen, has been clarified to make clear that prosecutors have a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.[38] In any event, there is no evidence this Court should consider in the instant motion to establish what the government prosecutors knew, and when they knew it.

Conspicuously, the government fails to cite to several more recent cases that are directly on topic, United States v. Price, 566 F.3d 900 (9th Cir. 2009), and Cerna, 633 F. Supp. 2d 1053. In Price, the court states that "[u]nder longstanding principles of constitutional due process,

[37] In Aichele, 941 F.2d at 764, the defendant contended that the government violated Brady by failing to disclose impeachment materials relating to a government witness that were contained in a California Department of Corrections file under the control of California officials. 941 F.2d at 764. Unlike the facts in this case, there was no indication in Aichele that the federal government had any connection whatsoever to the California Department of Corrections, whether by joint investigation, joint litigation, or by having used a California Department of Corrections employee as an agent of some sort. Yet, the government uses the case to support its assertion that it had no duty to disclose the bias created by WiFITER despite the fact that the federal government had agreed to jointly investigate and jointly litigate the Moonlight Fire and that the federal government used Joshua White, a state investigator, as its lead investigator and lead expert witness.

[38] The government cites Chen, 754 F.2d at 824, for the proposition that the government had "no duty to volunteer information that it does not possess or of which it is unaware." However, subsequent to Chen, the Supreme Court clarified in Kyles v. Whitley, 514 U.S. 419 (1995), that in fact prosecutors have a duty to *learn* of any favorable evidence known to the others acting on the government's behalf in the case, including the police.

information in the possession of the prosecutor *and* his investigating officers that is helpful to the defendant, including evidence that might tend to impeach a government witness, must be disclosed to the defense prior to trial." 566 F.3d at 903. The Ninth Circuit noted that it "is equally clear that a prosecutor cannot evade this duty simply by becoming or remaining ignorant of the fruits of his agents' investigations." Id. The Price court found a Brady violation based on a prosecutor's "failure to fulfill his duty to learn of and disclose favorable evidence that likely was in the possession of his lead investigating officer." Id. Importantly, the "lead investigating officer" in the case was a local officer with the Portland Police Department. Id. The Ninth Circuit stated that the "district court misunderstood the law" when it ruled that "no Brady violation occurred in this case because the prosecutor did not personally have in his possession the evidence." Id. at 908 (emphasis in original). Under Kyles, 514 U.S. at 438, the district court's reliance on the "prosecutor's lack of personal knowledge of the Brady material demonstrated a clearly erroneous understanding of the law." Price, 566 F.3d at 908. Here, the government has the same erroneous view of the law.

Cerna, 633 F. Supp. 2d 105, is another case that is directly on point the government noticeably fails to acknowledge in its brief. In Cerna, the Northern District of California evaluated Brady duties in the context of a federal prosecution arising out of a joint federal and state investigation. Id. at 1054-55. The court said that when "federal prosecutors have state police working on their behalf, it seems clear that the reasoning of Kyles requires federal prosecutors 'to learn of any favorable evidence known to others acting in the government's behalf,' including any local police acting on its behalf in the investigation." Id. at 1059 (emphasis in original). The Cerna court explained that "despite the separate sovereignty concept," there are avenues that can lead to Brady duties in "the federal-state context." Id. One of these "avenues" is when a state or local officer is a "lead investigating agent," in which case "the federal prosecutor has a "duty to learn of and to disclose favorable evidence that likely was in the possession of his or her lead investigating agent." Id.

Josh White, a state investigator, was undisputedly acting as a "lead investigating agent" for the federal government on the Moonlight Fire. Federal investigator Dave Reynolds testified

that White served as the lead investigator. Indicative of that role, White drafted and signed the Moonlight Fire Origin and Cause Report along with federal investigator Diane Welton. The United States designated White, but not Welton, as its expert witness, and intended to call White at trial to testify about his investigation and origin and cause conclusions, which served as the very foundation of its case against these Defendants. In fact, before trial, the government indicated that it did not intend to call its investigator Reynolds as a witnesses, and would call Welton only to the extent the "need arises." The government apparently had no need to call these federal investigators because of its reliance on lead investigator White.

In light of these facts, the government has no basis to contend that it had no duty to disclose material related to the bias of White simply because this evidence was allegedly contained in records of a "different sovereign." Instead, Price and Cerna stand for the fact that the government not only had to disclose what they *knew* White possessed that was favorable to the defense, but also to *learn of* any materials that White possessed that should be disclosed. It is known from discovery in the state case that White in fact possessed significant knowledge and materials regarding to the state cost recovery program and the WiFITER fund; given White's lead on the Moonlight Fire investigation and his prominent role in the federal case, the United States had an obligation to find this knowledge and material and disclose it.

Yet, while Josh White's relationship to the federal prosecution alone is enough to support a duty to disclose the bias created by WiFITER, it is worth noting that the federal government not only had agreed to investigate the Moonlight Fire jointly, but also had agreed to litigate it jointly. See United States v. Gupta, 848 F. Supp. 2d 491, 493-94 (S.D.N.Y. 2012).[39] The federal and state prosecutors together reviewed evidence, prepped witnesses, attended

[39] In Gupta, 848 F. Supp. 2d 491, the Southern District of New York held that the U.S. Attorney's Office had a duty, under Brady, to disclose memoranda and notes created by and held by the Securities Exchange Commission ("SEC"). The court said that "any argument that the Government's duty does not extend so far merely because another agency, not the USAO, is in actual possession of the documents created or obtained as part of the joint investigation is both hypertechnical and unrealistic." Id. at 493 (internal quotations omitted). In holding that the USAO had a duty to disclose SEC materials, the court focused on the fact that the USAO and SEC had conducted parallel investigations of the defendant and had interviewed witnesses together and consulted each other in preparing memoranda. Id. at 493-94. The court noted that "when it comes to Brady disclosures, the relevant context is one of fact-gathering" and thus for Brady purposes it is "enough that the agencies are engaged in joint fact-gathering." Id. at 494.

depositions and hearings, and more. Therefore, it should strike this Court as highly improbable that throughout the course of these intimate activities the federal prosecutors learned nothing of their *lead investigator*'s interest in the very fund to which state action damages would go. And even if they didn't, they still had a duty to learn and disclose. Therefore, the federal government cannot avoid its Brady violation by claiming that its state counterpart had all the information.

E. The Government Had an Obligation to Turn over *Brady* Material by the Point in Time that the Disclosure Could Be Effectively Used.

The government suggests that because Defendants settled before trial, any obligation under Brady to turn over information relating to WiFITER never arose. (Opp. at 96.) In support of this argument, the government relies on United States v. Ruiz, 536 U.S. 622, 633 (2002), which found that the Constitution does not require the government to disclose "impeachment evidence prior to entering a plea agreement with a criminal defendant." (Id.) While true that no hard-and-fast rule requires the government to disclose Brady/Giglio materials prior to a plea deal, that does not mean that the government may hold on to Brady/Giglio materials indefinitely so long as there remains any possibility that a defendant will plead/settle. A prosecutor has a duty to disclose Brady material "without any request therefor, at least by the point in time that the disclosure can be effectively used."[40] Cerna, 633 F. Supp. 2d at 1056 (citing Kyles, 514 U.S. at 433, 437).

This action settled just three days prior to trial, long after the parties had concluded fact and expert discovery, briefed motions for summary judgment, proposed jury instructions, and submitted witness lists, exhibit lists and trial briefs. By that late juncture, the time for the government to produce Brady material had long passed, as just a few weeks prior, the United States filed motions in limine seeking to exclude certain evidence relating to WiFITER and Ryan Bauer based on the supposed lack of evidence supporting defense theories of investigative bias and alternative causes of the fire. Certainly, at that point in time, having directly put these issues

[40] In Price, the Ninth Circuit stated that Brady material "must be disclosed to the defense prior to trial." 566 F.3d at 900 (emphasis added). However, other, older cases have stated that Brady does not "necessarily require that the prosecutors turn over exculpatory material before trial." Gordon, 844 F.2d at 1403 (emphasis added); see also Cerna, 633 F. Supp. 2d at 1057 ("defense has no automatic right to Brady material prior to trial").

in play for court evaluation, the government had an obligation to disclose its Brady material so that Defendants could "effectively use" the information in opposing the motions.[41] Accordingly, the government had a duty to disclose Brady materials prior to the time of settlement, and its suggestion to the contrary fails.

F. The Government Cannot Blame Defendants for Its Brady Violations.

Finally, the government argues that Defendants are precluded from asserting any Brady violation because of the so-called "lack of diligence" of Sierra Pacific in obtaining documents relating to the cost recovery program and WiFITER account. (Opp. at 98.) The government makes no "diligence" argument with respect to the false bribe allegation, as Defendants had no knowledge of the allegation and the need seek discovery on the topic. While the concept of "diligence" has application in other civil contexts, e.g. amending a scheduling order, that concept has no application to the analysis of whether the due process rights of a defendant have been violated because the government failed to turn over exculpatory information.

The only case the government cites, Aichele, 941 F.2d at 764, says nothing about diligence. (Opp. at 99.) The government acknowledges as much, asserting that Aichele stands for the different proposition that when "'a defendant has enough information to be able to ascertain the supposed Brady material on his own, there is no suppression by the government.'" (Id. (quoting Aichele, 941 F.2d at 764.) The government fails to disclose, however, that this aspect of Aichele is dictum and has been criticized by subsequent cases. For example, in Benn, the Ninth Circuit noted that the "Aichele court then added, by way of dictum, that if a defendant can ascertain the material on his own, there is no suppression" and stated that "[c]ertainly, that observation is overbroad, at the very least." 283 F.3d at 1061.

Not only is the government's argument legally untenable, but factually too. In their supplemental brief, which Defendants again incorporate here, Defendants discussed their efforts to conduct discovery on WiFITER during the federal action, which yielded very little, as well as

[41] In fact, in the context of a civil case, one could argue that the United States must turn over all Brady materials at least prior to the close of discovery so that the defense has an opportunity to use the information to conduct any necessary follow-up.

their efforts to conduct WiFITER discovery in the state action, which was met with stonewalling by the state, required extensive motion practice, and resulted in no less than three orders requiring Cal Fire to produce documents. (See Docket No. 625 at 108:22-116:19.) On the record before the Court, there is no basis to argue, let alone conclude, that Defendants were not "diligent" in attempting to discover that which the government suppressed.

VII.
THE GOVERNMENT RELIES ON ISSUES THAT ARE NOT RELEVANT TO THE FRAUD ON THE COURT INQUIRY

A. The Settlement Does Not Preclude This Court From Setting Aside the Judgment under Rule 60(d)(3).

The government argues at length that the judgment should not be set aside in this case because the parties settled. The government argues that, "[i]n most circumstances, a settlement cannot work a grave miscarriage of justice, because settlement is fundamentally a compromise that both sides consider more advantageous than the risks and burdens of trial." (Opp. at 23:14-16.) The government cites no actual support for this proposition.

The government attempts to support its own settlement rule by stating that the Supreme Court in Beggerly held that a "judgment entered upon the settlement could not be vacated for fraud on the court, even though the United States failed to produce to the opposing party and the court documents allegedly showing it could not have owned disputed land." (Opp. at 23:20-23.) But the government's word choice is unfortunate, as the actual holding in Beggerly says otherwise. In fact, the Beggerly decision reflects that the Supreme Court treated the settlement as irrelevant to its determination. Properly understood, Beggerly demonstrates that the impediment to finding fraud on the court was that the government's failure to produce a document followed a good-faith search and was innocent and unintentional. 524 U.S. at 44-46. Despite the settlement between the parties, the Supreme Court made clear that if the circumstances involved bad faith, such as a forgery, its decision may very well have been different. Id. at 47.

The ruling is similar in Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 641-42 (1978), adopted in full, 645 F.2d 699, even though the government's choice of words regarding that case appear to say something different. Specifically, the government states, "The only circumstance

in which there might be a fraud on the court in a settled case is if the court was deceived in approving the settlement." (Opp. at 26:5-6 (emphasis added).) To be clear, however, Valerio rejected a class representative's effort to overturn a settlement entered into by the class's former attorneys because they failed to advise the court of certain issues pertaining to the agreement. 80 F.R.D. at 641. In reaching its conclusion that the acts complained of "obviously [did] not" constitute a fraud on the court, the Valerio court focused on the nature of the misstatement and the quality of the fraud itself. Id. at 640-43. There was no discussion related to how or whether a settlement might alter or make more difficult the court's analysis. Instead, similar to the Supreme Court's review in Beggerly, the court focused on the nature of the misrepresentations it confronted, compared them to the standard established by Hazel-Atlas, and then denied the motion for fraud on the court. 80 F.R.D. at 641-42. Thereafter, also similar to the Supreme Court's analysis in Beggerly, where it made clear that bad faith conduct would likely have changed its analysis, 524 U.S. at 47, the court in Valerio made clear that its decision might very well have been different if the class lawyers had "affirmatively misrepresented [the defendant's] financial condition." Id. at 643.

In a further misguided effort to support its rule, the government also misstates the holding in Latshaw v. Trainer Wortham & Co., 452 F.3d 1097, 1099 (9th Cir. 2006), using that case in the context of its fraud on the court analysis to proclaim, "Rule 60 'is not intended to remedy the effects of a deliberate and independent litigation decision that a party later comes to regret through second thoughts or subsequently-gained knowledge . . . .'" (Opp. at 25.) Once again, the government's argument is mistaken.

In Latshaw, the plaintiff was essentially duped by her attorney into settling her lawsuit. 452 F.3d at 1099. In this regard, one of her two attorneys misrepresented that she could be liable for attorneys' fees if she did not settle, and that both attorneys were resigning from her case so it was in her interest to settle. Id. at 1099-1100. The plaintiff thus agreed to accept the settlement offer, and the attorney effectuated the settlement by signing her own name and forging her colleague's name on the document filed with the court. Id. at 1099.

When the plaintiff discovered the true facts, she brought a motion seeking to vacate the

judgment and rescind the settlement agreement. The district court denied her motion, and the appellate court affirmed. Significantly, the plaintiff based her motion on numerous grounds under Rule 60, and the appellate court's decision systematically discusses why the district court did not abuse its discretion in denying the plaintiff's motion under Rule 60(b)(1) (relief from judgment for mistake, inadvertence, surprise, or excusable neglect), Rule 60(b)(3) (relief from judgment for fraud by an adverse party), and Rule 60(b)(6) (relief from judgment for extraordinary circumstances).

Importantly, the Latshaw court's observation that Rule 60 "is not intended to remedy the effects of a deliberate and independent litigation decision that a party later comes to regret" is delivered in the context of a decision heavily focused on Rule 60(b)(1) and the conduct that took place between Latshaw and her counsel, as well as the reasons why that conduct caused her to settle with the defendants.[42] To provide context for the excerpt cherry-picked by the government, the court squarely puts the "second thoughts" portion of its decision within a Rule 60(b)(1) analysis as follows:

> We agree that Rule 60**(b)(1)** is not intended to remedy the effects of a litigation decision that a party later comes to regret through subsequently-gained knowledge **that corrects the erroneous legal advice of counsel**. **For purposes of subsection (b)(1), parties should be bound by and accountable for the deliberate actions of themselves and their chosen counsel.**

Id. at 1101 (emphasis added to reflect portions excluded by the government). By omitting select portions of this excerpt, the government misleadingly suggests that the court's analysis in this area of its opinion applies to fraud on the court, when in reality the court expressly limits this aspect of its discussion, and this particular quote, to its discussion of the alleged Rule 60(b)(1) fraud between Latshaw and her counsel. This "second thoughts" language therefore has nothing

[42] The version of Rule 60 then in effect did not contain a separate subdivision authorizing courts to set aside a judgment for fraud on the court. Instead, the rule contained subdivision (b)(6), which stated that the court may relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment." There was also a paragraph following subdivisions (b)(1)-(6) that contained the following sentence: "This rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court." Fed. R. Civ. P. 60(b) (pre-2007 amendment).

to do with the fraud on the court analysis presented here.[43] Indeed, the court makes that fact abundantly clear in yet another portion of its analysis, stating:

> [N]either of Latshaw's alleged mistakes are among those that Rule 60(b)(1) is intended to remedy. . . . Latshaw's beliefs do not provide grounds to rescind her acceptance. These mistakes, if true, arose from attorney misconduct. A party will not be released from a poor litigation decision made because of inaccurate information or advice, even if provided by an attorney. Latshaw's decision to accept the offer was deliberate and independent. In such situations, regret caused by new knowledge does not justify rescinding a decision.

Latshaw, 452 F.3d at 1101-02. Thus, what is critical about Latshaw is not its analysis or decision, but again what the government neglects to state about its decision. Once again, the government's omissions here are crucial. Since the Ninth Circuit pinned its analysis and language on fraud between parties under Rule 60(b)(1), it is not surprising for the court to have made the observations trumpeted by the government, but it is surprising the government fails to put them in context.

When the Ninth Circuit ultimately comes to its fraud on the court analysis in Latshaw, which does not begin until page 1104 of that opinion, it dispenses with this 'attorney versus client' fraud and negligence easily, and focuses its analysis on whether the court itself was defrauded. Specifically, the Ninth Circuit concludes, "[e]ven though it may have been fraud to forge a signature and the fraud may have reached the court, [Latshaw's counsel's] alleged conduct falls far short of 'defiling the court itself' and hardly resembles an 'unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" Latshaw, 452 F.3d at 1104. Thus, Latshaw's reasoning is on all fours with the Ninth Court's reasoning in Pumphrey, which held:

> [T]he inquiry as to whether a judgment should be set aside for fraud upon the court under Rule 60(b) focuses not so much in terms of whether the alleged fraud prejudiced the opposing party but more in terms of whether the alleged fraud harms the integrity

[43] Importantly, it was critical to the court's ruling in Latshaw that the plaintiff had brought her motion on the basis of fraud perpetuated by her own attorneys. The Ninth Circuit's holding denying relief under Rule 60(b)(1) was heavily influenced by the observation that the plaintiff had an adequate remedy at law: a suit for malpractice. Id. at 1101 ("Such mistakes are more appropriately addressed through malpractice claims."). Since the plaintiff in Latshaw had an adequate remedy "at law," the court did not find it necessary to resort to "equity" and rescind the settlement agreement.

of the judicial process.

62 F.3d at 1133 (quoting Intermagnetics, 926 F.2d at 917) (citing Hazel-Atlas, 322 U.S. at 264).

The government also invokes Judge Breyer's opinion in Roe v. White, 03-04035 CRB, 2009 WL 4899211 (N.D. Cal. Dec. 11, 2009), to suggest that the fraud on the court doctrine usually does not apply to settled cases, and that it certainly does not apply if courts do not "look behind" the agreement itself. (See Opp. at 26:11-19.) The government apparently missed the fact that Judge Breyer's opinion was only advisory; His Honor did not actually rule on the Rule 60(d)(3) motion before him because the district court lacked jurisdiction while the case was pending on appeal. 2009 WL 4899211, at *1. But the government's mistreatment of this case goes deeper than this single omission. In addition to representing to this Court that Judge Breyer held something he did not hold, the government also mistakenly states that the Ninth Circuit affirmed this advisory opinion. (Opp. at 26:20-21 (citing "Roe v. White, No. C 03-04035 CRB, 2009 WL 4899211, *3 (N.D. Cal. Dec. 11, 2009), **aff'd, 395 Fed. App'x 470, 471 (9th Cir. 2010)**") (emphasis added).) The government is incorrect. Even a cursory read of the opinion at 395 Fed. App'x 470 reveals that the Ninth Circuit was affirming a different opinion of Judge Breyer in the same case, which had been appealed to the Ninth Circuit in 2008. See Roe ex rel. Rodriguez Borrego v. White, 395 Fed. App'x 470 (9th Cir. 2010) (case number 08-15891, with the prefix reflecting the appeal was filed in 2008). The Judge Breyer opinion cited by the government was issued on December 11, 2009, and was never appealed. Indeed, it could not have been, as the district court noted at the outset of its order that it lacked "jurisdiction to deny Defendant's Motion" because the case was already on appeal. 2009 WL 4899211, at *1.

Moreover, and perhaps more importantly, the Ninth Circuit's decision cited by the government and a subsequent decision by Judge Breyer actually undermine the government's contention that settlement generally acts as a bar to vacating judgment based on a fraud on the court. In the unpublished opinion cited by the government, the Ninth Circuit actually acknowledged that several news stories had emerged suggesting that a former attorney for the plaintiffs may have committed fraud upon the court. 395 Fed. App'x at 472. The Ninth Circuit affirmed the court's order denying the defendant's motion but then stated that "the district court

may, on motion or sua sponte, reopen the case and take such other actions as may in its discretion be appropriate." Id.

On remand, Judge Breyer did in fact permit defendants discovery to investigate whether a fraud on the court had occurred. (No. C 03-04035 CRB, Docket No. 1039 at 3:21-4:19.) If, as the government contends, settlement were truly a bar to relief under Rule 60 unless the court "looked behind the agreement," then Judge Breyer would not have allowed the defendants to conduct any discovery,[44] since His Honor already explained that there had been no fraud in connection with the agreement. But Judge Breyer did eventually permit this discovery, stating:

> [A]fter all, as we know and we've repeatedly said, this was a settlement. And the only question the Court had in connection with the settlement was, was it fair to the plaintiffs? . . . Not whether it was fair to the defense, and not whether it was fair to, in some sense, the process. Though, if one carries that out, I think that there is some suggestion, some suggestion that if the process is so corrupted that one could potentially demonstrate, potentially demonstrate a fraud upon the court. . . . [S]o far you haven't identified anything that I would think demonstrates a corruption of the process such that it would warrant setting aside the settlement or demonstrating a fraud upon the Court . . . . But you're saying to me and you made it clear at the very outset, you said: Look, all I want to do is do some discovery here . . . . Because if I had [certain information] in mind or in hand, I then can try to demonstrate why having those documents created the corruption of the process that would then warrant setting aside the motion.

(Case No. C-03-04035-CRB, Docket No. 1039 (Hearing Tr., October 14, 2011) at 3:21-4:19.) Thus, Judge Breyer actually confirmed a proposition exactly opposite from the one the government attributes to him, as he recognized the possibility that even if the settlement was "fair" on its terms, it might nonetheless be the result of such a corrupt process that a finding of fraud on the court under Rule 60(d)(3) is warranted. (See id.)

Following its misleading discussion of Roe v. White, the government inserts a string cite to several out-of-circuit opinions, purportedly in support of its proposition that many courts "have recognized that there can be no fraud on the court in a settled case unless the order

[44] And certainly the Ninth Circuit would not have explained that Judge Breyer had authority to "take such other actions as may in [his] discretion be appropriate." 395 Fed. App'x at 472; see also Case No. C-03-04035-CRB, Docket No. 1039 (Hearing Tr., October 14, 2011) at 10:23-11:1 ("Also, I'm guided somewhat . . . by some of the language of the Ninth Circuit, which really did send the case back to me for any proceedings that I thought were appropriate.").

approving the settlement itself was obtained by deception." (Opp. at 26 n.31.) Defendants have, however, analyzed these additional cases, and not one of them actually articulates the alleged "rule" advanced by the government, or otherwise suggests that fraud on the court in a settled case is limited in the way the government contends. Instead, like the Supreme Court in Beggerly, these courts all acknowledge that the relevant inquiry in determining whether a judgment should be set aside based on a fraud on the court is whether the alleged fraud is egregious enough that it undermines the integrity of the judicial process. Defendants include a portion of their research on the government's string cited cases in the footnote below, and parenthetical reference to what each case actually stands for.[45] The results of this research are not surprising. As noted earlier, in Beggerly the Supreme Court was not focused on whether the court was defrauded "in approving the settlement itself" (as the government proposes), but on the nature of the alleged underlying wrong, and whether it was innocent or in bad faith. See 524 U.S. at 44-47.

After providing this legally insignificant string cite, the government proclaims, "We have searched for decisions rejecting this principle and found none." (Opp. at 26:22-27:1.) The reason the government found no cases rejecting this self-made "principle" is because it is not the law and does not exist, so there is nothing for cases to reject.[46] Thus, the government's assertion is meaningless. It is rather simple to construct numerous "rules" and "principles," only to then support them by stating that no decision or authority exists to the contrary.

Perhaps knowing that the cases it relies upon do not withstand scrutiny, the government

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[45] See, e.g., Superior Seafoods, Inc. v. Tyson Foods, Inc., 620 F.3d 873, 878 (8th Cir. 2010) (recognizing that relief for fraud on the court is available "where it would be 'manifestly unconscionable' to allow the judgment to stand"); Baltia Air Lines, Inc. v. Transaction Mgmt, Inc., 98 F.3d 640, 643 (D.C. Cir. 1996) (noting that fraud upon the court pertains to instances "involving far more than an injury to a single litigant"); In re Leisure Corp., 2007 WL 607696, at *6 (N.D. Cal. Feb. 23, 2007) ("To constitute fraud on the court, the alleged misconduct must harm the integrity of the judicial process"); Petersville Sleigh Ltd. v. Schmidt, 124 F.R.D. 67, 72 (S.D.N.Y. 1989) (noting that fraud on the court "embrace[s] only that species of fraud which does or attempts to, defile the court itself "); Int'l Tel. & Tel. Corp, 349 F. Supp. at 29 (same); In re NWFX, Inc., 384 B.R. 214, 226 (Bankr. W.D. Ark. 2008) ("Typically, cases involving fraud on the court involve two parties, one of whom has, by fraudulent means directed specifically at the operation (or machinery) of justice itself, gained an advantage over his opponent"); In re Mucci, 488 B.R. 186, 193 (Bankr. D.N.M. 2013) (noting that fraud on the court involves "the most egregious conduct").

[46] Indeed, because this is not the law, it is irrelevant that the Court never "looked behind" the parties' settlement agreement in this case. There is simply no requirement that the government's misconduct be directly tethered to the settlement agreement. (See Opp. at 27.)

goes to great length attempting to avoid the cases cited by Defendants, but its effort is unavailing. It first argues that in Hazel-Atlas, 322 U.S. 328, judgment was not entered based upon a settlement agreement, so it is inapposite. (Opp. at 28:4-13.) But the government's slippery distinction only matters if its starting point for assessing this Supreme Court case is actually correct, that a judgment in a settled case can only be set aside for fraud on the court when the court actually "looks behind" the agreement. As already explained above, its proposition is completely lacking in support, and is in fact contrary to the holding in Hazel-Atlas, which is the true "leading" Supreme Court case addressing fraud on the court.

In Hazel-Atlas, the Supreme Court implicitly recognized that a court should grant relief from a judgment obtained by fraud on the court even when the underlying action in which the fraud was committed involved a settlement agreement. 322 U.S. at 243. Judgment was entered in that case against Hazel after Hartford appealed the district court's judgment and the appellate court reversed. Following the reversal, Hazel tried to investigate the rumors it had heard about the article's true author, but was unable to find any evidence of the fraud because Hartford, in perpetuating its fraudulent scheme, had already gotten to the alleged author and convinced him to keep up the charade. Id. at 241-42. The Supreme Court was completely untroubled by this procedural history and only commented upon it in the context of providing the relevant background of the case. See id.

The government next attempts to distinguish Herring v. United States, 424 F.3d 384 (3rd Cir. 2005), a case Defendants cite as illustrating the willingness of at least one court to examine substantively a motion to vacate judgment based on fraud on the court, where the judgment at issue was based on a fifty-year-old settlement agreement. See id. at 390-92. The government believes it is important that the Third Circuit found no fraud existed and that the settlement came after a merits-based judgment was entered (see Opp. at 28:14-22), but the point of this case is not the outcome but the court's willingness to engage in the analysis despite the passage of time. If settlement were truly a bar to review in the manner suggested by the government, then the Herring court would not have conducted a lengthy discussion of the merits in the first place.

With respect to Black v. Suzuki Motor Corporation, No. 2:04-CV-180, 2008 WL

2278663, *3 (E.D. Tenn. May 30, 2008), the government argues that it "is not even about relief from judgment under Rule 60." But the case begins with the following explanation by the court: "This matter is before the Court on the 'Renewed Motion For Summary Judgment And Renewed Motion To Set Aside Settlement Agreement'. . . . In reality, the motion seeks an order setting aside the settlement agreement of the parties . . . pursuant to the Court's inherent power to dismiss an action wherein a party has committed fraud on the court and the Court will treat it as such." Id. at *1. Thus, the court treated the motion as arising under Rule 60 and its analysis is on point.

The government set up yet another straw-man by stating that Aoude v. Mobil Oil Corporation, 892 F.2d 1115, 1118-19 (1st Cir. 1989), is not about settlement at all, but as the government must know, the Defendants did not cite Aoude for any purpose relating to settlement. Instead, they cited it to explain the importance of a court's ability to address and rectify fraud that is committed against the judiciary:

> Courts cannot lack the power to defend their integrity against unscrupulous marauders; if that were so, it would place at risk the very fundament of the judicial system." Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1119 (1st Cir. 1989). As the First Circuit so precisely stated in Aoude, it is "[s]urpassingly difficult to conceive of a more appropriate use of a court's inherent power than to protect the sanctity of the judicial process – to combat those who would dare to practice unmitigated fraud upon the court itself. To deny the existence of such power would . . . foster the very impotency against which the Hazel-Atlas Court specifically warned. Id.

(Defs.' Supp. Brief at 18:25-19:4.)

Next, the government attempts to distinguish Broyhill Furniture Industries, Inc. v. Craftmaster Furniture Corporation, 12 F.3d 1080, 1087 (Fed. Cir. 1993), and Southerland v. Oakland County, 77 F.R.D. 727, 730-31 (E.D. Mich. 1978), on the ground that these cases ended in consent decrees, i.e., "an order of the court adjudicating the case." (Opp. at 29:10-19.) But again, this is a false distinction, since neither Rule 60 itself nor Hazel-Atlas or its progeny purport to limit the relief available under Rule 60(d)(3) based on the manner in which a case ended.

In the end, the government strains itself and this process to find support for the

proposition that a judgment in a case that settles may only be set aside for fraud upon the court "if the court was deceived in approving the settlement." (Opp. at 26:6.) It is telling that the one piece of authority the government never addresses is the plain language of the rule itself. This is because the text of Rule 60 unequivocally applies to any "judgment, order, or proceeding," and makes no distinction regarding its application to final dispositions such as stipulated judgments, consent judgments, or settlement orders. See Fed. R. Civ. P. 60. Instead of accepting the plain language as meaning what it says, and the case authority, the government grafts inapplicable sentence fragments, conflates issues, and even injects examples of its own misconduct about which Defendants purportedly knew[47] as reasons why the parties' settlement agreement should preclude this Court from exercising its inherent authority to set aside the judgment that was precipitated by the government's wrongful acts. But none of these efforts are successful, because from Hazel-Atlas to Beggerly, from Latshaw to Levander, controlling case law is perfectly consistent with the broad language of Rule 60, and it teaches that a settlement agreement establishes no special or peculiar bar of any kind to the court's assessment regarding whether there has been a fraud on the court.

B. The Government's Contention that Defendants Pretended to Settle Attempts to Controvert Facts that Must be Presumed True, Violates This Court's Order, and Must be Disregarded on This Motion.

In their portion of the Joint Status Report (Docket No. 612) the government wrongly asserted that Defendants only "pretended to settle" the federal Moonlight Fire action, while ignoring the fact that these Defendants have already paid over $30 million to the government as part of this so-called pretend settlement. Nevertheless, because the government made this false assertion, Defendants addressed it fully in their opening brief (Docket No. 625 at 35:3-36:23) with a complete factual recitation surrounding the government's baseless claim that this was only

[47] Specifically, the government repeats its argument from the previous section that Defendants "knew of almost every alleged act of misconduct set forth in their motion." (Opp. at 24:5-6.) In reality, as discussed in more detail infra, there were many significant facts evidencing misconduct by the government which Defendants were not aware of before they entered the settlement agreement. But even if there were not, some knowledge of the government's fraud does not prevent this Court from vacating the judgment. See Hazel-Atlas, 322 U.S. at 241, 244 ("At the time of the trial . . . , the attorneys of Hazel received information [of the fraud,]" but later holding that, despite the earlier knowledge, "[e]very element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments.").

a "pretend" settlement. Defendants explained why a press release correcting misstatements by the government attorneys was necessary to mitigate the government's efforts to poison the Plumas County jury pool. Those facts, as alleged, which are to be presumed true according to the Court's order on this motion, state, in part, as follows:

> At no time before the entry of Judge Nichols's February 4, 2014, Orders, wherein he found by "clear and convincing evidence" that the Moonlight Fire investigation and prosecution were "corrupt and tainted," had Defendants even considered the possibility of seeking to set aside the judgment in the federal action. Further underscoring the absurdity of the Moonlight Prosecutors' assertion that the federal settlement was a charade is the fact that Defendants have now paid the United States well over $30 million as part of the federal settlement, and the fact that Sierra Pacific has conveyed to the United States thousands of acres of land. Defendants can assure the Court that these payments and land conveyances most certainly are not "pretend."

(Docket No. 625 at 35:3 - 36:23).

This court ordered that all facts alleged by Defendants would be presumed true. In violation of the Court's order, the government attempts to challenge the veracity of these allegations, and again cites to the same press release, claiming once again that "when Sierra Pacific entered the settlement agreement and caused it to be filed with the Court, it already intended to bring this motion and have the judgment set aside." (Oppo. at 11:6-11.)

In making this assertion, the government once again fails to discuss the context in which counsel's statement was made. Moreover, the government ignores the fact that Sierra Pacific is but one of many parties that have sought relief under Rule 60(d)(3). In the end, because these arguments go beyond Defendants' allegations, they should be ignored by this Court, as should all the other arguments by the government that go beyond or attempt to controvert Defendants' allegations.

C. The Government's Assertion that Defendants' Awareness of Some Components of the Fraud Fails as A Matter of Law and Ignores the Numerous Components of the Fraud Defendants Uncovered After the Settlement.

1. The Government's Assertion that Defendants' Awareness of Some Components (But Admittedly Not All) of the Fraud Bars Relief under Rule 60(d)(3) Has Been Squarely Rejected By the Supreme Court.

In relying on the Seventh Circuit's case Oxxford Clothes, XX, Inc. v. Expeditors Int'l of Washington, Inc., 127 F.3d 574 (7th Cir. 1997), the government contends that "no deception—not even perjury—can be a fraud on the court if the opposing party either contested it or possessed facts or evidence to contest it before judgment." (Opp. at 20:21-21:1.) This assertion completely ignores the relevant facts in Hazel-Atlas and binding precedent of Pumphrey.

In Hazel-Atlas, the Supreme Court explicitly acknowledged that "[a]t the time of the trial in the District Court . . . , the attorneys of Hazel received information [about the fraud]. Hazel's attorneys did not at that time attempt to verify the truth of the hearsay story of the article's authorship, but relied upon other defenses which proved successful." 322 U.S. at 241.[48] After the appellate court reversed and remanded with a directive that the district court vacate its original judgment, only then did Hazel-Atlas attempt to investigate the fraud. Id. at 242. That investigation was unsuccessful, however, because Hartford's agents had already convinced the purported author to keep up the act. Id. Thus, Hazel-Atlas "capitulated" and settled the action. Id. at 243. The majority acknowledges that Hazel-Atlas obtained "indisputable proof" of these facts after they were brought to light in a subsequent action. Id. It was inconsequential to the Supreme Court that Hazel-Atlas received information relating to the fraud during trial, but did

[48] In light of this quote, which is taken directly from the majority's opinion in Hazel-Atlas, the Court can put to rest the government's contention that "Sierra Pacific tries to avoid this rule by sleight of hand, claiming that the Supreme Court set aside the judgment in Hazel-Atlas Glass Co. even though the defrauded party had evidence of the fraud at the time of settlement. [Citation omitted.] That was only the dissenting justices' view—not the Court's." (Opp. at 22:5-8.) Again, the quote provided above acknowledging that Hazel-Atlas had some knowledge of Hartford's fraud (whether in the form of admissible evidence or otherwise) is taken directly from the majority's opinion. See 322 U.S. at 242. Whether that knowledge came in the form of admissible testimony or otherwise, the point remains the same, that pre-judgment knowledge does not foreclose relief under Rule 60(d)(3). Defendants did not attempt to slice the bologna as thin as the government, and the only reason why the government is trying to align Defendants with the Hazel-Atlas dissent is because the government is making the exact same contention that the Hazel-Atlas majority disregarded, that Defendants were purportedly aware of certain instances of misconduct before judgment was entered and are therefore precluded from having the judgment set aside. The Supreme Court did not buy this argument in 1944 and this Court should not buy it today.

not act on it. Id. at 245-46. The Court disagreed that Hazel-Atlas had not been diligent, but explained that, even if Hazel could have done more to uncover the fraud, "Hartford's fraud cannot be condoned for that reason alone. . . . Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants." Id. at 246.

The Ninth Circuit was directly in line with this reasoning when it ruled in Pumphrey that the plaintiff was not precluded from having the judgment vacated based on a showing that the court had been defrauded, even "after receiving [the defendant's] interrogatory answers admitting [certain aspects of the fraud.]" 62 F.3d at 1133. Indeed, citing the Hazel-Atlas majority, the Pumphrey court recognized that the opposing party's knowledge is not a consideration because the inquiry is whether the judicial process was harmed, not what effect the fraud had on other litigants. Id. ("[E]ven assuming that [the plaintiff] was not diligent in uncovering the fraud, the district court was still empowered to set aside the verdict, as the court itself was a victim of the fraud.") (emphasis added).

The government also relies on Appling and Levander in support of its proposition that only after-discovered fraud is grounds for vacating a judgment based on a fraud committed on the court, but the conduct in Appling was far less severe than the conduct at issue here and misapprehends Levander. Appling concerned the defendant's counsel's actions in responding to a subpoena for information from an individual without that third party's authorization, and assuring plaintiffs' counsel that the third party had no documents or information related to the litigation. 340 F.3d at 773. The individual "was never shown a copy of the objections" to the subpoena, served in his name, and was never "consulted with respect to their contents." Id. at 774. The plaintiffs pointed to three documents that would have been produced but for this fraud by the defendant's counsel. Id. The Ninth Circuit found that this conduct was "aimed only at the [plaintiffs] and did not disrupt the judicial process because the [plaintiffs] through due diligence could have discovered the non-disclosure." Id. at 780. But the Appling court's determination that this nondisclosure did not amount to a fraud on the court was largely the consequence of a misquote of Levander. Specifically, Appling cites Levander for the rule that "[n]on-disclosure, or perjury by a party or witness, does not, by itself, amount to fraud on the

court," but omits the key words "generally" and "normally" used by Levander to describe when fraud on the court may be found. Compare Appling, 340 F.3d at 780, with Levander, 180 F.3d at 1119 ("Generally, non-disclosure by itself does not constitute fraud on the court. . . . Similarly, perjury by a party or witness, by itself, is not normally fraud on the court." (emphasis added)). Thus, even the Levander court acknowledges that non-disclosure and/or perjury may, under the right circumstances, constitute a fraud on the court.[49] Given the Appling court's misquote of the law of the Ninth Circuit – set forth in Levander and reaffirmed by Stonehill – its reasoning is unpersuasive and should be given little weight.[50]

In short, the government completely ignores (as did the Seventh Circuit in Oxxford Clothes) the Supreme Court's recognition that fraud on the court may be found even where the party asserting fraud on the court has information about the opposing side's fraudulent conduct

[49] The government also cites to Levander to suggest that because Defendants were aware of some of the alleged fraud prior to the settlement, Defendants are now precluded from challenging the government's misconduct as a fraud on the court because, to the extent they intended to challenge this misconduct at all, the opportunity to do so was at trial. (See Opp. at 21:8-16.) As discussed above, however, Hazel-Atlas is clear that having the opportunity to challenge fraudulent conduct at trial does not preclude a later finding of fraud on the court. There, Hazel suspected the fraud but did not challenge the article's origins at trial, instead "rely[ing] upon other defenses which proved successful." 322 U.S. 238. Perhaps more to the point, both Levander and Gleason, 860 F.2d 556 – a Second Circuit case cited by the government and discussed in Levander – presuppose that a trial or other proceeding wherein the perjured testimony could be challenged actually occurred. These cases do not stand for the proposition that the decision not to go to trial to challenge any suspected perjury bars later relief for fraud on the court resulting from that perjury. Finally, also discussed elsewhere, the government strategically ignores that Defendants discovered much of the government's fraud "after the fact," and that Defendants have not yet had the opportunity to discover what other acts of fraud the government committed that simply have not yet come to light.

[50] The government also cites two Eastern District cases in support of its contention that pre-judgment knowledge of some fraud precludes recovery under Rule 60(d)(3). (See Opp. at 21:22-22:4.) First, in Arnold v. County of El Dorado, 2012 WL 3276979, *5 (E.D. Cal. Aug. 9, 2012), Magistrate Judge Hollows ruled on a defendant's motion for terminating sanctions and, in examining the various sanctions available and their bases, remarked about the tension that exists between certain cases that authorize the dismissal of cases based on perjury, and other cases, including Stonehill and Levander, which explain that "perjury by a party or witness, by itself, is not normally fraud on the court." (Internal quotations omitted.) Judge Hollows then commented that "it appears that in the setting aside or reopening judgments context, perjury will not be grounds for upsetting a judgment when the fact of the untruth was known and could have been challenged during the proceeding itself. Levander, 180 F.3d at 1120." This language is dicta, since the motion pending before Judge Hollows was not based on Rule 60 at all (indeed, no judgment had yet been entered), and given its provisional nature ("it appears that . . ."), does not purport to reiterate the holdings of Stonehill and Levander as binding.

Second, in Wright v. U.S., 2001 WL 1137255, *9 (E.D. Cal. Aug. 21, 2001), Magistrate Judge Drozd recommended, in the context of a motion to dismiss filed by defendants, that a pro se plaintiff's request to set aside an earlier judgment be denied. In responding to the pro se plaintiff's request, which was made to avoid a dismissal based on res judicata, Judge Drozd remarked that "Federal Rule of Civil Procedure 60(b) provides that a court may relieve a party from a final judgment, order or proceeding for, among other reasons, newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) or fraud, misrepresentation or other misconduct of an adverse party." Nothing about this statement contravenes Defendants' position here.

but does not act on that information at trial or prior to judgment. Hazel-Atlas, 322 U.S. at 241. The government is incorrect in stating that only "after-discovered fraud" can constitute fraud on the court. To the extent that Oxxford Clothes supports this reading, it is non-binding and directly contradicts well-established Supreme Court precedent.

What the government is really arguing is that there can be no prejudice here because Defendants purportedly knew some (but admittedly not all) of these facts at the time they agreed to settle. However, as discussed elsewhere in this brief at length, prejudice is not an element the Court may consider. See Dixon, 316 F.3d at 1046 ("Prejudice is not an element of fraud on the court.") (citing Hazel-Atlas, 322 U.S. at 238; Pumphrey, 62 F.3d at 1132-33).

2. Numerous Fraudulent Actions By the Government, Which Individually Would Support Relief Under Rule 60(d)(3), Were Not Known to These Defendants Before Entry of Judgment.

Even if the government's claim that knowledge of misconduct before entry of judgment bars relief under Rule 60(d)(3) were correct (it is not), there is no question that much of the government's fraud here was not known to Defendants until after entry of judgment. Indeed, the government's contention that Defendants settled "knowing everything with the slightest significance discussed in the [Defendants'] supplemental brief" is contrary to the allegations in Defendants' opening brief, which must be assumed true for purposes of this motion. The following facts and the timing of their discovery after the Court entered the judgment in this matter are alleged in detail in Defendants' opening briefing. Nevertheless, in view of the government's false timeline of events (which must be ignored on this motion pursuant to the Court's order) Defendants summarize some of these after-acquired facts for the Court's convenience here:

a. Defendants Discovered Eddie Bauer's False Allegation of a $2 Million Bribe by Defense Counsel after Entry of the Federal Judgment.

As alleged in much more detail elsewhere in this briefing and in Defendants' opening brief, Defendants knew nothing about the false allegation by Eddie Bauer that counsel for Sierra Pacific had communicated a $2 million bribe to secure a confession by his son Ryan taking responsibility for starting the fire. Bauer communicated this allegation directly to the

government's lead attorneys, Kelli Taylor and Richard Elias, in spring 2012 and they concealed this information in direct violation of their duty of candor to the tribunal, and in violation of their discovery obligations. Having done so, they defrauded the court by securing a ruling based on a FRE 403 motion where the court was required to carefully balance such factors, thus successfully precluding Defendants from arguing that anyone else may have started the Moonlight Fire. This was the central issue in the case. As alleged in Defendants' opening briefing, the Court's ruling prohibiting Defendants from "eliciting evidence to argue that someone else started the fire" was a critical ruling that was a substantial factor in forcing Defendants to settle the federal action. This is fraud on the court perpetrated by officers of the court, and alone would be sufficient to set aside the judgment under Rule 60(d)(3) and vacate the action. Given its importance to this Court's assessment, Defendants have devoted an entire section of this briefing to this issue.

b. Defendants Discovered the Moonlight Prosecutors' Role in Encouraging False Testimony Concerning Transplanted Evidence and False Points of Origin after Entry of the Federal Judgment.

At the time the federal judgment was entered, Defendants did not have information to prove the Moonlight Prosecutors themselves affirmatively assisted Moonlight Fire investigator David Reynolds's stratagem to give false testimony regarding his false points or origin, and the fact that he and White transplanted evidence collected from the white flag rock to the alleged points of origin, E2 and E3. To be sure, and only because of Defendants' successful motion to compel his testimony on this front, law enforcement officer Reynolds eventually admitted that he attended a January 2011 meeting at the United States Attorney's Office in the Eastern District of California with law enforcement officer White, special agent Welton, and the federal and state prosecutors, Taylor and Winsor. But it was not until the last day of his state deposition, on November 1, 2012, after the federal settlement had been reached, when Reynolds testified as follows concerning the January 2011 meeting: "And they said it was going to come up and saw it as a nonissue." With that new information, the perjured testimony by Reynolds (and Joshua White for that matter) became not just a matter wherein officers of the court were failing to correct perjury in the record after the fact, but one in which these officers of the court had

participated on the front end in securing or facilitating the false testimony. Taylor apparently appreciates the import of this issue, because in her declaration she attempts to minimize her involvement and mislead the Court by stating the following:

> On March 21, 2011, I defended the out of town deposition of U.S.F.S. investigator Diane Welton; so one of my colleagues met with and prepared Dave Reynolds for his deposition. Those colleagues then defended Reynolds' deposition on March 22, 23 and 24, 2011. I attended part of the deposition on March 22, 2011 via phone.

(Docket No. 629 [Taylor Decl.].)[51] Of course, Taylor's declaration on this front violates the Court's order, as it goes well beyond assuming the truth of the allegations pleaded by Defendants. Nevertheless, her statement is incomplete and fails to fully reveal important facts. In January 2011, Taylor spent the better part of a day with Reynolds preparing him at his upcoming deposition, which of course is when Reynolds was told it was all a "non-issue," thus essentially receiving permission to provide false testimony. Notably, Taylor does not deny having met with Reynolds, and never states how many times she met with him, thus leaving open the possibility (indeed likelihood) for multiple meetings even beyond the infamous January 2011 meeting that has thus far been revealed. As a consequence, Taylor's declaration raises more questions than it answers. But to the extent the government contends that perjury in a deposition can never constitute fraud on the court unless an attorney is involved in procuring it, Reynolds November 1, 2012, deposition testimony provided new information following entry of judgment not previously known to these Defendants which supports relief under Rule 60(d)(3) on that ground.

c. Defendants Discovered the Lead Investigator's Contingent Financial Interest in The Outcome of His Investigation After Entry of the Federal Judgment.

It was not until after the federal settlement that Defendants learned of the illegality of WiFITER and received the documentary evidence showing:

- How it actually biased investigators;

[51] Taylor omits from her declaration the fact that she attended portions of Reynolds' March 22, 2011 deposition in person, as reflected on the transcript and video tape of that deposition.

- How it was controlled by Cal Fire employees Joshua White, Alan Carlson and others;
- How Cal Fire management concealed this account from state regulators;
- How Cal Fire management and its inside counsel (officers of the court) knew the account was illegal;
- How it was used to fund expensive "junkets" to expensive hotels in San Diego, a beach front resort in Pismo Beach, and the wine country;
- How desperately Alan Carlson (Joshua White's mentor) wanted the next "high % recovery" because WiFITER was "running in the red";
- How it was nothing more than a bank account of illegally skimmed money controlled by rogue Cal Fire employees; and,
- How it was never a separate public trust fund as represented to this Court by the federal Moonlight Prosecutors.

Documents revealing all of these facts were wrongfully withheld by Cal Fire, the United States' joint prosecution partner, until long after entry of judgment in the federal action. And Defendants only learned of them by chance – when the California State Auditor happened to reveal a critical email, which Cal Fire withheld from Defendants, in its publically disclosed audit of the illegal account on October 15, 2013. In addition to proving the existence of Joshua White's undisclosed contingent financial/beneficial interest in the outcome of his investigation, it further demonstrated a violation of California Rule of Professional Conduct 7-107(C). Cal Fire's in-house counsel, with the cooperation of Cal Fire's litigation counsel, actively suppressed evidence of WiFITER's illegality and its impact on wildland fire investigations, thereby defrauding this Court. As explained in detail in Defendants' moving papers, the "imperative of judicial integrity" as discussed by the Supreme Court in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), cannot possibly tolerate circumstances where law enforcement officers have any undisclosed contingent beneficial interest in an investigation which is the basis for governmental prosecution.

To the extent that the government has proffered any evidence that it contends contradicts

these facts, its submission must be ignored on this motion. The Court made clear in its ruling that it will not be resolving any factual disputes at this juncture in the proceeding. In any event, any contention that Defendants knew these facts before entry of the federal judgment is demonstrably incorrect.

The government's effort to minimize the import of White's contingent interest is without merit. Firstly, it contravenes the Court's directive to assume all allegations as true. Moreover, the government's contention that White's undisclosed contingent interest did not invade the federal action since White allegedly had no financial interest in any recovery by the federal government misses the point. White conducted his "investigation," picked his chosen defendants, destroyed his field notes and computer files, manufactured evidence and concealed evidence and packaged those efforts in the form of his Joint Report, all while having a contingent financial interest in the outcome. That Joint Report is the foundation of the federal action. Indeed, the Moonlight Prosecutors listed the Joint Report as their Trial Exhibit No. 1. For the government to suggest that the federal action was unaffected by White's undisclosed contingent financial interest in the outcome of his investigation ignores reality. Moreover, the bulk of White's deposition was conducted in the context of the state action, in which he undeniably held a contingent interest. Indeed, Cal Fire did not finally shut down WiFITER until 2013, after pressure began mounting when the Wall Street Journal and the Los Angeles Times began running articles about the evidence Defendants had collected concerning this illegal off-books account. Although Cal Fire now claims it shut down WiFITER in late 2012, that was still long after White gave his testimony under the belief that WiFITER stood to gain as much as $400,000 of any proceeds of the state litigation--money from which White himself would benefit.

d. Defendants Discovered Evidence Proving the Falsity of Testimony by Government Expert Chris Parker After Entry of the Federal Judgment.

It was not until after entry of the federal judgment that Defendants learned for the first time that during his federal deposition, USA expert witness Chris Parker testified falsely about or concealed the very purpose of WiFITER, which he conceived of and helped create in 2005

while employed with Cal Fire. It was only after the California State Auditor issued its October 15, 2013, report that Defendants learned that Parker had written an email which stated the purpose of the account was to give Cal Fire control over money that was unencumbered by restrictions on expenditure of state funds. Cal Fire's in-house counsel, with the cooperation of Cal Fire's litigation counsel, actively suppressed evidence of WiFITER's illegality and its impact on wildland fire investigations, thereby defrauding this Court. With respect to this issue, Taylor's declaration is silent, except for general statements about WiFITER, which raise more questions than they answer. In any event, the government's contention that Defendants knew this particular fact before entry of the federal judgment is demonstrably incorrect.

e. Defendants Discovered the Government's Expert's Admission that The Moonlight Fire Investigators' Testimony was Deceptive After Entry of the Federal Judgment.

The fraudulent nature of law enforcement officers White and Reynolds' testimony about the central aspect of their investigation was recognized by the joint origin and cause expert for the United States and Cal Fire, Larry Dodds. Dodds spent more than a thousand hours examining the evidence, finally conceding in May of 2013 (after the conclusion of the federal action) during a state deposition that the white flag raises "a red flag," creates a "shadow of deception" over the investigation, and caused him to admit "I will give you that it's more probable than not that there was [sic] some act of deception associated with testimony around the white flag."[52] Dodds did not make these concessions during his federal deposition. He did so only later, in his state deposition after the federal settlement. Likewise, Cal Fire Unit Chief Bernie Paul, who was only disclosed in the state action as a Cal Fire expert after the federal settlement, admitted in the state case that the evidence and testimony surrounding the white flag

[52] In violation of the Court's order, the government attempts to controvert the truth of *one* of Defendants' allegations about Dodds, and falsely claims in its briefing that Dodds refused to make one of the listed admissions. In support, the government cites to two pages in Dodds' deposition. (Docket No. 597-23, page 55-56). While it is true that Dodds was *initially* extremely evasive on one point and tried repeatedly to avoid answering the questions put to him, he eventually conceded the truth, as reflected about 100 pages later in the deposition transcript, when he admitted, "I will give you that it's more probable than not that there was [sic] some act of deception associated with testimony around the white flag." (Docket No. 597-23, p. 74 [Dodds 4/9/13 Depo, p. 1038:4-8]). The government does not even attempt to deny that Dodds said the white flag raised a red flag, or that he admitted that a "shadow of deception" hung over the investigation. Nor does the government deny that all of this testimony was given after the federal settlement.

caused him to disbelieve the Moonlight Investigators. Chief Paul also admitted that the investigators' testimony denying they knew anything about the white flag was "alone enough to cause you [Paul] to want to toss the whole report out."

None of these admissions had been obtained until after entry of the federal settlement through no fault of these Defendants. The government attempts unsuccessfully to manufacture the appearance that the false narrative proffered by its witnesses is merely a fantasy of Defendants borne of parlor tricks and gimmicks. The government is wrong, and in so arguing they violate the Court's clear directive that the parties are to confine their briefing to the standard for fraud on the court while assuming the facts alleged to be true. Nevertheless, nowhere in its papers does the government address or even acknowledge that its own expert Larry Dodds, and a Unit Chief and expert for Cal Fire, are apparently laboring under the same delusions as the Defendants.

f. Defendants Discovered Facts Proving that Diane Welton Lied in Deposition about Where the Fire May Have Started After Entry of the Federal Judgment.

At some point prior to October of 2008, AUSA Bob Wright retained several expert consultants and, on or about October 2, 2008, visited the fire site with consultants along with another government attorney. When they arrived in the area, they were joined by Moonlight Investigators White from Cal Fire and Welton from the USFS. When driving back into town in a pickup truck with White and Welton, Welton told Wright "there's something that we need to tell you." Welton then explained that USFS investigator Special Agent in Charge Marion Matthews, who had visited the alleged origin five days after the fire began, had wanted the investigators to declare a larger alleged origin area for the fire.

But the general area of origin in a wildfire origin and cause investigation is merely a tool to help narrow the search down to the specific point of origin. Wildfire investigators do not expand the general area of origin after they have already found the point of origin. Importantly, when Matthews made her comments, White and Welton had already claimed to have located the *specific points of origin*. Thus, Matthews' desire to expand the alleged general origin area further up the hill than had been "found" by the investigators would have made no sense unless

she believed the fire started further up the hill, which of course it did as proven by the aerial video.[53]

As stated in Defendants' earlier briefing, Welton suppressed the harmful key fact regarding Matthews during her deposition. On August 15, 2011, Welton testified as follows:

> Q: Was there any discussion that you recall at the scene about the general area of origin being potentially larger than the area that was bounded by the pink flagging?
>
> A: I don't recall having that discussion.
>
> Q: Did Marion Matthews at any point in time ever express to you the thought that she believed the general area of origin should have been bigger, both uphill and downhill?
>
> A: Not that I recall.

Defendants learned of this revelation regarding Welton for the first time in 2014. The fact that she made her comments to Wright in the presence of Cal Fire's Joshua White destroyed any possible privilege, as Magistrate Judge Brennan's order confirms that White's status as an expert makes any discussions in his presence discoverable. Any contention that Defendants knew of Welton's perjury on this front before entry of the federal judgment is demonstrably incorrect.

g. Defendants Discovered Facts Proving That the Moonlight Prosecutors Had Reason to Know the Fire Started Elsewhere After Entry of the Federal Judgment.

After the federal settlement, Defendants learned that the government failed to disclose certain exculpatory evidence associated with the Air Attack video. Specifically, the government attorneys did not provide Defendants with the handwritten notes created by their expert, Larry Dodds, a fire origin and cause expert jointly retained by the federal and state prosecutors under their Joint Prosecution Agreement. Defendants deposed Dodds first in the federal action and, after the federal settlement, again in the state action. In his later state deposition, Dodds produced handwritten notes that he prepared while he was retained as an expert in the federal action, but which the Moonlight Prosecutors had never produced or disclosed to Defendants.

[53] To help put this in perspective, ocean search and rescue teams do not expand the territory of their search *after* they have already found the stranded vessel, and neither do wildland fire investigators *after* they have already found the point of origin of a fire.

The notes reveal that Dodds struggled in consultation with the Moonlight Prosecutors to reconcile the location of the government's alleged origin with the Air Attack video, particularly joint federal/state expert Chris Curtis's placement of the alleged origin in the video frames.

For example, in his handwritten notes, Dodds writes: "Chris Curtis testified to separation between the GAO [government's alleged origin] & the smoke seen in the AA [Air Attack] video." Dodds confirmed during his state deposition that these notes reflect his understanding of Curtis's federal testimony. When questioned in the state action about this note, Dodds admitted that during a meeting with the federal prosecutors, Curtis discussed his opinion about the "separation" between the smoke and the government's origin. Thus, it was only after settlement of the federal action that Defendants learned that a jointly retained federal and state expert Chris Curtis had concluded and announced to a group including the federal prosecutors that he was concerned that the aerial video showed that the alleged point of origin was not yet burning at 3:09 p.m. some three hours after the fire was alleged to have started there. Defendants did not learn this until Dodds' notes on his discussions with Curtis were revealed in the context of the state action. Of interest, Taylor is silent in her declaration regarding Curtis' announcement to her and others during the federal action, and its import, and so is the government's brief. Instead, she claims in her declaration she was unaware of Dodds's note, which begs more questions.[54] What about Chris Curtis's statement to her? Who else did she speak with besides Curtis who believed the fire had not yet burned the alleged origin when the video was taken? What information did other members of the prosecution team have? Again, Taylor's declaration raises more questions than it answers.

h. Defendants Discovered Additional Facts Tending To Show Intent After Entry of the Federal Judgment.

Defendants learned for the first time in 2014 that former Assistant United States Attorney E. Robert Wright, who initiated the Moonlight Fire federal action, was forbidden from working on the case in January 2010, shortly after raising ethical concerns regarding disclosures in

[54] Even if it were true that Taylor was unaware of this exculpatory evidence in the form of Dodds's note in his federal expert files, Taylor's statement that she was unaware is irrelevant. Prosecutors have an obligation under Brady to search out, locate, and turn over the exculpatory evidence, especially when it is held by their own agents. Ignorance is not a defense under Brady under these circumstances.

another wildland fire action he was handling. Wright was engaged in a struggle with civil chief David Shelledy, who pressured Wright not to disclose a document that would have revealed a $10 million overcharge in the government's damage claim against private litigants in another case. These facts tend to show intent as they are consistent with the conclusion that the transgressions of the government in the Moonlight Fire action are not a function of incompetence or inadvertence, but instead are purposeful. None of these facts concerning Wright's termination from the Moonlight Fire matter, or Shelledy's misconduct in other cases were known until 2014.

i. The Neutral Evaluation of the Facts by Hon. Leslie C. Nichols

As indicated in their opening briefing, fraud on the court under Rule 60(d)(3) must be established by a clear and convincing evidence standard. While Defendants were aware of some of the investigators and prosecutors' acts of malfeasance, it was not until February 4, 2014, in the context of the state court action, that Defendants received orders from Hon. Leslie C. Nichols, the first neutral arbiter to have considered the body of evidence concerning the investigation and the Moonlight Fire prosecution. Judge Nichols prepared an order written in his own voice (not by Defendants, as falsely alleged by the government) and which he read word-for-word from the bench on February 4, 2014, to a packed courtroom. Therein, he found after spending countless hours reviewing every piece of evidence provided by both sides, including videotaped testimony, that the investigation and prosecution were, among so many other things, "corrupt and tainted," that the acts of Cal Fire were "too much for the administration of justice to bear" that his sense of "disappointment and distress" was "palpable," that the Moonlight Fire investigators had "repeatedly" testified falsely under oath, that the Joint Report contained numerous falsehoods, and that Joshua White had destroyed his field notes and computer files in bad faith. Importantly, Judge Nichols ruled that his findings were supported by the higher "clear and convincing" evidence standard. None of this information was available to Defendants until February 4, 2014.

D. The Government's Contention that there Can Be No Fraud on the Court Because It Provided Some Material upon which Defendants Now Rely is Mistaken.

Large portions of the government's opposition are devoted to arguing that there is no relief available under Rule 60(d)(3) because it produced certain documents in discovery that revealed a portion of what Defendants allege was a broad scheme to defraud the court. Put differently, and by way of example, the government argues that perjury by a witness, even with an officer of the court's participation, can never give rise to relief under Rule 60(d)(3) when the facts revealing the perjury can be found in documents produced in discovery. The government advances the same argument with respect to the presentation of perjured declarations to the Court, as well as perjured interrogatory responses, false exhibits, and false diagrams. But while the government devotes no less than seven sections of its brief to this issue, it fails to cite a single case in support of its novel proposition. There is no case authority to support this wholly invented rule, and the government's argument fails for at least four independent reasons.

First, as explicated herein, the government's claim that Defendants' motion is not based on suppressed evidence, and that the government produced everything, is incorrect. In this regard, the government goes so far as to assert that:

> Sierra Pacific can say a thousand times that some piece of evidence was "suppressed"; the truth is the United States produced in discovery the very evidence Sierra Pacific relies on in its motion. Responsible people do not call this fraud on the court. They call it litigation under the Federal Rules.

(Opp. at 49:13-16.)

The government is mistaken. For instance, the government admits that it *never* provided Defendants with evidence of Edwin Bauer's false claim that defense counsel offered him a $2 million bribe to secure his son's confession for starting the fire. Certainly concealing that fact alone is easily as significant as hiding the drop-test video in Pumphrey, or the actual progeny of an article on the novelty of the claimed invention in Hazel-Atlas. That evidence alone, which the government concealed from the Court and Defendants while making a successful motion under Federal Rule of Evidence 403, justifies relief under Rule 60(d)(3) and termination of the action. Indeed, in its Opposition, the government remains evasive about the body of documents

and evidence that exist concerning this issue, not a single one of which has ever been produced.

In addition to the false allegation of the bribe, there are numerous other instances of fraud, evidence of which was obtained from sources other than the government after the entry of judgment in the federal action. Those issues are fully responsive to the government's false claim that it produced everything and suppressed nothing. In the end, "peeling back the layers of the onion" to discover the government's fraud on the court took Defendants four years in two different forums, and involved painstaking discovery. Had Defendants relied on the government's representations in its verified interrogatory responses, responses to requests for admission, or the origin and cause report prepared by the Moonlight Investigators – as Defendants would have been able to if the government had conducted an honest investigation and prosecution – they would never have discovered any of these instances of fraud.

Second, the Court can and should reject the government's arguments in this regard because they contravene the clear directive of this Court's November 24, 2014, order. The Court is not resolving disputed issues of fact, and the parties are to assume all of Defendants' allegations are true. (Docket No. 618.) Defendants have alleged that the government investigators and prosecutors acted within a carefully planned stratagem designed to intentionally mislead this Court and intentionally subvert the judicial process. The government was to take those allegations as true. But in an apparent effort to set up some form of affirmative defense that does not exist, or perhaps in an effort to buttress its denial of these allegations, the government claims that because it was the source of some of this evidence, its misconduct could not have been intended to defraud. But the government's allegation squarely contradicts Defendants' allegation, which must be assumed true. For this reason, and because these sections of the government's brief violate the Court's order regarding the scope of permissible briefing, the Court should ignore them.

Third, the government's contention that there can be no fraud on the court if the defrauding party is also the source of the evidence that reveals a certain aspect of the fraud is wrong as a matter of law. Specifically, Ninth Circuit precedent forecloses the government's argument that, because it provided pieces of evidence pointing in the direction of fraud,

contained within a quarter of a million pages of documents, it is somehow exonerated from any claim that they committed a fraud on the court. In Pumphrey, the Ninth Circuit addressed a similar argument. There, defendant's counsel provided answers to interrogatories "admitting that the gun fired during a drop test." 62 F.3d at 1133. The gun company therefore later argued that there was no fraud on the court because the defendant provided these answers and the plaintiff "fail[ed] to uncover the alleged fraud, after receiving [these] interrogatory answers . . . ." Id. This argument is fundamentally the same one the government makes here – that because it provided Defendants with the means to uncover at least some aspects of the fraud it perpetrated, there is no fraud on the court. The Ninth Circuit squarely rejected this argument, stating: "Nor do we agree with [the defendant] that [the plaintiff's] failure to uncover the alleged fraud, after receiving [the defendant's] interrogatory answers admitting that the gun fired during a drop test, should bar this action." Id. The court relied on several reasons, not the least of which was that "even assuming [the plaintiff] was not diligent in uncovering the fraud, the district court was still empowered to set aside the verdict, as the court itself was the victim of fraud." Id. (citing Hazel-Atlas, 322 U.S. at 246).

Ultimately, the question is whether the Court was defrauded, and the government makes no showing, because it cannot, that it revealed all the pertinent documents in meaningful form so as to allow the Court itself to appreciate the full nature and extent of the fraud here. Indeed, with so many acts of evasion, the government failed to act with candor to the court and the parties, for example telling its investigators that the white flag and its attendant concerns were a "non-issue," and worked to impede Defendants' ability to defend themselves at every turn.

Accepting the government's position on this issue would be to approve of litigation misconduct in an expansive way. Under the government's bizarre version of "litigation under the Federal Rules," lawyers working under our Department of Justice are apparently free to encourage and/or sit on their hands with respect to false testimony, produce false documents or false exhibits, advance false arguments to the court, or conceal material facts critical to the court's rulings, so long as the true facts can be gleaned somewhere among the thousands and thousands of documents produced at some point by counsel. In essence, the government asserts

that litigation is a game, in which all conduct – including fraud – is acceptable so long as the party committing the fraud leaves a trail of breadcrumbs so that the opposing party, through diligent discovery born of deep skepticism, can follow the trail and, if it is lucky, reveal the truth. This tactic is precisely the one the government apparently believes it took with respect to the Red Rock Lookout Tower and its answer to Defendants' interrogatory about the activities that took place there. The government's false response is apparently absolved because Defendants chose to keep digging for more facts, ultimately leading the government to provide the information it should have provided to begin with.

That the government embraces this mode of litigation explains so much about what went wrong in the Moonlight Fire action. But that is not legitimate advocacy, especially by those charged with seeking justice, and it most definitely is not what "litigation under the Federal Rules" is designed to be, nor is it consistent with any proper search for the truth. Indeed, this conception of "litigation" is incongruent with the Supreme Court's directive that "[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). The government apparently took to heart Berger's statement that it may prosecute cases "with vigor," but missed the corollary point that "while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones." Id. It is therefore the duty of the government, in prosecuting a case, to "refrain from improper methods." Id. The conception of advocacy advanced by the government disposes with this requirement in one fell swoop. As with so many of its other positions on this motion, that the United States would advance such an argument is reason for alarm far beyond the confines of this action.

Fourth, the government's contention that it produced all documents is not supported by Defendants' allegation. In an effort to rebut these allegations, in violation of the Court's order, Assistant United States Attorney Taylor uses her declaration to outline what she produced and when she produced it. Because it violates the Court's order, Defendants object to it and ask that it either be stricken or ignored in its entirety. In the event the Court nevertheless reviews and

considers it, Taylor's declaration is more significant for what it fails to state and ultimately raises more questions than it answers. For example, Taylor says nothing in her declaration about the January 2011 joint meeting with the Deputy Attorney General to prepare David Reynolds for deposition. She fails to reveal what she told Reynolds about his testimony concerning the false points of origin and the transplanted evidence. Taylor says essentially nothing about the transplanted evidence, the false points of origin, or the white flag other than to identify which documents were produced and when. Taylor never claims she did not realize White and Reynolds were lying, nor does she state that she believes their testimony was truthful. Instead of addressing any of these key issues, Taylor instead attempts to create the misimpression that she did not prepare Reynolds for his deposition, and that she did not personally attend any portion of his deposition, when in fact she did prepare him and did attend portions of his deposition in person.

As indicated elsewhere in this briefing, Taylor's declaration says nothing at all about the alleged bribe, and provides nothing regarding the universe of evidence that surely exists relating to this issue. Taylor provides no statement about why she failed to disclose to the court facts of the bribe allegation in the context of her successful motion to preclude evidence regarding the Bauers. Surely if the non-disclosure was inadvertent, she would have said so, and given her belated and baseless claim of privilege, she gives every indication that this concealment was purposeful.

With respect to all of the abuses associated with the Red Rock Lookout Tower, Taylor is silent about one of the central issues –her false interrogatory response for which she secured a false verification under penalty of perjury by Larry Craggs. Taylor distracts from this critical issue by only focusing on those documents she produced. She provides no discussion about whether she knew Welton was testifying falsely, no discussion about why she prepared a false interrogatory response, and no discussion about whether she knew the witness statements were false. Essentially, Taylor claims that so long as she buries some of the related documents in a pile of a quarter million unrelated documents, the government can be dishonest about the true facts unless and until Defendants find the needle in the haystack, at which time the government

may simply pivot toward the truth without consequence.

With respect to WiFITER, Taylor claims to have been ignorant about the true facts. But as explained more fully elsewhere in this briefing, her ignorance of facts associated with WiFITER, which are directly relevant to the credibility of the lead investigator regarding all that the investigators found in the course of their investigation, and all that they destroyed, provides no excuse for this nondisclosure. Taylor's protestations that she knew little if anything about WiFITER are contradicted by her motion in limine representation to the Court that WiFITER was "a separate public trust fund." Moreover, her contention that she knew little or nothing about this fund only serves to underscore that these representations to the Court made recklessly. Taylor also begins her declaration stating that she has personal knowledge about everything in the declaration. She then claims that the United States had no documents concerning WiFITER. But she provided no foundation as to how she made that determination on behalf of the entire United States.

Similarly, Taylor's declaration with respect to the Lyman, Sheep, and Greens Fires provides more questions than answers. With respect these three fires, Defendants demonstrated that the investigatory conclusions regarding these fires were bogus and manufactured to buttress the claims against these Defendants for the Moonlight Fire. Tellingly, Taylor claims that she did not intend to call any of the investigators of those other fires as trial witnesses. But Taylor never explains herself in this regard; she never addresses whether she understood the reports of these other fires were fraudulent, or whether she understood the investigators had given false testimony about them. Moreover, it is worth noting that Defendants uncovered the fraud regarding these investigations largely through cross-examination of Cal Fire and other witnesses, and not through documents Taylor produced.

Notably, Taylor provides no discussion about her interactions with Assistant United States Attorney Overby. She gives no information about whether he raised ethical concerns with her, and if so which concerns – an important and relevant topic, as he essentially told Defendants' counsel that he was leaving the Moonlight Fire prosecution in disgust. She also provides no discussion about former Assistant United States Attorney Neil MacDonald or

whether he raised ethical concerns. Interestingly, Taylor does not deny that when Overby left the Moonlight Fire prosecution team, he admonished her that she worked for the "Department of Justice, not the Department of Revenue," or with other words to that effect.

At bottom, whether some of the documents produced by the government might be used against it as evidence that the government engaged in a fraud upon the court does not exculpate the government. There is no question that many of the governments' fraudulent acts were not revealed by the government or their documents, and were instead affirmatively suppressed. Ultimately, there is no safe harbor under controlling authority for the government's conduct here, nor should there be. Indeed, to the extent the government possessed so much of the evidence that reveals its misconduct, this fact does not erase the fraud on the court – it underscores it.

E. The Government Raises Ethical Violations Untethered to the Issues Before the Court on this Rule 60(d)(3) Motion

At every opportunity, the government has made a point of raising two instances of "professional misconduct" by lawyers for Sierra Pacific. Predictably, its opposition brief is no different. Because of that, Sierra Pacific briefly addresses these issues, even though they have nothing to do with whether the government engaged in a fraud on the court.

The first incident pertains to a Sierra Pacific lawyer attending a public tour in the mountains of Northern California. Four years ago, the U.S. Forest Service invited the public to a presentation regarding the implementation of a federal law relating to forest management, the Herger-Feinstein Quincy Library Group Forest Recovery Act. The Herger-Feinstein legislation was, among other things, supposed to create defensible fuel zones in the area where the Moonlight Fire began, but its implementation had been significantly delayed. Lead counsel for Sierra Pacific, William Warne, asked an associate at his firm, Michael Schaps, to attend this public presentation. The associate made the long drive to the town of Chester, and when he arrived, learned that the event was not as anticipated. As it turned out, the Herger-Feinstein presentation involved attendees riding in government vehicles, filling out volunteer forms, and close interactions with U.S. Forest Service employees who drove the vehicles. Members of the

press were present as well. These U.S. Forest Service employees asked the associate questions about his background and interest in the Herger-Feinstein Act. In response, the associate did not reveal his affiliation as an attorney for Sierra Pacific or his work on the Moonlight Fire litigation.

The government learned what had transpired and filed a motion for a protective order and sanctions. At the time, the government did not contend that the associate's attendance at the Herger-Feinstein presentation violated any ethical rules, and did not contend that the associate was restricted from communicating with employees of the U.S. Forest Service outside the presence of counsel, but did contend that the associate had violated ethical rules by not disclosing his affiliation as an attorney for Sierra Pacific. While Sierra Pacific disagreed with this characterization, the Court did find that an ethical violation had occurred. In addressing this issue in the briefing that was filed, lead counsel William Warne assured the Court that it had been and would continue to be his policy for attorneys working on the case to identify their relationship to Sierra Pacific and their involvement in the litigation before talking with government employees about the Moonlight Fire.[55] The Court then ordered counsel to do so.

Throughout the remainder of the case, defense counsel did their best to scrupulously comply with this order. Accordingly, when one of their experts, a Bureau of Alcohol, Tobacco, and Firearms agent, asked whether he could contact two of his former colleagues in the ATF to ask questions about a suspected arsonist, Sierra Pacific attorney Meghan Baker instructed him to clearly identify himself as a consultant working for Defendant Sierra Pacific on the Moonlight Fire litigation. The consultant attests under penalty of perjury that he carried out this instruction. The government learned about this contact, and filed a motion for contempt and for a protective order, arguing that the consultant had not identified himself as required and, contrary to its earlier arguments, that the California Rules of Professional Conduct precluded contact with all federal employees. Judge Brennan denied the request to hold counsel in contempt, but did find that an ethical violation occurred by virtue of the consultant's contact with the federal

[55] The government wrongly asserts in its brief that Mr. Schaps was "acting on instructions from William Warne, Esq., when he misrepresented himself as only an interested member of the public in order to obtain evidence ex parte from line employees of the Forest Service." (Opp. at 7.) While Mr. Warne did instruct his associate to attend the event, he did not instruct him to "obtain evidence ex parte from line employees of the Forest Service."

employees. In so ruling, Judge Brennan acknowledged that under California case law, such contact would not constitute an ethical violation, but found this California case law unpersuasive because of differences in federal and state evidence rules on party opponent admissions.[56] Sierra Pacific sought reconsideration of this aspect of the ruling on February 8, 2011; that motion was still under submission with the district court judge at the time of the settlement and dismissal order on July 18, 2012. (Docket No. 328.)

Counsel for Sierra Pacific fully appreciate how critical the Rules of Professional Responsibility are to our profession and to the practice of law, and acknowledge that any violation of the rules, even when inadvertent, should be subject to critical scrutiny. But these incidents are not relevant to incidents punctuating the prosecutors' long running scheme to defraud this Court. At each turn, they engaged in gross acts of misconduct, repeatedly breaching their ethical responsibilities and their obligations to this Court.

The prosecutors are not fooling themselves. They know that these incidents are simply a vehicle to suggest that their victims and accusers are guilty of imperfection too, "so who are they to accuse us?" But this effort to manufacture a false equivalency between these two incidents and what the prosecutors themselves have done in this matter is absurd. This aspect of the government's briefing should for be read for precisely what it is – an effort by the government to distract the Court from the gross misconduct these prosecutors engaged since the removal of AUSA Robert Wright.

VIII.
DEFENDANTS HAVE ALLEGED CONDUCT THAT CONSTITUTES A FRAUD UPON THE COURT

Defendants have already addressed most of the arguments advanced by the government regarding the fraud on the court inquiry. In light of that, Defendants have not attempted to

[56] Under the Eastern District Local Rules, California cases regarding the California Rules of Professional Conduct are adopted as part of the standards of professional conduct in this court. (E.D. Local Rule 180(e).) For that reason, Sierra Pacific argued in its motion for reconsideration: "Judge Brennan's ruling provides no reasonable basis for construing Rule 2-100 differently in federal court than in California court, and also fails to account for his own previous order's express blessing of precisely what counsel for Sierra Pacific did. If allowed to stand, it will affect the reputations of three attorneys who have not violated any established ethical limitations . . . . Finally, it will impose a different standard of conduct on attorneys practicing in this Court than applies in California court—even though Local Rule 180(e) expressly incorporates the California standard." (Docket No. 328 at 1-2.)

rehash all of the instances of fraud in this brief. A few instances of the fraud, however, are worth revisiting in light of the government's opposition arguments, and these are addressed briefly below. Additionally, a few of the themes that the government repeatedly returns to in its opposition, and that have not already been addressed above, are addressed below.

A. Fraud on the Court Exists Where Government Prosecutors Conceal Evidence That Its Material Witness Fabricated Bribery Allegations to Bolster His Story While Simultaneously Moving to Obtain a Favorable Pretrial Ruling Based on that "Lack of Evidence."

Edwin Bauer was a critical witness in this case. He was also the subject of significant scrutiny by these Defendants. According to the undisputed testimony set forth in Defendants' opposition to the United States' Federal Rule of Evidence 403 motion in limine, a private patrolman discovered Bauer and his wife Jennifer Bauer deep in the woods shortly after the fire was first reported, so close to the fire's inception that they were in the spray of the fire retardant bomber that flew overhead. He told the patrolman they were looking for their son, Ryan Bauer, who had told him that he was going to be in the area cutting firewood that day. One thing not included in Defendants' motion in limine opposition was the fact that Bauer just told the Moonlight Prosecutors that Mr. Warne and Sierra Pacific Industries had purportedly offered his son $2 million if he would just say that he started the Moonlight Fire. And that's only because the government did not tell Defendants about this representation. Nor did it tell this Court before it granted the government's motion, and issued a devastating ruling barring Defendants from arguing that any other party may have been responsible for having ignited the Moonlight Fire.

Bauer's false allegation of a multi-million dollar bribe by Downey Brand incriminates both Bauer and his son in a failed attempt to secure their safety regarding this matter – a final piece in a long running effort to make sure that the government succeeded in pinning blame on the wrong (but far wealthier) parties. The government opposition's sardonic treatment of Bauer's false claim of a bribe, coupled with the fact that it, uncharacteristically, does nothing to explain it by offering extrinsic evidence, speaks volumes. The government hid this material evidence from the Court during its critical June 26, 2012, motion in limine to exclude evidence pertaining to Ryan Bauer. Today, it is no more forthcoming.

The government's arguments violate the first rule of holes: when you're in one, quit digging. Quibbling about Defendants' quotation marks around the word "shred" does nothing to change the fact that during its all-important Federal Rule of Evidence 403 motion, when asking the Court to engage in a careful fact-specific balancing inquiry about whether to admit evidence that someone other than Defendants started the fire, the government knew, but did not reveal facts in its sole possession – facts that were clearly material to the Court's inquiry. In its opposition, the government scrambles for an excuse that does not exist, specifically quoting its initial statement to the Court that there was no "shred of physical evidence or expert support." From that, it argues that there was no misrepresentation because it did not actually tell the Court that there was no evidence at all.[57] (Opp. at 100:28-20.) Such arguments from lawyers working for our Department of Justice are distressing. Essentially, the government suggests that it is fine for them to make arguments so long as they are based on omissions and that it is somehow acceptable to allow the Court to proceed based on half-truths. But of course it cannot.

In Tiverton Board of License Commissioners v. Pastore, 469 U.S. 238 (1985), the Supreme Court stated, "It is appropriate to remind counsel that they have a 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation." Id. at 240, 105 S. Ct. at 686 (quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J. concurring)). In Shaffer Equipment Company, the government attorneys "omitted" mentioning that a material witness misrepresented his academic credentials and that he was being criminally investigated.[58] Here, the government omitted information revealing that a material witness was

[57] Though a detailed examination of the government's representation is irrelevant on this motion, at the time of the motion there in fact was "physical evidence," including the sawdust on Ryan Bauer's clothing and the chain saw in his pickup as he raced down the mountain to his girlfriend's house shortly after the fire started. There was also "expert support" in the form of arson expert Steve Carmen's testimony. These facts are not relevant at this juncture, but they demonstrate that then, as now, the government slices the baloney quite thin.

[58] Of course, in Shaffer, the trial court terminated the action for the government's fraudulent omissions. While the Fourth Circuit reversed in favor of imposing a lesser sanction short of outright dismissal, it affirmed the finding that the government attorneys had violated their duty of candor to the court. Reading the case as a whole, the court of appeal appears to have reversed the imposition of terminating sanctions largely because the government's deceit pertained to the qualifications of an expert whose decisions associated with the clean-up arguably exacerbated the government's damage claim. In this regard, $1 million (of an overall $5 million claim) was incurred on a solvent extraction remediation method that was unsuccessful, which the government then attempted to impose that expense on defendants. Nothing in Shaffer suggests that defendants had any prospect of avoiding liability altogether had the expert qualification issue been properly disclosed. Thus, in light of nature of the government's deception and its impact on the case, the court of appeal affirmed the findings that the government attorneys violated their ethical

fabricating evidence of a bribe and that a federal investigation ensued. There can be no question that the allegation as pled shows that the prosecutors violated their duty of candor to this court, and that it was part of a broader scheme to affect the administration of justice in this case. There can be no question that regardless of the state of discovery in the case, they had an affirmative obligation as officers of the court to reveal the existence of the bribe allegation to Defendants and to the Court. The fact that they affirmatively filed a motion to keep all Bauer evidence away from the jury and to preclude Defendants from arguing that the Bauers, or anyone else, was responsible for the fire made their duty to disclose this key information that much more critical. The government's present effort to backpedal from the language that it employed in its in limine motion is perhaps now understandable, because -- as it turns out -- there was far more than a "shred" of evidence that the Bauers were prevaricating regarding their actions, conversations and observations that day in the forest when the fire started. It is undisputed that Edwin Bauer and his wife were present in the area of the fire shortly after it started, searching for their son, who they understood was cutting wood in the area.[59] When interviewed by fire investigators on September 7, Edwin Bauer falsely attempted to blame one of Howell's bulldozer operators for the fire. He claimed that while looking for his son shortly after the fire began, he stopped and asked one of the bulldozer operators how the fire started. He reported that the operator replied that a "bulldozer hit a rock." He offered no explanation as to how the operator could reach such a conclusion so quickly. The Moonlight Investigators never scrutinized this allegation, never asked the bulldozer operators whether it was true, and never asked the operators why, if they saw

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obligations, including the duty of candor, and left it to the trial court to fashion an appropriate sanction short of outright dismissal. Shaffer, 11 F. 3d at 463.

Here, the government's fraud on the Court and these Defendants regarding its suppression of the false bribe was directly related to the core question of liability in the case, and whether another individual was responsible for the fire. The government's intentional concealment of this material information constitutes a classic fraud on the court, a critical component of an overarching scheme to thwart the proper administration of justice.

[59] Defendants alleged that Ryan Bauer, who ran a side business cutting and selling firewood, told his parents that he was going to out to cut firewood on the morning of September 3. He had a modified "hot-rodded" chain saw with greater horsepower and a lack of key fire safety components. He testified that he went to his favorite place to cut firewood, which is the same area where the Moonlight Fire started. After the fire started, he encountered a Lassen County deputy sheriff as he sped away with a chain saw in his pickup. Four days later, he offered an unsolicited false alibi that he was with his girlfriend all day, which was never followed up by Moonlight Investigators. This was the first of many lies and attempts at misdirection by Bauer, who ultimately invoked the Fifth Amendment in response to questions regarding his involvement with the fire.

the nascent ignition, they were unable to suppress the fire. These facts suggest that the Moonlight Investigators concluded that this conversation never happened, and both bulldozer operators denied having made any such statement.

On this front, Bauer is consistent, as he again attempted to deflect attention from himself and his son shortly before the federal trial when he was served with a trial subpoena by Moonlight Prosecutors Kelli Taylor and Richard Elias in the spring of 2012. At that time he told Taylor and Elias that his son's counsel, Susanville attorney Eugene Chittock, told him that Downey Brand was willing to give Ryan Bauer $2 million in exchange for admitting that he started the Moonlight Fire. Bauer repeated this misrepresentation to federal investigators and, eventually, long after the federal settlement, to Downey Brand's lead trial counsel, Bill Warne. In this regard, Bauer's revelation amounted to an "I'm still in control" jab he could not stop himself from delivering after Warne told him that he could not return the hard drive copy he possessed by way of a court order in the state litigation. In any event, defense counsel was fascinated and promptly called Chittock, the person Bauer identified has having delivered the bribe for Mr. Warne and Sierra Pacific.

The government spends much of its time in an effort to persuade this Court to accept Edwin's bribery allegation as true. For example, it attempts to call into question Chittock's emphatic denial by offering Edwin Bauer's further misstatement that Chittock told him "it could have happened." Aside from the fact that Bauer's iteration of Chittock's reaction is not an "allegation" that Defendants pled and that the parties should treat as true (whereas Chittock's version of events was pled and should be assumed true), there is no reason to believe that Bauer's further embellishment of his original lie would not also be false.

The government also urges the Court to ignore the law and Defendants' allegation that the Moonlight Prosecutors "concluded that the allegation was false" based on the fact that Defendants pled the allegation on information and belief. (Opp. at 99:12-18.) However, allegations based on information and belief must be accepted as true on a motion to dismiss. Blantz v. California Department of Corrections, 727 F.3d 917, 925 n.6 (9th Cir. 2013). The government goes on to opine that "[w]e do not know whose version of this 'he said, she said' is

true." (Opp. at 99:14-15.) But in reviewing the Court's order regarding this briefing, which directs the parties to "assum[e] the truth of Sierra Pacific's allegations," we *do* know what version to accept as true. (Docket No. 618 at 2:11-16.) It is telling that, unlike other areas of its briefing, the government makes no attempt to directly rebut this allegation about its conclusions by revealing them in the declarations of the Moonlight Prosecutors it offered on this motion. More importantly, if there is currently a question about the truth of the matter, that question only exists because the government ignored its duty to disclose the evidence to both the Court and counsel at a critical stage, long before the case reached this juncture. Indeed, this is but one example of the very harm caused by fraud on the court. The government intentionally concealed material evidence about a false bribe, denying Defendants and the Court the opportunity to conduct an investigation into its progeny as well as any ability to derive conclusions as to what it means about the Bauers' involvement in starting the fire. That it withheld this evidence at a time when the Court was engaged in a sensitive balancing of factors to make a decision on whether Bauer related material would be allowed into evidence, and whether Defendants would be permitted to argue that someone other than themselves ignited this fire, is yet another example of just how far these prosecutors were willing to go to protect the viability of their favored conclusions. This is precisely the kind of conduct courts look to when assessing whether a party engaged in fraud on the court.

Regardless, Defendants' "information and belief" regarding the Moonlight Prosecutors' conclusions about this allegation is sufficient, particularly given the history of sanctions motions in this case. There is little question about what the government would have done if it truly believed in the months leading up to trial that Sierra Pacific's lead trial counsel, a partner and Executive Committee member of Sacramento's oldest and largest law firm, had actually offered a multi-million dollar bribe to a key witness in a billion dollar case. It would not only have been the subject of another sanctions motion, but the centerpiece of a major criminal indictment under 18 U.S.C. Section 1512,[60] along with front page news and the rightful destruction of Downey

[60] In pertinent part, 18 USC § 1512, provides, "[w]hoever . . . corruptly persuades another person, or attempts to do so, with intent to . . . influence . . . the testimony of any person in an official proceeding . . . shall be fined under this title or imprisoned not more than 20 years, or both."

Brand's reputation in this community. Indeed, in view of their duty of candor to the tribunal, the Moonlight Prosecutors had an absolute obligation as a matter of pure logic to report the bribe allegation to the Court regardless of whether Bauer was being truthful since it necessarily demonstrates that either an attorney in the case was attempting to subvert the judicial process (if Bauer is to be believed), or that a material witness was, if Bauer was lying, which he of course was.

The fact that the government now attempts to persuade the Court that Downey Brand and Sierra Pacific offered a bribe – despite the fact that it does not believe it is true and despite the fact that the Court ordered the parties to assume the truth of Defendants' allegations on this briefing – is emblematic of the manner in which it has proceeded in this case from beginning to end. It purports to offer "evidence" (when ordered not to) to "demonstrate" this absurdity to the Court, even though it is the only party that had an opportunity to probe the facts, and it does so with no regard for the reputations of a respected firm and member of the bar.[61] This is yet another example of the advantage to be gained by hiding evidence, which is why such tactics are not permitted and why it is vital that they be rooted out and redressed.

Ignoring their broader duty of candor, including their "continuing duty to inform the

[61] As "evidence" that Mr. Warne offered the bribe, the government states that: "[t]he claim that there was only one phone call between Mr. Chittock and Downey Brand is highly improbable, since they are co-counsel for the same party on at least one major case that was actively litigated throughout 2012." (Opp. at 99:18-21.) However, Sierra Pacific never made such a claim as to "Downey Brand." The actual allegation was: "Mr. Chittock informed the federal employees that all they would find was a record of a single phone call he had received from Sierra Pacific's counsel Warne, who was in the process of scheduling the continued deposition of Ryan Bauer" and "[a]fter finding nothing beyond a record of that single call, the federal employees left." (Supp. Brief at 128:1-8.) The significance of the manner in which the government twisted these alleged facts is two-fold. First, it aggregates "phone calls from Warne on the Moonlight matter" with "phone calls from Downey Brand" in a manner implying that Mr. Chittock or Downey Brand misrepresented the number of phone calls between Mr. Chittock and Mr. Warne to this Court. Second, it takes the focus off what the federal investigators found, which at this stage, only the government knows because it buried this information and stifled Defendants' ability to discover the true facts. The government then builds on (what it knows is) a fiction by submitting as "evidence" the docket and captions from the case Lassen Municipal Utility District v. Kinross Gold, 2:11-cv-00255 MCE KJN (United States Request for Judicial Notice, filed 2/17/15 (DKT 631) at 1:24-27). Significantly, the Kinross captions demonstrate that neither Mr. Warne nor any other Downey Brand attorney of record on this case are attorneys of record in the Kinross matter. It is unremarkable that a firm which at the time had well over 100 attorneys works on multiple cases with other attorneys throughout the region. Using six-degrees-of-separation to suggest that because one Downey Brand attorney is working with Chittock another Downey Brand attorney on an unrelated matter must have offered Chittock's client a bribe is ridiculous. The fact that such innuendo would be offered to the Court to bolster Edwin Bauer's original fabrication by the only party with sole possession of a complete factual record is more than disconcerting, but unfortunately not inconsistent with so many other acts taken by the Moonlight Prosecutors on this matter.

Court of any development which may conceivably affect the outcome" of the litigation as described by the Supreme Court, the government's argument that it was acceptable to withhold from Defendants (and the Court) any notice whatsoever of the bribery allegation because attorney notes are work product, is without any merit, unduly narrows the scope of the information that the government concealed, and side-steps the law at issue. "Attorney notes" are merely one potential manifestation of the evidence that may exist regarding this allegation.[62] Parties of course have an ongoing duty to supplement their initial disclosures "in a timely manner" upon determining that their initial disclosures are materially incomplete or inaccurate. Fed. R. Civ. P. 26(e)(1)(A). They also have a duty to supplement disclosures about every person likely to have information and the subject of that information. Fed. R. Civ. P. 26(a)(1)(A); id. 26(e)(1)(A). The duty to supplement continues even after the close of scheduled discovery. See Adv. Comm. Notes on 1993 Amendments to Fed. R. Civ. P. 26(e) ("Supplementations . . . should be made . . . with special promptness as the trial date approaches"); Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc., 272 F.R.D. 350, 358 (WDNY 2011) ("[T]he duty to supplement continues even following the close of discovery"). Here, documents concerning this bribe were clearly called for by several of Defendants' Rule 34 document requests.

In any event, there is no authority for the proposition that an attorney may unilaterally withhold all information regarding a material issue – including the existence of the issue itself – and do so at such a critical time because they can conceive of a potential privilege that may apply to a particular document or a portion of a particular document. See Fed. R. Civ. P. 26(b)(5)(A) (requiring a party to expressly claim a privilege and describe the nature of the document in a manner that will enable other parties to assess the claim). That is not how our system works.

[62] Though the government's brief indicates that "attorney notes" exist, it provides no indication about what other evidence exists. Unlike its other arguments for which it offers over 3500 pages of documentation and declarations from the Moonlight Prosecutors, Taylor's declaration is eerily silent about what she knew about this issue, when she knew it, and what she discovered and/or received from the federal investigators or Bauer. She provided no information about all the evidence of the bribe allegation that may exist, and in what form it exists. Indeed, one wonders why, if it is clear that this is not information that required disclosure to the Court and Defendants' counsel, the government is still reluctant to shine the light of truth on these facts. Instead, it proclaims: "[w]e had no obligation to share such information with the defendants before judgment, and we will not share it with them now." (Opp. at 100:4-6.)

But for the government's concealment, any privilege claim regarding documents related to the bribery allegation would have been addressed by the Court in due course. The government's failure to provide notice that an issue even existed subverted this process. Taylor's attempt to find cover by alleging the parties agreed not to require privilege logs for privileged materials created during the pendency of the action is unavailing. Because she provided no information about what documents concerning the bribe exist, she necessarily provides no evidence that every piece of evidence concerning the bribe was privileged. Moreover, even assuming for the sake of argument a piece of a document concerning the bribe contained privileged material, there was never any agreement that a party could withhold an entire document or body of materials on the ground that a portion of one document constitutes work product.

The Moonlight Prosecutors' belated and baseless privilege assertion is extremely disconcerting for yet another reason. According to their view of the duty of candor, announced for the first time in their opposition to this motion, they were free to make devastating Federal Rule of Evidence 403 exclusionary motions (which here were granted), while withholding from the Court and Defendants *any and all* relevant information so long as the information came into their possession through attorney witness interviews, as reflected in attorney interview notes. This begs the question, what other information did they withhold from this Court on this basis? By their reasoning, they were perfectly free to also have withheld from the Court an *actual confession* by Bauer or someone else for having ignited the fire. According to the Moonlight Prosecutors, they were free to conceal such a confession by a third party from defendants and the Court, while making a motion and securing an order prohibiting defendants from arguing that anyone else may be responsible for the fire.[63] That the United States Department of Justice actually advanced this argument here is reason for alarm far beyond this case.

The government also engages in a bizarre effort to justify its withholding of this information because, under Brady, "the accusation that Sierra Pacific's lawyers offered a bribe

[63] The government would similarly have been utterly sanguine in concealing the confession, while simultaneously arguing there was not a "shred of physical evidence or expert support" for Defendants' position, given that an outright confession by a third party is neither physical or expert evidence. According to the government, such half-truths are perfectly consistent with their duty of candor.

for a false confession is inculpatory, not exculpatory." (Opp. at 103.) But that assertion, of course, is wrong and provides no cover whatsoever. The fact that Edwin Bauer communicated a false bribe to the government is exculpatory to these Defendants as the existence of that effort tends to prove that the Bauers had something to do with starting the fire and were concerned enough about Defendants' efforts to expose the potential that they would risk a criminal violation of law so as to further implicate Sierra Pacific, thereby driving attention from themselves.

Despite this clear duty to provide notice that this information existed, the government brazenly claims, despite its sordid conduct, that it has no duty to "do Sierra Pacific's job for it" and that "the lawyers should have interviewed the witnesses themselves." (Opp. at 102:14-19.) Frankly, such an assertion is outrageous. Defendants had already taken the deposition of Edwin Bauer. As alleged, the government came into possession of this exculpatory information when it served Bauer – after the close of discovery and when the parties were in the midst of arguing pre-trial motions. When the government violated Rule 26 by failing to update its disclosures with subsequently discovered material information, it actively prevented Defendants from knowing that a major new material piece of evidence had been created. The same is true with respect to the government's violation of its duty of candor to the tribunal. Without such notice, Defendants were deprived of the opportunity to interview witnesses, move the court for further discovery, or challenge privilege assessments. Here, none of these options were available because the government never brought the issue to the fore, which dramatically undermined the court's processes and subverted its truth-seeking function.

Revealing this information to either Defendants or the Court would have been damaging to the government's case as it showed that Edwin Bauer was willing to make false claims to federal investigators in order to divert attention from his son and bolster the case against Defendants. The question is therefore raised: why? And the answer to that question certainly deserved to be explored through the immediate reopening of discovery and the involvement of the Court. This grave piece of evidence may have also revealed that, ultimately, it was Bauer and/or the allegation that was the subject of a federal criminal investigation. In any event, the prosecutors' decision to conceal this material from Defendants in the Brady context violates

clearly established federal law. See Amado v. Gonzalez, 758 F.3d 1119,1125, 1139 (9th Cir. 2014) (noting that suppressed impeachment materials may be used to show that a witness had a motive to embellish the truth and even to lie). A failure to disclose it to the Court violates, at a minimum, the duty of candor. There can be no question the alleged bribe is evidence that was disclosed to the government personally and which should have been brought before the Court either because one of the government's primary witnesses was engaging in criminal misconduct or because the counsel for these Defendants before the Court were doing so.

In sum, someone is lying, and reaching a conclusion as to who is lying would seem imperative in view of the present posture of this case. If Bauer manufactured the existence of a bribe, violating federal criminal statutes which carry a penalty of 20 years, the government should immediately investigate him. Obviously, they should have done so immediately after the visit to Chittock revealed the obvious falsity of his assertions. The fact that the government apparently did not do so reveals a good portion of what this Court needs to know regarding the prosecution of this matter. If Bauer manufactured this evidence, and Downey Brand knows that he absolutely did, it means something quite serious, and certainly suggests a willingness to have altered all kinds of evidence so as to draw attention away from his son. But even that was not enough to deter the government's focus on its targeted Defendants and, more specifically, Sierra Pacific, an attitude and corruption that revealed itself through this matter, and which has led to the tragedy this District now must confront.

In light of the facts we now know regarding Bauer's claim of a bribe, and the significant fraud on the court this element alone portends, Sierra Pacific's lead trial counsel would request that this court immediately direct and supervise a full investigation into this previously concealed evidence, with of course a full investigation into any and all contacts that Mr. Warne and or his team and/or Sierra Pacific had with Mr. Chittock, and that it do the same regarding what the prosecutors actually did when their own investigation of Bauer's preposterous claim turned up nothing. This neutral investigation would of course also look into just why the prosecutors thereafter apparently did nothing to prosecute Bauer's crime but instead actively concealed its apparent existence, *despite* its Federal Rule of Evidence 403 motion to keep all Bauer evidence

away from the jury, and to prevent defendants from arguing that another party is responsible for the Moonlight Fire, as the government represented to this court, there was not a "shred" of evidence supporting any relevance to this matter.

There is a reason that these prosecutors quietly shelved this matter when they did. And there is a reason that they did not prosecute Bauer for his conduct. This court, these Defendants, and the public have a right to know that Downey Brand did not make such a bribe on behalf of its clients and they have a right to know why Bauer claimed that it did. They also have a right to know why the federal prosecutors did nothing to Bauer for attempting to interfere with an investigation, in violation of 18 USC § 1519. An individual such as Bauer willing to risk twenty years in jail clearly has a higher stake in affecting the outcome of the matter than any claim of innocence would suggest. If what appears to be revealed by this conduct is true, Bauer only remains free because misguided prosecutors did actually forget that they were working for the Department of Justice, as stated by AUSA Eric Overby, and had become so blinded by the pursuit of a pay day that a grave miscarriage of justice has indeed occurred. This issue goes beyond this case. The public not only has a right to know, but to be protected from future criminal violations. When that neutral investigation reveals the truth about this hidden bribe allegation, finds that it was manufactured, and that the government was willing to "run the risk" of not prosecuting it, this matter should be vacated and those responsible should be held accountable.

B. The Entire "Trail Of Fraud" in this Matter, From the Original Investigation, Through Discovery, and Including Judicial Filings, Are Fully Subject to this Court's Review and Establish a Fraud on the Court.

With no analysis, the government cites to Hazel-Atlas on two occasions for the unqualified proposition that "fraud on the court is a rule of equity for 'after-discovered fraud." (Opp. at 2,70.) But Hazel-Atlas actually states something different, simply acknowledging that fraud on the court is a "rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry." Hazel-Atlas, 322 U.S. at 244. Thus, properly understood, the Supreme Court's decision in Hazel-Atlas merely acknowledges that fraud discovered after a judgment is simply one

circumstance wherein a court can exercise its inherent powers to vacate and dismiss an action, not the only circumstance as suggested by the government.

The fact that Hazel-Atlas acknowledges a far broader spectrum for the court to operate in than urged by the government is revealed within the opinion in two ways. Specifically, in addition to finding that "after-discovered" evidence is only one circumstance for the court's consideration, Hazel-Atlas also teaches that the court can find fraud upon the court even if that fraud was not the primary basis of the court's earlier determination. In this regard, the Court reversed the Third Circuit's decision to deny fraud on the court on that ground; on this issue, the Supreme Court addressed a party's construction of a false article to affect the patent office and subsequent litigation, noting:

> They conceived [the false article regarding the patent] in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published. Having lost their infringement suit based on the patent in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness.

Hazel-Atlas, 322 U.S. at 247.

Thus, the Supreme Court confirms that fraud upon the court does not depend on the effective of the fraudulent effort, and went on to overturn the Third District's decision in part because the Third District's determination that the article wasn't a primary basis of its decision was the wrong question. Id.

Finally, in overturning the Third Circuit's finding of no fraud upon the court, the Supreme Court focused on what it called the "trail of fraud" associated with the conduct of Hartford and its counsel, beginning with executing the plan regarding the article, using it to deceive the Patent Office, then "without break" the District Court, and then the Circuit Court of Appeals. Id.

For these reasons and more, the government's arguments that fraud discovered before settlement is not relevant to this court's determinations here is misplaced. Specifically, for instance, its effort to claim that what happened at Red Rock is not a part of this court's analysis is not supported by law. The government prosecutors participated in the Red Rock cover-up by

creating and having the USFS sign a false interrogatory response. It did so in an effort to assist, at least initially, in preventing Defendants from uncovering an effort to conceal the action that took place in that tower at the time the fire broke out. The government's effort to excuse its conduct, for instance by saying that spotting a marijuana pipe is not an "activity" is beyond specious, and made worse by the fact that they attempt to ignore the fact that Juska smelled the heavy odor of marijuana on Lief, that Lief put the illegal contraband in his back pocket when it was discovered, and that Juska was able to surprise this lookout while he was inattentively urinating on his feet. All of these activities should have been readily disclosed by these prosecutors, and their efforts to excuse their failure to do so ring hollow.

Ultimately, the entirety of this matter, regardless of whether it was previously addressed by the court in another context, makes up the "scheme" which this court should now assess in the context of this motion, which is focused not on the parties but on the injury caused by such conduct on this court. The "trail of fraud" in this matter is long, beginning on the day of the fire, continuing through the fraudulent investigation and the investigators' sham report, extending through the use of that report by government lawyers in the context of litigation, and the prosecutors' protection of these investigators while they tried to cover their tracks during their investigation, and culminating in the concealment of a critical false bribe.

Case law confirms that this court can view all of this "sordid story," Hazel-Atlas, 322 U.S. at 243, when assessing this broad scheme to defraud this Court. Whether portions of this scheme were uncovered before the forced settlement or after, it is still one scheme or "trail of fraud," fully subject to this Court's assessment.

C. Given the Stage of the Proceedings, the Government Is Obligated to Assume the Truth of Defendants' Allegations That the Moonlight Prosecutors Participated in the Fraud.

Throughout its opposition, the government contends that its attorneys did not participate in any misrepresentations, and that the Court is therefore precluded from finding that a fraud occurred. Specifically, and among other things, the government prosecutors contend that that they did not attribute a false statement to J.W. Bush (Opp. at 54), and that they did not

misrepresent any facts about the three fires (Opp. at 78), WiFITER (Opp. at 88, 92), or about the $2 million bribe (Opp. at 100). The government's argument is baseless.

To begin, the Ninth Circuit has repeatedly employed the definition of fraud on the court set forth in *Moore's Federal Practice*. See In re Intermagnetics, 926 F.2d at 916. Moore's definition explains that fraud on the court includes "only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner . . . ." 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 60.33 (2d ed. 1978) (emphasis added). Thus, a fraud upon the court can be found when a matter that defiles or attempts to defile the court itself, i.e., without the involvement of an officer of the court, or when a fraud is perpetrated by officers of the court in a way that prevents the "judicial machinery" from performing in its normal way. Here, the Court's review is made easier because the egregious fraud in this matter operated pervasively on both levels. Not only does this matter constitute a species of fraud that "defiled the sanctity of the court and the confidence of all future litigants," Dixon, 316 F. 3d. at 1047, but these officers of the court thoroughly participated in throwing numerous wrenches into this Court's judicial machinery.

As officers of the court, prosecutors do not have the liberty to watch while the administration of justice is so thoroughly corrupted by their own star witnesses, only to thereafter wash their hands of any responsibility when the scheme is finally exposed. By presiding over this action and allowing it to unfold under their supervision, these prosecutors participated in every sense of that word. They were responsible for controlling the litigation and had a responsibility to serve as this court's "gatekeepers." In that role, it was their obligation to make sure that the investigators' fraud was exposed and that it did not prevent the "judicial machinery" from properly operating. Every omission by these prosecutors, every failure to alert this Court to what was taking place during discovery, and every instance where they sat on their hands while their investigators testified dishonestly comprises their participation in this fraud.

Moreover, in addition to countless omissions, they participated in the construction of a blatantly false interrogatory response on Red Rock, they actively put the investigators at ease

with respect to giving false testimony on the white flag, assuring them in advance that it was a "non-issue," and they actively concealed Bauer's allegations of a false bribe. They submitted what they knew (or recklessly failed to realize) was a blatantly false report, and they submitted White's false declaration as well, all acts which contributed to the court's impression that it was presiding over a fair dispute, when in fact the court was presiding over a lie which was actively advanced for three years. The impact of all of these acts and omissions cannot be overstated, and it was especially effective here since lawyers working for our Department of Justice were the perpetrators. See Berger, 295 U.S. at 88. As discussed by the Ninth Circuit in Dixon, the prosecutors helped create the court's impression that it was presiding over a "adversarial dispute when, in fact, the proceeding was a charade . . . ." Dixon, 316 F.3d at 1047.

Moreover, the prosecutors' claim that they did not participate in the misconduct is only argument, and not allowed at this stage of the proceeding. The Defendants' allegation in this area are clear:

- With respect to their falsified points of origin, that White and Reynolds perjured themselves when confronted during deposition about the white flag, and that the Moonlight Prosecutors assisted and encouraged this false testimony by telling Reynolds that the white flag was a "non-issue" and by failing to intervene or correct the record. (See Defs.' Supp. Brief at 43-60.)

- With respect to the interviews of J.W. Bush, that the Moonlight Prosecutors failed to disclose on motion practice before this Court that Bush denied ever thinking or believing that the cat tracks scraped a rock to cause the fire, that there was a dispute over the statement that Investigator Reynolds prepared and had Bush sign, and that the Moonlight Prosecutors misrepresented that Bush repeated to Investigator White what he had supposedly told Reynolds, even though an audio tape of the interview revealed exactly the opposite. (See Defs.' Supp. Brief at 60-65.)

- With respect to the three fires, that the Moonlight Prosecutors misrepresented in their discovery responses, trial brief, and in summary judgment briefing that Defendants caused these fires, when in fact they knew that each of the investigations was scientifically flawed in multiple ways and, at least for one of the fires, that even the investigators testified there was no final conclusion about the cause of the fire. (See Defs.' Supp. Brief at 82-89.)

- With respect to WiFITER, that the Moonlight Prosecutors argued to this Court in motions in limine that there was no evidence of a conspiracy, even though the government's joint prosecution partner, Cal Fire, subsequently produced in the state actions documents evidencing financial motive to blame wildfires on wealthy defendants, and misrepresented that WiFITER was a "separate public trust fund" when it was in fact secret, not public, as confirmed by multiple audits that occurred after the federal action settled. (See Defs.' Supp. Brief at 107-122.)

- With respect to the alleged $2 million dollar bribe, which is addressed in greater detail supra, that the Moonlight Prosecutors withheld evidence directly relevant to their motion in limine to preclude Defendants from introducing evidence that the Moonlight Fire was started by a third party, i.e., that a critical third party witness, Edwin Bauer, had made the false claim that either Sierra Pacific or its trial counsel had offered money in exchange for testimony from his son, Ryan, that Ryan had started the Moonlight Fire. The Moonlight Prosecutors investigated this claim and determined it was false but never disclosed it to Defendants, and then subsequently filed and prevailed on their motion in limine, based on FRE 403. (Defs.' Supp. Brief at 122-131.)

These allegations will be supported by the record evidence at the hearing and are more than sufficient to allege a fraud on this Court. The government's failed effort to deflect these facts with supposed contrary evidence should be ignored or stricken.

D. The Government Cannot Divorce Itself from the Conduct of Its Joint Prosecution Partner

In an effort to distance itself from the misconduct of the state prosecutors, and even more specifically the failure to disclose the WiFITER documents, the government discounts the importance of the joint prosecution agreement and claims that Judge Nichols's findings in the related state case are irrelevant. (Opp. at 59, 93.) Regardless of whether the federal prosecutors themselves can be personally liable for the misconduct of its joint prosecutors, the actions of the state prosecutors can, and do in this case, support a finding of fraud on the court.

In Pumphrey, the Ninth Circuit held that the general counsel for the defendant was acting as an officer of the court and in that capacity committed a fraud on the court, despite the fact that the lawyer was not a member of the trial team, "was not admitted to practice in the District . . . , did not enter an appearance . . . , was not admitted pro hac vice, and did not sign any documents

filed with the court." 62 F.3d at 1130-31. Instead, the court found that the lawyer was acting as an officer of the court based on the fact that he "participated significantly in [the case] by attending the trial on [the defendant's behalf], gathering information to respond to discovery requests and framing the answers, and participating in the videotaping of both the trial video and the original video." 62 F.3d at 1131.

Similarly here, the government admits that the very purpose of the joint prosecution agreement was to "engage in joint litigation efforts" based on the "two sovereign's common interest." (Opp. at 94.) Certainly these "joint efforts" included gathering information regarding the investigation into the origin and cause of the Moonlight Fire, framing answers for discovery responses, and engaging experts to test theories on sparks, wildfire spread, and more. Also, it is now known that the government had joint meetings with the state prosecutors at its office in Sacramento, during which the entities jointly prepped witnesses for depositions. Finally, and most importantly, the state prosecutors actually attended many of the federal depositions, and similar to Pumphrey, the lead state attorney was in the courtroom for the federal pre-trial conference, at which the federal motions in limine were argued and ruled upon, including the motion in limine resulting in part on the federal prosecutor's misrepresentations regarding WiFITER. Certainly this amount of involvement in the federal litigation meets and exceeds the standard set in Pumphrey for determining whether an attorney is acting as an "officer of the court" whose actions can support a claim of fraud on the court.

Indeed, just as the general counsel in Pumphrey "undermined the judicial process," by "fail[ing] to take action" to disclose the video, to correct the request for production and interrogatory responses, and to "correct the false impression" created by an expert's testimony, here the state prosecutors also had every opportunity during the course of this litigation to correct various deceptions that defrauded the court. 62 F.3d at 1130-33. And just as in Pumphrey, the state prosecutors here were "licensed attorney[s], . . . aware of the necessity for compliance with the rules of discovery and the rules of professional responsibility [and] aware of the damage failure to abide by these rules can wreck in the specific case at hand and the larger framework of confidence in the adversary trial system." Id. at 1133.

While the government certainly would like for its assertion at the conclusion of its brief to be true—that "alleged misconduct by Cal Fire concerning the State Fund cannot establish a fraud on the court [and the] United States cannot fairly be denied the benefit of a judgment based on alleged misconduct by someone else"—sadly they are mistaken. (Opp. at 114-15.) Pumphrey makes clear that all officers of the court are responsible for upholding the integrity of the judicial system and that fraud on the court can be found based on the actions of any officer, even one not participating as a member of the trial team. Given that the conduct of the state attorneys involved in the joint litigation effort most certainly can establish a fraud on the court, Judge Nichols's finding that the state attorneys failed to prevent a corrupt investigation and litigation of the Moonlight Fire is not only relevant but provides persuasive evidence of the fraud perpetrated on this court.

E. The Government's Attacks On Bob Wright and Eric Overby Are Without Merit.

While the government attempts to contend that nondisclosures can never cause a fraud on the court, controlling authority confirms that innocent nondisclosures generally cannot cause a fraud on the court but intentional nondisclosures most certainly can. Because this Court considers intent, evidence regarding whether the government's conduct was intentional here is relevant to this Court's review. If certain prosecutors in the office have engaged or attempted to engage in acts of deceit on other wildland fire cases, it would tend to show a pattern and practice, and that their actions on the Moonlight Fire were not the consequence of mistakes or inadvertence, but were instead deliberate and purposeful. Such evidence is made admissible under the Federal Rules of Evidence.

Perhaps sensing this reality, the government attempts to recast Wright's declaration as, instead, evidence of the government's "propensity for withholding evidence." Having recast the evidence, the government then argues that propensity evidence is inadmissible under Fed. Rule. Evid. 404(b). This argument contravenes controlling authority, which holds that evidence of earlier behavior is admissible "for other purposes 'such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .'" Boyd v. City & Cnty. of San Francisco, 576 F.3d 938, 946-47 (9th Cir. 2009) (quoting Fed. R. Evid. 404(b)).

As a consequence, evidence provided by former Assistant United States Attorney Wright regarding his experiences with Shelledy on two other wildland fire cases in the same year he filed the Moonlight Fire matter is admissible to show Shelledy's intent here. Although the government has been ordered to limit its briefing to the facts as alleged in the Defendants' opening briefing, presuming those allegations to be true, the government has nevertheless provided declarations from three government attorneys. These declarations should be ignored given the procedural posture of the instant motion. Nevertheless, because these declarations attempt to besmirch the character ofWright, Wright understandably insisted on preparing another declaration in response to these allegations, and to explain in detail the falsity of the government's declarations. In this regard, Wright has reviewed the allegations contained in Shelledy's declaration, and those within United States Attorney Benjamin Wagner's. As Wright indicates in his declaration, the factual assertions levied against him and against former Moonlight Fire prosecutor Eric Overby, who is deceased, are false. A copy of Wright's supplemental declaration is served and filed herewith.[64]

IX.
CONCLUSION

The government's opposition largely substitutes character assassination for serious legal analysis. Ultimately, it says nothing that should dissuade this Court from allowing these Defendants to move forward with their complaint for fraud on the court. As these Defendants have alleged (and will prove), during the government's investigation of this fire, it, among other things, manufactured evidence, buried key photographs and diagrams, told witnesses what they could and could not say. During the prosecution of this matter, the government sat on its hands as the investigators repeatedly lied under oath on the most key issues of their investigation, instructed witnesses to sign blatantly false interrogatory responses, and withheld material

[64] Defendants note that, as time passed after the government filed its opposition attacking, among others, former Wright, he felt compelled to quickly prepare and execute a declaration almost immediately thereafter, and then another one several days later. Wright did so out of concern that if he were to suffer an accident or a serious and immediate health problem, he might lose the chance to clear his good name, as is now the case for Overby, who passed in 2013. Ultimately, Wright had time to execute a final and fuller declaration, which has been submitted with this motion. The earlier versions of Wright's declarations have been preserved and will be provided to the extent requested by the Court.

evidence from the Court and Defendants. In this vein, it also breached its duty of candor to the Court regarding the existence of critical exculpatory evidence it learned on the eve of its Rule 403 motion.

As Defendants' reply demonstrates, the government's opposition violates the Court's order, manufactures whatever legal conclusions it needs to support its misguided effort to keep this Court from reviewing the evidence of its scheme to defraud it, and attacks those who have been handed the ugly job of exposing its corruption. In its brazen assertion that "each and every allegation is false," the government has gone "all in" with its effort to prevent the truth from being known to this court and the public.

Frankly, there is nothing new here, as it emanates from a sense of invulnerability on the part of the government that has driven this case from the start. Defendants are profoundly aware of the position they have been forced into by the government as they address these serious issues. They know that doing so necessarily sounds offensive – how does one expose such conduct without being diminished by doing so? Regardless, Defendants and their counsel will continue to do so. As officers of the court and as advocates for the victims of this tragedy, we have no choice but to carry out this obligation.

Essentially, when assessing a complaint for fraud on the court, the government would have this Court believe that so long as the Court itself is kept sufficiently in the dark to have blessed a settlement, then the government can basically use whatever means of abuse and dishonesty it chooses to achieve what it wants. Thankfully – for the benefit of all citizens who find themselves confronted by the litigation might of the government – that is not the law. Both the Supreme Court and Ninth Circuit resoundingly confirm this Court's power to control and respond to the litigation conduct of those who file, discover, and prosecute a case before it. Having such latitude is consistent with the Court's inherent power to administer justice with respect to all cases and parties. The Court should allow the next stage of this proceeding to take place.

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