

October 14, 2014

Contact:  
Bill Warne, Downey Brand  
916-444-1000 | [bwarne@DowneyBrand.com](mailto:bwarne@DowneyBrand.com)  
Dick Beckler, Bracewell & Giuliani  
202-828-5874 | [richard.beckler@bgllp.com](mailto:richard.beckler@bgllp.com)  
Richard Linkert, Matheny, Sears, Linkert &  
Jaime  
916-978-3434 | [rlinkert@mathenysears.com](mailto:rlinkert@mathenysears.com)

**THROUGH ITS MOTION SHOWING FRAUD UPON THE COURT, DEFENDANTS  
SEEK DISMISSAL OF CASE AND CALL UPON GOVERNMENT TO REMOVE  
DEFAMATORY STATEMENTS FROM WEBSITE**

SACRAMENTO – Defendants who were sued for more than \$1 billion by the United States for allegedly causing the 2007 California Moonlight Fire filed a motion on October 9, 2014, alleging that the Federal Court was the victim of an egregious fraud perpetrated by the “origin and cause” investigators and certain Assistant United States Attorneys in the Eastern District of California.

The Defendants, which include Sierra Pacific Industries, numerous landowners; forest manager W.M. Beaty & Associates; and Howell’s Forest Harvesting, settled the federal matter two years ago by paying \$55 million and by agreeing to convey 22,500 acres of land to the United States over time.

**Judge Found “Egregious” Abuses of the Discovery Process, Called Prosecution “Corrupt”**

The Defendants’ motion is supported by two lengthy orders issued earlier this year by Superior Court Judge Leslie C. Nichols in Cal Fire’s related Moonlight Fire cost recovery action. That action involved the same defendants and relied upon the same corrupt investigation.

In reviewing the prosecution of that matter, Judge Nichols found “egregious,” “pervasive,” and “reprehensible” discovery abuses involving “governmental corruption.” Judge Nichols also found the prosecution to be “corrupt and tainted.”

Judge Nichols therefore terminated the state action and issued sanctions in favor of Defendants for more than \$32 million, stating, “The misconduct in this case is so pervasive that it would serve no purpose for the Court to even attempt to recite it all here.” Judge Nichols found that the state case was a “...betray[al of] the primary purpose of the judicial system -- to reveal the truth.” Judge Nichols’ findings are one of several catalysts driving the motion filed last week.

**Defendants Demand that Defamatory Statements be Removed from USDA Website**

Despite the disclosures about the corrupt investigation, the United States Department of Agriculture’s website continues to state that Defendants Sierra Pacific Industries, W.M. Beaty & Associates, and Howell’s Forest Harvesting caused the Moonlight Fire.

In light of what has now been exposed regarding the fraudulent investigation and its misguided prosecution, the Defendants call upon the government to immediately remove any material from the USDA’s website that continues to wrongly claim that these Defendants started the Moonlight Fire.

## **Motion Includes Declaration from Former Assistant US Attorney**

Defendants' motion includes an extraordinary 15-page declaration from Robert Wright, the former Assistant United States Attorney who led the Eastern District's Affirmative Fire Litigation Team at the time of the Moonlight Fire and who drafted and filed the original Moonlight Fire complaint against these same Defendants.

Among other things, Wright states that he now believes the investigators falsified material portions of their 2009 Origin and Cause Report for the Moonlight Fire and that the investigators and certain government lawyers "obstructed discovery of the truth" during their prosecution of this case against the Defendants. Wright also believes these same prosecutors repeatedly breached their professional responsibilities and their duty of candor to the Court and that the investigators' material omissions pertaining to the claimed points of origin of the fire were intentional and serious enough to warrant consideration for obstruction of justice charges under 18 U.S.C. § 1519.

Wright's declaration exposes two instances in the same year he filed the Moonlight Fire action where he felt pressured to withhold from other wildland fire defendants information harmful to the United States' interests. In response to these pressures, Wright states that he turned to the Professional Responsibility Advisory Office (PRAO) of the Department of Justice in Washington D.C. to obtain support for releasing harmful documents. In one instance, Wright determined that he was required to provide defendants a document disclosing a \$10 million calculation error that decreased the United States' damage claim from \$25 million to \$15 million. PRAO confirmed that the information must be disclosed. However, Wright's declaration states that his immediate supervisor, Civil Chief David Shelledy, continued to resist PRAO's directives, stating in an email, "OK, Bob, that's a beginning. Now what can you do to avoid creating an ethical obligation to volunteer a harmful document?"

Despite that pressure, and with PRAO's strong support, Wright disclosed the document. Wright concludes: "The internal struggles that I encountered in 2009 with respect to my professional concerns on these wildland fire actions marked the first time in my 40 years of practicing law that I felt pressured to engage in unethical conduct as a lawyer."

On January 4, 2010, two months after Wright disclosed the United States' \$10 million calculation error, Civil Chief David Shelledy removed Wright from his lead role in the Moonlight Fire matter and barred him from working on the case in any capacity. Wright declares: "In light of what has finally been exposed regarding the Moonlight Fire action, I suspect that someone connected with the Forest Service or Cal Fire communicated with Civil Division management in late 2009 that there might be or was a problem with the Moonlight Fire investigation and Report, and that with my zero-tolerance of litigation misconduct by the government, I should be removed from the case."

The prosecutorial misconduct on the Moonlight Fire and its attendant fraud upon the Court discussed in the Defendants' motion occurred after Wright's removal from the action.

## **Second Moonlight Fire Prosecutor Also Weighs In**

Wright is not the only former Moonlight Fire prosecutor who has expressed serious concerns. Defendants' motion reveals that Eric Overby, another highly respected former federal prosecutor, who joined and then left the Moonlight Fire prosecution team in disgust in 2011, stated: "It's called the Department of Justice. It's not called the Department of Revenue."

Before leaving, Overby reached out to defense counsel about the prosecution of this matter, saying, "In my entire career, yes, my entire career I have never seen anything like this. Never."

## **Background and Supporting Facts**

The Defendants' motion for fraud upon the Court highlights the connection between federal and state Moonlight Fire prosecutions. Because the federal and state prosecutors claimed a "common interest" in suing these Defendants, they prosecuted their two actions under what is known as a "joint prosecution agreement," sharing evidence, developing common strategies, coordinating depositions, using the same expert witnesses, and jointly preparing the investigators for their testimony.

Finally, and most importantly, Defendants' motion for fraud upon the Court is also supported by declarations, deposition excerpts, and hundreds of pages of newly discovered evidence, all supporting Defendants' contention that "the lead prosecutors turned a blind eye to a thoroughly corrupt investigation, transported that corruption into the jurisdiction of this Court, and then permitted pervasive dishonesty by the investigators on issues going to the core of this matter."

The Defendants' motion exposes a species of fraud which has defiled our system of justice. That fraud includes the following facts:

- The jointly authored origin and cause report was a work of fiction regarding its most important conclusions, including where and how the fire started. The investigators moved their actual point of origin and then created a Joint Report that covered up what they had done. Their deceptions were so blatant that even the government's own expert ultimately testified that a "shadow of deception" hung over the investigators' primary work.
- An air-attack video taken from above the fire showed that the joint investigators' suppressed point of origin and their alleged points of origin were still not within the boundary of the fire's smoke plume more than an hour after the fire began.
- Federal prosecutors aided the investigators' pre-litigation efforts to cover up harmful information regarding the Red Rock lookout tower on the day of the fire by serving interrogatory responses which omitted material information harmful to the government.
- The lead investigator for the Moonlight Fire was receiving benefits from an illegal "off-book" account which he and others funded through the money they collected from the defendants they targeted on wildland fires. In fact, before the suit was filed, the lead investigator on the Moonlight Fire sent a letter threatening litigation unless the defendants paid \$8.1 million. The same letter, however, demanded that the defendants write two checks, one to the State for \$7.7 million, and then another to the illegal fund for \$400,000.

- Federal and state prosecutors were aware investigators failed to properly explore other causes of the fire, several of which were ignored by the investigators.

Defendants' motion for fraud upon the Court is the first instance where the federal court that has been defrauded, and has had an opportunity to review clear and convincing evidence that overwhelmingly demonstrates that government representatives here perpetrated egregious fraud upon two courts.

As noted by the U.S. Supreme Court, a motion for fraud upon the court provides the defrauded Court with the opportunity to use its inherent powers to restore justice. The two orders from Judge Nichols are available online here: [2014-02-04 Moonlight Fire](#) and here: [2014-0204 Order Moonlight Fire](#).

# # #