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16 UNITED STATES DISTRICT COURT
17 EASTERN DISTRICT OF CALIFORNIA

18
19 UNITED STATES OF AMERICA,
20
21 Plaintiff,
22 v.
23 SIERRA PACIFIC INDUSTRIES, ET AL.,
24 Defendants.

25
26
27 AND ALL RELATED CROSS-ACTIONS.
28

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Case No. 2:09-CV-02445-KJM-EFB

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF RULE 60(d)(3) MOTION TO
SET ASIDE A JUDGMENT FOR FRAUD
ON THE COURT**

Date: November 21, 2014
Time: 10:00 a.m.
Dept: Courtroom 3, 15th floor
Judge: Hon. Kimberly J. Mueller

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1 **I. INTRODUCTION**

2 In the fall of 2007, the Moonlight Fire burned 65,000 acres in the Sierra Nevada mountain
3 range, near Westwood, California. Approximately 45,000 of those acres belonged to the United
4 States. In 2009, as a result of conclusions reached by an investigation into the cause of the fire,
5 numerous lawsuits were filed against the same Defendants. The two primary suits were jointly
6 prosecuted by lawyers for the United States and for the California Department of Forestry and
7 Fire Protection (“Cal Fire”).

8 In July of 2012, the parties to the United States’ Moonlight Fire action entered into a
9 settlement. Defendants agreed to pay \$55 million to the United States over five years, and Sierra
10 Pacific agreed to transfer 22,500 acres of land through ongoing negotiations. Those payments
11 and land transfers continue to this day.¹

12 In contrast to the federal settlement, in February of 2014, Cal Fire’s Moonlight Fire action
13 was terminated by California Superior Court Judge Leslie C. Nichols, who described the action as
14 “corrupt and tainted” and who sanctioned Cal Fire more than \$32 million for “egregious,”
15 “pervasive” and “reprehensible” discovery abuses resulting from “governmental corruption.”
16 Much of Judge Nichols’ opinions focused on his findings that the underlying origin and cause
17 investigation for the Moonlight Fire, jointly carried out by members of the United States Forest
18 Service (USFS) and Cal Fire, was fraudulent and, more importantly, on the willingness of
19 prosecutors to allow that fraud to thoroughly invade and support their effort to prevail against the
20 Defendants.

21 Under certain circumstances, radically different results are not necessarily a significant
22 concern, as settlements can at times create divergent outcomes. But that is not the point of this
23 motion. This motion is instead focused on a particular “species of fraud” perpetrated upon two
24 courts, “an effort by the government to prevent the judicial process from functioning ‘in the usual
25 manner’” and that “involved perjury or nondisclosure [] so fundamental that it undermined the
26

27 ¹ Presently, Sierra Pacific Industries has transferred approximately 1500 acres, and the process of selecting and
28 finalizing conveyance of various parcels is moving forward.

1 workings of the adversary process itself.” *United States v. Estate of Stonehill*, 660 F.3d 415, 445
 2 (9th Cir. 2011). Defendants are not now before this Court to argue that they were fraudulently
 3 induced to settle the federal action.² They knew some but not all of what they were up against at
 4 the time of the settlement: a corrupt investigation prosecuted by federal and state lawyers focused
 5 on winning regardless of their own professional responsibilities and despite pervasive dishonesty
 6 on key facts at the core of the Moonlight Fire’s underlying origin and cause investigation.³

7 Importantly, this motion, brought under Federal Rule of Civil Procedure 60(d)(3), is about
 8 “far more than an injury to a single litigant,” it is about “a wrong against the institutions set up to
 9 protect and safeguard the public, institutions in which fraud cannot complacently be tolerated
 10 consistently with the good order of society.” *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322
 11 U.S. 238, 245 (1944). This motion asks this Court to utilize its “historic power of equity to set
 12 aside [a] fraudulently begotten judgment[]” in order to uphold the “preservation of the integrity of
 13 the judicial process.” *Id*; see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (“[This]
 14 inherent power [...] allows a federal court to vacate its own judgment upon proof that a fraud has
 15 been perpetrated upon the court. [...] Moreover, a court has the power to conduct an independent
 16 investigation in order to determine whether it has been the victim of fraud.”). As the Supreme
 17 Court commanded in *Hazel-Atlas*, “the public welfare demands that the agencies of public justice
 18 be not so impotent that they must always be mute and helpless victims of deception and fraud.”
 19 *Hazel-Atlas* at 246.⁴

20
 21 ² Thus, unless this Court finds by clear and convincing evidence that the underlying matter constitutes a fraud upon
 22 the Court, or unless this Court stays the settlement pending review and/or the outcome of other matters, the
 Defendants will of course continue to fully abide by the terms of their settlement agreement.

23 ³ Indeed, Defendants do not seek recourse under Rule 60(b) for other reasons as well. Rule 60(b) allows a court to
 24 relieve a party from a final judgment, for fraud, misrepresentation, or misconduct by an opposing party, but such a
 25 motion must be filed within one year of entry of judgment. Here, since judgment was entered more than a year ago, a
 Rule 60(b) motion would be untimely. A motion under Rule 60(d)(3) for fraud on the court, however, has no time
 limitation, but sets a higher bar (a bar cleared by the egregious conduct discussed herein) to set aside a final
 judgment. *Stonehill*, 660 F.3d at 443.

26 ⁴ Under Ninth Circuit authority, such motions are granted if the defendants can, by clear and convincing evidence,
 27 establish “that species of fraud which does or attempts to defile the court itself, or is a fraud perpetuated by officers
 28 of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases
 that are presented for adjudication.” *In re Levander*, 180 F.3d 1114 (9th Cir. 1999) (finding that perjury and
 nondisclosure that defiled the bankruptcy court amounted to a fraud on the court) (quoting 7 James Wm. Moore et al.,
 Moore’s Federal Practice ¶ 60.33, at 515 (2d ed. 1978)). A party can be found to have engaged in a scheme to

1 The Ninth Circuit has faithfully followed the Supreme Court’s mandate that misconduct
 2 resulting in a fraud on the court shall not be tolerated. It has recognized that such fraud
 3 “corrupt[s] the legitimacy of the truth-seeking process” and “defile[s] the sanctity of the court and
 4 the confidence of all future litigants.” *Dixon v. C.I.R.*, 316 F.3d 1041, 1046-47 (9th Cir. 2003)
 5 (finding a fraud on the court based on the actions of two IRS attorneys in covering up relevant
 6 evidence, including sitting by silently as witnesses presented testimony the attorneys knew to be
 7 false). Further, the Chief Judge of the Ninth Circuit has poignantly acknowledged that there is
 8 currently an “epidemic of *Brady* violations” and other examples of prosecutorial misconduct
 9 “abroad in the land” and that “[o]nly judges can put a stop to it.” *U.S. v. Olsen*, 737 F.3d 625,
 10 625 (9th Cir. 2013) (Chief Judge Kozinski dissenting) (“failing to disclose evidence casting
 11 serious doubt on the reliability of the only dispositive piece of evidence in the case” should have
 12 amounted to a *Brady* violation). When judges allow prosecutors and other litigants to get away
 13 with such behavior, it “erodes the public’s trust in our justice system, and chips away at the
 14 foundational premises of the rule of law.” *Id.* at 632. “When such transgressions are
 15 acknowledged yet forgiven by the courts, we endorse and invite their repetition.” *Id.* at 632.⁵

16 The Court’s assessment of this motion should include related factors. First, the conduct
 17 addressed in this motion is focused on governmental actors, who are required to operate under a
 18 higher standard of care in light of the power they hold in our society. When they fail to do so, it
 19 puts everyone at risk. Second, wildland fires threaten the lives and property of millions of
 20 citizens, as well as the economic viability of entire communities. Thus, one of the primary
 21 purposes of any legitimate fire investigation is to find the truth in order to *prevent* future fires.⁶

22
 23 defraud the court and “improperly influence” its decisions through “the use of misleading, inaccurate, and incomplete
 24 responses to discovery requests, the presentation of fraudulent evidence, and the failure to correct [] false
 25 impression[s] created by [witness] testimony.” *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1132 (9th Cir.
 1995) (finding that defendant committed a fraud on the court by failing to disclose the existence of favorable
 evidence to the plaintiff and other violations of the rules of discovery and professional responsibility).

26 ⁵ Defendants suspect that the United States may attempt to argue that the settlement of this matter somehow
 27 precludes this Court’s assessment of its conduct under FRCP Rule 60(d)(3). As discussed *infra*, such arguments
 would be misplaced.

28 ⁶ One of the leading scientific bodies on fire investigation, the National Fire Protection Association, (“NFPA”),
 expressly confirms that, “fire investigation or analysis and the accurate listing of causes are fundamental to the

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1 Here, the Moonlight Fire investigators and prosecutors abandoned this fundamental objective, and
2 abandoned any effort to seek an “accurate determination of cause and responsibility.” Instead,
3 they went “all in” to win at any cost. The fraud upon this Court therefore threatens not only the
4 judicial process but also all citizens who are exposed to the threat of future wildland fires.

5 Finally, and importantly, Defendants perceive this Court as a victim of the conduct
6 detailed herein, as it has neither had the chance to fully assess the trust it naturally placed in
7 certain federal prosecutors⁷ nor the ability to do so in the context of all that was eventually
8 discovered about the thoroughly corrupt and financially driven Moonlight Fire investigation. The
9 circumstances presented by this motion provide three separate layers of support for finding a
10 fraud upon this Court: (1) pervasive and egregious corruption at the core of the underlying origin
11 and cause investigation, (2) the repeated suppression or omission of key facts by certain
12 prosecutors in a manner which seriously altered this Court’s ability to properly adjudicate this
13 matter, and (3) radically dissimilar results in these nearly identical and jointly prosecuted actions,
14 in part occasioned by the underlying fraud upon the Court. On their own, each of these
15 circumstances has caused grave damage to the integrity of our judicial process, and each
16 separately draws support from the Supreme Court and Ninth Circuit for finding fraud upon the
17 Court. Here, each of these layers has been laminated into an egregious fraud that goes well
18 beyond what is required for this Court to exercise its inherent powers so as to effectuate justice
19 and preserve the public’s confidence in our judicial system.

21
22 protection of lives and property from the threat of hostile fire or explosions. It is through an efficient and accurate
23 determination of the cause and responsibility that future fire incidents can be avoided.” (Ex. 28 at 2.) Of course,
with all fires, the good men and women of Cal Fire engage in heroic acts on a regular basis to protect the lives and
property of California’s residents.

24 ⁷ The great majority of federal prosecutors in this District and elsewhere are highly ethical and hardworking public
25 servants. Sierra Pacific’s co-counsel Richard Beckler is a former federal prosecutor. What happened in this matter is
26 not only a profound affront to this Court, it is an affront to every prosecutor, many of whom will likely applaud this
27 effort. Thus, with respect to comments in this motion relating to the conduct of “the federal prosecutors,” those
28 comments are directed to the two lead prosecutors on the Moonlight Fire action and their immediate supervisor, as
discussed herein. Because of the significant size and scope of this matter, the facts of this case and the actual conduct
of certain prosecutors regarding those facts could only truly be known by those with day-to-day responsibility for this
action. Others in the office surely had little choice but to rely upon the supervising and lead AUSA’s representations
as to what was occurring. The same of course was true for this Court.

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II. EXECUTIVE SUMMARY

On February 4, 2014, California Superior Court Judge Leslie C. Nichols⁸ terminated Cal Fire’s Moonlight Fire action in its entirety after finding, among other things, “reprehensible,” “egregious,” and “pervasive” discovery abuses that “threatened the integrity of the judicial process.” (Ex. 24 at 19; Ex. 25 at 30 attached to the Declaration of W. Warne (“Warne Decl.”).⁹) Judge Nichols also awarded Defendants full compensatory attorney fees and expenses of more than \$32 million, finding that Cal Fire’s conduct “initiating, maintaining and prosecuting this action, to the present time, is corrupt and tainted.” (Ex. 24 at 21.) Emphasizing the weight of the evidence in support of his ruling, Judge Nichols stated further that “[a]lthough the standard of evidence review is the civil standard of preponderance of the evidence, the Court has been fully satisfied even by the higher clear and convincing standard of review.” (Ex. 24 at 9.)

In commenting on the conduct of the state attorneys, the court wrote, “[o]ne hopes that this conduct is not explained in our law schools as what ‘good lawyers’ do to win their cases.” (*Id.* at 23.) With respect to the size of the award, the court noted the expense associated with being forced to “uncover governmental corruption” and then stated:

To the observation that the award of attorney fees and expenses is a big number, a question is presented. Compared to what? The Plaintiffs went “all in,” and in this case it meant all in to win at any cost. Defendants were forced to meet these challenges. The cost of Plaintiff Cal Fire’s conduct is too much for the administration of justice to bear.

(*Id.* at 25.)

As Judge Nichols intimates above, Cal Fire did not act alone. There were seven related Moonlight Fire lawsuits -- one federal court action and six separate state court actions. Each

⁸ Judge Nichols, a graduate of Stanford University and Hastings College of the Law, received an appointment to serve as a Superior Court Judge in Santa Clara County in 1984, where his Honor was, among other things, responsible for all cases filed under California’s Environmental Quality Act. While Judge Nichols “retired” in 2009, for the past five years he has continued in his role as a Superior Court trial judge through numerous and ongoing appointments from the Chief Justice of the California Supreme Court, who issues such assignments within California’s Assigned Judges Program (AJP) under Article VI, Section 6 of the California Constitution. Prior to his 30 years of service as an esteemed Superior Court trial judge, Judge Nichols practiced law in Palo Alto for 17 years, while also serving on Mountain View’s City Council and as its Mayor just before his appointment. At the beginning of his Honor’s career, Judge Nichols worked with the San Mateo Legal Aid Society, where he worked on civil rights cases.

⁹ Unless noted otherwise, all references herein to an Exhibit refer to documents attached to the Warne Declaration.

1 sought damages for the wildland fire that began on September 3, 2007, and burned significant
 2 acreage in the Northern Sierra Nevada mountain range. Each relied upon the same origin and
 3 cause investigation, jointly conducted by agents of the United States Forest Service (“USFS”) and
 4 Cal Fire. Each suit named essentially the same Defendants and was premised on the same
 5 fraudulent causation theory. While there were seven cases, the lawyers for the United States and
 6 Cal Fire jointly controlled the litigation effort, as the lawyers for four of the five private actions
 7 took a back seat and, unfortunately, did little but watch as this matter metastasized.

8 But the cooperation between the government plaintiffs went well beyond their reliance
 9 upon their joint investigators. Throughout the litigation, the federal and state lawyers worked
 10 under a joint prosecution agreement, proclaiming a “common interest” in prosecuting their
 11 actions against these Defendants.¹⁰ They hired and relied upon the same consultants and experts,
 12 coordinated depositions, and jointly prepared critical witnesses. Regrettably, they also jointly
 13 allowed witnesses to testify falsely while under oath and violated their duties of disclosure and
 14 candor to the Court and these Defendants.¹¹

15 Obviously, Judge Nichols reached grim determinations about the conduct of certain
 16 governmental actors and their lawyers, but he is not alone in his assessment. In fact, two highly
 17 respected and former Moonlight Fire prosecutors from the Eastern District have disclosed equally
 18 unpleasant information about the federal prosecution of this matter. Former Assistant United

19
 20 ¹⁰ As stated in a declaration by federal prosecutor Richard Elias in the context of a previous motion: “Because of the
 21 joint nature of the investigation, and the common interest that the Forest Service and Cal Fire have in prosecuting
 22 their respective cases against Defendants, the USAO and California Attorney General’s Office (‘Cal AGO’) entered
 into a Joint Prosecution Agreement.” (Ex. 5 at 3.) Magistrate Judge Brennan also confirmed the existence of this
 partnership as follows, “Cal Fire voluntarily entered into a joint prosecution agreement with the United States, and is
 reaping the benefits of that arrangement.” (Ex. 9 at 8.)

23 ¹¹ Consistent with Judge Nichols’ findings in the related state court actions that the investigators “repeatedly” lied
 24 under oath about critical aspects of their investigation, Judge Nichols found a “betray[al of] the primary purpose of
 25 the judicial system -- to reveal the truth.” (Ex. 25 at 24.) “In all matters, the Court maintains the ability to adjudicate
 26 the conduct of all parties and their counsel, be they public or private, in order to protect the integrity of the court.
 27 Finding otherwise would do grave damage to the integrity of the judicial process and the public’s confidence in it,
 28 especially for those who find themselves defendants in actions brought by a public agency that perceives itself
 immune from the court’s oversight and control.” (*Id.* at 30.) While Judge Nichols focused on Cal Fire’s prosecution
 and the fraud it worked upon the state court, his orders also recognized (1) the false testimony provided by both the
 state and federal investigators regarding their most critical findings, (2) the federal and state prosecutors’ joint and
 improper preparation of critical witnesses, (3) the falsity of the joint origin and cause report, and (4) the joint failure
 to disclose damaging evidence.

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1 States Attorney (“AUSA”) Robert Wright,¹² the previous head of the Eastern District’s
2 Affirmative Fire Litigation Team and the prosecutor charged with investigating, drafting,
3 executing and filing the United States’ Moonlight Fire complaint, strongly supports this motion.
4 In his accompanying declaration, Wright exposes the pressure exerted upon him within the U.S.
5 Attorney’s office to withhold information damaging to other wildfire matters, his staunch refusal
6 to do so, and his subsequent removal from the federal Moonlight Fire litigation in January 2010
7 by his immediate supervisor. Wright summarizes his experiences as follows: “The internal
8 struggles that I encountered in 2009 with respect to my professional concerns on these wildland
9 fire actions marked the first time in my 40 years of practicing law that I felt pressured to engage
10 in unethical conduct as a lawyer.” (Wright Decl. ¶ 18.)

11 Another senior and highly respected AUSA, Eric Overby, echoed similar concerns. In or
12 about March of 2011, AUSA Overby came out to Sacramento from the United States Attorneys’
13 office in Salt Lake City, Utah, to join the Moonlight Fire prosecution team in Sacramento.
14 Several months later, Overby left in disgust, but not before requesting a meeting with Sierra
15 Pacific’s lead counsel.¹³ During that meeting at Downey Brand on May 12, 2011, AUSA Overby
16 disclosed his deep concerns regarding his co-federal prosecutors’ tactics, saying, “In my entire
17 career, yes, my entire career, I have never seen anything like this. Never.” (Warne Decl. ¶ 22.)
18 AUSA Overby also revealed that a few days earlier he had said to someone: “It’s called the
19 Department of Justice. It’s not called the Department of Revenue. Since we are the Department
20

21 ¹² Throughout his career, Robert Wright has enjoyed a stellar reputation. After graduating from U.C. Berkeley in
22 1966, and serving as a captain in the U.S. Army, he obtained a J.D. from Harvard Law School in 1971. Over the
23 course of practicing law for 40 years, which continues to this day in his capacity as Senior Counsel for a non-profit
24 environmental public interest organization in Sacramento, Wright has built a career punctuated by prestigious
25 positions, significant legal victories, and commendations for excellence as a lawyer. Wright is rated “AV” by
26 Martindale-Hubbell, a distinction defined by its website as a “testament to the fact that a lawyer’s peers rank him or
27 her at the highest level of professional excellence.” Among other positions, Wright served as a California Deputy
28 Attorney General in its Environmental Unit, as a law firm partner, and as an adjunct Professor of Environmental Law
at San Joaquin College of Law in Fresno from 1990 to 2003. Wright joined the Office of the United States Attorney
for the Eastern District of California in December of 1997, where he served for more than twelve years. As an
AUSA, Wright received significant praise for his work, and was appointed to lead the Office’s Affirmative Fire
Litigation Team after its formation by the Department of Justice in 2008, a position he maintained as he investigated
and initiated the Office’s Moonlight Fire prosecution. (Declaration of R. Wright (“Wright Decl.”) ¶¶ 2-7.)

¹³ AUSA Eric Overby died unexpectedly in 2012.

1 of Justice, we win if justice wins.” (*Id.*) Before leaving, Overby also talked to others regarding
 2 his concerns, including former AUSA Wright, asking: “Is it just me, or is there something
 3 seriously wrong in the Eastern District Civil Division management?” (Wright Decl. ¶ 28.)

4 As detailed in this Rule 60(d)(3) motion,¹⁴ the fraud worked upon this Court is, as one
 5 would expect with jointly prosecuted matters, similar to the fraud worked upon the state court.
 6 This Court’s inherent powers exist in part to “further[] the pursuit of achieving complete justice
 7 by enabling the court to suspend those judgments whose enforcement leads to inequitable
 8 results.” *In re Levander*, 180 F.3d 1114, 1118 (9th Cir. 1999) (quoting *Hazel–Atlas Glass Co. v.*
 9 *Hartford–Empire Co.*, 322 U.S. 238, 244 (1944)).

10 While the trial court proceedings in the coordinated Moonlight Fire litigations have ended
 11 in two radically different results, there is little difference between these two cases in those areas
 12 that should concern this Court. Properly understood, the settlement of the federal matter does not
 13 resolve the issues presented by a motion focused upon egregious and unconscionable misconduct
 14 which “defiles the court itself,” *Stonehill*, 660 F.3d at 443, and which, even after a settlement, still
 15 “presents a carefully planned scheme calculated to deceive the court . . . defense counsel, and his
 16 client,” *Southerland v. Irons*, 77 F.R.D. 727, 733 (E.D. Mich. 1978), *aff’d sub nom* 628 F.2d 978
 17 (6th Cir. 1980).

18 Here, the lead prosecutors turned a blind eye to a thoroughly corrupt investigation,
 19 transported that corruption into the jurisdiction of this Court, and then permitted pervasive
 20 dishonesty by the investigators on issues going to the core of this matter.¹⁵ These prosecutors

21 _____
 22 ¹⁴ The evidence in support of this motion is substantial, which is to be expected on such a significant action involving
 23 so many multiple instances of misconduct related to this fraud upon the Court. This fact is not uncommon when
 24 making highly factual inquiries associated with a fraud upon the Court. For instance, the Ninth Circuit’s published
 decision in *Stonehill* and the Sixth Circuit’s published decision in *Demjanjuk*, each discussed *infra*, involve lengthy
 factual analyses resulting in lengthy decisions.

25 ¹⁵ As found by Judge Nichols regarding dishonesty on fundamental facts, “Not only does this evidence go to one of
 26 the most central, substantive issues in this case — the location of the origin, and thus the cause of the fire — it also
 27 goes directly to the credibility of the investigators on the Moonlight Fire. While credibility is important in any case,
 the Court notes that it is even more critical when the witnesses at issue are law enforcement officers who have access
 28 to the scene, are charged with gathering and documenting the evidence, and are responsible for determining who is to
 blame. The Court finds that the credibility of the investigators is also an issue of substantial importance to this case.”
 (Ex. 25 at 42.)

1 recklessly omitted information favorable to these Defendants and coordinated their pervasive
2 discovery abuses with both the state prosecutors and the investigators. The conduct of counsel
3 for both the United States and Cal Fire constitutes a fraud which “defiles the court” and which
4 was “perpetrated by officers of the court so that the judicial machinery cannot perform in the
5 usual manner its impartial task of adjudging cases that are presented for adjudication.” *Alexander*
6 *v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989). Accordingly, Defendants respectfully request
7 that this Court terminate this matter for fraud upon the Court and vacate the settlement.

8 **III. BACKGROUND**

9 **A. A Brief Overview of the Moonlight Fire**

10 The Moonlight Fire began on a Monday, Labor Day, September 3, 2007, on private
11 property owned by members of the Walker family (“Landowner Defendants”) and managed by
12 W.M. Beaty and Associates (“Beaty”). Earlier that year, defendant Sierra Pacific Industries
13 (“Sierra Pacific”) had won a bid to harvest a portion of property owned by the Landowner
14 Defendants. In turn, Sierra Pacific hired defendant Eunice Howell’s Forest Harvesting Company
15 (“Howell”) to conduct the logging operations on the Landowner Defendants’ land.

16 While somewhat remote, the property was prime firewood cutting area for local
17 townspeople. The same property was also frequented by recreational users, including hikers,
18 hunters, and motorcycle and ATV riders. (Ex. 80 at 7-8; Ex. 81 at 3-5.) Because the area has
19 been logged over the course of many decades, the property is readily accessible through a
20 substantial network of navigable dirt trails and roads beneath the tree canopy. (Ex. 80 at 8; Ex. 81
21 at 7.) A number of people were in the area on Labor Day, or may have been. *Id.* On the day of
22 the fire, Ryan Bauer, a resident of the town of Westwood, told his parents he would be in the area
23 to cut firewood, an activity he engaged in frequently through a side-business. (Ex. 76 at 14.) To
24 do so, Bauer used an illegally modified chainsaw, which increased its fire danger. (Ex. 82 at 2-3.)
25 Shortly after the Moonlight Fire began, Bauer’s parents were found dangerously close to where
26 the fire began by a private patrolman, who testified that the Bauers said they were looking for
27 their son Ryan. (Ex. 79 at 2-4, 9.) During his deposition, their son encircled an area which
28

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1 included where the fire started as his favorite place to cut firewood. (Ex. 77.)

2 Others may have been in the area too, including Michael McNeil, a USFS employee and
3 suspected serial arsonist on numerous fires that appeared to coincide with his arrival on a variety
4 of geographical assignments. (Ex. 41 at 176-180.) After a lengthy attempt to catch McNeil using
5 transponders and surveillance, McNeil was inexplicably promoted to Battalion Chief, Fire
6 Prevention, and transferred to Lassen National Park about two months before the Moonlight Fire
7 began. (*Id.*) His whereabouts the morning and early afternoon on the day of the Moonlight Fire
8 are unknown because the investigators never bothered to look into, before releasing their origin
9 and cause scene, whether McNeil may have been responsible for starting the fire.¹⁶

10 Also, on the morning and early afternoon of the day the fire started, two Howell
11 employees, J.W. Bush and Kelly Crismon, were using bulldozers to create soil berms or “water
12 bars” across skid trails to help prevent erosion. Both operators wrapped up their work that day
13 before 1:00 p.m., drove down to a service road and then parked their bulldozers about a mile to
14 the south where they serviced them before leaving. (Ex. 73 at 2-6.) By 1:30 p.m., each was
15 headed back toward the nearby town of Westwood in their pickup trucks with windows down.
16 (*Id.* at 7-8.) At no time while working in the area that day, while at the log landing, or as they
17 drove out, did they smell or see any smoke or fire. (*Id.* at 28.) Within two hours of finishing their
18 work that day, J.W. Bush attempted to return to the general area in which he had been operating
19 but was prevented from doing so by the Moonlight Fire. (Ex. 73 at 117-124.)

20 _____
21 ¹⁶ The investigators’ failure to investigate the whereabouts of McNeil is even more inexcusable in light of what they
22 knew at the time. Lead investigator White was so concerned about McNeil’s arrival in the area that summer that
23 White quickly made a point of requesting that a transponder be placed on the bottom of McNeil’s USFS issued
24 pickup truck. (Ex. 41 at 178-180; Ex. 48 at 36-37.) Ultimately, McNeil was arrested and charged with arson in
25 another matter and with making extortionist email threats to various judges, law enforcement officials and politicians,
26 including Senator Barbara Boxer and Congresswoman Mary Bono. McNeil pled guilty to the extortionist threats, a
27 crime he initially carried out through a complicated scheme designed to make it appear as if his ex-wife were the
28 perpetrator. (Ex. 84 at 2-4.) Defendants were keen to take McNeil’s deposition because of the “blame-someone-
else” nature of his crimes, the long-held suspicions that McNeil may be a serial arsonist who could easily perpetrate
such crimes while in his USFS uniform and vehicle, and the timing of his arrival in Susanville in relationship to the
Moonlight Fire. Defendants therefore deposed McNeil in the State Actions on February 14 and 15, 2013, at the R.J.
Donovan Correctional Facility, where he is serving a 19 year, 8 month sentence. (*Id.* at 2.) During that deposition,
McNeil testified that he understood how to make timing devices which could start wildfires, and that the types of
devices and the length of the “fuses” was only limited by the imagination of the creator. He confirmed that such
delayed ignition mechanisms could be set to last anywhere between minutes to days. (*Id.* at 5-8.)

1 The Moonlight Fire was spotted from the closest United States Forest Service (“USFS”)
 2 lookout tower and called in at 2:24 p.m. (Ex. 30 at 3.) The Red Rock lookout tower is located on
 3 Red Rock peak about ten miles away. Once the fire was called in, suppression resources were
 4 directed to the site, but the Moonlight Fire would still burn approximately 65,000 acres over the
 5 course of the next two weeks, some 45,000 acres of which were in the Plumas and Lassen
 6 National Forests, the property of the United States. USFS and Cal Fire jointly worked to
 7 extinguish the blaze.

8 **B. The Moonlight Fire Investigation, as Told Through the Joint Report**

9 The USFS and Cal Fire jointly investigated the Moonlight Fire, and later jointly issued
 10 their official report on the cause of the fire, entitled “Origin and Cause Investigation Report,
 11 Moonlight Fire” (Joint Report). (Ex. 30 at 1.) The Joint Report was signed by Cal Fire’s
 12 investigator Joshua White (“White”) and the USFS’s investigator Diane Welton (“Welton”).
 13 However, the first investigator on the scene was USFS investigator David Reynolds
 14 (“Reynolds”), who had been dispatched to the scene shortly after the fire was called in by the Red
 15 Rock lookout tower. He arrived at approximately 3:30 p.m. (*Id.* at 5.) White, a Cal Fire
 16 Battalion Chief and law enforcement officer, was also dispatched to the fire, arriving later that
 17 same evening. Because it was too hot and too dark to do any substantive investigative work on
 18 that first night, White and Reynolds agreed they would start their joint investigation the next
 19 morning. (Ex. 30 at 17.)

20 Early that next morning, on September 4, 2007, Reynolds and White began their
 21 investigation, with White taking the lead. (Ex. 30 at 17-19; Ex. 34 at 1.) As they walked into the
 22 fire area, they eventually found a skid trail.¹⁷ After turning on that trail and walking down a
 23 slope, they located some rocks with strike marks, which they preliminarily identified as the
 24 general location of where the fire began. (Ex. 30 at 19-20.) Without securing the scene, they left,
 25 drove back towards Westwood for lunch, and used their phones to set up a meeting with Howell
 26 _____

27 ¹⁷ “Skid trails” are pathways within the forest created by bulldozers dragging logs down to “landings” where the logs
 28 are then removed by logging trucks to take them to mills.

1 bulldozer operator Kelly Crismon. (*Id.*) The investigators conducted their first interview of
 2 Crismon back at the fire scene, in their chosen origin area, finishing that discussion at roughly
 3 6:00 p.m. (*Id.* at 20-22.) During that meeting, Crismon confirmed that he had been in the area
 4 earlier that day installing water bars. (*Id.*) Thereafter, White took Crismon back down the hill,
 5 while Reynolds stayed behind to begin processing the scene, putting a pink tape around their
 6 chosen area of origin and marking the scene with indicator flags. (*Id.*)

7 When White returned, he and Reynolds continued placing indicator flags in the area they
 8 designated as the general area of origin. (Ex. 30 at 22.) According to their training, blue flags are
 9 used to denote where the fire was backing, yellow flags where the fire was moving laterally, and
 10 red flags where the fire was advancing. (*Id.*) A white flag typically designates the point of
 11 origin. (*Id.*; Ex. 41 at 48.) White has conceded that one of the *primary* goals of a wildland fire
 12 investigation is to find a point of origin. (Ex. 41 at 55, 158-159.) White also testified that finding
 13 the fire's point of origin is necessary before determining the cause of the fire as it is at that point
 14 where any physical evidence of the actual ignition is likely to be located. (*Id.* at 157, 158-159.)¹⁸

15 White and Reynolds returned the next morning, September 5, at roughly 8:00 a.m. (Ex.
 16 30 at 22; Ex. 41 at 45-46; Ex. 45 at 27-28.) The Joint Report provides that when they returned
 17 they placed "numbered plates" next to certain fire indicators, photographing those indicators as
 18 they went. (Ex. 30 at 22.) The Joint Report also provides that White and Reynolds used "a
 19 handheld magnet to 'sweep' the area in an effort to identify any ferrous material." (*Id.* at 23.)
 20 "Within close proximity of two of the rocks... a ferrous material consistent with that of metal
 21 shavings, were recovered." (*Id.* at 23-24.) According to the Joint Report, White and Reynolds
 22 placed the metal allegedly found at these two rocks into one bag, which they labeled E-1, for
 23 "Evidence #1." (*Id.* at 24.) After finding the metal, the investigators left the origin area and
 24

25 _____
 26 ¹⁸ The USFS and Cal Fire's lead origin and cause investigator Larry Dodds, an expert in the science of origin and
 27 cause investigations, confirmed during his deposition that being off by eight feet regarding the point of origin can
 28 make "a world of difference," as locating the correct point of origin is critical to establishing causation. (Ex. 52 at
 29.) If investigators find what they believe is a competent ignition source in a spot where the fire did not start, they
 are necessarily missing what could be far different causation potentials at the actual point of origin – a timing device,
 a gasoline spill, a match, a set of footprints, etc.

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1 walked downhill to their trucks, where they photographed the metal at 10:02 a.m. (Ex. 41 at 94.)

2 By 10:15 a.m. on September 5, 2007, White and Reynolds concluded that the Moonlight
3 Fire was caused by rock strikes from a Howell bulldozer. Importantly, they then “released” their
4 area of origin. (Ex. 34 at 1.) According to Reynolds, they “were confident” and they “were
5 “done.” (Ex. 45 at 31.) Indeed, later that same day, Reynolds finished an “Incident Report”
6 identifying Sierra Pacific as the “defendant.” (Ex. 30 at 51.)

7 Three days later, on September 8, 2007, Special Agent Diane Welton, a law enforcement
8 officer with the USFS, replaced Reynolds as the USFS’s lead investigator. Welton visited the fire
9 scene that morning with White, along with her supervisor and fellow USFS law enforcement
10 officer Marion Matthews (“Matthews”). Both Welton and Matthews were directed to join the
11 investigation by their supervisor Craig Endicott (“Endicott”), Assistant Special Agent in Charge.
12 (Ex. 48 at 4; Ex. 50 at 2-7; Ex. 30 at 31.) Both Matthews and Welton [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 [REDACTED] (Ex. 48 at 6-15; Ex. 83.) During
18 their depositions, both Matthews and Welton [REDACTED]
19 [REDACTED] (*Id.*; Ex. 50 at 18-20.)

20 When Matthews and Welton visited the fire scene on September 8, 2007, Matthews told
21 Welton that she had reservations about the size of the alleged origin area as established by White
22 and Reynolds. (Ex. 50 at 10-11.) Matthews believed that the origin area should have been
23 enlarged to encompass more area further up the hill to the west.¹⁹ (*Id.* at 11-14; Wright Decl. ¶
24 7.) The Joint Report, however, says nothing whatsoever about Matthews’ stated concerns that the
25 investigators should have enlarged their area of origin to extend further up the hill, nor does the
26

27 ¹⁹ Placing the fire further up the hill would have brought the alleged points of origin closer to the area where the 3:09
28 p.m. air attack video, discussed *infra*, shows the smoke plume.

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1 Joint Report say anything about the arrival of USFS employee Michael McNeil into the area
2 several weeks before the Moonlight Fire.

3 After this investigation, nearly two years passed. Finally, on June 30, 2009, the USFS and
4 Cal Fire released their Joint Report, which concluded that the cause of the Moonlight Fire was “a
5 rock strike with the grouser or front blade from S-2 CRISMON’s bulldozer.” (Ex. 30 at 4.) This
6 Joint Report contains an official sketch that identifies two separate points of origin, labeled E-2
7 and E-3. (Ex. 39.)

8 As thoroughly discussed in this motion, however, the Defendants have discovered clear
9 and convincing evidence that the Joint Report fails to disclose what actually happened during the
10 Moonlight Fire origin and cause investigation and that, instead, the Joint Report covers up the real
11 conduct of these investigators during their origin and cause investigation.

12 **C. The Initiation of the State Actions**

13 On August 4, 2009, approximately a month after the Joint Report was released, White
14 signed and sent a letter to each of the primary Defendants, claiming that they had been found
15 responsible for the Moonlight Fire and that they were therefore liable for the \$8.1 million that Cal
16 Fire had incurred in suppressing and investigating the cause of the Moonlight Fire. (Exs. 115-
17 117.) However, instead of demanding full payment to the State of California, White sought the
18 reduced amount of \$7.6 million for the State of California but then also demanded that the
19 Defendants issue a separate check in the amount of \$400,000, payable to something called the
20 “CDAW Wildland Fire Training and Equipment Fund.”²⁰ (Ex. 115.) White stated that if
21 Defendants failed to comply with the demand for payments as set forth in the letter within 30
22 days, Cal Fire would file its action against them and add interest to its damage claim. (*Id.*)

23 Cal Fire did not wait 30 days. On August 9, 2009, the Office of the California Attorney
24 General filed its Moonlight Fire action in Plumas County Superior Court on behalf of Cal Fire.
25 Cal Fire’s lead counsel was Supervising Deputy Attorney General Tracy L. Winsor (“Winsor”),

26 _____
27 ²⁰ After settlement of the federal Moonlight Fire action, Defendants later learned that this “fund” was internally
28 referred to as “WiFITER” and, as discussed more fully below, was controlled by Cal Fire, not the California District
Attorneys Association.

1 primarily assisted by Deputy Attorney General Daniel M. Fuchs (“Fuchs”). (Ex. 1.)

2 Several other private parties who claimed damages from the Moonlight Fire also filed suit.
3 In total, there were five private party lawsuits and one Cal Fire suit. Because all six state court
4 lawsuits (seeking well over \$60 million in damages) relied on the same joint USFS and Cal Fire
5 origin and cause investigation, the state court consolidated the actions early in the litigation for
6 purposes of discovery, and later consolidated all matters for a trial on liability as well.

7 **D. The Initiation of the Federal Action**

8 In the summer of 2008, before the Joint Report was released, and well before Cal Fire
9 filed its action, AUSA Robert Wright, the acting head of the Affirmative Fire Litigation Team in
10 the Eastern District, had become particularly interested in the Moonlight Fire because of the
11 substantial damage it had caused to USFS land. (Wright Decl. ¶ 7.) In fact, Wright ultimately
12 sought and obtained an “early referral” because he believed he had a strong case on liability and
13 also knew that there were extensive damages. (*Id.* ¶ 11.) Wright also understood that such
14 referrals were typically not given until after the Forest Service determined its amount of claimed
15 damages. (*Id.* ¶ 11.)

16 At some point prior to October of 2008, Wright retained several expert consultants and, on
17 or about October 2, 2008, visited the fire site with consultants along with another AUSA. (*Id.* ¶¶
18 7-8.) When they arrived in the area, they were joined by investigator White from Cal Fire and
19 investigator Welton from the USFS. (*Id.* ¶ 7.) Consistent with what is described in their
20 dishonest Joint Report, the investigators both claimed the Moonlight Fire was caused by a rock-
21 strike from a metal tracked bulldozer working in their selected “area of origin.” (*Id.* ¶ 7.) When
22 driving back into town in a pickup truck with White and Welton, Welton told Wright “there’s
23 something that we need to tell you.” (*Id.* ¶ 7.) Welton then explained that investigator Matthews,
24 who had visited the alleged origin five days after it began, had wanted the investigators to declare
25 a larger alleged origin area for the fire. (*Id.* ¶ 7.) At the time, Wright believed that White and
26 Welton were “scrupulously honest and trustworthy in their conduct of the investigation and
27 preparation of the Report.” (*Id.* ¶ 7.) Later, however, when Defendants asked Welton about this
28

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1 issue in her deposition, she denied any memory of it.²¹ (Ex. 48 at 28-29.)

2 After discussing the matter with his consultants, and with investigators White and Welton,
3 AUSA Wright began the process of drafting the Moonlight Fire complaint on behalf of the United
4 States, eventually executing and filing that complaint on August 31, 2009, three weeks after Cal
5 Fire's complaint and nearly two years after the fire began. (Wright Decl. ¶ 11.) Thereafter,
6 AUSA Wright oversaw the Moonlight Fire litigation until January 4, 2010. On that day, Wright's
7 supervisor, AUSA David Shelledy, abruptly removed Wright from the Moonlight Fire litigation
8 with an additional instruction that Wright viewed as unprecedented in his many years of
9 experience as a federal prosecutor. (*Id.* ¶ 21.) Specifically, Shelledy told Wright that he was not
10 only being relieved as the lead prosecutor, but that he was barred as of that day from working on
11 the Moonlight Fire matter in any capacity whatsoever. (*Id.*)

12 Shelledy then replaced Wright with AUSA Kelli Taylor, who led the Moonlight Fire
13 prosecution from that point forward. (*Id.* ¶ 23.) Three months later, Taylor signed the United
14 States' first Rule 26 disclosure, claiming damages against these Defendants in excess of \$791
15 million. Together with estimated interest and attorney fees, Taylor's disclosure brought the total
16 claim against these Defendants to more than \$1 billion.²² (Warne Decl. ¶ 7 & Ex. 3.)

17 _____
18 ²¹ In his declaration, Wright explains: "In hindsight, I believe that Matthews thought that the fire may well have
19 originated in a location different from where the investigators had alleged." (Wright Decl. ¶ 7.) Wright's loss of trust
20 is warranted on numerous levels, as discussed further herein. On this point, while Welton confessed Matthews'
21 concerns to AUSA Wright, she was not so forthcoming to these defendants under oath and instead kept to the script
22 of the falsified Joint Report. Specifically, Welton suppressed the harmful key fact regarding Matthews during her
23 deposition. On August 15, 2011, Welton testified as follows:

21 Q: Was there any discussion that you recall at the scene about the general area of origin being
22 potentially larger than the area that was bounded by the pink flagging?

22 A: I don't recall having that discussion.

23 Q: Did Marion Matthews at any point in time ever express to you the thought that she believed the
24 general area of origin should have been bigger, both uphill and downhill?

24 A: Not that I recall.

25 (Ex. 48 at 28-29.) The fact that Welton made a point of telling Wright about Matthews' critical commentary
26 is directly at odds with what she told these Defendants under oath, yet another example of the investigators'
27 willingness to cover-up information harmful to their goal of pinning blame for this fire on their chosen
28 targets.

27 ²² On October 21, 2011, the United States supplemented its initial disclosures, reducing its purported damages to
28 approximately \$662 million. (Ex. 4 at 11.) However, in that disclosure, the United States also reserved its right to
seek a jury instruction that would permit the jury to assess environmental damages in an amount "significantly higher

1 For the next three years, the lawyers for the United States and Cal Fire collaborated under
 2 their joint prosecution agreement regarding this two-front litigation. (Warne Decl. ¶¶ 9-10.) For
 3 example, the federal and state prosecutors coordinated deposition scheduling so that testimony
 4 from certain witnesses could be used in both of their actions. They also collaborated so that
 5 certain depositions would only be taken in one action. Federal prosecutors would often attend
 6 depositions noticed only in the State Action, and vice versa. Additionally, the federal and state
 7 prosecutors jointly prepared the primary investigators for their depositions, hired many of the
 8 same consultants, and disclosed many of the same expert witnesses. (*Id.* ¶¶ 9-11; Ex. 7 at 7-8.)

9 **E. The Resolution of the Federal Action**

10 Defendants intended to defend themselves at trial by demonstrating the investigators' lack
 11 of credibility, by highlighting the absence of any credible evidence that Howell had started the
 12 fire, and by submitting compelling evidence showing that the fire was most likely started by a
 13 third party. (Warne Decl. ¶ 26.) The United States filed motions with this Court attempting to
 14 prevent Defendants from advancing these defenses at trial. (*Id.*; Ex. 14; Ex. 15.)

15 On July 2, 2012, at the urging of the United States, this Court issued tentative pretrial
 16 orders holding, among other things, that Defendants could not elicit any evidence to argue that
 17 someone else started the fire. (Ex. 19 at 8.) Additionally, the Court tentatively held that, under
 18 state forestry regulation 14 California Code of Regulation, section 938.8, Defendants could be
 19 liable even if a third party started the fire. (*Id.* at 9.) Moreover, with one of their primary
 20 defenses gone, Defendants were facing an economic death penalty case against federal
 21 prosecutors who had repeatedly demonstrated a willingness to breach their ethics while
 22 defrauding both Defendants and the Court.²³ Defendants therefore agreed to settle the federal

23
 24 than the number listed herein.” (*Id.* at 10.) The Moonlight Fire action continued to pose catastrophic damages for
 25 the Defendants. Thousands of jobs and the viability of entire communities in many already depressed Northern
 California logging regions hung in the balance.

26 ²³ Although the Court's tentative rulings on the motions *in limine* were certainly factors for these Defendants in
 27 assessing whether to settle this matter, the Defendants were forced to assess those rulings in the context of having to
 28 also defend against prosecutorial misconduct. Thus, in reaching their reluctant decision to resolve the federal matter,
 Defendants understood the power held by federal prosecutors, as all courts have a right to assume that Assistant
 United States Attorneys would zealously comply with their obligations to the court and to their opponents. In fact, as
 acknowledged by the Supreme Court itself, the judicial system expects and relies upon a government attorney to act

1 Moonlight Fire action by collectively paying the United States \$55 million over time and by
 2 Sierra Pacific conveying to the United States 22,500 acres of its land over time.²⁴ Because the
 3 Settlement Agreement contemplated performance over a period of years, the parties expressly
 4 agreed that this Court would retain jurisdiction over the enforcement of the Agreement. (Ex. 20
 5 at 10). In connection with that agreement, the Court issued an order confirming its ongoing
 6 jurisdiction. (*Id.* at 28 (“Notwithstanding the entry of a dismissal herein, this Court (Kimberly J.
 7 Mueller, District Judge) shall retain jurisdiction to enforce the terms of this compromise
 8 settlement.”).)

9 **F. The Resolution of the State Actions**

10 After the federal settlement, discovery continued in the consolidated Moonlight Fire State
 11 Actions. In the spring of 2013, the state court issued two rulings rejecting the effort by Cal Fire
 12 to repeat in the State Actions the tentative federal pretrial rulings that Defendants could be held
 13 liable for a fire caused by a third party. More specifically, in ruling on cross-motions for
 14 summary judgment and/or adjudication, the state court found that Cal Fire could only recover its
 15 suppression costs if Defendants caused the fire. In that same order, the state court also ruled that
 16 state forestry regulation 14 California Code of Regulation, section 938.8 could not create a “duty”
 17 on the part of any of the Defendants under California tort law to suppress or detect third party
 18 fires.

19 Thereafter, the Honorable Leslie C. Nichols was assigned to the case for all purposes by
 20 the Chief Justice of California under the Assigned Judges Program. On July 26, 2013, following
 21 a lengthy three-day hearing, Judge Nichols issued a series of orders dismissing all six state court
 22

23 in good faith and as a “servant of the law.” See *Berger v. United States*, 295 U.S. 78, 88 (1935). Defendants were
 24 also acutely aware, as defense lawyer Brendan Sullivan recently commented, “if the government is not honest, it can
 25 trump even the best efforts of those who work in the system.” Mr. Sullivan’s comments apply with full force here.
 26 The lead prosecutors took full advantage of the Court’s understandable inclination to believe that these AUSAs were
 abiding by their professional responsibilities while they were actually doing just the opposite. This combination made
 it nearly impossible for the Defendants to succeed.

27 ²⁴ In a press release, the United States publically valued the settlement (including cash and land) at \$122.5 million,
 28 characterizing this amount as the “largest recovery ever received by the United States for damages caused by a forest
 fire.” See USDA website at <http://www.fs.usda.gov/detail/r5/news-events/?cid=STELPRDB5380322>.

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1 actions and entering judgment for the Defendants on the ground that, among other things,
2 Plaintiffs were unable to present a prima facie case of causation. (Ex. 23.)

3 After obtaining these dismissals, Defendants began their effort to expose the egregious
4 misconduct associated with the prosecution of the Moonlight Fire matters by filing a Motion for
5 Fees, Expenses and Sanctions on October 4, 2013. The filing of this motion initiated a lengthy
6 process involving the submission by all parties of thousands of pages of briefing, declarations
7 with evidence, deposition transcripts and deposition video.

8 Four months later, On February 3 and 4, 2014, Judge Nichols heard oral argument on the
9 Motion for Fees, Expenses and Sanctions in the Plumas County courthouse in Quincy, California.
10 In the afternoon of February 4, 2014, Judge Nichols issued two orders, one 26 pages and the other
11 58 pages. The 26-page order contains the court’s conclusions regarding Cal Fire and its counsels’
12 conduct as a whole, which the court read from the bench. (Ex. 24.) The other 58-page order
13 contains detailed findings supported by references to evidence. (Ex. 25.) Together, the orders
14 terminated Cal Fire’s lawsuit in its entirety for its “egregious and reprehensible conduct.” (Ex. 24
15 at 19.) Additionally, the orders awarded Defendants “full compensatory attorney fees and
16 expenses” amounting to approximately \$32.4 million. (*Id.* at 20 & Ex. 25 at 57-58.)

17 In these orders, the court found that “Cal Fire’s actions initiating, maintaining, and
18 prosecuting this action, to the present time, is corrupt and tainted. Cal Fire failed to comply with
19 discovery obligations, and its repeated failure was willful.” (Ex. 24 at 20-21.) Additionally, the
20 court found that Cal Fire had engaged in “egregious and reprehensible conduct” and “a systematic
21 campaign of misdirection with the purpose of recovering money from Defendants.” (*Id.* at 19,
22 21.) Although the misconduct was “so pervasive that it would serve no purpose for the Court to
23 recite it all,” the court made specific findings that critical USFS and Cal Fire witnesses failed to
24 testify honestly, falsified witness statements, and falsified both the Joint Report for the Moonlight
25 Fire action, as well as other origin and cause reports, which they attempted to use in support of
26 their Moonlight Fire prosecution. (*Id.* at 21-22.) Judge Nichols specifically noted the misconduct
27 of various USFS witnesses, including the “improper efforts of the two federal investigators,
28

1 Reynolds and Welton.” (Ex. 25 at 2.)

2 While the court elected not to sanction counsel for Cal Fire,²⁵ the court expressed
3 profound concerns regarding the conduct of the state prosecutors. The court stated:

4 The sense of disappointment and distress conveyed by the court is so palpable,
5 because it recalls no instance in experience over forty seven years as an advocate
6 and as a judge, in which the conduct of the Attorney General so thoroughly
7 departed from the high standard it represents, and, in every other instance, has
8 exemplified.

9 (Ex. 24 at 20.)

10 The court also found that the state prosecutors created “a tremendous burden” on the court
11 “by allowing a meritless matter to go forward,” and that this ran afoul of their responsibility “to
12 only advance just actions.” (Ex. 25 at 18.)

13 **G. AUSA Robert Wright and His Experiences Relating to the Moonlight Fire and Other**
14 **Wildfire Cases in the Year He Filed the Moonlight Action.**

15 Former AUSA Robert Wright eventually obtained copies of the termination orders issued
16 by Judge Nichols in the State Actions. (Wright Decl. ¶ 30.) After reviewing Judge Nichols’
17 orders as well as a copy of the Joint Report and other materials, Wright concluded that a grave
18 injustice had occurred during the prosecution of the federal Moonlight Fire matter, which led to
19 his preparation of a declaration in support of this motion. (*Id.* ¶ 34.)

20 In the spring of 2009, AUSA Wright was working on other wildland fire prosecutions for
21 the office. In one of those cases he had determined that he was “ethically obligated to disclose a
22 document to the defense that called into question the viability of the government’s prosecution in
23 that matter.” (*Id.* ¶ 13.) At the time the Civil Chief in the Office was David Shelledy. (*Id.* ¶ 13.)
24 AUSA Wright sought advice from the Department of Justice’s Professional Responsibility

25 _____
26 ²⁵ The court noted that its leniency regarding Cal Fire’s counsel “in no way speaks to issues of legal ethics or
27 compliance with the requirements of the State Bar Act.” (Ex. 24 at 19-20.) The court also noted that its “lenity,
28 prudence, and caution as it relates to sanctions against officers of the court should not in any way be seen as softening
or mitigating the force of this Court’s decision, findings and orders as it relates to Cal Fire. It simply means that,
whatever else might be said about the conduct and advocacy of cited attorneys, it will not be sanctioned here.” (*Id.* at
20.)

1 Advisory Office (PRAO) in Washington, D.C.²⁶ PRAO supported Wright's understand that he
 2 had to disclose the document and Wright dismissed the action. (*Id.*) Several months later, in
 3 August of 2009, AUSA Wright filed the Moonlight Fire complaint for the United States. (*Id.* ¶
 4 14.)

5 In the fall of that year, on a separate wildland fire action he was handling, AUSA Wright
 6 had a significant disagreement with AUSA Shelledy regarding Wright's desire to carry out what
 7 he believed were his ethical obligation to disclose to the defense a document which revealed a
 8 serious calculation error which incorrectly increased the United States' damage claim in the
 9 action by \$10 million. (Wright Decl. ¶ 14.) Because AUSA Shelledy was resisting disclosing
 10 this error, Wright "sought advice from PRAO to obtain support for the proper exercise of [his]
 11 professional responsibilities." (*Id.*) When Wright received advice from PRAO stating it was his
 12 ethical obligation to disclose the \$10 million reduction to the defense, Shelledy continued to
 13 oppose disclosure by sending his own email to PRAO, questioning the advice PRAO gave to
 14 Wright on the matter. (*Id.* ¶ 15.) When that effort failed, Shelledy sent Wright an email stating,
 15 "Okay, Bob, that's a beginning. Now what can you do to avoid creating an ethical obligation to
 16 volunteer a harmful document?" (*Id.*) Because Wright believed as a lawyer for the DOJ and
 17 member of the California Bar he "had a broad duty of candor to the court and a responsibility to
 18 seek justice and develop a full and fair record," he responded to AUSA Shelledy by explaining,
 19 "David, pursuing our theory of timber loss requires disclosure. The only way I am aware of to
 20 moot the disclosure requirement would be to drop the claim for timber losses, which would result
 21 in a lower damages number than simply disclosing the harmful document." (*Id.* at ¶ 16.) Wright
 22 states that his supervisor Shelledy responded by calling his comment "flippant." (*Id.*)

23 Thereafter, on October 23, 2009, PRAO attorney Kandice Wilcox responded with a
 24 crystal clear directive, stating in an email, "Part of the issue in making a false statement means

25
 26 ²⁶ As Wright states in his declaration, "PRAO exists to provide ethical advice to DOJ attorneys helping to insure that
 27 DOJ attorneys conduct litigation appropriately and consistent with ethical requirements, and provides protection for
 28 AUSA's from internal discipline by the Department's Office of Professional Responsibility (OPR) if disclosure of all
 material facts are made to PRAO and the attorney then acts in accordance with PRAO's recommendations." (Wright
 Decl. ¶ 13.)

1 not only an affirmative mis-statement but deliberately withholding information which refutes the
2 position you assert.” (Wright Decl. ¶ 17.) Wright provided the calculation error document in the
3 United States’ initial disclosures and the case has since settled. (*Id.*)

4 Thereafter, Shelledy treated Wright with hostility. (Wright Decl. ¶ 18.) Wright further
5 states, “the internal struggles that I encountered in 2009 with respect to my professional concerns
6 on these wildland fire actions marked the first time in my 40 years of practicing law that I felt
7 pressured to engage in unethical conduct as a lawyer.” (*Id.*) On January 4, 2010, just after
8 receiving a commendation from U.S. Attorney Benjamin Wagner for his work on another
9 wildland fire matter, Civil Chief Shelledy abruptly relieved Wright of any and all responsibility
10 for the Moonlight Fire, forbade him from working on the matter in any capacity, and replaced
11 Wright with AUSA Kelli Taylor (“Taylor”). (*Id.* ¶¶ 21-23.) Shelledy told Wright that lately they
12 disagreed about almost everything.²⁷ (*Id.* at ¶ 21.) Taylor remained lead counsel for the United
13 States for the remainder of the case.

14 **H. AUSA Eric Overby**

15 AUSA Wright is not the only federal prosecutor who worked on the Moonlight Fire and
16 who opened up about the misdirected prosecution of this matter. In March of 2011, Eric Overby,
17 a highly respected senior AUSA from Salt Lake City, came to Sacramento to assist with the
18 Moonlight Fire litigation.²⁸ (Warne Decl. ¶ 13.) Unfortunately, after working on the case for

19 _____
20 ²⁷ In response to Shelledy’s assertion, Wright declares, “But in fact, there were only two things we had disagreed
21 about. One was the duty of attorneys to sometimes have to disclose a harmful fact or document to the court or other
22 side. The other was his insistence that our damages experts only talk to Forest Service personnel in the presence of
23 the AUSA. It was noteworthy in that regard that the document revealing the \$10 million overcharge in the fire case I
24 referred to above was discovered by my expert, a retired Forest Service employee, during his one-on-one
25 conversation with the Forest Service person who discovered her own mistake. Had I or another AUSA been present, I
26 do not believe that action and document would have been revealed.” (Wright Decl. ¶ 21.)

27 ²⁸ Sometime after his arrival, Overby spoke with Katherine Underwood, an attorney working at the time for Rick
28 Linkert at Matheny, Sears, Linkert & Jamie, who was acting lead trial counsel for Defendant Beaty and the
Defendant Landowners. (Declaration of K. Underwood ¶¶ 3-5.) Overby told Underwood that he was working on the
Moonlight Fire matter as an “evaluator.” (*Id.* ¶ 7.) Overby also told Underwood that he had hoped his presence in
this case could repair some of the damage that had been done by Taylor to the working relationship with defense
counsel. (*Id.* ¶ 6.) Underwood’s declaration summarizes a telling point of discussion with Overby as follows:

In order to further explain his role in the Moonlight Fire prosecution, Mr. Overby told me about
another United States prosecution he had been sent to evaluate shortly before trial. Mr. Overby
said there was a deposition taken, essentially on the eve of trial, wherein evidence was obtained
that demonstrated the government’s case should be dismissed. Mr. Overby recommended

1 several months, Overby became frustrated with his inability to rectify the prosecutorial problems
 2 he was witnessing. In fact, Overby told an attorney representing the Landowner Defendants and
 3 Beaty the following: “Imagine you’re on a train that is running out of control towards the edge of
 4 a cliff. You really only have two options: head to the front of the train and try to gain control or
 5 jump off. I’m choosing to jump off.” (Declaration of D. Kim ¶ 7.)

6 On May 12, 2011, AUSA Overby contacted Sierra Pacific’s lead trial counsel William
 7 Warne to inform him that he would be leaving the Moonlight prosecution team. (Warne Decl. ¶
 8 22.) Overby asked Warne if they could meet in person, and they set up a meeting later that same
 9 day at Downey Brand. (*Id.*) During that meeting, Overby confirmed with Warne that he was
 10 leaving the matter and going back to Utah. He said, “If I thought there was anything positive that
 11 would result from me staying, then I would stay.” (*Id.*) Overby also told Warne that it was a
 12 physics problem, and that, “If I am banging my head against a brick wall, then my head loses.”
 13 (*Id.*) Echoing similar sentiments as expressed by Judge Nichols regarding the rarity of what he
 14 was witnessing, Overby also said, “In my entire career, yes, my entire career, I have never seen
 15 anything like this. Never.” (*Id.*) Overby told Warne that he told someone (presumably in his
 16 office) a few days earlier the following: “It’s called the Department of Justice. It’s not called the
 17 Department of Revenue. Since we are the Department of Justice, we win if justice wins.” (*Id.*)

18 In May of 2011, Overby also contacted former federal prosecutor Robert Wright, who had
 19 left the U.S. Attorney’s Office in December of 2010. (Wright Decl. ¶ 28.) During that call,
 20 Overby asked Wright, “Is it just me, or is there something seriously wrong in the Eastern District
 21 Civil Division management?” (*Id.*) Later in May of 2011, Overby met with Wright in person and
 22 discussed his dissatisfaction with the prosecution of fire cases by the Eastern District. (*Id.*) Later,
 23 Overby told Wright that he was so concerned with the management of fire litigation matters in the
 24 Eastern District that he altered his plans to stay in California and instead decided to return to the

25
 26 dismissal with prejudice, his recommendation was accepted, and the United States reimbursed the
 27 defendant(s) their defense costs. Mr. Overby described this action to me as “the most satisfying act
 28 of my career.”

(*Id.* ¶ 8.)

1 U.S. Attorney's Office for the District of Utah. (*Id.*)

2 **I. Filing with OPR**

3 The Office of Professional Responsibility (OPR) was established by order of the Attorney
4 General to ensure attorneys and law enforcement personnel with the Department of Justice
5 perform their duties in accordance with the highest professional standards expected of the
6 nation's principal law enforcement agency. In July, Defendants submitted a lengthy brief to OPR
7 in Washington D.C. detailing the prosecutorial misconduct on the part of certain federal
8 prosecutors who took over the Moonlight Fire matter after AUSA Wright's removal. (Warne
9 Decl. ¶¶ 206-207.)

10 **IV. SELECTED EXAMPLES OF FRAUDULENT MISCONDUCT**

11 The fraud worked upon this Court in this matter was comprised of numerous acts of
12 misconduct. Although recklessness is all that need be shown to establish a fraud on the Court
13 under the controlling authorities, the vast majority of the conduct here was clear, intentional, and
14 wilful. Together, the acts amounted to a pervasive fraud driven by the goal of prevailing at
15 whatever the cost. The following selected examples discuss only some of the more egregious acts
16 of fraud. Indeed, Judge Nichols, who for months reviewed thousands of pages of legal briefing,
17 deposition testimony, photographs and exhibits, and who watched hours of deposition testimony,
18 found that "the misconduct in this case is so pervasive that it would serve no purpose for the
19 Court to even attempt to recite it all here." (Ex. 24 at 21.) Before setting forth these instances of
20 fraudulent misconduct, Defendants first include a brief survey of applicable case authority to aid
21 in this Court's review.

22 **A. Ethical Obligations of Government Attorneys and Investigators**

23 A government attorney is "the representative not of an ordinary party to a controversy, but
24 of a sovereignty . . . [whose] interest in a . . . prosecution is not that it shall win a case, but that
25 *justice shall be done.*" *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added); *see*
26 *also* Prof'l Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1218 (1958) (a
27 government lawyer possesses "governmental powers that are pledged to the accomplishment of
28

1 one objective only, that of impartial justice”). As such, an attorney representing the United States
 2 government is “held to a *higher* standard of behavior.” *United States v. Young*, 470 U.S. 1, 25-26
 3 (1985) (Brennan, J., concurring). The standard applies with equal force to both criminal and civil
 4 cases. See *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992); see
 5 also A.B.A. Code of Prof’l Responsibility 7-14; Model Code of Prof’l Responsibility EC 7-14
 6 (1981) (“A government lawyer in a civil action” has the “responsibility to seek justice”). This
 7 higher standard requires that a government attorney refrain from using “his position or the
 8 economic power of the government to harass parties or to bring about unjust settlements or
 9 results.” A.B.A. Code of Prof’l Responsibility 7-14. A government lawyer should similarly
 10 “refrain from instituting or continuing [civil] litigation that is obviously unfair.” Model Code of
 11 Prof’l Responsibility EC 7-14 (1981).

12 Critically important to this case is the obligation of a lawyer representing the United
 13 States “to see that all evidence relevant to the case is presented, *even if unfavorable to its*
 14 *position.*” *United States v. Chu*, 5 F.3d 1244, 1249 (9th Cir. 1993) (emphasis added). “A
 15 prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This
 16 responsibility carries with it specific obligations to see that the defendant is accorded procedural
 17 justice and that guilt is decided upon the basis of sufficient evidence.” *Id.* While the
 18 government’s disclosure obligation encompasses more than just exculpatory evidence, the failure
 19 to produce evidence “material either to guilt or punishment” gives rise to constitutional
 20 violations. *Brady v. Maryland*, 373 U.S. 83, 87 (1947). Thus, an attorney who withholds such
 21 evidence not only violates his disclosure obligations, but also the due process clause. *Id.*

22 Although the Supreme Court has not yet explicitly stated that *Brady* applies in civil cases,
 23 numerous federal courts have opined that the policy justifications underlying *Brady* apply in civil
 24 settings as well. For example, in *EEOC v. Los Alamos Constructors, Inc.*, the court ordered the
 25 government to disclose a list of witnesses and stated that a defendant in a civil case brought by
 26 the government should be afforded no less due process of law than a defendant in a criminal case.
 27 382 F. Supp. 1373, 1383 (D.N.M. 1974) (citing *Berger*, 295 U.S. at 88). Similarly, the court in
 28

1 *Sperry & Hutchinson Co. v. FTC* stated that the due process requirements that inhere in a criminal
 2 case, requiring the prosecution to “disclose evidence in its possession which may be helpful to the
 3 accused,” should also apply in civil actions brought by the government, as “[i]n civil actions, also,
 4 the ultimate objective is not that the Government ‘shall win a case, but that justice shall be
 5 done.’” 256 F. Supp. 136, 142 (S.D.N.Y. 1966). Finally, in *Demjanjuk v. Petrovsky*, a Sixth
 6 Circuit case examining whether the government committed fraud upon the court in civil
 7 extradition proceedings, the court stated that “*Brady* should be extended to cover . . . cases where
 8 the government seeks [remedies] based on proof of alleged criminal activities of the party
 9 proceeded against.” *Demjanjuk v. Petrovsky*, 10 F.3d 338; 353 (6th Cir. 1993).

10 The logic of *Demjanjuk* as it relates to *Brady* is equally applicable here, as this case is
 11 tantamount to a criminal case. Indeed, the United States premised its claims against Defendants,
 12 in part, on criminal violations of 36 Code of Federal Regulations 261.5, thus implicating its *Brady*
 13 obligations. (Ex. 2 at 10.) Moreover, because of the significant damages claimed by these
 14 prosecutors – far exceeding the fair market value of the land itself, and threatening the economic
 15 ruin of each defendant – the Defendants are fully entitled to all of the procedural due process
 16 afforded by *Brady*.

17 The duty to disclose material evidence is not limited to government attorneys; it also
 18 applies to investigating agencies. Both the Ninth Circuit and the Supreme Court have recognized
 19 that “exculpatory evidence cannot be kept out of the hands of the defense just because the
 20 prosecutor does not have it, where an investigating agency does.” *Tennison v. City and County of*
 21 *San Francisco*, 570 F.3d 1078 (9th Cir. 2008) (quoting *United States v. Blanco*, 392 F.3d 382,
 22 388) (9th Cir. 2004)). Such a rule “would undermine *Brady* by allowing the investigating agency
 23 to prevent production by keeping a report out of the prosecutor’s hands until the agency decided
 24 the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give
 25 him certain materials unless he asked for them.” *Id.* (quoting *Blanco*, 392 F.3d at 388). *Tennison*
 26 relied in part on the Supreme Court’s opinion in *Youngblood v. West Virginia*, where the Court
 27 made clear that “*Brady* suppression occurs when the government fails to turn over even evidence
 28

1 that is ‘known only to police investigators and not to the prosecutor.’” 547 U.S. 867, 869-70
2 (2006) (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)).

3 Although the conduct at issue in the Moonlight Fire prosecution was a coordinated effort
4 among investigators and prosecutors, Courts have held that where the fraud is perpetrated by the
5 United States acting through the Department of Justice, the lines of demarcation between lawyer
6 and client are blurred, and that neither willful intent nor a plan or scheme to defraud need be
7 shown to establish that a fraud upon the court has occurred:

8 When the party is the United States, acting through the Department of Justice, the
9 distinction between client and attorney actions becomes meaningless. The
10 Department acts only through its attorneys. Although there are cases holding that a
11 “plan or scheme” must exist in order to find fraud on the court, we agree with
12 Judge Wiseman that a scheme, based on a subjective intent to commit fraud, is not
13 required in a case such as this. Reckless disregard for the truth is sufficient.

14 *Demjanjuk v. Petrovsky* 10 F.3d 338; 353.

15 **B. The Prosecutors Remained Passive While The Investigators Repeatedly Lied under**
16 **Oath about the Very Foundation of Their Investigation.**

17 Joshua White and Dave Reynolds repeatedly abused their discovery obligations while
18 testifying on issues relating to the essence of their investigation – the point of origin.²⁹ Indeed,
19 with respect to the essence of their investigation, they repeatedly lied under oath regarding issues
20 that go to the core of their Joint Report. (Ex. 25 at 15-19.) As stated in the Joint Report, White
21 testified that the only points of origin he and his co-investigator ever identified were two points
22 on a spur trail, identified in the Joint Report as E-2 and E-3, and that he found the metal
23 fragments they claimed were the ignition source adjacent to these two rocks. (Ex. 41 at 41-44,
24 99-100.) Reynolds testified similarly. (Ex. 47 at 17-18, 21-23.) The evidence of their lies under
25 oath is beyond clear and convincing. Despite their effort to cover up what they actually did,
26 discovery reveals that, just before releasing their scene, White and Reynolds each engaged in
27 significant and focused conduct regarding a different, secret point of origin, the existence of

28 ²⁹ White conceded that one of the *primary* goals of a wildland fire investigation is to find a point of origin. (Ex. 41 at 55, 158-159.) White also testified that finding that point is necessary before determining a fire’s cause because that is where any physical evidence of the actual ignition is likely to be located. (*Id.* at 157.)

1 which they attempted to suppress during their depositions. Discovery also reveals that the
2 investigators concocted their two “official” points of origin well after releasing the scene, and
3 then lied repeatedly under oath.

4 Before discussing what the investigators did do, it is important to note what they did not
5 do. Despite what it stated in the Joint Report, the investigators did absolutely nothing during their
6 actual investigation with or to their “claimed” points of origin E-2 and E-3. White was forced to
7 concede that neither he nor Reynolds ever marked their E-2 and E-3 points of origin with a white
8 flag, the color that investigators use to denote the point of origin. (Ex. 41 at 47-48; Ex. 52 at 12-
9 13.) Specifically, White testified that he and his co-investigator used blue, yellow, and red
10 indicator flags as they processed the scene, but that they *never* placed a white flag in their scene
11 for any purpose at all. (Ex. 41 at 5-6, 41-42.) In addition to conceding their failure to mark E-2
12 and E-3 as their point of origin, White and Reynolds admitted that they never documented those
13 points in any way. (Ex. 41 at 36-37, 170; Ex. 47 at 21-22.) When asked why, White said, “I
14 don’t know.” (Ex. 41 at 36-37, 170.) White took no photos of the rocks he testified were his
15 “points of origin.” When asked “can you tell me why you didn’t do that?” White responded,
16 “no.” (*Id.* at 38, 170.) White’s testimony is blatantly false. White and Reynolds simply did not
17 want to reveal that they fabricated these points of origin *after* their investigation was over and
18 suppressed evidence pointing to what they had actually done during their investigation.

19 In short, because their official points of origin E-2 and E-3 were created after the
20 investigation, there is no evidence in the record which confirms any interest by the investigators
21 in those points on September 4 and 5. On the other hand, discovery revealed that the
22 investigators performed extensive work during these two days of investigation regarding their
23 actual, and suppressed, point of origin. Specifically, the initially suppressed evidence reveals that
24 on the evening of September 4, Reynolds and White focused on a different rock in a skid trail
25 about 10 feet away from the “official” E-2 and E-3 points of origin. Reynolds took a GPS
26 measurement from this rock and wrote the coordinates on a form entitled “Fire Origin
27 Investigation Report,” which the investigators ultimately omitted from their Joint Report. (Ex.
28

1 34; Ex. 47 at 18-20.)

2 The next morning, September 5, beginning at approximately 8:00 a.m., White and
 3 Reynolds established two reference points, labeled “RP1” and “RP2,” from which they then took
 4 five separate photographs between 8:18 a.m. and 8:20 a.m., three from RP1 and two from RP2.
 5 (Ex. 31 at 9-13; Ex. 41 at 45-16; Ex. 45 at 27-28; Ex. 47 at 12-14.) Each one of these
 6 photographs depicts a white flag in the middle of the field of view, hanging from a metal stem
 7 placed into the soil next to a large rock on a skid trail different from the trail presented in the Joint
 8 Report. (*Id.*) The large white flag rock in these five photographs is the same rock White
 9 photographed Reynolds crouching over three times the day before, as Reynolds was staring down
 10 to take the only GPS reading of the investigation. (Ex. 31 at 6-8.)

11 Reynolds and White then took precise distance and bearing measurement from their two
 12 reference points directly to the same rock where they had placed the white flag, triangulating and
 13 measuring to that location with accuracy to a quarter-of-an-inch and to a single degree.³⁰ (Ex.
 14 38.) Reynolds then recorded these distance and bearing measurements on a form entitled “Fire
 15 Origin Sketch,” which the investigators also omitted from the Joint Report.³¹ (*Id.*) The
 16 suppressed sketch shows a single point of origin alongside the same skid trail, which Reynolds
 17 marked with an “x” and then labeled “P.O.” (*Id.*) The key on this same form also confirms his
 18 intent, as it states that “x = point of origin.” (*Id.*) United States experts David Woolley, Larry
 19 Dodds and Christopher Curtis confirmed that these distance and bearing measurements intersect
 20 perfectly at the white flag rock. (Ex. 52 at 37-38; Ex. 53 at 2-111, 13-14; Ex. 54 at 23-39, 58-61.)

21 _____
 22 ³⁰ While White denied under oath the importance of these reference points in relationship to their suppressed white
 23 flag in this case, in another wildland fire matter, White had no trouble explaining the process and the critical purposes
 24 of that process. Specifically, on August 8, 2008, in *Cal Fire v. Dustin White* (Lassen County Superior Court Case
 25 No. 43654), Joshua White testified that, “aside from trying to get the absolute measurement to be able to go and
 26 recreate that point of origin so that I establish two reference points. Then I take those measurements. That’s the very
 27 foundation of a origin and cause investigation.” (Ex. 44 at 3.)

28 ³¹ Both Reynolds and White denied any on-site connection to the sketch. (Ex. 41 at 129-130, 220-221; Ex. 45 at 26;
 Ex. 47 at 4-5, 45.) However, they actually took a photo of a portion of the sketch while they photographed the metal
 fragments on a sheet of white paper at 10:02 a.m. that same morning. (Ex. 58; Ex. 59; Ex. 61.) The Defendants
 would urge this Court to focus on these exhibits as they expose the depth of the investigators’ corruption, as well as
 the prosecutors’ wilful or reckless failure to disclose harmful information to this Court. These photos and exhibits
 are nearly enough on their own to confirm the extent of deceit and corruption in this matter.

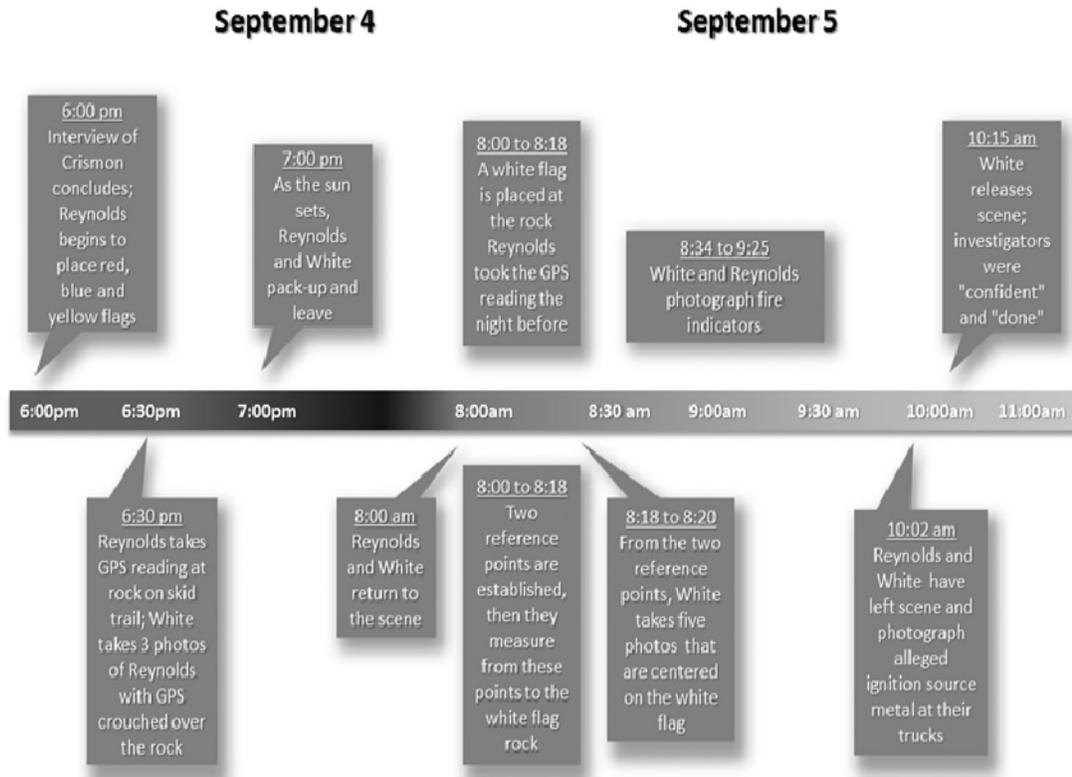
1 Thereafter, after the investigators carefully set up the evidence of their work, White took
 2 two critical photographs, one at 9:16 a.m. and another at 9:25 a.m. Both of these photographs are
 3 in the Joint Report and entitled, eponymously, "Overview of Indicators." (Ex. 31 at 29, 34.)
 4 White confirmed under oath that he took these two photographs in order to create a photographic
 5 overview showing the substance of the investigators' primary scene processing work -- the blue
 6 backing flags, the yellow lateral flags, and the red advancing flag, along numbered placards to
 7 identify certain burn indicators related to their directional flagging. (Ex. 41 at 75-76, 46.) There
 8 is nothing whatsoever in either of these photographs signifying any interest in the investigators'
 9 claimed points of origin E-2 and E-3, a fact perfectly consistent with the investigators' after-the-
 10 fact fabrication of these so-called points of origin. Importantly, under magnification, this Court
 11 will see that there is in fact a white flag in the 9:16 a.m. "overview of indicators" photo, stuck in
 12 the ground at, as one would expect, the very same spot revealed by the five white flag
 13 photographs omitted from the Joint Report.³²

14 Consistent with the investigators' focus on a single point of origin, there is one plastic bag
 15 containing metal shavings, which the Joint Report calls "Evidence #1" or E-1. (Ex. 30 at 24.)
 16 This Court will see that those metal shavings sit directly on top of a white sheet of paper in a
 17 photo taken at 10:02 a.m. just before the investigators released their scene, and that underneath
 18 that sheet of paper, sits the secret sketch containing the single point of origin that White
 19 repeatedly denied any knowledge of while under oath. (Ex. 41 at 129-130, 220-221; Ex. 45 at 26;
 20 Ex. 47 at 4-5, 45, Ex. 58; Ex. 59; Ex. 61.) White struggled to explain why -- if he *actually* had
 21 found two points of origin and collected metal from two separate spots -- he would have put what
 22 he claims are competent ignition sources into one bag; White then had no choice but to concede

23
 24 ³² Importantly, the investigators decided to place this critical "overview of indicators" photo in their Joint Report, as
 25 such overview photos are an essential and required element of any origin and cause report. (Ex. 41 at 70-76, 80-82.)
 26 They must not have been too worried about being forced to do so, as each of these two overview photos as copied
 27 into the Joint Report is so small and of such poor resolution that the secret white flag is all but invisible to the naked
 28 eye. (Ex. 30 at 142, 145.) Their ruse nearly worked. Initially, defense counsel missed the white flag as they
 carefully reviewed the Joint Report as well as all of the native photographs of the investigators' work in those first
 two critical days. In all of those photographs, especially the 9:16 a.m. overview photograph, the white flag easily
 fades into the background. (Warne Decl. ¶ 80.) Eventually, however, defense counsel spotted the single white flag
 while reviewing the native photographic files on a computer screen with back-lit magnification. (*Id.*)

1 that doing so would have been a violation of evidence collection protocols. (Ex. 41 at 99-100.)³³

2 In short, a timeline of the key events on September 4 and 5 reveals that the investigators
 3 did everything possible to document their actual, and suppressed, point of origin, while doing
 4 nothing to document their so-called “official” points of origin E-2 and E-3:



20 Despite the significant and purposeful nature of their multi-faceted effort, the investigators
 21 further frustrated discovery and violated their oaths by simply denying any knowledge of their
 22 actions, even when Defendants confronted them with indisputable evidence of those actions.
 23 During these questions and answers, prosecutors from the Attorney General’s Office and from the
 24 United States Attorneys’ Office sat on their hands, doing nothing to prevent the investigators’
 25 desperate efforts to avoid the truth. When initially provided with a copy of the first photograph

27 ³³ At the time White collected the metal, it was of course not a violation of evidence protocols, as he and Reynolds
 28 only had a single point of origin, which is why they placed what they found into a single bag.

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1 he took on September 5, 2007, at 8:18 a.m., White denied that there was any white flag in its view
2 since he had earlier testified that he and Reynolds placed no white flags during their investigation.
3 (Ex. 41 at 5-6, 45-48; Ex. 56.) When he was forced to admit its existence, White claimed he was
4 unable to explain why there was a white flag in the center of five photos he carefully aligned and
5 took from his chosen points of reference, one of which is provided for reference below in a
6 magnified and cropped format. (*Id.* at 46-47.)



17 Thereafter, in March of 2011, and despite incontrovertible evidence to the contrary,
18 Reynolds also repeatedly testified that the investigators did not use any white flags. When
19 Defendants confronted him with photographs of the white flag, including the one above,
20 Reynolds denied ever placing any white flags, and claimed that it “looks like a chipped rock.”
21 (Ex. 45 at 20, 40; Ex. 56.) Over a year later, after the federal settlement, and only when it became
22 clear that his fraud was being exposed, Reynolds admitted during a state deposition to seeing a
23 white flag, and then took a different tack by testifying that the investigators *may* have initially
24 thought the rock marked with the flag was important, but that they must have abandoned it that
25 same morning in favor of the E-2 and E-3 rocks. (Ex. 47 at 15-16.) But this belated effort to
26 salvage their situation fails for numerous reasons, including because their own photographs reveal
27 no interest of any kind in E-2 or E-3 during their investigation of the scene, and because the
28

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1 documents they suppressed and lied about repeatedly reveal a singular interest and focus on their
2 suppressed point of origin.

3 Contrary to Reynolds' last minute change in direction in the state action, White testified,
4 falsely, that he and Reynolds *never* identified the point of origin as being in the vicinity of the
5 rock marked with the white flag, that he never identified the rock as a potential point of origin
6 before finding a different spot, and that he never searched for metal fragments in its vicinity. (Ex.
7 41 at 168-169.) White testified that he does not know why Reynolds was crouched over the same
8 rock with a GPS unit (despite the fact that he took not one, but three photos of Reynolds
9 performing this act), does not know when the white flag was placed on that rock, when it was
10 removed, or why there are a series of photographs of it. He denied that the white flag was ever
11 even the focus of the photographs. (*Id.* at 49-50.) He even testified that he took the five photos
12 which depict the same white flag in the center not to photograph a white flag, but to instead
13 photograph the reference rocks themselves, so that others could "go back out to this exact
14 location and have this angle line up and be able to say, okay, that's Reference Point 1." (*Id.* at
15 166-168.) White refused to acknowledge that the photographs were centered, like a gun sight, on
16 the white flag, as doing so would reveal that he and Reynolds were actually focused on a point of
17 origin far different than the official points of origin he and Welton had already fully committed to
18 in the official Joint Report. He also refused to concede the point as doing so would reveal that
19 they released the scene before deciding that they had to change (and conceal the fact that they
20 were changing) their actual point of origin.³⁴ (*Id.*)

21 Moreover, when White and Reynolds were shown the presence of the white flag in the
22 9:16 a.m. "Overview of Indicators" photo, magnified with the aid of a back-lit computer screen,
23 each of them preposterously testified that they could not explain why it was there, despite the fact
24 that the *very purpose* of their overview photo was to create a record of the most important
25

26 _____
27 ³⁴ In the same section of White's deposition, the following questions and answers were exchanged: "Q: And do you
28 know why there is a white flag at that rock? A: I believe I have answered it. No, I don't. Q: Okay. And it's true that
you guys changed your point of origin at some point in time after that morning of September 5th, correct? A: No."
(Ex. 41 at 51.)

1 indicators of their work, including, of course, just where they identified their point of origin
2 through the placement of the white flag. (Ex. 41 at 45-48; Ex. 45 at 20-21, 40-41.)

3 White and Reynolds' "forgetfulness" about their numerous and meaningful acts and
4 denying them outright are not functions of misplaced memory. Instead, they are the function of a
5 cover up, not of minor issues, but of the essence of their work. They are a function of profound
6 investigative corruption regarding key facts, transported into the province of this Court's
7 jurisdiction for ill-intent and without regard for the solemn vow of honesty inherent in all
8 discovery.³⁵ Not only was this immediately recognized by Moonlight Fire complaint signatory
9 AUSA Wright, once he had access to the records, but it was also recognized by the joint origin
10 and cause expert for the United States and Cal Fire, Larry Dodds, who after spending more than a
11 thousand hours on this record, finally conceded in May of 2013 during a state deposition that the
12 white flag raises "a red flag," creates a "shadow of deception" over the investigation, and caused
13 him to conclude "it's more probable than not that there was some act of deception associated with
14 testimony around the white flag." (Ex. 52 at 43-47, 60, 64.) Likewise, Cal Fire Unit Chief Bernie
15 Paul later admitted in the state case that the evidence and testimony surrounding the white flag
16 caused him to disbelieve the investigators. (Ex. 55 at 11-12.)

17 As Dodds and Paul understand, investigators do not forget about the "very foundation" of
18 their work, and they do not forget about the time expended and the physical tasks associated with
19 performing that work, such as taking measurements with a GPS device, or standing behind each
20 reference point and taking five photos of the white flag at that same rock, carefully lining each up
21 so the white flag is centered. The investigators did not forget about these actions when they
22 intentionally excluded the evidence of each of them from the Joint Report. And they did not
23 forget about these actions when they pretended to remove them from their memories as they
24 violated their oaths. Each act was purposeful, and the investigators' effort to deny any memory

25
26 ³⁵ Testifying in this manner is akin to two law enforcement officers, while under oath, "forgetting" about the
27 apprehension of a criminal suspect – even though the officers recorded his weight and height, even though they
28 sketched his face, even though they photographed him not once, but numerous times, and even though his presence at
the scene was recorded when the crime was committed – and then failing to weigh, sketch, measure or photograph
their new suspect at all.

1 of those acts or deny any understanding of just how a single white flag became the focus of their
 2 attention and their photographs is nothing less than a mockery of our judicial system and a
 3 substantial fraud upon this Court. In the end, there is a lattice work of lies in this matter, but the
 4 investigators' stubborn refusal to simply admit what became obvious through the Defendants'
 5 painstaking efforts to uncover the investigators' deception reflects a profoundly disturbing
 6 arrogance and cynicism towards the very purpose of our discovery rules and our legal system in
 7 general, as does the willingness of federal prosecutors to sit by in silence as the investigators
 8 repeatedly violated their oath.

9 **C. The Prosecutors Participated in Advancing the Fraud at the Heart of the**
 10 **Investigation into the Realm of this Court's Jurisdiction.**

11 In the context of the broad tapestry of prosecutorial misconduct presented by this action,
 12 there was perhaps nothing so primary and significant as the manner in which certain federal
 13 prosecutors aided and abetted the investigators as they provided false and misleading testimony
 14 on the most fundamental aspect of their investigation: their origin determination. AUSA Robert
 15 Wright, the federal prosecutor who initially investigated, drafted, and filed the federal Moonlight
 16 Fire complaint, describes in his declaration the importance of the white flag and what he would
 17 have done after reviewing the evidence:

18 The change in the point of origin and the reasons for the change
 19 should have been, but were not, disclosed in the [Joint] Report.
 20 These omissions from the [Joint] Report were material. Had I been
 21 left in charge of the Moonlight Fire action, and as depositions
 22 began and I obtained government documents such as the Reynolds
 23 Report and the white flag photographs, I would have insisted that
 24 the material omissions from the [Joint] Report had to be disclosed
 25 to defendants through counsel regardless of the impact of such
 26 disclosures on the government's case.

27 (Wright Decl. ¶ 31.) The manner in which Wright would have handled his professional
 28 responsibilities in the Moonlight Fire litigation is identical to what Wright insisted upon doing
 (after seeking and receiving the full support of PRAO) in two other wildland fire matters,
 without regard to whether such material disclosure revealed information "harmful" to the
 government. His insistence on doing so is of course not unique nor is it heroic; it is required of

1 all federal prosecutors. As an attorney from PRAO stated in an email to Wright: “Part of the
2 issue in making a false statement means not only an affirmative mis-statement but deliberately
3 withholding information which refutes the position you assert...” (*Id.* ¶ 17.)

4 Here, the existence of malfeasance by the investigators on this critical aspect of their
5 investigation, and their decision to transport that malfeasance into the realm of judicial process
6 through false testimony, was unfortunately condoned by counsel for both the United States and
7 Cal Fire after AUSA Shelledy removed Wright from this matter. In contrast to what Wright
8 would have done, and to what PRAO confirmed in an email must always be done, the federal
9 prosecutors in this action sat in silence as the investigators repeatedly testified in ways that were
10 directly contradicted by their own concealed conduct, photographs, and documents. Instead of
11 disclosing the omissions in the Joint Report, as the original signatory to the federal Moonlight
12 Fire complaint would have done, the prosecutors who replaced him did what Wright was, in
13 essence, instructed to do by his supervisor months earlier on a different matter. They simply
14 chose not to report what Wright knew he would have been ethically required to report, never
15 disclosing to Defendants or to the Court the gross inconsistencies between the photographs and
16 sketches, on the one hand, and the Joint Report and deposition testimony on the other. These
17 conscious acts of silence when addressing this Court contribute to the fraud. Moreover, the
18 prosecutors’ underlying discovery abuses which took place beyond the Court’s direct purview
19 still harmed our system of justice and are part and parcel of the fraud upon this Court.³⁶

20 _____
21 ³⁶ That the discovery process is relevant to the assessment of whether there is a fraud upon the court has been
22 directly addressed by at least one court:

23 “The discovery process is an integral part of the judicial process, and in this case it was conducted under the auspices
24 and with the participation of Magistrate Judge Mitchell, as were the settlement negotiations which also are integral to
25 the process. . . . Magistrate Judge Mitchell erroneously accepted plaintiff’s argument that their fraud was not really
26 fraud on the Court because the fraudulent tax returns had never been filed with the Court. . . . ‘Although [the
27 plaintiff] by his improper conduct did not violate a per se order of this court, the parties were engaging in court-
28 ordered discovery under the authority and jurisdiction of the [court] and its rules and procedures. This knowing and
intentional improper conduct occurred under this court’s supervision and has grossly tainted the litigation process of
the court. Because the inherent power of the court reaches conduct both before the court directly and beyond the
court’s confines, and because the discovery and settlement processes in this case were certainly within the penumbra
of the court’s authority and at the hands-on supervision of Magistrate Judge Mitchell, plaintiff’s misconduct
adversely impacts on the judicial system’”

1 But the joint prosecutors were not only silent, they affirmatively assisted and encouraged
 2 the investigators' false testimony, a fact recognized by Judge Nichols. In particular, in order to
 3 prepare for his deposition, Reynolds attended a January 2011 meeting at the U.S. Attorney's
 4 Office in the Eastern District with Josh White, Diane Welton, and the federal and state
 5 prosecutors, AUSA Kelli Taylor and Deputy A.G. Tracy Winsor. (Ex. 46 at 2-8; Ex. 47 at 34-
 6 43.) White also confirmed that he and Reynolds, as well as AUSA Kelli Taylor and Deputy A.G.
 7 Tracy Winsor were present at this January meeting in the morning for three hours, and that co-
 8 investigator Welton joined the group for another four hours after lunch. (Ex. 42 at 2-3.) During
 9 this meeting, which occurred after the first six days of White's deposition, the prosecutors used a
 10 computer screen to enhance the images and openly discussed the white flag that defense counsel
 11 exposed during White's earlier deposition. (Ex. 46 at 2-8; Ex. 47 at 34-43.) Instead of
 12 demanding answers – *as any properly focused federal prosecutor would have immediately done* –
 13 the prosecutors in the January meeting did the opposite by putting Reynolds at ease by saying the
 14 white flag was a “non-issue,” as Reynolds revealed in the last day of his deposition during the
 15 state action on November 1, 2012.³⁷

16 In March of 2011, a few weeks *after* this meeting January meeting, Defendants deposed
 17 Reynolds and asked him about this same topic.³⁸ In response, Reynolds feigned ignorance,
 18 responding “I don't really see a flag” and testifying it “looks like a chipped rock.” (Ex. 45 at 20-
 19 21; Ex. 47 at 12-16.) As he repeatedly did so throughout his deposition, the federal prosecutors
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 21

22 *Derzack v. Cnty. of Allegheny, Pa.*, 173 F.R.D. 400, 416 (W.D. Pa. 1996) *aff'd sub nom, Derzack v. Cnty. of*
 23 *Allegheny Children & Youth Servs.*, 118 F.3d 1575 (3d Cir. 1997).

24 ³⁷ During the last day of his state deposition, and after the federal settlement had been reached, Reynolds testified as
 follows: “And they said it was going to come up and saw it as a nonissue.” (Ex. 47 at 42.)

25 ³⁸ Curiously or tellingly, Reynolds was defended by newly-arrived AUSA Eric Overby, who was not at the meeting
 26 to prepare Reynolds for his deposition. The deposition transcript reflects that lead prosecutor AUSA Kelli Taylor
 27 was in attendance on the first day of the deposition, but skipped the second day when Sierra Pacific's counsel began
 28 asking questions about the white flag. While the timing of her departure is interesting, it does nothing to absolve her
 of her responsibility to have made sure that Reynolds testified honestly and to have corrected his testimony when she
 found out that he had not done so. Instead, Ms. Taylor did nothing to correct the record regarding this foundational
 dishonesty, apparently because she saw it as a “non-issue.”

1 did nothing to intervene or to correct the record afterward, as was their responsibility.³⁹ The
 2 prosecutors apparently believed that Defendants would never discover what had been discussed
 3 with Reynolds before his deposition, so they chose to stay mute.⁴⁰ Months later, and only after
 4 Defendants prevailed on a motion to compel, did Reynolds hesitantly revealed to Defendants the
 5 facts associated with his pre-deposition meeting and the white flag discussion with the federal and
 6 state prosecutors.⁴¹ (Ex. 46 at 2-8; Ex. 47 at 34-43.)

7 Judge Nichols reviewed this series of events, which he said stood out “among so many
 8 acts of evasion, misdirection and other wrongful acts...” (Ex. 24 at 22; Ex. 26 at 5.) His Honor
 9 stated that the court was “deeply troubled by two things:” first, that Reynolds, one of the primary
 10 Moonlight investigators “would admit one thing to a table of ‘friends’ and then refuse to admit
 11 the same thing once put under oath,” and second, that the prosecutors sat “idly by as Reynolds . . .
 12 denied in his deposition what he had conceded in . . . counsel’s presence several weeks earlier.”
 13 (Ex. 25 at 18, fn. 13.)

14 Former AUSA Robert Wright, the most experienced wildland fire recovery lawyer in the
 15 Eastern District’ office, has this to say about these unfortunate facts:

16 [T]he investigators and government attorneys who were present at
 17 the January 2011 meeting apparently obstructed discovery of the

18 ³⁹ The Ninth Circuit has clearly defined the responsibilities of federal prosecutors when confronted with such
 19 conduct:

20 When a prosecutor suspects perjury, the prosecutor must at least investigate. The duty to act “is not discharged by
 21 attempting to finesse the problem by pressing ahead without a diligent and good faith attempt to resolve it. A
 22 prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the
 facts.” *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001). . . . The Court has emphasized that
 the presentation of false evidence involves “a corruption of the truth-seeking function of the trial process.” *Agurs*,
 427 U.S. at 103, 96 S.Ct. 2392. *Morris v. Ylst*, 447 F.3d 735, 744 (9th Cir. 2006).

23 ⁴⁰ During the deposition of Reynolds in March of 2011, the federal and state prosecutors instructed him not to
 24 answer questions about what was discussed during the meeting at the U.S. Attorney’s office, invoking the attorney-
 25 client privilege and their joint prosecution agreement. (Ex. 45 at 3-12.) Thereafter, Defendants were able to reopen
 his deposition after prevailing on a motion to compel because both Reynolds and White had been named as experts
 for the United States. Indeed, because the United States had named both White and Reynolds as experts, Magistrate
 Judge Brennan ruled that none of the discussions which took place in their presence were confidential. (Ex. 8.)

26 ⁴¹ After Magistrate Brennan’s order, Defendants deposed Reynolds again in November of 2011. Even then,
 27 Reynolds attempted to waffle on what he saw when viewing photographs with the federal and state prosecutors, but
 28 he ultimately conceded the existence of a white flag. (Ex. 46 at 2-8.) A year later, in November 2012, Defendants
 deposed Reynolds in the State Actions. During that deposition, Reynolds clearly admitted that he conceded the
 existence a “white flag” in the photos when they were shown to him by the prosecutors. (Ex. 47 at 38-43.)

1 truth by such means as investigator witnesses claiming that what
 2 might look like a white flag was instead a “chipped rock.” The
 3 only reason not to have simply disclosed the original point of origin
 4 determination, and then the change in the Report or at least later
 5 during the litigation, would be to wrongly evade the adverse impact
 6 of the change on the perceived validity of the investigation and the
 7 credibility of the investigators. I believe that the omissions of the
 8 change in claimed point of origin and reasons for the change, the
 9 Reynolds report and sketch, and the white flag photographs from
 10 the Report, were intentional and that the omissions warranted being
 11 considered for possible charges against persons determined
 12 responsible for the omissions as obstructions of justice under 18
 13 U.S.C. § 1519. I believe the AUSA(s) with knowledge of the facts
 14 constituting violations of federal criminal law by federal employees
 15 responsible for material omissions in the Report of Investigation
 16 and/or possible perjured testimony during their depositions were
 17 under a duty to report same to the Attorney General pursuant to 28
 18 U.S.C. § 535(b). I also believe if the AUSA(s) concealed and failed
 19 to make the violations and/or possible perjured testimony known
 20 that would warrant consideration for possible charges for
 21 misprision of a felony under 18 U.S.C. § 4. Finally, I believe that
 22 continued prosecution of even a badly damaged civil case would
 23 likely not have been a realistic possibility. This is because the
 24 credibility of the investigation and the investigators would have
 25 been destroyed.

26 (Wright Decl. ¶ 31.)

27 The fact that the federal prosecutors on this matter would allow this conduct to occur is
 28 beyond troubling. Certainly, as confirmed by former AUSA Wright, it is simple to see that the
 investigators were engaged in a fraud. It is also simple to see that the federal prosecutors were as
 misguided as their state counterparts, a perfect storm of prosecutorial misconduct, with each side
 bolstering and feeding off the other as the promise of another large recovery, and all the
 commendations and awards that would come with it, hung in the balance.

As was the case initially with Judge Nichols,⁴² this Court had the right to assume that the
 story it was receiving from federal prosecutors was true, and it had the right to assume that the
 prosecutors would immediately report and correct any dishonesty by their key witnesses on such
 key facts. When federal prosecutors, however, take advantage of the esteem they enjoy as a

⁴² Judge Nichols found: “While declining to impose sanctions against cited counsel, the Court emphasizes that it
 relied on statements of counsel as officers of the court in considering a number of matters, including in limine
 motions and ex parte applications. On too many occasions, that reliance was misplaced, and that reliance directly
 impacted the Court’s ruling on matters before the Court.” (Ex. 24 at 20.)

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1 consequence of their position, justice quickly breaks down. *Berger*, 298 U.S. at 88.⁴³

2 **D. The Federal Prosecutors Proffered False Testimony Regarding the Investigation in**
3 **Opposition to Defendants’ Motion for Summary Judgment.**

4 On February 29, 2012, Defendants filed a Motion for Summary Judgment challenging
5 each of the government’s claims. On March 28, 2012, the United States filed its opposition, the
6 centerpiece of which was a declaration by lead investigator Joshua White which omitted key facts
7 regarding what actually occurred during the investigation. (Exs. 11-12.) At the time, the federal
8 prosecutors knew that this declaration omitted critical information as they had already
9 participated directly or indirectly in all 17 days of White’s deposition, and since they had
10 prepared and watched Reynolds testify as well. Among other things, as the prosecutors remained
11 silent (or interfered with obstreperous objections), they heard White simply deny any knowledge
12 of the white flag he photographed five times, measured and diagramed, and they witnessed first-
13 hand the complete lack of effort during that same period by the investigators to document their
14 “official” points of origin. It was of course this same testimony that Judge Nichols focused upon
15 while finding that the action was “corrupt and tainted” and while finding that White had
16 “repeatedly” given false testimony.⁴⁴

17 Despite this background and their participation in it, the federal prosecutors chose to cite
18 White’s fraudulent declaration – which parroted his deposition testimony – in support of twenty-
19 three separate statement facts. (Ex. 11 at 2-4, 8, 11, 24, 28-29.) Once again, just as he and
20 Welton had done within the Joint Report, White simply omitted from his declaration to the Court
21 the most critical details of his actual conduct with respect to marking, measuring and recording
22 their secret point of origin. (See Ex. 12.) Instead, and with the aid and knowledge of the federal
23 prosecutors, White represented to this Court that he and Reynolds found “small metal fragments
24

25 _____
26 ⁴³ Fabled lawyer Brendan Sullivan discussed the difficulty he encountered with such conduct on the matter involving
27 Senator Ted Stevens. (Ex. 165 at 1.)

28 ⁴⁴ Specifically, Judge Nichols found: “[I]t is this Court’s responsibility to review whether Cal Fire abused the legal
process through the false testimony of its lead investigator on the Moonlight Fire, Joshua White. This Court finds
that Cal Fire, through White, repeatedly did so.” (Ex. 25 at 14.)

1 near two of the rocks that we identified as having been struck by heavy equipment.”⁴⁵ (*Id.* at 8.)

2 **E. The Prosecutors Misrepresented J.W. Bush’s “Admission” that the Moonlight Fire**
3 **Was Caused by a Rock Strike.**

4 Relying solely on Josh White and the Joint Report, the federal prosecutors presented the
5 following as an “undisputed fact” in the United States’ summary judgment briefing:

6 In a signed statement that Bush submitted to investigators, he admitted
7 that Crismon was operating in the area closest to the fire and that he
believes that Cat tracks scraped rock to cause fire.

8 (Ex. 11 at 29.) In presenting this “undisputed fact” to the Court, the federal prosecutors failed to
9 disclose that investigators interviewed J.W. Bush twice. The first, conducted by federal
10 investigator Dave Reynolds on September 3, 2007, was summarized in writing, but not tape
11 recorded. Reynolds prepared a write-up of what Bush allegedly said during that interview; that
12 write-up says, in pertinent part: “Believes Cat [Caterpillar bulldozer] tracks scraped rock to cause
13 fire.”⁴⁶ (Ex. 70 at 1.) This was the only evidence the federal prosecutors offered as support for
14 their “undisputed fact.” (See Ex. 11 at 29.) The second interview of J. W. Bush, by Josh White
15 on September 10, 2007, was summarized in writing and also recorded. (Exs. 71-72.) White
16 included the written statements from both interviews in the Joint Report. (Ex. 30 at 59, 61.) He
17 did not include the audio recording of the second interview, but Defendants obtained it in
18 discovery.

19 _____
20 ⁴⁵ Judge Nichols, after discussing “just how incredible the investigators’ testimony was on the most central issues in
21 this case – indeed, on the very basis upon which this action was brought,” also discussed a declaration White
22 submitted in the State Actions, stating: “the Court also finds that White’s Phase I declarations to this Court, wherein
he repeated and advanced the absurdity of his deposition testimony regarding the white flag in effort to avoid the
consequences of his actions, are also an affront to this Court, as is Cal Fire’s counsel’s willingness to allow such a
declaration to be filed.” (Ex. 25 at 18.)

23 ⁴⁶ That particular Bush witness statement consists of a handwritten report of the interview conducted by Reynolds on
24 September 3, 2007, a little over an hour after the fire was called in from the Red Rock Lookout. The statement asserts
that Bush said that he “believes CAT tracks scraped rock to cause fire.” The form calls for a signature by the officer
25 issuing the report and the signature of a witness, neither of which is present on the version of the form included in the
Joint Report. (Ex. 30 at 59.) Bush did sign the statement, but during his deposition denied making the statement that
26 he believed the cat tracks scraped a rock and caused the fire. (Ex. 73 at 2-6.) When plaintiffs responded by
challenging him with the fact that he had signed the statement, Bush then revealed that he is unable to read. (*Id.*)
27 The attestation Bush signed starts with the language “I have read the foregoing statement,” which in this case was not
possible. All of this evidence was developed through discovery well before the federal prosecutors elected to rely on
28 the first Bush interview in support of their summary judgment opposition and remain silent about his actual recorded
statement, which was nowhere to be found in the Joint Report.

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1 As confirmed by Judge Nichols, White’s report of the second interview falsely attributes
2 to Mr. Bush an admission of liability regarding the government’s rock strike theory. In particular,
3 during White’s interview of Bush, White asked Bush whether he had ever told Reynolds he
4 believed the bulldozer scraped a rock and started the fire, and Bush flatly denied having done so,
5 a fact which the interview recording (and the transcript of that recording) confirms. (Ex. 71 at 2.)
6 Nevertheless, White’s written summary of that interview, advanced into the Joint Report and then
7 into this civil matter through the United States’ statement of undisputed facts, states that: “Bush
8 reiterated the same information he had provided to I-1 Reynolds.” (Ex. 72.) This of course was
9 false, given that the most important component of Reynolds’ written summary of his interview
10 with Bush is his claim that Bush said he believes that “a Cat scraped a rock and started the fire,”
11 and one of the most important components of White’s interview with Bush is Bush’s statement
12 that he never told anyone what caused the fire and that he did not know. When White was
13 confronted during his deposition and asked why there was a glaring inconsistency between the
14 actual tape recording of his interview and his written summary of the same he could not explain
15 it, instead responding, “No. I don’t know why.”⁴⁷ (Ex. 41 at 132-133.) Judge Nichols recited
16 these facts in finding that “Cal Fire’s lead investigator falsified J.W. Bush’s interview statement,
17 and incorporated that falsification into its interrogatory responses.” (Ex. 25 at 18.) Certainly, the
18 federal prosecutor’s duty of candor with the Court required, at a bare minimum, disclosure that
19 Bush’s alleged “admission” was anything but an “undisputed fact.” Nevertheless, the federal
20 prosecutors never corrected the record before the Court, and never withdrew their reliance on
21 both of the statements in the Joint Report.

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25 ⁴⁷ Certainly, if White believed Bush was recanting or changing what he had allegedly told Reynolds during the first
26 interview, White would have interrogated Bush on the issue. But White remained silent as Bush emphatically stated
27 that he had never stated to anyone that he knew what started the fire, and thereafter prepared his falsified written
28 summary of his interview with Bush, which states the opposite – that Bush “reiterated the same information he had
provided to I-1 REYNOLDS.” These facts alone strongly suggest that the first “confession” was fabricated by
Reynolds, just as E-2 and E-3 were fabricated, and that White was simply there to perpetuate the fraud through the
second interview, regardless of what Bush actually said.

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F. Ryan Bauer and the AUSA’s Failure to Disclose an Alleged Two Million Dollar Bribe.

At some point almost immediately after this matter was filed, Defendants found evidence that the investigators ignored and suppressed evidence of Ryan Bauer as a potential cause of the Moonlight Fire.⁴⁸ Thus, Defendants focused much of their discovery efforts on uncovering the facts regarding Bauer and his whereabouts on the day of the fire. That evidence showed that Ryan Bauer told his parents that he would be cutting wood that day in the area where the fire eventually started (Ex. 76 at 14) and that a private patrolman found his parents deep in the woods and dangerously near the fire, looking for their son shortly after it began. (Ex. 79 at 2-5, 9).

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REDACTED (Ex. 76 at 2-12). Moreover, a deputy sheriff encountered and stopped Ryan Bauer as he was speeding away from the area of the fire shortly after it started, with chainsaws in the back of his pickup. (Ex. 78 at 2-7) Bauer then lied about his whereabouts on the day of the fire,⁴⁹ and he provided a false alibi to investigators when they interviewed him four days after the fire started. (Ex. 74 at 6; Ex. 75 at 2-14.) The subject of his alibi, his then girlfriend, refuted his statements to the investigators and also told them Bauer could not be trusted. *Id.*

On May 31, 2012, the federal prosecutors for the United States filed various motions in limine in an effort to keep much of the evidence relating to Ryan Bauer away from the jury. (Ex. 14.) Defendants opposed all of these motions as being contrary to law and evidence. During the June 26, 2012, Final Pretrial Conference and motion hearing, the Court largely granted these motions, and later confirmed its rulings in its Final Pretrial Order. (Ex. 19 at 18.)

It appears, however, that the United States and its counsel failed to disclose to the Court

⁴⁸ That the government did not investigate Ryan Bauer, an individual unable to pay any damages, was consistent with lead investigator Josh White’s status as a recipient of various benefits associated with Cal Fire’s illegal WiFITER slush fund. The same can be said about the investigators’ failure to investigate Michael McNeil.

⁴⁹ Bauer lied to the investigators during his interview about other issues as well, including that, on the day of the fire, an officer in a red fire engine helped to retrieve a chainsaw that Bauer had stashed behind a tree in the area of the fire. (Ex. 74 at 2-5, 7.) Later, during his deposition, when Bauer was asked about whether he had stashed a chainsaw in the area of the fire, he contradicted himself, saying that he had not stashed any chainsaws on the mountainside that day. (Ex. 172 at 2.)

1 and the Defendants the existence of critical information regarding the credibility of Ryan Bauer
2 and/or his father Edwin Bauer. (Warne Decl. ¶ 37, 44.) In November of 2013, while Defendants
3 were working on various motions that led to the termination of Cal Fire’s state court action,
4 counsel for Sierra Pacific received a call from Ryan Bauer’s father, Edwin Bauer. (*Id.* ¶ 30.)
5 Edwin Bauer ostensibly called to request the return of documents the defendants had copied from
6 his hard drive pursuant to a court order issued in the State Actions. (*Id.* ¶¶ 30-32.) During that
7 telephone call, Edwin Bauer made a comment about a \$2 million bribe. (*Id.* ¶ 33.) When Sierra
8 Pacific’s counsel immediately sought more information, Edwin Bauer claimed that Eugene
9 Chittock, the lawyer he retained for his son Ryan Bauer, had told him that Downey Brand or
10 Sierra Pacific had offered his son Ryan a \$2 million bribe if Ryan would state that he had started
11 the Moonlight Fire. (*Id.* ¶¶ 33-34.) Edwin Bauer also revealed that he had told lead federal
12 prosecutors Kelli Taylor and Richard Elias that his son had been bribed when those two
13 prosecutors personally delivered a trial subpoena to him in advance of the federal trial. (*Id.* ¶¶
14 35-36.) Bauer said he filed a police report, and that the FBI had interviewed him and Mr.
15 Chittock. (*Id.* ¶ 34.)

16 The next day, Sierra Pacific’s counsel contacted Chittock to ask him about Mr. Bauer’s
17 story. (*Id.* ¶¶ 38-39; Declaration of E. Chittock (“Chittock Decl.”), ¶ 6.) Mr. Chittock said that
18 he had “absolutely not” conveyed any bribe offer, but that one of the Bauers had apparently made
19 the claim to federal employees working on this case. Chittock stated that he had been contacted
20 by two federal investigators or lawyers. (Warne Decl. ¶¶ 39-40; Chittock Decl. ¶ 6.) Chittock
21 stated that these two individuals, a man and a woman, came to his office in the spring of 2012,
22 telling him that Ryan Bauer’s parents had stated that Chittock conveyed the offer of a bribe to
23 their son Ryan in the amount of \$2 million and that the money would be coming from Downey
24 Brand or Sierra Pacific. (Warne Decl. ¶¶ 39-40, Chittock Decl. ¶¶ 3, 6.) Chittock told the
25 investigators that the charge was “absolutely false,” and he readily agreed to allow them to search
26 his phone records and files. (*Id.* ¶¶ 3, 4, 6.) Chittock informed the federal employees that all they
27 would find was a record of a single phone call he had received from Sierra Pacific’s counsel
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1 Warne, who was in the process of scheduling the continued deposition of Ryan Bauer within
2 Susanville's adult detention facility, as Bauer was there serving a term for assaulting a police
3 officer. Chittock described this single call as a predictable and normal event before the federal
4 agents began their search. (*Id.* ¶ 4.) After finding nothing beyond a record of that single call, the
5 federal employees left. (*Id.*)

6 The federal prosecutors neither revealed to the Court nor to Defendants the fact that
7 Edwin Bauer had made the false claim that Chittock had communicated a \$2 million bribe to his
8 son Ryan Bauer, nor did they reveal the fact that Chittock denied the allegation and that the
9 federal investigators or employees found no evidence supporting Bauer's claim. (Warne Decl. ¶
10 44.) The federal attorneys never revealed the existence of a federal investigation into the matter
11 concerning the Bauers, even after the investigation revealed the falsity of the charges. (*Id.*)

12 Revealing such information to Defendants would have been damaging to the
13 government's case, as it would have raised the possibility that Edwin Bauer made a false
14 assertion to strengthen the government's claims against Sierra Pacific while diverting attention
15 from his son. (*Id.*) Obviously, had it been true, it would have been more serious than the charges
16 set forth in the Moonlight Fire action. Since it is not true, the false report of such a crime is also
17 serious, demonstrating, among other things, a willingness to manufacture evidence harmful to an
18 innocent party and an effort to deflect attention away from someone who may have actually
19 started the fire. It raised numerous questions, including whether the Bauers had engaged in
20 similar conduct when Edwin Bauer told investigators that a man in a silver pickup had told him
21 that "a bulldozer hit a rock." (Ex. 30 at 77.) Mr. Bauer's false allegation of a multi-million dollar
22 bribe in this case by Downey Brand or Sierra Pacific can only have been made in an effort to
23 falsely inculcate Sierra Pacific, and thus it actually has the opposite effect, and tends to
24 incriminate Mr. Bauer and his son Ryan as a failed attempt to deflect focused attention from
25 themselves and what role they had in starting the Moonlight Fire. But instead of receiving this
26 information, which is harmful to the government's case, Defendants heard and received nothing --
27 another instance of the government withholding harmful evidence.
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1 Government attorneys have a responsibility to do justice and seek the truth. Their
 2 responsibility to do so is not only imposed through *Brady*, but also through the Rules of
 3 Professional Conduct, as well as compliance with the rules of discovery. *See, e.g., Morris v.*
 4 *Yilst*, 447 F.3d 735, 744 (9th Cir. 2006) (stating the obligations of the state to “collect potentially
 5 exculpatory evidence, to prevent fraud upon the court, and to elicit the truth.”). Under the *Brady*
 6 doctrine, the federal prosecutors had the absolute responsibility to disclose this information to the
 7 Court and to Defendants. *Brady*, 373 U.S. at 87; *Berger*, 295 U.S. at 88. Moreover, the Supreme
 8 Court has “long emphasized” that an attorney representing the United States government “is held
 9 to a *higher* standard of behavior.” *United States v. Young*, 470 U.S. 1, 25 (1985) (Brennan, J.
 10 concurring and dissenting in part) (emphasis in original) (citations omitted). The evidence
 11 concerning the alleged bribe and the evidence concerning the results of the investigation that
 12 ensued -- which ultimately revealed Mr. Bauer’s allegation as false -- is without question
 13 “evidence relevant to the case” which the government had an obligation to produce. *See Chu*, 5
 14 F.3d at 1249.

15 Separate and apart from their *Brady* obligations, the federal prosecutors had additional
 16 independent duties, as officers of the Court, to disclose this critical information to the Court and
 17 Defendants. First and foremost, given their motion to exclude evidence concerning Ryan Bauer
 18 as a potential cause of the fire, they had an obligation under the Professional Rules of Conduct to
 19 ensure that the record evidence before the Court and their arguments based on them were fair,
 20 complete, and not misleading. *See Cal. R. Prof. Conduct 5-200(A)* (“In presenting a matter to a
 21 tribunal, a member shall employ, for the purpose of maintaining the causes confided to the
 22 member such means only as are consistent with the truth.”); *id.* 5-200(B) (“In presenting a matter
 23 to a tribunal, a member shall not seek to mislead the judge, judicial officer, or jury by an artifice
 24 or false statement of fact or law.”); *id.* 5-220 (“A member shall not suppress any evidence that the
 25 member or the member’s client has a legal obligation to reveal or to produce.”).⁵⁰

26 _____
 27 ⁵⁰ Local Rule 180(e) incorporates the Rules of Professional Conduct of the State Bar of California as standards of
 28 professional conduct in the Eastern District of California.

1 Additionally, the United States and its attorneys also had an independent duty to disclose
 2 the information about Bauer and the alleged bribe pursuant to their discovery obligations. Indeed,
 3 early in the Federal Action, Defendants propounded requests for documents, including Request
 4 for Production No. 186, which sought “All notes taken during witness interviews conducted by
 5 YOU, the USFS, and/or CAL FIRE in connection with investigating the MOONLIGHT FIRE,”
 6 and Request for Production No.188, which requests “All DOCUMENTS RELATING TO witness
 7 interviews conducted in connection with the MOONLIGHT FIRE.” (Ex. 22 at 90, 91.) The
 8 United States agreed to produce all responsive documents (*id.*), and had an obligation to update
 9 all such responses well in advance of their pre-trial motions in limine. See Fed. R. Civ. Proc. 26.
 10 Despite this obligation, the United States never provided any information to Defendants or this
 11 Court about the alleged bribe.

12 **G. The United States Made Reckless Misrepresentations About Cal Fire’s Civil Cost**
 13 **Recovery Program, Which the Court Relied Upon in Its Pre-Trial Rulings.**

14 After this Court entered its final Pre-trial Order premised on the federal settlement,
 15 Defendants discovered facts which revealed that the federal prosecutors made, even under the
 16 most charitable view, reckless misrepresentations to this Court about the legitimacy of Cal Fire’s
 17 civil cost recovery program, which were directly relevant to the Court’s pretrial rulings. The true
 18 facts flatly contradicted positions taken by the United States in its pretrial motions.

19 As part of its pre-trial Omnibus Motion in Limine, the United States included a request
 20 styled “Motion to Exclude Argument of Government Conspiracy and Cover Up.” (Ex. 14 at 8-
 21 10.) In support of that Motion, the United States first attacked a straw man, arguing that
 22 Defendants’ so-called conspiracy allegations were premised in part on the fact “that Cal Fire has a
 23 fire cost recovery program” (*Id.* at 8:17-18.) Of course, the mere existence of a cost
 24 recovery program was never Defendants’ real concern. Instead, Defendants were troubled by the
 25 possibility that, under its program, Cal Fire might be diverting a portion of the money it was
 26 recovering from those it accused of starting wildland fires into accounts controlled by wildland
 27 fire investigators. The United States nevertheless claimed that “defendants’ allegations of a
 28

1 conspiracy are unsupported” (*id.* at 9:18), and described for the Court Cal Fire’s cost recovery
2 system as a benign public program established for altruistic purposes, as follows:

3 The other evidence Defendants rely upon is equally flimsy. That
4 Cal Fire has a fire cost recovery program does not support an
5 inference that investigators concealed evidence. Under the
6 program, a portion of assets recovered from Cal Fire’s civil
7 recoveries can be allocated to a separate public trust fund to
8 support investigator training and to purchase equipment for
investigators (e.g., investigation kits and cameras). A public
program established to train and equip fire investigators is hardly
evidence of a multi-agency conspiracy.

9 (*Id.* at 9:27-10:4.)

10 For their part, Defendants were convinced that, to the extent a program within Cal Fire
11 earmarked *any* civil cost recovery dollars for accounts controlled by Cal Fire investigators
12 (thereby creating beneficiaries out of those responsible for reaching causation decisions), any
13 such practice could create an unacceptable bias in favor of blaming affluent parties to the
14 exclusion of other possible causes. In other words, in order to perpetuate such a fund and the
15 benefits flowing from it, investigators might name affluent individuals and entities as defendants
16 as opposed to penurious culprits, such as arsonists, who generally provide little or no prospect of
17 financial recovery. At the time of the motions in limine briefing, Defendants’ discovery efforts
18 had uncovered remarkably little information to support their common sense conclusion.

19 In the State Actions, Defendants propounded discovery on Cal Fire in October 2010,
20 seeking “All DOCUMENTS evidencing the use of any money recovered from any wildfire
21 litigation to which YOU were a party in the last ten years.” (Ex. 148 at 28.) In response, Cal Fire
22 and its attorneys produced only two responsive documents concerning an outside fund: a single
23 cryptic accounting spread sheet, and what Cal Fire described as a “CDAA Audit Report”
24 pertaining to a November 2009 Cal Fire internal audit of a program labeled the “Wildland Fire
25 Investigation Training and Equipment Fund” (WiFITER) administered by the California District
26 Attorneys’ Association (CDAA) for Cal Fire.⁵¹ (*Id.*; see also Ex. 124.) This audit report

27 ⁵¹ Under California law, Cal Fire is the state agency charged with pursuing wildland fire cost recovery actions under
28 Health and Safety Code section 13009, the proceeds of which are required by law to be returned to the state’s general

1 generally found WIFITER to be of “considerable value” and stated that the audit “did not reveal
2 any significant internal control problems or weaknesses.” (Ex. 124 at 4.) Thus, Cal Fire
3 proffered material that made WiFITER appear to be a legitimate program controlled not by Cal
4 Fire, but by the CDAA.

5 Defendants encountered similar road blocks in the federal action. During the federal
6 deposition of United States expert Chris Parker (a recently retired Cal Fire Deputy Chief of Law
7 Enforcement), Parker reluctantly admitted that he had conceived of and founded the WiFITER
8 account in 2005. (Ex. 147 at 6-7.) But Parker testified that the account was created only for
9 altruistic purposes for the benefit of all Californians and rejected any suggestion that the fund
10 might bias investigators or that it was improper in any way. (*Id.* at 4, 15-17.) At no time did
11 Parker ever suggest that the account was established to circumvent state fiscal controls. Thus, at
12 the time of the federal pretrial conference, Defendants had limited evidence to prove a cover-up
13 or conspiracy associated with WiFITER, or that the WiFITER account (ostensibly controlled by
14 the CDAA) instilled any bias in those individuals controlling the Moonlight Fire investigation,
15 including Joshua White and his supervisor and mentor Alan Carlson. (Warne Decl. ¶ 203.)

16 Given the state of the evidence then available to the Court and Defendants, the Court
17 granted the government’s motion with respect to conspiracy arguments as it pertained to the
18 impact of Cal Fire’s cost recovery program. (Ex. 19 at 17:22.) That ruling contributed to the
19 increased risks of trial and the Defendants’ settlement assessment. (Warne Decl. ¶ 204.)

20 Although Defendants respectfully disagreed with the Court’s ruling, it was not necessarily
21 a surprise in view of the limited evidence then available to the Court. Indeed, when initially
22 confronted with a similar motion *in limine* in the state court action one year later, Judge Nichols
23 issued a similar ruling, excluding from trial altogether evidence of Cal Fire’s WiFITER program.

24
25 fund. Moreover, State Administrative Manual, Section 8002 makes it illegal for any agency to set up a separate
26 account without express authority from the Department of Finance. Given this Request for Production, and given the
27 state prosecutors’ duties of disclosure, Defendants had every right and expectation that, as officers of the court, the
28 government attorneys would disclose any facts which called into question the credibility of investigators flowing
from the WiFITER account. As discussed, *infra*, during the pendency of the federal action, Cal Fire, its in-house
general counsel, and its litigation counsel from the Office of the California Attorney General concealed virtually all
evidence favorable to the defense concerning WiFITER.

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1 (Warne Decl. ¶ 205.) Judge Nichols eventually dismissed the state action on other grounds,
2 including the fact that Cal Fire was unable to present a *prima facie* case of causation, but his
3 tentative ruling on WiFITER remained intact at the time of his Honor’s dismissals in late July of
4 2013. (*Id.*)

5 Circumstances, however, changed rather dramatically after October 15, 2013, when the
6 California State Auditor issued a Formal Audit Report concerning “Accounts Outside the State’s
7 Centralized Treasury System.”⁵² (Exs. 139, 149.) The *final* portion of the State Auditor’s report
8 (at pages 26-39) contains findings regarding WIFITER, which the State Auditor summarized as
9 follows:

10 Cal Fire had \$3.7 million in settlement payments for the cost of
11 fire suppression and investigation (cost recovery revenues)
12 deposited into an outside account, the Wildland Fire and
13 Investigation Training and Equipment Fund (Wildland Fire Fund),
14 that was neither authorized by statute nor approved by Finance.⁵³
15 Further, it did not subject the money in this outside account to its
16 own internal controls, nor did it track or monitor the account’s
17 revenues adequately. Specifically, the management of Cal Fire’s
18 law enforcement unit bypassed Cal Fire’s accounting and
19 budgeting processes by failing to submit a request to its accounting
20 office to establish the account and by diverting and spending cost
21 recovery revenues without submitting the appropriate request to
22 increase its budget appropriations. As a result, this portion of Cal
23 Fire’s cost recovery revenue was not subject to Cal Fire’s normal
24 internal controls or to oversight by the control agencies or the
25 Legislature, leaving Cal Fire open to possible misuse of these
26 revenues.

20 (Ex. 149 at 3.)

21 The State Auditor’s findings were based in part on a critical January 8, 2005, internal Cal
22 Fire email by Chris Parker to other high ranking Cal Fire managers regarding the formation of
23 WIFITER. (Ex. 149 at 38.) The State Auditor described and analyzed the Parker email as
24 follows:

25 An e-mail dated January 2005 from the former deputy chief to a
26 _____

27 ⁵² The full State Auditor Report is available online at: <http://www.bsa.ca.gov/pdfs/reports/2013-107.pdf>

28 ⁵³ Elsewhere, the State Auditor confirmed that State Administrative Manual 8002 requires all accounts established
outside the State Treasury to be approved and authorized by the California Department of Finance. (Ex. 119.)

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1 former cost recovery case manager [Parker] suggests that cost
2 recovery program management designed the Wildland Fire Fund,
3 at least in part, to avoid state fiscal controls. Specifically, the
4 former deputy chief discussed using the attorneys association or
5 another third party to set up and manage a fund with the purpose of
6 training and equipping Cal Fire’s fire investigators. He said he
7 would like to see an outside organization receive the money so it
8 could be used in a more effective manner. He went on to say that if
9 the State received the money, there would be a lot of limiting
10 factors on how, when, and where it could be used, such as
11 budgeting, purchasing, and contracting limitations, and spending
12 freezes.

* * *

13 By directing and spending portions of cost recovery revenues
14 through the Wildland Fire Fund account instead of following
15 normal state processes, cost recovery program management
16 prevented Finance and the Legislature from performing their role
17 in deciding how state money should be spent, including whether
18 some of it should be spent on non-state entities.

19 (Ex. 149 at 38; Ex. 150.)

20 Parker’s email, which had never been produced by Cal Fire or the United States, conflicts
21 with his sworn testimony in the federal action regarding the purpose of the fund (Parker never
22 disclosed it was designed “to avoid state fiscal controls”), and evidences scienter in forming
23 WIFITER. Despite eventual orders by the state court in 2013 requiring Cal Fire and its counsel to
24 produce all WiFITER documents, Cal Fire withheld this critical document and thousands of other
25 documents. In fact, but for the issuance of the State Auditor’s report, Defendants would have
26 never discovered these documents. (Warne Decl. ¶ 177-178.)

27 Once this report (and the existence of this unproduced document) became public,
28 Defendants immediately notified Cal Fire of its failure and demanded production. (Warne Decl. ¶
179.) That demand then precipitated an admission by Cal Fire and its attorneys that the Office of
the Attorney General had failed to produce the critical email identified by the State Auditor, and
thousands of pages of additional critical WiFITER documents. (*Id.*) After Defendants secured a
third order requiring production of all WiFITER documents, Cal Fire’s attorneys belatedly
produced two tranches of documents: first, approximately 5,000 pages, and then (after assuring
Judge Nichols in a telephonic hearing that there was “nothing” else) Cal Fire belatedly produced

1 more than 2,000 additional pages, many of which were directly responsive to Defendants' 2010
2 request for production, and to its subsequent requests in October 2012.⁵⁴ (*Id.* ¶¶ 180-182.)

3 It is through this belated process that Defendants finally obtained critical documents
4 revealing the true reason Cal Fire created WiFITER, confirming Defendants' suspicions that such
5 free money (unencumbered by any State oversight or control) created the motivational context
6 which drove this unfortunate matter, causing investigators – the lead here being a WiFITER
7 beneficiary himself – to seek out moneyed defendants.⁵⁵ More specifically, documents eventually
8 produced by Cal Fire's counsel, none of which had been provided to Defendants by the time this
9 Court issued its rulings on motions in limine, revealed, among other things, the following:

- 10 • Cal Fire law enforcement and wildland fire investigators created WiFITER
11 without obtaining approval from the California Department of Finance (DOF)
12 as required by state law. (Ex. 120 at 5-6; Ex. 122 at 2; Ex. 123 at 1, 26, 27;
13 Ex. 126; Ex. 149 at 13, 32-33; Ex. 151 at 1; Ex. 154; Ex. 155.)
- 14 • Cal Fire established WiFITER for the purpose of facilitating Cal Fire
15 investigators' circumvention of strict limitations in expenditure of State
16 general fund dollars. (Ex. 149 at 38; Ex. 150.)
- 17 • Cal Fire senior management, including those overseeing the Moonlight
18 investigation, strategized on how to conceal WiFITER from regulators. (Ex.
19 122 at 6; Ex. 151 at 1.)
- 20 • During the time frame when Cal Fire Northern Region Chief Alan Carlson,
21 who eventually assisted the United States in this action, was reviewing and
22 revising his mentee Joshua White's draft Moonlight Fire report in February
23 2008, Carlson was also concerned that WiFITER was "running in the red" and
24 emphasized that the fund would remain so, "unless someone is going to make
25 a high % recovery." In another email that same day, Carlson denied a request
26 to use WiFITER funds to enhance Cal Fire's ability to find arsonists on the
27 stated ground that "it is hard to see where our arson convictions are bringing
28

24 ⁵⁴ Further indicia of Cal Fire's lawlessness, and of its failure to produce all information pertinent to the WiFITER
25 account, can be found in several documents which indicate that Cal Fire civil cost recovery staff including Josh
26 White used personal email accounts and text messaging on certain occasions when discussing WiFITER. (Ex. 152;
27 Ex. 153.)

28 ⁵⁵ In this regard, on February 7, 2013, former Eastern District of California AUSA and Civil Chief Matthew Jacobs,
now General Counsel for CalPers, published an article deriding the practice of creating financial incentives for
investigators and prosecutors, and raising the very concerns expressed herein by these Defendants relating to the
motivational biases created by such practices. (Ex. 156.)

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in additional cost recovery.” (Ex. 36; Ex. 151 at 2-3; Warne Decl. ¶ 190.)⁵⁶

- Three months prior to Moonlight, lead investigator White admitted in an email to circumventing the chain of command (“CoC”) so as to check on whether WiFITER funds would allow him to get his hands on additional WiFITER-funded equipment – in this instance, an expensive computer voice stress analyzer (“CVSA”). He tells the person he is writing to that he “figured [she] wouldn’t rat him out for circumventing the CoC” on this question because “as Alan’s boy, I can do no wrong”⁵⁷ (Ex. 125 at 1-2; Ex. 141 at 1-2.)
- Cal Fire’s counsels’ failure to produce WiFITER documents enabled United States expert witness Chris Parker, a former Cal Fire investigator and the creator of WiFITER, to provide misleading testimony in this case about WiFITER and the purpose and benefits of it, which was inconsistent with his own wrongfully withheld January 8, 2005, internal email, which showed that WiFITER was created to circumvent rules restricting expenditure of state money. (Ex. 147; Ex. 149 at 38; Ex. 150.)
- The November 2009 internal WiFITER audit report produced by Cal Fire (one of only two WiFITER documents provided to Defendants as of the federal trial date) was a fraudulent document that supplanted earlier versions of the audit report, which had contained a finding that the account was not formed in compliance with law, and had never been approved. (Ex. 146 at 7-8; Ex. 120 at 2; Ex. 124; Ex. 126.)

⁵⁶ Given these statements by the very person supervising the Moonlight Fire investigation, the United States’ repeated representations to the Court that there was no evidence of arson because “[t]he government investigators Josh White and Dave Reynolds found no evidence of arson during their investigation” can now be seen as simply one more step in advancing this pervasive fraud on the Court, as this representation is obviously misleading in view of the motivational context in which the supposed vacuum of evidence exists. (Ex. 14 at 11:9-10.) White, as lead investigator, along with Reynolds, had exclusive control over the alleged origin scene. While the investigators’ obligation was to report what they “found,” the evidence in this matter clearly and convincingly demonstrates that these investigators, instead of doing so, simply reported what they *wanted* to find, or what they *needed* to find, and that they frequently suppressed whatever they found when it interfered with their favored conclusions – what they initially found on the skid trail, what they found out about Red Rock, what they heard from Ryan Bauer, or from J.W. Bush, what Ivan Houser revealed in his witness statement (which they suppressed from the Joint Report), and who knows what else. In any event, the Court was certainly entitled to far more than these prosecutors gave, as they papered over facts concerning the motivations of those overseeing the Moonlight Fire investigation at the time the Court was engaged in the careful balancing of interests and evidence when ruling on (and granting) the United States’ motion in limine to preclude argument by Defendants that others were responsible for igniting the Moonlight Fire (through arson or otherwise).

⁵⁷ In other instances, Alan Carlson and White (the lead Moonlight Fire investigator) strategized together about how much money they should initially demand for the WiFITER account from their chosen defendants to perpetuate their illegal off-books account. In one instance involving another fire only a few short months before he sent the Moonlight Fire demand letters, White wanted to divert 20% of what Cal Fire was demanding from the defendants on that fire to WiFITER. But Carlson, apparently heeding the advice of Cal Fire’s general counsel Giny Chandler to “keep a low profile,” directed White to divert only 5%. White reluctantly complied, but not before pleading to Carlson: “Giving up money for the CDAA fund? Can’t we wait until we get the CVSA?” (Ex. 166.)

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- The finding of illegality in the first final audit report was deleted and suppressed at the urging of Alan Carlson, shortly after the state and federal Moonlight Fire complaints were filed in 2009. (Ex. 120 at 2; Ex. 124; Ex. 126; Ex. 143 at 16-18; Ex. 144 at 7-9, 10-12, 15-16; Ex. 146 at 7-8.)
 - Cal Fire ultimately and *illegally* siphoned approximately \$3.66 million dollars of state money into the WiFITER account between 2005 and 2012, and spent some \$2.9 million of those funds for the benefit of its wildland fire investigators -- the very people who, with exclusive and private access to fire scenes, assign blame -- including numerous “training” events at various locations including a beach front resort in Pismo Beach and expensive equipment, such as \$1800 camera packages. (Ex. 135; Ex. 138 at 9; Ex. 140; Ex. 141; Ex. 142; Ex. 149.)
 - Many of the training events and WiFITER purchases were coordinated and overseen, or requested by, Moonlight Fire lead investigator Joshua White, who also attended numerous WiFITER funded events. (Ex. 140; Ex. 141; Ex. 142.)
 - The CDAA merely processed the expenditure of WiFITER money only as directed by Cal Fire civil cost recovery staff and investigators, including Alan Carlson. Thus, the same investigators and case managers responsible for assigning blame and recovering money for wildland fires controlled the unlawful expenditure of millions of dollars in recovered funds. (Ex. 127; Ex. 128; Ex. 130; Ex. 131; Ex. 132; Ex. 133; Ex. 134; Ex. 136; Ex. 140; Ex. 141; Ex. 142; Ex. 143 at 2-3; Ex. 151 at 49, *passim*.)
 - Alan Carlson, the case manager on the Moonlight Fire prosecution, was one of only a handful of Cal Fire staff members on a committee that made all decisions on how to spend WiFITER money, and he suggested and received approval for multiple expenditures of WiFITER money. (Ex. 127; Ex. 128; Ex. 130; Ex. 140; Ex. 141; Ex. 142; Ex. 143 at 2-3); Ex. 145; Ex. 149; Ex. 151 at *passim*.)
 - Alan Carlson apparently received personal payments from the WiFITER account for his participation as an instructor at WiFITER training events, while at the same time he was also receiving a salary as a state employee. (Ex. 137 at 5.)
 - Lead investigator White’s Moonlight Fire demand letter of August 4, 2007, which required the payment of \$8.1 million in two separate checks, one short-changing the State of California and the other requiring an illegal payment to CDAA in the amount of \$400,000, would have effectuated one of the largest WiFITER cash infusions in the history of the illegal off-book account. (Exs. 115-118.)
 - In March 2008, while concerned that the WiFITER account was “running in

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1 the red” Alan Carlson urged other Cal Fire law enforcement personnel to
2 divert an even greater percentage of wildland fire settlement dollars from the
3 state’s general fund into the WiFITER account. In response, Cal Fire’s then
4 lead in-house general counsel, an officer of the Court, advised against it -- not
5 because the fund was illegal, but to prevent discovery of the fund by state
6 regulators. Specifically, Cal Fire’s general counsel stated: “the point is to
7 keep a low profile. If we take a cut off the top of a recovery where assets are
8 say \$100K but costs are \$1 Million, that will look fishy.” This advice was
9 repeated in an email from Cal Fire’s highest ranking law enforcement official
10 in a March 2008 email to Alan Carlson, not because the fund was illegal, but
11 to ensure the fund was not discovered by regulators. (Ex. 151 at 1.)

- 12 • In late January, 2013, after Defendants exposed WiFITER, the Wall Street
13 Journal, the Los Angeles Times, and the Sacramento Bee ran stories on Cal
14 Fire’s malfeasance. Thereafter, Cal Fire’s lead in-house general counsel, who
15 provided the above-quoted advice, was terminated from Cal Fire in March
16 2013.⁵⁸ (Ex. 164 at 3-4.)

17 The California Department of Finance also issued its own review of WiFITER, and
18 similarly concluded that Cal Fire had failed to obtain the legally required authorization for the
19 outside bank account, and that Cal Fire had not complied with state mandated restrictions on the
20 expenditure of state money. Shortly after publication of that report, retired Cal Fire Law
21 Enforcement Chief Tom Hoffman came forward as yet another “whistle blower,” offering his
22 own revealing criticism of WiFITER and Cal Fire’s civil cost recovery unit responsible for the
23 state Moonlight Fire action, stating:

24 I feel vindicated. I tried so hard to get centralized management of
25 cost recovery monies. I was stymied at every turn by the North
26 Region and the South Region. It became the wild west with
27 everyone doing their own thing. The system was doomed. Lack of

28 _____
⁵⁸ The termination of Cal Fire’s in-house general counsel occurred in the spring of 2013, and appears to have been the product of significant press coverage about the WiFITER scandal in national news outlets, including the Wall Street Journal and The L.A. Times. (Ex. 157.) Those articles appeared to be a product of a number of revealing WiFITER documents obtained in 2012 in response to California Public Records Act requests to Cal Fire. Perhaps because the responses to those requests were not filtered by the California Attorney General’s Office, these materials began to reveal, for the first time, the true nature of WiFITER. Nevertheless, it was not until after the October 15, 2013, State Auditor’s report, which revealed that Cal Fire and its lawyers had withheld the most important documents, that the Office of the Attorney General finally began to provide the most damaging documents (those most favorable to the Defendants). These documents, largely in the form of internal emails, prove the existence of a conspiracy to actively conceal WiFITER. It was this last batch of documents that also revealed most clearly the motivational bias that WiFITER instilled in fire investigators to target affluent defendants, partially explaining the effort here to pin blame on these Defendants, regardless of evidence pointing to other parties and the damage it would cause to our system of justice.

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support from my management to do the right thing is what led to my early retirement. I also recommend [sic] CALFIRE go to Department of Finance for approval of the Wildland Investigation and Training Fund. This was in the original draft report, but someone wiped it out, (shortly after I retired) thereby covering up what was the right thing to do.

(Ex. 126.)

In stark contrast to these facts, the federal prosecutors essentially represented to this Court that WiFITER was a noble cause, stating that “[a] public program established to train and equip fire investigators is hardly evidence of a multi-agency conspiracy;” and that “Defendants’ allegations of a conspiracy are unsupported.” (Ex. 14 at 9-10.) The federal prosecutors recklessly misrepresented WiFITER was a “separate public trust fund.” (Ex. 14 at 10.) In fact, it was secret, not public; it was an off-books illegal account, not a trust; and, it was filled with money controlled and spent by wildland fire investigators on themselves after skimming a portion of wildland fire settlements that were legally required to be delivered to the state’s general fund, and thus was anything by “separate.” It is difficult to imagine a more reckless and misleading set of characterizations – which ultimately achieved their desired results with this Court.

Indeed, the eventual disclosure of the true facts has recently precipitated needed corrective action by California’s Legislature. Specifically, Governor Brown signed into law two new pieces of legislation (SB 1074, and SB 1075) in August 2014, amending California’s Government Code. SB 1074 now makes it a misdemeanor for a state employee to knowingly transfer money outside of the State Treasury System.⁵⁹ (Ex. 162.) The Senate Committee on Governmental Organization analysis indicates that this law was enacted because “it is unknown if any Cal Fire employees that were responsible for the misappropriation of funds were punished for their actions” and that “SB 1074 makes sure there are consequences to bad actions by employees doing what they know is wrong” and that “state agencies, such as Cal Fire will be held accountable”

⁵⁹ This legislative action was largely symbolic, because diversion of money by state employees, as was done in Cal Fire by numerous individuals acting in coordination, including Alan Carlson and the Moonlight Fire’s lead investigator Joshua White, was and is already a felony under California law. See California Penal Code § 424. But despite a request by California State Senator Ted Gaines and others in open letters to Attorney General Kamala Harris urging her to undertake a criminal investigation, Attorney General Harris claimed she could not take any such action because her office represented Cal Fire. (Exs. 158-160.)

1 (*Id.* at 5.) SB 1075 is a bill also specifically targeted at WiFITER. (Ex. 163.) That bill codifies
 2 the recommendations of the State Auditor and imposes annual reporting requirements for Cal
 3 Fire's Civil Cost Recovery Program and orders that the balance of the WiFITER account
 4 (approximately \$807,000 according to the bill) be turned over to the General Fund in
 5 conformance with existing state law. (*Id.*) The State Controller's Office also sent notices to all
 6 state agencies specifically calling out Cal Fire's malfeasance, in an effort to ensure that other
 7 agencies would not engage in similar behavior. (Ex. 161.)

8 In view of the egregious nature of the true facts, the concerted effort by officers of the
 9 court to conceal them is that much more disappointing. There can be no question that Judge
 10 Nichols' initial WiFITER ruling, as well as this Court's ruling, were the product of a fraud
 11 worked on two courts. Indeed, Judge Nichols reached this very conclusion after finally having in
 12 his possession a full accounting of what actually occurred with this illegal slush fund, including
 13 documents showing the motivational bias it instilled in those involved with the Moonlight Fire
 14 investigation, including Alan Carlson and Joshua White. In particular, Judge Nichols found:

15 First, this Court's determination regarding Cal Fire's motion in
 16 limine was tentative and thus subject to change as the case
 17 developed. Additionally, this Court's initial determination
 18 regarding WiFITER was naturally based on the assumption that
 19 Cal Fire had disclosed all responsive evidence in its possession to
 20 the Defendants before this Court made its determination, as Cal
 21 Fire had earlier been ordered to do. But the State Auditor's report
 22 regarding WiFITER ultimately revealed that Cal Fire had not
 23 complied with its discovery obligations or with the Court's order
 24 of April 10, 2013, which commanded the production of all
 25 responsive and non-privileged WiFITER documents on or before
 26 April 30, 2013. Thereafter, Cal Fire belatedly produced thousands
 27 of documents. In the context of reviewing the Defendants'
 28 Motions for Fees, Expenses and/or Sanctions, the Court has
 considered a number of belatedly produced documents and finds
 that certain of these documents are contrary to Cal Fire's
 representations to this Court regarding the lack of any evidence
 that WiFITER was improper, as alleged in its WiFITER motion in
 limine. The Court further finds that many of the belatedly
 produced documents are supportive of Defendants' argument that
 WiFITER is relevant to the question of whether Moonlight Fire
 case manager Alan Carlson and Moonlight Fire investigator (and
 subsequent case manager) Josh White were biased towards affixing

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1 blame on affluent defendants who could pay for Cal Fire's
2 suppression costs (and who therefore could, by extension, help
3 fund WiFITER) in order to perpetuate an illegal account for which
4 Carlson, White and others were beneficiaries.

5 (Ex. 25 at 44-45.)

6 Judge Nichols' findings with respect to WiFITER were among his reasons for the
7 imposition of terminating sanctions, and his conclusions that the action was "corrupt and tainted"
8 and "too much for the administration of justice to bear." (Ex. 24 at 21 & 25.) But these state
9 court findings regarding this joint prosecution do nothing to address or ameliorate the fraud
10 worked upon this Court. Indeed the asymmetry between the state court actions and the federal
11 action, and the impact of the WiFITER revelations, only serve to underscore the need for this
12 Court to assess the facts of this prosecution anew and to do so with a focus on whether it too was
13 defrauded, whether through its own review or through the appointment of a special master to
14 reach findings of fact and conclusions of law.

15 Judge Nichols' orders provide much of what is necessary to appreciate that the fraud
16 perpetrated by Cal Fire, its investigators, and its attorneys saturated virtually every corner of the
17 action. But fraud perpetrated so thoroughly and on such a broad scale is not confined to one
18 tribunal when it is based on a joint investigation and joint prosecution. Cal Fire's investigators
19 and attorneys plainly knew that their actions and decisions to disclose or not disclose evidence
20 favorable to the defense had a direct and material effect on *this* Court's concurrent Moonlight
21 proceedings, and their fraud necessarily extended to the oversight and workings of this Court.⁶⁰

22 ⁶⁰ The United States listed Joshua White and David Reynolds as expert witnesses. The United States then asserted
23 that in view of its Joint Prosecution Agreement with Cal Fire, it had no obligation to produce what it claimed were
24 privileged communications with these experts germane to their opinions. (Ex. 7 at 9.) On May 26, 2011, Magistrate
25 Judge Brennan entered an order granting Defendants' Motion to Compel production by the United States, despite
26 finding that, "[t]he USAO and the AGO have entered into a joint prosecution agreement." (Ex. 8 at 2, n. 2.)
27 Defendants also served a Rule 45 document subpoena on Cal Fire, seeking documents pertaining to Joshua White and
28 David Reynolds' expert opinions for the United States. Cal Fire similarly refused to produce documents, and on
November 8, 2011, Magistrate Judge Brennan entered an order on Cal Fire's motion for protective order. (Ex. 9.) In
ordering Cal Fire to comply with much of the subpoena, Judge Brennan again found that Cal Fire and the United
States had "voluntarily entered into a joint prosecution agreement" and that Cal Fire was "reaping the benefits of that
arrangement." (*Id.* at 8.) Judge Brennan also ruled that discoverability of the expert files turned on whether the
documents are "germane to the subject matter on which the expert has offered an opinion." (*Id.* at 7.) Certainly,
counsel for Cal Fire and the United States were obligated to disclose to the Court the WiFITER program and White's
role within it. It is difficult to imagine material more "germane" to an expert opinion than a contingent

1 Cal Fire institutionalized a system where wildland fire investigators had a personal, direct, and
 2 contingent financial interest in the outcome of their own investigations, and Cal Fire and its
 3 counsel did so knowing that their investigations would form the basis for both criminal and civil
 4 proceedings in courts of *all* jurisdictions. Doing so, while simultaneously concealing the
 5 evidence of that motivational context, works a fraud on every court where any such investigations
 6 are at issue. The impact of this decision making was woven into this action with the additional
 7 stratagem of obfuscation on the part of the federal prosecutors, as so thoroughly evidenced by the
 8 record in this action.

9 **H. The Federal Prosecutor Misrepresented Evidence to Wrongfully Claim that Howell**
 10 **Started Other Wildland Fires.**

11 In its trial brief, the United States claimed: “All the defendants should have foreseen the
 12 fire, because Howell’s had already started two other fires earlier that same summer while
 13 performing similar work for Sierra Pacific with bulldozers, and Beaty, Howell’s, and Sierra
 14 Pacific all learned of those fires weeks before the Moonlight Fire. The Greens Fire ignited on
 15 June 21, 2007, on another job site where Howell’s had yarded logs.” (Ex. 16 at 8.) The federal
 16 prosecutors also represented: “The Lyman Fire ignited later that same season, on August 17,
 17 2007, once again in close proximity to Howell’s operations. Howell’s learned the next day that
 18 the cause of the fire was an equipment-to-rock strike by a Howell’s employee conducting
 19 operations on Sierra Pacific land.” (*Id.* at 9.) However, these representation to the Court,
 20 designed as they were to wrongly paint Howell’s as an irresponsible operator, intentionally
 21 omitted key facts associated with each of these fraudulent investigations.

22 The Greens Fire broke out on June 21, 2007, about a mile west of where Moonlight
 23 eventually started, on property owned by the Landowner Defendants, managed by W.M. Beaty,
 24 and harvested by Sierra Pacific through Howell’s logging outfit. Although the USFS investigator
 25 on the fire, Brigitte Foster (“Foster”), conducted a perfunctory investigation on June 21, 2007,

26 _____
 27 financial/beneficial interest in the investigation/outcome. Yet, the prosecutors here failed to disclose any of it, and
 28 instead entered their defense of the WiFITER program.

1 Foster submitted no origin and cause report on this extremely small fire until September 8, 2007,
 2 five days *after* the Moonlight Fire began and only then at the specific request of Dave Reynolds.
 3 (Ex. 105 at 4.) Thus, this so-called origin and cause report blaming Howell for another bulldozer
 4 caused fire suddenly surfaced -- at the request of a Moonlight Fire investigator -- more than two-
 5 and-a-half months after the Greens Fire but just days after the Moonlight Fire. Also, it surfaced
 6 just after the Moonlight Fire despite investigator Foster's confirmation that the USFS has a
 7 requirement that origin and cause reports be completed within two weeks of a fire. (*Id.* at 2-3.)
 8 Further, when defense counsel asked investigator Foster why she had failed to comply with this
 9 deadline on the Greens Fire, she could not explain why.⁶¹ (*Id.*)

10 Foster's sudden production of this forgotten report blaming Howell's for another fire at
 11 the request of a Moonlight Fire investigator who had just blamed Howell's for causing the
 12 Moonlight Fire is not the only reason the prosecutors here should have paused before defrauding
 13 the Court with claims that Howell was a bad operator. Indeed, aside from the fact Foster only
 14 generated the Greens Report at the request of Reynolds, there were certainly other reasons for the
 15 prosecutors to pause before making such a claim to this Court, especially since lead prosecutor
 16 Taylor defended Foster's deposition performance in its entirety on March 3, 2011. Among other
 17 things, Foster's testimony revealed that she neither located a point of origin nor even a specific
 18 area of origin. (Ex. 105 at 10-11; Ex. 30 at 159.) Under accepted fire investigation standards,
 19 Foster's failure to even look for the origin, let alone find one, should have resulted in a finding
 20 that the fire's cause was "undetermined." (Ex. 28 at 3-4.)⁶² In addition to failing to find a point
 21 of origin, Foster also admitted that she found no ignition source. (Ex. 105 at 24.) Foster also
 22 _____

23 ⁶¹ Curiously, Foster claimed to have submitted a single-page excerpt of the report in July under her married name
 24 "Foster," and then in the section designed for her supervisors' approval, Foster filled in her maiden name "Boysen."
 As was the case throughout her deposition, Foster could give no explanation for her apparent act of deception, simply
 25 stating, "I don't why I . . . put 'Approved by Boysen.'" (Ex. 105 at 9, 23.)

26 ⁶² Joint state and federal origin and cause expert, Larry Dodds ("Dodds") confirmed under oath that it is almost
 always the case that an investigator must find a point of origin before he or she can discover a fire's cause. (Ex. 52 at
 27 27-28.) Dodds also confirmed that in order to identify the origin and cause of a fire, the investigator must locate a
 competent ignition source and find where that competent ignition source came into contact and ignited a fuel. (*Id.* at
 28 78.) Here, not only did Foster fail to find a point of origin, she failed to even locate the far broader specific area of
 origin, as well as any ignition source.

1 testified that she saw rock strikes but took no photographs of them and could not explain why she
2 failed to do so. Indeed, she was unable to say if there were 100 rock strikes or two. (*Id.* at 17.)
3 Strangely, Foster also testified that, even though she had a magnet with her, she made no effort to
4 search for metal as potential ignition source because “the area was disturbed and I didn’t feel the
5 need to pull out the magnet.” (*Id.* at 15.) When Foster was then asked whether she thought the
6 fire was caused by “fragment that came off of a caterpillar,” she paused and could only say,
7 “possibly.” (*Id.* at 16.) Finally, while accepted scientific methodology required her to test her
8 claimed hypothesis, Foster admitted that she failed to do so. (*Id.* at 30-32.)

9 Despite these investigative failures, Foster’s report still inexplicably concludes that
10 Howell caused the Greens Fire. Moreover, while Foster testified that Damon Baker was the
11 Howell employee responsible for starting the fire (Ex. 105 at 18-19), a year later the United States
12 prepared and filed a sworn declaration from Josh White in which he stated that Howell employee
13 Bush admitted to starting the fire (Ex. 12 at 13).

14 There are additional oddities with the Greens Fire’s investigation and its report. When the
15 United States produced the Greens Fire investigation report during litigation, Foster created an
16 entirely new version of the report from whole cloth. Foster conceded that she decided to
17 manufacture a new report from memory and pass it off as the actual report. But a side-by-side
18 comparison of her original report and her new report exposes significant differences between the
19 two, as Foster simply manufactured an entirely different scene sketch, photo descriptions, and
20 incident report. (*Compare* Ex. 106, *with* Ex. 107; *see also* Ex. 105 at 33-41.)

21 The United States never discussed or tried to reconcile the competing theories discussed
22 above, nor did it cause Foster to correct her report to reflect that the cause of the Greens Fire was
23 “undermined.” Moreover, while Foster’s deposition revealed Foster to be either entirely
24 incompetent or deceptive, the lead prosecutor did nothing to correct her testimony. A properly
25 focused AUSA would have, for instance, demanded answers as to why Foster would engage in at
26 least two separate acts of deception by using her maiden name in a box reserved for another, and
27 by fabricating her report and producing it in discovery. Instead, the prosecutor continued to rely
28

1 on this sham report, and then caused the Court to do so as well.

2 As outrageous as are the circumstances with respect to the Greens Fire origin and cause
3 report, the circumstances regarding the Lyman Fire origin and cause report are perhaps worse.
4 Like the Greens Fire, the August 17, 2007, Lyman Fire also broke out before the Moonlight Fire.
5 Like the Greens Fire, there was no origin and cause report on the Lyman Fire until *after* the
6 Moonlight investigators blamed Howell for the Moonlight Fire. On September 24, 2007, more than a
7 month after the Lyman Fire broke out, Cal Fire finally issued its report. Purportedly written by Cal
8 Fire employee Les Anderson, it concluded that the Lyman Fire was caused by a Howell
9 bulldozer. (Ex. 30 at 179-182.)

10 However, when Defendants took the deposition of Anderson on July 14, 2011, and took
11 the deposition of another Lyman Fire investigator, Greg Gutierrez (“Gutierrez”), on October 19,
12 2011, a far different story emerged. Both Anderson and Gutierrez testified that they had *not*
13 concluded that Howell caused the Lyman Fire. Anderson testified that he was not an investigator,
14 did no real investigation, and only relied upon Gutierrez. (Ex. 103 at 2-3, 6-8.) Gutierrez then
15 testified that he reached no formal conclusion at all and that he was unable to rule out arson or
16 other possible causes. (Ex. 102 at 2-4; Ex. 103 at 4-5.) Despite these facts, Cal Fire still issued
17 the Lyman Fire report on September 24, 2007, shortly after the Moonlight Fire broke out,
18 concluding that it was caused by, yet again, a Howell bulldozer striking a rock. On the same day,
19 Cal Fire’s Battalion Chief David Harp (“Harp”) sent Eunice Howell a demand letter, stating that
20 “The [Lyman] fire . . . was caused by one of your bulldozers striking a rock within a timber
21 harvest clear cut area.” Among other things, Harp alluded to the potential for criminal charges
22 and demanded that Eunice Howell immediately send Cal Fire a check in the amount of
23 \$46,206.26. (Ex. 100.) Harp then sent Eunice Howell another demand letter on December 10,
24 2007, and then a letter on January 6, 2008, confirming receipt of \$26,206.26, and Ms. Howell’s
25 agreement to make monthly installment payments until the balance was paid off. (Ex. 101.)
26 Eunice Howell closed the business shortly thereafter. Despite Anderson and Gutierrez’s
27 testimony, Cal Fire never returned Howell’s money, and neither Cal Fire nor the United States
28

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1 ever amended or withdrew its reliance on this false origin and cause report in their pleadings and
2 discovery responses. (See e.g. Ex. 109 at 6, 9, 15, 18, 25, 28.) Indeed, as noted above, the United
3 States continued to rely upon it in an effort to help make its case against these Defendants in
4 various interrogatories, Request for Admission's, the operative pleadings, and even in its trial
5 brief to this Court. (Ex. 16 at 9.) Regarding Cal Fire's similar conduct, Judge Nichols
6 summarized the issue as follows:

7 With respect to the Lyman Fire, Cal Fire does not even attempt to
8 deny that the conclusion of the Origin and Cause Report for that
9 fire prepared by Lester Anderson was false. There is no dispute
10 that his conclusion, that a Howell's bulldozer ignited the Lyman
11 Fire, was flatly contradicted by the lead investigator of the Lyman
12 Fire, Officer Greg Gutierrez, who testified that the cause was
13 properly classified as undetermined.

14 (Ex. 25 at 23.)⁶³

15 The Sheep Fire, also referenced in the United States' complaint as a Howell caused fire, is
16 more of the same. It occurred on either September 17 or September 18, 2007, in close proximity
17 to where the Lyman Fire had occurred a month prior. Cal Fire purportedly investigated the Sheep
18 Fire and, as was the case with Greens and Lyman, failed to locate a point of origin and failed to
19 identify a source of ignition. (Ex. 108 at 4-5.) This fact should have led to a conclusion that the
20 fire's cause was undetermined. (Ex. 28 at 3-4; Ex. 52 at 27-28, 78.) Once again ignoring the
21 scientific method, the origin and cause report for the Sheep Fire stated that the fire was caused by
22 "the bulldozer tracks or rippers contacting the rocks" in an outcropping. (Ex. 30 at 194.)

23 In the end, there is clear and convincing evidence that the "investigations" on the Greens,
24 Lyman and Sheep fires were nothing but opportunities to manufacture evidence to buttress the
25 government's allegations that Howell was a dangerous and rogue operator and that it started the
26 Moonlight Fire, even if doing so meant an elderly woman had to pay \$46,000. In fact, before
27 these fraudulent investigations, Howell had operated for over 30 years without such an incident.
28 (Ex. 173 at 2.) Again, only *after* the Moonlight Fire broke out, three separate origin and cause

⁶³ Moreover, with respect to Cal Fire's discovery responses, which relied upon the Lyman Fire and its false report, Judge Nichols stated, "[t]hose responses were demonstrably false, as confirmed by Gutierrez's testimony." (Ex. 25 at 23.)

1 reports “finding” that Howell started each fire with a rock strike suddenly surfaced, ultimately
 2 finding their way into the Moonlight origin and cause report.⁶⁴ None of those reports, however, is
 3 scientifically based. Each in fact is unsupported. Indeed, as the governments’ primary origin and
 4 cause investigator Larry Dodds testified, based on what he read, the fires were not investigated by
 5 “first-string investigators,” they drew conclusions which did not appear to be sufficiently
 6 supported, and, based on the limited material he read, the three fires appeared better classified as
 7 “undetermined.” (Ex. 52 at 14-15.)⁶⁵ But the United States’ prosecutors did not have limited
 8 material. The lead investigator defended Foster’s deposition, and understood that the Lyman Fire
 9 report had been exposed as a sham, yet the prosecutors pressed forward without regard to their
 10 duties of disclosure to this Court.

11 **I. The Lead Investigator Destroyed Critical Evidence Even Though He Reasonably**
 12 **Anticipated the Moonlight Fire Litigation.**

13 The Moonlight investigators’ “unconscionable plan or scheme . . . designed to improperly
 14 influence the court in its decisions,” is further evidenced by the lead investigators’ spoliation of
 15 critical evidence that goes to the heart of the case -- their fraudulent alleged points of origin.
 16 According to USFS employee Reynolds, Joshua White took copious notes when processing the
 17 alleged origin scene. (Ex. 47 at 6-11.) These notes would have likely included the investigators’
 18 careful steps with respect to the placement of the white flag and their measurements of it, their
 19 collection of metal, and its documentation. In addition to destroying these notes, White also
 20 deleted his computer files before the lawsuit was filed. (Ex. 41 at 12-23.) At the time he took
 21 these notes, he knew the Moonlight Fire was likely to result in litigation.⁶⁶ White nevertheless
 22 _____

23 ⁶⁴ Although beyond the scope of this particular motion, the investigators’ alleged rock strike theory of ignition by a
 24 Howell bulldozer was never scientifically established by federal experts. This area of the case is an equally fertile
 ground for prosecutorial reliance on fraudulent forensic evidence.

25 ⁶⁵ Importantly, the governments’ joint expert Dodds also confirmed that an “undetermined” fire results in no civil or
 criminal action. (Ex. 52 at 10-11.)

26 ⁶⁶ On September 5, 2007, the day White and Reynolds processed the alleged origin scene, Reynolds listed Sierra
 27 Pacific Industries as the “Defendant” on an incident report. (Ex. 30 at 51.) That same day, Cal Fire retained
 28 *litigation* consultant/metallurgist Lester Hendrickson, and Joshua White met with him five days later. (Ex. 41 at 61-
 63, 88, 200-202; Ex. 42 at 11-12.) By September 5, 2007, the Moonlight Fire had already grown to over 22,000
 acres. (Ex. 37.) On September 7, 2007, apparently with his WiFITER biases fully intact, Joshua White interviewed

1 destroyed his notes (Ex. 41 at 206-212), thereby giving himself freedom to create whatever false
 2 narrative he desired.⁶⁷ By doing so, the Moonlight Fire investigators were able to select and
 3 shape the evidence without being impeded by contemporaneous notes of what actually occurred.⁶⁸

4 **J. The United States, with the Aid of Its Prosecutors, Covered-Up Misconduct at the**
 5 **Red Rock Lookout.**

6 According to the Joint Report, the Moonlight Fire was spotted and reported from Red
 7 Rock Lookout at 2:24 p.m. (Ex. 30 at 3.) Except for Red Rock's role in reporting the fire, the
 8 Joint Report is written as if all was normal in the tower on that Labor Day. The Joint Report's
 9 account is false. Indeed, the investigators' and the prosecution team's misrepresentations with
 10 respect to the events that transpired at Red Rock Lookout have been partially revealed through
 11 existing court filings in this case. (Ex. 178.)

12 USFS employee Caleb Lief was manning the Red Rock Lookout on September 3, 2007.
 13 At roughly 2:00 p.m., Karen Juska, another federal employee, was in the process of responding to
 14 Lief's request that she come to the tower to repair or replace a radio. The Joint Report, however,
 15 intentionally omits the following key material facts. When Juska arrived in her USFS pickup
 16 truck after driving up the dusty switch-back road in plain view of the lookout tower, she parked
 17 just beneath the tower, walked up its steps, turned the corner and startled Lief who was standing
 18 on the catwalk in front of her, on the side opposite from where the fire was burning in the
 19 distance. (Ex. 97 at 2-3.) He was urinating on his bare feet. (*Id.*) Caught in this revealing
 20 position, Lief turned around to zip up his pants, saying over his shoulder that it was a cure for

22 Bill Dietrich of Howell and reported, "Dietrich said the [Safeco] policy was for \$3 million liability insurance, as
 23 required by SPI. Dietrich said he would fax me a copy of their insurance policy." (Ex. 30 at 69-70.) White testified
 that his investigation included assessing insurance policies of "potential defendants." (Ex. 41 at 128.) White also
 admitted that he understood that fires of every variety can result in litigation. (*Id.* at 59-60.)

24 ⁶⁷ White did the same regarding his interview with J.W. Bush, as White admits to destroying his notes of that
 interview. (See Ex. 41 at 133, 206-207.)

25 ⁶⁸ In the state action, attorneys for Cal Fire attempted to excuse such spoliation of evidence by arguing that White's
 26 "field notes were destroyed only after the information in them was transferred to his Report, which was and is the
 27 common practice," and that he "transferred all of the case file information to his laptop computer, so all this
 28 electronic information is in fact preserved." This is incorrect. White has demonstrated a propensity to conceal and
 omit numerous things from the Joint Report, including the only aspect of the scene processing that his co-investigator
 Reynolds felt was important enough to carefully document (the white flag rock diagram).

1 athletes foot fungus. (*Id.* at 3-4.) Taken aback, Juska then entered the cabin of the tower with
 2 Lief. Shortly after entering the cabin, Juska saw what she believed was a blue/green glass
 3 marijuana pipe on the counter, which Lief then placed in his back pocket, saying: “[M]y bad.
 4 You weren’t supposed to see that.” (*Id.* at 4-5.) Later, when Lief handed Juska the radio she had
 5 come to repair, Juska smelled the “heavy odor of marijuana” on his hand and on the radio. (*Id.* at
 6 20.)

7 The investigators intentionally omitted these key facts of what occurred between Lief and
 8 Juska from their Joint Report, despite their relevance as to whether Lief was properly performing
 9 his duty to report fires as quickly as possible.⁶⁹ Indeed, the USFS’s lead investigator at the time,
 10 Diane Welton, took the interviews of both Lief and Juska on September 12, 2007, but made sure
 11 that neither interview statement revealed what actually happened at Red Rock on September 3.
 12 (Ex. 85; Ex. 30 at 87-91, 93-98.) In fact, Juska testified that Welton expressly told her just before
 13 she began the interview to say nothing about Lief’s misconduct on the tower that day.⁷⁰ (Ex. 97
 14 at 9-18.)

15 Early in the case, before it obtained only limited documents that disclosed the above-
 16 referenced misconduct on the part of Lief, defendant Sierra Pacific had heard rumors that the
 17 United States was covering up something that occurred at the Red Rock Lookout Tower and that
 18 whatever occurred may have had some impact on whether the fire was reported in a timely
 19 manner. Accordingly, given that the USFS’s diligence in spotting and reporting the fire was a
 20 central issue in the case, Sierra Pacific sought to expose the issue by propounding an

21 _____
 22 ⁶⁹ From the outset of the action, Sierra Pacific asserted with its first appearance a number of affirmative defenses,
 23 including comparative fault on the part of the USFS. Accordingly, whether the USFS employee stationed at Red
 24 Rock Lookout on September 3, 2007, exercised due care in the performance of his duties was necessarily a central
 25 issue in the case for numerous reasons. This conclusion is confirmed in the Court’s Pre-Trial Order (Ex. 19 at 17-
 26 18), and in its order denying the United States’ motion for partial summary judgment (Ex. 179 at 12 (“Plaintiff’s
 27 motion for partial summary judgment is denied as to comparative negligence based on the alleged conduct of the Red
 28 Rock Lookout.”)).

⁷⁰ According to Juska’s sworn testimony and her own notes, Welton instructed Juska just before her interview that
 Juska was to stay silent about Lief’s misconduct on the day of the fire – essentially, that Juska was to omit those
 particular facts as Welton purported to record from Juska what she had witnessed on that day. (Ex. 97 at 9-18.) In
 this regard, Welton expressly told Juska, “I can’t know about that.” After providing those instructions, Welton
 prepared and signed a witness statement for Juska, which omitted any reference to Lief’s misconduct at critical
 moments while the fire was in its initial stages. (Ex. 85.)

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1 unambiguous interrogatory on the United States:

2 Describe in detail all activity at Red Rock Lookout on September 3,
3 2007, including (without limitation) the IDENTITY of all
4 PERSONS involved and all conduct and action taken by those
PERSON.

5 (Ex. 91 at 3.) The United States’ response, verified by USFS Plumas Division Chief Larry
6 Craggs (“Craggs”), reported a normal day which involved the arrival of Juska and the spotting
7 and reporting of the Moonlight Fire at 2:24 p.m. (Ex. 92.) The United States’ response, however,
8 drafted by the federal prosecutors, deliberately withheld any and all references to Lief’s obvious
9 misconduct and malfeasance. The federal prosecutors also denied a series of requests for
10 admissions that clearly, based on the true facts, should have been admitted. (Ex. 93.) Only after
11 those discovery responses, and after Defendants began to push for more information regarding
12 Leif and Juska’s personnel files, did the United States began to slowly produce internal
13 memoranda and related emails, which revealed some of the true facts.

14 The information regarding what Juska observed at the Red Rock tower, and the
15 investigators’ efforts to conceal it – with, unfortunately, the assistance of the federal prosecutors–
16 was highly relevant to whether Juska spotted the fire timely and, perhaps more importantly, to the
17 investigators’ propensity to conceal harmful information which might otherwise harm their
18 chances of prevailing against their chosen defendants (a practice that apparently took hold after
19 AUSA Wright’s removal from the action by AUSA Shelledy.) It was also highly relevant to their
20 credibility as investigators and to the credibility of this investigation in particular.

21 Thereafter, on April 7, 2011, long after the briefing on the motion for reconsideration had
22 closed, Defendants conducted the deposition of USFS employee Larry Craggs, who verified the
23 patently false interrogatory response prepared for his signature by the federal prosecutor.⁷¹
24 Craggs’ deposition represented what Defendants perceived at the time was a turning point, as
25 Craggs showed himself to be a remorseful man focused on attempting to tell the truth, regardless

26 _____
27 ⁷¹ Neither the Magistrate Judge nor the District Court had the benefit of Mr. Craggs’ testimony in assessing the facts
28 in the context of Defendants’ discovery motion or subsequent motion for reconsideration.

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1 of what it revealed. When Sierra Pacific’s counsel put his verified interrogatory response before
2 him, [REDACTED] (Ex. 96 at 13-20.)

3 [REDACTED]
4 [REDACTED]

5 [REDACTED]⁷² (*Id.* at 17-18)

6 In view of Craggs’ testimony, Defendants had hoped that the federal prosecutors would
7 finally move to make a full disclosure to the Court and these Defendants and that they would
8 relatedly correct their demonstrably false discovery responses. Certainly AUSA Wright would
9 have done so. However, after the deposition of Craggs, neither the lead federal prosecutor nor
10 any member of her team retracted any of the false discovery responses served on behalf of the
11 United States, and never informed the U.S. Magistrate or this Court of these additional facts to
12 correct the record or the Courts’ orders.⁷³

13 In view of the federal prosecutors’ failure to correct the record, the Landowner
14 Defendants served requests seeking admissions from the United States that its previous response
15 to Interrogatory No. 1 about what transpired at Red Rock Lookout was false, and that the United
16 States knew it to be false before serving the verified response. (Ex. 94 at 3.) Answering the
17 Landowners’ Request for Admissions, the federal prosecutors objected, stating: “[T]he United
18 States denies this request in full. The United States denies that any portion of the response was

19 _____
20 ⁷² A DVD containing relevant excerpts of the videotaped depositions of witnesses concerning the events that
21 transpired at Red Rock Lookout; the concerted and systematic cover-up of those events by the Moonlight
22 investigators in the Joint Report; and the effort to perpetuate that cover-up during the prosecution of this matter is
23 provided as Exhibit 95 to the Warne Declaration. Defendants urge the Court to carefully review this evidence to
24 gain a more thorough appreciation, through the testimony of the witnesses themselves, of the nature of this fraud on
25 the Court. The DVD includes Ron Heinbockel, Lief’s supervisor, [REDACTED]

23 [REDACTED]

24 [REDACTED] (Ex. 98 at 13-15.) Heinbockel also testified

25 [REDACTED] (Ex. 98 at 18.) See Exhibits 89 and 90 for more detailed comments
26 made by Heinbockel, filed under seal.

26 ⁷³ It now appears that the fact Craggs was allowed to tell the truth had something to do with veteran prosecutor Eric
27 Overby’s defense of his deposition. AUSA Eric Overby is discussed herein, but suffice it to say that Mr. Overby was
28 all of those things one expects from a federal prosecutor – including being tough, principled and honest.
Unfortunately, his departure shortly after Craggs’ deposition left little hope that the prosecution would adjust its
stratagem.

1 false.” (*Id.*) The federal prosecutors signed and served this response even though Craggs, who
2 verified the prior interrogatory response, had at this point [REDACTED]
3 [REDACTED] (Ex. 96 at 13-
4 20.) As with the United States’ first interrogatory response, this subsequent discovery response is
5 controverted by the clear evidence. It also contravenes the clear directive from PRAO counsel
6 Kandice Wilcox in October of 2009, as disclosed by Wright. Specifically, Wilcox stated, “part of
7 the issue in making a false statement means not only an affirmative mis-statement but deliberately
8 withholding information which refutes the position you assert...” (Wright Decl. ¶ 17.)

9 As trial approached, the federal prosecutors continued their false narrative, using their trial
10 brief to state:

11 Further, the unclean hands defense fails because the United States
12 has purged itself of any alleged cover up. The defense of unclean
13 hands is inappropriate where a party purges itself of the inequitable
14 conduct giving rise to the defense. (citations) Here, the only basis
15 for an unclean hands defense that any defendant has arguably pled
16 is Sierra Pacific’s vague allegation that the Forest Service
“suppressed” evidence of conduct at the Red Rock Lookout. . . .
Thus, even if the defendants could prove that evidence of Lief’s
conduct was “suppressed,” such suppression was purged by the
United States’ subsequent full disclosure of the information.

17 (Ex. 16 at 21.)

18 In what manner had the United States and the federal prosecutors purged themselves? Any
19 suggestion that the federal prosecutors had “purged” themselves of their discovery abuses, after
20 all that they had done, and all that they had failed to do, or that they had somehow made a “full
21 disclosure” was itself a gross misrepresentation to this Court. Again, the videotaped deposition
22 excerpts provided with respect to this section tell the story better than anything else can. Properly
23 understood, the Red Rock lookout cover-up is the story of the Moonlight Fire investigation: if
24 there was information harmful to the goal of collecting money from these Defendants, the
25 investigators and their government lawyers worked to conceal it. Red Rock is simply another
26 spot on a broad tapestry of investigative and prosecutorial corruption, helping again to reveal
27 what Judge Nichols found was an “all-in” mentality to “win” regardless of the damage it did to
28

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1 our system of justice and to this Court's ability to properly adjudicate this matter.

2 **K. The Overhead Video, the "New Diagram," and the Prosecutors' Failure to Disclose**
 3 **and Correct Admittedly False Expert Reports, as Required Under Rule 26(a)(2)(E)**
 4 **and Rule 26(e).**

5 Approximately an hour or so after the Moonlight Fire began its "free burning" stage,⁷⁴ the
 6 first pilot over the scene captured low altitude video footage of the fire. That video, taken at
 7 approximately 3:09 p.m., was the subject of focused attention by all parties. (Ex. 111 at
 8 20070903150911.mpg.) Under their Joint Prosecution Agreement, federal and state prosecutors
 9 retained expert Christopher Curtis ("Curtis"), a civil engineer and land surveyor.⁷⁵ Among other
 10 things, they retained Curtis to identify the precise location of the governments' alleged points of
 11 origin within relevant frames of the video taken from above. By doing so, the prosecutors hoped
 12 to demonstrate that the governments' alleged points of origin would be somewhere near the
 13 center of the plume of smoke depicted in the video. Defendants were doing the same with their
 14 own consultants.

15 Curtis' work, however, revealed something very interesting. Specifically, his expert
 16 report showed that the investigators' hastily chosen points of origin -- identified by a red dot he
 17 had placed in video frames taken from above -- existed in terrain that appeared to still be *outside*
 18 the smoke, underneath the unburned trees standing east and downhill from the plume. (Ex. 110 at
 19 2-6; Ex. 111 at F-10150.pdf and Video Captures w Origin 30fps_Page_501.tif) Curtis' report,
 20 however, did not come as a surprise to these Defendants as his placement of the alleged points of
 21 origin in the video frames mirrored the work of Defendants' experts, a fact that Curtis did not
 22 contest in his own federal deposition, when commenting on the defense expert's assessment ("It

23 ⁷⁴ The investigators use this phrase to describe when the fire "actually takes off." In this case, the investigators
 24 testified, and their report states, that the fire entered the free burning stage at approximately 1:45 p.m. (Ex. 30 at 44-
 25 45.) But the Joint Report also alleges that the fire began at 12:15 p.m. and remained in an "incipient state" until the
 26 "free burning" stage began. (*Id.*) When USFS investigator Reynolds was asked to explain the difference in time, he
 27 testified, "It was -- you have to back into a number here," essentially stating that it was an arbitrary exercise primarily
 28 focused on when the bulldozer in this case was present in the location where the investigators alleged the fire started.
 (Ex. 45 at 22-24.)

⁷⁵ Curtis did a significant amount of work on this case for both the United States and Cal Fire, a joint engagement
 involving numerous joint meetings with state and federal prosecutors, for which he was paid, collectively, more than
 \$700,000. (Ex. 54 at 2-3, 18-20.)

1 looks pretty close, actually.”) (Ex. 110 at 4-6 & 17.)⁷⁶

2 Later deposition testimony in the state action from the governments’ jointly retained
3 origin and cause expert Larry Dodds ultimately revealed the significance of Curtis’ findings. In
4 the federal action, and notwithstanding their obligation under *Brady* to disclose exculpatory
5 evidence, the federal prosecutors withheld Dodds’ handwritten notes prepared during what he
6 testified was over 1000 hours analyzing the case. Thereafter, Cal Fire proffered Dodds as its own
7 expert witness in the state action on the fire’s origin and cause, and finally revealed the existence
8 of and produced Dodds’ handwritten notes. Those notes reveal that Dodds had in fact been
9 struggling in consultation with the federal prosecutors to reconcile the location of the
10 governments’ alleged origin with the aerial video, particularly given the location where joint
11 state/federal expert Chris Curtis had placed it in the video frames.

12 In Dodds’ hand written notes prepared during his engagement with the federal
13 prosecutors, Dodds states, “Chris Curtis testified to separation between the GAO [government’s
14 alleged origin] & the smoke seen in the AA [air attack] video.” (Ex. 52 at 24-30.) Dodds
15 confirmed during his state deposition that this was his understanding of Curtis’ federal testimony.
16 *Id.* When questioned in the state action about this note, Dodds admitted that Curtis had
17 announced his opinion during the federal action to the prosecution team in the presence of Kelli
18 Taylor. (Ex. 52 at 25.) Dodds also produced his handwritten notes he prepared later during the
19 state action. (Ex. 52 at 35.) Therein, Dodds wrote that Curtis’ opinion was not only that the
20 GAO was not in the smoke, but that the GAO had “not burned yet” and that Dodds was trying to
21 “square” Curtis’ opinion with Dodds’ assignment. (Ex. 52 at 34, 35, 76, 77.) Dodds conceded in
22 the context of the state action that if the GAO had not yet burned when the video was taken (as
23 Curtis announced to the prosecution group), “*it would negate the whole government’s origin*
24 *area.*” (Ex. 52 at 78.) Although Dodds would later struggle attempting to reconcile the alleged

25 _____
26 ⁷⁶ The defense experts independently reached the same conclusion as Curtis and placed the government investigators’
27 alleged points of origin in approximately the same location, east and downhill from the plume of smoke. (See e.g.
28 Ex. 111 at JasonDorris_SPI_06_Zoom - PointCloud.wmv, JasonDorris_SPI_04_Zoom - Stabilized.wmv,
JasonDorris_SPI_01_Track - APO.wmv.; see also Ex. 110 at 4-6 & 17.)

1 origin with the aerial video, the fact remains that the federal prosecutors never revealed Dodds'
2 exculpatory notes, and never revealed Curtis' announcement.

3 In any event, the inconvenience of these facts with respect to the investigators' ignition
4 theory was only compounded by the Joint Report and the testimony of Reynolds, as each had
5 asserted that the fire advanced downhill and northeast from the area where it allegedly began.⁷⁷
6 Indeed, the official sketch in the Joint Report unmistakably alleges that their wrongly imagined
7 and incorrectly placed fire advanced from their alleged points of origin to the northeast, *downhill*
8 and *away* from the smoke plume. (Ex. 39; Ex. 45 at 13-14; Ex. 111 at F-10146.pdf; Ex. 48 at 24-
9 25.) In other words, before various experts analyzed the video frames, the investigators had all
10 stated that the fire moved *downhill and away* from the area where the plume was shown to exist
11 in relation to the investigators' alleged points of origin, further demonstrating the falsity of the
12 Joint Report's alleged points of origin.⁷⁸

13 Curtis conducted additional work in this matter that is relevant to the location of the
14 alleged points of origin and the fire's spread, and also relevant to the ongoing fraud upon the
15 Court, that, as found by Judge Nichols, is inherent in nearly all that was done in this matter by the
16 government. Specifically, Curtis testified that Carlson and "counsel from the state and from the
17 federal government" came to his office "before Christmas" in 2010. (Ex. 110 at 11-14.) Speaking
18 of a new diagram he had created (which counsel had placed before him as Exhibit 10159), Curtis
19 testified, "they asked me if I could do this." *Id.*

20 Later, in the state case, Curtis explained that, as requested by the prosecutors, he created a
21 diagram that attempted to plot each of the investigators' origin and cause photographs using
22 survey and LiDAR data.⁷⁹ As requested by the prosecutors, Curtis testified that he thereafter

23 _____
24 ⁷⁷ Reynolds testified as follows: Q: "Were you and Chief White in agreement that the fire was moving downhill,
northeast from the cedar tree" A: "Yes." (Ex. 45 at 15.)

25 ⁷⁸ Frankly, in light of what should have been the proper focus of these federal prosecutors -- to seek justice -- the
26 video and all that it revealed should not have presented an inconvenience or problem at all, as it was nothing but
27 another opportunity for these prosecutors to comply with their obligation to do actual justice by dismissing their case,
something these somewhat naïve defense counsel initially hoped may result from the work of the experts who had
studied these video frames. Defense counsels' hopes were misplaced.

28 ⁷⁹ LiDAR (light detection and radar) is a survey technology which measures distances with the use of a fixed laser.

1 worked with Alan Carlson, who brought to his office “the library of all the photographs” taken by
 2 the investigators. (Ex. 54 at 8-9.) Carlson would then hand each photo to Curtis while Curtis
 3 then resolved where the photograph should be plotted on the diagram using data he had
 4 developed. (*Id.*)

5 In reality, however, not all the photographs in the investigators’ September 4 to September
 6 5 “library” were plotted, as the new diagram has one glaring omission. When the Defendants
 7 deposed Curtis on January 30, 2013, in the state actions, they asked why he had failed to plot the
 8 white flag itself. In response, Curtis testified that Carlson never gave him any photographs
 9 depicting that flag. (Ex. 54 at 10-11.) (Q: “And it’s your testimony that the only item placed by a
 10 human being, that [Carlson] did not ask you to identify and locate, is the white flag; is that true?”
 11 A: “That is the truth, yeah.”) Shortly thereafter, Curtis testified: “I was never asked to place the
 12 white flag. I never even saw the white flag. I never saw the white flag. I never asked any
 13 questions about it because I wasn’t aware of it . . . at the time of this exercise.” (*Id.* at 14-15.) It
 14 was only later that Curtis discovered and discussed with others the existence of the white flag.⁸⁰
 15 Specifically, Curtis testified that he later discovered that “the defense is trying to make an issue of
 16 that,” and further testified that his discussions on this omission “may have” involved Carlson, the
 17 federal prosecutors and/or the state prosecutors. (Ex. 54 at 6-7.)

18 In addition to failing to plot the existence of the white flag (and the prosecutors’ failure to
 19 correct that aspect of Curtis’ report), there was something else quite extraordinary about the new
 20 diagram: it dramatically altered the direction of the advancing fire indicators as compared to the
 21 direction set forth in the official sketch, moving them a full 90 degrees and thereby showing the
 22 fire’s advance moving to the northwest (generally up the hill, and towards the plume), as opposed
 23 to moving to the northeast as depicted three years earlier on the official sketch (generally down
 24

25
 26 ⁸⁰ When Defendants confronted White about the lack of any plotting regarding his white flag, he testified that he did
 27 not know why the white flag was removed or when it was removed. When White was asked why it had not been
 28 plotted on the new diagram, he essentially parroted what Reynolds revealed they had been told by government
 prosecutors in January of 2011, that it was “a non-issue.” Specifically, White testified “Because I don’t believe that
 the white flag had any significance.” (Ex. 42 at 8.)

1 the hill, and away from the plume).⁸¹ (Ex. 40.)

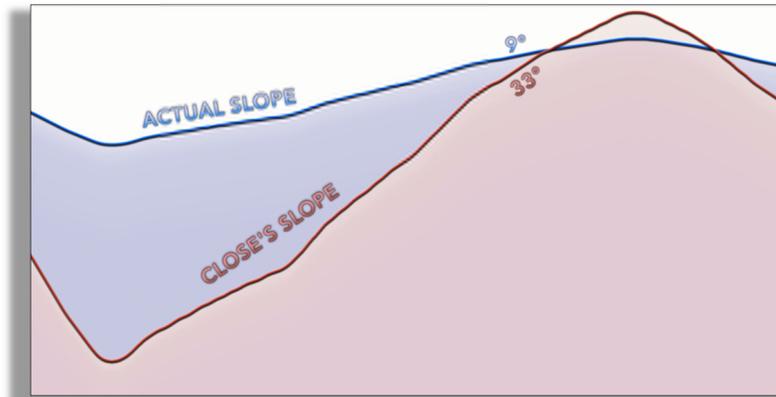
2 But changing the directional vectors associated with the fire's advance is not all that was
 3 done to actively support their theories, regardless of the truth. The prosecutors also retained
 4 expert Kelly Close ("Close"), a fire spread behavior specialist who, among other things, would
 5 "model" the fire's behavior using software known as FARSITE. Close would use this program to
 6 depict the fire's likely spread using data sets including fuel loads, terrain and weather. When
 7 Close eventually produced his FARSITE modeling -- as was the case with the changed advancing
 8 indicators -- it miraculously showed the fire advancing from the alleged points of origin *uphill* to
 9 the west, directly towards the smoke plume. (Ex. 113 at 19.) Thus, the government would argue,
 10 the alleged points of origin were correct; the fire simply burned uphill to the west under the tree
 11 canopy until it burst through that canopy in the area of the smoke plume, as seen in the video.⁸²
 12 (*Id.*)

13 However, Close's modelling was actually very wrong. Instead of correctly inputting the

17 ⁸¹ The prosecutors well knew that this directional change was significant, as they knew that the original placement of
 18 the fire's advancing indicators on the official sketch, clearly pointing to the northeast, were not placed through a
 19 careless drafting error. In fact, during her deposition, Welton testified that co-investigator White took a particular
 20 interest in the precise placement of the official sketch's critical north directional indicator, seen on the sketch in the
 21 vicinity of the red advancing indicators pointing northeast in relation to that same north directional indicator. In
 22 particular, Welton testified that White even instructed her to revise and to slightly cant their north directional
 23 indicator to the left so as to improve its accuracy before finalizing the official Moonlight Fire sketch. (Ex. 48 at 34-
 24 36.) Notwithstanding the care that went into the original placement of the northeast advancing indicators, and in
 25 furtherance of doing whatever was necessary to "win," state and federal prosecutors allowed White and Reynolds to
 26 change their indicators on Curtis' new diagram to show the fire moving toward the plume. The investigators'
 27 willingness to alter their original work on this critical issue, and the prosecutors' allowing them to do it, is yet another
 28 example, like their altered point of origin, of these investigators simply creating those "facts" that would advance
 their cause. When Curtis was presented with the facts of the changed directional indicators during his expert
 deposition, he testified he was just a "scrivener" and that White and Reynolds instructed him to place them in a
 northwest direction during a meeting at his office on January 25, 2011. (Ex. 54 at 42-45.) In response to deposition
 questions which revealed the background of the investigators' original placement of the indicators to the northeast,
 the care that Welton and White went through in selecting that original direction, and the 90 degree shift, Curtis
 testified that he was concerned. (*Id.* at 40-56.)

⁸² The National Fire Protection Association publishes a fire investigation manual entitled NFPA 921: Guide for Fire
 and Explosion Investigations. NFPA 921 supports the use of certain analytical techniques and tools, ranging from
 simple algebraic equations to complex computer fire modeling, to develop and test origin hypotheses. Similarly,
 another well-known fire investigation manual, the Wildfire Origin & Cause Determination Handbook, directs fire
 investigators to use fire modeling "to scientifically model fire behavior." (Ex. 29 at 11.)

1 actual 9 degrees of slope in the area, Close inputted 33 degrees. (Ex. 113 at 19-31.)⁸³ (*Id.*) In
 2 Close's inaccurate steep slope environment, the fire would have burned straight up the hill to the
 3 west, into the plume as seen in the video frame captured from above, regardless of the wind. The
 4 magnitude of Close's error is apparent from a demonstrative comparing the actual slope (in blue)
 5 to Close's slope (in red). (Ex. 111 at 01_CloseElevations_ Rev02_1cut2. wmv; Ex. 113 at 19-
 6 31.)



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 13
 14 Defendants' own fire modeling expert Dr. Chris Lautenberger ("Lautenberger")
 15 discovered Close's error. Using the correct data set, including the correct slope, Lautenberger's
 16 FARSITE model revealed that the mild 9 degree slope would not override the effect of the
 17 northeast wind and, consequently, the fire would have generally advanced in that same direction
 18 during its initial phase. Thus, had the fire actually started where the government had claimed it
 19 started, it would have advanced away from the plume and it would have created a far different
 20 boundary than what actually existed for the fire's initial advance, taking out green trees further
 21 down and to the northeast that were not burned by the fire. (Ex. 113 at 18-35.) These facts of
 22 course tended to prove that the fire did not start where the government claimed, and that it
 23 actually started further up the hill. (*Id.*)

24 In light of Lautenberger's work and his discoveries, Defendants were eager to take
 25 Close's deposition, which took place on March 5, 2012. While Lautenberger's supplemental

26
 27 ⁸³As fire behaviorists and investigators recognize, slope has a tremendous impact on the rate and direction of fire
 28 spread. (Ex. 114 at 6-7.) Fires will burn faster uphill than downhill because of the preheating of the uphill fuels and
 the influence of upslope and up-canyon winds.

1 report clued Close into his error before the deposition began, Close nevertheless began by
 2 testifying that he had no changes to make to his report. (Ex. 112 at 2.) In light of the severity of
 3 his calculation error, defense counsel pressed the issue, asking him, “Do you understand that if in
 4 fact you think you found a mistake, that you are obligated to make changes to your report?”⁸⁴
 5 AUSA Richard Elias objected to this line of questioning, accusing defense counsel of “misstating
 6 the law” and instructing the witness not to “speculate.” (*Id.* at 2-6.) After a lengthy back-and-
 7 forth, and in a moment of understatement, expert witness Close finally admitted that “there was
 8 an error in specifically a slope map error that I used for inputs in the FARSITE...that caused
 9 some of the slope values to be somewhat exaggerated in some parts of the terrain that I was
 10 examining.” (*Id.* at 5.) When defense counsel asked Close if he had taken any steps to correct his
 11 report, Close testified that he brought the error to the attention of the federal prosecutors on the
 12 case. (*Id.* at 5-6.)⁸⁵ He also testified that had considered making changes but ultimately did
 13 nothing to correct his report. (*Id.* at 14-19.) Close did testify, however, that after realizing his
 14 mistake he went back into his models, fixed the slope error, and “for his own edification” re-ran
 15 the model. (*Id.* at 7.) Close claimed that his results with the corrected slope “were very similar.”
 16 (*Id.*) Close’s assertion, however, is completely unsubstantiated since the prosecutors allowed him
 17 (or perhaps instructed him) to keep the results of his corrected work private. (*Id.* at 7-8, 20-21.)

18 In light of the federal prosecutors’ failure to comply with their discovery obligations,
 19 Defendants had no choice but to have Dr. Lautenberger re-run Close’s modeling using Close’s
 20 actual inputs (as revealed by Close’s report), and also using his inputs except for the incorrect

21 _____
 22 ⁸⁴ Under Rule 26(a)(2)(E), as expressly informed by Rule 26(e)(1), “A party who has made a disclosure under Rule
 23 26(a) -- or who has responded to an interrogatory, request for production, or request for admission -- **must**
 24 **supplement or correct its disclosure or response:** (A) in a timely manner **if the party learns that in some**
 25 **material respect the disclosure or response is incomplete or incorrect**, and if the additional or corrective
 26 information has not otherwise been made known to the other parties during the discovery process or in writing. Rule
 27 26(e)(1)(A)(emphasis added)

28 ⁸⁵ Of course, a properly focused lead prosecutor would have quickly discussed the error with her expert, discussed the
 need to be careful with such important data sets, and immediately instructed her expert to comply with Rule 26 and
 get a corrected report out as soon as possible. Not here. Moreover, it appears that Ms. Taylor wanted Curtis to rebut
 Lautenberger. Curtis testified that he was asked to go out and do some filming from a helicopter, and that he was
 asked to give expert opinions on certain experts but that he “refused to do so because they were outside my area of
 expertise,” and that one of those experts was “Chris Lautenberger.” While he did not know why, he testified that
 “Ms. Taylor asked if I could rebut Lautenberger and I wouldn’t do it.” (Ex. 54 at 16-17.)

1 slope. Contrary to Close's unsubstantiated claim, Dr. Lautenberger's analysis revealed that
 2 Close's slope error *significantly* affected the output, just as one would expect in light of the
 3 magnitude of his error. Rerunning Close's modeling also tended to show that the fire could not
 4 have started at the government's alleged points of origin and then spread preferentially up the hill
 5 to the location burning in the video (Ex. 113 at 19-31), a fact which appears to explain why Close
 6 was not asked to provide a corrected report and the federal prosecutors never corrected the record.

7 V. LEGAL STANDARD

8 Final judgments, including settlement agreements, are generally considered binding and
 9 are accorded a degree of finality. However, Rule 60 of the Federal Rules of Civil Procedure
 10 provides various mechanisms for a court to set aside a final judgment or order. Rule 60(b)
 11 provides that "[o]n motion and just terms, the court may relieve a party or its legal representative
 12 from a final judgment, order, or proceeding" for various reasons, including "fraud (whether
 13 previously called intrinsic or extrinsic), misrepresentation, or misconduct by the opposing party."
 14 Fed. R. Civ. P. 60(b)(3). Although also addressing fraud, Rule 60(d) provides a separate and
 15 distinct avenue for relief by recognizing and codifying the inherent power of the court to "set
 16 aside a judgment for fraud on the court." *Id.* 60(d)(3); *see also Hazel-Atlas*, 322 U.S. at 244.
 17 While most motions under Rule 60(b), including those for fraud, must be made no more than a
 18 year after the entry of a judgment, there are no such time restrictions when filing a motion for
 19 fraud upon the court under Rule 60(d).⁸⁶ *See id.* 60(c)(1); *Stonehill*, 660 F.3d at 443-44.

20
 21 ⁸⁶ Rule 60(d) supports two distinct procedural avenues to seek to set aside a judgment procured by fraud on the
 22 court: either by filing an independent action or through a motion. See Wright & Miller, 11 Fed. Prac. & Proc. § 2870
 23 (3d ed.). The ability of a party to choose the preferred procedural route is demonstrated in Ninth Circuit cases
 24 analyzing allegations of fraud on the court. For example, in *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128,
 25 1130 (9th Cir. 1995), the court analyzed an independent action for fraud on the court, while in *England v. Doyle*, 281
 26 F.2d 304 (9th Cir. 1960), the court analyzed a motion to set aside on the grounds of fraud on the court. Moreover,
 27 because a court's power to set aside a judgment for fraud on the court arises from the long-recognized "historic
 28 power [in] equity to set aside fraudulently begotten judgments," the substance of a party's filing related to fraud on
 the court controls over its form. *Hazel-Atlas*, 322 U.S. at 245; *U.S. v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002)
 ("no purpose would be served by denying...relief on the ground that the motion misstated the plea for relief...[t]he
 substance of the plea should control, not the label"). In fact, because the form of the filing is of no regard, the court
 has been understood to have the power to treat a motion as an independent action or vice versa. *Zone Sports Center
 Inc. LLC, et. al. v. Red Head, Inc.*, No. 11-CV-00634-JST, 2013 WL 2252016, at *6 (N.D. Cal. May 22, 2013) ("The
 Court has the authority to construe Plaintiff's request as either a motion brought under Rule 60(b) or as an
 independent action under Rule 60(d) because the substance of the relief sought is what controls, not the label of the
 submissions."); *Buck*, 281 F.3d at 1341-42 (finding that the federal courts have the power to construe a motion for

1 The Court’s power, recognized under Rule 60(d), comes from its “historical power of
 2 equity” and its need “to manage [its] own affairs so as to achieve the orderly and expeditious
 3 disposition of [its] cases” and “further[] the pursuit of achieving complete justice.” *In re*
 4 *Levander*, 180 F.3d 1114, 1118 (9th Cir. 1999) (internal quotations omitted). In determining
 5 whether to vacate a judgment pursuant to this inherent power, courts must exercise “restraint and
 6 discretion,” *United States v. Estate of Stonehill*, 660 F.3d 415, 443 (9th Cir. 2011), weighing the
 7 “deep-rooted policy in favor of the repose of judgment” against “enforcement of [a] judgment
 8 [that] is manifestly unconscionable,” *Hazel-Atlas*, 322 U.S. at 244-45. For these reasons, fraud
 9 on the court must be “established by clear and convincing evidence.” *Stonehill*, 660 F.3d at 443
 10 (quoting *England v. Doyle*, 281 F.2d 304, 310 (9th Cir. 1960)).

11 Courts have sometimes struggled to define what qualifies as a fraud on the court. *See*
 12 *Stonehill*, 660 F.3d at 444. Courts and commentators have acknowledged that not all “fraud
 13 ‘connected with the presentation of a case to a court’ is . . . necessarily a fraud on the court.” *Id.*
 14 (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2870 (2d
 15 ed. 1987)). Rather, fraud on the court occurs when the conduct either “defiles the court or is
 16 perpetrated by officers of the court.” *Dixon v. C.I.R.*, 316 F.3d 1041, 1046 (9th Cir. 2003).
 17 When the conduct harms “the integrity of the judicial process . . . and the fraud rises to the level
 18 of ‘an unconscionable plan or scheme which is designed to improperly influence the court in its
 19 decisions,’” the court “not only can act, [but] should.” *Id.* (citations omitted).

20 In its most recent published opinion addressing fraud on the court, the Ninth Circuit stated
 21 that “the relevant inquiry is not whether fraudulent conduct ‘prejudiced the opposing party,’ but
 22 whether it ‘harm[ed] the integrity of the judicial process.’” *Stonehill*, 660 F.3d at 444 (quoting
 23 *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989)). Accordingly, “to show fraud on the
 24 court, [the moving party] must demonstrate, by clear and convincing evidence, an effort by the

26 fraud on the court “either as an independent action . . . or, because there are no formal requirements for asserting a
 27 claim of fraud on the court, as a pleading invoking the court’s inherent power to grant relief for fraud upon the
 28 court”); Wright & Miller, 11 Fed. Prac. & Proc. § 2868 (3d ed.) (“A party is not bound by the label used in the
 party’s papers. A motion may be treated as an independent action or vice versa as is appropriate.”).

1 [opposing party] to prevent the judicial process from functioning in the usual manner. They must
 2 show more than the perjury or nondisclosure of evidence, unless that perjury or nondisclosure
 3 was so fundamental that it undermined the workings of the adversary process itself.” *Id.* at 445.

4 Importantly, fraud upon the court may be found in an entire course of conduct by a party,
 5 rather than a single act of fraud directed at the court. For example, in *Stonehill*, the Ninth Circuit
 6 analyzed seven categories of evidence cited as fraud upon the court. *See* 660 F.3d at 446-51. The
 7 Ninth Circuit first examined each category of evidence in isolation to determine whether it
 8 constituted fraud upon the court, and determined that each category, on its own, did not qualify.
 9 *Id.* Importantly, the Ninth Circuit then proceeded to examine the allegations of fraud on the court
 10 as a whole, analyzing whether, taken together, the misrepresentations and nondisclosures
 11 “change[d] the story . . . presented to the district court.” *Id.* at 452. While the Ninth Circuit
 12 ultimately found that the conduct, considered in its totality, did not constitute fraud upon the court
 13 because it did not go to the central issues of the case, *Stonehill* makes clear that a court is not
 14 limited to analyzing each alleged instance of misconduct in a vacuum, but must also consider
 15 whether a party’s entire course of conduct rises to the level of undermining the judicial process
 16 sufficient to constitute fraud upon the court. *Id.* at 454; see also *Pumphrey v. K.W. Thompson*
 17 *Tool Co.*, 62 F.3d 1128, 1129-32 (9th Cir. 1995) (analyzing whether the defendant’s course of
 18 conduct throughout the case constituted fraud on the court).

19 VI. LEGAL ANALYSIS

20 A. Fraud Has Been Committed on this Court.

21 The pervasive and coordinated misconduct of the Moonlight Fire prosecutors and
 22 investigators, whether viewed in isolated parts or as a whole, clearly and convincingly reflects
 23 “an effort by the government to prevent the judicial process from functioning ‘in the usual
 24 manner,’” and that it also “involved perjury or nondisclosure [] so fundamental that it
 25 undermined the workings of the adversary process itself.” *Stonehill*, 660 F.3d at 445.

26 Here, USFS and Cal Fire investigators obfuscated the truth at every turn, a process which
 27 began with their so-called origin and cause search, continued with their drafting of a false Joint
 28

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1 Report, and then invaded their lengthy depositions. Ultimately, the prosecutors joined in the
 2 process by concealing key documents, falsifying responses to interrogatories and requests for
 3 admissions, and by allowing witnesses to lie under oath. Whether analyzed independently or
 4 collectively, these acts establish a fraud upon this Court. As set forth in this motion, these acts
 5 include:

6 ***The White Flag:*** Despite the Joint Report’s very purpose – to report the truth and only the
 7 truth – it actually covered up the truth and advanced a false narrative regarding the investigators’
 8 most critical conclusions. As noted by former AUSA Wright, “The change in the point of origin
 9 and the reasons for the change should have been, but were not, disclosed in the Report.” (Wright
 10 Decl. ¶ 31.) Thus, Defendants had no choice but to use discovery to uncover hidden sketches,
 11 reports, photographs and measurements, all exposing an ugly truth – that the Moonlight Fire
 12 investigators were corrupt and willing to say whatever they thought they had to say to lay blame
 13 for this large fire at the doorstep of those who might be able to pay.⁸⁷ They were willing to do so
 14 regardless of the existence of contrary evidence, and also willing to do so even if it meant
 15 manufacturing evidence, and even if it meant committing perjury.

16 The prosecutors participated in advancing the fraud at the heart of the investigation into
 17 this Court’s jurisdiction. Indeed, when defense counsel then confronted White with five photos
 18 which he had *not* included in his Joint Report but which they had found on his photo CD, the
 19 prosecutors sat on their hands as White continued to deny knowing anything about why there was
 20 a white flag in the middle of the scene he was in charge of securing, one that he had photographed
 21 five times. During their meeting with the investigators in January of 2011, with the full power of
 22 the United States Attorneys’ Office behind them, indeed with the power of the Office literally
 23 surrounding them, the prosecutors put the white flag photos on a computer screen for all in
 24 attendance to see and assured Reynolds that it was a “non-issue.” (Ex. 47 at 42.) Reynolds’

25 _____
 26 ⁸⁷ The Defendants encourage this court to thoroughly review Exhibit 56 to Warne’s Declaration. Exhibit 56 is a
 27 video montage of testimony from a number of critical witnesses regarding the white flag and the investigators’ efforts
 28 to cover it up, even while they were under oath. It also contains testimony from experts in the state actions who were
 questioned on the issue of the white flag cover up.

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1 admission in 2012 on this front is telling as both the federal and state prosecutors watched
2 White’s own cross-examination of the white flag, and could see for themselves that this “non-
3 issue” destroyed White’s credibility.

4 Thereafter, the prosecutors continued to allow both White and their star pupil Reynolds to
5 testify dishonestly about the most critical aspect of what they did, about the essence of their case
6 against these Defendants. Certainly, because of the core nature of this fraud, their conduct is
7 alone enough to find a fraud upon the Court. See *Dixon v. C.I.R.*, 316 F.3d 1041, 1046-47 (9th
8 Cir. 2003) (finding a fraud on the court based on the actions of two IRS attorneys in covering up
9 relevant evidence, including sitting by silently as witnesses presented testimony the attorneys
10 knew to be false).

11 But the white flag cover-up means far more than discovering that the most essential point
12 of the investigation was actually at a spot 8 or 10 feet from the official points of origin, and it
13 means far more than finding that the state and federal prosecutors were willing to play along.⁸⁸
14 The deceit by the government investigators on this issue, aided and abetted as they went by
15 prosecutors, demonstrates a mindset focused on winning at whatever cost.

16 As stated by the state court, “corrupt intent knows no stylistic boundaries.” (Ex. 24 at 22.)
17 A willingness to lie repeatedly under oath with a camera rolling and attorneys present reveals a
18 propensity towards dishonesty that would likely be even more adventurous with no attorneys

19 _____
20 ⁸⁸ The investigators’ deception regarding this central issue is far more meaningful than 10 feet, and it certainly does
21 not mean that the investigators were 10 feet from being correct. Indeed the plume of smoke shown in the air attack
22 video demonstrates that the investigators’ secret point of origin and their fabricated but official points of origin all
23 existed in an area too far down the slope, roughly 150 to 200 feet from the center of the smoke plume revealed by an
24 air attack video taken overhead roughly an hour after the fire began. (Ex. 114 at 2-5.) Given their mindset, their
25 error is not surprising. As these investigators quickly processed the scene, the entire point of that exercise was to pin
26 blame on chosen defendants, not to find the truth. Thus, because they were not engaged in a scientific exercise they
27 were way off from where the fire actually started. Once the mindset of these investigators is exposed, it is easy to
28 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 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 further up on the ridge a few days after the fire
started. (Ex. 167 at 2-7.)

1 present as they worked their exclusive scene with no one watching. It is, potentially, a
 2 willingness to ignore footprints 200 feet further up the hill; a willingness to destroy evidence of a
 3 gasoline spill from a person cutting firewood on the western ridge; a willingness to suppress a
 4 delayed-fuse arson device timed to go off at 2:00 p.m.; a willingness to overlook witness
 5 interview information pointing to a different cause;⁸⁹ a willingness to cover-up a confession from
 6 a third party who started the fire; and a willingness to manufacture a confession from someone
 7 they wanted to blame, as happened here. Once an investigation is discovered to have been
 8 infused with dishonesty, it is not about distances or a single point of origin or two. It is
 9 immediately about everything, making the investigation worse than merely useless – indeed, it
 10 appears that this investigation was simply a vehicle to affirmatively create or destroy evidence so
 11 as to frame these Defendants, especially when there was an illegal slush fund creating the
 12 financial motive to do just that.

13 But the fraud upon the Court on this key issue did not stop there. The prosecutors also
 14 advanced the fraudulent investigation into the judicial proceedings by submitting a false and
 15 misleading declaration from White in summary judgment practice (Exs. 11-12), and also by
 16 attaching the false Joint Report to that declaration (Ex. 12 at 3). Moreover, the federal
 17 prosecutors relied upon this false document in other ways as well, citing the Joint Report in
 18 verified interrogatory responses (Ex. 109 at 10, 19, 21, 29), and making it “Trial Exhibit No. 1” in
 19 their list of trial exhibits (Ex. 17 at 2).⁹⁰ When these attorneys chose to advance their prosecution

21 ⁸⁹ That the government did not investigate Ryan Bauer, an individual unable to pay any damages, and that they
 22 covered up information regarding his potential culpability (such as not revealing critical aspects of his taped
 23 interview in the written summary found in their “official” report), is consistent with lead investigator Joshua White’s
 24 status as a recipient of substantial benefits associated with Cal Fire’s illegal WiFITER slush fund. It is also
 consistent with the mind-set of his supervisor and case manager Alan Carlson, who, in the spring of 2008, wrote an
 email denying the use of WiFITER money to purchase equipment which might aid in catching arsonists, saying, “it is
 hard to see where our arson convictions are bringing in additional cost recovery.”

25 ⁹⁰ The state prosecutors engaged in similar conduct in state court. After addressing the fraud inherent in the
 26 investigators’ testimony regarding the white flag cover-up, Judge Nichols found: “Moreover, and perhaps more
 27 importantly, Cal Fire’s discovery abuses, and Defendants’ requests for sanctions, are not limited to just the white flag
 28 cover-up. Indeed, in its July 2010 false interrogatories responses, Cal Fire refused to provide substantive responses
 and instead invoked CCP § 2030.230, thus incorporating by reference the entire Joint Report, and all of its
 misrepresentations concerning the core issues in this case. All of Defendants’ defense expenses are, in one way or
 another, inextricably intertwined with the falsehoods and omissions in the Origin and Cause Report.” (Ex. 25 at 29.)

1 by relying upon the corruption at the heart of the investigators' work, they defiled the Court. In
 2 this regard, it is worth noting that "some courts and commentators have suggested that perjury
 3 should not usually constitute fraud on the court unless 'an attorney or other officer of the Court
 4 was a party to it.' 11 Wright & Miller, § 2870." *Stonehill*, 660 F.3d at 445. Here, the lawyers
 5 most certainly were a part of it, as they well knew what White and Reynolds were *not* telling this
 6 Court, but they filed the declaration anyway. Perhaps even more importantly, the Ninth Circuit
 7 has also noted that, "most fraud upon the court cases involve a scheme by one party to hide a key
 8 fact from the court and the opposing party." *Stonehill*, 660 F.3d at 444. The Joint Report here
 9 was "Exhibit 1" for these prosecutors. There is no more "key fact" in this matter than the fraud at
 10 the heart of that Joint Report and at the heart of White and Reynolds' false testimony, and the
 11 perpetration of this fraud was actively supported by these prosecutors and then used to defend
 12 against Defendants' Motion for Summary Judgment.⁹¹

13 ***The Falsified J.W. Bush Interview Summary:*** In furtherance of the type of scheme the
 14 Ninth Circuit discusses in *Stonehill*, the investigators here falsified more than just their original
 15 white flagged point of origin. In another effort to sell their fraudulent scheme that a bulldozer
 16 started this fire, the undisputed evidence establishes that Joshua White produced a witness
 17 interview summary for J.W. Bush falsely attributing to Mr. Bush admissions of liability regarding
 18 the government's rock strike theory. Even after Defendants uncovered the falsification of Bush's
 19 interview, prominently displayed in the Joint Report as tab 9, and even after White could not
 20 answer why the tape of his Bush interview was in conflict with his written summary (Ex. 41 at
 21

22 ⁹¹ Additionally, in ruling on the Motion for Summary Judgment, the Court relied extensively on White's Declaration
 23 in support of what it found to be genuine issues of material fact associated with whether Howell was negligent in its
 24 operations on September 3, 2007. In this regard, the Court's analysis hinged in part on paragraphs 22-23 of White's
 25 Declaration, wherein he described the manner in which a Howell employee had supposedly conducted his work that
 26 day. (Ex. 13 at 9.) However, White's Declaration described events which were not consistent with the summary of
 27 his witness interview of that Howell employee in September 2007. Defendants objected on the ground that White's
 28 Declaration was a sham affidavit. The Court, approaching the issue with caution, overruled that objection, finding
 "Defendants have not cited to anything in the record that would indicate White's statement is a sham." (*Id.*) In light
 of Judge Nichols' finding that White has been untruthful on numerous fronts, and in view of what is revealed herein
 to this Court, there is no reason to conclude that White's recitation in his Declaration of the Howell employee's
 operations was the single jewel of truth in his otherwise falsified declaration. In fact, there is every reason to now
 conclude the opposite.

1 132-133), the federal prosecutors still advanced in motion practice before this Court the so-called
 2 “undisputed fact” that Mr. Bush had admitted liability. Notably, in *Stonehill*, the Ninth Circuit
 3 spoke of a scheme to hide “a key fact.” (*Id.* 444.) Here, White’s false interview summary was
 4 one of many key facts hidden (or fabricated) by these investigators, as aided by these prosecutors,
 5 so as to advance a fraudulent scheme to frame these Defendants.

6 ***The Alleged Bribe to the Bauers:*** The failure of the federal prosecutors to comply with
 7 their duty of candor, as well as with their discovery obligations, by disclosing a key witness’s
 8 fabrication of an alleged bribe to Ryan Bauer in exchange for admitting to starting the fire,
 9 necessarily deprived this Court of critical information, given that the Court was asked to engage
 10 in a careful balancing of interests on the important motions *in limine*, and did so here without the
 11 prosecutors providing a complete record to which the Court and Defendants were absolutely
 12 entitled. The failure by the federal prosecutors to comply with these obligations and rules
 13 constitutes yet another fraud upon the Court, as this conduct was a knowing and potentially
 14 criminal⁹² attempt to hinder the judicial process, the subsequent suppression of which further
 15 tainted the Moonlight Fire prosecution while prejudicing these Defendants. *See Stonehill*, 660
 16 F.3d at 445 (stating that fraud on the court exists where the fraudulent conduct “harm[ed] the
 17 integrity of the judicial process”); *see also Chambers*, 501 U.S. at 44 (stating that “tampering
 18 with the administration of justice . . . [is] a wrong against the institutions set up to protect and
 19 safeguard the public”).

20 ***WiFITER Fund:*** Through discovery conducted after settlement of the federal action,
 21 Defendants uncovered evidence indicating that WiFITER served as one of the primary engines
 22 motivating Cal Fire investigators and cost recovery specialists to engage in a fraudulent effort to
 23 pin the blame for the Moonlight Fire on these Defendants. To the extent the United States
 24 attempts to argue that the motivations and biases of Cal Fire investigators are irrelevant in the
 25 context of this federal action, the United States would be incorrect. The United States voluntarily
 26

27 ⁹² As noted by Wright in his declaration, the suppression or falsification of information in an investigation conducted
 28 by any agency of the United States is covered by 18 U.S.C. § 1519. (Wright Decl. ¶ 31.)

1 elected to undertake a joint investigation of the Moonlight Fire with Cal Fire. At every point
 2 along the path of the concurrent state and federal actions, the United States availed itself of the
 3 benefits of a joint prosecution and the evidentiary privileges associated with it. Given that the
 4 prosecutors aided and abetted one another in the prosecution of both actions, any failure to
 5 disclose critical facts associated with the WiFITER account are failures of the *entire* joint
 6 prosecution team. The United States cannot seize the benefits of its “common interest” at every
 7 turn with Cal Fire, and now distance itself from the acts of its joint prosecution partner. As in any
 8 joint venture, both parties become responsible for the acts of the other.

9 Moreover, in addition to their partnership with Cal Fire on this action, the United States,
 10 through its lead prosecutors, made recklessly false statements about WiFITER that this Court
 11 relied upon.⁹³ Thus, even if there were no joint prosecution agreement which bound the federal
 12 and state prosecutors together as one, the judgment should nonetheless be vacated and the case
 13 dismissed as a result of the fraud upon this Court committed by Cal Fire’s general counsel and
 14 litigation counsel who, under the Ninth Circuit’s rationale under *Pumphrey*, were also officers of
 15 this Court.

16 Moreover, the duty to disclose material evidence is not limited to government attorneys; it
 17 applies to investigating agencies. Both the Ninth Circuit and the Supreme Court have recognized
 18 that “exculpatory evidence cannot be kept out of the hands of the defense just because the
 19 prosecutor does not have it, where an investigating agency does.” *Tennison v. City and County of*
 20 *San Francisco*, 570 F.3d 1078 (9th Cir. 2008) (quoting *United States v. Blanco*, 392 F.3d 382,
 21 388) (9th Cir. 2004)). Such a rule “would undermine *Brady* by allowing the investigating agency
 22 to prevent production by keeping a report out of the prosecutor’s hands until the agency decided
 23 _____

24 ⁹³ Even if this Court were to assume, counterfactually, that the United States is simply another victim of Cal Fire’s
 25 concealment of the true facts associated with WiFITER, that would do nothing to lessen the fact that a fraud has been
 26 worked upon this Court, and that the settlement and judgment are a consequence of that fraud. *See Pumphrey*, 62
 27 F.3d at 1130-31 (9th Cir. 1995) (finding fraud upon the court committed by defendant’s general counsel although
 28 general counsel was not admitted to practice in court where trial occurred, did not enter an appearance in the case,
 was not admitted pro hac vice, and did not sign any documents filed with the court, when general counsel attended
 trial, gathered information to respond to discovery requests and framed answers, and participated in creation of video
 at issue).

1 the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give
 2 him certain materials unless he asked for them.” *Id.* (quoting *Blanco*, 392 F.3d at 388). *Tennison*
 3 relied in part on the Supreme Court’s opinion in *Youngblood v. West Virginia*, where the Court
 4 made clear that “*Brady* suppression occurs when the government fails to turn over even evidence
 5 that is ‘known only to police investigators and not to the prosecutor.’” *Youngblood v. West*
 6 *Virginia, supra*, 547 U.S. 867, 869-70 (2006) (quoting *Kyles v. Whitley*, 514 U.S. 419, 438
 7 (1995)).

8 Accordingly, regardless of whether the federal prosecutors even possessed evidence
 9 material to the defense, Cal Fire -- as the investigating agency and the federal prosecution team’s
 10 joint prosecution partner -- *did* have such evidence and had a duty to disclose that evidence to the
 11 Court, at least in connection with a motion to compel all documents germane to the investigators’
 12 opinions.⁹⁴ Cal Fire’s general counsel and litigation counsel, officers of the court, also had a duty
 13 to ensure this jointly prosecuted action did not work a fraud upon any court. *See Pumphrey*, 62
 14 F.3d at 1130-31. Instead, Cal Fire’s in-house counsel, with the cooperation of Cal Fire’s
 15 litigation counsel, actively coordinated efforts with Cal Fire law enforcement management,
 16 including Alan Carlson, to suppress evidence of WiFITER’s illegality and impact on wildland fire
 17 investigations. Cal Fire and its counsel did so even though they knew precisely which arguments
 18 the United States advanced before the federal trial.⁹⁵ Indeed, as a branch of the government

19 _____
 20 ⁹⁴ Any question of whether the federal prosecution team considered Cal Fire to be the lead investigating agency was
 21 answered when the United States served its trial witness list. The United States witness list had two sections. The
 22 first section was a listing of those witnesses the United States absolutely intended to call. The United States included
 23 lead investigator Joshua White of Cal Fire in that section. He is the only Moonlight Fire investigator listed. (Ex. 18
 24 at 11.) The United States’ provisional witness list/section, included witnesses that may be called “if the need arises.”
 25 USFS fire investigator Diane Welton can be found only in this section. (*Id.* at 25.) Perhaps recognizing that he could
 26 not withstand cross-examination with respect to the most important aspects of the investigation, namely the
 27 processing of the alleged origin scene and the placement of a white flag he later claimed was chipped rock, the
 28 United States did not list David Reynolds as a trial witness at all. *Id.* Lead prosecutor Taylor chose to exclude him
 even though he was the only USFS Moonlight investigator participating in the investigation before the scene was
 released. Of course, the prosecution team’s election to exclude Reynolds did nothing to lessen the fraudulent nature
 of the action since key portions of the origin and cause investigation were highly dependent upon evidence he
 collected, observations he made, and witness interviews he alone conducted. Indeed, the omission of this critical
 witness was part and parcel of a broad effort by the prosecutors to help suppress and omit what actually happened on
 that hillside in the first critical days after the fire.

⁹⁵ Defendants are informed and believe that counsel for Cal Fire reviewed the United States’ pre-trial filings, and
 attended the pretrial conference in the federal Moonlight Fire action.

1 working directly with the team of federal prosecutors under a joint prosecution agreement, Cal
 2 Fire's violations of these ethical rules, and any lack of investigation into WiFITER by federal
 3 prosecutors, coupled with their affirmative and reckless misrepresentations to this Court, only
 4 underscore the conclusion that the government, through its attorneys and its investigators, not
 5 only failed to meet the high standards of conduct expected and required of it, but also perpetrated
 6 a fraud on the Court by "tampering with the administration of justice," *Chambers*, 501 U.S. at 44,
 7 through an "unconscionable plan or scheme designed to improperly influence the court in its
 8 decision," *Dixon*, 316 F.3d at 1046. In doing so, both Cal Fire and the government attorneys
 9 interfered with the "institutions set up to protect and safeguard the public" and harmed "the
 10 integrity of the judicial process" regarding a material issue central to the adjudication of the case.
 11 *Id.*

12 ***Three Fires:*** In furtherance of their scheme to defraud the Court, the investigators, with
 13 the support of the joint prosecutors, coordinated and fabricated three "rock strike" fires against
 14 Howell after the Moonlight Fire began. Two of these fires occurred before the Moonlight Fire,
 15 but received little attention, and no origin and cause report, until after Howell was targeted as a
 16 defendant, along with Sierra Pacific and the Landowners. Of course, the most egregious facet of
 17 this fraud is Cal Fire's willingness to fabricate an origin and cause report against Eunice Howell
 18 and its subsequent willingness to collect more than \$46,000 from her in order to support its claims
 19 against Sierra Pacific and the Landowners.⁹⁶ The heartless quality of such an act reveals much of
 20 what this Court needs to know about their government actors behind the Moonlight Fire action, as
 21 does the federal prosecutor's willingness to rely upon these fires in their filings with this Court.⁹⁷

22 ***Destruction of White's Notes:*** Having elected to undertake a joint investigation with Cal
 23 Fire, and having entered into a joint prosecution agreement with Cal Fire by which the United
 24

25 ⁹⁶ California Welfare and Institutions Code Section 15610.30 defines financial abuse of an elder, in part, as
 26 appropriating "real or personal property of an elder . . . for a wrongful use with the intent to defraud or both."

27 ⁹⁷ While Ms. Howell initially sued Cal Fire for fraud, the Superior Court granted Cal Fire's demurrer on a statute of
 28 limitations argument. Eunice Howell, however, pressed on under a different theory regarding the illegality of the
 WiFITER fund, which Cal Fire settled last week by agreeing to pay \$225,000.

1 States contends that the prosecution team’s communications with Joshua White are “attorney
 2 client privileged” (Exhibit 5 at 2-3), the prosecution team had an obligation to ensure that its lead
 3 investigator preserved all evidentiary materials. Spoliation on this fundamental aspect of the
 4 investigation unquestionably evidences “an unconscionable plan or scheme.” Indeed, the
 5 destruction of evidence here concerning Joshua White’s abandoned point of origin is far more
 6 egregious than the mere concealment of evidence, as was the case in *Pumphrey*, which
 7 nevertheless amounted to a fraud on the court in that matter. 63 F.3d at 1131.

8 **Expert Work:** Before the deposition of government expert Kelly Close, the prosecutors
 9 were aware that he had used an egregiously invalid slope input and, at best, they did nothing to
 10 cause him to correct it, despite the requirement that they do so under Rule 26(e). Thereafter, one
 11 of the lead prosecutors sat on his hands while Close testified at his deposition that he had nothing
 12 to correct in his original expert report. That the federal prosecutors allowed Close to conduct
 13 additional fire modeling experimentation using the correct slope input data for his “edification,”
 14 while discarding, or allowing Close to discard, the output of those experiments makes the abuse
 15 that much worse. Addressing a similar issue, the Ninth Circuit found that the purposeful
 16 concealment of experimental results that controvert or call into question the reliability of
 17 produced results was sufficient to support a finding of fraud upon the court. *Pumphrey v. K.W.*
 18 *Thompson Tool Co.* 62 F.3d 1128, 1130-31 (9th Cir. 1995).⁹⁸

19 Additionally, the conduct of the federal prosecutors with respect to the invalid new scene
 20 diagram prepared by their expert Christopher Curtis was not only a violation of their heightened
 21 ethics as representatives of our government, but it was also similar to the conduct at issue in
 22 *Pumphrey*, where defendant and its in-house counsel omitted critical data from what they
 23 disclosed. The prosecutors were aware that the investigators had omitted the most essential
 24 aspect of their work from the new scene diagram, and they knew that the same diagram had
 25 _____

26 ⁹⁸ Admittedly, the conduct in *Pumphrey* is different in that the fraud ultimately played out before the Court during
 27 trial. But case law confirms that such conduct throughout discovery is not immune from this Court’s determination as
 28 to whether there was a fraud upon the Court. *Levander*, 180 F.3d at 1120. In fact, the *Pumphrey* court confirmed
 that defendants’ fraud upon the Court in that matter included its failure to disclose in discovery the existence of
 favorable evidence to the plaintiff, as well as other discovery violations. *Id.* at 1132.

1 dramatically changed the direction of the advancing fire indicators from the direction detailed in
2 the Joint Report. At best, they did nothing. At worst, they encouraged the behavior in a manner
3 that was similar to what Reynolds testified they said to him about the white flag – a “non-issue.”
4 Either way, the conduct violated their ethical duties and constituted a fraud on the court.

5 **B. The Settlement Agreement Is No Bar to Relief.**

6 Defendants anticipate the government will argue that this Court is powerless to address
7 the fraud perpetrated upon it because the judgment in this action resulted from a settlement
8 between the parties. While the existence of the underlying settlement makes the posture of this
9 Rule 60(d) motion for fraud on the court somewhat unique, it by no means renders the motion
10 improper in any way, and says very little about this Court’s ability to exercise its own inherent
11 powers under Rule 60(d)(3). *See e.g. Hazel-Atlas*, 322 U.S. 238 at 245, 248 (vacating prior
12 judgments and denying relief to the party that committed a fraud on the court, despite existence of
13 underlying settlement agreement).

14 Rule 60 unequivocally applies to *any* “judgment, order, or proceeding,” and makes no
15 distinction with respect to its application to final dispositions such as stipulated judgments,
16 consent judgments or settlement orders. *See Fed. R. Civ. Proc. 60(b), (d)(3)*. Indeed, nothing in
17 Rule 60(d) limits the ability of a court to “set aside a judgment for fraud on the court” based
18 simply on the nature of the ultimate disposition of the case. This makes perfect sense since Rule
19 60(d) entails the court using its “historic power of equity to set aside fraudulently begotten
20 judgments,” a power that is characterized “by flexibility which enables it to meet new situations
21 which demand equitable intervention, and to accord all the relief necessary to correct the
22 particular injustices involved in these situations.” *Hazel-Atlas*, 322 U.S. 238 at 245, 248.
23 Regardless of whether the action culminated in a settlement or otherwise, fraud upon the Court is
24 still fraud upon the Court, and the Court’s ability to use its “historic power of equity” is not
25 diminished by whatever agreements the parties may reach, as nothing they do between
26 themselves can alleviate what has been done to this Court.

27 Numerous courts have conducted a full analysis of the merits of a claim of fraud on the
28

1 court despite the fact that the original litigation ended in a stipulated judgment or settlement
 2 agreement. *See e.g. Herring v. United States*, 424 F.3d 384 (3rd Cir. 2005) (analyzing the merits
 3 of a Rule 60 action to set aside a 50-year-old settlement agreement on the grounds that the
 4 settlement was procured by fraud on the court); *Broyhill Furniture Indus., Inc. v. Craftmaster*
 5 *Furniture Corp.*, 12 F.3d 1080 (Fed. Cir. 1993) (analyzing the merits of a Rule 60 motion to
 6 vacate a consent judgment for fraud on the court and ultimately denying the motion for a failure
 7 to show the requisite egregious fraud); *In re Hunter*, 66 F.3d 1002 (9th Cir. 1995) (noting that if
 8 the petitioner had alleged fraud on the court, instead of filing a Rule 60(b)(3) motion to vacate a
 9 satisfaction of judgment which was untimely, the court could have asserted ancillary jurisdiction
 10 because that doctrine is available to a court to “vindicate its authority, and effectuate its
 11 decrees”).⁹⁹

12 To the extent there are cases that allude to a narrow and artificial constraint on claims of
 13 fraud on the court in cases that culminate in such final dispositions as settlement or consent
 14 judgments, these cases are wrongly decided. The Supreme Court and the lower federal courts
 15 have numerous times recognized the need to protect the institutions of justice from such
 16 egregious fraud. *See Hazel-Atlas* at 246. The “Courts cannot lack the power to defend their
 17 integrity against unscrupulous marauders; if that were so, it would place at risk the very
 18 fundament of the judicial system.” *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir. 1989)
 19 (“All in all, we find it surpassingly difficult to conceive of a more appropriate use of a court’s
 20 inherent power than to protect the sanctity of the judicial process—to combat those who would
 21 dare to practice unmitigated fraud upon the court itself. To deny the existence of such power
 22 would, we think, foster the very impotency against which the *Hazel-Atlas* Court specifically
 23 warned.”) To place such an illogical and superficial limitation on such a robust inherent power of
 24

25 ⁹⁹ The majority of cases that have addressed a Rule 60(d) challenge where there is an underlying settlement
 26 agreement have found that there was no fraud on the court under the specific facts of the case, and thus the judgment
 27 need not be set aside. *See, e.g., Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp.*, 12 F.3d 1080 (Fed.
 28 Cir. 1993) (refusing to vacate consent judgment when no fraudulent evidence submitted to district court). The cases
 that have denied Rule 60(d) challenges due to insufficient evidence, or due to procedural issues unrelated to the form
 of the final disposition, in no way speak to the propriety of granting a Rule 60(d) motion when the case involved a
 settlement agreement.

1 the court, which is presently confronting such a robust fraud upon it, would do justice a
 2 disservice. Each case should rest on the merits of the allegations of fraud, and if a fraud on the
 3 court is found by clear and convincing evidence, the integrity of our judicial system demands
 4 relief.¹⁰⁰

5 In the present case, the Court relied on the government's egregiously fraudulent
 6 representations in ruling on motions for summary judgment and motions in limine, and those
 7 rulings influenced Defendants' decision to settle the case rather than proceed to trial. Because the
 8 fraud on the Court here was so pervasive, and encompassed many of the most critical issues in the
 9 case, the fraud permeated the Court's entry of judgment, threatening the sanctity of the judicial
 10 process. It is therefore appropriate to take the broad and equitable view that the judgment entered
 11 here, as the result of the government's fraudulent conduct, is an affront to the Court and to all
 12 who appeared before it in this matter as Defendants.

13 **C. The Fraud on the Court Warrants Dismissal of the Entire Action.**

14 The Supreme Court has held that dismissal of the plaintiff's case is appropriate, and
 15 indeed necessary, when the plaintiff commits fraud upon the court. *See Hazel-Atlas*, 322 U.S. at
 16 250 (stating that "[t]he total effect of all this fraud [by plaintiff] . . . calls for nothing less than a
 17 complete denial of relief"); *see also Chambers*, 501 U.S. at 44-45 ("[O]utright dismissal of a
 18 lawsuit . . . is a particularly severe sanction, yet it is within the court's discretion."). The Ninth
 19 Circuit has also stated that "courts have inherent power to dismiss an action when a party has
 20 willfully deceived the court and engaged in conduct utterly inconsistent with the orderly
 21 _____

22 ¹⁰⁰ A number of courts have taken a very nuanced approach to examining fraud on the court, and have looked at
 23 whether the actions of officers of the court throughout litigation affected the course of the case to such an extent that
 24 settlement should never have been entered, or would not have been entered had the court known of the fraud upon it.
 25 For example, in *Southerland v. Irons*, the Sixth Circuit upheld a district court's decision to vacate a consent judgment
 26 obtained by fraud on the court where the defendant's attorney "through his fraudulent misrepresentations induced the
 27 court to approve a consent judgment. . ." *Southerland b. Oakland Cnty.*, 77 F.R.D. 727, 731 (E.D. Mich. 1978), *aff'd*
 28 *sub nom Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980). The district court's order stated: "While [a lawyer]
 should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or
 fraudulently; on the contrary, his loyalty to the court, as an officer thereof, demands integrity and honest dealings
 with the court. And when he departs from that standard in the conduct of a case he perpetrated a fraud upon the
 court." *Id.* at 733 (quoting Moore's Federal Practice 513 (1975)). The Sixth Circuit thus found the district court did
 not abuse its discretion in vacating the judgment which resulted from the settlement agreement. *Southerland v. Irons*,
 628 F.2d 978, 980 (6th Cir. 1980).

1 administration of justice.” *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1989)
 2 (dismissing district court’s dismissal of a complaint as a sanction for plaintiff’s numerous
 3 knowingly false statements and failure to comply with court’s discovery orders). Similarly, other
 4 circuit courts have observed that “a federal district judge can order dismissal or default where a
 5 litigant has stooped to the level of fraud on the court.” *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115,
 6 1119 (1st Cir. 1989) (citations omitted).

7 As this Court has no doubt seen from this pleading, the Moonlight Fire action, and this
 8 motion under Rule 60(d)(3) presents a unique set of circumstances which cry out for this Court’s
 9 review and action. Judge Nichols’ orders and former AUSAs Wright and Overby’s revelations
 10 only serve to heighten the need for a full review and the termination of this matter.

11 VII. CONCLUSION

12 As former Moonlight Fire prosecutor Robert Wright essentially states in his declaration,
 13 and as former prosecutor Overby felt compelled to confirm before leaving this case, a federal
 14 prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty
 15 whose obligation to govern impartially is as compelling as its obligation to govern at all; and
 16 whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice
 17 shall be done.” *United States v. Maloney*, 755 F.3d 1044, 1046 (9th Cir. 2014) (quoting *Berger v.*
 18 *United States*, 295 U.S. 78, 88 (1935)). “More succinctly: ‘The prosecutor’s job isn’t just to win,
 19 but to win fairly, staying well within the rules.’” *Id.* (quoting *United States v. Kojayan*, 8 F.3d
 20 1315, 1323 (9th Cir.1993)).

21 Here, instead, the federal prosecutors – shielded by the high level of trust our system of
 22 justice naturally places in them as representatives of the United States – pursued their goal at the
 23 expense of justice. Instead of serving as gatekeepers, these Assistant United States Attorneys
 24 aided and abetted the very type of conduct they were charged with preventing, an approach which
 25 ultimately led to the broad tapestry of fraud now presented in this motion. Today, the issue is no
 26 longer preparing an accurate origin and cause report or an honest prosecution, as there is no
 27 accurate record of what might have been discovered regarding the origin of the fire that day. The
 28

1 DATED: October 9, 2014

MATHENY SEARS LINKERT & JAIME

2

By: /s/ Richard Linkert as auth'd on 10/8/14

3

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4

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