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MOTION ALLEGES PROSECUTORIAL MISCONDUCT AND FRAUD IN FEDERAL COURT, FOLLOWING STATE COURT'S FINDINGS

SACRAMENTO - The Defendants who were sued by the United States for allegedly causing the 2007 Moonlight Fire and who settled that federal matter two years ago by paying \$55 million and providing 22,500 acres of land to the US, have today filed a motion alleging that the federal Court which maintains jurisdiction over the matter was the victim of an egregious fraud perpetrated by Moonlight Fire origin and cause investigators and certain Assistant United States Attorneys in this district.

Defendants' motion is supported by two lengthy orders issued earlier this year by Superior Court Judge Leslie C. Nichols in Cal Fire's related Moonlight Fire cost recovery action. That action involved the same defendants and relied upon the same corrupt investigation. In reviewing the prosecution of that matter, Judge Nichols found "egregious," "pervasive," and "reprehensible" discovery abuses involving "governmental corruption." His Honor also found the prosecution to be "corrupt and tainted." Judge Nichols therefore terminated the state action and issued sanctions in favor of Defendants for more than \$32 million. His Honor stated, "the misconduct in this case is so pervasive that it would serve no purpose for the Court to even attempt to recite it all here." Judge Nichols found that the state case was a "betray[al of] the primary purpose of the judicial system -- to reveal the truth." Judge Nichols' findings are one of several catalysts driving the motion filed today.

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

Judge Nichols' decisions also brought forward additional information now supporting this motion. Specifically, Defendants' filing includes an extraordinary 15 page declaration from Robert Wright, the former Assistant United States Attorney who led the Eastern District's Affirmative Fire Litigation Team at the time of the Moonlight Fire and who drafted and filed the original Moonlight Fire complaint against these same Defendants.

Among other things, Wright states that he now believes the investigators falsified material portion of their 2009 Origin and Cause Report for the Moonlight Fire and that the investigators and certain government lawyers "obstructed discovery of the truth" during their prosecution of this case against the Defendants. Wright also believes these same prosecutors repeatedly breached their professional responsibilities and their duty of candor to the Court and that the investigators' material omissions pertaining to the claimed points of origin were intentional and

serious enough to warrant consideration for obstruction of justice charges under 18 U.S.C. § 1519.

Wright's declaration also exposes two instances in the same year he drafted and filed the Moonlight Fire action where he felt pressured to withhold from other wildland fire defendants information harmful to the United States' interests. "The internal struggles that I encountered in 2009 with respect to my professional concerns on these wildland fire actions marked the first time in my 40 years of practicing law that I felt pressured to engage in unethical conduct as a lawyer." In response to these pressures, Wright reveals that he turned to the Professional Responsibility Advisory Office (PRAO) at the Department of Justice in Washington D.C. In each case PRAO supported Wright's understanding that he was ethically required to release such information, regardless of any harm caused to the government's interest. Wright notes that lawyers working on behalf of the United States have a special responsibility to the Court to operate honestly and with complete candor.

Wright also reveals that, roughly two months later, his immediate supervisor removed him from his lead role on the Moonlight Fire action and barred him from working on the case in any capacity. Speaking of Judge Nichols' decision and steps he took thereafter, Wright declares: "In light of what has finally been exposed regarding the Moonlight Fire action, I suspect that someone connected with the Forest Service or Cal Fire communicated with Civil Division management in late 2009 that there might be or was a problem with the Moonlight Fire investigation and Report, and that with my zero-tolerance of litigation misconduct by the government, I should be removed from the case." The prosecutorial misconduct on the Moonlight Fire and its attendant fraud upon the Court discussed in the Defendants' motion occurred after Wright's removal from the action.

Wright is not alone. Defendants' motion reveals that Eric Overby, another highly respected former federal prosecutor, ultimately left the Moonlight Fire prosecution team in disgust, but not before stating: "It's called the Department of Justice. It's not called the Department of Revenue." Before leaving, Overby reached out to defense counsel and, in talking about the federal prosecution of this matter said, "In my entire career, yes, my entire career I have never seen anything like this. Never."

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

- The jointly authored origin and cause report was a work of fiction regarding its most important conclusions, including where and how the fire started, and a critical government expert ultimately testified that a "shadow of deception" hung over the investigators' primary work.

- An air-attack video taken from above the fire showed that the joint investigators' alleged points of origin were still not within the boundary of the fire's smoke plume more than an hour after the fire began.
- Federal prosecutors aided the investigators' pre-litigation efforts to cover up harmful information regarding the Red Rock lookout tower on the day of the fire by serving interrogatory responses which omitted material information harmful to the government.
- The lead investigator for the Moonlight Fire was receiving benefits from an illegal "off-book" account which he and others funded through the money they collected from the defendants they targeted on wildland fires.
- Federal and state prosecutors were aware investigators failed to properly explore other causes of the fire, several of which were ignored or suppressed.

Today's motion is the first instance where the federal judge has been provided with an opportunity to review clear and convincing evidence overwhelmingly demonstrating that government actors here perpetrated an egregious fraud upon not just one court, but two. As noted by our Supreme Court, a motion for fraud upon the court provides this Court the opportunity to use its inherent powers to finally restore justice.

The two orders from Judge Nichols are available online here: [2014-02-04 Moonlight Fire](#) and here: [2014-02-04 Order Moonlight Fire](#)