NO. 15-15799

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

V.

SIERRA PACIFIC INDUSTRIES, ET AL.,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES' OPPOSITION TO APPELLANTS' MOTION FOR JUDICIAL NOTICE AND REQUEST TO STRIKE RELATED REFERENCES AND ARGUMENTS FROM APPELLANTS' BRIEFS

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Defendants request judicial notice of at least 20 "facts," and of the "existence and contents" of 27 attachments, for the purpose of accusing a respected veteran jurist of bias. But Senior District Judge Shubb is merely the latest target of their false accusations.[1] Sooner or later, anyone who disagrees with Sierra Pacific's accusations must be accused of misconduct or worse.

All of the facts and documents proffered for judicial notice relate to Defendants' central contention that Judge Shubb is the account holder and author of all Tweets from the Twitter handle "@Nostalgist1," and that a "social network relationship" between @Nostalgist1 and @EDCAnews created an appearance of partiality. (*See* O.B. at 80-81.) But the factual claim is subject to reasonable dispute and cannot be readily determined from sources whose accuracy cannot be questioned. None of Defendants' exhibits name the owner of the @Nostalgist1 account or the person who authored the supposedly offensive Tweet—which was in fact an innocuous link to an article objectively reporting on the court's order. The profile photo for the account is not a picture of Judge Shubb; it is a baseball. The header photo is of at least 25 different people. The bio for @Nostalgist1

[1] When Sierra Pacific learned in a hearing that another judge was likely to find its lawyers committed professional misconduct, it moved to recuse him, too, before he could issue an order. (*See* Defs. Mot. to Recuse J. Brennan, Taylor Dec., Ex. 1.) The court properly denied the motion to recuse, noting the suspicious timing of the request. (Nov. 16, 2010 Order, Taylor Dec., Ex. 2, pp. 1-2, 10-12.)

contains no reference to Judge Shubb. The photos and videos posted to the account include at least 50 different people. For all we know, and for all this Court can know, the account may belong to any combination of those people, or to none of them. And whoever may own the account, the author of any specific Tweet would still be unknown. This alone precludes judicial notice.

Defendants' alternative request to supplement the record must also be denied. Social media postings are generally inadmissible to establish account ownership or identity, because they are notoriously unreliable; and Defendants' speculation cannot support deciding the appeal on a record other than the one before the district court.

After denying judicial notice, the Court should strike Section VIII of Defendants' Opening Brief, which is based solely on inadmissible speculation.

I. THE FACTS ARE SUBJECT TO REASONABLE DISPUTE

A. The High Standard for Judicial Notice is Generally Not Met by "Facts" Gleaned from Social Media Accounts

Under Rule 201 of the Federal Rules of Evidence, a judicially noticed fact must be one "not subject to reasonable dispute" because it either "(1) is generally known within the trial court's territorial jurisdiction" or "(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see also United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003) (stating standard). The standard for judicial notice is high,

as it is intended to streamline judicial proceedings by acknowledging there are some things so universally known or beyond challenge that requiring proof of their existence would be a waste of time and resources. As the Advisory Committee Notes to Rule 201 caution, "[a] high degree of indisputability is the essential prerequisite." Advisory Committee Note to Subdivision (a). Indeed, "the tradition has been one of caution in requiring that the matter be beyond reasonable controversy." *Id.*, Note to Subdivision (b).

For this reason, "judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities." *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347 (5th Cir. 1982); *see also Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (*en banc*) ("high degree of indisputability" required for judicial notice).

Judicial notice is only rarely used on appeal. *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1193 (9th Cir. 2011) (This Court "rarely take[s] judicial notice of facts presented for the first time on appeal."); *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 392 n.7 (9th Cir. 2000) ("It is rarely appropriate for an appellate court to take judicial notice of facts that were not before the district court.").[2]

[2] Defendants claim the facts "arose after entry of the order" on appeal. (MJN, p. 1.) But the @Nostalgist1 account existed since at least spring 2014 and

Because of the nature of social media, the stringent requirements for judicial notice can rarely be satisfied. For example, in *Richcourt Allweather Fund Inc. v. Midanek*, Civ. No. 13-4810, 2014 WL 1582630, at *5 (D.N.J. Apr. 21, 2014), the court refused to take judicial notice of a LinkedIn profile, explaining, "courts that have considered the issue have refused to take judicial notice of online networking profiles such as the one produced here," as "it is not a source 'whose accuracy cannot reasonably be questioned.'" *Id.*; *Tank v. Deutsche Telekom, AG*, Civ. No. 11–4619, 2013 WL 1707954, at *2 (N.D.Ill. Apr. 19, 2013); *see also Shkolnikov v. JPMorgan Chase Bank*, Civ. No. 12–3996, 2012 WL 6553988, at *2 (N.D.Cal. Dec. 14, 2012) (refusing to take judicial notice of a LinkedIn profile).

Indeed, recognizing the uncertainty that exists with social media accounts and the heightened possibility for impersonation and other manipulation, courts routinely exclude social media printouts even under the lower standards for admissibility, outside the judicial notice context. *See, e.g.*, *Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007) (information from the Internet is unreliable and court could not assume a webpage is owned by a company "merely

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its feed contains two other Tweets to press articles summarizing public filings regarding the Moonlight Fire litigation, including one as early as November 19, 2014—two months before Defendants filed their Revised Supplemental Briefing and five months before the district court's order issued. (Defs. Att. #2, pp. 50/413, 51/413, 63/413; Taylor Dec., Exs. 10, 11.) If Defendants were concerned about @Nostalgist1's Tweets, this issue could have, and should have, been raised below.

because its trade name appears in the uniform resource locator"); *United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000) (website postings allegedly showing white supremacist groups taking credit for a fraud were properly excluded as lacking authentication); *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999) (finding that "[a]nyone can put anything on the Internet" and "hackers can adulterate the content on *any* web-site from *any* location at *any* time," so "[f]or these reasons, any evidence procured off the Internet is adequate for almost nothing") (emphasis in original); *Smith v. Mississippi*, 136 So.3d 424, 433 (Miss. 2014) ("[T]he fact that an electronic communication on its face purports to originate from a certain person's social networking account is generally insufficient standing alone to authenticate that person as the author of the communications."); *Commonwealth v. Williams*, 926 N.E. 2d 1162, 1172-73 (Mass. 2010) (admission of MySpace message was error where proponent advanced no evidence as to security of MySpace page or purported author's exclusive access); *People v. Lenihan*, 30 Misc. 3d 289, 294 (N.Y. Sup. Ct. 2010) (MySpace photographs not authenticated "[i]n light of the ability to 'photoshop,' [or] edit photographs on the computer"); *State v. Eleck*, 23 A.3d 818, 822 (Conn. App. 2011) (electronic communication could be generated by someone other than the named sender, "even with respect to accounts requiring a unique user name and password").

In *United States v. Vayner*, 769 F.3d 125 (2d Cir. 2014), the Second Circuit held the district court had abused its discretion in admitting evidence of a printout of what the government claimed to be the defendant's profile on "the Russian equivalent of Facebook," because the evidence lacked proper authentication. *Id*. at 131-33. The court held the evidence was not authenticated because the government "did not provide a sufficient basis on which to conclude that the proffered printout was what the government claimed it to be—[the defendant's] profile page," even though information about the defendant, including his name, photograph, and details about his life that were consistent with other testimony, appeared on the page. *Id*. at 131-32. "[T]he mere fact that a page with [the defendant's] name and photograph happened to exist on the Internet . . . does not permit a reasonable conclusion that this page was created by the defendants or on his behalf." *Id*. at 132.

These concerns apply in spades to information drawn from Twitter accounts. Twitter's terms of service explicitly state that Twitter "do[es] not endorse, support, represent or guarantee the completeness, truthfulness, accuracy, or reliability of any Content or communications posted via [Twitter]." (Taylor Dec., Ex. 3.) Twitter requires a phone number and/or email address in order to initiate an account, but does not require that the owner of the phone number or address match any name listed on the account. Impersonation and "username squatting" are

prohibited but not effectively prevented, because Twitter does not ordinarily verify user identities. (Taylor Dec., Exs. 4, 5.) Twitter itself estimated in a 2013 SEC filing that "less than 5%" of its monthly active users—amounting to millions of accounts—were fake or spam accounts. (Taylor Dec., Ex. 6.)

Only in rare cases does Twitter "verify" select accounts to ensure that certain people or brands are who they claim. (Taylor Dec., Ex. 7); *Naffe v. Frey*, 789 F.3d 1030, 1037 n.2 (9th Cir. 2015). When an account is verified, a small blue checkmark is placed by the top right corner of a user's page or next to the username in a Twitter feed or in Twitter's "search" function. (Taylor Dec., Ex. 7.) Accounts without the blue checkmark are unverified. (*Id.*) Many of the Twitter accounts reflected in Defendants' exhibits are verified accounts, including @washingtonpost, @nytimes, @CNN, and @NBCNews. (Defs. Att. #15, p. 200/413.) The @Nostalgist1 account is unverified. (Defs. Att. #2, p. 34/413.)

There are many documented instances of individuals creating fictitious social media accounts, masquerading under another person's name, or gaining access to another's account by obtaining their username and password. *See, e.g.*, *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009) (woman created a MySpace profile pretending to be 16-year-old male in order to taunt her daughter's classmate). Twitter's advice to users on "safe tweeting" includes the acknowledgment that "user accounts and computers can sometimes become

compromised by phishing, hacks, or viruses." (Taylor Dec., Ex. 8.) Indeed, "Twitter Hack" tools are available online that claim to "provide[] fast and effective ways to . . . steal someone[']s twitter account password." (Taylor Dec., Ex. 9.)

Because of the high potential for fabricating, tampering with, or presenting false information on Twitter, information drawn from this website, without more, cannot be considered authenticated, much less a proper subject of judicial notice.[3]

B. Whether Judge Shubb Is @Nostalgist1 Is Subject to Reasonable Dispute

Defendants' admission that the @Nostalgist1 account "does not identify [Judge Shubb] by name" (MJN, p. 2, fn. 2), is alone sufficient to show that ownership of the account and authorship of any particular Tweet are subject to reasonable dispute. And while it may be an arguable inference that @Nostalgist1

[3] The three cases cited by Defendants regarding judicial notice of online information do not support their Motion because the information there was not challenged or subject to reasonable dispute, and none of those cases relied solely on unreliable evidence of social media identity or authorship. *See Reese v. Malone*, 747 F.3d 557, 570 n.8 (9th Cir. 2014) (no challenge made to the accuracy of information on a university website regarding an individual's educational background); *Multi Time Mach., Inc. v. Amazon.com, Inc.*, 792 F.3d 1070, 1071 n.1 (9th Cir. 2015) (no dispute regarding information on Amazon.com about a watch offered for sale); *Haynes v. Ottley*, Civ. No. 2014-70, 2014 WL 5469308, at *6 n.4 (D.V.I. Oct. 28, 2014) (attorney's representations about the Virgin Islands' election schedule were confirmed by "numerous news stories," the official elections calendar, and the requirements of a federal statute, and "[t]he printing of ballots, the commencement of early voting, the date of the election, and the text of federal statutes are precisely the types of facts of which the Court may . . . take judicial notice.").

is *either* Judge Shubb *or* some unknown number of admirers, none of the 413 pages Defendants submitted shows who owns the account or who wrote and posted the innocuous Tweet Defendants consider offensive. The account page for @Nostalgist1 does not name the account holder or tell who or how many people can post Tweets on it. (Defs. Att. #2, p. 34/413.) The profile photo for @Nostalgist1 is a baseball. (*Id*.) The header photo is a picture of a large group of people, only one of whom may be Judge Shubb. (*Id*.) The bio for @Nostalgist1 contains no identifying information and reads "Return to the Thrilling Days of Yesteryear." (*Id*.) No signature appears on Tweets sent or received. (*Id*. at 35-63/413.) As noted above, @Nostalgist1 is not among the rare accounts verified by Twitter to an identified account owner. (*See id*. at 34/413.) No evidence is provided of the names or even number of people who have access to the account and can tweet from it, and it is impossible to tell from the information provided whether the account was hacked or is a fake. (*See generally* Defs. Att. #2.)

Defendants argue that "the contents [of the account] confirm its origins" because Judge Shubb appears to be in some of the photos and videos posted to the account. (MJN, p. 2, n.2.) So do fifty other people – a dozen of them in "close-up photographs." (*Id*.) Such uncertain evidence falls far short of the stringent requirements for judicial notice. *See, e.g.*, *Richcourt*, 2014 WL 1582630, at *5 (rejecting plaintiff's argument that "the property, the resume, the LinkedIn profile,

and the email, taken together, constitute 'compelling evidence that Defendants in fact makes her primary home in New Jersey'"); *Smith*, 136 So.3d at 433 ("something more than simply a name and small, blurry photograph purporting to be Smith is needed to identify the Facebook account as his in the first place").

Defendants also fail to explain a separate Twitter account with the username "@wshubb," which is one of the approximately 150 Twitter accounts "followed" by @Nostalgist1. Unlike @Nostalgist1, the @wshubb account bears Judge Shubb's full name—William Shubb—and includes a profile photo of what appears to be Judge Shubb. (Defs. Att. #15, p. 238/413; Defs. Att. #1.) A request for judicial notice of the ownership of the @wshubb account would be no more appropriate than Defendants' current request, but the existence of the account underscores the disputable nature of the ownership and authorship of @Nostalgist1.[4]

[4] It is puzzling that Defendants failed to advise the Court of the separate @wshubb account, which is referenced multiple times in the exhibits they submitted. (*See* Defs. Att. #3, pp. 73/413, 74/413, 238/413.) And it is extremely improbable that Sierra Pacific's lead counsel actually "ha[s] personal knowledge" that @Nostalgist1 was "Judge Shubb's Twitter account," that Judge Shubb authored Tweets from that account, or that Judge Shubb later changed the status of "his Twitter account" from public to protected. (*See* Warne Dec., pp. 1-4.) An assertion of opinion without personal knowledge is prohibited by Federal Rule of Evidence 602, and the opinion of counsel for a litigant is not a "source[] whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

Because the owner of @Nostalgist1 is unknown and is subject to reasonable dispute, every "fact" Defendants proffer regarding the use of the account by Judge Shubb—Tweets sent or received from the account, and other accounts it follows—is speculative and an improper subject for judicial notice.

Even if the account holder for @Nostalgist1 were established beyond reasonable dispute, it would still be impossible to know who wrote and posted the Tweet Defendants consider offensive. Thus, their requests for judicial notice of "Facts" 3, 5, 6, 10, 15, 18, 19, 21 and Attachments 4-7, 14, 15, 21, 23-27 must equally be denied.

Whether Judge Shubb ever read anything tweeted by any of the Twitter accounts "followed" by @Nostalgist1 is also subject to reasonable dispute. The claim that @Nostalgist1 "followed" @EDCAnews does not support—much less compel—an inference that the account owner (whoever that may be) actually saw or read any Tweets from the @EDCAnews account, much less the "eight congratulatory Tweets concerning Judge Shubb's order."[5] According to Defendants' evidence, @Nostalgist1 appears to have "followed" approximately 150 Twitter accounts. (Defs. Att. #15, pp. 217-241/413.) Whether Tweets from

[5] Each of the @EDCAnews Tweets summarized or quoted from the order Judge Shubb had already issued. (Defs. Att. #19; Apr. 17, 2015 Order, Taylor Dec., Ex. 10.) Thus, even if he read them, the Tweets could not have influenced him.

any of them were read, or by whom, cannot be known. Accordingly, Defendants' requests for judicial notice of "Facts" 3, 5, 6, 10,15, 18, 19, 21 and Attachments 4-7, 14, 15, 21, 23-27 must also be denied.

Defendants also assert that Judge Shubb changed "his" Twitter account from "public" to "protected" status as a result of receiving a letter from the U.S. Attorneys' Office. The letter, a copy of which was sent to counsel for all parties, merely notified Judge Shubb that he had been accused of judicial misconduct (since Defendants did not see fit to notify him). (*See* Defs. Att. #22.) No conclusion of account ownership (much less Tweet authorship) can be drawn from these facts, because Defendants admit that the change to protected status may have occurred as early as September 11, days before the letter was delivered. (MJN, p. 14.)

C. The Facts Proffered by Defendants Are Irrelevant

Defendants' admission that "[o]nly relevant facts may be judicially noticed" also dooms their motion. (MJN, p. 6.) Each of Defendants' 20-plus "facts" and 27 attachments is conceivably relevant only if the Court accepts Defendants' unproven speculation that Judge Shubb is both the owner of @Nostalgist1 and the author of all its Tweets. Without that speculative inference, none of the material Defendants put forth constitutes adjudicative facts. *See Chatman v. Early*, 389 Fed. Appx. 599, 600 (9th Cir. 2010) (affirming denial of request for judicial notice

where "the news articles at issue did not contain adjudicative facts relevant to the parties' dispute"); *City & County of San Francisco v. Tutor-Saliba Corp.*, 218 F.R.D. 219, 222-23 (N.D. Cal. 2003) (denying request for judicial notice of facts from newspaper article as irrelevant and not proffered for a proper purpose). Thus, all of Defendants' offered "facts" and attachments—including Judge Shubb's image on the Eastern District California website ("Fact" 1; Defs. Att. #1), Twitter searches for "Moonlight Fire" ("Fact" 4; Defs. Att. #5), news stories about the court's order ("Fact" 7; Defs. Att. #8-10), the existence of the @EDCAnews and @SierraPacificIn Twitter accounts ("Facts" 9, 13, 14; Defs. Att. #13, 19, 20), definitions of Twitter terms ("Facts" 11, 12; Defs. Att. #16-18), and the letter to Judge Shubb from the U.S. Attorney's Office ("Fact" 17; Defs. Att. #22)—are irrelevant and not subject to judicial notice.

In any event, the proffered items from the Washington Post and the Wall Street Journal ("Fact" 8; Defs. Att. #11, 12) are not "articles," as Defendants claim. On their face, those items are opinion pieces parroting the Defendants' accusations before the United States had an opportunity to rebut them, and before the district court correctly found the accusations to be "devoid of any substance." (Apr. 17, 2015 Order, Taylor Dec., Ex. 10, p. 63.) Repetition of a litigant's false accusations is hardly comparable to the article Defendants find offensive, which objectively reported the content of a court decision actually adjudicating their claims.

The existence of two appeals pending in state court regarding the Moonlight Fire ("Fact" 20) is equally irrelevant. It is inconceivable that an anonymous[6] Tweet consisting solely of a link to an article already published elsewhere about an order already entered, could have any effect whatsoever on the state appeals process. *United States ex rel. Robinson Rancheria Citizens Counsel v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (for judicial notice to be proper, other proceedings must have a "direct relation to matters at issue").

It is possible that the state courts will notice the rigorous and detailed legal analysis in Judge Shubb's order. But the notion that an anonymous posting of a news headline and nothing more will influence anyone is fanciful. If that were to happen, it would only be because Defendants drew attention to the Tweet and asked the world to conclude Judge Shubb wrote it.

II. DEFENDANTS' REQUEST TO SUPPLEMENT THE RECORD SHOULD BE DENIED

No extraordinary circumstances exist to warrant supplementing the record. Generally, papers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal.

[6] Even if Judge Shubb's authorship of the Tweet were not subject to reasonable dispute, the re-posting of a news headline announcing the fact of a court order does not by any stretch constitute "public comment on the merits" of the case before the state court. (*See* MJN, p. 4.)

Fed. R. App. P. 10(a)(1); *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) ("Save in unusual circumstances, we consider only the district court record on appeal. . . . As a court of appeals, we lack the means to authenticate documents submitted to us . . . ."). Exceptions to the general rule exist to correct inadvertent omissions from the record, to take judicial notice, and to exercise inherent authority in extraordinary cases. *Id.* at 1024; *Castro v. Terhune*, 712 F.3d 1304, 1316 n.5 (9th Cir. 2013) (denying request to supplement the record); *United States v. Blinder*, 10 F.3d 1468, 1477 (9th Cir. 1993) (same).

No extraordinary circumstances exist here. Defendants' request is based on their speculation that Judge Shubb, as @Nostalgist1, followed a Twitter account maintained by the U.S. Attorney's Office and tweeted the title of published newspaper article summarizing a decision he already had entered. (MJN, p. 19.) That innocuous Tweet would not show bias or even an appearance of partiality, and therefore could not support reversal or recusal, even if Defendants could establish Judge Shubb wrote it. Regardless, unreliable newspaper articles and social media postings on a case currently pending for adjudication by this Court have no proper purpose in this proceeding.

III. THE RELATED ARGUMENT IN DEFENDANTS' OPENING BRIEF SHOULD BE STRICKEN

Upon the denial of Defendants' Motion, the Court should strike Defendants' "conflict of interest" argument in Section VIII of their Opening Brief (O.B., pp.

80-84), because it relies solely on documents that will not be part of the record. Fed. R. App. P. 27; 9th Cir R. 27-1. Parties refer to materials that are the subject of a motion for judicial notice "with the understanding that the Court may strike such references and related arguments if it declines to grant the request." 9th Cir R. 27-1; *See Barcamerica Int'l USA Trust v. Tyfield Imps, Inc.*, 289 F.3d 589, 593-95 (9th Cir. 2002) (striking documents not before the district court and portions of opening brief that relied upon them); *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1077-78 (9th Cir. 1988) (striking and refusing to consider a declaration which was never submitted to the district court). The same should be done here.

CONCLUSION

For the foregoing reasons, Defendants' motion for judicial notice should be denied, and related references and arguments in their opening brief stricken.

Dated: November 19, 2015

Respectfully submitted,
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/s/ Kelli L. Taylor
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DECLARATION OF KELLI L. TAYLOR

I, Kelli L. Taylor, declare as follows:

1. I am an Assistant United States Attorney in the Eastern District of California and am licensed to practice law before all the courts of the State of California and am admitted to practice before this court. I am counsel of record for the United States in this case. I have personal knowledge of the matters stated in this declaration and if called upon to testify thereto, could and would competently do so.

2. **Exhibit 1** is a true, correct, genuine, and accurate copy of Sierra Pacific's Motion to Recuse the Honorable Edmund F. Brennan, dated October 7, 2010. **Exhibit 2** is a true, correct, genuine, and accurate copy of Judge Brennan's order dated November 16, 2010, denying Sierra Pacific's Motion to Recuse and noting the suspicious timing of the motion, filed shortly after Sierra Pacific learned in a hearing that Judge Brennan was likely to find one of its lawyers committed professional misconduct. (*See* pp. 1-2, 10-12.)

3. **Exhibit 3** is a true, correct, genuine, and accurate copy of Twitter's Terms of Service, as last accessed on November 18, 2015, at https://twitter.com/tos?lang=en.

4. **Exhibits 4 and 5** are true, correct, genuine, and accurate copies of Twitter support pages, as last accessed on November 18, 2015, at

https://support.twitter.com/articles/100990#; and https://support.twitter.com/articles/18311#.

5. **Exhibit 6** is a true, correct, genuine, and accurate copy of select pages of a Form S-1 registration statement filed by Twitter, Inc. with the SEC on October 3, 2013, as last accessed on November 18, 2015, at http://www.sec.gov/Archives/edgar/data/1418091/000119312513390321/d564001ds1.htm.

6. **Exhibit 7** is a true, correct, genuine, and accurate copy of a Twitter support pages regarding "verified" accounts, as last accessed on November 18, 2015, at https://support.twitter.com/articles/119135# and https://support.twitter.com/articles/119135#.

7. **Exhibit 8** is a true, correct, genuine, and accurate copy of a Twitter support page regarding "safe tweeting," as last accessed on November 18, 2015, at https://support.twitter.com/articles/76036?lang=en#.

8. **Exhibit 9** is a true, correct, genuine, and accurate copy of printouts from two websites purporting to provide instructions and advice regarding how to hack Twitter accounts, as last accessed on November 18, 2015, at http://www.hacktwitter.info/ and http://www.twitter-hack.net/.

9. **Exhibit 10** is a true, correct, genuine, and accurate copy of the district court's order dated April 17, 2015, denying Defendants Rule 60(d) Motion.

10. **Exhibit 11** is a true, correct, genuine, and accurate copy of the caption page of Defendants' Revised Supplemental Briefing on their Rule 60(d) Motion, as filed on January 21, 2015.

I declare, under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed this 19th day of November, 2015, at Sacramento, California.

/s/ Kelli L. Taylor

KELLI L. TAYLOR

EXHIBIT 1

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SIERRA PACIFIC INDUSTRIES

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SIERRA PACIFIC INDUSTRIES, et al.

Defendants.

AND RELATED CROSS-ACTIONS

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

NOTICE OF MOTION AND MOTION TO RECUSE THE HONORABLE EDMUND F. BRENNAN

Date: November 10, 2010
Time: 10:00 a.m.
Judge: Hon. Edmund F. Brennan
Courtroom: 24
Trial Date: April 23, 2012

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

Please take notice that on Wednesday, November 10, 2010, at 10:00 a.m. in Courtroom 24 before the Honorable Edward F. Brennan, Magistrate Judge for the Eastern District of California, Defendant Sierra Pacific Industries ("Sierra Pacific") will and hereby does move Judge Brennan to recuse himself from this case under 28 U.S.C. § 455. This motion is based on information Sierra Pacific discovered on October 5, 2010, namely, that near the end of his long service as an Assistant United States Attorney representing the U.S. Forest Service, Judge Brennan was lead counsel for the Forest Service in *Sierra Nevada Forest Protection Campaign v.*

U.S. Forest Service, No. Civ. S-04-2023 MCE GGH, 2005 WL 1366507 (E.D. Cal. May 26, 2005), *aff'd* 166 Fed. Appx. 923 (9th Cir. 2006)[1], a case concerning the Forest Service's implementation of the Herger-Feinstein Quincy Library Group Act, 16 U.S.C. § 2104 note ("Herger-Feinstein Act" or "Act"). The Act required the Forest Service to implement a forest fire prevention pilot project on the very lands that burned in the Moonlight Fire, but the Forest Service failed to do so. *See* Sierra Pacific Industries' Answer to Second Amended Complaint ("Answer") at ¶79. Sierra Pacific asserts as an affirmative defense that if the Forest Service had implemented the Act on the lands that burned, as required by law, its damages from the Moonlight Fire would have been significantly reduced or eliminated. *Id.* at 16-17.

Under 28 U.S.C. § 455(b)(1), a magistrate judge must recuse himself "[w]here he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding." In *Sierra Nevada Forest Protection Campaign*, Judge Brennan for years defended the Forest Service against allegations that its proposed implementation of the Herger-Feinstein Act on a tract of land close to where the Moonlight Fire would burn did not comply with various environmental laws. In the course of that representation, Sierra Pacific reasonably presumes that Judge Brennan had conversations with Forest Service decision makers regarding the Act, its requirements, and the advisability of moving forward with implementation of the Act. More specifically, Sierra Pacific reasonably presumes that Judge Brennan advised the Forest Service regarding whether to implement the Act on the lands that would go on to burn in the Moonlight Fire (lands that were not subject to dispute in *Sierra Nevada Forest Protection Campaign*), and that he is privy to attorney-client communications regarding the basis of the Forest Service's decision not to do so. If so, it is clear that Judge Brennan must recuse himself under section 455(b)(1).[2]

[1] For the Court's convenience, copies of these decisions, as well as of the Eastern District docket report showing Judge Brennan as lead counsel, are attached to the Declaration of William R. Warne.

[2] The magistrate judge in this case will have to rule on the scope of permissible discovery into the Forest Service's alleged failure to implement the Herger-Feinstein Act. Sierra Pacific already has propounded a number of discovery requests regarding the issue, and it intends to propound more. *See* Warne Decl. ¶¶ 5-6 & Exs. D, E. The government has denied failing to implement the Act and/or objected to Sierra Pacific's discovery requests. *See id.* The government has also interposed a general objection based on attorney-client privilege. *See id.* If the parties cannot resolve their differences regarding the appropriate scope of discovery, Sierra Pacific likely will bring a motion to compel. *Id.* ¶ 5. It would be inappropriate for any such motion to be decided by a judge who, while acting as an attorney for the Forest Service, may have advised the Forest Service regarding the very actions at issue and may be

Indeed, Judge Brennan may be highly knowledgeable about the scope and significance of the legal challenges to Herger-Feinstein Act implementation, and as such may be called as a witness in this matter by a defendant or by the government. Of course, Judge Brennan cannot testify in a matter he is adjudicating. *See* 28 U.S.C. § 455(b)(3) (stating that judge must recuse himself from any matter in which he has served as a material witness).

Judge Brennan also may have served as an advisor to the Forest Service regarding the "merits of the particular case in controversy" within the meaning of section 455(b)(3). Although he had left the United States Attorney's office before this case was filed, Judge Brennan represented the Forest Service regarding issues that are again disputed in this case. Even if this fact does not, strictly speaking, require recusal under section 455(b)(3), it appears to require, along with the other facts discussed above, recusal under section 455(a). That section requires recusal where a magistrate judge's "impartiality might reasonably be questioned."

Because the Moonlight Fire occurred after Judge Brennan took the bench, it is understandable that Judge Brennan would not have perceived or appreciated the relevance of his representation of the Forest Service through 2006 to this case. But that representation spanned the period during which the Forest Service was deciding not to implement the Act on the lands that burned, and it involved litigation so closely related to the Forest Service's decision as to make an actual conflict likely and an apparent conflict unavoidable. Accordingly, Sierra Pacific respectfully requests that Judge Brennan recuse himself from this case.

DATED: October 7, 2010

DOWNEY BRAND LLP

By: */s/ William R. Warne*
WILLIAM R. WARNE
Attorney for Defendant/ Cross-Defendant
SIERRA PACIFIC INDUSTRIES

DOWNEY BRAND LLP

privy to the very attorney-client communications the disclosure of which the government has objected to.

Siegfried, Kimberly (USACAE)

From: caed_cmecf_helpdesk@caed.uscourts.gov
Sent: Thursday, October 07, 2010 3:13 PM
To: caed_cmecf_nef@caed.uscourts.gov
Subject: Activity in Case 2:09-cv-02445-JAM-EFB United States of America v. Sierra Pacific Industries et al Motion for Miscellaneous Relief

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Eastern District of California - Live System

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The following transaction was entered by Warne, William on 10/7/2010 at 3:12 PM PDT and filed on 10/7/2010
Case Name: United States of America v. Sierra Pacific Industries et al
Case Number: 2:09-cv-02445-JAM-EFB
Filer: United States of America
Document Number: 83

Docket Text:
MOTION RECUSE THE HONORABLE EDMUND F. BRENNAN by United States of America. Attorney Warne, William Ross added. Motion Hearing set for 11/10/2010 at 10:00 AM in Courtroom 24 (EFB) before Magistrate Judge Edmund F. Brennan. (Warne, William)

2:09-cv-02445-JAM-EFB Notice has been electronically mailed to:

Jeffrey H. Ikejiri jeffrey.ikejiri@sdma.com, maxine.maritz@sdma.com

Kelli L. Taylor kelli.L.taylor@usdoj.gov, Karen.G.Clark@usdoj.gov, Kimberly.Siegfried@usdoj.gov, monica.lee@usdoj.gov, pamela.beauvais@usdoj.gov, usacae.ecfsaccv@usdoj.gov

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2:09-cv-02445-JAM-EFB Electronically filed documents must be served conventionally by the filer to:

The following document(s) are associated with this transaction:

Document description: Main Document
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[STAMP dcecfStamp_ID=1064943537 [Date=10/7/2010] [FileNumber=4185014-0
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03e6bf5708d1b959bc30873d11ac83832e1275e3c079935f882e769bff6ca]]

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff, No. CIV S-09-2445 JAM EFB

vs.

SIERRA PACIFIC INDUSTRIES, et al.,

Defendants. ORDER

_____/

On October 7, 2010, Sierra Pacific Industries (hereafter "SPI") filed a motion to recuse the undersigned. The government submitted its opposition to the motion on October 27, 2010, and SPI submitted a reply brief on November 3, 2010. The matter was heard and submitted on November 10, 2010. For the reasons stated below, the motion for recusal is denied.

Two weeks before SPI filed the recusal motion, the court had held a hearing on SPI's motion for additional discovery and the United States' motion for a protective order. SPI had asked for leave to depose thirty-seven fact witnesses and for leave to depose two witnesses for at least five days each. The court allowed ten extra depositions beyond the number that the parties had already agreed to, and allowed two days and four hours for each of the two witness depositions.

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The court did not rule from the bench on the government's motion, which sought sanctions for SPI's counsel's conduct in violating the no-contact rule of professional responsibility, but took the matter under submission. At the end of the hearing the undersigned stated "I remain concerned . . . I have the same concerns now as I did when we began this hearing . . . . I'm going to hold you to [your] representation" that SPI would refrain from engaging in improper contacts with government employees "during the time it takes me to get an order out." Transcript, Dckt. No. 85, at 62.

That hearing was held on September 22, 2010. Fifteen days later, on October 7, 2010, the undersigned's staff received a phone call from counsel for SPI stating that the undersigned might want to refrain from issuing the order on the government's protective motion because SPI would be filing a motion for recusal. SPI filed its motion for recusal later that day.

I. Parties' Arguments

SPI contends that it discovered on October 5, 2010 that when the undersigned was an Assistant United States Attorney he represented the United States Forest Service in *Sierra Nevada Forest Protection Campaign v. U.S. Forest Service*, 2:04-cv-2203 MCE GGH, 2005 WL 1366507 (E.D. Cal. May 26, 2005), *aff'd* 166 Fed. Appx. 923 (9th Cir. 2006) (hereafter "*Sierra Nevada*").[1] SPI contends that the case involved the Forest Service's implementation of the Herger-Feinstein Quincy Library Group Act, which required the Forest Service to implement a forest fire prevention pilot project on the land that SPI claims was burned in the Moonlight Fire.

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[1] SPI's counsel also asserts that "I learned for the first time on Tuesday, October 5, 2010, that . . . Judge Brennan frequently represented the United States Forest Service" and that based on this information research was done which led to the discovery of several cases in which the undersigned is listed as counsel of record for the government. Warne Decl., Dckt. No. 84 at 3. However, as described in some detail at oral argument, SPI and its general counsel, David Dun, were participants in several cases dating back to 1990 in which I, as an Assistant U.S. Attorney, represented the Forest Service. Mr. Dun, a very experienced and capable attorney, and I had numerous interactions over the course of litigating those cases and it could not have been a surprise to SPI on October 5, 2010, that I previously represented the Forest Service in those cases in which SPI was a participant.

SPI states that it has raised as an affirmative defense in this action a claim that if the Forest Service had implemented the Act on the land that burned in the Moonlight fire its damages would have been reduced or eliminated.

The predicate of SPI's recusal motion is that the undersigned allegedly was the "lead attorney" in *Sierra Nevada* and necessarily acquired personal knowledge of disputed evidentiary facts concerning this proceeding. Secondarily, SPI argues that because of the "lead attorney" designation the undersigned's impartiality might reasonably be questioned; that he may be called as a witness in this matter; and that he may have advised the Forest Service regarding issues that are disputed in this case.

The government argues that the undersigned did not actively represent the Forest Service in *Sierra Nevada,* but may have merely answered questions regarding local rules and customs within this district. Moreover, the government argues, that case did not involve any specific facts that are at issue in this case, and mere knowledge of the subject matter that is at issue in a proceeding does not constitute personal knowledge of disputed evidentiary facts.

II. Governing Law

The applicable recusal statute, 28 U.S.C. § 455, provides as follows:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy . . . .

Although a judge must recuse himself from any proceeding in which any of these criteria apply, he or she must not simply recuse out of an abundance of caution when the facts do not warrant recusal. Rather, there is an equally compelling obligation not to recuse where recusal in not appropriate. *See United States v. Holland*, 519 F.3d 909, 912 (9th Cir. 2008) ("We are as bound to recuse ourselves when the law and facts require as we are to hear cases when there is no reasonable factual basis for recusal."). Furthermore, as discussed below, a motion to recuse must be timely filed.

III. Analysis

A. Knowledge of Disputed Evidentiary Facts

SPI argues that I should recuse myself because I have personal knowledge of disputed evidentiary facts concerning the proceeding. *See* 28 U.S.C. § 455(b)(1). The premise of its motion, that I necessarily acquired such knowledge because I was lead counsel for the Forest Service in a case involving the same evidentiary issues and facts as this case, namely *Sierra Nevada*, is mistaken. As discussed below, I was not lead counsel in the case and I had no significant role in its litigation. Categorically, I have no personal knowledge regarding the issues in that case.[2]

SPI has presented no evidence to support its contention about personal knowledge of evidentiary facts. Instead, SPI argues that because I represented the Forest Service in the *Sierra Nevada* case as a "lead attorney,"[3] it "reasonably presumes" that I advised the Forest Service regarding "whether to implement the [Herger-Feinstein] Act on the lands that would go on to

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[2] In addition, SPI has not shown how that case involved evidentiary facts that are at issue in this case. However, the relevance of the *Sierra-Nevada* case is presumed for the purposes of this motion.

[3] The phrase "lead attorney" is misleading. As addressed at length in oral argument, each and every attorney on the court docket is listed as a "lead attorney." *See* Dckt. No. 84-1, Ex. A. This is true not only of that case but of cases which were pending in this district when the court converted from the ICMS electronic docketing to the current Case Management/Electronic Case Filing ("CM/ECF") system. Every attorney appearing on the docket was designated both "lead attorney" and "attorney to be noticed." As explained below, I neither worked on the case nor supervised the attorneys who did work on the case.

burn in the Moonlight fire" and that I was "privy to attorney-client communications regarding the basis of the Forest Service's decision not to do so." SPI's Mot. to Recuse, Dckt. No. 83, at 2. Based on that assumption, SPI contends that recusal is required because in the course of this proceeding I will have to rule on the scope of permissible discovery into the Forest Service's alleged failure to implement the Herger-Feinstein Act.

The government responds that I did not, in fact, actively represent the Forest Service in the *Sierra-Nevada* case. Rather, as shown by the government's declarations from three attorneys who actually did work on the case both in the district court and on appeal to the Ninth Circuit, it was not handled out of the U.S. Attorney's office. Instead, the case was staffed and litigated by the Environment and Natural Resources Division ("ENRD") of the U.S. Department of Justice in Washington D.C. Although U.S. Attorney Offices provide local logistical assistance to ENRD for cases pending in the various districts, the Department of Justice ENRD attorneys, not attorneys in the U.S. Attorney Offices, litigate those cases. Occasionally, some cases are co-litigated by the ENRD and an assigned Assistant U.S. Attorney. However, *Sierra Nevada Forest Protection Campaign v. U.S. Forest Service* was not such a case. Instead, ENRD retained responsibility for the case and the local U.S. Attorney's office had no significant role in it.

James Rosen, an attorney with the United States Department of Agriculture, Office of the General Counsel, declares that he was the agency counsel assigned to the *Sierra-Nevada* litigation. Gov't's Opp'n, Dckt. No. 87, Ex. 1 at 2. He declares that the case involved the Forest Service's "Meadow Valley Project," which did not involve any land that was later burned in the Moonlight Fire, and was in fact an hour's drive away. *Id.* He declares that attorneys from the Department of Justice's Environmental and Natural Resources Division in Washington D.C. defended the case; specifically, Brian Toth represented the Forest Service before the district court, and Lisa Jones handled the appeal before the Ninth Circuit. *Id.* Mr. Rosen declares that he was involved in all aspects of the litigation, and worked almost exclusively with Toth and Jones. *Id.* He declares that he does not recall working with me on the case, and that he is not

aware of any substantive work that I did on the case.[4] *Id.*

Brian Toth declares that he handled the defense of the *Sierra-Nevada* case in the district court. Dckt. No. 87, Ex. 2 at 2. He declares that he was lead attorney on the case, and that it was understood that ENRD was responsible for all aspects of the litigation. *Id.* It was a common practice for an Assistant United States Attorney to be assigned to monitor cases that ENRD was handling and be available for consultation on matters of local practice. *Id.* In essence, the monitoring attorney serves as a local liaison for the ENRD but does not typically have a role in handling the litigation. *Id.* I was the Assistant United States Attorney assigned to provide local logistical assistance that might be needed. *Id.* Mr. Toth declares that he is not aware of any substantive assistance that I provided in the litigation. *Id.* However, he notes that it is possible that I could have provided him information about procedural matters concerning the Eastern District of California. *Id.* Although he does not state a specific recall of me ever doing so, Mr. Toth allows for the possibility that I may have reviewed final drafts of briefs before they were filed. *Id.* He believes that I was also present in the public gallery during oral argument before the District Court and discussed how the argument went.[5] *Id.* at 2-3.

Lisa Jones, another ENRD attorney, declares that she was responsible for handling all aspects of the appeal in the *Sierra-Nevada* case in the Ninth Circuit. Dckt. No. 87, Ex. 3 at 2. She declares that she worked primarily with James Rosen and Brian Toth. *Id.* She also declares that it is the practice of the United States Attorney's Office of the Eastern District of California to assign an Assistant United States Attorney to monitor cases that are handled by ENRD, and

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[4] Given that I did not assist either Rosen or Toth with the case it is not at all surprising that Mr. Rosen has no recollection of ever working with me on it.

[5] As discussed below, I was not involved in writing or reviewing the briefs or arguing the case, and I had no role in conferring with or advising the Forest Service in the *Sierra-Nevada* case. Indeed, upon reading SPI's recusal motion I had to read the Ninth Circuit and district court rulings in that case to become familiar with the specific issues that were litigated, and I had to examine the CM/ECF docket and pleadings to see who actually litigated it. The speculation that I was involved in either advising the Forest Service in that action, or in drafting the briefs or arguing or preparing to argue the case is mistaken.

that I was assigned to do so with the *Sierra-Nevada* case while it was pending in the district court. *Id.* She declares that I did not provide any substantive assistance for the appeal. *Id.*

Although these affidavits submitted by the government are evidence of the extent of my participation in the *Sierra-Nevada* case, I will also set out in this order (as I did in the argument on the motion) the extent of my involvement in that case. When I was an Assistant United States Attorney I was assigned to provide local liaison assistance to ENRD on the *Sierra-Nevada* case. This is a role that the U.S. Attorney's Office referred to as a monitoring attorney. My role was to be available to the DOJ attorneys in Washington D.C. to answer questions about local practices and the Local Rules. I was not assigned to litigate the case and at no time did I provide any substantive assistance with the case. I did not write or assist in writing the briefs. I did not argue the case, or assist in doing so. And I did not advise or consult with the client agency regarding the case, nor did I assist in doing so. While my name and the United States Attorney appeared on the court docket, and apparently on the letterhead for the pleadings as a matter of customary practice by ENRD, I performed no substantive work on the case. Nor did I sign the briefs in the case.

Noting the "lead attorney" designation on the docket, SPI speculates in its motion that I must have advised the Forest Service on the implementation of a statute that SPI contends is in issue in this case, the Herger-Feinstein Act.[6] Dckt. No. 83 at 2. Again, SPI's assumption is mistaken. I did not advise the Forest Service on the implementation of the Herger-Feinstein Act, nor was I privy to any confidential or privileged discussions regarding its implementation. Moreover, I did not receive any confidential or privileged information from the Forest Service in the *Sierra-Nevada* case. All of the facts I know concerning the *Sierra-Nevada* case are from having read, after the fact, the Ninth Circuit's and district court's rulings, and from reviewing the

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[6] The relevance of the Act to this case is far from clear to me but is assumed for purposes of this motion.

docket and district court record after this motion was filed.[7]

As I have no personal knowledge of disputed evidentiary facts concerning this proceeding, there is no basis for recusal under 28 U.S.C. 455(b)(1). Accordingly, SPI's motion to recuse on that basis is denied.

B. Appearance of Impropriety

SPI also argues that I should recuse myself because my impartiality in this matter might reasonably be questioned. *See* 28 U.S.C. § 455(a). Recusal is required under section 455(a) "even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." *United States v. Bosch*, 951 F.2d 1546, 1556 (9th Cir. 1991) (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61 (1988)). Thus, what matters under § 455(a) "is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994). This inquiry is an objective one, made from the perspective of a reasonable person who is informed of all the surrounding facts and circumstances. *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000). However, the reasonable person is not "hypersensitive or unduly suspicious," but is a "well-informed, thoughtful observer." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008). Here, SPI does not fully explain its contention that my impartiality in this matter might reasonably be questioned, but states that I "represented the Forest Service regarding issues that are again disputed in this case" and argues that "along with the other facts discussed above," recusal is required under section 455(a). Dckt. No. 83 at 3. SPI's reply brief makes clear that this argument is premised on the docket sheet in *Sierra-Nevada* erroneously listing me as "lead attorney" for the government. Reply, Dckt. No. 88, at 2 ("[R]egardless of Judge Brennan's actual knowledge of disputed facts, his 'impartiality might reasonably be questioned' based on

[7] Each of those documents are matters of public record and subject to judicial notice. The rulings and docket for *Sierra-Nevada* are attached as exhibits to the Warne declaration.

information in the public record.")

First, as I have explained above, I did not advise the Forest Service regarding issues that are disputed in this case and the speculation to the contrary is mistaken. Second, SPI now knows this and is now aware that the docket sheet designation is wrong. A well-informed, thoughtful observer who was made aware of all of the surrounding facts and circumstances of my limited role as counsel in the *Sierra-Nevada* case would not reasonably question my impartiality in this matter. Such an observer would not reasonably assume that my limited local liaison role in the *Sierra-Nevada* case would have caused me to be biased in favor of the Forest Service in a separate action several years later involving a fire that had not occurred at the time that *Sierra-Nevada* was being litigated. A well-informed observer would know--as SPI does now-- that in the course of the *Sierra-Nevada* case I did not advise the Forest Service regarding whether or how to implement the Act that SPI contends is relevant, nor was I privy to confidential information on these topics.[8] Accordingly, SPI's assertion as an affirmative defense a lack of compliance with the Herger-Feinstein Act does not create a question as to my impartiality.

C. Other Arguments

SPI makes two more somewhat threadbare arguments for recusal. SPI argues that I "may have served as an advisor to the Forest Service regarding the 'merits of the particular case in

[8] In fairness to counsel for SPI, the docket sheet erroneously listed me as "lead attorney" and SPI appears to have made a number of incorrect assumptions based on that mistaken information. But, as discussed at oral argument, the designation "lead attorney" is from an attorney designation data field that was not in use by the Clerk's Office at the time to differentiate lead attorneys from attorneys who were simply designated to receive notice of orders and court filings. Rather, under the electronic docketing system being put in place at that time the default designation for all attorneys appearing on the letterhead of briefs or that were designated to receive copies of orders was both "lead attorney" and "attorney to be noticed." Thus, in thousands of cases multiple attorneys were listed as both "lead attorney" and "attorney to be noticed" for the same party, but the designation bears no relationship to who actually litigated the case.

Significantly here, SPI's mistaken belief in that regard has now been corrected. Thus, a well-informed observer having that additional information could not reasonably rely on the inaccurate docket designation to argue that I litigated a case that I did not. SPI now has the benefit of having learned from the attorneys who actually litigated the case, as well as from the undersigned, that in fact I had no significant role in the *Sierra-Nevada* case.

controversy' within the meaning of 455(b)(3)." Dckt. No. 83 at 3. SPI then backpedals, stating that "[e]ven if this fact does not, strictly speaking, require recusal under section 455(b)(3)," it creates an appearance of impropriety under 455(a). *Id.* Section 455(b)(3) requires recusal where a judge "has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." Here, the "proceeding" or "the particular case in controversy" refer to the instant action, not the *Sierra-Nevada* case. Accordingly, section 455(b)(3) has no application.

SPI also argues that I must recuse because I may be called as a witness in this case. Dckt. No. 83 at 3. SPI offers no explanation for this curious assertion except that I "may be highly knowledgeable about the scope and significance of the legal challenges to the Herger-Feinstein Act implementation." *Id.* SPI appears to be implying that I might be called to testify in this case as an expert legal historian. SPI has not attempted to explain why either party would call an expert legal historian to opine on the legal challenges of the Act's implementation. Neither has it attempted to explain why a party would call their presiding judge as such an expert rather than any number of other persons with similar expertise.

Thus, these arguments present no grounds for granting the recusal motion.

D. Duty Not to Recuse and Timing

Two weeks before SPI filed the recusal motion I heard and partially denied SPI's discovery motion. I also heard and gave some indication of my leanings on the government's motion for a protective order that called into question the propriety of certain contacts by an attorney for SPI with Forest Service employees. The arguments were spirited and counsel for SPI was quite pointed in his disagreement with the ruling as to the discovery matter. In light of the fact that this motion followed soon after that hearing, I am obliged to weigh carefully my obligation not to recuse in the absence of a legitimate reason to do so. While I do not consider this a close call, SPI has argued that in a close call the court should err on the side of recusal.

Yet a compelling countervailing concern in this case is the timing of the recusal motion as it intersects with the court's duty not to recuse lightly. *United States v. Snyder*, 235 F.3d 42, 45 (1st Cir. 2000) ("[J]udges are not to recuse themselves lightly under § 455(a)"); *In re U.S.*, 441 F.3d 44, 67 (1st Cir. 2006) ("The trial judge has a duty not to recuse himself or herself if there is no objective basis for recusal"). Several Circuits have admonished that "[t]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *See Himan v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987). The Ninth Circuit has explained a judge's obligation to sit on assigned cases as follows:

> We begin with the general proposition that, in the absence of a legitimate reason to recuse himself, "a judge should participate in cases assigned." This proposition is derived from the "judicial Power" with which we are vested. See U.S. Const. art. III, § 1. It is reflected in our oath, by which we have obligated ourselves to "faithfully and impartially discharge and perform [our] duties" and to "administer justice without respect to persons, and do equal right to the poor and to the rich." 28 U.S.C. § 453. Without this proposition, we could recuse ourselves for any reason or no reason at all; we could pick and choose our cases, abandoning those that we find difficult, distasteful, inconvenient or just plain boring. Our mythic Justice, represented by a blindfolded figure wielding a balance and a sword, hears all cases coming before her, giving no preference-whether in priority or result-to the station or economic status of such persons.

Holland, 519 F.3d at 912 (internal citations omitted).

The obligation not to recuse is perhaps at its highest when the motion has been brought after the party seeking recusal has sustained an adverse ruling in the course of the action. "Granting a motion to recuse many months after an action has been filed wastes judicial resources and encourages manipulation of the judicial process." *Willner v. University of Kansas*, 848 F.2d 1023, 1029 (10th Cir. 1988). *See also In re Int'l Business Machines Corp.*, 618 F.2d 923, 932-33 (2d Cir. 1980); *Apple v. Jewish Hosp. and Medical Center*, 829 F.2d 326 (2d Cir. 1987) (although § 455 does not contain an explicit timeliness requirement, timeliness has been read into the section); *Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984) (recusal motion was untimely where it was filed a year after the complaint was filed and after the appellants had suffered some adverse rulings on interlocutory matters).

Simply stated, a judge must take care not to recuse out of an abundance of caution when it appears that a party may be seeking recusal out of dissatisfaction after sustaining adverse rulings. As the First Circuit has explained:

> . . . an appellate court has no wish to encourage strategic moves by a disgruntled party to remove a judge whose rulings the party dislikes. '[T]he disqualification decision must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.'

In re U.S., 441 F.3d 44, 67 (1st Cir. 2006) (quoting *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989)).

IV. Conclusion

Given the timing and history of this recusal motion, coming as it did on the heels of a hearing in which SPI's motion was partially denied and I gave some indication that I was inclined to rule in the government's favor on their motion for a protective order, I have carefully considered my obligation not to recuse where there is no clear basis to do so. While it is possible that I may have provided nominal logistical support to the ENRD attorneys who litigated the *Sierra-Nevada* case for the government, I have no personal knowledge of disputed evidentiary facts in this proceeding. Moreover, with the information that has been provided to SPI, a well-informed observer would be aware of my lack of personal knowledge of disputed evidentiary facts and would therefore not question my impartiality in this matter. There are no other grounds for recusal under section 455. Accordingly, SPI's motion to recuse is hereby denied.

SO ORDERED.

DATED: November 15, 2010.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

EXHIBIT 3

Twitter Terms of Service

These Terms of Service ("**Terms**") govern your access to and use of our Services, including our various websites, SMS, APIs, email notifications, applications, buttons, widgets, ads, commerce services (the "**Twitter Services**"), and our other covered services that link to these Terms (collectively, the "**Services**"), and any information, text, graphics, photos or other materials uploaded, downloaded or appearing on the Services (collectively referred to as "**Content**"). Your access to and use of the Services are conditioned on your acceptance of and compliance with these Terms. By accessing or using the Services you agree to be bound by these Terms.

1. Basic Terms

You are responsible for your use of the Services, for any Content you post to the Services, and for any consequences thereof. Most Content you submit, post, or display through the Twitter Services is public by default and will be able to be viewed by other users and through third party services and websites. Learn more here, and go to the account settings page to control who sees your Content. You should only provide Content that you are comfortable sharing with others under these Terms.

Tip: What you say on the Twitter Services may be viewed all around the world instantly. You are what you Tweet!

You may use the Services only if you can form a binding contract with Twitter and are not a person barred from receiving services under the laws of the United States or other applicable jurisdiction. If you are accepting these Terms and using the Services on behalf of a company, organization, government, or other legal entity, you represent and warrant that you are authorized to do so. You may use the Services only in compliance with these Terms and all applicable local, state, national, and international laws, rules and regulations.

The Services that Twitter provides are always evolving and the form and nature of the Services that Twitter provides may change from time to time without prior notice to you. In addition, Twitter may stop (permanently or temporarily) providing the Services (or any features within the Services) to you or to users generally and may not be able to provide you with prior notice. We also retain the right to create limits on use and storage at our sole discretion at any time without prior notice to you.

The Services may include advertisements, which may be targeted to the Content or information on the Services,

queries made through the Services, or any other information. The types and extent of advertising by Twitter on the Services are subject to change. In consideration for Twitter granting you access to and use of the Services, you agree that Twitter and its third party providers and partners may place such advertising on the Services or in connection with the display of Content or information from the Services whether submitted by you or others.

2. Privacy

Any information that you or other users provide to Twitter is subject to our Privacy Policy, which governs our collection and use of your information. You understand that through your use of the Services you consent to the collection and use (as set forth in the Privacy Policy) of this information, including the transfer of this information to the United States, Ireland, and/or other countries for storage, processing and use by Twitter. As part of providing you the Services, we may need to provide you with certain communications, such as service announcements and administrative messages. These communications are considered part of the Services and your account, which you may not be able to opt-out from receiving.

Tip: You can control most communications from the Twitter Services, including notifications about activity related to you, your Tweets, Retweets, and network, and updates from Twitter. Please see your settings for email and mobile notifications for more.

3. Passwords

You are responsible for safeguarding the password that you use to access the Services and for any activities or actions under your password. We encourage you to use “strong” passwords (passwords that use a combination of upper and lower case letters, numbers and symbols) with your account. Twitter cannot and will not be liable for any loss or damage arising from your failure to comply with the above.

4. Content on the Services

All Content, whether publicly posted or privately transmitted, is the sole responsibility of the person who originated such Content. We may not monitor or control the Content posted via the Services and, we cannot take responsibility for such Content. Any use or reliance on any Content or materials posted via the Services or obtained by you through the Services is at your own risk.

We do not endorse, support, represent or guarantee the completeness, truthfulness, accuracy, or reliability of any Content or communications posted via the Services or endorse any opinions expressed via the Services. You understand that by using the Services, you may be exposed to Content that might be offensive, harmful, inaccurate or otherwise inappropriate, or in some cases, postings that have been mislabeled or are otherwise deceptive. Under no circumstances will Twitter be liable in any way for any Content, including, but not limited to, any errors or omissions in

any Content, or any loss or damage of any kind incurred as a result of the use of any Content posted, emailed, transmitted or otherwise made available via the Services or broadcast elsewhere.

5. Your Rights

You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).

Tip: This license is you authorizing us to make your Tweets on the Twitter Services available to the rest of the world and to let others do the same.

You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use.

Tip: Twitter has an evolving set of rules for how ecosystem partners can interact with your Content on the Twitter Services. These rules exist to enable an open ecosystem with your rights in mind. But what's yours is yours – you own your Content (and your photos are part of that Content).

Such additional uses by Twitter, or other companies, organizations or individuals who partner with Twitter, may be made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services.

We may modify or adapt your Content in order to transmit, display or distribute it over computer networks and in various media and/or make changes to your Content as are necessary to conform and adapt that Content to any requirements or limitations of any networks, devices, services or media.

You are responsible for your use of the Services, for any Content you provide, and for any consequences thereof, including the use of your Content by other users and our third party partners. You understand that your Content may be syndicated, broadcast, distributed, or published by our partners and if you do not have the right to submit Content for such use, it may subject you to liability. Twitter will not be responsible or liable for any use of your Content by Twitter in accordance with these Terms. You represent and warrant that you have all the rights, power and authority necessary to grant the rights granted herein to any Content that you submit.

6. Your License To Use the Services

Twitter gives you a personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software that is provided to you by Twitter as part of the Services. This license is for the sole purpose of enabling you to use and enjoy the benefit of the Services as provided by Twitter, in the manner permitted by these Terms.

7. Twitter Rights

All right, title, and interest in and to the Services (excluding Content provided by users) are and will remain the exclusive property of Twitter and its licensors. The Services are protected by copyright, trademark, and other laws of both the United States and foreign countries. Nothing in the Terms gives you a right to use the Twitter name or any of the Twitter trademarks, logos, domain names, and other distinctive brand features. Any feedback, comments, or suggestions you may provide regarding Twitter, or the Services is entirely voluntary and we will be free to use such feedback, comments or suggestions as we see fit and without any obligation to you.

8. Restrictions on Content and Use of the Services

Please review the Twitter Rules (which are part of these Terms) to better understand what is prohibited on the Twitter Services. We reserve the right at all times (but will not have an obligation) to remove or refuse to distribute any Content on the Services, to suspend or terminate users, and to reclaim usernames without liability to you. We also reserve the right to access, read, preserve, and disclose any information as we reasonably believe is necessary to (i) satisfy any applicable law, regulation, legal process or governmental request, (ii) enforce the Terms, including investigation of potential violations hereof, (iii) detect, prevent, or otherwise address fraud, security or technical issues, (iv) respond to user support requests, or (v) protect the rights, property or safety of Twitter, its users and the public.

Tip: Twitter does not disclose personally identifying information to third parties except in accordance with our Privacy Policy.

Except as permitted through the Twitter Services, these Terms, or the terms provided on dev.twitter.com, you have to use the Twitter API if you want to reproduce, modify, create derivative works, distribute, sell, transfer, publicly display, publicly perform, transmit, or otherwise use the Twitter Services or Content on the Twitter Services.

Tip: We encourage and permit broad re-use of Content on the Twitter Services. The Twitter API exists to enable this.

If you use commerce features of the Twitter Services that require credit or debit card information, such as our Buy Now feature, you agree to our Twitter Commerce Terms.

You may not do any of the following while accessing or using the Services: (i) access, tamper with, or use non-public areas of the Services, Twitter's computer systems, or the technical delivery systems of Twitter's providers; (ii) probe, scan, or test the vulnerability of any system or network or breach or circumvent any security or authentication measures; (iii) access or search or attempt to access or search the Services by any means (automated or otherwise) other than through our currently available, published interfaces that are provided by Twitter (and only pursuant to the applicable terms and conditions), unless you have been specifically allowed to do so in a separate agreement with Twitter (NOTE: crawling the Services is permissible if done in accordance with the provisions of the robots.txt file, however, scraping the Services without the prior consent of Twitter is expressly prohibited); (iv) forge any TCP/IP packet header or any part of the header information in any email or posting, or in any way use the Services to send altered, deceptive or false source-identifying information; or (v) interfere with, or disrupt, (or attempt to do so), the access of any user, host or network, including, without limitation, sending a virus, overloading, flooding, spamming, mail-bombing the Services, or by scripting the creation of Content in such a manner as to interfere with or create an undue burden on the Services.

9. Copyright Policy

Twitter respects the intellectual property rights of others and expects users of the Services to do the same. We will respond to notices of alleged copyright infringement that comply with applicable law and are properly provided to us. If you believe that your Content has been copied in a way that constitutes copyright infringement, please provide us with the following information: (i) a physical or electronic signature of the copyright owner or a person authorized to act on their behalf; (ii) identification of the copyrighted work claimed to have been infringed; (iii) identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit us to locate the material; (iv) your contact information, including your address, telephone number, and an email address; (v) a statement by you that you have a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and (vi) a statement that the information in the notification is accurate, and, under penalty of perjury, that you are authorized to act on behalf of the copyright owner.

We reserve the right to remove Content alleged to be infringing without prior notice, at our sole discretion, and without liability to you. In appropriate circumstances, Twitter will also terminate a user's account if the user is determined to be a repeat infringer. Under the U.S. Digital Millennium Copyright Act, our designated copyright agent for notice of alleged copyright infringement appearing on the Services is:
Twitter, Inc.
Attn: Copyright Agent
1355 Market Street, Suite 900
San Francisco, CA 94103
Reports: https://support.twitter.com/forms/dmca
Email: copyright@twitter.com

10. Ending These Terms

The Terms will continue to apply until terminated by either you or Twitter as follows.

You may end your legal agreement with Twitter at any time for any or no reason by deactivating your accounts and discontinuing your use of the Services. You do not need to specifically inform Twitter when you stop using the Services. If you stop using the Services without deactivating your accounts, your accounts may be deactivated due to prolonged inactivity under our Inactive Account Policy.

We may suspend or terminate your accounts or cease providing you with all or part of the Services at any time for any or no reason, including, but not limited to, if we reasonably believe: (i) you have violated these Terms or the Twitter Rules, (ii) you create risk or possible legal exposure for us; or (iii) our provision of the Services to you is no longer commercially viable. We will make reasonable efforts to notify you by the email address associated with your account or the next time you attempt to access your account.

In all such cases, the Terms shall terminate, including, without limitation, your license to use the Services, except that the following sections shall continue to apply: 4, 5, 7, 8, 10, 11, and 12.

Nothing in this section shall affect Twitter's rights to change, limit or stop the provision of the Services without prior notice, as provided above in section 1.

11.Disclaimers and Limitations of Liability

Please read this section carefully since it limits the liability of Twitter and its parents, subsidiaries, affiliates, related companies, officers, directors, employees, agents, representatives, partners, and licensors (collectively, the "Twitter Entities"). Each of the subsections below only applies up to the maximum extent permitted under applicable law. Some jurisdictions do not allow the disclaimer of implied warranties or the limitation of liability in contracts, and as a result the contents of this section may not apply to you. Nothing in this section is intended to limit any rights you may have which may not be lawfully limited.

A. The Services are Available "AS-IS"

Your access to and use of the Services or any Content are at your own risk. You understand and agree that the Services are provided to you on an "AS IS" and "AS AVAILABLE" basis. Without limiting the foregoing, to the maximum extent permitted under applicable law, THE TWITTER ENTITIES DISCLAIM ALL WARRANTIES AND CONDITIONS, WHETHER EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT.

The Twitter Entities make no warranty or representation and disclaim all responsibility and liability for: (i) the completeness, accuracy, availability, timeliness, security or reliability of the Services or any Content; (ii) any harm to your computer system, loss of data, or other harm that results from your access to or use of the Services or any Content; (iii) the deletion of, or the failure to store or to transmit, any Content and other communications maintained by the Services; and (iv) whether the Services will meet your requirements or be available on an uninterrupted, secure, or error-free basis. No advice or information, whether oral or written, obtained from the Twitter Entities or through the Services, will create any warranty or representation not expressly made herein.

B. Links

The Services may contain links to third-party websites or resources. You acknowledge and agree that the Twitter Entities are not responsible or liable for: (i) the availability or accuracy of such websites or resources; or (ii) the content, products, or services on or available from such websites or resources. Links to such websites or resources do not imply any endorsement by the Twitter Entities of such websites or resources or the content, products, or services available from such websites or resources. You acknowledge sole responsibility for and assume all risk arising from your use of any such websites or resources.

C. Limitation of Liability

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE TWITTER ENTITIES SHALL NOT BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES, OR ANY LOSS OF PROFITS OR REVENUES, WHETHER INCURRED DIRECTLY OR INDIRECTLY, OR ANY LOSS OF DATA, USE, GOOD-WILL, OR OTHER INTANGIBLE LOSSES, RESULTING FROM (i) YOUR ACCESS TO OR USE OF OR INABILITY TO ACCESS OR USE THE SERVICES; (ii) ANY CONDUCT OR CONTENT OF ANY THIRD PARTY ON THE SERVICES, INCLUDING WITHOUT LIMITATION, ANY DEFAMATORY, OFFENSIVE OR ILLEGAL CONDUCT OF OTHER USERS OR THIRD PARTIES; (iii) ANY CONTENT OBTAINED FROM THE SERVICES; OR (iv) UNAUTHORIZED ACCESS, USE OR ALTERATION OF YOUR TRANSMISSIONS OR CONTENT.

IN NO EVENT SHALL THE AGGREGATE LIABILITY OF THE TWITTER ENTITIES EXCEED THE GREATER OF ONE HUNDRED U.S. DOLLARS (U.S. $100.00) OR THE AMOUNT YOU PAID TWITTER, IF ANY, IN THE PAST SIX MONTHS FOR THE SERVICES GIVING RISE TO THE CLAIM.

THE LIMITATIONS OF THIS SUBSECTION SHALL APPLY TO ANY THEORY OF LIABILITY, WHETHER BASED ON WARRANTY, CONTRACT, STATUTE, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, AND WHETHER OR NOT THE TWITTER ENTITIES HAVE BEEN INFORMED OF THE POSSIBILITY OF ANY SUCH DAMAGE, AND EVEN IF A REMEDY SET FORTH HEREIN IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE.

12. General Terms

A. Waiver and Severability

The failure of Twitter to enforce any right or provision of these Terms will not be deemed a waiver of such right or provision. In the event that any provision of these Terms is held to be invalid or unenforceable, then that provision will

be limited or eliminated to the minimum extent necessary, and the remaining provisions of these Terms will remain in full force and effect.

B. Controlling Law and Jurisdiction

These Terms and any action related thereto will be governed by the laws of the State of California without regard to or application of its conflict of law provisions or your state or country of residence. All claims, legal proceedings or litigation arising in connection with the Services will be brought solely in the federal or state courts located in San Francisco County, California, United States, and you consent to the jurisdiction of and venue in such courts and waive any objection as to inconvenient forum.

If you are a federal, state, or local government entity in the United States using the Services in your official capacity and legally unable to accept the controlling law, jurisdiction or venue clauses above, then those clauses do not apply to you. For such U.S. federal government entities, these Terms and any action related thereto will be governed by the laws of the United States of America (without reference to conflict of laws) and, in the absence of federal law and to the extent permitted under federal law, the laws of the State of California (excluding choice of law).

C. Entire Agreement

These Terms, including the Twitter Rules for the Twitter Services, and our Privacy Policy are the entire and exclusive agreement between Twitter and you regarding the Services (excluding any services for which you have a separate agreement with Twitter that is explicitly in addition or in place of these Terms), and these Terms supersede and replace any prior agreements between Twitter and you regarding the Services. Other than members of the group of companies of which Twitter, Inc. is the parent, no other person or company will be third party beneficiaries to the Terms.

We may revise these Terms from time to time, the most current version will always be at twitter.com/tos. If the revision, in our sole discretion, is material we will notify you via an @Twitter update or e-mail to the email associated with your account. By continuing to access or use the Services after those revisions become effective, you agree to be bound by the revised Terms.

If you live in the United States, these Terms are an agreement between you and Twitter, Inc., 1355 Market Street, Suite 900, San Francisco, CA 94103 U.S.A. If you live outside the United States, your agreement is with Twitter International Company, an Irish company with its registered office at The Academy, 42 Pearse Street, Dublin 2, Ireland. If you have any questions about these Terms, please contact us.

Effective: May 18, 2015

Archive of Previous Terms

EXHIBIT 4

Signing up with Twitter

To create an account on the web:

1. Go to http://twitter.com and find the sign up box, or go directly to https://twitter.com/signup.
2. Enter your **full name**, **phone number**, and a **password**.
3. Click **Sign up for Twitter**.
4. In order to verify your phone number, we will send you an SMS text message with a code. Enter the verification code in the box provided. Learn more about having a phone number associated with your account here.
5. Once you've clicked **Sign up for Twitter**, you can select a **username** (usernames are unique identifiers on Twitter) — type your own or choose one we've suggested. We'll tell you if the username you want is available.
6. **Double-check** your name, phone number, password, and username.
7. Click **Create my account.**You may be asked to complete a Captcha to let us know that you're human.

Note: if you'd like to sign up with Twitter using an email address, you can do so via the "Use email instead" link at the bottom of the sign up page.

Tips for picking a username:

- Your **username** is the name your followers use when sending @replies, mentions, and direct messages.
- It will also form the URL of your Twitter profile page. We'll provide a few available suggestions when you sign up, but feel free to choose your own.
- **Please note**: You can change your username in your account settings at any time, as long as the new username is not already in use.
- Usernames **must be fewer than 15 characters** in length and cannot contain "admin" or "Twitter", in order to avoid brand confusion.

Important information about signing up with email address:

- **An email address can only be associated with one Twitter account at a time.**
- The email address you use on your Twitter account is not publicly visible to others on Twitter.
- We use the email you enter to confirm your new Twitter account. Be sure to enter an email address that you actively use and have access to. Check your inbox for a confirmation email to make sure you signed up for your account correctly.

First steps after you've created your account:

1. After signing up, follow a handful of accounts to create a customized stream of information on your home timeline. Following means you'll get that user's Tweets on your Twitter home timeline. You can unfollow anyone at any time. Find out how to follow news sources, friends, and more in our Finding people on Twitter article.

2. Read our Getting started with Twitter article.
3. Learn about using Twitter on your mobile phone.

Having trouble?

If you are signing up for an account using an older version of Internet Explorer (IE9 or earlier), you may be redirected to mobile.twitter.com to complete the sign-up. Learn more here.

For other tips and solutions to common problems, check out our troubleshooting articles.

Was this article helpful?

Tweet

EXHIBIT 5

Help Center

English Log in Sign up

How can we help?

HELP CENTER > POLICIES AND REPORTING > OUR POLICIES

Our policies

General policies

- Abusive behavior policy
- Twitter media policy
- The Twitter Rules
- Twitter's use of cookies and similar technologies
- Country withheld content
- Twitter API limits
- Twitter search rules and restrictions
- Fair Use
- Counterfeit goods policy
- Trademark policy
- Inactive account policy
- Username squatting policy
- Copyright and DMCA policy
- Child sexual exploitation policy
- Impersonation policy
- Private information posted on Twitter
- Parody, commentary, and fan account policy

Advertiser policies

Back

The Twitter Rules

Our goal is to provide a service that allows you to discover and receive content from sources that interest you as well as to share your content with others. We respect the ownership of the content that users share and each user is responsible for the content he or she provides. Because of these principles, we do not actively monitor and will not censor user content, except in limited circumstances described below.

Content Boundaries and Use of Twitter

In order to provide the Twitter service and the ability to communicate and stay connected with others, there are some limitations on the type of content that can be published with Twitter. These limitations comply with legal requirements and make Twitter a better experience for all. We may need to change these rules from time to time and reserve the right to do so. Please check back here to see the latest.

- **Impersonation**: You may not impersonate others through the Twitter service in a manner that does or is intended to mislead, confuse, or deceive others.
- **Trademark**: We reserve the right to reclaim usernames on behalf of businesses or individuals that hold legal claim or trademark on those usernames. Accounts using business names and/or logos to mislead others may be permanently suspended.
- **Private information**: You may not publish or post other people's private and confidential information, such as credit card numbers, street address or Social Security/National Identity numbers, without their express authorization and permission. You may not post intimate photos or videos that were taken or distributed without the subject's consent.
- **Violence and Threats**: You may not publish or post threats of violence against others or promote violence against others.
- **Copyright**: We will respond to clear and complete notices of alleged copyright infringement. Our copyright procedures are set forth in the Terms of Service.
- **Unlawful Use**: You may not use our service for any unlawful purposes or in furtherance of illegal activities. International users agree to comply with all local laws regarding online conduct and acceptable content.
- **Misuse of Twitter Badges**: You may not use badges, such as but not limited to the Promoted or Verified Twitter badge, unless provided by Twitter. Accounts using these badges as part of profile photos, header photos, background images, or in a way that falsely implies affiliation with Twitter may be suspended.

Abuse and Spam

Twitter strives to protect its users from abuse and spam. User abuse and technical abuse are not tolerated on Twitter.com, and may result in permanent suspension. Any accounts engaging in the activities specified below may be subject to permanent suspension.

- **Serial Accounts**: You may not create multiple accounts for disruptive or abusive purposes, or with overlapping use cases. Mass account creation may result in suspension of all related accounts. Please note that any violation of the Twitter Rules is cause for permanent suspension of all accounts.
- **Targeted Abuse**: You may not engage in targeted abuse or harassment. Some of the factors that we take into account when determining what conduct is considered to be targeted abuse or harassment are:
  - if you are sending messages to a user from multiple accounts;
  - if the sole purpose of your account is to send abusive messages to others;
  - if the reported behavior is one-sided or includes threats
- **Username Squatting**: You may not engage in username squatting. Accounts that are inactive for more than six months may also be removed without further notice. Some of the factors that we take into account when determining what conduct is considered to be username squatting are:
  - the number of accounts created
  - creating accounts for the purpose of preventing others from using those account names
  - creating accounts for the purpose of selling those accounts
  - using feeds of third-party content to update and maintain accounts under the names of those third parties
- **Invitation spam**: You may not use Twitter.com's address book contact import to send repeat, mass invitations.
- **Selling usernames**: You may not buy or sell Twitter usernames.
- **Malware/Phishing**: You may not publish or link to malicious content intended to damage or disrupt another user's browser or computer or to compromise a user's privacy.
- **Spam**: You may not use the Twitter service for the purpose of spamming anyone. What constitutes "spamming" will evolve as we respond to new tricks and tactics by spammers. Some of the factors that we take into account when determining what conduct is considered to be spamming are:
  - If you have followed and/or unfollowed large amounts of users in a short time period, particularly by automated means (aggressive following or follower churn);
  - If you repeatedly follow and unfollow people, whether to build followers or to garner more attention for your profile;
  - If your updates consist mainly of links, and not personal updates;
  - If a large number of people are blocking you;
  - If a large number of spam complaints have been filed against you;
  - If you post duplicate content over multiple accounts or multiple duplicate updates on one account;
  - If you post multiple unrelated updates to a topic using #, trending or popular topic, or promoted trend;
  - If you send large numbers of duplicate @replies or mentions;

- If you send large numbers of unsolicited @replies or mentions;
- If you add a large number of unrelated users to lists;
- If you repeatedly create false or misleading content;
- Randomly or aggressively following, favoriting or Retweeting Tweets;
- If you repeatedly post other users' account information as your own (bio, Tweets, url, etc.);
- If you post misleading links (e.g. affiliate links, links to malware/click jacking pages, etc.);
- Creating misleading accounts or account interactions;
- Selling or purchasing account interactions (such as selling or purchasing followers, Retweets, favorites, etc.);
- Using or promoting third-party services or apps that claim to get you more followers (such as follower trains, sites promising "more followers fast" or any other site that offers to automatically add followers to your account);

- **Graphic Content**: You may not use pornographic or excessively violent media in your profile image, header image, or background image.

Your account may be suspended for Terms of Service violations if any of the above is true. Please see our help pages on Following rules and best practices and Automation rules and best practices for a more detailed discussion of how the Rules apply to those particular account behaviors. Accounts created to replace suspended accounts will be permanently suspended.

Accounts engaging in any of these behaviors may be investigated for abuse. Accounts under investigation may be removed from Search for quality. Twitter reserves the right to immediately terminate your account without further notice in the event that, in its judgment, you violate these Rules or the Terms of Service.

We may revise these Rules from time to time; the most current version will always be at twitter.com/rules.

Have Questions?

Check out our complete list of articles outlining our policies, guidelines, and best practices.

To report an account for violation of the Twitter Rules, please use our forms.

EXHIBIT 6

S-1 1 d564001ds1.htm FORM S-1

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As filed with the Securities and Exchange Commission on October 3, 2013

Registration No. 333-

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM S-1
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

Twitter, Inc.
(Exact name of Registrant as specified in its charter)

Delaware	7370	20-8913779
(State or other jurisdiction of incorporation or organization)	(Primary Standard Industrial Classification Code Number)	(I.R.S. Employer Identification Number)

1355 Market Street, Suite 900
San Francisco, California 94103
(415) 222-9670

(Address, including zip code, and telephone number, including area code, of Registrant's principal executive offices)

Richard Costolo
Chief Executive Officer
Twitter, Inc.
1355 Market Street, Suite 900
San Francisco, California 94103
(415) 222-9670

(Name, address, including zip code, and telephone number, including area code, of agent for service)

Steven E. Bochner, Esq. Katharine A. Martin, Esq. Rezwan D. Pavri, Esq. Wilson Sonsini Goodrich & Rosati, P.C. 650 Page Mill Road Palo Alto, California 94304 (650) 493-9300	*Copies to:* Vijaya Gadde, Esq. Sean Edgett, Esq. Twitter, Inc. 1355 Market Street, Suite 900 San Francisco, California 94103 (415) 222-9670	Alan F. Denenberg, Esq. Davis Polk & Wardwell LLP 1600 El Camino Real Menlo Park, California 94025 (650) 752-2000

Approximate date of commencement of proposed sale to the public: As soon as practicable after this registration statement becomes effective.

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act, check the following box: ☐

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. ☐

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. ☐

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer	☐	Accelerated filer	☐
Non-accelerated filer	☒ (Do not check if a smaller reporting company)	Smaller reporting company	☐

CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to be Registered	Proposed Maximum Aggregate Offering Price[1][2]	Amount of Registration Fee
Common Stock, $0.000005 par value per share	$1,000,000,000	$128,800

(1) Estimated solely for the purpose of computing the amount of the registration fee pursuant to Rule 457(o) under the Securities Act of 1933, as amended.
(2) Includes the aggregate offering price of additional shares that the underwriters have the right to purchase from the Registrant, if any.

The Registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the Registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933 or until the registration statement shall become effective on such date as the Securities and Exchange Commission, acting pursuant to said Section 8(a), may determine.

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(ii) that the price of our common stock at the time of settlement was equal to $, which is the midpoint of the estimated offering price range set forth on the cover page of this prospectus, we estimate that this tax obligation on the initial settlement date would be approximately $ in the aggregate. The amount of this obligation could be higher or lower, depending on the price of shares of our common stock on the initial settlement date for the Pre-2013 RSUs. To settle these Pre-2013 RSUs on the initial settlement date, assuming a 40% tax withholding rate, if we choose to undertake a net settlement of all of these awards rather than allowing our employees who are not executive officers to sell shares of our common stock in the public market to satisfy their income tax obligations related to the vesting and settlement of Pre-2013 RSUs, we would expect to deliver an aggregate of approximately shares of our common stock to Pre-2013 RSU holders and withhold an aggregate of approximately shares of our common stock. In connection with these net settlements, we would withhold and remit the tax liabilities on behalf of the Pre-2013 RSU holders to the relevant tax authorities in cash.

If we choose to undertake a net settlement of our Pre-2013 RSUs, then in order to fund the tax withholding and remittance obligations on behalf of our Pre-2013 RSU holders, we would expect to use a substantial portion of our cash and cash equivalent balances, or, alternatively, we may choose to borrow funds or a combination of cash and borrowed funds to satisfy these obligations.

We may require additional capital to support our operations or the growth of our business, and we cannot be certain that this capital will be available on reasonable terms when required, or at all.

From time to time, we may need additional financing to operate or grow our business. Our ability to obtain additional financing, if and when required, will depend on investor and lender demand, our operating performance, the condition of the capital markets and other factors, and we cannot assure you that additional financing will be available to us on favorable terms when required, or at all. If we raise additional funds through the issuance of equity, equity-linked or debt securities, those securities may have rights, preferences or privileges senior to the rights of our common stock, and our existing stockholders may experience dilution. If we are unable to obtain adequate financing or financing on

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terms satisfactory to us when we require it, our ability to continue to support the operation or growth of our business could be significantly impaired and our operating results may be harmed.

We rely on assumptions and estimates to calculate certain of our key metrics, and real or perceived inaccuracies in such metrics may harm our reputation and negatively affect our business.

The numbers of our active users and timeline views are calculated using internal company data that has not been independently verified. While these numbers are based on what we believe to be reasonable calculations for the applicable period of measurement, there are inherent challenges in measuring usage and user engagement across our large user base around the world. For example, there are a number of false or spam accounts in existence on our platform. We currently estimate that false or spam accounts represent less than 5% of our MAUs. However, this estimate is based on an internal review of a sample of accounts and we apply significant judgment in making this determination. As such, our estimation of false or spam accounts may not accurately represent the actual number of such accounts, and the actual number of false or spam accounts could be higher than we have currently estimated. We are continually seeking to improve our ability to estimate the total number of spam accounts and eliminate them from the calculation of our active users, but we otherwise treat multiple accounts held by a single person or organization as multiple users for purposes of calculating our active users because we permit people and organizations to have more than one account. Additionally, some accounts used by organizations are used by many people within the organization. As such, the calculations of our active users may not accurately reflect the actual number of people or organizations using our platform.

Our metrics are also affected by mobile applications that automatically contact our servers for regular updates with no user action involved, and this activity can cause our system to count the user associated with such a device as an active user on the day such contact occurs. The calculations of MAUs presented in this prospectus may be affected by this activity. The impact of this automatic activity on our metrics varies by geography because mobile application usage varies in different regions of the world. In addition, our data regarding user geographic location is based on the IP address associated with the account when a user initially registered the account on Twitter. The IP address may not always accurately reflect a user's actual location at the time of user engagement on our platform.

We present and discuss timeline views in the six months ended June 30, 2012, but we did not track all of the timeline views on our mobile applications during the three months ended March 31, 2012. We have included in this prospectus estimates for actual timeline views in the three months ended March 31, 2012 for the mobile applications we did not track. We believe these

made. We undertake no obligation to update any forward-looking statements made in this prospectus to reflect events or circumstances after the date of this prospectus or to reflect new information or the occurrence of unanticipated events, except as required by law. We may not actually achieve the plans, intentions or expectations disclosed in our forward-looking statements and you should not place undue reliance on our forward-looking statements. Our forward-looking statements do not reflect the potential impact of any future acquisitions, mergers, dispositions, joint ventures or investments we may make.

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INDUSTRY DATA AND COMPANY METRICS

This prospectus contains estimates and information concerning our industry, including market size and growth rates of the markets in which we participate, that are based on industry publications and reports. This information involves a number of assumptions and limitations, and you are cautioned not to give undue weight to these estimates. We have not independently verified the accuracy or completeness of the data contained in these industry publications and reports. The industry in which we operate is subject to a high degree of uncertainty and risk due to variety of factors, including those described in the “Risk Factors” section. These and other factors could cause results to differ materially from those expressed in these publications and reports.

We review a number of metrics, including MAUs, timeline views, timeline views per MAU and advertising revenue per timeline view, to evaluate our business, measure our performance, identify trends affecting our business, formulate business plans and make strategic decisions. See the section titled “Management’s Discussion and Analysis of Financial Condition and Results of Operation—Key Metrics” for a discussion of how we calculate MAUs, timeline views, timeline views per MAU and advertising revenue per timeline view.

The numbers of active users and timeline views presented in this prospectus are based on internal company data. While these numbers are based on what we believe to be reasonable estimates for the applicable period of measurement, there are inherent challenges in measuring usage and user engagement across our large user base around the world. For example, there are a number of false or spam accounts in existence on our platform. We currently estimate that false or spam accounts represent less than 5% of our MAUs. However, this estimate is based on an internal review of a sample of accounts and we apply significant judgment in making this determination. As such, our estimation of false or spam accounts may not accurately represent the actual number of such accounts, and the actual number of false or spam accounts could be higher than we have currently estimated. We are continually seeking to improve our ability to estimate the total number of spam accounts and eliminate them from the calculation of our active users. For example, we made an improvement in our spam detection capabilities in the second quarter of 2013 and suspended a large number of accounts. Spam accounts that we have identified are not included in the active user numbers presented in this prospectus. We treat multiple accounts held by a single person or organization as multiple users for purposes of calculating our active users because we permit people and organizations to have more than one account. Additionally, some accounts used by organizations are used by many people within the organization. As such, the calculations of our active users may not accurately reflect the actual number of people or organizations using our platform.

Our metrics are also affected by applications that automatically contact our servers for regular updates with no user action involved, and this activity can cause our system to count the users associated with such applications as active users on the day or days such contact occurs. In the three months ended June 30, 2013, approximately seven percent of all active users used applications that have the capability to automatically contact our servers for regular updates. As such, the calculations of MAUs presented in this prospectus may be affected as a result of automated activity. We expect that the percentage of active users that use applications that have the capability to automatically contact our servers for regular updates will decline over time, particularly as usage of our mobile applications increases.

In addition, our data regarding user geographic location for purposes of reporting the geographic location of our MAUs is based on the IP address associated with the account when a user initially registered the account on Twitter. The IP address may not always accurately reflect a user’s actual location at the time of user engagement on our platform.

We present and discuss timeline views in the six months ended June 30, 2012, but we did not track all of the timeline views on our mobile applications during the three months ended March 31,

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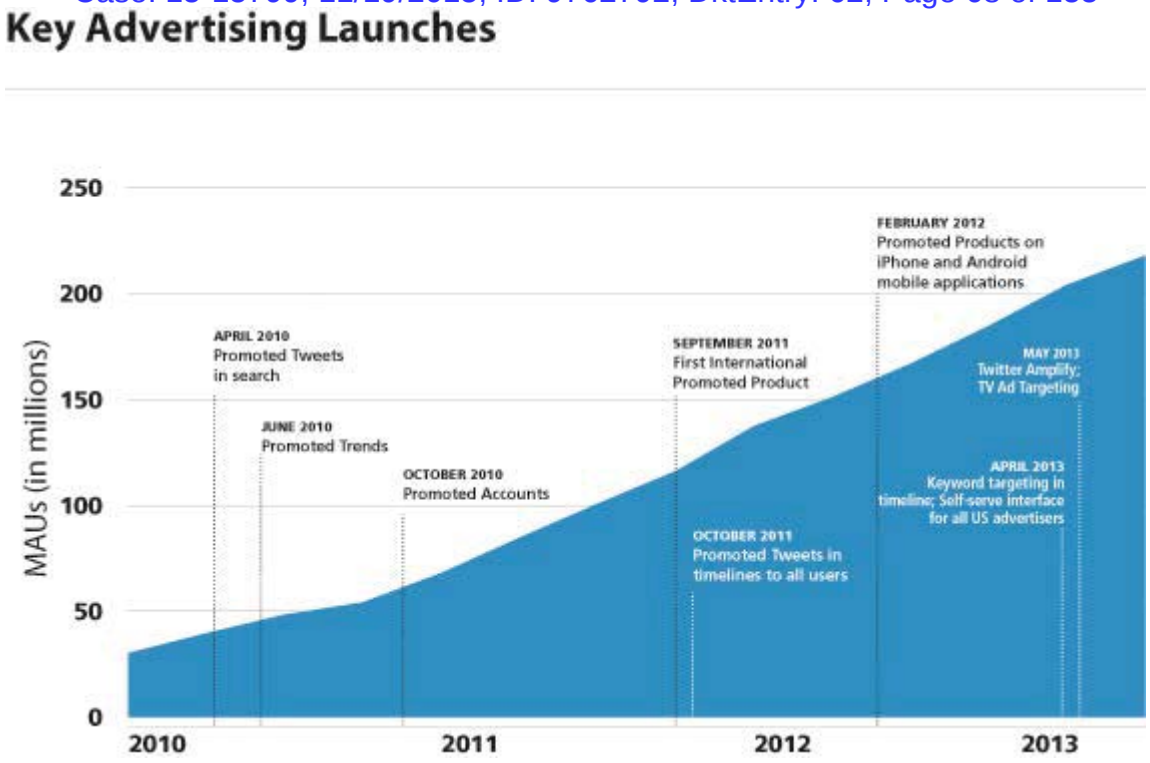

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Key Metrics

We review a number of metrics, including the following key metrics, to evaluate our business, measure our performance, identify trends affecting our business, formulate business plans and make strategic decisions:

Monthly Active Users (MAUs). We define MAUs as Twitter users who logged in and accessed Twitter through our website, mobile website, desktop or mobile applications, SMS or registered third-party applications or websites in the 30-day period ending on the date of measurement. Average MAUs for a period represent the average of the MAUs at the end of each month during the period. In the discussion of our results of operations we compare average MAUs for the last three months of each period discussed in such comparison. MAUs are a measure of the size of our active user base. In the three months ended June 30, 2013, we had 218.3 million average MAUs, which represents an increase of 44% from the three months ended June 30, 2012. In the three months ended June 30, 2013, we had 49.2 million average MAUs in the United States and 169.1 million average MAUs in the rest of the world, which represent increases of 35% and 47%, respectively, from the three months ended June 30, 2012. For additional information on how we calculate the number of MAUs and factors that can affect this metric, see the section titled “Industry Data and Company Metrics.”

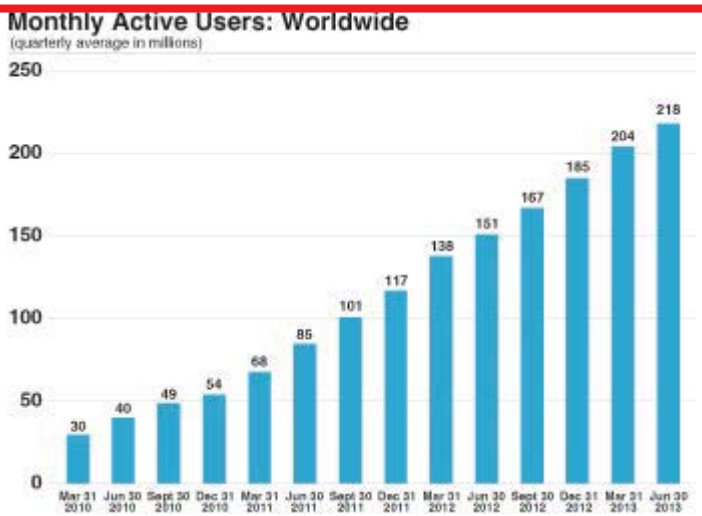


EXHIBIT 7

FAQs about verified accounts

What is a verified account?

Any account with a blue verified badge on their Twitter profile is a verified account.

Why does Twitter verify accounts?

Verification is currently used to establish authenticity of identities of key individuals and brands on Twitter.

What kinds of accounts get verified?

Twitter verifies accounts on an ongoing basis to make it easier for users to find who they're looking for. We concentrate on highly sought users in music, acting, fashion, government, politics, religion, journalism, media, sports, business and other key interest areas. We are constantly updating our requirements for verification. Note, verification does not factor in follower count or Tweet count.

We do not accept requests for verification from the general public. If you fall under one of the above categories and your Twitter account meets our qualifications for verification, we may contact you in the future.

Why hasn't my account been verified?

If you think you meet the criteria for verification and have not yet received a badge, please be patient. We are working within key interest areas to verify accounts that are sought after by other Twitter users. We don't accept verification requests from the general public, but we encourage you to continue using Twitter in a meaningful way, and you may be verified in the future. Please note that follower count is not a factor in determining whether an account meets our criteria for verification.

Besides verification, how can I show my account is authentic?

Linking to your Twitter profile from an official website is the easiest way to confirm the authenticity of your Twitter account. Including Twitter's follow button on your webpage is the absolute best way to do this. Click here to learn how. Or, visit all help articles about linking to your Twitter account from your blog or website here.

How to identify an official verified account:

- The verified badge will appear next to a user's name on their profile page. It will also appear next to a user's name in searches for people on Twitter.
- If the verified badge appears anywhere else on a user's profile page (such as in the avatar or the background) it is not a verified account.
- The verified badge cannot be used unless it is provided by Twitter. Accounts using a badge as part of profile pictures, background images or in any way implying false verification will be permanently suspended.
- The verified badge will have the same colour even if users have customised their profile page theme colours.

Why do I see two timeline options on verified profiles?

When visiting the profile of a verified user or advertiser, you will see two timeline options – with **All** or **No replies**. Some verified users like to reply to mentions from their many fans and followers, but these replies can crowd their profile timeline, making it hard to see their other Tweets that may be of more interest to you. By default, **No replies** is selected when you navigate to a verified user's profile. If you'd like to see that user's complete timeline, including their @replies, simply click **All**.

Do verified accounts have access to extra features?

Yes, verified account holders have access to the following extra features:

- Verified account holders have access to filters in the **Notifications** page that let them display their **Notifications** via one of three options: **All** (default), **Mentions** and **Verified**.
- Visitors to verified account profile pages can select between two timeline options: **No replies** or **All**. **No replies**, which is the default setting, displays Tweets that are not direct @ replies to fans or followers. **All** displays every Tweet, including @ replies.
- Verified account holders have access to account analytics, including data and characteristics about Tweet engagement and followers.
- Verified account holders can elect to opt out of Group Direct Messages via the Security and Privacy settings page on Twitter.com.

How do Vine accounts get verified?

If a Vine account is linked to a verified Twitter account, the Vine account will automatically be verified.

To link a verified Twitter account to a Vine account:

1. Sign in to the Vine mobile app
2. Navigate to **Profile** and select **Settings**
3. Disconnect the current Twitter connection (if there is one) and then reconnect to the verified account

Can an account lose its verified status?

Changing certain profile information (such as the @ username or protecting Tweets) will result in the removal of a verified badge. That account will automatically be reviewed again to ensure it is eligible for verification.

An account may also lose its verified status if it violates the Twitter Rules or Terms of Service.

Previously verified accounts may not be eligible to have their badges restored.

Was this article helpful?

Tweet

EXHIBIT 8

Safe Tweeting: the basics

Keeping your account secure

We want Twitter to be a safe and open community. This help page provides some information and tips to help you practice safe Tweeting and keep your account secure. Here are some basics:

- Use a strong password.
- Use login verification.
- Watch out for suspicious links, and always make sure you're on Twitter.com before you enter your login information.
- Never give your username and password out to untrusted third parties, especially those promising to get you followers or make you money.
- Make sure your computer and operating system is up-to-date with the most recent patches, upgrades, and anti-virus software.

We're working to improve our responses to security threats, but user accounts and computers can sometimes become compromised by phishing, hacks, or viruses. If you think your account has been compromised, please visit our help page for compromised accounts to find out how to fix it quickly!

You can help protect your account by following some easy precautions, discussed below.

Use a strong and unique password

In addition to creating a secure Twitter account password, **you should also do the same for your email address associated with your Twitter account.**

Do's:

- **Do** create a password at least 10 characters long. Longer is better.
- **Do** use use a mix of uppercase, lowercase, numbers, and symbols.
- **Do** use a different password for each website you visit.
- **Do** keep your password in a safe place. Consider using password management software to store all of your login information securely.

Don'ts:

- **Do not** use personal information in your password such as phone numbers, birthdays, etc.
- **Do not** use common dictionary words such as "password", "iloveyou", etc.
- **Do not** use sequences such as "abcd1234", or keyboard sequences like "qwerty".
- **Do not** reuse passwords across websites. Your Twitter account password should be unique to Twitter.

Additionally, you can select **"Require personal information to reset my password"** in your Security and privacy settings. If you check this box, you will be prompted to enter your e-mail address or phone number to reset your password if you ever forget it.

For more info on selecting a secure password, check out these password tips from Google.

Use login verification

Login verification is a feature that helps you keep your account more secure. Instead of relying on just a password, login verification introduces a second check to make sure that you and only you can access your Twitter account. Only people who have access to both your password and your phone will be able to log in to your account.

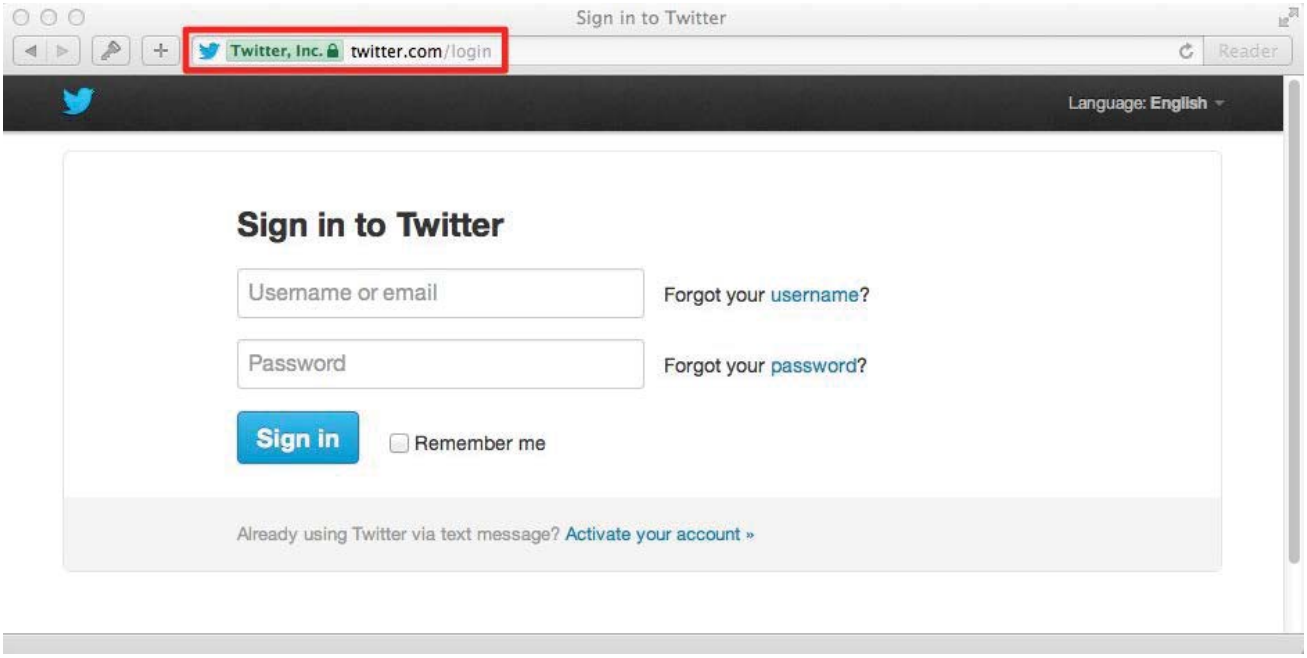
For help setting up login verification on your account, visit our article about using login verification.

Always check that you're at twitter.com before logging in

Phishing is when someone tries to trick you into giving up your Twitter or email username and password, usually so they can send out spam to all your followers from your account. Often, they'll try to trick you with a link that goes to a fake login page.

Be wary of weird links in DMs: Be cautious when clicking on odd links in DMs. Even if the link came from a friend, it's possible that their account was compromised and the URL was actually sent out by a spammer.

Make sure you're on Twitter.com before logging in: Whenever you are prompted to enter your Twitter password, just take a quick look at the URL and make sure you're actually on Twitter.com.



You can find the URL in the address bar of your browser. Twitter domains will always have the http://twitter.com/ as the base domain. Here are some examples of Twitter login pages:

- https://twitter.com
- https://twitter.com/login

Phishing websites will often look just like Twitter's login page, but will actually be a website that is not Twitter. Here are some examples of URLs that are **NOT** Twitter pages:

- http://twitter.example.com
- http://twitter.photobucket.example.com
- http://twitter.com@example.com

If you think you may have been phished, change your password as soon as possible and visit this help page for compromised accounts.

Log in directly at Twitter.com if you're unsure: If you're ever uncertain of a website, just type Twitter.com into your browser bar, hit enter, and log in directly from our homepage.

We won't contact you asking for your password

Twitter will never ask you to provide your password via email, direct message, or @reply.

We will never ask you to download something or sign-in to a non-Twitter website. Never open an attachment or install any software from an email that claims to be from us; it's not.

If we suspect your account has been phished or hacked, we may reset your password to prevent the hacker from misusing your account. In this case, we'll email you a link to where you can reset your password. Again, this link will always be on the http://twitter.com/ website, and we will never ask you to provide your password via email, direct message, or @reply.

If you forget your password, you can reset it yourself at this link.

Tip: If you're getting password reset emails you didn't request, you might consider verifying a phone with your account to prevent other users from mistakenly typing your username into our password reset form. We always ask for phone number confirmation before we send any user-requested password reset emails.

Evaluating links on Twitter

Lots of links are shared on Twitter, and many are posted with URL shorteners. URL shorteners, like bit.ly or TinyURL, create unique, shortened links that redirect to your longer link so it can be more easily shared. URL shorteners can also obscure the end domain, making it difficult to tell where the link goes to.

Some browsers have free plug-ins that will show you the extended URLs without you having to click on them. Here are links to plug-ins for Internet Explorer and Firefox (which is a free-to-download browser):

- URL Expanders for Internet Explorer
- URL Expanders for Firefox

In general, please use caution when clicking on links. If you click on a link and find yourself unexpectedly on a page that resembles the Twitter login page, don't give up your username and password! Just type in Twitter.com into your browser bar and log in directly from the Twitter homepage.

Keep your computer and browser up-to-date and virus-free

Keep your browser and Operating System updated with the most current versions and patches; patches are often released to address particular security threats. Be sure to also scan your computer regularly for viruses, spyware, and

adware.

If you're using a public computer, like at a library or school, make sure you always sign out of Twitter when you're done (there's a "Sign Out" link in the upper right of the site).

Assist any compromised friends and followers

If you get a weird link from a follower that you think is a phishing site or a spam site, reach out and suggest they change their password right away. You can also send them to the help page for compromised accounts so they can get more information.

Select third-party applications with care

There are lots of third-party programs and applications you can use with your Twitter accounts. These applications are built on the Twitter platform by external developers and allow you to do an array of neat things with your account. However, you should be cautious before giving up control of your account to someone else.

There are two ways to grant an application access to your account. The first is a secure protocol called OAuth. This is our recommended connection method and doesn't require you to give out your username and password. The other way to connect requires you to give your Twitter username and password and is called Basic Authentication. You can find out more about OAuth and Basic Authentication on our Connecting to Third-Party Application help page.

You should be particularly cautious when you're asked to give your username and password to an application or website. When you give your username and password to someone else, they have complete control of your account and can lock you out or take actions that cause your account to be suspended. Be wary of any application that promises to make you money or get you followers. If it sounds too good to be true, it probably is!

Some legitimate applications do ask for your username and password. These include installed applications you use for tweeting from your desktop or mobile phone. Just be sure to research applications thoroughly before providing account access.

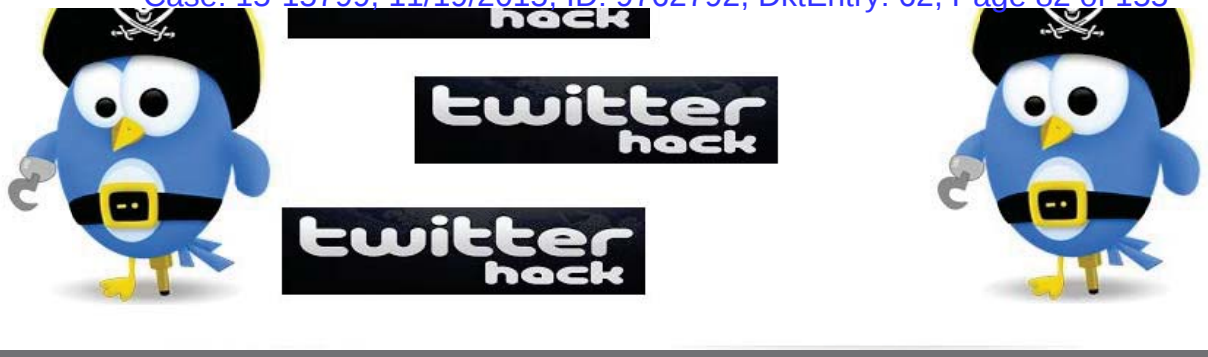
Revoke access for any third-party application that you don't recognize by visiting the Applications tab in Account Settings.

EXHIBIT 9

twitter hack

Tweet 235 101 Like Like 1.3k

Our updated Twitter Hack Tools (Updated Nov 2015) provides fast and effective ways to recover your twitter account or to even steal someones twitter account password by using some undetected exploit codes sent through the twitter recover services.



Hack twitter and hacking twitter passwords from their user accounts or find out someones twitter password...Do you think this is possible? We can tell you...

Yes it is!
For sure you have heard a while ago about how President Obama's twitter password got hacked or the hacks of a few other celebrities twitter accounts. This is all possible due to the poor programming/coding of twitter.
And the many errors twitter got makes it possible to exploit their codes.

It's a few months ago when i tried to check a old Twitter account but when i tried to login i couldn't remeber the damn password anymore ...nor i could remeber my email I used for this account so i sent an recovery email to the twitter technical support ...but if you ever have tried this you know they may or may not reply in my case they didn't reply so I decided to get together my highly skilled hacker friends and find a good way to get that account login information back. This is how it started... after several versions we finished our 100% undetectable twitter account hacking exploit auto tool so anybody who got the same problem and doesn't get a response by twitter will now be able to recover any twitter account password again..

The Twitter platform has got two major databases (they are divided in one for male users and one for female users) where all the account informations of their users is stored, because of this you can use the 'Forgot your password?' option if you remember the email you used to login to this twitter account but forget your twitter password... but what if you do not have any of that information anymore... it's impossible to legally recover that accounts.
If you know anything about programming websites you know the 'Forgot your password?' service has to be in direct contact with the databases in order to send requests to retrieve the forgotten information for you, basically what that means is if you 'ask' the database for the login information with the right 'code' (in our case exploit), it will send you back that information.
So all I had to figure out is what the code was and what system they used to contact the databases through the 'Forgot your password?' service, after a few weeks of writing and testing codes I came up with the right one for the job and after doing a bit of research I learned Twitter uses something similar to an email service to contact their databases.
But as usual, everything isn't as easy as it seems. For security reasons the databases are programmed to verify the account your requesting is actually yours and not someone elses so they need some type of authentication or verification.
With this knowledge we started to code our unique undetectable twitter account recovery hack tools which do all the needed stuff automatically.

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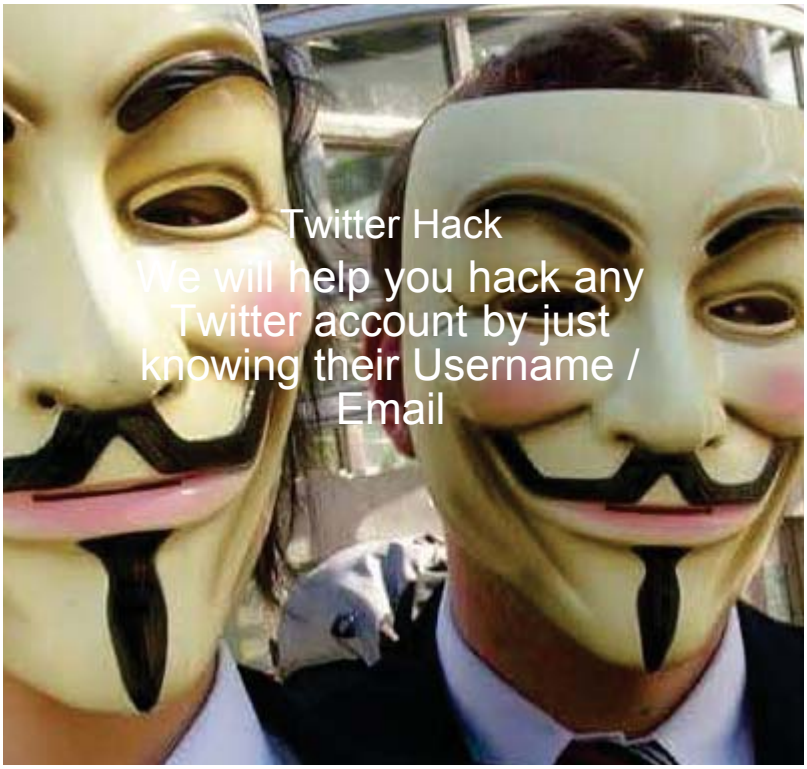

Twitter Hack – Learn How to Hack a Twitter Account Easily

Hello People,

Welcome to the only website on the internet offering **FREE Twitter Hack** without any tool downloads.

You may wonder why people hack twitter accounts?

The answer is ***simple***.

There are various reason as to why one would want to hack another person's Twitter account.

1. Parents might want to see what their kids are doing online to monitor them.

2. A boyfriend or girlfriend might want to see what their counterpart is doing behind their back.

3. A husband would want to check if his wife is faithful or vice-versa.

Today in the world of Internet, social media has become one of the most trending thing for people of every age. Many people share their deepest and darkest secrets, interests, hobbies, likes and dislikes with their friends. And this is the reason why people want access to others account to know everything about them.

There are loads of scam sites out there that claim they can hack twitter accounts for money, or let you download “free hacking tools” that are actually designed to steal your own passwords or to load bot-net and viruses on your computer and such sites should be highly avoided.

So our team came up with this unique idea for ***hacking twitter accounts*** without any hacking software download or asking for money.

We will help you hack any twitter account by just knowing their ***twitter username*** or ***twitter email***.

How our Twitter Hack works??

Step 1: Social Engineering

Our servers have access to thousands of travel/entertainment/affiliate marketing websites which save username, email address and passwords of their client.

You might think how many users are registered on these sites. You will be surprised to know that around 85% of all the people who use internet are registered to one or more of these sites. And it's not just them, even big companies like Facebook and Google provides these companies with the details of their users for advertisement as there is big money involved in it.
So what our server does is to check all those databases for a hit on the username / email address you provide because almost all the times the people use the same email-password combination for many of their accounts. If we find a hit we provide you with their password.

This method works for almost 91% of the requests we receive.

Step 2: Brute Force Hacking

The system will process thousands of common password variations of keywords on their profile page. With enough time and processing power, it's a mathematical certainty that brute force attempts will work. Usually, the main login page will block these attacks, but the security holes in the login fields allows us to bypass it. Suppose the victims have a 12-digit password on

their account. This would take a normal computer with 3Ghz CPU around 3 years to hack. But with our specially designed brute force servers with more than 30,000 cuda cores (each doing millions of password match each second) it would take less than 10 second to break this code.

Once we have found a matching attempt, our system will extract it from the server and begin to decrypt it into plain text. Each hacked twitter password is stored in an encrypted form known as MD5 salted hash. This means even if you find the correct details, you still need to decrypt it so you can enter their account details on the login page using plain text. We do this automatically for you.

Our algorithm for generic brute force rely heavily on social engineering. So kindly like our social pages. If the person is in your friend list or is connected to you in some way, this would highly increase the chance of a correct hit.

So what are you waiting for?

Simply ***Enter*** the **Twitter Username** / **Email id** of your victim and let us hack it for you.

Enter Twitter Username (without@) / Email Id below: (*Required)

Hack Password!!

Our project is growing and we hope you will like it. We will be glad to hear your opinions and thoughts on how to make the project better. We are the only Organization that provide ***Twitter Hack for FREE****. Note: Only for Educational Purposes. We take no liability. Do LIKE US on Facebook to get updates on more fun apps and hacks*

Kindly share our website in any social media using the sidebar on your left. This is the only thing we ask from you in return. 🙂

EXHIBIT 10

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

----oo0oo----

UNITED STATES OF AMERICA, Plaintiff, v. SIERRA PACIFIC INDUSTRIES, et al., Defendants, AND ALL RELATED CROSS-ACTIONS.	CIV. NO. 2:09-02445 WBS AC MEMORANDUM AND ORDER

----oo0oo----

After reaching a settlement with the government and requesting the court to enter judgment pursuant to that settlement almost two years ago, defendants Sierra Pacific Industries, Howell's Forest Harvesting Company, and fifteen individuals and/or trusts who own land in the Sierra Nevada mountains (referred to collectively as "defendants") now move to set aside that judgment based upon "fraud on the court."

I. Brief Factual and Procedural Background

On September 3, 2007, a fire ignited on private property near the Plumas National Forest. The fire, which became known as the Moonlight Fire, burned for over two weeks and ultimately spread to 46,000 acres of the Plumas and Lassen National Forests. The day after the fire started, California Department of Forestry and Fire Protection ("Cal Fire") investigator Joshua White and United States Forest Service ("USFS") investigator David Reynolds sought to determine the cause of the fire. As a result of the joint investigation, Cal Fire and the USFS ultimately issued the "Origin and Cause Investigation Report, Moonlight Fire" ("Joint Report"). The Joint Report concluded that the Moonlight Fire was caused by a rock striking the grouser or front blade of a bulldozer operated by an employee of defendant Howell's Forest Harvesting Company. After winning a bid to harvest timber on the private property, Sierra Pacific Industries had hired that company to conduct logging operations in the area.

On August 9, 2009, the Office of the California Attorney General filed an action in state court on behalf of Cal Fire to recover its damages caused by the Moonlight Fire (the "state action"). That same month, on August 31, 2009, the United States Attorney filed this action on behalf of the United States to recover its damages caused by the Moonlight Fire (the "federal action"). The two cases proceeded independently, but the

government[1] and Cal Fire operated pursuant to a joint prosecution agreement.

To say that this case was litigated aggressively and exhaustively by all parties would be an understatement. When the court entered judgment almost two years ago, the docket had almost six hundred entries, which included contentious discovery motions and voluminous dispositive motions. Almost three years after the federal action commenced, it was set to proceed to jury trial on July 9, 2012 before Judge Mueller and was expected to last no more than thirty court days. Three days before trial, the parties voluntarily participated in a settlement conference and reached a settlement agreement.

Under the terms of the settlement agreement, Sierra Pacific Industries agreed to pay the government $47 million, Howell's Forest Harvesting Company agreed to pay the government $1 million, and other defendants agreed to pay the government $7 million. (Settlement Agreement & Stipulation ¶ 25 (Docket No. 592).) Sierra Pacific Industries also agreed to convey 22,500 acres of land to the government. (Id.) At the request of the parties and pursuant to the settlement agreement, the court dismissed the case with prejudice on July 18, 2012 and directed the clerk to enter final judgment in the case. (Id.)

More than two years later, on October 9, 2014, defendants filed the pending motion to set aside that judgment.

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[1] All references to the "government" in this Order refer to the United States government and, where appropriate, the Assistant United States Attorneys who represented the government in this case.

After Judge Mueller recused herself, the case was reassigned to the undersigned judge. After conferring with the parties, the court required limited briefing addressing the threshold issue of whether the alleged conduct giving rise to defendants' motion constitutes "fraud on the court." The court now addresses that limited issue.

II. Legal Standards

A. Federal Rule of Civil Procedure 60

To preserve the finality of judgments, the Federal Rules of Civil Procedure limit a party's ability to seek relief from a final judgment. Rule 60(b) enumerates six grounds under which a court may relieve a party from a final judgment:

> (1) mistake, inadvertence, surprise, or excusable neglect;
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> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). A motion seeking relief from a final judgment under Rule 60(b) must be made "within a reasonable time" and any motion under one of the first three grounds for relief must be made "no more than a year after the entry of the judgment." Id. R. 60(c)(1). Defendants concede that any motion under Rule 60(b) in this case would be barred as untimely because

it would rely on one or more of the first three grounds for relief but was not filed within a year of the entry of final judgment.

Despite the limitations in Rule 60(b), "[c]ourts have inherent equity power to vacate judgments obtained by fraud." United States v. Estate of Stonehill, 660 F.3d 415, 443 (9th Cir. 2011) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991)). Rule 60(d)(3) preserves this inherent power and recognizes that Rule 60 does not "limit a court's power to . . . set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3); accord Appling v. State Farm Mut. Auto. Ins. Co., 340 F.3d 769, 780 (9th Cir. 2003) ("Federal Rule of Civil Procedure 60(b) preserves the district court's right to hear an independent action to set aside a judgment for fraud on the court."); Estate of Stonehill, 660 F.3d at 443 ("Rule 60(b), which governs relief from a judgment or order, provides no time limit on courts' power to set aside judgments based on a finding of fraud on the court.").[2] Because defendants failed to file a timely Rule 60(b) motion, they are forced to argue that the judgment in this case

[2] Prior to the amendments to the Federal Rules of Civil Procedure in 2007, the savings clause for fraud on the court was contained in Rule 60(b), thus courts referred to Rule 60(b) as preserving a court's inherent power to set aside a final judgment for fraud on the court. As part of the stylistic amendments in 2007, the savings clause language was moved from subsection (b) to subsection (d)(3). Compare Fed. R. Civ. P. 60(b) (2006) ("This rule does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud on the court."), with Fed. R. Civ. P. 60(d)(3) (amended 2007) ("This rule does not limit a court's power to: . . . (3) set aside a judgment for fraud on the court."); see also Fed. R. Civ. P. 60 (2007 amendments cmt.) ("The language of Rule 60 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.").

should be set aside for fraud on the court, and the court must assess defendants' allegations under this narrowly defined term.

B. Definition of "Fraud on the Court"

The Supreme Court has "justified the 'historic power of equity to set aside fraudulently begotten judgments' on the basis that 'tampering with the administration of justice . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public.'" In re Levander, 180 F.3d 1114, 1118 (9th Cir. 1999) (quoting Chambers, 501 U.S. at 44). Still, "[a] court must exercise its inherent powers with restraint and discretion in light of their potency." Id. at 1119.

Relief for fraud on the court must be "reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata." United States v. Beggerly, 524 U.S. 38, 46 (1998) (quoting Hazel–Atlas Glass Co. v. Hartford–Empire Co., 322 U.S. 238, 244 (1944), overruled on other grounds by Standard Oil Co. v. United States, 429 U.S. 17 (1976)). The Ninth Circuit has repeatedly emphasized that "[e]xceptions which would allow final decisions to be reconsidered must be construed narrowly in order to preserve the finality of judgments." Abatti v. Comm'r of the I.R.S., 859 F.2d 115, 119 (9th Cir. 1988); see also Appling, 340 F.3d at 780; Dixon v. C.I.R., 316 F.3d 1041, 1046 (9th Cir. 2003).

Fraud on the court "'embrace[s] only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial

machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.'" Appling, 340 F.3d at 780 (quoting In re Levander, 180 F.3d at 119) (alteration in original). A finding of fraud on the court "must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1131 (9th Cir. 1995) (internal quotations marks omitted); see also Appling, 340 F.3d at 780 ("Fraud on the court requires a 'grave miscarriage of justice,' and a fraud that is aimed at the court." (quoting Beggerly, 524 U.S. at 47)).

"In determining whether fraud constitutes fraud on the court, the relevant inquiry is not whether fraudulent conduct 'prejudiced the opposing party,' but whether it '"harm[ed]" the integrity of the judicial process.'" Estate of Stonehill, 660 F.3d at 444 (quoting Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989)); see also Estate of Stonehill, 660 F.3d at 444 ("Fraud on the court involves 'far more than an injury to a single litigant . . . .'" (quoting Hazel-Atlas Glass Co., 322 U.S. at 246)). Although "one of the concerns underlying the 'fraud on the court' exception is that such fraud prevents the opposing party from fully and fairly presenting his case," this showing alone is not sufficient. Abatti, 859 F.2d at 119; see also Abatti, 859 F.2d at 118 ("[W]e have said that it may occur when the acts of a party prevent his adversary from fully and fairly presenting his case or defense. . . . Fraud on the court must involve 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" (quoting

Toscano v. Comm'r of the I.R.S., 441 F.2d 930, 934 (9th Cir. 1971) (internal citation omitted) (emphasis added)). At the same time, a showing of prejudice to the party seeking relief is not required. Dixon, 316 F.3d at 1046.

"Non-disclosure, or perjury by a party or witness, does not, by itself, amount to fraud on the court." Appling, 340 F.3d at 780; accord In re Levander, 180 F.3d at 1119 ("Generally, non-disclosure by itself does not constitute fraud on the court. . . . Similarly, perjury by a party or witness, by itself, is not normally fraud on the court."); see also Hazel-Atlas Glass Co., 322 U.S. at 245 ("This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury.").

The Supreme Court has held that a party's failure to "thoroughly search its records and make full disclosure to the Court" does not amount to fraud on the court. Beggerly, 524 U.S. at 47 (internal quotation marks omitted); see also Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 641 (C.D. Cal. 1978), adopted as the opinion of the Ninth Circuit in 645 F.2d 699, 700 (9th Cir. 1981) ("[N]ondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.").

Non-disclosure by an officer of the court or perjury by or suborned by an officer of the court may amount to fraud on the court only if it was "so fundamental that it undermined the workings of the adversary process itself." Estate of Stonehill, 660 F.3d at 445; see also 11 Charles Alan Wright, Arthur R.

Miller, Mary Kay Kane, Richard L. Marcus & Adam N. Steinman, Federal Practice and Procedure § 2870 (3d ed. 2014) ("[T]here is a powerful distinction between perjury to which an attorney is a party and that with which no attorney is involved. . . . [W]hether perjury constitutes a fraud on the court should depend on whether an attorney or other officer of the court was a party to it."). Non-disclosure by an officer of the court, however, does not rise to this level if it had a "limited effect on the district court's decision" and the withheld information would not have "significantly changed the information available to the district court." Estate of Stonehill, 660 F.3d at 446.

As the Ninth Circuit has recognized, "the term 'fraud on the court' remains a 'nebulous concept.'" In re Levander, 180 F.3d at 1119 (quoting Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080, 1085 (Fed. Cir. 1993)). Nonetheless, it "places a high burden on [the party] seeking relief from a judgment," Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d 1097, 1104 (9th Cir. 2006), and the party seeking relief must prove fraud on the court by clear and convincing evidence, Estate of Stonehill, 660 F.3d at 443-44.

C. Inapplicability of *Brady v. Maryland*

Relying on Brady v. Maryland, 373 U.S. 83 (1963), defendants argue that the government is held to a higher standard than non-government parties not just in criminal cases but in civil cases as well.[3] In Brady, the Supreme Court held that "the

[3] Some of defendants' arguments come within Giglio v. United States, 405 U.S. 150 (1972), as the non-disclosures may have contained impeachment, not exculpatory, evidence. The court's discussion of Brady in this Order extends equally to

suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Its holding relied on the rights of a criminal defendant under the Due Process Clause of the Fourteenth Amendment and the "avoidance of an unfair trial to the accused." Id.; see also Lisenba v. California, 314 U.S. 219, 236 (1941) ("As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.").

"'Due process is a flexible concept, and its procedural protections will vary depending on the particular deprivation involved.'" Goichman v. Rheuban Motors, Inc., 682 F.2d 1320, 1324 (9th Cir. 1982) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)); see also Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (identifying the first consideration in the procedural due process inquiry as "the private interest that will be affected by the official action").[4] In a criminal case, the government is

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consideration of the government's heightened disclosure obligations in a criminal case under Giglio.

[4] The Supreme Court has not yet indicated whether Brady derives from a criminal defendant's procedural or substantive due process rights. See Castellano v. Fragozo, 352 F.3d 939, 968 (5th Cir. 2003) (discussing the differing views expressed in Albright v. Oliver, 510 U.S. 266 (1994)); see also Martin A. Schwartz, The Supreme Court's Unfortunate Narrowing of the Section 1983 Remedy for Brady Violations, 37-MAY Champion 58, 59 (May 2013) ("The Supreme Court has never definitively held whether Brady is based on substantive or procedural due process."). The court need not resolve this issue because the differences between criminal and civil cases would render Brady inapplicable to civil cases regardless of whether its protections

seeking to deprive a defendant, who is presumed to be innocent, of his liberty. The "'requirement of due process . . . in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.'" Mooney v. Holohan, 294 U.S. 103, 112 (1935). In contrast to a criminal case where there is a potential loss of liberty, a civil action such as this is strictly about money. Except that the government happens to be the plaintiff, this case is no different from any other civil case in which one party pursues recovery of damages allegedly caused by the other party. The government did not seek to deprive any defendant in this case of liberty or impose any other consequences akin to a criminal conviction.[5] It therefore stands

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derive from the procedural or substantive components of the Due Process Clause. Here, defendants rely exclusively on the protections of procedural due process in arguing that Brady applies to this civil case. (See Defs.' Reply at 56:1-17 (applying the procedural due process balancing test from Mathews, 424 U.S. 319).)

[5] Defendants suggest that this case had criminal implications because the government's Second Amended Complaint relied on 36 C.F.R. § 261.5(c) and California Public Resources Code section 4435.

Section 4435 provides:

> If any fire originates from the operation or use of any engine, machine, barbecue, incinerator, railroad rolling stock, chimney, or any other device which may kindle a fire, the occurrence of the fire is prima facie evidence of negligence in the maintenance, operation, or use of such engine, machine, barbecue, incinerator, railroad rolling stock, chimney, or other device. If such fire escapes from the place where it originated and it can be determined which person's negligence caused such fire, such person is guilty of

to reason that Brady has no application in civil cases such as this.

The differences between discovery in criminal and civil cases also underscore the need for Brady only in criminal cases. In a criminal case, a defendant is "entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified." Degen v. United States, 517 U.S. 820, 825 (1996). A defendant in a civil

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a misdemeanor.

Cal. Pub. Res. Code § 4435. In their Second Amended Complaint, the government did not assert a claim under section 4435, but relied on that section to generally allege that the ignition of the fire was prima facie evidence of defendants' negligence. (See Second Am. Compl. ¶¶ 26-27.) Similarly, in denying defendants' motion for summary judgment as to prima facie negligence, Judge Mueller regarded section 4435 as relevant to the burdens at trial, not as an independent claim. (See May 31, 2012 Order at 17:4-18:12 (Docket No. 485) (discussing section 4435 and concluding that defendants will have the "burden at trial to present sufficient evidence that the bulldozer was not negligently maintained, operated, or used").) The government did not seek to hold any of the individual defendants liable for a violation of section 4435 and could not have pursued a state law misdemeanor charge in federal court.

Section 261.5(c) prohibits "[c]ausing timber, trees, slash, brush or grass to burn except as authorized by permit." 36 C.F.R. § 261.5(c). Under § 261.1b, "[a]ny violation of the prohibitions of this part (261) shall be punished by a fine of not more than $500 or imprisonment for not more than six months or both pursuant to title 16 U.S.C., section 551, unless otherwise provided." Id. § 261.1b. The government relied on § 261.5(c) in its Second Amended Complaint only to allege that "[c]ausing timber, trees, brush, or grass to burn except as authorized by permit is prohibited by law." (Second Am. Compl. ¶ 29.) The government did not, and could not, pursue the criminal fine or imprisonment contemplated by § 261.5(c) in this civil case. Judge Mueller also found that § 261.5(c) was inapplicable to this case because the fire did not start on federally-owned land and entered judgment in favor of defendants on the government's state law claims "insofar as plaintiff relies on 36 C.F.R. § 261.5(c) for the underlying violation of law." (May 31, 2012 Order at 19:1-20:2.)

case, on the other hand, is "entitled as a general matter to discovery of any information sought if it appears 'reasonably calculated to lead to the discovery of admissible evidence.'" Id. at 825-26. The Supreme Court has explained that "[t]he Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees." Nelson v. Adams USA, Inc., 529 U.S. 460, 465 (2000). The expansive right to discovery in civil cases and the Federal Rules of Civil Procedure thus provided defendants with constitutionally adequate process to mount an effective and meaningful defense to this civil action.

Defendants have not cited and this court is not aware of a single case from the Supreme Court or Ninth Circuit applying Brady to a civil case.[6] In fact, all of the Supreme Court and Ninth Circuit cases defendants rely on for this proposition are cases assessing the conduct of prosecutors[7] in criminal cases. (See Defs.' Revised Supplemental Briefing at 3, 19-20 (Docket No. 625-1) ("Defs.' Br.") (relying on Youngblood v. West Virginia,

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[6] In Pavlik v. United States, the Ninth Circuit "assume[d], without deciding, that the principle enunciated in Brady v. Maryland applies in the context of [National Oceanic and Atmospheric Administration] civil penalty proceedings." 951 F.2d 220, 225 n.5 (9th Cir. 1991).

[7] In what cannot have been an inadvertent choice, defendants exclusively refer to the government attorneys in this case as "prosecutors." Referring to the plaintiff's attorneys in a civil case as prosecutors may be technically correct, particularly where, as here, the government entered into a "joint prosecution agreement." In practice, however, the term "prosecutors" is generally used to describe government attorneys in criminal cases. More importantly, referring to the government attorneys in this case as prosecutors does not convert them into criminal prosecutors within the meaning of Brady.

547 U.S. 867, 869-70 (2006) (criminal case addressing Brady); Kyles v. Whitley, 514 U.S. 419, 438 (1995) (habeas petition based on Brady violation); United States v. Young, 470 U.S. 1, 25-26 (1985) (Brennan, J., concurring) (criminal case addressing prosecutorial misconduct); Imbler v. Pachtman, 424 U.S. 409, 424 (1976) (discussing prosecutorial immunity in suits under 42 U.S.C. § 1983); Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (emphasis added)); Tennison v. City & County of San Francisco, 570 F.3d 1078, 1087 (9th Cir. 2009) (42 U.S.C. § 1983 claim based on Brady violations in underlying criminal case); Morris v. Ylst, 447 F.3d 735, 744 (9th Cir. 2006) (criminal case addressing Brady and prosecutor's duty to investigate suspected perjury); United States v. Chu, 5 F.3d 1244, 1249 (9th Cir. 1993) (criminal case addressing prosecutorial misconduct in questioning of witness); Benn v. Lambert, 283 F.3d 1040, 1062 (9th Cir. 2002) (habeas petition based on Brady violation)).)

Outside of the Ninth Circuit, "courts have only in rare instances found Brady applicable in civil proceedings, mainly in those unusual cases where the potential consequences 'equal or exceed those of most criminal convictions.'" Fox ex rel. Fox v. Elk Run Coal Co., Inc., 739 F.3d 131, 138-39 (4th Cir. 2014) (quoting Demjanjuk v. Petrovsky, 10 F.3d 338, 354 (6th Cir.

1993)); see also Brodie v. Dep't of Health & Human Servs., 951 F. Supp. 2d 108, 118 (D.D.C. 2013) ("Brady does not apply in civil cases except in rare situations, such as when a person's liberty is at stake. . . . With only three exceptions, . . . courts uniformly have declined to apply Brady in civil cases.").

In arguing that Brady should be extended to this civil case, defendants rely heavily on the Sixth Circuit's decision in Demjanjuk. In that case, the government sought denaturalization and extradition to Israel on capital murder charges based on its belief that Demjanjuk was "the notorious Ukrainian guard at the Nazi extermination camp near Treblinka, Poland called by Jewish inmates 'Ivan the Terrible.'" Demjanjuk, 10 F.3d at 339. During the proceedings, the government did not disclose documents and statements in its possession that "should have raised doubts about Demjanjuk's identity as Ivan the Terrible." Id. at 342.

The Sixth Circuit recognized that even though Brady did not apply in civil cases, "it should be extended to cover denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against." Id. at 353 (emphasis added); see also id. (indicating that Brady would not apply if "the government had sought to denaturalize Demjanjuk only on the basis of his misrepresentations at the time he sought admission to the United States and subsequently when he applied for citizenship").

In extending Brady to the proceedings in Demjanjuk, the Sixth Circuit explained that the "consequences of denaturalization and extradition equal or exceed those of most

criminal convictions," "that Demjanjuk was extradited for trial on a charge that carried the death penalty," that the government attorneys were from the Office of Special Investigations ("OSI"), which is a unit within the Criminal Division of the Department of Justice, that the government attorneys were frequently referred to as prosecutors during the proceedings, and that the Director of OSI believed Brady applied to the proceedings. Id. at 353-54. Unlike in Demjanjuk, this case was brought by the Civil Division of the United States Attorney's Office, the government did not seek to prove that defendants engaged in serious criminal conduct potentially subject to capital punishment, and a judgment in favor of the government would not have subjected defendants to consequences akin to those following a criminal conviction.

Because Brady is understandably inapplicable to this civil case, defendants' reliance on criminal cases discussing a prosecutor's heightened duties in light of Brady and other distinctly criminal rights is misguided. Lawyers representing the United States, like lawyers representing any party, must of course comport with the applicable rules governing attorney conduct. As defendants appear to concede, those ethical standards, or any self-imposed standard by the executive branch, do not affect the showing necessary to prove fraud on the court, and the court should not, as defendants argue, assess the conduct of the government through the lens of any heightened obligation.

The Supreme Court and Ninth Circuit have repeatedly analyzed claims of fraud on the court by government attorneys without suggesting that their conduct is to be evaluated in light of any heightened obligations. In Beggerly, the government had

brought a quiet title action. 524 U.S. at 40. Defendants sought proof of their title to the land during discovery and, after searching public land records, the government informed defendants that it had not found any evidence showing that the land in dispute had been granted to a private landowner. Id. at 40-41. After judgment was entered pursuant to a settlement the parties reached on the eve of trial, defendants discovered a land grant in the National Archives that supported their claim. Id. at 41. Defendants sought to vacate the judgment for fraud on the court because "the United States failed to 'thoroughly search its records and make full disclosure to the Court'" regarding the land grant. Id. at 47. Without suggesting that a heightened standard governed the government's conduct during discovery or litigation, the Supreme Court held that defendants were not entitled to relief from the judgment. The Court concluded that "it surely would work no 'grave miscarriage of justice,' and perhaps no miscarriage of justice at all, to allow the judgment to stand." Id.

In Appling, the Ninth Circuit discussed Beggerly without mentioning that the alleged misconduct was committed by the government and referred to the government only as the prevailing party. See Appling, 340 F.3d at 780 (describing Beggerly as "holding that allegations that the prevailing parting [sic] failed during discovery in the underlying case to 'thoroughly search its records and make full disclosure to the Court' were not fraud on the court").

Similarly, in Estate of Stonehill, the Ninth Circuit engaged in a detailed examination of alleged instances of

misconduct by the government without suggesting that a heightened standard applied because it was the government that engaged in the conduct at issue. 660 F.3d at 445-52. Instead, the standards the Ninth Circuit articulated and applied were the same as those which govern the ability to seek relief for fraud on the court by non-government parties.[8] See, e.g., id. at 444-45 (discussing Levander and Pumphrey, which assessed allegations of fraud on the court by non-government attorneys); see also id. at 445 ("In order to show fraud on the court, Taxpayers must demonstrate, by clear and convincing evidence, an effort by the government to prevent the judicial process from functioning 'in the usual manner.'"); accord Dixon, 316 F.3d at 1046-47 (finding fraud on the court perpetrated by government tax attorneys under the same standards governing fraud on the court by non-government attorneys).

The court therefore finds that Brady is inapplicable to this civil case and that the conduct of the government is to be assessed under the same standards as a non-government party when analyzing whether that conduct amounts to fraud on the court.

III. Analysis

Initially, it does not appear that any of the alleged acts of fraud tainted the court's decision to enter the stipulated judgment. The government argues quite persuasively that none of those acts therefore may form the basis for setting

[8] In their brief, defendants mis-cite Estate of Stonehill as mentioning a "higher standard of behavior" for government attorneys. (See Defs.' Br. at 23:18-19.) That quoted language, however, is not in Estate of Stonehill. The language comes from the criminal case of Young, 470 U.S. 1.

aside the settlement agreement and stipulated judgment. The argument certainly has logical appeal and finds support in a plethora of lower court decisions.[9] The Supreme Court,

[9] See Superior Seafoods, Inc. v. Tyson Foods, Inc., 620 F.3d 873, 880 (8th Cir. 2010) (affirming the denial of relief for fraud on the court when "[t]he court entered its consent judgment based on the written document provided by the parties after extensive negotiation" and explaining that "the court was not required to look behind or interpret that written document to ensure that the meeting of minds reflected therein was not, in fact, against the wishes of Mr. Kemp and his attorney"); Pfotzer v. Amercoat Corp., 548 F.2d 51, 52 (2d Cir. 1977) (affirming denial of relief for fraud on the court and noting that "'it sufficed for the court to know the parties had decided to settle, without inquiring why'" (quoting Martina Theatre Corp. v. Schine Chain Theatres, Inc., 278 F.2d 798, 801 (2d Cir. 1960))); Roe v. White, No. Civ. 03-04035 CRB, 2009 WL 4899211, at *3 (N.D. Cal. Dec. 11, 2009) ("The alleged fraud 'did not improperly influence the court' because the judgment was based on the parties' voluntary settlement and not an adjudication on the merits. . . . The purported falsity of Plaintiffs' allegations is irrelevant to the settlement agreement, and to the resulting judgment. Accordingly, any fraud in no way affected the proper functioning of the judicial system."); In re Leisure Corp., No. Civ. 03-03012 RMW, 2007 WL 607696, at *7 (N.D. Cal. Feb. 23, 2007) (explaining that an alleged lack of disclosure did not amount to fraud on the court because it "was not material to the bankruptcy court's assessment of the Settlement Agreement"); Petersville Sleigh Ltd. v. Schmidt, 124 F.R.D. 67, 72 (S.D.N.Y. 1989) (finding that alleged fraud surrounding the source of settlement funds did not amount to fraud on the court because the court "never inquired, nor was it told, the source of those funds"); United States v. Int'l Tel. & Tel. Corp., 349 F. Supp. 22, 36 (D. Conn. 1972) (concluding that a failure to disclose a motivating factor of the government's decision to enter settlement negotiations could not amount to fraud on the court when the court "had a limited role in approving" the consent decree and the government's "decision to negotiate a settlement of the [] case w[as] simply not relevant to such an inquiry"); In re Mucci, 488 B.R. 186, 194 (Bankr. D. N.M. 2013) ("[I]f the Court did not rely on fraudulent conduct in entering the judgment from which the party seeks relief, the judgment should not be set aside. . . . The Court entered the Stipulated Judgment setting forth terms of the settlement between the Plaintiffs and Defendant and approving the settlement based on the stipulation of the parties, not based on

nevertheless, appears to have rejected that argument. See Beggerly, 524 U.S. at 39, 40-41, 47 (addressing the sufficiency of allegations of fraud on the court despite the fact that the judgment in that case was entered pursuant to a settlement agreement and the alleged fraud was not relevant to the court's decision to enter the judgment pursuant to the settlement agreement). The court accordingly proceeds to consider defendants' claims, individually and collectively, in light of the government's alternative arguments.

A. Allegations of fraud on the court that defendants knew about prior to settlement and entry of judgment

With the exception of any allegations subsequently addressed in this Order, defendants concede they knew of the following alleged instances of fraud on the court prior to settling the federal action: (1) that the government advanced an allegedly fraudulent origin and cause investigation and allegedly allowed investigators to testify falsely about their work, (Defs.' Br. at 58:2-9); (2) that the government allegedly misrepresented J.W. Bush's admission that a bulldozer rock strike caused the Moonlight Fire, (id. at 63:26-28); (3) that the government proffered allegedly false testimony in opposition to

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any affidavits or testimony from the Plaintiffs or Mr. Ely. The Court did not look behind the parties' stipulation."); In re NWFX, Inc., 384 B.R. 214, 220 (Bankr. W.D. Ark. 2008) ("To prove fraud on the court, the movant must establish that the officer of the court's misrepresentation or nondisclosure was material to the court's judgment. . . . [T]he aforementioned cases indicate that a relevant inquiry in the present case is whether the court would have approved the settlement had it known the undisclosed facts, i.e., whether the trustee's misrepresentations were 'material' to the court's approval of the settlement.").

defendants' motion for summary judgment, (id. at 69:3-4); (4) that the government failed to take remedial action after learning that the air attack video allegedly undermined its origin and cause theory, (id. at 74:3-4); (5) that the government created an allegedly false diagram, (id. at 77:8-9); (6) that the government failed to correct an allegedly false expert report, (id. at 79:20-80:11); (7) that the government allegedly misrepresented evidence regarding other wildland fires, (id. at 88:5-6); and (8) that the government allegedly covered up misconduct at the Red Rock Lookout Tower, (id. at 104:9-11).

Despite knowing of and having the opportunity to persuade the jury that the government engaged in the aforementioned alleged misconduct, defendants chose to settle the case and forgo the jury trial. Relying exclusively on Hazel-Atlas Glass Co., defendants now argue that the calculated decision to settle the case with full knowledge of the alleged fraud does not bar their ability to seek relief for fraud on the court.

In Hazel-Atlas Glass Co., however, the Supreme Court indicated that it was addressing relief from a judgment gained by fraud on the court because of "after-discovered fraud." See Hazel-Atlas Glass Co., 322 U.S. at 244 ("From the beginning there has existed along side the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry."); Hazel-Atlas Glass Co., 322 U.S. at 245 ("This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-

discovered evidence, is believed possibly to have been guilty of perjury."); accord O.F. Nelson & Co. v. United States, 169 F.2d 833, 835 (9th Cir. 1948) ("Nor is it a case of after discovered fraud, where an appellate court, after the expiration of the term, has an equitable right, in a proceeding in the nature of a bill of review, to set aside its judgment on proof of fraud in its procurement as in . . . Hazel-Atlas Glass Co.") (internal citation omitted); Demjanjuk, 10 F.3d at 356 ("The Supreme Court has recognized a court's inherent power to grant relief, for 'after-discovered fraud,' from an earlier judgment 'regardless of the term of [its] entry.'" (quoting Hazel-Atlas Glass Co., 322 U.S. at 244)).

While the Court in Hazel-Atlas Glass Co. contemplated relief only for "after-discovered fraud," it recognized that Hazel-Atlas Glass Co. ("Hazel") had "received information" about the fraud prior to entry of judgment and, when the significance of the suspected fraud became clear, had "hired investigators for the purpose of verifying the hearsay by admissible evidence." 322 U.S. at 241-42. Hazel was unable to confirm the fraud because the witness who could have revealed it lied to Hazel's investigators at the behest of defendants. Id. at 242. In rejecting the appellate court's finding that Hazel was not entitled to relief because it "had not exercised proper diligence in uncovering the fraud," the Court concluded, "We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud." Id. at 246 (emphasis added). The Court went on to explain that, "even if Hazel did not exercise the highest degree of diligence [in

uncovering the fraud,] Hartford's fraud cannot be condoned for that reason alone." Id.

The Court was therefore working under the factual premise that Hazel suspected and was investigating the fraud prior to settlement, but had not yet uncovered it, possibly due to its own lack of diligence. The Court's understanding of the facts was consistent with Hazel's allegations in seeking relief. See id. at 263-68 (Roberts, J., dissenting) (indicating that Hazel alleged that it "'did not know'" of the fraud and "'could not have ascertained [it] by the use of proper and reasonable diligence'" prior to entry of judgment).

Justice Roberts' dissenting opinion underscores the factual assumptions the majority relied on because his primary disagreement with the majority was that an evidentiary hearing was necessary to determine whether Hazel in fact knew of the fraud before entry of judgment. In his dissent, Justice Roberts belabors facts that are entirely absent from the majority opinion and from which he believes a trier of fact could find that Hazel knew of the fraud prior to entry of judgment. See id. (Roberts, J., dissenting). He concludes,

> [I]t is highly possible that, upon a full trial, it will be found that Hazel held back what it knew and, if so, is not entitled now to attack the original decree. . . . And certainly an issue of such importance affecting the validity of a judgment, should never be tried on affidavits.

Id. at 270 (Roberts, J., dissenting).

In sum, all of the justices in Hazel-Atlas Glass Co. agreed that Hazel would have been barred from seeking relief if it knew of the fraud prior to settlement and entry of judgment.

They disagreed only as to whether the limited evidence before the Court was sufficient to find--as the majority did--that Hazel had suspicions, but had not yet uncovered the fraud and could therefore seek relief based on "after-discovered fraud."

At the opposite end of the spectrum, defendants here concede they knew of the eight instances of alleged fraud prior to reaching a settlement and the stipulated entry of judgment pursuant to that settlement. In fact, at the time they settled the case, defendants possessed and understood the purported significance of the very documents and testimony they now rely on in support of their motion before the court. According to defendants, these documents prove the alleged fraud and, unlike in Hazel-Atlas Glass Co., would have presumably been admissible at trial. See id. at 241-43. Other than Hazel-Atlas Glass Co., which does not support defendants' position, defendants have not cited and this court is not aware of a single decision in which a court set aside a final judgment because of fraud on the court when the party seeking relief knew of and had the evidence to prove the fraud prior to entry of judgment.

That defendants cannot cite such a case comes as no surprise to this court. "The concept of fraud upon the court challenges the very principle upon which our judicial system is based: the finality of a judgment." Herring v. United States, 424 F.3d 384, 386 (3d Cir. 2005). Moreover, this is not just a case in which a party seeks the extreme relief of setting aside a final judgment. Defendants here seek to set aside a final judgment entered only because of their own strategic choice to settle the case with full knowledge of the alleged fraud.

The significance of defendants' decision to settle with the government cannot be overstated. A settlement, by its very nature, is a calculated assessment that the benefit of settling outweighs the potential exposure, risks, and expense of litigation. Here, the parties acknowledged these competing considerations in their settlement agreement: "This settlement is entered into to compromise disputed claims and avoid the delay, uncertainty, inconvenience, and expense of further litigation." (Settlement Agreement & Stipulation ¶ 12.) In any lawsuit, it is not uncommon for the parties to disagree not only on the ultimate issues in the case, but also about whether witnesses are telling the truth or the opposing party complied with its discovery obligations. Any settlement agreement would become just a meaningless formality if a settling party could set aside that agreement at any later time based upon alleged fraud the party knew of when entering into the agreement.

In explaining why perjury by a witness and non-disclosure alone generally cannot amount to fraud on the court, the Ninth Circuit has also emphasized that such fraud "could and should be exposed at trial." In re Levander, 180 F.3d at 1120; accord George P. Reintjes Co., Inc. v. Riley Stoker Corp., 71 F.3d 44, 49 (1st Cir. 1995) ("The possibility of perjury, even concerted, is a common hazard of the adversary process with which litigants are equipped to deal through discovery and cross-examination . . . . Were mere perjury sufficient to override the considerable value of finality after the statutory time period for motions on account of fraud has expired, it would upend the Rule's careful balance." (internal

citation omitted)); Great Coastal Exp., Inc. v. Int'l Bhd. of Teamsters, Chauffeurs, 675 F.2d 1349, 1357 (4th Cir. 1982) ("Perjury and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out as early as possible. In addition, the legal system contains other sanctions against perjury.").

For the eight allegations of fraud that defendants knew of at the time of settlement, there can be no question that they had the opportunity to expose the alleged fraud at trial. During depositions, defendants' counsel repeatedly cross-examined witnesses on the very issues defendants now claim constitute fraud on the court. (See, e.g., Defs.' Br. at 45:3-15, 52:9-12, 52:20-53:17, 61:23-28, 62:24-28, 67:20-23, 78:20-80:7, 83:18-20, 84:3-11, 103:3-7.) In their trial brief, defendants expressed their intent to expose the fraud at trial and had every opportunity to do so. (See, e.g., Defs.' Trial Br. at 1:11-13 (Docket No. 563) ("But, as the facts of this case show, their investigation was more than just unscientific and biased. When the investigators realized that their initial assumptions were flawed, they resorted to outright deception."); July 2, 2012 Final Pretrial Order at l7:21-22 (Docket No. 573) (denying the government's motion in limine in part and allowing defendants "to introduce evidence that there was an attempt to conceal information from the public or the defense").)

To the extent defendants argue that any tentative in limine ruling would have limited their ability to prove the alleged fraud, their argument must fail. Defendants had the opportunity to challenge any in limine ruling during trial and on

appeal. Instead, defendants elected to forgo the normal procedures of litigating a dispute. Allowing defendants to knowingly bypass an appeal and seek relief now would erroneously allow "fraud on the court" to "become an open sesame to collateral attacks." Oxxford Clothes XX, Inc. v. Expeditors Intern. of Wash., Inc., 127 F.3d 574, 578 (7th Cir. 1997); see also Oxxford Clothes XX, Inc., 127 F.3d at 578 ("A lie uttered in court is not a fraud on the liar's opponent if the opponent knows it's a lie yet fails to point this out to the court. If the court through irremediable obtuseness refuses to disregard the lie, the party has--to repeat what is becoming the refrain of this opinion--a remedy by way of appeal. Otherwise 'fraud on the court' would become an open sesame to collateral attacks, unlimited as to the time within which they can be made by virtue of the express provision in Rule 60(b) on this matter, on civil judgments."); Abatti, 859 F.2d at 119 ("Appellants might have been successful had they argued their version of the agreement on a direct and timely appeal from the decisions against them, but their argument does not change the finality of the decisions now.").

The litigation process not only uncovered the alleged fraud, it equipped defendants with the opportunity to prove it. Instead, defendants made the calculated decision on the eve of trial to settle the case knowing everything that they now claim amounts to fraud on the court. Cf. Latshaw, 452 F.3d at 1099 ("Generally speaking, Rule 60(b) is not intended to remedy the effects of a deliberate and independent litigation decision that a party later comes to regret through second thoughts . . . .").

A party's voluntary settlement with full knowledge of and the opportunity to prove alleged fraudulent conduct cannot amount to a "grave miscarriage of justice," Beggerly, 524 U.S. at 47. To argue otherwise is absurd.

B. Allegations of fraud on the court that defendants discovered after settlement and entry of judgment

As to the six overarching allegations of fraud that defendants allegedly discovered after settlement and entry of judgment, the government contends that the allegations must fail because of defendants' lack of diligence and the settlement agreement in this case.

When fraud is aimed at the court, the injured party's lack of diligence in uncovering the fraud does not necessarily bar relief. In Hazel-Atlas Glass Co., the Supreme Court held that relief in that case was not precluded even if Hazel "did not exercise the highest degree of diligence" in uncovering the fraud. 322 U.S. at 246. The Court explained that it could not "condone[]" the fraud based on a party's lack of diligence because the fraud was perpetrated against the court:

> This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Id. (internal citations omitted). More recently, in Pumphrey, the Ninth Circuit cited Hazel-Atlas Glass Co. and explained that, "even assuming that [the plaintiff] was not diligent in uncovering the fraud, the district court was still empowered to set aside the verdict, as the court itself was a victim of the fraud." Pumphrey, 62 F.3d at 1133 (emphasis added).

On the other hand, the Ninth Circuit has held that fraud "perpetrated by officers of the court" did not amount to fraud on the court when it was "aimed only at the [party seeking relief] and did not disrupt the judicial process because [that party] through due diligence could have discovered the non-disclosure." Appling, 340 F.3d at 780 (emphasis added). In Appling, plaintiffs had served a subpoena on Henry Keller, who was a former executive of the defendant. Id. at 774. Defendant's counsel responded to the subpoena on behalf of Keller and orally assured plaintiffs' counsel that Keller did not have any documents or knowledge relevant to the litigation. Id.

After the district court granted summary judgment in favor of defendant, plaintiffs discovered that "Keller had not authorized State Farm to respond on his behalf, [] was never shown a copy of the objections or consulted with respect to their contents," and in fact had a document and video and had made a statement that were relevant and favorable to plaintiffs. Id. The Ninth Circuit concluded that, although a non-disclosure by counsel that was aimed only at the opposing party and could have been discovered through due diligence might have "worked an injustice, it did not work a 'grave miscarriage of justice.'" Id. at 780; see Appling, 340 F.3d at 780 ("Fraud on the court

requires a 'grave miscarriage of justice,' and a fraud that is aimed at the court." (quoting Beggerly, 524 U.S. at 47)).

Similarly, in Gleason v. Jandrucko, the plaintiff sought to set aside a judgment entered pursuant to the parties' settlement for fraud on the court. 860 F.2d 556 (2d Cir. 1988). After the case had settled and judgment was entered, the plaintiff uncovered alleged fraud by the defendant police officers. Id. at 558. The Second Circuit nonetheless concluded that the plaintiff was not entitled to relief because he "had the opportunity in the prior proceeding to challenge the police officers' account of his arrest." Id. at 559. Instead of pursuing the relevant discovery to uncover the fraud and challenging the police officers' account of his arrest through litigation, the plaintiff "voluntarily chose to settle the action." Id. The Ninth Circuit relied on Gleason when explaining that perjury or non-disclosure cannot amount to fraud on the court when the party seeking relief had "the opportunity to challenge" the alleged fraud through discovery that could have been performed and evidence that could have been introduced at trial. In re Levander, 180 F.3d at 1120.

With the exception of evidence that simply did not exist at the time of settlement and entry of judgment, defendants uncovered most of the evidence underlying their allegations of fraud through discovery in the state action that occurred after the federal action concluded. Since defendants were able to successfully obtain the evidence to show the alleged fraud through discovery in the state action, the court can discern no reason why they could not have obtained that same evidence

through diligent discovery in the federal action. As the Ninth Circuit has explained, a grave miscarriage of justice simply cannot result from any fraud that was directed only at defendants and could have been discovered with the exercise of due diligence.

Even as to allegations of fraud on the court that defendants could not have discovered through diligence before settlement and entry of judgment, the terms of the settlement agreement in this case bar relief, at least as to alleged fraud aimed only at defendants. In their settlement agreement, defendants not only willingly settled the case in light of the facts they knew, but expressly acknowledged and accepted that the facts may be different from what they believed:

> The Parties understand and acknowledge that the facts and/or potential claims with respect to liability or damages regarding the above-captioned actions may be different from facts now believed to be true or claims now believed to be available. . . . Each Party accepts and assumes the risks of such possible differences in facts and potential claims and agrees that this Settlement Agreement shall remain effective notwithstanding any such differences.

(See Settlement Agreement & Stipulation ¶ 25.) Defendants were not obligated to include this language in the settlement agreement and, when defendants believed at the time of settlement that the case was based on "outright deception," (Defs.' Trial Br. at 1:13), it might have seemed more appropriate to exclude any fraudulent government conduct or fraud on the court from this waiver. But they did not. Defendants have been represented by numerous high-priced attorneys throughout this litigation and the court has no doubt that defense counsel expended many hours

reviewing and revising each term in the settlement agreement. A grave miscarriage of justice cannot result from enforcing the clear and deliberate terms of a settlement agreement. If the court were to simply ignore the express language of a settlement agreement, parties to such an agreement could never obtain a reasonable assurance that a settlement was indeed final.

For alleged fraud on the court aimed only at defendants, any lack of diligence and the express terms of their settlement agreement preclude a finding that the alleged misconduct resulted in a grave miscarriage of justice. Nonetheless, the court will go on to examine whether any of the allegations defendants discovered after settlement and entry of judgment are sufficient to sustain defendants' motion notwithstanding the preclusive effect of the settlement agreement.

1. Allegations Surrounding the White Flag

Defendants contend that the government advanced a fraudulent origin and cause investigation and allowed the investigators to lie during their depositions about the foundation of their investigation. The central aspect of these allegations is the existence of a white flag, which allegedly denotes an investigator's determined point of origin. (Defs.' Br. at 44:26-27.) As revealed by photographs taken during their investigation, a white flag had been placed at the location that matches with the investigators' only recorded GPS measurement but is about ten feet away from the two points of origin identified in the Joint Report. (Id. at 45:21-25.) Of the conduct giving rise to the overarching allegation of fraudulent conduct

surrounding the white flag, defendants discovered only three discrete alleged acts of misconduct after settlement and entry of judgment.

a. Reynolds' Deposition Testimony

First, defendants allege that in January 2011, the government had a pre-deposition meeting with Reynolds at which they discussed the white flag. Defense counsel obviously knew about that meeting before settlement because they questioned Reynolds at length about it at his earlier deposition on November 15, 2011. (See, e.g., Reynolds Nov. 15, 2011 Dep. at 1053:16-21 ("Q: And do you recall your testimony, sir, is that someone in the January--roughly January 2011 meeting at the D.O.J.'s office or the U.S. Attorney's Office asking questions about the white flag, correct? A: Yes."); see also Reynolds Nov. 15, 2011 Dep. at 1062:21-2063:8, 1064:7-14, 1065:13-24, 1101:7-14.) At that deposition, Reynolds testified that he did not "recall for sure" what the government counsel "contribute[d] to the discussion" about the white flag. (Reynolds Nov. 15, 2011 Dep. at 1068:7-22.)

During his later deposition in the state action and after the federal action settled, Reynolds allegedly testified for the first time that the government attorneys told him that the white flag was a "non-issue" at the January 2011 meeting:

> Q: And in this conversation did they ask you questions as to whether or not you placed that white flag?
>
> A: Yes.
>
> Q: And what was your answer in response to those questions?

> A: I have no recollection of placing the flag. And that's--we saw it as a nonissue. And they said it was going to come up and saw it as a nonissue.

(Reynolds Nov. 1, 2012 Dep. at 1499:3-11 (Docket No. 597-18); see also Defs.' Br. at 56:15-21; Defs.' Reply in Support of Supplemental Briefing at 83:24-26 (Docket No. 637) ("Defs.' Reply").)

According to defendants, the government attorneys' indication that they saw the white flag as a "non-issue" gave Reynolds "permission to provide false testimony," and the government did not correct Reynolds' testimony when he denied the existence of a white flag in his subsequent deposition. (Defs.' Reply at 84:11-13; see also Defs.' Br. at 56:22-57:6 (quoting from the March 2011 deposition).) At oral argument, defendants recognized that Eric Overby represented the government at Reynolds' three-day deposition in March 2011. Probably because defendants rely on statements Overby made about this case to advance their motion, they do not argue that Overby suborned perjury. Instead, they suggest that the lead government attorney had a duty to correct Reynolds' allegedly perjured testimony after his deposition.

When the record is examined there is no substance whatsoever to defendants' contention. Specifically, the court is at a loss to decipher how Reynolds' testimony at his deposition following the January 2011 meeting could possibly be construed as falsely testifying that a white flag did not exist. When defense counsel originally showed Reynolds a picture with the white flag, he testified that he could not see the flag:

> Q: I have blown it up for you on a laptop here, Mr. Reynolds.
>
> And if I could have you look at the very center of that photograph and tell me if you recognize a white flag with a post on it? . . .
>
> THE WITNESS: I see what looks like a chipped rock there.
>
> Q. BY MR. WARNE: And do you see the flag?
>
> A. No.
>
> Q. You don't see any white flag?
>
> A. It looks like a chipped rock right there (indicating).

(Reynolds Mar. 23, 2011 Dep. at 534:11-24.)

Had Reynolds' testimony about the white flag ended there, defendants' allegations might make sense. However, defense counsel continued his questioning and Reynolds ultimately agreed that the image counsel identified was indeed a white flag, albeit hard to make out:

> Q. There is a white flag right there (indicating).
>
> A. Okay.
>
> Q. Do you see it?
>
> A. Well, I don't really see a flag. It almost looks like a wire here.
>
> Q. That's right. And do you see the flag on top of it, sir?
>
> A. I guess if that's what that is.
>
> Q. And you don't recall where that came from?
>
> A. No.

> . . .
>
> Q. You don't recognize a white flag there?
>
> A. Hard to say that that's a white flag but I do see a stem--
>
> Q. But you don't recall--
>
> A. --that looks like it's one.
>
> Q. It looks like it's a white flag, correct?
>
> A. It looks like a white flag.

(Id. at 531:25-10, 536:1-7.)

That Reynolds struggled to see the white flag should not come as a surprise. Defense counsel admit that they initially "missed the white flag as they carefully reviewed the Joint Report as well as all of the native photographs" and only discovered it "while reviewing the native photographic files on a computer screen with back-lit magnification." (Defs.' Br. at 49 n.29.) Defendants included a "magnified and cropped" photograph of the white flag in their brief. (Id. at 46.) Similar to Reynolds, only after examining the image for a considerable amount of time, could the court locate what appears to possibly be a thin metal pole. Near the top of the pole is a whitish colored object that the court presumes must be the white flag. Without having located the metal pole, the court itself would have firmly believed that the whitish object was a rock or other ground debris.

Even if Reynolds' reluctance in acknowledging the flag was not so easily understood, he ultimately testified that the white flag was in the picture. Assuming that an attorney's

encouraging and then suborning perjury during a deposition could amount to fraud on the court even though it is not "aimed at the court," Appling, 340 F.3d at 780 (quoting Beggerly, 524 U.S. at 47), the government never encouraged nor suborned perjury with respect to Reynolds' deposition testimony. Accordingly, the January 2011 pre-deposition meeting and Reynolds' subsequent deposition testimony about the white flag fail to amount to any type of fraud, let alone fraud on the court.

b. Dodds' and Paul's Deposition Testimony

The second instance of alleged fraudulent misconduct by the government about the white flag involves deposition testimony during the state action by one of the government's origin and cause experts, Larry Dodds, and Cal Fire Unit Chief Bernie Paul. At his deposition for the state action about ten months after the federal settlement, Dodds allegedly recognized that "the white flag raises 'a red flag,' creates a 'shadow of deception' over the investigation, and caused him to conclude 'it's more probable than not that there was some act of deception associated with testimony around the white flag.'" (Defs.' Br. at 55:11-14.) Similarly, defendants allege that during his deposition for the state action about six months after the federal settlement, Paul testified that "the evidence and testimony surrounding the white flag caused him to disbelieve the Moonlight Investigators," (id. at 55:14-16), and was "'alone enough to cause [him] to want to toss the whole report out.'" (Defs.' Reply at 88:2-3.)[10]

[10] Defendants may be playing loose with their characterization of the deposition testimony as the questions often relied on the witness making faulty assumptions, such as Reynolds having denied the existence of the white flag during his

Defendants do not allege that either witness testified differently and thus falsely during any deposition in the federal action. As to Dodds, defendants allege only that he "did not make these concessions during his federal deposition." (Id. at 87:19.) So what? There is no allegation that Dodds committed perjury, let alone that the government was a party to any perjury.

The most that can be inferred from Dodds' testimony is that he either failed to volunteer his personal opinions during the federal deposition or did not form those opinions until after the settlement. As the Ninth Circuit has repeatedly recognized, "[n]on-disclosure. . . does not, by itself, amount to fraud on the court." Appling, 340 F.3d at 780. Moreover, there is no allegation that the government attorneys knew of these alleged opinions; thus it cannot even be suggested that any alleged out-of-court non-disclosure was "a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Id.

If Dodds simply did not form these opinions until after the federal settlement, any allegation of fraud must fail. See Pumphrey, 62 F.3d at 1131 (explaining that a finding of fraud on the court "must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." (internal quotations marks omitted)). If a post-judgment change

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deposition. (See, e.g., Paul Dec. 18, 2012 Dep. at 202:9-23; Paul Jan. 15, 2013 Dep. at 806:2-8 (Docket No. 597-26).)

in opinion by an expert witness could somehow be elevated to fraud on the court, the finality of every judgment relying on expert testimony could always be called into question.

Paul was neither disclosed as an expert nor deposed in the federal action. (Defs.' Reply 87:21-22.) That an expert in a separate case forms an opinion allegedly advantageous to a party after entry of judgment does not even come close to the outer limits of fraud on the court. Stretching defendants' allegations to their limit, defendants might argue that Paul formed his opinions before the settlement and that the government knew of and failed to disclose those opinions. Again, so what? Even if defendants had alleged that the government knew of Paul's opinions before settlement, the government was under no obligation to disclose the opinions of a potential expert witness whom it did not intend to call. See Fed. R. Civ. P. 26(a)(2)(A). Such a non-disclosure surely could not be considered a "grave miscarriage of justice." Beggerly, 524 U.S. at 47.

For these reasons, the allegations regarding Dodds' and Paul's subsequent testimony during their depositions for the state action cannot constitute fraud on the court.

c. Welton's Deposition Testimony

According to defendants, United States Forest Service law enforcement officer Marion Matthews and United States Forest Service investigator Diane Welton visited the fire scene on September 8, 2007. During that meeting, "Matthews told Welton that she had reservations about the size of the alleged origin area as established by White." (Defs.' Br. at 30:9-11.) At the time of settlement, defendants were aware of Matthews'

reservations about the size of the alleged origin area and that she had communicated those concerns to Welton. (See, e.g., Matthews Apr. 26, 2011 Dep. at 174:22-176:8, 177:17:178:3.)

About thirteen months later, former Assistant United States Attorney ("AUSA") Robert Wright visited the fire site with several expert consultants, White, and Welton. (Id. at 32:3-6.) After viewing the site, Wright allegedly drove back to town with White and Welton. (Id. at 32:8-9.) During the drive, Welton allegedly told Wright "that investigator Matthews, who had visited the alleged origin five days after it began, had wanted the investigators to declare a larger alleged origin area for the fire." (Id. at 32:10-12.)

At her deposition on August 15, 2012 prior to the settlement and entry of judgment, Welton testified that she did not recall having any discussions with Matthews about expanding the origin area:

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

(Welton Aug. 15, 2011 Dep. at 579:23-580:7.)

According to defendants, Welton "lied" during her deposition when she testified that she did not recall the conversation with Matthews about the area of origin. She did

not, however, deny that the conversation occurred. Welton testified only that she did not recall an alleged conversation that occurred almost four years prior to her deposition. Even assuming that Welton's testimony could be considered perjury, perjury by a witness alone cannot amount to fraud on the court. See, e.g., Appling, 340 F.3d at 780 ("Non-disclosure, or perjury by a party or witness, does not, by itself, amount to fraud on the court."); Hazel-Atlas Glass Co., 322 U.S. at 245 ("This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury."). Having already deposed Matthews at length about her conversation with Welton about the area of origin, (see, e.g., Matthews Apr. 26, 2011 Dep. at 174:22-176:8, 177:17-178:3), defendants could not have been deceived by Welton's inability to remember.

Alleging that Welton told AUSA Wright about the conversation, defendants apparently seek to make the government a party to Welton's allegedly perjured testimony. According to defendants, however, Welton told Wright about the conversation on October 2, 2008, and Wright was then forbidden from working on the case in January 2010. Wright was therefore neither present for nor privy to the substance of Welton's August 15, 2011 deposition. While it would ordinarily be reasonable to infer that one attorney's knowledge is shared by all of the attorneys working on a case, the allegations in this case preclude such an inference. Not only was AUSA Wright removed from this case, he has since left the United States Attorney's Office and

essentially joined forces with defense counsel in the very case he originally pursued on behalf of the government.

In the detailed declarations from Wright that defendants submitted in support of the pending motion, Wright never suggests that he told any of the other AUSAs assigned to this case about his pre-litigation conversation with Welton. (See June 12, 2014 Wright Decl. (Docket No. 593-4), Mar. 6, 2015 Wright Decl. (Docket No. 637-2).) Because Wright is now cooperating with and advocating on behalf of defendants, and has not hesitated to accuse his former colleagues of misconduct, the court has no doubt he would have disclosed that he told his former colleagues about the conversation if he had done so. Any argument of fraud on the court must fail in the absence of an allegation or reasonable inference that the government had unique knowledge beyond Matthews' testimony about the area of origin conversation when Welton testified she did not recall it.[11]

2. Dodds' Handwritten Notes

Defendants' next allegation of fraud on the court relates to the air attack video, which was taken by a pilot flying over the Moonlight Fire about one-and-a-half hours after it ignited. While the federal action was pending, both parties had their experts identify the alleged points of origin on the video and, according to defendants, both experts marked locations

[11] Defendants of course do not argue that Wright, whom they obviously believe to be their star witness, should have voluntarily disclosed his conversation with Welton about the area of origin prior to his removal from the case. Had this mere non-disclosure been by any other AUSA, the court has no doubt that defendants would acuse that AUSA of egregious misconduct.

that are in unburnt areas outside of the smoke plume. Defendants knew of and litigated the issues surrounding the air attack video and the related expert analysis prior to settlement and entry of judgment. (See Defs.' Br. at 74:3-4.)

The only evidence surrounding the air attack video that defendants were unaware of prior to settling were handwritten notes by Dodds.[12] Dodds provided these notes to defendants for the first time during his deposition in the state action. Defendants allege that the undisclosed handwritten notes "reveal that Dodds struggled in consultation with the [government] to reconcile the location of the government's alleged origin with the Air Attack video, particularly joint federal/state expert Curtis's placement of the alleged origin in the video frames." (Id. at 74:16-19.)

That defendants even suggest the alleged fraud regarding the air attack video is remotely analogous to the fraud in Pumphrey underscores the looseness with which defendants want the court to view conduct required to allege fraud on the court. The similarities between defendants' allegations in this case and Pumphrey end at the fact that both include a video. Unlike in Pumphrey, there is no allegation in this case that the air attack video was recorded for a fraudulent purpose or concealed from defendants. See Pumphrey, 62 F.3d at 1130-32. Defendants and the government simply, albeit strongly, disagree about what

[12] Defendants initially argued that two sets of notes were not produced. Dodds did not transcribe the second set of notes until after the federal action settled. As defendants appear to concede in their reply brief, failing to disclosure handwritten notes that did not yet exist cannot amount to fraud on the court.

inferences can reasonably be drawn from the smoke plume and the experts' placement of the alleged points of origin in the air attack video.[13]

Defendants' allegation of fraud on the court based on the non-disclosure of Dodds' handwritten notes fails for several reasons. First, defendants' entire argument appears to rely on the government's purported duty to disclose under Brady, which does not apply in this civil case. Second, defendants do not allege that the government even knew about the handwritten notes. Third, defendants identify the notes as only recounting Curtis's deposition testimony about placement of the points of origin outside of the smoke plume in the video. (See id. at 74:20-23; Defs.' Reply at 90:4-7.) Defendants were aware of Curtis's deposition testimony and did not need Dodds' notes about Curtis's testimony to effectively question Dodds or any other witness about the alleged inconsistency between the smoke plume and alleged points of origin.

Nonetheless, even if the government should have known

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[13] Although defendants quote Pumphrey as having focused on the defendant's "failure to disclose," (Defs.' Br. at 13 n.12), that language appears only in the editorial description of the case and is absent from the opinion. Pumphrey did not involve mere non-disclosure. Although a significant video was not disclosed, defendant's general counsel "engaged in a scheme to defraud the jury, the court, and [plaintiff], through the use of misleading, inaccurate, and incomplete responses to discovery requests [about the undisclosed video], the presentation of fraudulent evidence, and the failure to correct the false impression created by [expert] testimony" at trial. Pumphrey, 62 F.3d at 1132. While non-disclosure discovery violations may be relevant in determining whether a scheme to defraud the court exists, Pumphrey does not suggest that discovery violations alone can amount to fraud on the court.

about Dodds' handwritten notes and the notes would have aided defendants, non-disclosure generally "does not constitute fraud on the court." See, e.g., In re Levander, 180 F.3d at 1119. The allegations regarding Dodds' undisclosed notes do not even rise to the level of the previously discussed affirmative misrepresentations made by counsel in Appling, which the Ninth Circuit held did not constitute fraud on the court. See Appling, 340 F.3d at 774.

For any and all of the reasons discussed above, the non-disclosure of Dodds' handwritten notes cannot amount to fraud on the court.

3. The State Wildfire Fund

Defendants' next allegation of fraud on the court is based on Cal Fire's "Wildland Fire Investigation Training and Equipment Fund" (the "State Wildfire Fund" or "fund"). Portions of wildfire recoveries collected by Cal Fire were deposited in the State Wildfire Fund and available for use by Cal Fire. Defendants allege that the existence of the State Wildfire Fund motivated Cal Fire employees, such as White, to falsely attribute blame for fires to wealthy individuals or corporations in an effort to gain personal benefits through the State Wildfire Fund. Defendants knew of the State Wildfire Fund prior to settlement and entry of judgment but allege that they discovered the true nature and inherent conflicts created by the fund after settlement and entry of judgment.

For example, after settlement of the federal action, the California State Auditor issued a formal report on October 15, 2013 that criticized the State Wildfire Fund. (Defs.' Br. at

110:12-16.) Among the findings, the State Auditor found that the State Wildfire Fund "'was neither authorized by statute nor approved'" and "'was not subject to Cal Fire's normal internal controls or oversight by the control agencies or the Legislature.'" (Id. at 110:18-27 (citing the California State Auditor's report titled, "Accounts Outside the State's Centralized Treasury System").) After repeated motions to compel in the state action, Cal Fire also produced numerous documents allegedly raising concerns about the impartiality of its investigators in light of the State Wildfire Fund. (Id. at 111:21-25, 112:3-8.) For example, an email from Cal Fire Northern Region Chief Alan Carlson allegedly "denied a request to use [the State Wildfire Fund] to enhance Cal Fire's ability to investigate arsonists because, he said, 'it is hard to see where our arson convictions are bringing in additional cost recovery.'" (Id. at 113:2-4.) Documents also allegedly showed that Cal Fire management sought to conceal the fund from state regulators, knew the fund was illegal, and used the fund to pay for destination training retreats. (Id. at 112:21-22, 113:5-20.)

Defendants contend that their post-judgment discoveries revealing the true nature and inherent conflicts created by the State Wildfire Fund support their claim of fraud on the court based on four distinct theories: (a) the federal government made reckless misrepresentations[14] to the court to obtain a favorable

[14] Although defendants make a passing reference to the government's "intentional misconduct" of "fail[ing] to disclose" the State Wildfire Fund to defendants, (Defs.' Br. at 117:8-9), they do not advance this theory and rely only on alleged reckless misrepresentations. Moreover, absent application of Brady and a finding that Cal Fire's knowledge can somehow be attributed to

in limine ruling pertaining to the State Wildfire Fund; (b) Cal Fire's general counsel and litigation counsel should be treated as officers of the federal court and thereby committed fraud on the court when they failed to disclose the true nature of the State Wildfire Fund; (c) Chris Parker testified falsely about the State Wildfire Fund during his deposition; and (d) the very existence of the State Wildfire Fund constitutes a fraud on the court.

a. Alleged Reckless Misrepresentations by the Government

In one of its in limine motions, the government sought to exclude argument of a government conspiracy and cover-up. (U.S.'s Omnibus Mot. in Limine at 2:1 (Docket No. 487).) While the motion focused on the alleged misconduct surrounding the events at the Red Rock Lookout Tower, the government also argued that defendants sought to prove a conspiracy based, in part, on the State Wildfire Fund. The government explained that "a portion of assets recovered from Cal Fire's civil recoveries can be allocated to a separate public trust fund to support investigator training and to purchase equipment for investigators (e.g., investigation kits and cameras)." (Id. at 3:28-4:3.) It argued that the existence of the State Wildfire Fund "does not support an inference that investigators concealed evidence" and that "[a] public program established to train and equip fire investigators is hardly evidence of a multi-agency conspiracy." (Id. at 3:27-4:4.)

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the government, this theory has no legs to stand on.

Judge Mueller granted the government's in limine motion "as to conspiracy." (July 2, 2012 Final Pretrial Order at 17:21.) In their instant motion, defendants recognize that Judge Mueller's ruling "was not necessarily a surprise given the limited evidence then available to the Court," but nonetheless argue that, in light of what was subsequently discovered about the State Wildfire Fund, the government was reckless in its representations to the court about the legitimacy of the fund. (Defs.' Br. at 110:10-11, 115:17-10.)

To suggest that the limited evidence before the court was the only reason defendants were not surprised by Judge Mueller's ruling is misleading. In fact, in their opposition to the government's motion, defendants disavowed any intent to argue the existence of a government conspiracy:

> The U.S. mischaracterizes Defendants' arguments in order to knock down a straw man. Defendants have not argued--and do not intend to argue--a "conspiracy" among the USFS, CDF, and their respective counsel, based on . . . (2) the facilitation of a program that encourages agents to blame fires on companies who are most likely able to pay for them . . . .

(Defs.' Opp'n to U.S.'s Mot. in Limine at 3:4-8 (Docket No. 531).) Defendants do not explain how any reckless misrepresentations by the government persuaded Judge Mueller to tentatively preclude defendants from arguing a theory defendants expressly disavowed.

Notwithstanding the questionable footing of defendants' position, allegations of reckless conduct cannot give rise to fraud on the court. The Ninth Circuit has indicated that fraud

on the court requires proof of "an intentional, material misrepresentation directly 'aimed at the court.'" In re Napster, Inc. Copyright Litig., 479 F.3d 1078, 1097 (9th Cir. 2007), abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 105 n.1, 114 (2009);[15] see also In re Napster, Inc. Copyright Litig., 479 F.3d at 1097-98 (emphasizing that the evidence does not suggest that defendants selected the contract terms "with the intent to defraud the courts"). The Ninth Circuit has also explained that it has "vacated for fraud on the court when the litigants intentionally misrepresented facts that were critical to the outcome of the case, showing the appropriate 'deference to the deep rooted policy in favor of the repose of judgments.'" Estate of Stonehill, 660 F.3d at 452 (quoting Hazel–Atlas Glass Co., 322 U.S. at 244–45) (emphasis added). Allowing reckless conduct to amount to fraud on the court would also be inconsistent with the Ninth Circuit's explanation that a finding of fraud on the court "must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." Pumphrey, 62 F.3d at 1131 (internal quotations marks omitted).

Although defendants appear to concede that reckless

[15] In Napster, the Ninth Circuit was assessing whether defendants had committed fraud on the court thereby vitiating the attorney-client privilege under the crime-fraud exception to the privilege. 479 F.3d at 1096-98. Although the Ninth Circuit does not discuss the fraud on the court doctrine in detail, it concluded that even if it considered the evidence as argued, it "would not conclude that this evidence establishes an intentional, material misrepresentation directly 'aimed at the court.'" Id. at 1097 (quoting Appling, 340 F.3d at 780).

conduct by a non-government party could not amount to fraud on the court, (Defs.' Br. at 24:14-18), they argue that because it was on the part of the government, recklessness can amount to fraud on the court. Defendants have not cited and the court is not aware of a single case in which the Supreme Court or Ninth Circuit suggested that reckless conduct by the government could come within the narrow confines of fraud on the court.

In arguing that a reckless disregard for the truth by government attorneys can amount to fraud on the court, defendants rely exclusively on Demjanjuk. In Demjanjuk, the Sixth Circuit held that an objectively reckless disregard for the truth can satisfy the requisite intent to show a fraud on the court. 10 F.3d at 348-49. Its holding was not, however, dependent on the fact that the misconduct was committed by government attorneys. See id. In the Sixth Circuit, a reckless state of mind by non-government parties can also suffice to show fraud on the court. See Gen. Med., P.C. v. Horizon/CMS Health Care Corp., 475 Fed. App'x 65, 71-72 (6th Cir. 2012).

Defendants have not cited and this court is not aware of a single circuit that has joined the Sixth Circuit in allowing something less than intentional conduct to arise to fraud on the court. See, e.g., Herring v. United States, 424 F.3d 384, 386 & n.1 (3d Cir. 2005) (recognizing Demjanjuk's holding, but requiring proof of "an intentional fraud"); United States v. MacDonald, 161 F.3d 4, 1998 WL 637184, at *3 (4th Cir. 1998) (rejecting Demjanjuk's holding and describing that position as the "minority view"); Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1266-67 (10th Cir. 1995) (rejecting Demjanjuk's

holding and requiring "a showing that one has acted with an intent to deceive or defraud the court"). In disagreeing with the Sixth Circuit, the Tenth Circuit explained, "A proper balance between the interests underlying finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing--what can properly be characterized as a deliberate scheme to defraud--before relief from a final judgment is appropriate under the Hazel–Atlas standard." Robinson, 56 F.3d at 1267.

Even if this court was at liberty to depart from Ninth Circuit precedent and was inclined to examine the government's conduct under the reckless disregard for the truth standard, the reasons the Sixth Circuit concluded that the government acted with a reckless disregard in Demjanjuk are not present in this case. As previously discussed, Demjanjuk did not examine the government's reckless failure to disclose through the lens of its obligations in a civil case. The Sixth Circuit concluded that the denaturalization and extradition proceedings in that case were one of the rare instances in which Brady extended to a civil case and thus the OSI prosecutors had a "constitutional duty" to produce the exculpatory evidence. The Sixth Circuit's application of Brady was inextricably entwined with its finding of fraud of the court: "This was fraud on the court in the circumstances of this case where, by recklessly assuming Demjanjuk's guilt, they failed to observe their obligation to produce exculpatory materials requested by Demjanjuk." Demjanjuk, 10 F.3d at 354.

Thus, even if the Ninth Circuit adopted the minority position in Demjanjuk of allowing reckless conduct to rise to the level of fraud on the court, Demjanjuk does not aid defendants because Brady does not apply to this case. Moreover, in Demjanjuk, the documents the government failed to disclose were "in their possession." Id. at 339, 350. Here, defendants do not even allege that the government had the documents exposing the alleged conflicts created by the State Wildfire Fund, and the critical audit report allegedly revealing the true nature of the fund did not even exist before judgment was entered in this case.

In sum, allegations of reckless conduct regarding the State Wildfire Fund cannot amount to fraud on the court and, even if the Ninth Circuit adopted the minority position from Demjanjuk, defendants' allegations are still insufficient because Brady does not apply and the government did not possess the documents at issue.

b. Treating Cal Fire's General Counsel and Litigation Counsel as Officers of This Court

Relying on Pumphrey, defendants argue that Cal Fire's general counsel and litigation counsel were "officers of the court" as the term is used when examining allegations of fraud on the court. In Pumphrey, plaintiff filed suit and proceeded to trial in Idaho and local counsel represented defendants throughout the litigation. 62 F.3d at 1131. Defendant's general counsel was not admitted to practice in Idaho or admitted pro hac vice and never made an appearance or signed a document filed with the court. Id. at 1130-31. The Ninth Circuit nonetheless found that he was an "officer of the court" for purposes of assessing

fraud on the court because he "participated significantly" by attending trial on defendant's behalf, gathering information during discovery, participating in creating the fraudulent video, and maintaining possession of the fraudulent and undisclosed video. Id. at 1131.

The court doubts whether the rationale in Pumphrey can be extended to Cal Fire because, although it operated under a joint investigation and prosecution agreement with the government, Cal Fire was not a party to this case as was the defendant in Pumphrey. Cf. Latshaw, 452 F.3d at 1104 ("We find it significant that vacating the judgment would in fact '"punish" parties who are in no way responsible for the "fraud."'" (quoting Alexander, 882 F.2d at 425)). Nor did Cal Fire's general counsel or litigation counsel ever act or purport to act as an attorney for the United States.

Nonetheless, the court need not resolve this issue because defendants' theory attributing fraud on the court to Cal Fire's general counsel and litigation counsel relies on their failure to comply with their alleged obligation to disclose evidence about the State Wildfire Fund under Brady. (See Defs.' Br. at 119:1-17.) As this court has already explained, Brady does not apply in this civil action. Absent some duty to disclose imported from Brady, non-disclosures to defendants alone cannot amount to fraud on the court. See, e.g., Appling, 340 F.3d at 780; In re Levander, 180 F.3d at 1119; Valerio, 80 F.R.D. at 641, adopted as the opinion of the Ninth Circuit in 645 F.2d at 700. Any allegations based on Cal Fire's counsel's failure to

disclose information about the State Wildfire Fund therefore cannot amount to fraud on the court.

c. Chris Parker's Deposition Testimony

Chris Parker, a former Cal Fire investigator, was an expert witness for the government and the creator of the State Wildfire Fund. During his deposition in this action, Parker allegedly testified that the State Wildfire Fund was "created only for altruistic purposes" and did not "suggest that the account was established to circumvent state fiscal controls." (Defs.' Br. at 109:17-19.) This testimony was allegedly false or concealed the true nature of the State Wildfire Fund because the 2013 audit report revealed that Parker "had written an email which stated the purpose of the account was to give Cal Fire control over money that was unencumbered by restrictions on expenditure of state funds." (Id. at 87:2-4.)

Assuming Parker testified falsely at his deposition, the Supreme Court and Ninth Circuit have unequivocally held that perjury by a witness alone cannot amount to fraud on the court. See, e.g., Hazel-Atlas Glass Co., 322 U.S. at 245 ("This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury."); Appling, 340 F.3d at 780 ("[P]erjury by a party or witness[] does not, by itself, amount to fraud on the court."). Defendants do not allege that the government had any knowledge of this alleged perjured testimony. Even assuming Cal Fire's counsel knew of the false testimony, defendants' theory of fraud on the court tied to Cal Fire's counsel relies on a questionable extension of Pumphrey and

an impermissible extension of Brady. Parker's deposition testimony simply does not rise to fraud on the court.

d. Mere Existence of the State Wildfire Fund

As their Hail Mary attempt to show fraud on the court based on the State Wildfire Fund, defendants contend that the existence of the fund alone is a fraud on the court. Although the State Wildfire Fund did not and could not receive any proceeds obtained in the federal action, defendants nonetheless allege that it created a conflict of interest for Cal Fire employees and that the investigation and opinions of those employees were central to the federal action. Even assuming those alleged conflicts permeated this action, defendants do not explain how the existence of conflicts of interest by witnesses translates into a fraud on the court. Suffice to say, the mere existence of the State Wildfire Fund does not "'defile the court itself'" and is not a fraud "'perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.'" Appling, 340 F.3d at 780 (quoting In re Levander, 180 F.3d at 119).

4. Alleged Bribe by Downey Brand LLP or Sierra Pacific Industries

To introduce the allegation of fraud on the court based on the government's failure to inform the court and defendants of an alleged bribe by Downey Brand LLP or Sierra Pacific Industries, defendants spend four pages detailing the facts and circumstances allegedly showing that Ryan Bauer may have started the Moonlight Fire. (See Defs.' Br. at 122:6-126:6.) Ryan lived

in Westwood, California and was allegedly near the area of origin with a chainsaw when the Moonlight Fire ignited. At the time of settlement and entry of judgment, defendants knew all of the information detailed in their brief that allegedly shows Ryan may have started the fire.

After the settlement, defendants learned that Ryan's father, Edwin Bauer, had told the government that Downey Brand LLP or Sierra Pacific Industries had offered Ryan two million dollars if he would state that he had started the Moonlight Fire. (Id. at 127:10-19.) Edwin allegedly filed a police report of the bribe attempt and the FBI interviewed him and Ryan's lawyer about it. (Id. at 127:19-20.) According to defendants, revealing the alleged bribe to the court or defendants "would have been damaging to the government's case, as it would have tended to prove that Edwin Bauer made a false assertion to strengthen the government's claims against Sierra Pacific while diverting attention from his son." (Id. at 128:21-24.) Defendants further contend that the false bribe allegation shows "a willingness on the part of the Bauers to manufacture evidence harmful to an innocent party and an effort to deflect attention away from someone who may have actually started the fire." (Id. at 128:26-28.)

As one of their eighteen motions in limine, the government sought to exclude any evidence seeking to show that the Moonlight Fire was caused by a potential arsonist, including Ryan. (U.S.'s Omnibus Mot. in Limine at 5:1-7.) Defendants opposed the motion, putting forth the allegations recited in its current motion. Judge Mueller tentatively denied the motion

"insofar as defendants may use evidence indicating arson was not considered to show weaknesses in the investigation following the fire," but excluded defendants from "elicit[ing] evidence to argue that someone else started the fire." (July 2, 2012 Final Pretrial Order at 18:1-6.) Based on this tentative in limine ruling, defendants claim the court was defrauded by the government's failure to disclose the alleged bribe to the court and defendants while arguing that there was "no evidence" of arson.

"[I]n limine rulings are not binding on the trial judge, and the judge may always change his mind during the course of a trial." Ohler v. United States, 529 U.S. 753, 758, n.3 (2000); (see also July 2, 2012 Final Pretrial Order at 17:2-5 ("The following motions have been decided based upon the record presently before the court. Each ruling is made without prejudice and is subject to proper renewal, in whole or in part, during trial.").) Defendants in fact filed written objections to the tentative ruling, but the parties reached a settlement agreement before Judge Mueller had the opportunity to address those objections. That Judge Mueller's ruling was only tentative minimizes its significance in the fraud on the court inquiry.

Moreover, that defendants would now claim that even though the ruling was only tentative it somehow prevented them from "elicit[ing] evidence to argue that someone else started the fire" boggles the judicial mind. It may seem plausible based on their statement in their current brief that they "always intended to argue that one or more of the Bauers may have caused the fire either intentionally or unintentionally, whether via arson, with

a chainsaw, spilled gasoline, or through careless smoking." (Defs.' Br. at 126:4-6.) It is concerning to this court, however, that defendants would so flippantly make this representation now when defendants' lead counsel made the opposite representation to Judge Mueller during the hearing on the motions in limine:

> MR. WARNE: The other issue that I don't -- again, another burning need question here, you indicated a ruling as it relates to Bauer . . . . We appreciated that. We're not here to prove that Mr. Bauer started the fire, nor can anybody do that right now in light of the way the investigation was done.

(June 26, 2012 Tr. at 94:11-14 (Docket No. 572) (emphasis added).) As Warne's colloquy with the court continued, he repeatedly emphasized that defendants' intent was to show the flaws in the investigation, not prove that Ryan started the fire:

> MR. WARNE: But the evidence pertaining to those two individuals goes directly to the quality of the investigation . . . .
>
> THE COURT: There is no evidence that -- there is no evidence suggesting that arson was the cause of this fire, is there? Your point is that the investigation didn't consider that fully.
>
> MR. WARNE: Actually, there is as much evidence -- and we don't intend to play it this way to the jury, but there is as much evidence suggesting that there was another perpetrator of this fire, be it arson or a chain saw or something else, as there is the circumstantial evidence that the government is relying upon to say that the bulldozer started the fire. . . . The government's case is fully and completely based on circumstantial evidence and opinion evidence, as is the arguments we're making with respect to the investigation and what it left behind without looking into various other possibilities.

> THE COURT: Why can't you make that point generally without referencing Mr. Bauer or Mr. McNeil?
>
> MR. WARNE: Because it is the essence of our case there, as I indicated in footnote 3, with respect to what I understood this Court's ruling was as it relates to an effort by the government to really, apologize, mischaracterize our motion or our case as trying to prove that Mr. Bauer is an arsonist. Our case is focused on the investigation.

(Id. at 94:14-95:20 (emphasis added).)

When asked at oral argument on this motion about his representations to Judge Mueller, Mr. Warne suggested he was simply feigning agreement with Judge Mueller's tentative ruling to avoid any suggestion that the ruling could weaken defendants' case. As Judge Mueller explained at the hearing on the motions in limine, however, her tentative ruling was based on the suggestion of one of defendants' counsel. (See June 26, 2012 Tr. at 67:19-24 ("The exclusion of arson defenses generally. My current plan is to deny, but consider some kind of limiting instruction; that is, the defense represents it will not attempt to show that someone else started the fire, but wished to introduce evidence showing the investigation was biased. Mr. Schaps referenced this approach earlier."); see also June 26, 2012 Tr. at 45:2-18).

At the very least, it remains a mystery how a tentative in limine ruling based on defendants' own suggestion can transform into a "substantial factor in forcing Defendants to settle the federal action," (Defs.' Br. at 126:27-28). Even setting aside the inconsistencies surrounding defendants' alleged intent, their argument that the government's non-disclosure of

the bribe allegation amounts to fraud on the court relies heavily on Brady, which does not extend to this civil case. Absent application of Brady, the government was under no obligation to disclose the alleged bribe. In fact, if the government attorneys had disclosed the alleged bribe, they could have just as easily been criticized for spreading a scandalous rumor in attempt to intimidate defendants.

In the civil context, the Ninth Circuit has repeatedly held that non-disclosures alone generally cannot amount to fraud on the court. See, e.g., Appling, 340 F.3d at 780. To meet the high threshold for fraud on the court, a non-disclosure by counsel must be "so fundamental that it undermined the workings of the adversary process itself." Estate of Stonehill, 660 F.3d at 445. The Ninth Circuit has found that non-disclosures did not rise to this level when they "had limited effect on the district court's decision" and the withheld information would not have "significantly changed the information available to the district court." Id. at 446.

That defendants even argue that the government's non-disclosure of the bribe was "so fundamental that it undermined the workings of the adversary process itself" is disturbing. The court ruled consistent with the very trial strategy defendants represented they wanted to take, and it is far from plausible that evidence of the alleged bribe would even have remotely changed the information available to the district court, let alone have been admissible. Cf. id.

5. Removal of AUSA Wright from the Case

Former AUSA Wright was originally assigned to lead the

Moonlight Fire case, but was allegedly "forbidden from working on the case in January 2010, shortly after raising ethical concerns regarding disclosures in another wildland fire action he was handling." (Defs.' Reply at 90:24-91:1.) Defendants do not articulate how removal of Wright from the Moonlight Fire case could amount to fraud on the court. It is the exclusive prerogative of the United States Attorney to determine how to staff any case in his office. Defendants argue only that the removal of Wright "tend[s] to show" the government's fraudulent intent and that its alleged misconduct was purposeful. (Id. at 90:22-91:8.) It neither shows nor suggests any such thing.

6. Judge Nichols' Terminating Order and Sanctions in the State Action

In the state action, Judge Nichols issued two decisions[16] condemning misconduct by Cal Fire and its attorneys and ultimately dismissed the state action with prejudice and ordered sanctions in favor of defendants because of Cal Fire's misconduct. Defendants acknowledge that Judge Nichols' findings in the state action have no preclusive or binding effect in this

[16] The government criticizes Judge Nichols for having adopted the detailed proposed findings submitted by Downey Brand LLP with only two minor edits. As a companion to that order, however, Judge Nichols first issued an order that "speaks in the Court's own voice." See Cal. Dep't of Forestry v. Howell, No. GN CV09-00205, 2014 WL 7972096, at *7 (Cal. Super. Ct. Feb. 4, 2014). Judge Nichols repeatedly emphasized that he had belabored to review all of the evidence and did not simply sign the proposed order. See id. at *7, *12 ("The fact that the Court has signed Defendants' proposed orders with few changes reflects only the reality that those orders are supportable in all respects. . . . The Court does not wish on any appellate tribunal the task undertaken by the undersigned: the personal review of every document and video deposition submitted in the case. This task required countless hours of study and consideration.").

case. Not only was the government not a party in the state action, it did not have the opportunity to argue or brief any of the issues before Judge Nichols. More importantly, Judge Nichols' findings and criticisms were levied against Cal Fire and its counsel. See Cal. Dep't of Forestry v. Howell, No. GN CV09-00205, 2014 WL 7972096 (Cal. Super. Ct. Feb. 4, 2014); Cal. Dep't of Forestry v. Howell, No. GN CV09-00205, 2014 WL 7972097 (Cal. Super. Ct. Feb. 4, 2014).

The only references Judge Nichols makes in either order regarding any involvement of the federal government were about the pre-deposition meeting with Reynolds. Cal. Dep't of Forestry, 2014 WL 7972096, at *10; Cal. Dep't of Forestry v. Howell, 2014 WL 7972097, at *n.13. This court has already determined that the allegations regarding the pre-deposition meeting with Reynolds cannot amount to fraud on the court.

Judge Nichols, moreover, based his decision to impose terminating sanctions on Cal Fire's discovery abuses and his determination that Cal Fire "prejudiced [defendants'] ability to go to trial." Cal. Dep't of Forestry, 2014 WL 7972096, at *4. Findings in that context and under that legal standard are not relevant to the determination of whether alleged misconduct by the federal government constituted fraud on the court. As the Ninth Circuit has explained, prejudice to the opposing party may be considered when assessing fraud on the court, but fraud on the court exists only if there is "'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" Abatti, 859 F.2d at 118 (quoting Toscano, 441 F.2d at 934). Judge Nichols' findings that Cal Fire prejudiced

defendants' ability to go to trial in the state action thus do not aid this court in determining whether defendants' allegations about the federal government amount to a "'grave miscarriage of justice,'" Appling, 340 F.3d at 780 (quoting Beggerly, 524 U.S. at 47).

IV. Conclusion

Defendants made a calculated decision to settle this case almost two years ago, and a final judgment was entered pursuant to their agreement. To set that judgment aside, the law requires a showing of fraud on the court, not an imperfect investigation. Defendants have failed to identity even a single instance of fraud on the court, certainly none on the part of any attorney for the government. They repeatedly argue that fraud on the court can be found by considering the totality of the allegations. Here, the whole can be no greater than the sum of its parts. Stripped of all its bluster, defendants' motion is wholly devoid of any substance.

IT IS THEREFORE ORDERED that defendants' motion to set aside the judgment (Docket No. 593) and defendants' motion for a temporary stay of the settlement agreement (Docket No. 615) be, and the same hereby are, DENIED.

Dated: April 17, 2015

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

EXHIBIT 11

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SIERRA PACIFIC INDUSTRIES, W.M. BEATY AND ASSOCIATES, INC., EUNICE E. HOWELL, INDIVIDUALLY AND DOING BUSINESS AS HOWELL'S FOREST HARVESTING COMPANY; ANN McKEEVER HATCH, AS TRUSTEE OF THE HATCH 1987 REVOCABLE TRUST, ET AL.

Defendants.

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

DEFENDANTS' REVISED SUPPLEMENTAL BRIEFING REGARDING THE MOONLIGHT PROSECUTORS' FRAUD ON THE COURT

Date: April 6, 2015
Time: 2:00 p.m.
Dept: Courtroom 5
Judge: Hon. William B. Shubb

9th Circuit Case Number(s) 15-15799

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

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When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [ ].

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [November 19, 2015].

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Signature (use "s/" format) s/ Kelli L. Taylor

9th Circuit Case Number(s): 15-15799

I, KELLI L. TAYLOR, caused the electronically filed, UNITED STATES' OPPOSITION TO APPELLANTS' MOTION FOR JUDICIAL NOTICE AND REQUEST TO STRIKE RELATED REFERENCES AND ARGUMENTS FROM APPELLANTS' BRIEFS, to be hand served on November 19, 2015 to the following people:

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Signature: */s Kelli L. Taylor*
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