

Appeal No. 15-15799

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

vs.

SIERRA PACIFIC INDUSTRIES, ET AL.,
Defendants – Appellants.

On Appeal From the United States District Court
for the Eastern District of California, Sacramento

Hon. William B. Shubb

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

**APPELLANTS' MOTION FOR JUDICIAL NOTICE OR, IN THE
ALTERNATIVE, MOTION TO SUPPLEMENT THE RECORD ON
APPEAL; MEMORANDUM OF POINTS AND AUTHORITIES;
DECLARATION OF WILLIAM R. WARNE**

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**MOTION FOR JUDICIAL NOTICE OR, IN THE ALTERNATIVE, TO
SUPPLEMENT THE RECORD**

Pursuant to Federal Rule of Evidence 201, all Defendants jointly move this Court to judicially notice the adjudicative facts set forth herein. The facts, which arose after entry of the order that is the subject of this appeal, are relevant to one of the arguments Defendants raise in their opening brief, and are both generally known within the territorial jurisdiction of the trial court, and are capable of accurate and ready determination from sources whose accuracy cannot reasonably be questioned. The facts and documents that are the subject of this motion pertain to a Twitter account belonging to Judge William B. Shubb, who issued the appealed-from order; another Twitter account belonging to the U.S. Attorney's Office for the Eastern District of California; the public nature of those accounts; and the existence of the contents of portions of both accounts. Defendants do not seek judicial notice of the truth of the statements in either Twitter account.

Defendants alternatively move to supplement the record under Federal Rule of Appellate Procedure 10(e) and this Court's inherent power, on grounds that these materials did not exist before the district court issued the appealed-from order.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL HISTORY

A. Judge Shubb Follows the Twitter Account Belonging to the U.S. Attorney's Office for the Eastern District of California, and Received Tweets About the Merits of the Action.

Judge Shubb issued his order denying Defendants' motion on April 17, 2015, at 2:45 p.m. Over the next two hours, the federal prosecutors on this action, Assistant United States Attorneys for the Eastern District of California, used their "@EDCAnews" Twitter account to broadcast eight congratulatory Tweets concerning Judge Shubb's order and the case's merits to their office's Twitter followers.¹ (Attachments 13, 19.) (Warne Decl., ¶ 2.) Defendants have since confirmed that, through his then-public Twitter account, titled "@nostalgist1," Judge Shubb "followed" @EDCAnews and thus received those Tweets.² (Attachments 14-15.) *Id.* The mere existence of a social network relationships

¹ "Following" another account on Twitter means establishing a subscription to that account's Tweets. Once established, the Tweets from the followed account are automatically delivered to one's own Twitter account. A followed account holder may send confidential messages to a follower through Twitter. (Attachments 16-17.)

² While Judge Shubb's Twitter account does not identify him by name, the contents confirm its origins, as his account contains, among other identifying characteristics, close-up photographs and links to videos of him, one with him wearing a shirt with the name "Shubb" and others with captions of him performing at the District Court. (Attachments 1-3.)

between a judge and one of the parties³ appearing before him creates an appearance of bias and raises “significant concern” regarding the risk of *ex parte* communications. California Judges Association, Formal Opinion No. 66 - Online Social Networking § III (C)(3)-(D) (2011). Those concerns materialize when a “followed” party posts Tweets regarding the case, which are directed to the judge in his capacity as a follower.

B. Judge Shubb Posted an Inaccurate and Prejudicial Tweet to his then-Public Twitter Account about Defendants and the Merits of the Case.

On April 17, 2015, at 9:51 p.m., Judge Shubb posted on his @nostalgist1 public Twitter account: “Sierra Pacific still liable for Moonlight Fire damages.” (Attachment 6.) (Warne Decl., ¶ 3.) Just beneath this post, Judge Shubb linked to an article with the same title from the Central Valley Business Times.

(Attachments 6-7.) Contrary to Judge Shubb’s imprimatur, the title was false.

Sierra Pacific was never found liable and has paid no damages. (Warne Decl., ¶ 4.)

Judge Shubb’s inaccurate public post violates Canon of Judicial Conduct 3A(6) and only increases the appearance of bias. It also prejudices Sierra Pacific and all Defendants in the pending state court appeal regarding the Moonlight Fire. When a judge selectively posts third-party communications pertaining to his or her cases, it necessarily creates the appearance of bias, especially with respect to

³ Sierra Pacific has a Twitter account as well, which Judge Shubb does not follow. (Attachments 20-21.).

articles that are inaccurate and prejudicial. The act of picking and choosing one article of many reveals a willingness to step out of the role of a neutral. By assenting to and posting a particular article, the court entangles itself with the message and slant of that article, thereby creating the appearance of having picked sides or of favoring one spin over another.⁴

C. Defendants Filed A Proposed Opening Brief Raising Concerns with Respect to Judge Shubb's Social Media Activities.

On Friday, September 11, 2015, Defendants filed a draft of their opening brief on appeal with a motion to exceed the word count limit. At that time, the judge's Twitter account was "public." (Attachments 2, 24-27.) (Warne Decl., ¶¶ 7, 8.) Therein, Defendants argued that Judge Shubb's Twitter post is a violation of Canon 3(A)(6) of the Code of Conduct for United States Judges, which precludes judges from "mak[ing] public comment on the merits of a matter pending or impending in any court."⁵ Defendants further argued that this appearance of impropriety and violation of Canon 3(A)(6) requires reversal and recusal under

⁴ The government would also have cause for concern if Judge Shubb tweeted "Prosecutors Burn Down The Law" and linked to the *Wall Street Journal's* Moonlight Fire editorial with that title, or if he had tweeted "A wildfire of corruption" and linked to the *Washington Post's* Moonlight Fire opinion piece of that title. (Attachments 11-12.) (Warne Decl., ¶ 6.)

⁵ In addition to the instant federal appeal, there are two appeals pending in the California Courts of Appeal, Third Appellate District, Case Nos. C074879 and C076008, which arise out of the Moonlight Fire state action litigated in Plumas County Superior Court.

28 U.S.C. § 455(a). (See ECF Docket Entry No. 27, Warne 9/11 Decl., Ex. A at pp. 92-95.)

D. The U.S. Attorney's Office Intervened and Advised Judge Shubb Of Defendants' Arguments Arising From Social Media Activities, and Judge Shubb Changed the Status of His Then-Public Twitter Account.

On the following Monday, September 14, the prosecutors hand-delivered to Judge Shubb a letter, the purpose of which was to inform him of Defendants' appellate arguments regarding his Twitter usage. (Attachment 22.) (Warne Decl., ¶ 9-10.) Before Defendants received mailed copies of the government's letter on September 16, Judge Shubb changed his @nostalgist1 account from "public" to "protected," thus restricting access to "confirmed followers."⁶ (Attachment 23.) (Warne Decl., ¶ 11.) Although this Court cannot, as of November 6, 2015, access the substance of Judge Shubb's account through Twitter, many of his Tweets, including the April 17 tweet, can still be found in Google cached internet pages. (Attachments 24-27.) (Warne Decl., ¶ 12.)

E. The Foregoing Facts Are Relevant to Defendants' Arguments Seeking Reversal of the District Court's Order.

As explained in Defendants' opening brief on appeal and hereinbelow, the facts and circumstances associated with Judge Shubb's Twitter usage are directly relevant to and supportive of Defendants' arguments seeking reversal of his order

⁶ However, Defendants had previously downloaded much of Judge Shubb's account. (Attachments 2-3, 6.) (Warne Decl., ¶ 12.)

denying their Rule 60(d)(3) Motion. These facts are also perfectly suited for judicial notice. Defendants alternatively seek leave under Federal Rule of Appellate Procedure 10(e) and this Court's inherent power to include these same materials in the record because Judge Shubb did not receive the prosecutors' Tweets or post his prejudicial and inaccurate public comments on the merits of the case until after he issued his order, at which point the record had already been developed for the proceedings below.

II. ARGUMENT

A. Judicial Notice of the Existence, Status, and Certain Contents of Judge Shubb's Twitter Account and that of the U.S. Attorney's Office for the Eastern District of California is Appropriate.

1. Legal Standard Regarding Judicial Notice

Pursuant to Federal Rule of Evidence 201(a), a court may take judicial notice of adjudicative facts only. In addition, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A court "must" take judicial notice if a party requests it and supplies the court with the requisite information. *Id.*, Rule 201(c). Only relevant facts may be judicially noticed. *See Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 991 n.8 (9th Cir. 2012).

2. Facts And Documents For Which Judicial Notice Is Sought

In their opening brief, Defendants argue that Judge Shubb has, at a bare minimum, an appearance of partiality and impropriety that warrants reversal and remand to a judge outside the Eastern District of California. (*See* Defendants' Opening Brief on Appeal, Section VIII.) Relying on numerous cases, including *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988) (holding that § 455(a) violation warrants vacating judgment of disqualified judge), *United States v. Microsoft Corp.*, 253 F.3d 34, 116 (vacating lower court order by imposing partial retroactive disqualification), and *Wylar Summit Partnership v. Turner Broadcasting System, Inc.*, 235 F.3d 1184, 1196 (9th Cir. 2000) (authorizing remand to a different judge), Defendants' argument is based in part on the inaccurate Twitter post that Judge Shubb made about the merits of this case, just hours after issuing the order from which this appeal is taken. Defendants' argument is also based on the fact that Judge Shubb simultaneously uses his account to "follow" the Twitter account of the U.S. Attorney's Office for the Eastern District of California, "@EDCAnews."

In light of this argument, Defendants request that this Court take judicial notice of the following, all of which are directly relevant to Defendants' contentions:

1. That the Honorable William B. Shubb's image can be seen on his profile page on the Eastern District of California's website. In support of this request, Defendants provide a true and correct copy of a screenshot of this profile page attached hereto as **Attachment 1**, available online at <http://www.caed.uscourts.gov/CAEDnew/index.cfm/judges/all-judges/5005/>

2. That Judge Shubb maintained a "public" (i.e., not "protected") Twitter account under the username "@nostalgist1" through at least September 11, 2015. In support of this request, Defendants provide true and correct printouts downloaded on or before September 11, 2015, of the contents of Judge Shubb's "@nostalgist1" Twitter account from April 2014 to August 31, 2015, attached hereto as **Attachment 2**, which were available online at <https://twitter.com/nostalgist1> as of September 11, 2015. **Attachment 2** was printed from "@nostalgist1" before this account status was changed to "protected" and thus became inaccessible sometime between September 11 and September 15, 2015. **Attachment 3** comprises printouts of various Tweets found on Judge Shubb's Twitter account that were printed therefrom on September 11, 2015.

3. That Judge Shubb's Tweets from his "@nostalgist1" Twitter account were not protected on or before September 11, 2015, and were therefore visible to anyone, whether or not they have a Twitter account. In support of this request, Defendants provide a true and correct screenshot of Twitter's "About public and

protected Tweets,” attached hereto as **Attachment 4**, available online at <https://support.twitter.com/articles/14016#> as of the filing of this motion.

4. That a search of Twitter for “Moonlight Fire” returns numerous Tweets. In support of this request, Defendants provide as **Attachment 5** hereto true and correct printouts of screenshots of Tweets from April 17, 2015, which appeared in those search results as of August 25, 2015. **Attachment 5** was printed before the “@nostalgist1” account status was changed to “protected” and thus became inaccessible sometime between September 11 and September 15, 2015.

5. That on April 17, 2015, Judge Shubb publicly Tweeted from his “@nostalgist1” Twitter account: “Sierra Pacific still liable for Moonlight Fire damages.” In support of this request, Defendants provide a true and correct copy of the screenshot of this Tweet, attached hereto as **Attachment 6**. **Attachment 6** was printed from “@nostalgist1” before the account status was changed to “protected” and thus became inaccessible sometime between September 11 and September 15, 2015. This Tweet is also in **Attachment 2**.

6. That Judge Shubb’s April 17, 2015, Tweet, set forth in **Attachment 6**, also included an internet link to an article entitled “Sierra Pacific still liable for Moonlight Fire damages” by the Central Valley Business Times, which was available on the internet. In support of this request, Defendants provide a true and correct copy of this article attached hereto as **Attachment 7**. In addition,

Defendants also request judicial notice of the fact that Judge Shubb's post added a period at the end of the Tweet, whereas the article has no ending period in the title.

7. That the article that appeared in the Central Valley Business Times on April 17, 2015, was not the only online article that was published on that date regarding Judge Shubb's opinion and ruling in this matter. That same day, the Sacramento Bee published an article (Denny Walsh, *Judge rejects Sierra Pacific attempt to throw out Moonlight fire settlement*, April 17, 2015, <http://www.sacbee.com/news/business/article18804324.html>), a true and correct copy of which is attached hereto as **Attachment 8**, as did the Valley Online News (*Judge Issues Ruling Denying Sierra Pacific's Motion To Set Aside The Settlement In The Moonlight Fire Case*, April 17, 2015, <http://valleyonlinenews.com/index.php/news/local-one/4598-judge-issues-ruling-denying-sierra-pacific-s-motion-to-set-aside-the-settlement-in-the-moonlight-fire-case>), a true and correct copy of which is attached hereto as **Attachment 9**. Several days later, the National Review also published an online article (Jonathan Keim, *District Judge Denies Motion to Set Aside Settlement for Moonlight Fire*, April 23, 2015, <http://www.nationalreview.com/bench-memos/417389/district-judge-denies-motion-set-aside-settlement-moonlight-fire-jonathan-keim>), a true and correct copy of which is attached hereto as **Attachment 10**.

8. That online articles critical of the government regarding the Moonlight Fire matter ran in the *Wall Street Journal* (*Prosecutors Burn Down the Law*, Wall St. J., Jan. 2, 2015, <http://www.wsj.com/articles/prosecutors-burn-down-the-law-1420242330>), a true and correct copy of which is attached hereto as **Attachment 11**; and the *Washington Post* (Kathleen Parker, *A Wildfire of Corruption*, Dec. 16, 2014, https://www.washingtonpost.com/opinions/kathleen-parker-talk-about-a-wildfire/2014/12/16/bf10b7d2-8567-11e4-b9b7-b8632ae73d25_story.html), a true and correct copy of which is attached hereto as **Attachment 12**. Defendants request judicial notice only of the existence of these materials and the fact of their availability online. Defendants do not seek judicial notice of the facts set forth in these articles.

9. That the United States Attorney's Office for the Eastern District of California maintains and operates a Twitter account under the username "@EDCAnews." In support of this request, Defendants provide a true and correct printout of the "@EDCAnews" profile attached hereto as **Attachment 13**, available online at <https://twitter.com/EDCAnews> as of the filing of this motion.

10. That through his "@nostalgist1" Twitter account, Judge Shubb "follows" the "@EDCAnews" Twitter account. Defendants submit two independent sources of information verifying this statement. First, Defendants provide a true and correct copy of a printout from "@EDCAnews" showing the

Twitter accounts that follow “@EDCAnews,” attached hereto as **Attachment 14**, and available online at <https://twitter.com/EDCAnews/followers> as of the filing of this motion. This printout shows at approximately the forty-first page of the printout that “@nostalgist1” is one of the listed followers of “@EDCAnews.” Second, Defendants provide a true and correct copy of a download made by accessing the “@nostalgist1” Twitter account on August 31, 2015, showing a number of the Twitter accounts that “@nostalgist1” follows, attached hereto as **Attachment 15**. As shown on approximately the tenth page of this printout, “@EDCAnews” is listed as one of the accounts that “@nostalgist1” follows.

11. That when one Twitter account “follows” another Twitter account, the follower can see Tweets posted by the followed account as soon as they are posted. In support of this request, Defendants provide as **Attachment 16** hereto a true and correct copy of The Twitter Glossary, provided by Twitter, which defines “following.” The Twitter Glossary is available online at <https://support.twitter.com/articles/166337#> as of the filing of this motion. Also included as part of **Attachment 17** is a true and correct copy of Twitter’s “FAQs about following,” available online at <https://support.twitter.com/articles/14019#> as of the filing of this motion.

12. That any Twitter user can initiate a private conversation, known as a “Direct Message,” through Twitter to any other Twitter user who follows their

Twitter account. In support of this request, Defendants refer to **Attachment 17**, and provide a true and correct printout of the “About Direct Messages” as **Attachment 18**. “About Direct Messages” is an informational article provided by Twitter, defining Direct Messages and explaining how to send a Direct Message. “About Direct Messages” is available online at <https://support.twitter.com/articles/14606#> as of the filing of this motion.

13. That on April 17, 2015, the United States Attorney’s Office for the Eastern District of California posted, through its “@EDCAnews” Twitter account, a total of eight Tweets concerning the Moonlight Fire action and the substance of Judge Shubb’s order denying Defendants’ Rule 60(d)(3) motion. In support of this request, Defendants provide these Tweets attached hereto as **Attachment 19**, available at <https://twitter.com/EDCAnews> as of September 11, 2015.

14. That Sierra Pacific Industries maintains and operates a Twitter account under the username “@SierraPacificIn,” and has done so since June 2009. In support of this request, Defendants provide a true and correct printout of the “@SierraPacificIn” profile attached hereto as **Attachment 20**, available online at <https://twitter.com/SierraPacificIn> as of the filing of this motion.

15. That Judge Shubb does not “follow” Sierra Pacific Industries’ Twitter account through his @nostalgist1 Twitter account, as demonstrated by the fact that @nostalgist1 is not listed among those Twitter users “following” Sierra Pacific

Industries' Twitter account. The list of those Twitter users "following" "@SierraPacificIn" is attached hereto as **Attachment 21**, and is available online at <https://twitter.com/SierraPacificIn/followers> .

16. That on September 11, 2015, Defendants filed on the Ninth Circuit's public ECF filing system a motion seeking leave to exceed the word count limit for their joint opening brief on appeal. The motion explained that one of the issues on appeal pertained to Judge Shubb's Twitter account and his inaccurate Tweet about the merits of this case, and attached the proposed opening brief, which made clear that Defendants would be seeking judicial notice of the contents of Judge Shubb's public Twitter account. (ECF Docket Nos. 27-28.)

17. That on September 14, 2015, Plaintiff/Appellee, the United States of America, delivered a letter to Judge Shubb notifying him of Defendants' Twitter arguments set forth in Defendants' proposed opening brief on appeal. A true and correct copy of this letter is attached hereto as **Attachment 22**.

18. That at some point after Defendants filed Docket Nos. 27 and 28 on September 11, 2015, and before September 15, 2015, Judge Shubb's "@nostalgist1" Twitter account shifted from a "public" account to a "protected" account and thus became accessible only to "confirmed followers." In support of this request, Defendants provide a true and correct copy of a printout made on

September 15, 2015, attached hereto as **Attachment 23**, which shows that Judge Shubb's "@nostalgist1" Twitter account status is now "protected."

19. That although Judge Shubb changed his Twitter account from public to "protected," the substance of many of his Tweets are, as of this filing of this request, still in the Google cache, and thus accessible on the internet to anyone through the Google cache. In support of this request, Defendants provide **Attachment 24**, which comprises a series of five printouts from a simple internet search using Google conducted on September 16, 2015, which this Court can readily conduct. The first page shows a Google query page, with the search terms "sierra pacific still liable for moonlight fire damages nostalgist1". The second page shows the Google search results. The third page shows the same results with the cursor hovering over the downward-facing arrow which results in a drop-down menu including the term "Cached." The fourth page is a printout of the same search result, but with instructions added to show the Court exactly where the drop-down menu can be accessed. The fifth page is the Tweet from Judge Shubb's account that can be found by clicking on the cached term in the dropdown menu. This last page was obtained in this same manner on September 16, 2015, after Judge Shubb protected his account, thus demonstrating the previous public nature of his Twitter account. Defendants also provide **Attachment 25** in support of this request, which is a similar Google cache download conducted in the same manner,

but using the search term “@nostalgist1,” also conducted on September 16, 2015, and **Attachment 26**, which is a similar Google cache download conducted in the same manner, but using the search terms “Moonlight fire sierra pacific.”

Defendants also submit in support of this request **Attachment 27**, which is a printout from Google explaining that Google cache is a storage of websites visited by Google, and further explaining how to access Google cached images as explained hereinabove.

20. That there are two appeals pending in the California Court of Appeal, Third Appellate District, Case Nos. C074879 and C076008, which arise out of the Moonlight Fire state action litigated in Plumas County. The dockets of these appeals are at <http://appellatecases.courtinfo.ca.gov/> .

21. Defendants also request that this Court take judicial notice of the existence and contents of the Attachments submitted in support of each of the requests. Defendants do not seek judicial notice of the truth of the matters stated therein, except with respect to **Attachments 4, 16, 17, 18, and 27**, which are technical documents that simply explain how Google cache and Twitter function.

3. This Evidence is Not Subject to Reasonable Dispute and is Relevant to Defendants’ Opening Brief.

The matters listed above may properly be judicially noticed. First, they are “generally known within the trial court’s territorial jurisdiction” and “can be accurately and readily determined from sources whose accuracy cannot reasonably

be questioned.” *See* Fed. R. Evid. 201(b)(1), (2). Defendants have provided this Court with printouts of the public content of Judge Shubb’s Twitter account, and the public contents of the Twitter account of the U.S. Attorney’s Office for the Eastern District of California. These documents were obtained by simple internet searches, and thus the fact of their existence, and the contents thereof, cannot reasonably be questioned. Moreover, due to the previous public nature of the account, most of Judge Shubb’s Tweets can still be accessed over the internet by using key word searching, and then opening the Google cache portion of the search results. (Warne Decl., ¶ 12.) The fact that the contents of Judge Shubb’s account are present in the Google cache confirms that the account was publically accessible, and thus these matters are subject to judicial notice under Federal Rule of Evidence 201. Courts faced with similar types of evidence have taken judicial notice of a website, including Twitter, when it is publicly available and otherwise meets the requirements of Federal Rule of Evidence 201. *See, e.g., Multi Time Mach., Inc. v. Amazon.com, Inc.*, 792 F.3d 1070, 1072 n.1 (9th Cir. 2015) (taking judicial notice of Amazon’s website and facts contained therein); *Reese v. Malone*, 747 F.3d 557, 570 n.8 (9th Cir. 2014) (taking judicial notice of information posted on website to establish information about a party’s educational background); *Haynes v. Ottley*, No. CV 2014-70, 2014 WL 5469308, at *6 (D.V.I. Oct. 28, 2014) (taking judicial notice of fact posted on Twitter account).

Next, these matters are directly relevant to Defendants' argument that Judge Shubb violated Canon 3(A)(6) of the Code of Conduct for United States Judges, and that his conduct is ground for reversal and remand to a judge outside of the Eastern District of California. Fed. R. Evid. 401(a).

Finally, Defendants do not seek judicial notice of the truth of the statements contained in Judge Shubb's Twitter account, the news article he attached to his April 17, 2015, Tweet, or the numerous other news articles critical of the government that he elected not to promulgate through his Twitter account. *See Dent v. Holder*, 627 F.3d 365, 371-72 (9th Cir. 2010) (judicially noticing the existence of documents but not facts proved by the documents).

B. Alternatively, Defendants Request Leave to Supplement the Record.

In the alternative, or in addition to their motion for judicial notice, Defendants request that this Court grant them leave to supplement the record pursuant to Federal Rule of Appellate Procedure 10(e) and its inherent power. Under Appellate Rule 10(e)(3), questions as to the form and content of the record – other than questions regarding simple omissions and misstatements – must be presented to this Court. Fed. R. App. P. 10(e)(3). Ordinarily, this Court will not supplement the record on appeal with material not considered by the district court. *Daly-Murphy v. Winston*, 837 F.2d 348, 351 (9th Cir. 1987). However, the Court

may exercise its “inherent authority to supplement the record in extraordinary cases.” *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003).

This is an extraordinary case. The Tweets and Twitter accounts discussed above were not placed before the district court in this case because Judge Shubb did not Tweet “Sierra Pacific still liable for Moonlight Fire damages.” until *after* he had issued his order denying Defendants’ motion. Accordingly, Defendants raised the issue of Judge Shubb’s apparent conflict of interest at the earliest possible opportunity. Thus, in the event judicial notice is not granted in full, or in addition to taking judicial notice, supplementing the record is necessary to afford Defendants a full and fair opportunity to present their argument on appeal.

III. CONCLUSION

For the foregoing reasons, Defendants request that this motion be granted in full.

DATED: November 6, 2015 DOWNEY BRAND LLP

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SIERRA PACIFIC INDUSTRIES

DATED: November 6, 2015 BRACEWELL & GIULIANI LLP

By: s/ Richard W. Beckler

RICHARD W. BECKLER
JENNIFER T. LIAS
Attorneys for Appellant
SIERRA PACIFIC INDUSTRIES

DATED: November 6, 2015 MATHENY SEARS LINKERT & JAIME, LLP

By: s/ Richard S. Linkert

RICHARD S. LINKERT
JULIA M. REEVES
Attorneys for Appellants W. M. Beaty &
Associates, Inc., and Ann McKeever Hatch, As
Trustee of The Hatch 1987 Revocable Trust, et al.

DATED: November 6, 2015 RUSHFORD & BONOTTO, LLP

By: s/ Phillip R. Bonotto

PHILLIP R. BONOTTO
Attorneys for Appellants Eunice Howell,
individually, DBA Howell Forest Harvesting

DECLARATION OF WILLIAM R. WARNE

I, William R. Warne, declare as follows:

1. I am an attorney at law, licensed to practice before all the courts of the State of California and am admitted to practice before this Court and am a partner with Downey Brand LLP, counsel of record for Defendant Sierra Pacific Industries (“Sierra Pacific”) in the above entitled action. I have personal knowledge of the matters set forth herein based on my work for Sierra Pacific in this matter and, if called upon to testify thereto, could and would competently do so.

2. United States District Court Judge William B. Shubb presided over and ruled upon Defendants’ Motion to Set Aside a Judgment for Fraud Upon the Court. Judge Shubb issued his order denying Defendants’ motion on April 17, 2015, at 2:45 p.m. Based on a review of the Twitter account maintained by the Office of the United States Attorney for the Eastern District of California, the prosecutors in that office used their “@EDCAnews” Twitter account over the following two hours to broadcast eight Tweets concerning Judge Shubb’s order and the case’s merits to their Twitter followers. (Attachments 14, 20.) Defendants have since confirmed that through his then-public Twitter account, titled “@nostalgist1,” Judge Shubb “followed” @EDCAnews and thus, according to

Twitter's online glossary regarding its functionality, received those Tweets about the merits of the case.

3. That evening, after Judge Shubb issued his April 17, 2015, order denying Defendants' motion for relief under Rule 60(d)(3), and following the Tweets by the prosecutors directed to their followers, which include Judge Shubb, Judge Shubb posted to his then-public Twitter account, "@nostalgist1," the following: "Sierra Pacific still liable for Moonlight Fire damages."

4. This statement is incorrect, and was incorrect at the time Judge Shubb posted this statement. The only judge who has considered the Moonlight Fire litigation on its merits is Judge Leslie C. Nichols, who ruled on the merits in the jointly prosecuted state court actions regarding the same fire. Judge Nichols determined that Defendants could not be found liable. Defendants also disclaimed liability in the federal settlement agreement underlying the instant action. Finally, contrary to Judge Shubb's Tweet, Defendants have never paid damages, nor have they ever agreed to pay damages for the Moonlight Fire.

5. Judge Shubb's April 17 Tweet linked to a news article titled "Sierra Pacific still liable for Moonlight Fire damages" which was published in the Central Valley Business Times.

6. Scores of other newspapers and internet sites have published Moonlight Fire-related materials critical of the government, and are available to

over the internet. Examples of these articles include a piece titled Prosecutors Burn Down The Law, published in the *Wall Street Journal*; and A wildfire of corruption, published by The *Washington Post*.

7. Because Judge Shubb's public comment about the merits of the action did not occur until after Judge Shubb issued his underlying order and were thus not part of the record, and because Judge Shubb's Twitter account was publicly available, Defendants prepared a motion for judicial notice regarding Judge Shubb's Twitter post and social media activity. The motion was referenced in Defendants' proposed opening brief filed with a request for an extension of the Ninth Circuit word count limits.

8. Before Defendants submitted their proposed joint opening brief on September 11, 2015, Defendants verified that Judge Shubb's Twitter account was still accessible to the public and still contained his April 17 post regarding Sierra Pacific.

9. On Monday, September 14, 2015, after reviewing Defendants' proposed opening brief submitted to the Court on September 11, 2015, the U.S. Attorney's Office hand delivered a letter to Judge Shubb, notifying him of Defendants' argument in their proposed opening brief. This letter stated, in its entirety:

Dear Judge Shubb:

In the opening brief lodged with the Ninth Circuit on Friday, Sierra Pacific accuses you of violating Canon of Judicial Conduct 3A(6). The accusation appears on page 93 of the brief.

Basic fairness seems to require that you be informed of the accusation, but we have not seen such notice from Sierra Pacific. That is the reason for this letter.

10. The United States Attorney's Office did not also hand-deliver this letter to Defendants. Instead, they sent it by regular mail to all Defendants, even though counsel for Defendants operate offices in Sacramento. Defendants therefore did not receive this same notice until Wednesday, September 16.

11. Sometime between Friday, September 11, 2015, when Defendants submitted their opening brief, and Tuesday, September 15, one day after the U.S. Attorney's Office notified him of Defendants' argument, Judge Shubb changed his Twitter account from "public" to "protected," thereby restricting access to his Twitter account to "confirmed followers."

12. However, before Judge Shubb restricted access to his account, my firm downloaded significant portions of his Twitter account, including numerous Tweets and records of the "following" activity of his Twitter account. Moreover, Judge Shubb's April 17 post and many of his other posts and large portions of his Twitter account are still stored as part of the Google cache, which is easily accessible online, because his "@nostalgist1" account was previously

public. Thus, many of Judge Shubb's Tweets can still be accessed over the internet by using key word searching, and then opening the Google cache portion of the search results.

13. Attachments 1 through 27 submitted in support of Defendants' Motion for Judicial Notice are true, correct, genuine, and accurate copies of those documents obtained on the dates stated in Defendants' motion.

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 6th day of November, 2015, at Sacramento, California.

s/ William R. Warne

WILLIAM R. WARNE

CERTIFICATE OF SERVICE

United States of America, Appellee v. Sierra Pacific Industries, et al., Appellants

Ninth Circuit Case No. 15-15799

U.S.D.C Case No. 2:09-cv-02445-WBS-AC

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)*

November 6, 2015

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature *(use "s/" format)*

s/ Tammy R. Chacon

ATTACHMENT 1

ATTACHMENT 1

[About](#) | [Location](#) | [Contact](#)[Website Suggestion?](#)[Go](#)[Home](#) [Judges](#) [Attorney Info](#) [CM/ECF E-Filing](#) [Rules](#) [Forms](#) [Jury Info](#) [Clerk's Office](#) [Careers](#) [Education](#)[United States Magistrate Judge Gary S. Austin \(GSA\)](#)[United States Magistrate Judge Dennis L. Beck \(DLB\)](#)[United States Magistrate Judge Stanley A. Boone \(SAB\)](#)[United States Magistrate Judge Edmund F. Brennan \(EFB\)](#)[Senior United States District Judge Garland E. Burrell, Jr. \(GEB\)](#)[United States Magistrate Judge Allison Claire \(AC\)](#)[United States Magistrate Judge Carolyn K. Delaney \(CKD\)](#)[Chief United States Magistrate Judge Dale A. Drozd \(DAD\)](#)[Chief United States District Judge Morrison C. England, Jr. \(MCE\)](#)[United States Magistrate Judge Gregory G. Hollows \(GGH\)](#)[Senior United States District Judge Anthony W. Ishii \(AWI\)](#)[United States Magistrate Judge Craig M. Kellison \(CMK\)](#)[United States Magistrate Judge Barbara A. McAuliffe \(BAM\)](#)[United States District Judge John A. Mendez \(JAM\)](#)[United States District Judge Kimberly J. Mueller \(KJM\)](#)[United States Magistrate Judge Kendall J. Newman \(KJN\)](#)[United States District Judge Troy L. Nunley \(TLN\)](#)[United States Magistrate Judge Sheila K. Oberto \(SKO\)](#)[United States District Judge Lawrence J. O'Neill \(LJO\)](#)[United States Magistrate Judge Michael J. Seng \(MJS\)](#)[Senior United States District Judge William B. Shubb \(WBS\)](#)[Senior United States District Judge William B. Shubb \(WBS\)](#)[United States Recalled Magistrate Judge Sandra M. Snyder \(SMS\)](#)[United States Magistrate Judge Jennifer L. Thurston \(JLT\)](#)[Home](#) » [Judges](#) » [All Judges](#) » [Senior United States District Judge William B. Shubb \(WBS\)](#)

SENIOR UNITED STATES DISTRICT JUDGE WILLIAM B. SHUBB (WBS)



Robert T. Matsui United States Courthouse
501 I Street
Sacramento, CA 95814

Courtroom 5, 14th Floor

[Biography](#)

JUDGE STAFF

Courtroom Deputy:

Karen Kirksey Smith
kkirkseysmith@caed.uscourts.gov
(916) 930-4234

Court Reporter:

For court reporter information and to order transcripts
[click here](#)

Chambers:

(916) 930-4230

Law Clerks:

Alexandra Heifetz
Breann Moebius
Channing Turner

CASE MANAGEMENT PROCEDURES

Procedures to be followed in **cases assigned to Hon. William B. Shubb**

[Standard Information](#)

Standing Order re: 18 U.S.C. 1326

MOTION SCHEDULE

Motion Type: Civil
Day: Designated Mondays*
Time: 02:00 p.m.

Motion Type: Criminal
Day: Mondays*
Time: 09:30 a.m.

Courtroom: 5, 14th floor
Telephone: (916) 930-4234

*See dates in [Standard Information](#)

See Local Rules for proper noticing of motions.

Judge Shubb's court calendars:

Available hearing dates are subject to change without notice. Please verify last minute changes with the courtroom deputy.

ATTACHMENT 2

ATTACHMENT 2



TWEETS
320

FOLLOWING
150

FOLLOWERS
47

FAVORITES
192

LISTS
5



Follow

Nostalgist

@Nostalgist1

Return to the Thrilling Days of
Yesteryear.

Sacramento, California





Home



Notifications



Messages



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Nostalgist retweeted

**Boxing Trivia Guy** @BoxingTriviaGuy · Aug 29

#OnThisDay in 1928 Scotland got it's 1st world boxing champion when flyweight Johnny Hill outpointed Newsboy Brown.



3 5

Nostalgist retweeted

**Chris Treadway** @christreadway · Aug 23

1948 Oakland Oaks in the Post-Enquirer, the city's other daily newspaper. #emeryville



1 1

**Nostalgist** @Nostalgist1 · Aug 28I neglected to post this YouTube ukulele video earlier. Nevertheless... youtu.be/OIQF9LOdVvk

View media

Nostalgist retweeted

**Chris Treadway** @christreadway · Aug 26

#Oakland Oaks Li'l Acorn mascot at the Emeryville ballpark, 1950.





Suggested by Twitter

Clean Energy CA @CleanEnergyCA · Aug 17



Tell @CBakerAD16 to stand up to the oil industry and support #SB350 & #SB32: cleanerca.com #CAleg



Promoted



4



3



Nostalgist @Nostalgist1 · Aug 23

Celebrate this @Athletics win with hamburgers at Barney's on Piedmont Avenue.



1



Nostalgist retweeted



Baseball Hall @BaseballHall · Aug 17

#OTD 1948: An estimated 100,000 people visit the Babe's casket at Yankee Stadium. coop.bb/QZmE5





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30 26



Nostalgist @Nostalgist1 · Aug 15

Once In Love With Amy (Sopranino Ukulele) youtu.be/b2jFV0u4efQ

1

View media



Nostalgist @Nostalgist1 · Aug 12

sacbee.com/news/local/crime



Nostalgist @Nostalgist1 · Aug 2

Another great place to stop after an @Athletics win. El Agavero Mexican Restaurant in Montclair. @elagaveromontcl



1



Nostalgist @Nostalgist1 · Jul 31

Enjoying a ballgame @BoiseHawks

👤 Vicki and Sandy Shubb



2



Home



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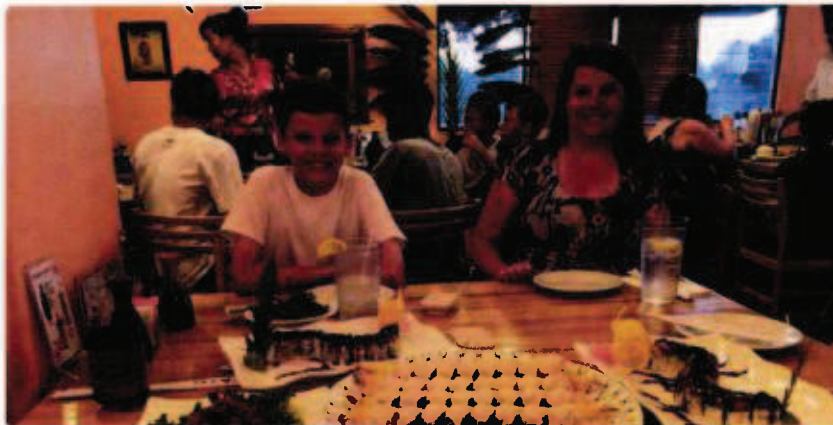
Messages



Search Twitter



A sushi celebration after a successful Taekwondo black belt test.



1 3



Nostalgist @Nostalgist1 · Jul 28

Not a good idea to sell counterfeit sports caps and jerseys.
7thspace.com/headlines/5139...

1



Nostalgist retweeted



Washington Post @washingtonpost · Jul 26

The AP just put half a million historical videos on YouTube. Here's what you have to see: wapo.st/1OEFA7P

304 300

[View summary](#)



Nostalgist @Nostalgist1 · Jul 21

Farm Group Beats Ex-Members In Fight Over "Grange" Name.
law360.com/articles/67977...

1



Nostalgist @Nostalgist1 · Jul 19

Taking the @Amtrak train on the @CapitolCorridor to the @Athletics game at the O.co Coliseum.

Vicki

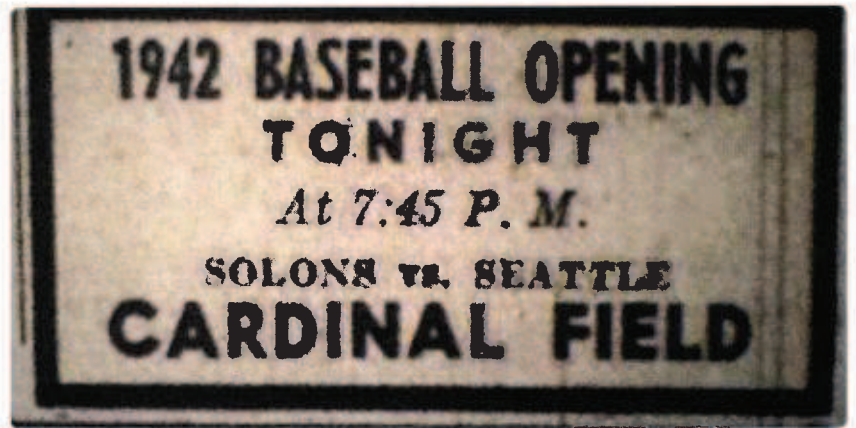


1



Nostalgist retweeted

they won the pennant that year.



2 5



Nostalgist @Nostalgist1 · Jul 13

What's Wrong With Kamala Harris?
courthousenews.com/2015/07/13/wha...

2 5



Nostalgist retweeted



The Sacramento Bee @sacbee_news · Jul 12

Longtime federal court judge Lawrence K. Karlton dies sacb.ee/3IMK

6 3



Nostalgist followed Ukulele Go!, Carly Fiorina and Sandy Shubb



Ukulele Go!

@goukulele

If it's ukulele, we love it! Lessons, tips, reviews and anything else we can find.



Follow



Carly Fiorina ✓

@CarlyFiorina

Businesswoman, wife, mother, & grandmother. A conservative who believes in unlocking human potential & holding govt accountable.



Follow



Nostalgist @Nostalgist1 · Jul 9

Man's \$125K award against CHP officer for false arrest and excessive force upheld. courthousenews.com/2015/07/09/man...


2 5



Nostalgist @Nostalgist1 · Jul 5

Sand Dabs, Fried Oysters, and Clam Chowder at Spenger's in Berkeley after

tradition.

   2 **Nostalgist** @Nostalgist1 · Jul 4Yankee Doodle Dandy/Grand Old Flag (Sopranino Ukulele). Happy Fourth of July. youtu.be/pJqnHOed6lY   [View media](#)

Nostalgist retweeted

**ARC News** @ARCNewsToday · Jul 2ARC speech professor Alisa Shubb at the recent #TEDxUCDavis on "The Power of Public Listening" youtu.be/X5mXaVOPUKA @mbenson_LosRios  2  2 [View media](#)**Nostalgist** @Nostalgist1 · Jul 1[sacbee.com/news/local/crime](https://www.sacbee.com/news/local/crime)   

Nostalgist retweeted

**Chris Treadway** @christreadway · Jun 27

Turn Back the Clock: Kansas City Athletics get first look at new home in #Oakland in November 1967

  4  3 **Nostalgist** @Nostalgist1 · Jun 28

Lo Coco's Italian Restaurant on Piedmont Avenue. Another place to stop after the @Athletics game.





Nostalgist retweeted



Baseball Oakland @baseballoakland · Jun 25

Manfred's pro-Oakland comments validate what A's fans have said for years: Only thing stopping new a A's ballpark is Wolff-Fisher

14 17



Nostalgist @Nostalgist1 · Jun 21

Barclay's Pub on College Ave. A good place to stop after an @Athletics game.



1

Nostalgist retweeted



Baseball Oakland @baseballoakland · Jun 20

No matter what happens, they can't ever take this away from Oakland:



9 29



Nostalgist @Nostalgist1 · Jun 19

Ticket quotas? What ticket quotas? m.ocregister.com/articles/offic...



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Nostalgist retweeted

**The Sacramento Bee** @sacbee_news · Jun 17Jury awards motorist \$125,000 for arrest by CHP [sacb.ee/3w2y](https://sacbee.com/3w2y)

1

**Nostalgist** @Nostalgist1 · Jun 15Court case hinges on claim of illegal CHP ticket quotas.
sacbee.com/news/local/tra... **Nostalgist** @Nostalgist1 · Jun 15Workers win certification in suit over SEIU political expenses.
law360.com/articles/66099...

Nostalgist retweeted

**Chris Treadway** @christreadway · May 30

#Oakland Oaks opening day parade arrives at the #Emeryville ballpark, circa 1931



7 11

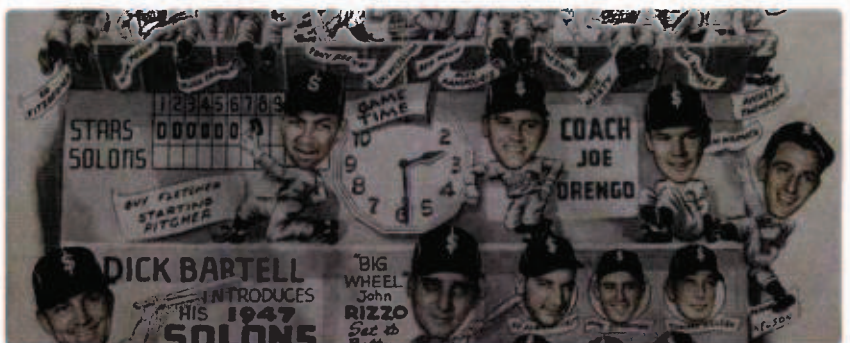
**Nostalgist** @Nostalgist1 · May 28Looking for the SWEEP at Raley Field today. @nashvillesounds
#Soundsramento @Athletics #GreenCollar

1

Nostalgist retweeted

**Sacto Baseball HOF** @LaSalleClubHOF · May 27

The 1947 Sacramento Solons including @joemartys from baseball historian Alan O'Connor on display @LimelightSac



4 2



Nostalgist @Nostalgist1 · May 22
'Deeply troubled' appeals court upholds Yuba City drug conviction - News - Appeal-Democrat appeal-democrat.com/news/deeply-tr... via @appealdemocrat

4 2

Nostalgist followed **Alisa Shubb** and **Sac Traffic**



Alisa Shubb
@AlisaShubb
Speech Tango Dance Run Yoga Shop

Follow

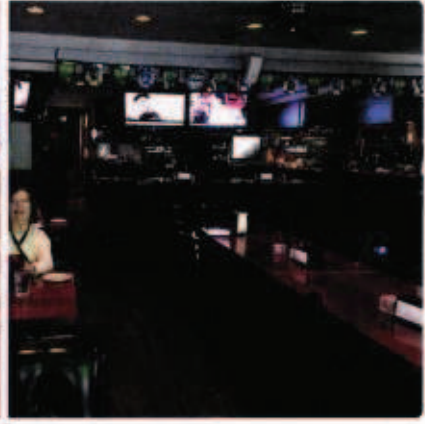


Sac Traffic
@sactraffic
CHP traffic alerts in the Sacramento, CA area

Follow



Nostalgist @Nostalgist1 · May 17
A meal at the Grand Oaks after the @Athletics game.

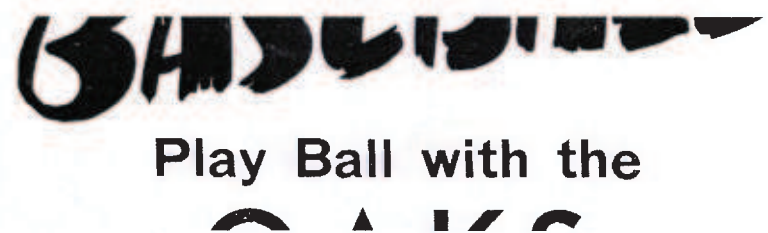


4 2

Nostalgist retweeted



Chris Treadway @christreadway · May 12
The Oakland Oaks promise a "rootin', tootin'" team with Casey Stengel taking the helm in 1946.





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IN 1946

Yes Sir, The Oaks will be a rootin', tootin' ball club in 1946 with one of the truly outstanding managers in baseball to

5 1

Nostalgist retweeted



Mike Luery @baseballbetween · May 10

Sacramento's Limelight: A Slice of Baseball Heaven:
baseballbetweenus.com/?p=1023

8 3



Nostalgist @Nostalgist1 · May 1

Wishing a happy retirement to My Gal Sal. youtu.be/F6dD7GRfBi8. #ukulele

View media



Nostalgist @Nostalgist1 · Apr 24

Just You, Just Me, with a #ukulele
youtu.be/XR_Nntv8Zhg

View media



Nostalgist @Nostalgist1 · Apr 17

Sierra Pacific still liable for Moonlight Fire damages.
centralvalleybusinesstimes.com/stories/001/?l...

View media

Nostalgist retweeted



Chris Treadway @christreadway · Apr 12

Centerfield scoreboard at Oaks Ball Park in #Emeryville



3 1



Nostalgist @Nostalgist1 · Apr 6

Barry Zito starts the season with the @nashvillesounds. Hope all the new River Cats fans are happy.

View media



Nostalgist @Nostalgist1 · Mar 20

I Love A Ukulele. [youtu be/fQV_Z9IFMzc](https://youtu.be/fQV_Z9IFMzc)



Nostalgist retweeted

**Chris Treadway** @christreadway · Mar 6More about the Oakland Oaks and their first PCL baseball title in 1912
ibabuzz.com/westcounty/201...

2 3

**Nostalgist** @Nostalgist1 · Mar 5

Sacramento County Gordon D. Schaber Mock Trial Competition results.

scoe.net/news/library/2... **Nostalgist** @Nostalgist1 · Mar 4

Police Abuse Claims Headed To Trial.

courthousenews.com/2015/03/04/pol... **Nostalgist** @Nostalgist1 · Mar 3The evil that men do. centralvalleybusinesstimes.com/stories/001/?l... **Nostalgist** @Nostalgist1 · Feb 18

Remembering Newsboy Brown. One of the great flyweight and bantamweight boxing contenders of the 1920s and 1930s.

youtu.be/st4wjKmxihA **Nostalgist** @Nostalgist1 · Feb 15

Sacramento sunset. @TheCityofSac



4

Nostalgist retweeted

**Chris Treadway** @christreadway · Jan 21

Bay Area press pose with the Oakland Oaks 1948 championship banner.



ATTACHMENT 3

ATTACHMENT 3

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Nostalgist

@Nostalgist1

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Wishing a happy retirement to My Gal Sal.
youtu.be/F6dD7GRfBi8. #ukulele

YouTube



My Gal Sal

Sally Hoover's retirement party at the U.S. District Court in Sacramento on April 24, 2015.

[View on web](#)

8:06 PM - 1 May 2015

📍 Sacramento, CA



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@Nostalgist1

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Yankee Doodle Dandy/Grand Old Flag
(Sopranino Ukulele). Happy Fourth of July.
youtu.be/pJqnHOed6lY

YouTube



Yankee Doodle Dandy/Grand Old Flag (Sopranino Ukulele)

Medley of patriotic George M. Cohan songs, accompanied on an Ohana Honey SK-21 Sopranino ukulele.

[View on web](#)

8:07 AM - 4 Jul 2015

📍 Sacramento, CA



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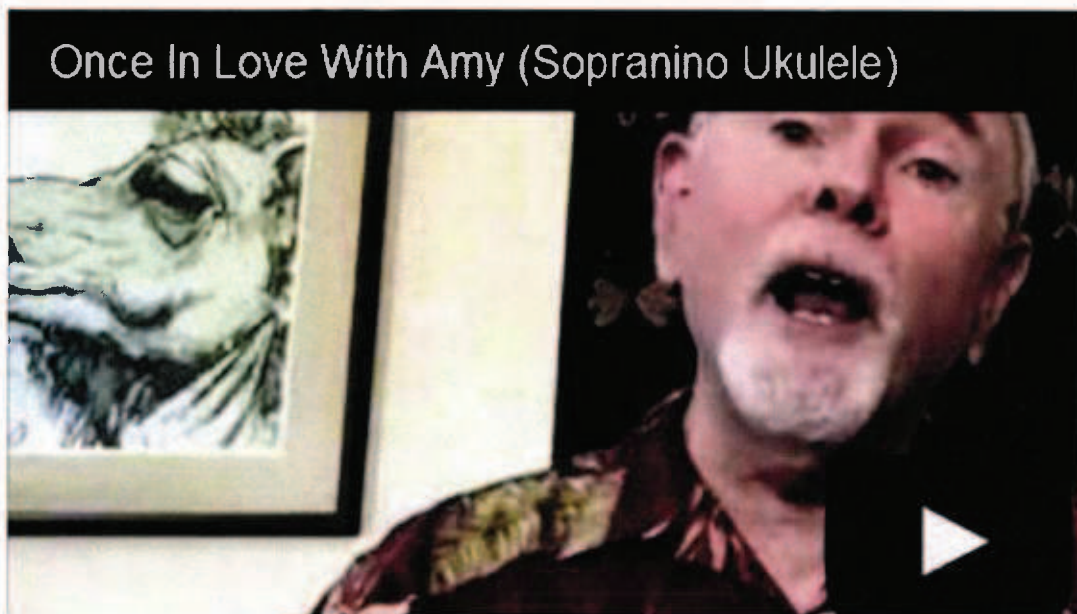
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@Nostalgist1

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Once In Love With Amy (Sopranino Ukulele) youtu.be/b2jFV0u4efQ



Once In Love With Amy (Sopranino Ukulele)

Words and music by Frank Loesser, introduced by Ray Bolger in the 1948 musical Where's Charley. Played on sweet little Ohana sopranino ukulele with Martin fl...

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1



3:07 PM - 15 Aug 2015



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@Nostalgist1

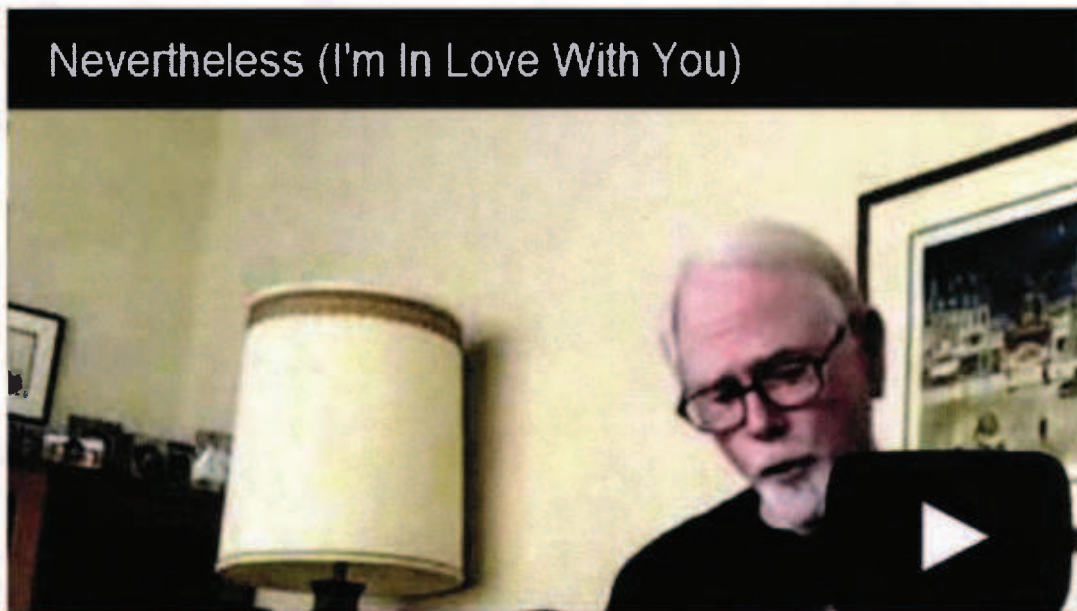
 Follow

I neglected to post this YouTube ukulele video earlier. Nevertheless . . .

youtu.be/OIQF9LOdqVk



YouTube



Nevertheless (I'm In Love With You)

1931 song by Harry Ruby and Bert Kalmar. Accompanied on a Kamaka soprano ukulele.

[View on web](#)

FAVORITE

1



4:59 PM - 28 Aug 2015

 Sacramento, CA



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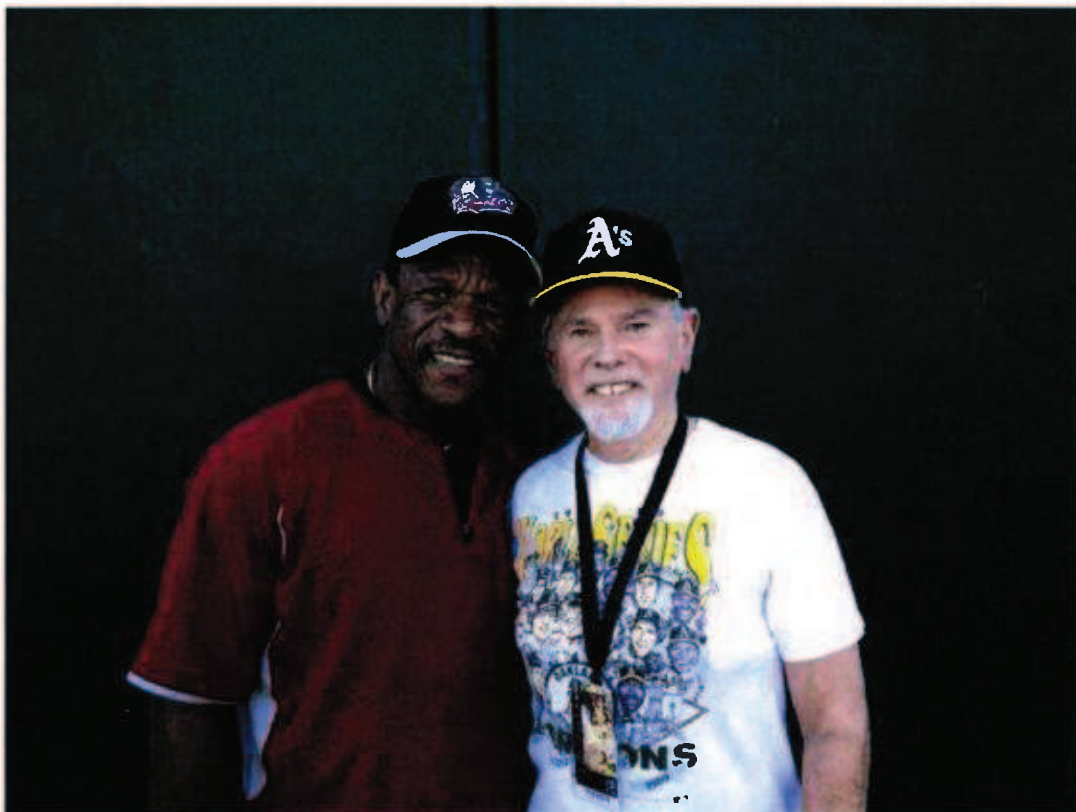
Have an account? Log in ▾



Nostalgist
@Nostalgist1

+ Follow

Two Oakland Tech alumni get together
@RaleyField before the @RiverCats game.
@JDoskow @wshubb #rickey @Athletics



RETWEETS

3

FAVORITES

2



5:33 PM - 29 Apr 2014

📍 West Sacramento, CA



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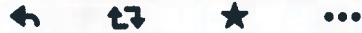
Carissa Shubb @firdelis · 29 Apr 2014

@Nostalgist1 @RaleyField @RiverCats @JDoskow @wshubb @Athletics

Awesome! What a great photo!

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ATTACHMENT 4

ATTACHMENT 4



Nostalgist @Nostalgist1 · Apr 17

Sierra Pacific still liable for Moonlight Fire damages.
centralvalleybusinesstimes.com/stories/001/?l...

9:51 PM - 17 Apr 2015 · Details



ATTACHMENT 7

ATTACHMENT 7



Buttons

Print

Close

Saturday News Briefs

STOCKTON

April 17, 2015 9:01pm

- **Lumber company rejected by court**
- **Fresno company expands**
- **And more....**

Sierra Pacific still liable for Moonlight Fire damages

U.S. District Judge William Shubb has issued a detailed, 63-page order denying Sierra Pacific Industries' motion to set aside the settlement of the Moonlight Fire case and rejecting every allegation by Sierra Pacific's counsel that there was fraud on the court.

After an exhaustive review of the law and the record of this case, Judge Shubb concluded that the defendants "have failed to identify 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."

The Moonlight Fire ignited on Sept. 3, 2007, on private forest land in Plumas County and raged for more than two weeks, consuming about 65,000 acres of land, including more than 46,000 acres of federal public lands.

A jury trial in the case before U.S. District Judge Kimberly J. Mueller had been scheduled to begin on July 9, 2012 in Sacramento, but the parties entered into a settlement shortly before trial. At an estimated value of at least \$122,500,000, the settlement was the largest recovery ever received by the United States for damages caused by a forest fire.

But in October 2014, Sierra Pacific filed a motion to set aside the judgment for damages resulting from the Moonlight Fire, claiming there had been a fraud on the court.

In rejecting each and every claim by Sierra Pacific's attorneys, Judge Shubb noted that they were aware of almost all of the facts, which they now claim show fraud-on-the-court before they decided to settle the case. As the Court put it, "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."

-oo0oo-

Netafim to open expanded Fresno distribution center

Drip irrigation equipment seller Netafim USA is expanding as California copes with a fourth year of drought.

It has a ribbon-cutting ceremony set for April 22 for its expanded 102,000-square-foot distribution center in Fresno that's designed to handle the increased demand for its drip irrigation products.

ATTACHMENT 8

ATTACHMENT 8

ATTACHMENT 10

ATTACHMENT 10

NATIONAL REVIEW

District Judge Denies Motion to Set Aside Settlement for Moonlight Fire

By Jonathan Keim — April 23, 2015

Last Friday, and after exhaustive briefing, Judge William B. Shubb, the federal judge handling the Moonlight Fire litigation denied the defendants' motion to set aside their multi-million-dollar settlement with the government as a fraud on the court.

The court concluded that the government's failure to turn over important information and documents undermining its case did not rise to the level of a fraud on the court:

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 identify 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.

Harsh words from a district judge. And not quite fair to the defendants, either, who spent nearly 70 pages of their initial motion and 20 pages of their reply brief explaining the "substance" behind their allegations.

Although this is the last step in the trial court, it's probably not the end of the litigation. If the defendants appeal, they will likely renew their argument that the Brady v. Maryland (1963) standard for production of exculpatory information in criminal cases applies to civil cases.

They'll also be able to argue that the district court misapplied the standard for "fraud on the court." In general, a "fraud on the court" takes place when a fraud is conducted by officers of the court or is directed at the court itself. The Ninth Circuit has said that "fraud on the court" includes "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." As a result, "Most fraud on the court cases involve a scheme by one party to hide a key fact from the court and the opposing party." Although finding a "fraud in the inducement" makes it easier to find "fraud on the court," one does not necessarily imply the other.

The district court's opinion appears to conflate the two categories, concluding that no fraud on the court could have occurred because "defendants possessed and understood the purported significance of the very documents and testimony they now rely on." Any factual revelations that occurred after settlement, the court said, were either a failure of diligence or the sort of problem that could have been brought up in cross-examination at trial.

If the defendants appeal, we'll find out if the appeals court agrees with that interpretation of the facts.

ATTACHMENT 11

ATTACHMENT 11

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REVIEW & OUTLOOK

Prosecutors Burn Down the Law

How fire investigators distorted evidence to loot a company.

Jan. 2, 2015

6:45 p.m. ET



GETTY IMAGES

Prosecutorial misconduct has become an ugly commonplace of modern government, manipulating the legal system to attack easy political targets. So some good news: The courts may dismantle a California settlement that was a product of fraud by prosecutors.

The story began in 2007 with the Moonlight Fire in California that burned some 65,000 acres, about two-thirds on federal land. Within 48 hours and while the flames were still burning, the state's department of forestry and fire protection, known as Cal Fire, and the U.S. Forest Service blamed the disaster on Sierra Pacific, a Redding-based company that owns some 1.2 million acres of timberland.

In 2009 a federal-state task force brought official complaints against the company and nearby landowners. California officials filed an action in state court while prosecutors sued for \$1 billion in federal court. Sierra Pacific has insisted it didn't start the fire but, faced with an open-ended legal fight, the company in 2012 settled the federal case for \$55 million and a deed of some 22,500 acres to the U.S. government.

But the state case continued, and it has exposed a fiasco of fraud and corruption so significant that the company is seeking to have the federal settlement overturned. Among other problems, government investigators and prosecutors doctored reports, misrepresented facts and retaliated against employees whose questions threatened their strategy.

According to the theory implicating the company, the fire started when the blade of a Sierra Pacific bulldozer hit a rock and created a spark. Government investigators pinpointed a location and claimed they had confirmation from a bulldozer driver. Problem was, both the fire's alleged point of origin and the scenario to buttress it were fraudulent. When the company questioned the bulldozer driver, he denied having made the statement and admitted he couldn't have confirmed the statement prosecutors had him sign because he didn't know how to read.

Prosecutors were also dishonest about where the fire started. Overhead videos have shown that the point of origin marked by the government was well outside the visual boundaries of the burning forest nearly an hour after the fire started.

Leading the federal fire investigation was then-head of the Eastern District of California's Affirmative Fire Litigation Team, Robert Wright. A specialist in fire litigation, Mr. Wright says in a 15-page declaration in federal court that prosecutors withheld material information in the case, including a change in the fire's stated point of origin.

Mr. Wright says he also discovered an error in calculating the damage of part of a separate wildfire, which reduced the potential liability to \$15 million from \$25 million. Mr. Wright felt he was under a professional obligation to disclose the document, and he confirmed this with the Justice Department's Professional Responsibility Advisory Office. But he says his boss, Civil Chief David Shelledy, pushed back, saying, "That's a beginning. Now what can you do to avoid creating an ethical obligation to volunteer a harmful document."

When Mr. Wright disclosed it anyway, he says he was kicked off the Moonlight Fire case by Mr. Shelledy, days after he received a commendation for his performance on another case by U.S. Attorney Benjamin Wagner. Mr. Shelledy declined to comment, but Mr. Wagner told us that “we very strongly disagree with the assertions” made by Mr. Wright, “particularly insofar as they allege misconduct by individual AUSAs and retaliation by our office against a former employee.”

Mr. Wagner adds that Mr. Shelledy was “recently awarded the Attorney General’s Award for Distinguished Service from Attorney General Holder. ”

A second federal prosecutor, Eric Overby, joined the case in 2011, only to withdraw promptly on discovering what he called prosecutorial abuse directed squarely at raising revenue. He told defense counsel that in “my entire career, I have never seen anything like this. Never.”

In February 2014, California state Judge Leslie Nichols assailed the federal and state government for abuses of discovery so “reprehensible” and “egregious” that they “threatened the integrity of the judicial process.” He threw out the case and awarded Sierra Pacific \$30 million in sanctions against Cal Fire.

If that seems like a large number, the judge noted, the prosecutors were out to “win at any cost.” Defendants had to uncover layers of governmental corruption, Judge Nichols continued. “The cost of Plaintiff Cal Fire’s conduct is too much for the administration of justice to bear.”

The case is growing in infamy. In October, Sierra Pacific filed a motion before federal judge Kimberly Mueller under rule 60(d) to vacate the settlement on grounds that it had been reached as the result of fraud on the court. The case was then removed from Judge Mueller and reassigned to a new judge, William Shubb, who will hear the next phase of the case.

That move acknowledges a legal fraud that could burn down the courthouse, not to mention the reputation of the government’s fire investigators and the federal prosecutors pursuing a payday. Judge Shubb has an obligation to sanction these legal abuses with enough force that prosecutors across the country get the message.

ATTACHMENT 12

ATTACHMENT 12

Tuesday, December 30 2014

Opinions

A wildfire of corruption

Captain Larry Turman, of the California Department of Forestry and Fire Protection, keeps an eye on flames approaching a containment line of the King fire near Fresh Pond, Calif., Thursday, Sept. 18, 2014. (Rich Pedroncelli/AP)



By Kathleen Parker Opinion writer
December 16 

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First there's the spark, then the conflagration, followed by the litigation and then, surely, the movie.

Call it "Moonlight Fire," and prepare to suspend disbelief.

Kathleen Parker writes a twice-weekly column on politics and culture. She received the Pulitzer Prize for Commentary in 2010. [View Archive](#)



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The story is a doozy — a tale of corruption, prosecutorial abuse, alleged fraud upon the court and possible government cover-ups in the service of power and greed. All the script needs is a U.S. Forest Service employee urinating on his bare feet in his lookout tower just as the fire was beginning.

What?!

This is what a real-life ranger discovered when she went to the tower to pick up a radio for repair. She also reported spotting a small glass pipe and smelling marijuana. As for the urinary exercise, the lookout said he was treating his athlete's foot. But of course.

So goes one of the more colorful anecdotes surrounding the 2007 California wildfire that burned up to 65,000 acres — 45,000 of them on federal land — in the northern Sierra Nevada Mountains.

Who caused the blaze, whom to blame and who should pay? Was it an arsonist, the chainsaw dude, the bulldozer or the tower employee's,

ahem, diverted attention? Such questions no doubt would amuse Miss Scarlet and Col. Mustard if this were a game, but the events and consequences were and continue to be grave.

Finding someone to blame became the obsession of state and federal investigators — the Forest Service and the California Department of Forestry and Fire Protection (Cal Fire) — who worked jointly to solve the mystery. They found their perpetrator to be Sierra Pacific Industries, the nation's second-largest lumber producer.

How did investigators know it was Sierra Pacific? If you ask the defendants, they'll say investigators "knew" because this family-owned company has very deep pockets. And, too, a bulldozer used by a company working under contract for Sierra Pacific that day reportedly produced a spark.

It's not easy to feel sympathy for a mega-company that may have caused such a terrible fire. But what if there were other possible culprits, known about but never revealed by the plaintiff's attorneys? Alas, such is the case.

Also in the area when the blaze started were a man who was cutting firewood with an illegally modified chainsaw and perhaps another individual who was a suspected arsonist. This isn't to say that these others are culpable, but defense attorneys claim that their existence — and investigators' failure to pursue or disclose these individuals — constitutes fraud upon the court.

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These facts among others prompted California Superior Court Judge Leslie C. Nichols in February to dismiss the Cal Fire action against Sierra Pacific and other defendants and the state lawsuits stemming from the investigation.

In his ruling, Nichols called the Cal Fire investigation “corrupt and tainted” and shot through with “egregious” and “reprehensible” discovery abuse that “threatened the integrity of the judicial process.”

“The cost of plaintiff Cal Fire’s conduct is too much for the administration of justice to bear.”

It was also, apparently, too much for the defendants to bear. Thus, Nichols ordered the

state to pay defendants \$32 million in attorneys' fees and court expenses.

Remaining is the matter of a separate federal lawsuit, which had resulted in a settlement by which the defendants are paying the federal government \$55 million and have started to transfer 22,500 acres of land.

Emboldened by Nichols's ruling, as well as new testimony by a former assistant U.S. attorney, E. Robert Wright, the defendants are seeking to reverse the federal settlement. In a 15-page sworn statement to the plaintiff's attorneys, Wright suggested possible suppression of evidence. In response, the Justice Department tried to get a judge to disqualify all defense attorneys who might have read Wright's statement. No deal: District Judge William B. Shubb declined the request.

To recap: A terrible fire started either by a spark from a machine, by an arsonist — or by some other unknown means — raged out of control, possibly in part because of a forest watcher's negligence while dealing with a self-diagnosed medical emergency. Whether the watcher's greater attention might have reduced the fire's

ravages is an exercise of the imagination, but who could resist?

State investigators have been officially judged corrupt and fined accordingly. Whether the Justice Department is found similarly culpable remains to be determined.

In the meantime, one sympathizes with Loretta Lynch, who has been nominated to become attorney general. Assuming her confirmation, and pending a final ruling in the California case, she may face an inferno of her own.

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U.S. DEPARTMENT OF JUSTICE

*United States Attorney
Eastern District of California*

*Benjamin B. Wagner
United States Attorney*

501 I Street, Suite 10-100
Sacramento, CA 95814

Phone 916/554-2700
Fax 916/554-2900
TTD 916/554-2855

September 14, 2015

BY HAND DELIVERY

Hon. William B. Shubb
United States District Judge
Eastern District of California

Re: *United States v. Sierra Pacific Industries*, No. 2:09-2445
Ninth Cir. No. 15-15799

Dear Judge Shubb:

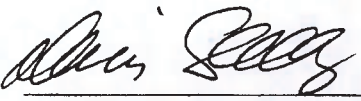
In the opening brief lodged with the Ninth Circuit on Friday, Sierra Pacific accuses you of violating Canon of Judicial Conduct 3A(6). The accusation appears on page 93 of the brief.

Basic fairness seems to require that you be informed of the accusation, but we have not seen any such notice from Sierra Pacific. That is the reason for this letter.

Thank you.

Sincerely,

BENJAMIN B. WAGNER
United States Attorney

By: 
DAVID T. SHELEDY
Assistant U.S. Attorney

cc (by mail):

William R. Warne, Esq.
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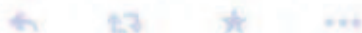
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