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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Sierra Pacific Industries hereby provides the following information: There are no parent corporations or publicly held corporations that own 10% or more of the stock of Sierra Pacific Industries.

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant W.M. Beaty & Associates, Inc. hereby provides the following information: There are no parent corporations or publicly held corporations that own 10% or more of the stock of W.M. Beaty & Associates, Inc.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

FEDERAL STATUTORY AUTHORITIES

STATE STATUTORY AUTHORITIES

FEDERAL RULES AND REGULATIONS

JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1345. Following a settlement on July 18, 2012, the court dismissed this action and entered judgment. (ER 765-76.) On October 9, 2014, Defendants sought relief from that judgment under Federal Rule of Civil Procedure 60(d)(3). (ER 608-13.) The court denied Defendants' request on April 17, 2015. Defendants filed their notice of appeal on April 20, 2015. (ER 64-66.) Jurisdiction is conferred under 28 U.S.C. § 1291.

INTRODUCTION

In the state Moonlight Fire action, after extensively reviewing the evidence, the court concluded that the government's investigation and prosecution was "corrupt and tainted," and included "so many acts of evasion, misdirection, and other wrongful acts and omissions," that it was simply "too much for the administration of justice to bear." (ER 654-55, 658.) In the federal Moonlight Fire action, the district court dismissed the allegations of misconduct at the pleading stage, stating: "Defendants have failed to identity [sic] even a single instance of fraud on the court, certainly none on the part of any attorney for the government." (ER 63:11-13.) Its decision must be reversed. Instead of following the law regarding fraud on the court, the district court ignored binding authority or conflated it with legal principles relating to fraud upon a party. Instead of

compelling the government to comply with the court's limiting order to assume the fraud on the court allegations as true, the court allowed the government to ignore and override its order and then failed to give Defendants a chance to respond. Instead of analyzing the prosecutors' behavior, the district court made excuses for it.

ISSUES PRESENTED

1. Whether the court erred by relying on the parties' settlement agreement to exclude from its analysis all fraud Defendants uncovered before and after settlement, and by then failing to assess the fraud in its totality.

2. Whether the court denied Defendants due process by ordering the parties to assume the truth of Defendants' allegations and brief the legal sufficiency of those allegations under Rule 60(d)(3), and then, without providing Defendants notice and an opportunity to respond, by making factual findings that certain allegations were untrue, and by also failing to grant leave to amend.

3. Whether the court applied the wrong legal standard by requiring Defendants to have been diligent in discovering the fraud, and whether it erred by finding that Defendants had not been diligent notwithstanding factual allegations to the contrary.

4. Whether the court applied the wrong legal standard by requiring Defendants to have been prejudiced, and whether it erred by finding that Defendants were not harmed notwithstanding factual allegations to the contrary.

5. Whether the court applied an erroneous legal standard by concluding that a motion *in limine* ruling cannot support fraud on the court because the ruling was not final and/or had not been subjected to appellate review.

6. Whether an illegal and undisclosed contingent financial interest in the outcome of the investigation supports a finding of fraud on the court.

7. Whether the court erred in ruling the government had no obligation to disclose exculpatory and impeachment evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), or in response to civil discovery requests, or pursuant to the duty of candor, and by ruling that the nondisclosure did not constitute fraud on the court.

8. Whether the district court judge's inaccurate and prejudicial Twitter post on the merits of the case just after entering his order violates Canon of Judicial Conduct 3A(6) and, along with his decision to "follow" the Twitter account of the United States' Attorney's Office in the Eastern District, creates the appearance of impropriety warranting retroactive disqualification, vacatur of the court's order, and remand to a judge from outside the Eastern District.

ADDENDUM

Attached hereto is the separate addendum containing legal authorities required by Circuit Rule 28-2.7.

STATEMENT OF THE CASE

The Moonlight Fire started on Labor Day, September 3, 2007, on property owned by members of the Walker family ("Landowners") and managed by W.M. Beaty and Associates ("Beaty"). While somewhat remote, the property was frequented by recreational users, including hikers, hunters, and ATV riders. It was also the site of logging operations, as Sierra Pacific Industries ("Sierra Pacific") had won a bid to harvest timber on the property and hired Eunice Howell's Forest Harvesting Company ("Howell") to conduct logging operations. (ER 461-62.)

Until roughly 12:45 p.m. that day, two Howell employees, Kelly Crismon and J.W. Bush, were using bulldozers in the area to create "water bars" on "skid trails."[1] By 1:30 p.m., both operators were leaving in their trucks with windows down. At no time did they see or smell fire. (ER 462.) That morning, Ryan Bauer, a Howell employee and the sole proprietor of a fledgling firewood business, told his parents he would be cutting firewood in the area, his favorite place to do

[1] A "skid trail" results from bulldozers dragging logs to "landings" for loading. (ER 463 n.19.) A "water bar" is a soil berm installed across the skid trail to prevent erosion. (ER 462.)

so. He would also be using a chainsaw illegally modified in a way that increased its power and the risk it might start a fire. (ER 461, 557.)

At 2:24 p.m., the USFS' closest lookout spotted smoke and reported the fire. Both the USFS and Cal Fire responded. Despite their efforts, the fire burned for more than two weeks, consuming approximately 65,000 acres, including 45,000 acres in the Plumas and Lassen National Forests. (ER 462-63.)

I. A FUNDAMENTAL RULE OF FIRE INVESTIGATION

Investigators are trained to scientifically and systematically read burn indicators to locate the "general origin area" of the fire, and then the smaller "specific origin area." Once established, investigators must examine indicators within the specific origin area while carefully reading indicators to the "point of origin," where they then look for the ignition source. Once found, investigators mark the point of origin with a white indicator flag. (ER 479.) Locating the actual ignition source and point of origin is critical to determining the correct cause of the fire. Mislocating the point of origin – even by eight feet – can make "a world of difference." When wildland fire investigators end up at a point where the fire did not start, the actual cause of the fire – be it a match, a gasoline spill, or a timing device – remains undiscovered, regardless of whether it is eight feet away or 100.

Thus, as wildfire investigation standards confirm, if the origin cannot be found, the fire's cause generally cannot be determined.[2] (ER 479.)

II. THE MOONLIGHT FIRE ORIGIN AND CAUSE INVESTIGATION

The USFS and Cal Fire jointly investigated the Moonlight Fire. The lead investigator, Cal Fire's Joshua White, worked with USFS wildfire investigator David Reynolds. White and Reynolds began their joint investigation the morning of September 4, 2007, and reached their determination by 10:15 a.m. the next day. On both days of their investigation, the investigators focused on one area where metal bulldozer tracks left strike marks on rocks, a phenomenon that occurred all over the hillside that day. (ER 463-64, 864-65.)

Before fully analyzing their selected area on September 4, the investigators contacted bulldozer operators Crismon and Bush. (ER 463, 849-50.) After learning Crismon had been working in this area, they met with him. (ER 849-50.) Parking at a landing below, the investigators hiked with Crismon to where they thought the fire started, pointed to these particular rock strikes, and asked if he created water bars there on the day of the fire. Crismon confirmed he had done so at around 12:15 p.m. − nearly two hours before the fire started. (ER 850-51.)

[2] Of course, when investigators resort to fabricating or planting evidence, their work ceases to be about determining cause and, instead, becomes a fraudulent effort to affix blame.

At approximately 6:00 p.m., White took Crismon to the landing while Reynolds stayed behind, placing blue, yellow, and red indicator flags in what the investigators concluded was the general and specific origin area.[3] (ER 463, 852.) When White returned, he took photographs; three show Reynolds crouching over a specific rock partially buried in the skid trail. Each photo shows Reynolds staring at a GPS device perched on top of the rock. (ER 480-81.)

On September 5, White and Reynolds returned to the area at about 8:00 a.m., (ER 464), placed a single white flag alongside the same rock Reynolds crouched over the night before, and marked two reference points ("RP1" and "RP2"), (ER 481, 486). White took five photographs, three from RP1 and two from RP2, each centered and focused on their white flag. (ER 481.) With accuracy to within 1/4 inch and a single degree, the investigators then took precise distance and bearing measurements from these reference points to their white flag.[4] Reynolds also prepared a Fire Origin Investigation Report that included a sketch of the scene and the GPS measurements he had taken of the rock the night before. He handwrote measurements from RP1 and RP2 to this single point designated with an "X" and

[3] Under wildland fire investigation protocols, blue flags mark backing fire spread; yellow flags mark lateral spread; and red flags mark advancing spread. A white flag marks the point of origin. (ER 464.)

[4] A year later, in a separate wildfire litigation, White testified that such measurements were the foundation of an origin and cause investigation. (ER 482 n.27.)

labeled "P.O." A key on the Reynolds sketch states the "X" marks the "point of origin." (ER 482.)

Just before 10:00 a.m., they pulled their flags and returned to the landing below. (ER 464, 734.) At 10:15 a.m., White released the scene, a fact recorded on Reynolds' report. According to Reynolds, they did so because they "were confident" and they "were done." Later that day, Reynolds created another report identifying Sierra Pacific as the "defendant." (ER 464.)

Three days later, the USFS replaced Reynolds with Special Agent Diane Welton. On September 8, Welton visited the scene with White. (ER 464.) White took two photographs of Welton pointing downward with a long-handled shovel at two different rocks half-buried in the soil on an entirely different trail, eight-to-ten feet from the rock White and Reynolds marked, measured, and identified three days earlier. (ER 627, 726-28.)

III. THE OFFICIAL REPORT

On June 30, 2009, the USFS and Cal Fire announced their joint findings in their "Origin and Cause Investigation Report, Moonlight Fire" ("Official Report"). White signed and attested to its truth for Cal Fire, and Welton did the same for the USFS. (ER 463, 465.)

Despite its 300 pages, the Official Report's narrative never mentions the white-flagged rock or the investigators' extensive efforts to memorialize it before

releasing the scene. (ER 79, 478, 480-82.) The Official Report omits the five photographs of the white flag, omits the sketch that marks the single point, and omits Reynolds' report, which confirms White released the scene at 10:15 a.m. on September 5. (ER 478-87.) Instead, the Official Report advances an entirely different sketch, "the official sketch," with two points of origin labeled E-2 and E-3, (ER 465), located where White photographed Welton pointing downward with a shovel on September 8, (ER 727-28). The Official Report states the investigators identified these alleged points of origin on September 5. (ER 478-79.) It also claims they found metal fragments at E-2 and E-3, which they collected and placed in one bag, labeled E-1.[5] (ER 464.) Finally, the Official Report concludes that the fire began at either E-2 or E-3 when Crismon's bulldozer tracks or blade struck these rocks, causing metal fragments to separate *there*, land *there*, and smolder *there* in a dry fuel bed "for 1 1/2 hours until it entered into the free-burning stage and produc[ed] enough smoke to be identified by Red Rock Lookout." (ER 487, 526, 616.) The Official Report does not reveal that these two points were identified three days after the investigation, after the metal was collected, and after the scene had been released. (ER 480.)

[5] White could not explain why they placed metal from two rocks into one bag. (ER 485.)

IV. THE INITIATION OF THE STATE AND FEDERAL MOONLIGHT FIRE ACTIONS

On August 4, 2009, approximately a month after publication of the Official Report, White authored a demand letter to inform Defendants they were liable to Cal Fire for $8.1 million in fire suppression and investigation costs. Instead of seeking full payment for the State of California, White gave Defendants 30 days to pay the State approximately $7.7 million and to write a separate check for $400,000 to the "WiFITER" account. (ER 465-66.)

Cal Fire, however, did not wait 30 days. On August 9, 2009, it filed suit in Plumas County Superior Court. Five additional private party lawsuits followed (collectively, the "state action"). The state court consolidated these matters for discovery and then for trial. Potential damages in the state action exceeded $60 million. (ER 465-66.)

On August 31, 2009, the United States filed the federal action. In its initial Rule 26 disclosure, it estimated damages at $791 million. With attorneys' fees and additional interest, Defendants faced a federal damages claim exceeding $1 billion. (ER 467-68.)

V. DISCOVERY IN THE STATE AND FEDERAL ACTIONS

Although there were seven Moonlight Fire cases, the federal and state prosecutors controlled the litigation effort throughout discovery and motion practice. (ER 466-68.) To facilitate that effort, they proclaimed a "common

interest" to the court and entered into a "joint prosecution agreement." (ER 615.) Thus, they choreographed their litigation efforts, jointly preparing critical witnesses, (ER 468, 491), hiring and relying upon many of the same consultants and experts, (ER 468, 507, 516-18), and coordinating deposition questions, defense, and scheduling, (ER 468, 492 n.39). They also jointly advanced a fraudulent origin and cause investigation, repeatedly allowed witnesses to testify falsely, and regularly violated their duties of disclosure and candor to two courts.

A. The Investigators and Prosecutors Advanced a Fraudulent Origin and Cause Investigation and Report in the Litigation.

While the Official Report served as the foundation for the lawsuits, (ER 494, 556), it falsified the most essential elements of the investigation. Ultimately, through painstaking discovery, Defendants found what the investigators had concealed, including their five white-flag photographs, their original sketch, and their original point of origin. (ER 478-95.)

White's deposition began with him parroting the Official Report, confidently confirming the only points of origin he and Reynolds ever identified were E-2 and E-3, and that they *never* identified any other potential point of origin and *never* placed any white flags. When Defendants thereafter surprised White with his own carefully aligned high resolution images of the single white flag in an area different than represented in the Official Report, White first claimed he could not see the flag. Red-faced when confronted with his own photos on a computer screen,

White then admitted to seeing it, but said he could not explain why it was there and that neither he nor Reynolds had anything to do with it. White would not explain why he had taken five photographs from two reference points with the same white flag in the center of each. (ER 487-89.)

White also denied knowing anything about Reynolds' sketch, testifying that he learned of it through counsel after litigation began. Defendants, however, discovered another photo omitted from the Official Report but taken by White just before he released the scene; it reveals the sketch peeking out from underneath a photo White himself took at 10:02 a.m. of the metal he collected earlier that morning.[6] (ER 464, 484-86.)

Like White, Reynolds also falsely and repeatedly testified that they did not use *any* white flags. (ER 488.) When Defendants showed him photographs of the flag, Reynolds claimed, "I don't really see a flag" and testified it "looks like a chipped rock." (ER 491-92.) Shortly thereafter, Reynolds conceded only that the flag in the photographs "looks like a white flag," but never admitted it was a white

[6] Reynolds also employed deceit in a failed effort to explain away his own hidden sketch. When Defendants put it before him at his deposition to discuss the perfect correlation between the distance and bearing measurements to the white flag, he testified that his measurements "have nothing to do with any kind of a white flag," and instead correlated with the so-called E-3 point of origin some eight to ten feet away. (ER 488.) As the government's own surveying expert confirmed, this testimony was false. (ER 482, 488, 503.) The investigators' distance and bearing measurements align perfectly with the location of their concealed point of origin, not E-3 and not E-2. (ER 482.)

flag. (ER 731:7.) Later in his testimony, Reynolds refused to acknowledge that what "looked like a white flag" was in fact a white flag, stating: "I don't ever . . . recall putting a white flag out." (ER 731:10-13.) Reynolds later reverted to "[i]t looks like a chipped rock to me," quipped, "[i]f you call it a flag," and stated "I just have no recollection of there being a white flag." (ER 735:5-6, 16, 20-21.) Later, refusing to acknowledge the white flag's existence, Reynolds defiantly referred to it as a "supposed flag," and stated, "I don't recall putting the white flag out there." (ER 416:14, 419:1-2.)

Like White, Reynolds persisted in giving false testimony about whether he or White placed the white flag, whether they possessed any white flags, how the flag came to be there, and what it signified. (ER 488-92.) The falsification of the Official Report forced the investigators' hands. Once signed, they had little choice but to support it, even if doing so required perjury.[7] (ER 478.)

As the prosecutors defended the investigators' depositions, they did nothing to stop their witnesses' deceit or correct the record. (ER 487-89, 492-93.) They also employed the Official Report and its falsified conclusions in sworn discovery

[7] The investigators' efforts to conceal the essence of their actual investigation went further than falsifying the Official Report and lying under oath. Before the case was filed, White destroyed the contemporaneous notes he made while conducting his investigation. (ER 486-87).

responses and in motion practice before the trial court, and they made it their first trial exhibit. (ER 478, 491, 493-96, 213.)

B. The Prosecutors Failed to Correct the Government's Falsified Origin and Cause Conclusions, and Instead Worked to Create False Evidence to Further Their Case.

At 3:09 p.m., less than an hour after Red Rock Lookout Tower first reported smoke, an "Air Attack" pilot flying over the Moonlight Fire recorded video which shows that the fire did not start anywhere near the falsified points, E-2 or E-3, or, for that matter, near the single point the investigators memorialized before releasing their scene. Instead, the video reveals that the fire started to the west, at a location several hundred feet farther up the hill, thus negating the investigators' cause determination, since it is unconnected to their alleged origin.[8] (ER 506-08.)

Despite finding this video after publication of the Official Report, the prosecutors took no remedial action to correct the Official Report or numerous written discovery responses or line after line of false deposition testimony. (ER 506-10.) Instead, as was the case in every instance when confronted with evidence harmful to the government, the prosecutors helped manufacture specious explanations. To address the discrepancy between the location of E-2 and E-3 and the location of the smoke in the Air Attack video, they helped prepare a revised

[8] Video analysis by government and defense experts revealed that the alleged points of origin E-2 and E-3 are not encompassed in the smoke, but exist farther downhill to the east, among a stand of then unburned trees in the video. (ER 507-08.)

diagram of the alleged origin that, despite Reynolds' testimony to the contrary, depicted the fire advancing to the northwest so as to move it towards the plume in the video. (ER 507, 511-12.)

The government and its prosecutors also used experts to falsely advance their case. For instance, they hired expert Kelly Close to model the Moonlight Fire using a computer program known as FARSITE. Using false data, Close modeled the fire advancing uphill to the west from E-2 and E-3, directly towards the smoke seen in the Air Attack video, helping the prosecutors to argue the Official Report was correct. (ER 513-14.) Close's FARSITE modeling was deeply flawed. Instead of inputting the actual nine-degree slope, Close used thirty-three degrees, which, if correct, would have been enough slope to override the northeasterly wind and advance the fire up the hill. (ER 620, 763-64.) When defense expert Christopher Lautenberger corrected Close's data, the FARSITE model revealed a fire moving northeast with the wind, again confirming the fire did not start where the investigators and prosecutors claimed. (ER 513-14.)

While Lautenberger's expert rebuttal caused Close to address his incorrect slope before his deposition, the prosecutors never directed Close to prepare a corrected supplemental report as required under Federal Rule of Civil Procedure 26(a)(2)(E). Close also testified that, after Lautenberger revealed his error, and for

his own "edification," he re-ran his FARSITE modeling with the real slope inputs, creating new results that the government never produced. (ER 513-15.)

C. The Investigators and Prosecutors Advanced a Fraudulent "Confession."

Reynolds first interviewed bulldozer operator Bush shortly after arriving at the fire on September 3, 2007. When Reynolds urged Bush to say a bulldozer strike caused the fire, Bush refused. Reynolds then used a different method to secure a "confession," drafting a witness statement falsely attributing this same admission to Bush. However, Bush is illiterate. Not knowing what it said, Bush signed the statement, mistakenly believing Reynolds accurately transcribed their conversation. (ER 495-98.)

A week later, White interviewed Bush. As revealed by the discovered audio recording, White asked Bush whether he told Reynolds that a bulldozer scraped a rock and started the fire. Bush flatly denied having done so, stating that he never thought the fire started in that manner. Nevertheless, White wrote a formal summary of his Bush interview, falsely stating, "Bush reiterated the same information he had provided to . . . Reynolds." (ER 497.) When Defendants asked White why he falsified the most important aspect of what Bush had actually said, White could offer no explanation. Still, the prosecutors proffered the so-called fact of Bush's "confession" in verified discovery responses, and then represented to the court the alleged Bush admission of liability as an "undisputed fact." (ER 495-98.)

D. The Investigators and Prosecutors Advanced Three Other Fraudulent Wildfire Investigations.

The Moonlight Fire litigation involved more than one fire. To support their allegations, the investigators relied on three other fires that year in areas where Howell had operated: the Greens, Lyman, and Sheep fires. (ER 517-23.) Although the Greens and Lyman Fires burned well before the Moonlight Fire, they generated no investigation reports until *after* the Moonlight Fire, at which point each fire was retroactively blamed on a Howell bulldozer striking a rock. The Official Report and the government's complaint relied on these reports as support for, among other things, allegations that the other defendants were negligent in their alleged supervision of this "bad operator." (ER 517, 522-23.)

However, discovery revealed that these other investigations were also fraudulent – an effort to fabricate evidence to bolster the Moonlight Fire claims against Defendants. (ER 517-23.) Indeed, the investigators on these fires all testified that they were unable to locate a point of origin, a failure which compels an "undetermined" cause. (ER 518-19, 521-22.) Nevertheless, just after the Moonlight Fire started, the government pressed the respective investigators to create reports blaming these other fires on Howell's equipment. (ER 517-23.) With respect to the Lyman Fire, Cal Fire went so far as to invoice Howell $46,206.26 for suppression costs, even though Cal Fire's investigators never found an origin or established the cause, a fact revealed when Defendants deposed them

in the Moonlight Fire action. Eunice Howell paid Cal Fire and closed her business shortly thereafter.[9] (ER 520-21.) Even after the Lyman Fire investigators admitted they never determined the cause, Cal Fire kept the money and the federal prosecutors never withdrew their reliance on the false Lyman Fire report in their pleadings and discovery responses.[10] To the contrary, the government continued to rely on the fraudulent reports for these fires in response to written discovery and in various pleadings.[11] (ER 521-23.)

E. The Investigators and Prosecutors Covered Up Misconduct at Red Rock Lookout Tower.

The Official Report claims the fire was spotted from Red Rock and reported at 2:24 p.m. (ER 525.) Because of the two hour time difference between when Crismon actually worked in the alleged origin area (12:15 p.m.) and when Red

[9] Later, Howell sued Cal Fire, which ultimately paid her $225,000 in settlement. (ER 621 n.97.)

[10] The Greens Fire report was equally false. The federal Greens Fire investigator conceded in her deposition she actually found no point of origin, manufactured a false report to produce in discovery, and fabricated another Greens Fire investigative document by signing with her married name in one signature box and her maiden name in another, concocting the appearance that her manufactured work had been reviewed by another individual. (ER 518-19.) Lead prosecutor Kelli Taylor sat on her hands during the deposition that revealed these frauds and did nothing to correct the record. (ER 518-23.)

[11] As Judge Leslie C. Nichols found in the state action, "Cal Fire does not even attempt to deny that the conclusion of the Origin and Cause Report for that fire prepared by Lester Anderson was false. There is no dispute that his conclusion, that a Howell's bulldozer ignited the Lyman Fire, was flatly contradicted by the lead investigator of the Lyman Fire, Officer Greg Gutierrez, who testified that the cause was properly classified as undetermined." (ER 522:6-9.)

Rock spotted smoke (2:24 p.m.), the Official Report claimed the Moonlight Fire must have begun as a smolder, then maintained in an "incipient state" for at least an hour and a half before transitioning to a "free burning stage," at which point it produced enough smoke to be identified from Red Rock. This timing theory was shaped to fit when Crismon was in the chosen origin area, a fact Reynolds conceded by acknowledging "you have to back into a number here." (ER 506 n.45, 619 n.74.)

Defendants maintained that the significant time difference between when Crismon departed the area and when the fire began demonstrated someone else started the fire. (ER 506 n.45.) Defendants also argued that the USFS employee manning Red Rock failed to exercise due care in performing his duties. (ER 526.)

Although Defendants heard rumors of misconduct at Red Rock, the Official Report and the formal interview summaries Welton prepared indicated there was nothing amiss at Red Rock that day. (ER 533, 525-26, 529-30, 537.) Defendants propounded interrogatories directing the government to "[d]escribe in detail all activity at Red Rock Lookout on September 3, 2007, including (without limitation) the IDENTITY of all PERSONS involved and all conduct and action taken by those PERSONS." (ER 533.) The government provided a verified response stating that the lookout on duty that day, Caleb Lief, "conducted lookout activities throughout the day on September 3, 2007," including performing "a 360

observation of the surrounding forest from the lookout looking for signs of fire, including smoke." According to the government, another USFS employee, Karen Juska, arrived at the lookout between 2:05 and 2:10 p.m. and then "proceeded into the lookout, spoke with Mr. Lief and performed a 360 scan of the horizon," but saw no signs of fire. (ER 534.) The response claims Juska and Lief then went to her truck below the tower and spotted smoke. (ER 533-34.)

However, Defendants found that the government whitewashed what actually occurred. On the day of the fire, Juska made her way up to the lookout on a dirt road, creating a visible dust plume. She parked just below the tower, exited her truck, and ascended the nearby wooden stairs to the catwalk. As she reached the elevated catwalk and rounded a corner of the tower cabin opposite from the fire, she caught Lief by surprise, looking down, facing her direction, and urinating on his bare feet. Lief quickly turned to zip his pants, saying he was curing his athlete's foot fungus. (ER 525-27.) Juska, taken aback, entered the cabin along with Lief, leaving wet footprints as he went. (*See generally* ER 734-60.) Thereafter, Juska spotted what she described as a blue-green glass marijuana pipe on the counter. Lief quickly grabbed the pipe, put it behind his back, saying, "My bad, you weren't supposed to see that." When Lief handed Juska a radio, Juska smelled the "heavy odor" of marijuana on Lief's hand and the radio. Lief and

Juska then went down to her truck, where Juska spotted smoke over Lief's shoulder. Lief testified the smoke plume was "huge" by then. (ER 527-28.)

The government omitted each of these facts from its verified response to Defendants' interrogatory seeking a detailed description of *all activity* by those present at the tower. Defendants subsequently deposed USFS Supervisor Larry Craggs, who the prosecutors used to verify the government's false response. When pushed, Craggs admitted the response was not truthful. When asked why he verified the response knowing it was untrue, he said he was handed the document, that it was written by someone else, and he "didn't know [he] was supposed to add more to the document." Even after Craggs' admissions, the government did nothing to correct its interrogatory response. Later, the government even argued it was not false.[12] (ER 533-38.)

[12] In trying to justify this false interrogatory response, the prosecutors again confirmed an entrenched cynicism regarding their responsibilities. They argued they had no obligation to reveal Lief's urination, stating: "the United States did not deem [the] issue to be responsive and had no greater obligation to include that than whether he blew his nose the same day." (ER 376:12-14.) But it is not the government's prerogative to "deem" any "activity" irrelevant or nonresponsive. Also, it *was* in fact highly relevant that Lief, whose very job was to be hyper-vigilant, was caught incapacitated and unaware urinating on his feet by a colleague who had driven up a long dusty road, parked immediately below, and climbed a flight of stairs, especially when the fire was burning in the distance on the other side of the tower. With respect to concealing the pot pipe and related issues, the government brazenly argued the "interrogatory asked about 'activities'" and "the presence of [a] pot pipe is not an activity." (ER 376:8-9.) But the act of seeing a pot pipe is certainly an activity, as is the act of seeing the user hide it behind his back saying, "my bad," as is the act of smelling the "heavy odor of marijuana."

Discovery revealed otherwise. Welton formally interviewed Juska in the context of her investigation of the Moonlight Fire. Before the interview, however, Welton instructed Juska to omit any information about Lief's misconduct the day of the fire.[13] (ER 529.)

Discovery, however, ultimately revealed[14] that Juska created a separate written record of what actually happened despite Welton's instructions to keep silent. (*See generally* ER 734-60.) Discovery also revealed that USFS District Ranger Dave Loomis forced supervisor Ron Heinbockel to give Lief a "fully satisfactory" rating and to rehire Lief the following season, a move that Heinbockel conceded under oath was an effort to keep Lief "on our side" so he would not "shoot his mouth off." Heinbockel also wrote a strong letter of protest to Loomis, documenting what he had been forced to do. (ER 530-31.)

Finally, the government even argued, "the United States was not required to adopt Juska's contested accusation." (ER 376:10-11.) But all of what the government said about the tower that afternoon was the consequence of "adopting" portions of witness statements so long as they were not harmful to its case.

[13] In an effort to lend an air of meticulousness to her report, Welton's interview summaries contained irrelevant details, including where and when Juska had lunch that day. However, consistent with the corrupt methodology that governed this matter, Welton systematically omitted all information harmful to the government's case. With her signature, she attested that Juska and Lief's witness summaries were "true, accurate, and complete," and placed them in the Official Report. (ER 529-30.)

[14] The prosecutors tried to prevent Defendants from getting much of this information by arguing it was privileged employment material, but the magistrate ordered the documents produced. (ER 530, 884-85.)

VI. FEDERAL MOTION PRACTICE

A. Defendants' Motion for Summary Judgment

After years of discovery, Sierra Pacific and Howell moved for summary judgment. (ER 501.) On March 28, 2012, the government filed its opposition, the centerpiece of which was a declaration by investigator White incorporating almost the entire fraudulent Official Report. (ER 501, 841.) Although White's declaration details various tasks that he and Reynolds supposedly undertook, White once again omits having marked, measured, photographed, sketched, and labeled the only point of origin they identified before releasing the scene. (ER 501, 847-57.) Likewise, the Official Report filed with White's declaration conceals all this work, thus perpetuating – with the assistance of the prosecutors – the seminal fraud at the heart of their Official Report. (ER 501-02, 845-57.)

White's declaration adopts Bush's alleged "confession" that a bulldozer scraped a rock to start the fire, attaches that false confession to his declaration, (ER 495-96, 502, 856), adopts the falsified witness statements from Juska and Lief, (ER 502), and adopts the fraudulent Greens, Lyman, and Sheep investigations, (ER 503-04, 847, 857).

The prosecutors assisted with this pageantry of fraud, (ER 502-04), and proffered to the court White's false declaration and its phony exhibits so as to dispute at least twelve material facts proffered by Defendants, (ER 501, 858-71),

and to support what the government argued were at least twenty-five so-called "undisputed" facts, (ER 501, 872-83). Defendants objected to White's declaration as a sham, (ER 838), but the court overruled the objection and denied Defendants' motion, (ER 498, 838-40). The Moonlight Fire litigation continued.

B. The Government's Trial Brief

The parties submitted trial briefs on June 25, 2012. Besides advancing the central Moonlight Fire fraud, (ER 517, 538-39, 803-04), the government argued Defendants could not assert that the government failed to properly investigate the fire, covered up or manufactured relevant evidence, or provided false testimony and false interrogatories, because Defendants had not pled these defenses with particularity, (ER 805). The government queried: "What 'intentional failure' to properly investigate? What 'cover up' and 'manufacturing' of evidence? What 'intentionally untrue' deposition testimony?" The prosecutors claimed that the "factual allegations underlying these claims are anyone's guess." (ER 806.)

C. The Government's Motions *in Limine*

At all relevant times during the Moonlight Fire investigation, Cal Fire had been diverting a portion of its civil recoveries into "WiFITER," an account it used to buy equipment for investigators and to finance unapproved travel. (ER 543, 549.) Defendants were troubled by the possibility that, under this program, Cal Fire diverted a portion of money it recovered from those it accused of starting

wildfires into accounts controlled by wildfire investigators, thus creating a financial bias to target affluent defendants. (ER 543.) Despite diligent discovery efforts in the state and federal actions, Defendants had uncovered little information to support this common sense conclusion before the federal trial. (ER 543-44.)

As part of pretrial briefing, the government filed a motion *in limine* to "Exclude Argument of Government Conspiracy and Cover Up." (ER 542, 829-30.) The prosecutors argued that Defendants should be barred from arguing a "conspiracy" premised in part on the fact "that Cal Fire has a fire cost recovery program[.]" (ER 542:28-543:1, 831.) The prosecutors claimed WiFITER was a benign public program and that Defendants' concerns were "unsupported." (ER 543:8, 831:18.) The court granted the motion *in limine*, excluding evidence regarding conspiracy associated with the cost recovery program. (ER 545.)

The government also filed a motion *in limine* under Federal Rule of Evidence 403 to preclude Defendants from presenting evidence relating to an alternative cause of the Moonlight Fire, as well as four additional motions *in limine* to exclude evidence relating to one of those potential causes, Ryan Bauer.[15]

[15] The investigators also ignored concerns about suspected serial arsonist and USFS employee, Michael McNeil, who was reassigned to the area two months before the fire started. These concerns were so serious that Welton drafted a lengthy "confidential" report detailing her investigation into the alarming connection between McNeil's USFS assignments and the unexplained arson fires that immediately followed his arrival in those areas. White himself asked the

(ER 819, 829.) Through these motions, the government represented to the court there was not a "shred" of evidence tending to show that firewood cutter Ryan Bauer or others may have caused the Moonlight Fire. (ER 833:19.)

Defendants opposed the motions. (ER 818-19, 814.) Discovery had revealed that Bauer told his parents on the morning of September 3 that he planned to cut firewood, and that his favorite area to do so was where the fire started. A private patrolman who first responded to the fire found Bauer's parents, Edwin and Jennifer, looking for Ryan in the area close to the fire shortly after it began. (ER 557-58, 818 n.3.) A deputy sheriff testified that he stopped Ryan speeding away from the fire shortly after it started, and that Ryan was highly agitated while claiming he had been at the fire to retrieve his chainsaws. (ER 558, 818 n.3.) Ryan then provided a false alibi to investigators during his interview, blurting out, "I was with my girlfriend all day. She can verify that if I'm being blamed for the fire." (ER 558:14-15; *see* ER 818 n.3.) The investigators never attempted to talk to Ryan's girlfriend. However, when Defendants deposed her, she testified Ryan was *not* with her all day, that he showed up in the afternoon, stayed as few as ten minutes, was covered in sawdust, and had a chainsaw in his pickup. (ER 558, 818 n.3.) Defendants also deposed Ryan, and he initially invoked the Fifth

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USFS to put a transponder on McNeil's USFS truck just after he arrived. Neither White, nor Welton, nor Reynolds investigated McNeil for this fire. (ER 461-62.)

Amendment when asked if, among other things, he had lied to investigators to draw attention away from himself. (ER 559, 818 n.3.)

Defendants argued in opposition to the government's motion that they "do not have the burden to prove at trial that . . . [Bauer] started the fire." (ER 821.) Defendants also stated they intended to show that the investigators failed to properly investigate and exclude Ryan Bauer as a cause, and that the government therefore could not satisfy its burden of proving Defendants started the fire. (ER 818, 820-22.) Defendants reiterated this point in their opposition briefing and at oral argument, noting that they did not intend to "prove" Ryan was responsible. However, they argued their right and intent to, among other things, elicit evidence concerning far more likely causes. (ER 819-21, 790-801, 799:15.)

One week before trial, the court ruled on all motions *in limine*. (ER 469, 781, 784.) The court held that Defendants "may use evidence indicating arson was not considered to show weakness in the investigation following the fire," but precluded Defendants from eliciting evidence "to argue that someone else started the fire." (ER 784.) Defendants filed objections, arguing the ruling was legally incorrect and deprived them of a key defense. (ER 777-79.)

VII. SETTLEMENT OF THE FEDERAL ACTION

Against this backdrop, Defendants faced losing their businesses and livelihoods to unscrupulous prosecutors willing to aid and abet the investigators'

fraud. Given the prosecutors' abuse of the court's trust in them as Department of Justice lawyers, Defendants were forced to contend with the *in limine* rulings. (ER 469-70.) Thus, on July 17, 2012, Defendants reluctantly settled the federal action, agreeing to pay $55 million along with Sierra Pacific's agreement to convey 22,500 acres of its land to the government. (ER 469, 765-75.) The court then entered an order dismissing the case. (ER 776.) The Defendants' exposure of the government's fraud was not finished.

VIII. CONTINUED DISCOVERY IN THE STATE ACTION

As the state action continued, Defendants uncovered substantial additional evidence of fraud. For instance, on November 1, 2012, Reynolds testified that, when meeting with prosecutors at the U.S. Attorney's Office in January 2011 to prepare for deposition, and while discussing White's earlier testimony and being shown enhanced photographs of the white flag, the federal prosecutors assured him it was a "non-issue."[16] (ER 491:19, 491-92.) Buoyed by the prosecutors' reassurances concerning his effort to frame Defendants, Reynolds boldly feigned ignorance at his federal deposition several weeks later, responding, "I don't really see a flag" and testifying it "looks like a chipped rock," (ER 492:1), and later calling it a "supposed flag," (ER 416:14). Reynolds thus provided a critical post-

[16] That prosecutors would embrace a report of investigation replete with falsehoods is unacceptable; that they would also prepare an investigator for his deposition by putting him at ease regarding the central fraud in this matter is appalling.

settlement disclosure: the prosecutors were more than just silent in the face of preposterously false testimony; they helped create it.

Additionally, after the federal settlement, Defendants deposed Larry Dodds, a primary origin and cause expert for both the state and federal government. Dodds revealed that the prosecutors held a meeting to discuss the significance of the Air Attack video and that the government's survey expert discussed his concern about the "separation" between the location of the fire and the supposed origin. (ER 509-10.)

IX. DISMISSAL OF THE STATE ACTION

On April 30, 2013, California's Chief Justice appointed Judge Nichols to preside over the state action. (ER 472.) To prepare for pretrial motions, Judge Nichols considered thousands of pages of pleadings and documents. (ER 663.) On July 26, 2013, following a lengthy three-day hearing, Judge Nichols issued a series of orders dismissing the state action and entering judgment for Defendants on the ground that, among other things, the plaintiffs could not present a prima facie case. (ER 472.)

X. DEFENDANTS CONFIRM CAL FIRE HAD A CONTINGENT, BENEFICIAL INTEREST IN THE OUTCOME OF THE MOONLIGHT FIRE INVESTIGATION.

On October 15, 2013, the California State Auditor issued a public report on WiFITER. In addition to finding that WiFITER was illegal, the report revealed a key document that Cal Fire had failed to produce in defiance of a prior court order.

(ER 545-46.) The Auditor's report precipitated Cal Fire's post-judgment admission that it failed to produce the key document, and more than 5,000 pages of other relevant WiFITER materials. The state court then entered a post-judgment order requiring Cal Fire to produce these documents. Thereafter, Cal Fire produced yet another 2,000 pages of responsive WiFITER materials. (ER 547.) These belated productions exposed that Cal Fire had testified falsely and produced fraudulent written discovery responses regarding the purpose and legality of WiFITER. (ER 543-49.)

Although Defendants knew before the federal settlement and state dismissal of the existence of WiFITER, (ER 543-44), they did not know Cal Fire had created it to avoid state fiscal controls limiting how, when, and where monies from its civil cost recovery program could be used, (ER 546-47).[17] These documents showed that Cal Fire perpetrated this scheme by illegally demanding that wildfire defendants write one check to the State of California and another directly to WiFITER, ultimately diverting approximately $3.66 million to WiFITER since 2005. (ER 466, 545-47, 549.)

Defendants discovered that a small Cal Fire committee controlled WiFITER's illegal spending, a committee that included Alan Carlson – the initial

[17] With limited exceptions, state law requires all money collected by or in the possession of state agencies to be deposited into the General Fund. *See* Cal. Gov. Code §§ 16305.2-16305.3.

case manager for the Moonlight Fire, the supervisor and mentor of Moonlight Fire investigator White, and, thereafter, a paid litigation consultant for Cal Fire in the state action. (ER 545, 547, 549.) Along with Carlson, White personally demanded payments from accused parties in a manner that allowed him to divert money from the general fund into WiFITER, an account which personally benefitted both of them.[18] (ER 549, 108.) Cal Fire illegally used WiFITER funds to send its investigators to numerous "training" events at locations including beachfront resorts in Pismo Beach and San Diego and to purchase expensive equipment, such as the $1,800 camera package, (ER 549), White used during the Moonlight Fire investigation, (ER 108). In fact, White himself coordinated or requested a number of the training events and WiFITER purchases, and attended numerous WiFITER events. (ER 549.) As a result of these and other benefits, White and other Cal Fire investigators had a contingent, beneficial interest in targeting deep-pocketed defendants for fires. These improper motivations were firmly in place at the time White led the investigation of the Moonlight Fire. (ER 551, 547-49.)

After the federal settlement, and through these belatedly produced documents, Defendants also learned that in February 2008, when Carlson was still

[18] Just three months before investigating the Moonlight Fire, White admitted to circumventing the chain of command to determine whether WiFITER funds would allow him to obtain an expensive computer voice stress analyzer, telling the recipient of his email that he "figured [she] wouldn't rat him out" on this question because "as Alan [Carlson's] boy, I can do no wrong[.]" (ER 548.)

in the process of reviewing the Official Report, Carlson expressed concern that WiFITER was "running in the red," emphasizing that the account would remain so unless the investigators made "a high % recovery." (ER 547-48.) Had Defendants paid $400,000 to WiFITER, as White demanded, it would have effectuated one of the largest cash infusions in WiFITER's history. (ER 549.)

Cal Fire's belated documents also revealed that Carlson, as he reviewed the draft Official Report, denied a request to use WiFITER money to enhance Cal Fire's ability to investigate arsonists, declaring, "it is hard to see where our arson convictions are bringing in additional cost recovery." (ER 547-48.) About a month later, Carlson urged other Cal Fire law enforcement personnel to divert an even greater percentage of settlement dollars to WiFITER. However, Cal Fire's general counsel advised against it, stating, "the point is to keep a low profile." (ER 548.)

Apparently complying with this directive, Cal Fire suppressed the production of these documents revealing the financial incentives and benefits flowing to investigators, making none of them available to Defendants before either the federal settlement or state dismissal. (ER 545-49.) Additionally, contrary to what the prosecutors recklessly informed the district court, WiFITER was anything but the altruistic, benign public program they represented. (ER 543-44.)

XI. DEFENDANTS LEARN THAT THE FEDERAL PROSECUTORS CONCEALED A FALSE REPORT OF A TWO MILLION DOLLAR BRIBE.

After the federal settlement and state dismissal, Defendants learned that, before the prosecutors prevailed on a motion *in limine* by arguing there was not a "shred" of evidence to support Defendants' contention that Ryan Bauer or others may have caused the Moonlight Fire, they actually possessed critical evidence to the contrary. (ER 561-62.) In particular, the prosecutors knew that Edwin Bauer – the father of firewood cutter Ryan Bauer – had lied when the government served him with a trial subpoena, asserting that Sierra Pacific and its counsel had offered a $2 million bribe if Ryan would confess to starting the Moonlight Fire. (ER 617.)

The government launched an investigation, interviewing Edwin Bauer and his lawyer Eugene Chittock, and reviewing Chittock's telephone records and files, which confirmed the allegations were false. Thus, while telling the court there was not a "shred" of evidence to support an alternative cause, the government concealed from the district court and Defendants that Edwin Bauer had engaged in felony obstruction of justice by concocting a $2 million bribe to falsely inculpate Sierra Pacific – a final effort to deflect attention from his son. (ER 561-64.)

XII. THE STATE SANCTIONS ORDERS

On October 4, 2013, after securing dismissal of the state action, Defendants filed a Motion for Fees, Expenses and/or Sanctions, submitting thousands of pages

of briefing, supplemental briefing as ordered by the court, declarations, deposition transcripts, documents, photos, and video for the court's review. (ER 472.)

On February 4, 2014, the state court issued two orders, one twenty-six pages and another fifty-eight pages, imposing terminating sanctions against Cal Fire and awarding Defendants full compensatory attorneys' fees and expenses of approximately $32.4 million. In these orders, the court found that "Cal Fire's actions initiating, maintaining, and prosecuting this action, to the present time, is corrupt and tainted." (ER 473.)

Additionally, the court found by "clear and convincing evidence" that Cal Fire had engaged in "egregious and reprehensible conduct" and "a systematic campaign of misdirection with the purpose of recovering money from Defendants." Although the misconduct was "so pervasive that it would serve no purpose for the Court to recite it all," the state court made specific findings that USFS and Cal Fire witnesses failed to testify honestly, falsified witness statements, and falsified the Official Report as well as other origin and cause reports, which they used in support of their prosecution of the state and federal actions. (ER 471, 473.) The court found the state prosecutors created "a tremendous burden" on the state court "by allowing a meritless matter to go forward," and that this ran afoul of their responsibility "to only advance just actions." (ER 474.) These orders are provided in full. (ER 634-725.)

XIII. THE UNDERLYING MOTION FOR FRAUD ON THE COURT

On October 9, 2014, Defendants moved to set aside the federal judgment for fraud on the court. (ER 608-13.) They supported the motion with extensive evidentiary submissions, including deposition transcripts and video clips, excerpts from fire investigation manuals, diagrams, sketches, discovery requests and responses, documents produced by the parties in discovery and those obtained outside of the discovery process, and legal pleadings.

Six days later, Judge Morrison England, Chief Judge of the Eastern District of California, recused all Eastern District judges because their "impartiality . . . might reasonably be questioned." (ER 605-07.) A week later, the Chief Judge of this Circuit directed Judge England to a Ninth Circuit recusal policy that required polling each judge to confirm his or her own assessment of impartiality. (ER 602-04.) Thereafter, Chief Judge England vacated his order, the Honorable Kimberly Mueller recused herself, and the Honorable William Shubb elected to take the case. (ER 600-01.)

Judge Shubb ordered the parties to submit a joint status report proposing how the court should handle the motion. (ER 598-99.) In the status report, Defendants requested leave to conduct additional discovery on the issues raised in their Rule 60(d)(3) motion, and outlined a preliminary list of documents requested of the government. (ER 594-96.)

On November 24, 2014, the court held a status conference and ordered the parties to first focus on the "threshold" issue of whether, assuming the truth of the defense allegations, the conduct of the Moonlight Fire investigators and prosecutors constituted a "fraud on the court." (ER 575-92, 572-74.) The court ordered focused briefing "limited to": (1) identifying the test for "fraud on the court" under Rule 60(d)(3) and what Defendants must prove to seek relief under that subsection; (2) addressing whether, assuming the truth of the allegations, each alleged act of misconduct separately or collectively constitutes "fraud on the court" within the meaning of Rule 60(d)(3); and (3) explaining how Defendants discovered the alleged misconduct and whether Defendants learned of each alleged act before or after the settlement of the case. (ER 573.)

Defendants submitted the required briefing on January 15, 2015. (ER 428-571.) Opposition and reply briefing followed. (ER 282, 152.) On April 13, the district court heard oral argument. On April 17, the court issued its order denying Rule 60(d)(3) relief. (ER 67-151, 1-63.) On the same day, just hours later, Judge Shubb posted to his then-public Twitter account: "Sierra Pacific still liable for Moonlight Fire damages." (Motion for Judicial Notice ("MJN"), Attachments 6-7.) This appeal ensued. (ER 64-66.)

STANDARD OF REVIEW

This Court typically reviews denial of a Rule 60(d)(3) motion under the abuse of discretion standard. *Agostini v. Felton*, 521 U.S. 203, 238 (1997). Here, however, the district court denied the Rule 60(d)(3) motion after directing "threshold" briefing on whether, assuming the truth of the allegations, Defendants stated a claim for fraud on the court. (ER 573, 583, 586.) Because the district court purportedly adopted a procedural posture similar to Rule 12(b)(6), this Court should review all findings de novo. *See, e.g.*, *Compton v. Countrywide Fin. Corp.*, 761 F.3d 1046, 1054 (9th Cir. 2014) (de novo standard applies to Rule 12(b)(6) motion); *see also Appling v. State Farm Mut. Auto Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003) (on appeal of order dismissing Rule 60 independent action, stating that de novo review applies to Rule 12(b)(6) dismissals, but that abuse of discretion applies to denial of equitable relief). In contrast to *Appling*, the district court here expressly eschewed factual findings, ordering that Defendants' factual allegations were to be assumed true; thus, its focus was on resolving issues of law, including whether Defendants' allegations stated a claim for fraud on the court. That exercise is reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Thus, the abuse of discretion standard has no application under these circumstances.

Even if the abuse of discretion standard applied, this Court would still review de novo the vast majority of the issues on appeal. Under the abuse of discretion standard, the appellate court must first "determine de novo whether the trial court identified the correct legal rule to apply to the relief requested." *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). Next, the appellate court considers the application of the law to the facts, but looks first "to the substance of the issue on review to determine if the question is factual or legal." *Id.* at 1259. If the issue requires the appellate court "to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then . . . the question should be classified as one of law and reviewed de novo."[19] *Id.* at 1260.

SUMMARY OF ARGUMENT

Supreme Court precedent confirms that the court retains the power to set aside a judgment that defiles our system of justice, regardless of whether the parties settled, what they knew when they settled, or the terms of their settlement. The district court, however, discarded from its analysis each instance of fraud Defendants managed to uncover before settlement and refused to consider these

[19] "If application of the rule of law to the facts requires an inquiry that is 'essentially factual,'" the appellate court reviews the district court's determination under the clearly erroneous standard, reversing when the court's determination was "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Hinkson*, 585 F.3d at 1259-60, 1262 (citation omitted).

instances of fraud for any purpose. Additionally, the court found that the settlement between the parties precluded the court from vacating the judgment for any fraud discovered post-settlement. Its conclusions regarding the settlement misapprehend the nature of fraud on the court and constitute reversible error.

The district court erred and denied Defendants due process by ordering the parties to assume the truth of Defendants' allegations and to brief the legal sufficiency of those allegations, but then, without providing notice and an opportunity to respond, by refusing to accept numerous allegations as true. Compounding the error, the court made factual findings that are illogical, implausible, and lack support in the record, all in the context of what it ordered would be a pleadings motion.

The court also premised its conclusions on several erroneous legal principles, including the legally untenable proposition that Defendants must have been diligent in uncovering fraud on the court, that Defendants must have been prejudiced by fraud on the court, and that a tentative ruling procured by fraud is insufficient under Rule 60(d)(3) because it was not "final."

The court erred in assessing the government's concealment of Edwin Bauer's fabricated bribe assertion. Specifically, it wrongly concluded the government had no obligation to disclose this exculpatory and impeachment evidence under the holding of *Brady*, and ignored altogether the government's

independent civil discovery obligations and the prosecutors' duty of candor. Additionally, in finding that concealment of this evidence did not support a finding of fraud on the court, the court applied the wrong legal standard.

The court also erred by finding that the undisclosed contingent financial interest of the lead fire investigator, created by an illegal off-books account formed to embezzle public money, does not constitute fraud on the court when considered individually or as part of the totality of the fraud.

Finally, the district judge's misuse of his public social media account reveals, at minimum, an appearance of bias. For these reasons and others detailed herein, reversal is warranted.

ARGUMENT

I. LEGAL STANDARDS GOVERNING FRAUD ON THE COURT

Federal Rule of Civil Procedure 60(d)(3) provides that a court may "set aside a judgment for fraud on the court," and codifies a fundamental principle: federal courts always have the "inherent equity power to vacate judgments obtained by fraud." *United States v. Estate of Stonehill*, 660 F.3d 415, 443 (9th Cir. 2011). A court's inherent power to vacate a judgment procured by fraud "fulfill[s] a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence" to the rule that a final judgment is typically binding and final. *Hazel-*

Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944), *overruled on other grounds by Standard Oil of Cal. v. United States*, 429 U.S. 17 (1976).

While courts have "struggled to define the conduct that constitutes fraud on the court," the Ninth Circuit confirms that this species of fraud exists where there is "clear and convincing evidence" that a party's misconduct has harmed "the integrity of the judicial process[.]" *Stonehill*, 660 F.3d at 443-44. "[F]raud upon 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." *In re Intermagnetics Am., Inc.*, 926 F.2d 912, 916 (9th Cir. 1991).

While each case differs, fraud on the court exists where there is "an unconscionable plan or scheme . . . designed to improperly influence the court in its decision." *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960) (citation omitted); *see also Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131 (9th Cir. 1995). In *Hazel-Atlas*, fraud on the court consisted of concocting and misrepresenting evidence to obtain and enforce a patent that was then used as a predicate for an infringement suit. 322 U.S. at 240-43. In contrast, in *United States v. Beggerly*, the Supreme Court found that no fraud on the court resulted from innocent nondisclosure of evidence. 524 U.S. 38, 47 (1998) (addressing

allegation that government "failed to thoroughly search its records and make full disclosure to the Court").

Importantly, Rule 60(d)(3) relief does not turn on the diligence of those uncovering the fraud. *Pumphrey*, 62 F.3d at 1133. Additionally, "[p]rejudice is not an element of fraud on the court." *Dixon v. Comm'r*, 316 F.3d 1041, 1046 (9th Cir. 2003), *as amended* (Mar. 18, 2003) (citations omitted). Rather, "[f]raud on the court occurs when the misconduct harms the integrity of the judicial process, regardless of whether the opposing party is prejudiced." *Id*. In these instances, the court "not only can act, [it] should." *Id*.

Given its focus on the integrity of the judicial process, the fraud-on-the-court inquiry here is informed by the unique role attorneys representing our government play in the judicial system.[20] Prosecutors are "representative[s] not of an ordinary party to a controversy, but of a sovereignty" whose interest "is not that it shall win

[20] The court held that Defendants "concede[d]" that the conduct of the government attorneys should not be assessed "through the lens of any heightened obligation." (ER 16:20-24.) Defendants made no such concession. They argued the opposite. (ER 214:20-28.) Still, relying on *Beggerly*, 524 U.S. at 40, and *Stonehill*, 660 F.3d at 445-52, the court held that the fact Defendants alleged *government* lawyers had defrauded the court had no bearing on its inquiry. (ER 16:25-18:15.) But *Beggerly* and *Stonehill* are silent on the question and cannot stand for a proposition not considered. *In re Larry's Apartment, L.L.C.*, 249 F.3d 832, 839 (9th Cir. 2001). Not surprisingly, courts and this Circuit have factored the unique role and heightened duties of government attorneys into analogous motions. *See, e.g.*, *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1367-68, 1370 (9th Cir. 1980).

a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). "[W]hile he may strike hard blows, [a prosecutor] is not at liberty to strike foul ones." *Id.* at 78.

In view of their unique role, prosecutors are "held to a *higher* standard of behavior," *United States v. Young*, 470 U.S. 1, 25-26 (1985) (Brennan, J., concurring), in both criminal and civil cases, *Cervantes v. United States*, 330 F.3d 1186, 1187, 1189 (9th Cir. 2003); *Freeport-McMoRan Oil & Gas Co. v. F.E.R.C.*, 962 F.2d 45, 47 (D.C. Cir. 1992).

II. THE DISTRICT COURT APPLIED THE WRONG LEGAL STANDARD IN RULING THAT SETTLEMENT BARS RELIEF.

In dismissing Defendants' allegations, the court stated, "[t]he significance of defendants' decision to settle with the government cannot be overstated." (ER 25:1-2.) It then held that Rule 60(d)(3) was unavailable for fraud known to Defendants before settlement. (ER 20-28.) Based thereon, the court disregarded every instance of fraud Defendants uncovered before settlement, neither assessing that fraud individually nor in totality with the fraud uncovered after settlement. With respect to that after-discovered fraud, the court again relied on the settlement, finding that the settlement agreement's terms prevented it from acting under Rule

60(d)(3) to preserve the integrity of the judicial process.[21] (ER 31:6-32:10.) On all of these fronts, the court erred.

A. Settlement Does Not Foreclose Relief Under Rule 60(d)(3) Even Where Portions of the Fraud Are Discovered Before Settlement.

Rule 60(d) applies to any "judgment, order, or proceeding." *See* Fed. R. Civ. P. 60(d). Nothing in Rule 60(d) restricts the court's power to "set aside a judgment for fraud on the court" to actions resolved through means other than settlement. In *Hazel-Atlas*, the Supreme Court recognized that relief from a judgment obtained by fraud on the court is warranted even where the underlying action settled. 322 U.S. at 243. There, attorneys and officials for a patent holder, Hartford, schemed to overcome the rejection of a patent application by submitting a bogus article describing the invention as a "remarkable advance in the art" and "revolutionary." *Id*. at 240. Hartford's attorneys "procured the signature" of an ostensibly disinterested expert and had the article published. *Id*. Hartford submitted the article in support of its renewed patent application, and overcame the rejection. *Id.* at 240-41. Hartford then brought suit against Hazel for infringement. *Id*. at 241. Long before the matter settled, "attorneys of Hazel received

[21] The district court inexplicably stated that Defendants had "*full knowledge* of the alleged fraud" and "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." (ER 24:27-28; 27:23-25 (emphasis added).) But the district court then contradicted itself, acknowledging elsewhere that Defendants did not discover critical aspects of the fraudulent scheme until long after settlement. (ER 28:5-7.)

information that . . . the Hartford lawyer was the true author of the spurious publication." *Id.* Hazel nevertheless did not press the issue, and instead pursued other defenses that were successful. *Id.* Hartford appealed the judgment. *Id.*

Quoting the fraudulent article at length, the appellate court reversed and found infringement. *Id.* at 241-42. Shortly before its deadline to appeal, Hazel settled after Hartford obtained a statement from the purported author, fraudulently confirming the article's authenticity. *Id.* at 241-43.

Nine years later, Hazel sought to vacate the judgment for fraud on the court. *Id.* at 243. Without questioning whether the settlement barred relief, the Supreme Court stated: "Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments." *Id.* at 245. The majority never suggested its ruling was dependent upon Hazel having been ignorant of the fraud before settlement. Indeed, the majority explicitly identified components of the fraud Hazel understood before settlement and ruled that relief was warranted despite Hazel's lack of diligence in raising the fraud sooner. *Id.* at 245-46.

Ignoring these components of *Hazel-Atlas*' majority opinion, and strangely focusing on the dissent, the district court here postulated that *Hazel-Atlas*' majority believed that Hazel had no knowledge of the fraud before settlement, while the dissenting justices supposedly believed that Hazel knew more than it had

disclosed. (ER 23:12-25.) From this supposed factual disagreement, the district court inferred that all the justices "agreed that Hazel would have been barred from seeking relief if it knew of the fraud prior to settlement and entry of judgment." (ER 23:26-28). Thus, the district court surmised, the majority did not address the situation where the moving party knew of the fraud before settling.[22]

The district court's inference cannot be reconciled with the opinion itself. The majority acknowledged that Hazel possessed evidence of fraud before settlement. 322 U.S. at 241, 243. In fact, the dissent's focus on Hazel's pre-settlement knowledge of the fraud, which consumed ten pages, did not dissuade the majority. *Id.* at 261-70. Because the majority understood and still disregarded Hazel's pre-settlement knowledge, the case confirms that settlement and pre-settlement knowledge are not the pertinent inquiries. Instead, the proper focus is the "integrity of the judicial process" itself.[23] *See id.* at 246. Other Supreme Court precedent is in accord. *See, e.g.*, *Marshall v. Holmes*, 141 U.S. 589, 601 (1891)

[22] The district court also wrongly concluded *Hazel-Atlas*' majority "indicated that it was addressing relief from a judgment gained by fraud on the court because of 'after-discovered fraud.'" (ER 21:20-21.) However, the Supreme Court merely made this reference after surveying the law, and did not characterize the facts before it as "after-discovered fraud." *Hazel-Atlas*, 322 U.S. at 244.

[23] Properly understood, the dissent simply reveals differing value judgments on the relative importance of protecting the "integrity of the judicial process" versus the risk of conferring benefits on parties with "unclean hands." 322 U.S. at 246, 270. Clearly, the imperative of judicial integrity prevailed.

(providing relief from judgment for fraud notwithstanding injured party's awareness of some aspects of fraud pre-judgment).

Beggerly is also instructive as it involved an action over title to land that resolved through settlement. 524 U.S. at 39. Thereafter, the plaintiff filed a motion for fraud on the court, claiming that the government failed to disclose a key document. *Id*. at 41. Because the government's failure to disclose the document was inadvertent, the Supreme Court found no fraud on the court. *Id.* at 47. Despite the existence of the settlement, the Supreme Court explained that its decision may well have differed had the government engaged in intentional concealment or fraud. *See id.* The Court reached this conclusion even though, at the time of settlement, the plaintiff believed the government had not disclosed evidence in its possession, a belief which spurred the plaintiff to undertake a lengthy investigation that ultimately yielded the critical title document. *Id.* at 40-41.

Hazel-Atlas and *Beggerly* thus confirm that neither settlement, nor the defrauded party's knowledge or suspicion of fraud before settlement, is the proper focus of Rule 60(d)(3). Instead, the proper focus is on preserving the integrity of the judicial process itself. *Cf. Pumphrey*, 62 F.3d at 1133.[24]

[24] While *Pumphrey* did not involve settlement, the Ninth Circuit tracked the reasoning of *Hazel-Atlas* and *Beggerly* by vacating a judgment based in part on misleading interrogatory responses that were, in part, revealed to the moving party

This Court's decision in *Haeger v. Goodyear Tire & Rubber Co.*, 793 F.3d 1122 (9th Cir. 2015), underscores this conclusion. *Haeger* involved personal injuries caused by defective tires. *Id*. at 1126. The case settled on the eve of trial following discovery disputes concerning tire performance tests. *Id*. at 1126-29. At the time of settlement, plaintiffs knew that Goodyear had delayed production of certain test data, misrepresented the state of its production to the court, and failed to produce another set of test data its corporate witness had referenced, but which Goodyear told the court did not exist. *Id*. at 1127-29. A year after settlement, plaintiffs confirmed that Goodyear had not produced all responsive documents and had misrepresented to the court that it had. *Id*. at 1129. The Court granted Plaintiffs' post-judgment motion for sanctions, reasoning that Goodyear and its attorneys "engaged in repeated and deliberate attempts to frustrate the resolution of this case on the merits."[25] *Id.* In affirming, this Court cited *Hazel-Atlas* and analogized to *Pumphrey*, reasoning that although the procedural posture differed,

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"less than a month before trial." 62 F.3d at 1133. The court held that these responses, plus misleading testimony proffered during trial, and the intentional withholding of key evidence, "undermined the judicial process" and generally constituted "an unconscionable plan or scheme" which rose to the level of fraud on the court. *Id*. at 1132-33.

[25] Apparently, because the *Haeger* plaintiffs were beneficiaries under the settlement, they sought sanctions rather than Rule 60 relief. But this Court analogized the issue, in part, to fraud on the court. *See* 793 F.3d at 1131 (stating that "inherent power of a federal court to investigate whether a judgment was obtained by fraud is beyond question" (internal quotation omitted)).

"the similarities . . . support the conclusion that the district court did not abuse its discretion in concluding that [Goodyear] engaged in fraud upon the court in [its] scheme to avoid [its] discovery obligations." *Id.* at 1133. Finding that Goodyear "forc[ed] the Haegers to engage in sham litigation," this Court analyzed all of Goodyear's misconduct, including those portions known before and after settlement. *Id.* at 1126-29, 1137.

Under these controlling authorities,[26] relief is plainly available to address fraud on the court notwithstanding a settlement. The imperative of judicial integrity requires courts to intercede, even where a party was aware of instances of fraud before entry of judgment, and especially when additional fraud is discovered post-settlement.

B. The Court Erred by Failing to Assess the Totality of the Circumstances, Including Acts Of Fraud Discovered Before and After Settlement.

Defendants alleged the government's fraud in its entirety – numerous acts revealing not only a "trail of fraud" but "an unconscionable plan or scheme" to defraud the court and defile our system of justice. *Hazel-Atlas*, 322 U.S. at 250; *Pumphrey*, 62 F.3d at 1131. In *Stonehill*, this Court again confirmed the principle that fraud on the court may be based on a party's overall course of conduct, even if

[26] The district court incorrectly stated that Defendants relied exclusively on *Hazel-Atlas*, (ER 21:14-15), but Defendants also relied on *Pumphrey*, *Beggerly*, and *Marshall*, (ER 186-87, 201-03, 228, 234, 452). They could not cite *Haeger* because it was not yet decided.

separate acts of malfeasance may not individually warrant relief from judgment. 660 F.3d at 445-52.

Here, the government's scheme spanned some five years, infecting the entire body of the government's effort − taking hold during the corrupt investigation and, with the aid of prosecutors, spreading throughout the litigation. In reviewing Defendants' allegations (and the government's improper factual response to those allegations), the court simply disregarded any and all instances of fraud uncovered before settlement. Instead of analyzing the totality of the government's conduct, the court merely noted those categories of fraud Defendants knew before settlement and dismissed them as irrelevant. (ER 24-28.) Ultimately, it found, "the whole can be no greater than the sum of its parts."[27] (ER 63:13-16.) On numerous levels, the court's determination was in error.

C. The District Court Wrongly Concluded that the Settlement Terms Barred Relief for Fraud Discovered *After* Settlement.

In an apparent effort to distinguish this case from *Hazel-Atlas* and its progeny, the district court erred by ruling that, with respect to after-discovered fraud, the specific terms of the settlement agreement prevented it from acting to preserve the integrity of the judicial process, "at least as to alleged fraud aimed

[27] The court did not even assess the totality of the fraud pertaining to those parts of the scheme that Defendants discovered after settlement.

only at defendants."[28] (ER 31:6-32:6.) First, the court never actually found that any of the after-discovered fraud was solely directed at Defendants. Indeed, it was all directed at the court:

- In an effort to protect his son, Edwin Bauer fabricated an assertion to the government that Sierra Pacific offered his son a $2 million bribe, a fact concealed by the government when it argued *to the court* in its motion *in limine* that there was not a "shred" of evidence implicating the Bauers or other alternative causes. (ER 393, 561-65.)
- WiFITER was anything but a "separate public trust fund" and a "public program," as the government argued *to the court* in another motion *in limine*. After-discovered evidence revealed that the government's assertions were false, reckless, and contradicted by documents which, at the time, were in the possession of its joint prosecution partner, Cal Fire. (ER 543, 546-53.)
- After-discovered evidence revealed that the prosecutors aided and abetted the fraud at the heart of the investigation by telling the investigators the hidden white flag was a "non-issue," and by directing that same fraud *to the court* by submitting investigator White's declaration and his attached Official Report in opposition to Defendants' motion for summary adjudication. (ER 491, 500-03.)

Moreover, and perhaps more importantly, the district court's ruling runs afoul of *Hazel-Atlas*, *Beggerly*, and *Haeger*, which confirm that a settlement, regardless of its terms, has no bearing on the court's power to redress fraud on the court. As stated in *Hazel-Atlas*, "tampering with the administration of justice in

[28] The district court's error on this point is underscored by its reliance on *Gleason v. Jandrucko*, 860 F.2d 556 (2d Cir. 1988). (ER 30:3-20.) Although the *Gleason* court mentions the fact that the case ended with a settlement, nowhere in its opinion did the court rule that relief was unavailable because of the settlement.

the manner indisputably shown here involves far more than an injury to a single litigant." 322 U.S. at 246.

III. THE DISTRICT COURT ERRED BY RULING THAT DEFENDANTS' SUPPOSED LACK OF DILIGENCE BARRED RELIEF.

Relief under Rule 60(d)(3) is not contingent upon the diligence of the movant. *Hazel-Atlas*, 322 U.S. at 246; *Pumphrey*, 62 F.3d at 1133. "Even if [the opposing party] did not exercise the highest degree of diligence[,] [the] fraud cannot be condoned for that reason alone[.] Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of the litigants." *Hazel-Atlas*, 322 U.S. at 246. This Court reiterated this principle in *Pumphrey*, stating that a party's lack of diligence does not affect the court's power "to set aside the verdict, as the court itself was a victim of the fraud." 62 F.3d at 1133.

Although the district court initially acknowledged these binding authorities, (ER 28:12-14), it later shifted its focus away from fraud aimed at the court toward fraud aimed at Defendants, stating, "[o]n 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)." (ER 29:7-12.) The district court here then reasoned:

> With the exception of evidence that simply did not exist at the time of settlement and entry of judgment,[29] defendants uncovered most of the evidence underlying their allegations of fraud through discovery in the state action[.] [T]he court can discern no reason why they could not have obtained that same evidence through diligent discovery in the federal action[.] [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.

(ER 30:21-31:5 (emphasis added).)

The court thus suggested – but never actually found – that the fraud Defendants uncovered after judgment was aimed only at them and not the court. As noted above, the court was mistaken.

IV. THE COURT ERRED BY CASTING ASIDE ITS OWN ORDER AND NOT ALLOWING DEFENDANTS TO RESPOND TO THE GOVERNMENT'S MISCHARACTERIZATIONS.

Although Defendants initially styled their request as a motion supported by declarations and evidence, the court thereafter ordered the parties to submit supplemental briefing on the threshold question of whether Defendants' allegations, *accepted as true*, stated a claim for fraud on the court.[30] (ER 573, 583,

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[29] Notwithstanding the court's language, all evidence of the prosecutors' fraud *existed* as of the entry of judgment. (*See generally* ER 428-571.) As Defendants argued below, the essence of the problem is that, although it existed, the government concealed it.

[30] The court essentially established a procedural framework consistent with Rule 12(b)(6). While not specifically contemplated by Rule 60, the court's order in this regard was consistent with its power to construe Defendant's motion under Rule 60(d)(3) as a pleading. *See United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir.

586.) From the bench, the court stated, "I'm going to be identifying the alleged facts that constitute the fraud on the Court, but I'm not going to resolve any disputed issues of fact." (ER 586:22-25; *see also* 583:18-19, 587:4-6.) Thereafter, the court's written order confirmed: "Focused briefing shall be submitted *limited to* . . . addressing whether, *assuming the truth of [Defendants'] allegations*, each alleged act of misconduct separately or collectively constitutes fraud on the court[.]"[31] (ER 573:11-16 (emphasis added).)

While Defendants complied with the court's order, the government ignored it, submitting three declarations and more than 3,300 pages of deposition excerpts, exhibits, photographs, and expert witness reports, all purportedly disproving Defendants' allegations. (ER 409-14.) It also lodged 147 days of deposition testimony. (ER 421-27.) Trumpeting the fact that it had filed the antithesis of what the court ordered, the government proclaimed, "[w]e do not . . . assume the truth of Sierra Pacific's many demonstrably false assertions about . . . the content of our own prior briefs, or the Court's prior orders, or transcripts of depositions alleged to show perjury." (ER 298:5-10.) Thereafter, it initiated what became a one-sided paper trial. (*See, e.g.*, ER 330, 335-38.)

2002).

[31] As ordered, Defendants focused their supplemental briefing on whether the facts alleged constituted fraud on the court. Because the court confirmed that all of their allegations would be assumed true, Defendants did not provide evidence or citations thereto.

In their reply, Defendants objected to the government's submissions and factual argument as a gross violation of the court's order, (ER 162, 173-74), and requested leave to respond if the court elected to consider the government's submissions, (ER 176 n.6). The court did not respond to Defendants' request, held its hearing, and issued its order.

A. The District Court Committed Reversible Error and Denied Defendants Due Process by Altering the Procedural Framework Without Giving Defendants Notice or an Opportunity to Respond.

The unfairness of the court's procedures, on its own, warrants reversal. Without regard to its order confirming that it would, at that stage, assume the truth of Defendants' allegations, the court instead made multiple credibility determinations, weighed evidence, resolved factual issues, and drew numerous inferences adverse to Defendants. (ER 26-27, 34-36, 42, 44.) By abandoning the procedural framework it imposed, the court committed reversible error. *Cf.* Fed. R. Civ. P. 12(d); *Erlich v. Glasner*, 374 F.2d 681, 683 (9th Cir. 1967) (holding that trial court erred by considering affidavit submitted on Rule 12(b)(6) motion without converting motion to one for summary judgment under Rule 56 and giving all parties a reasonable opportunity to present all material facts). Indeed, even under an abuse of discretion standard, reversal is warranted when a court imposes a procedural framework and then − to the benefit of one party and the detriment of the others − abandons that framework without notice or an opportunity to respond.

It is also a deprivation of due process. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'").

To the extent the government contends the court could consider matters outside the pleadings, the contention is unavailing.[32] The court established – indeed ordered – a procedural framework that eschewed evidentiary submissions and factual argument. The court also ordered that Defendants' allegations would be accepted as true for this "threshold" inquiry. (ER 573.) Defendants of course complied, filed their allegations, and argued the law. However, the court permitted the government to ignore its previous order and gave Defendants no opportunity to respond to the government's non-compliant opposition. The court accepted the *government's* factual assertions as true, heard argument, and quickly issued its decision. (*See generally* ER 1-63.) On these grounds alone, its ruling must be reversed.

Moreover, having adopted a "pleadings motion" framework to address the motion, the court's failure to grant Defendants leave to amend the allegations also

[32] The government never requested and the court never took judicial notice of any extrinsic evidence. (*See generally* ER 1-63.) But even if the court had judicially noticed extrinsic evidence, such notice would have been improper since the "facts" are disputed. *United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003) (citing Fed. R. Evid. 201(b)).

warrants reversal. *Mayes v. Leipziger*, 729 F.2d 605, 608-09 (9th Cir. 1984); *Lee v. City of Los Angeles*, 250 F.3d 668, 683 n.7 (9th Cir. 2001).

B. The Court Erred By Making Factual Findings that Are Illogical, Implausible, and Without Support in Inferences that May Be Drawn From the Facts in the Record.

1. Factual Findings Regarding the Testimony of Investigators White and Reynolds

Defendants alleged that the scheme to defile our system of justice began with the fraudulent investigation. In alleging facts, Defendants described that White and Reynolds picked a rock on a southerly skid trail as their point of origin, took GPS readings from it, and marked it with a white flag; that the investigators selected two reference points and then took precise measurements to this point; that White took not just one photograph, but five separate photographs centered on this flag from the same two reference points; that Reynolds sketched their origin area, placing an "X" so as to denote it as their "point of origin;" and that the investigators then *released* the scene. Defendants detailed how, three days later, White and Welton abandoned this point of origin, replaced it with E-2 and E-3, created photographs with Welton belatedly pointing downward with a shovel, *and* eradicated from the Official Report all the work Reynolds and White performed with respect to their actual, pre-release point of origin. In their allegations, Defendants explained how the investigators advanced this central deceit in discovery, repeatedly lying under oath, about not just their hidden white flag, but

about *the purpose and nature* of their actual investigation. Defendants also revealed how the prosecutors participated in this effort by assuring the investigators the white flag was a "non-issue."[33] (ER 464-65, 479-93, 726-28.)

Before the district court, the government shamelessly attempted to justify the prosecutors' "non-issue" instructions, arguing the white flag was an irrelevancy because it was still placed in an area where Crismon had used his bulldozer. (ER 329:22-28.) Thus, as the government's argument goes: *The bulldozers were still in the right general area, so what difference does it make if the investigators lied in their depositions or, for that matter, if the prosecutors encouraged their dishonesty?* As the argument goes: *Defendants started the fire anyway, so who cares?*

But the prosecutors know better. First, their own origin and cause expert confirmed that being off by even eight feet on the point of origin can make a "world of difference," as the systematic and scientific process that leads to that

[33] As Defendants also alleged, the fraudulent nature of Reynolds and White's testimony was recognized by the joint origin and cause expert for the United States and Cal Fire, Larry Dodds. After spending more than a thousand hours examining the evidence, Dodds finally conceded under oath, in May 2013 (after the federal action concluded), that the white flag raises "a red flag" and creates a "shadow of deception" over the investigation, which caused him to conclude "it's more probable than not that there was some act of deception associated with testimony around the white flag." (ER 490:8-14.) As Dodds admits, investigators do not forget about the "very foundation" of their work, nor do they forget about the time expended and the extensive physical tasks associated with performing that work. (ER 482.)

precise point is critical to the ultimate cause determination. (ER 464 n.20.) Additionally, the prosecutors surely understand that the investigators are the authors of all that is known about their discoveries. Indeed, the court and Defendants are quite literally at the mercy of the investigators' integrity.

Here, the investigators' proclivity for engaging in dishonesty while under oath − as numerous lawyers watched and cameras recorded every word − suggests a willingness to have engaged in even more adventurous fabrications when they privately conducted their investigation. Indeed, nothing the investigators claim is remotely credible, not only with respect to their falsified points of origin, but also with respect to their general area of origin. Their willingness to lie under oath is easily transposed into a willingness to conceal (when no one was watching) that the fire was actually caused by a gasoline spill from a chainsaw farther up the hill, or to bury an arson timing device planted by an uninvestigated USFS serial arsonist set to go off at 2:00 p.m., or to tell a witness what she can and cannot say about what she actually witnessed, or to pick a sham area of origin with several rock strikes farther down the hill to frame wealthier defendants. The prosecutors know this, and their willingness to pretend otherwise to the court is yet another indication of just why this matter so thoroughly reveals an effort to defile our system of justice.

Still, in response to this squall of dishonesty, the court disregarded the framework it imposed on the parties and summarily concluded, in contrast to Judge Nichols, "[w]hen the record is examined there is no substance whatsoever to defendants' contention." (ER 34:22-23.) In so holding, the court ultimately rejected Defendants' allegations of nearly omnipresent investigative dishonesty by focusing on the question of whether one witness, Reynolds, denied *seeing* a white flag in a photograph at his deposition. (ER 34.) However, the court's analysis ignored a deposition record brimming with falsehoods on most every aspect of the investigators' actual work, concluding there was "no substance" to the Defendants' allegations because Reynolds, in one answer, tentatively acknowledged that something "looks" like a white flag. (ER 35-36.) But there is nothing about that narrow strand of testimony that vitiates this multifaceted fraud on the court.

When the prosecutors told Reynolds the white flag was a "non-issue," it was not an instruction focused on whether he could see it.[34] It was an instruction going

[34] Indeed, after the federal settlement, Reynolds finally admitted in the state action on November 1, 2012, that he could see the white flag and that he must have placed it to mark what they initially thought was the point of origin before choosing the official points. (ER 488.) But even that testimony was suffused with dishonesty, as Reynolds later testified he could not recall placing the flag and could not respond to questions as to why, if they actually abandoned that point before choosing E-2 and E-3 that same morning, the same white flag can be seen on a backlit and enlarged version of the "overview of indicators" photograph White took at 9:16 a.m. just before releasing the scene (which he created to make a record of the most essential indicators in their investigation), or why there are no

to the heart of why they were investigating the scene and what steps they actually took in doing so. Still, according to the court, Reynolds ultimately exonerated himself by testifying at one point, "It looks like a white flag." (ER 34:23-36:10.) Thus, the court reasoned, "[t]hat Reynolds struggled to see the white flag should not come as a surprise." (ER 36:11-12.) After all, the court explained, it too had difficulty in seeing the flag in the cropped photograph Defendants presented in their supplemental brief.[35] (ER 36:11-25 (referring to photograph at ER 481).) From there, the court inexplicably concluded that "the government never encouraged nor suborned perjury with respect to Reynolds' deposition testimony." (ER 37:4-5.)

However, had the court given Defendants a chance to respond, or had it followed through on the threshold issue and then held a hearing, Defendants would have presented and highlighted numerous instances of testimony where – as referenced and cited earlier in this brief – Reynolds quickly retreated from his

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indicator flags whatsoever in that same critical photo at E-2 and E-3. (ER 479-80, 488-90.)

[35] The district court's use of its own stated difficulty in recognizing the white flag in order to clear Reynolds of wrongdoing was illogical and improper. Unlike Reynolds, of course, the court never stuck the flag in the ground, never measured it, never photographed it or sketched it, and never before saw it with its own eyes. In addition to seeing Defendants' computer screen enhancement of the suppressed white flag photos during his deposition, Reynolds' knowledge of the white flag and all it represented was enhanced in a far more important manner – by the focused and multifaceted effort Reynolds and White gave to it before releasing the scene and then again by all they did to cover it up.

reluctant and ephemeral admission, and repeatedly took cover under additional falsehoods about the white flag, his inability to see it, and his work regarding it. The court's conclusion to the contrary is illogical, implausible, unsupported, and unfortunate.[36]

2. Factual Findings Regarding the False Bribe Allegation

By concealing the false bribe allegation from the court, the prosecutors secured a critical *in limine* ruling prohibiting Defendants from eliciting evidence to argue that someone else started the fire. (ER 561-64.) Although not required to establish fraud on the court, Defendants alleged that this ruling was a substantial factor in causing them to settle. (ER 561:26-28.) Again ignoring its own procedural framework, the court refused to accept this allegation as true, expressing its disbelief with the so-called "mind-boggling" and "flippant[]" allegation that the *in limine* ruling prejudiced Defendants. (ER 57:22-58:4.) In particular, based on its cold reading of the pretrial hearing transcript, the court

[36] After reviewing the entire record, Judge Nichols easily concluded "that Reynolds did not testify honestly" about the white flag. (ER 699:13-22.) Indeed, Judge Nichols commented that "[a]mong so many acts of evasion, misdirection, and other wrongful acts, one series of events stands out . . . Dave Reynolds' 'white flag' testimony." (ER 724.) Judge Nichols noted that when Reynolds was first deposed, "he denied knowing about the white flag, denied ever placing it, and testified that it looked like a 'chipped rock' to him." (ER 678 n.13.) Judge Nichols was "deeply troubled" by this testimony, particularly in light of the fact that Reynolds was shown photographs of the white flag by the prosecutors before his deposition and admitted to seeing it, and that the prosecutors sat "idly by as Reynolds . . . denied in his deposition what he had conceded" to the prosecutors several weeks earlier. (*Id.*)

apparently developed the opinion that Defendants themselves had suggested they should not be allowed to present such evidence, a conclusion the district court raised sua sponte at the Rule 60(d)(3) oral argument. (ER 58-59.) In support, the court focused on a defense counsel's comments that Defendants did not intend to "prove" at trial that Ryan Bauer started the fire. (ER 58:2-59:8 (citing ER 798:9-19); *see also* ER 791:2-9 ("Of course, defendants don't have to prove anything in this case.").) Although these comments were directed at the burden of proof, the court implausibly construed these comments as an admission that Defendants had no intention of arguing alternative causes.

The court also misconstrued comments by counsel regarding the Moonlight Fire investigation. Specifically, the court erroneously surmised that Defendants were focused only on the unscientific nature of the investigators' work, and not the existence of alternative causes. (ER 58:12-59:8.) While the investigators' scientific missteps, fraud, and deceit certainly served as a major defense theme, the investigators engaged in such conduct to divert attention from and cover up far more probable causes of the fire, all to implicate these Defendants. Thus, at the pretrial hearing, Defendants merely explained that, although no one could "prove" who actually started the fire "in light of the way the investigation was done," Defendants absolutely intended to elicit evidence regarding Ryan Bauer and other alternative causes. (ER 798:9-799:12.) When the trial judge asked why counsel

could not "make that point generally without referencing Mr. Bauer," counsel responded, "Because it is the essence of our case[.]" (ER 799:13-16.)

The court erred by concluding from these comments that Defendants did not intend to argue alternative causes of the fire. Its conclusion is illogical and not remotely supported by the record in light of the fact that: (1) Defendants opposed the *in limine* motion to exclude evidence of alternative causes, (ER 818-22); (2) Defendants never stated that they did not intend to elicit evidence of alternative causes, (ER 786-801); and (3) Defendants filed formal objections immediately after the district court issued its *in limine* ruling, (ER 778-79).[37]

3. Factual Findings as to Whether Defendants Were Diligent

The court also refused to accept as true allegations that Defendants had been diligent in discovering the fraud, and instead concluded the opposite, specifically, that with "due diligence" Defendants could have uncovered all of the fraud during the federal action. (*Compare* ER 471:28-472:3 *with* ER 31:21-5.) The court reached this conclusion notwithstanding its contrary observation that the federal action had been litigated "aggressively and exhaustively," (ER 3:3-4), and the

[37] Defendants expressly argued that a ruling that allowed them "to use evidence to show weaknesses in the investigation," but not "to show that someone else started the fire" contravened Supreme Court authority, and also ignored "[t]he very reason that Defendants seek to challenge the . . . investigation," which was "to establish that it cannot be relied upon to show that defendants started the fire, and that someone or something else necessarily did." (ER 778:25-779:15.)

government's assertion that Defendants had "conducted discovery beyond all reason" in "one of the most over-discovered cases ever," (ER 296:14, 297:3).

In support of its conclusion, the court claimed that Defendants "uncovered most of the evidence underlying their allegations of fraud through discovery in the state action," and thus reasoned that, "since defendants were able to obtain the evidence through discovery in the state action," there was "no reason why they could not have obtained that same evidence through diligent discovery in the federal action." (ER 30:21-31:5.) But, the false bribe allegations and the incriminating WiFITER documents were covered up and not identified until *after* the state action's dismissal, and only then by chance, not through discovery.[38]

With respect to the white flag, Defendants discovered the prosecutors' "non-issue" instruction during the last day of Reynolds' deposition in the state case, when the federal prosecutors were no longer defending him. That Reynolds finally elected to reveal this exchange after concealing it during his federal deposition is not the fault of Defendants, and certainly not the consequence of any lack of

[38] Defendants learned of the false bribe allegations through a fortuitous and apparently spiteful phone call from Edwin Bauer, who had previously been represented by counsel, after entry of judgment in the state action. (ER 562-63.) *See* discussion *supra*.

Defendants similarly learned Cal Fire had failed to produce incriminating WiFITER documents through an equally fortuitous issuance of a Report from the California State Auditor on October 15, 2013, after the federal settlement and judgment in the state action. (ER 545-46.) *See* discussion *supra*.

diligence. Nowhere did the court attempt to explain what more Defendants could have done to uncover that which was being actively hidden with the affirmative assistance of lawyers from our Department of Justice.

V. ADDITIONAL ERRORS PERVADE THE DISTRICT COURT'S ANALYSIS OF THE PROSECUTORS' CONCEALMENT OF THE FALSE BRIBE ALLEGATION.

Instead of criticizing the government's concealment of the false bribe allegation, the district court created a justification for it, suggesting the prosecutors may have altruistically withheld the false bribe evidence to avoid "spreading a scandalous rumor in attempt [sic] to intimidate defendants." (ER 60:4-7.) The court proffered this excuse even though the government never suggested it and the record fails to support it.

The prosecutors actually took a contrary tack, suggesting they did not know whether Bauer's bribe allegation was false. (ER 392:14-18 ("We do not know whose version of this 'he said, she said' is true. . . . Sierra Pacific has amply demonstrated that it would spend almost any amount, and resort to almost any tactic, to avoid responsibility for the Moonlight Fire.").) But even the court rejected the government's preposterous contention, stating during oral argument that the government did not believe Bauer's bribe allegation. (ER 95:17-25 ("The government says they didn't believe it either.").) *Again*, however, it is not the

government's prerogative to deem what it should and should not reveal, regardless of what it believes.[39]

Rather than fault the prosecutors, the court criticized only Defendants, suggesting that Defendants were not prejudiced by the government's concealment of the false bribe allegation, that the prosecutors had no obligation to disclose it, and that Defendants had been "flippant" in suggesting that the concealment would have impacted the court's "tentative" ruling. (ER 57-60.) None of these criticisms withstand minimal judicial scrutiny.

A. The District Court Committed Legal Error by Requiring a Showing of Prejudice.

The court erroneously found that Defendants never intended to argue that one or more of the Bauers may have caused the fire; thus, according to the court, the prosecutors' failure to disclose the false bribe caused Defendants no harm. The court is legally mistaken. Although Defendants did in fact suffer severe prejudice, the court's ruling wrongly assumes that prejudice is required to show fraud on the court, and simply ignores the government's failure to disclose this information to

[39] *See, e.g.*, *DiSimone v. Phillips*, 461 F.3d 181, 195 (2d Cir. 2006) ("[I]f there were questions about the reliability of the exculpatory information, it was the prerogative of the defendant and his counsel – and not of the prosecution – to exercise judgment in determining whether the defendant should make use of it[.] If the evidence is favorable to the accused . . . then it must be disclosed, even if the prosecution believes the evidence is not thoroughly reliable. To allow otherwise would be to appoint the fox as henhouse guard." (internal quotation marks and citations omitted)).

the court. Controlling Ninth Circuit authority confirms that "[p]rejudice is not an element of fraud on the court." *Dixon*, 316 F.3d at 1046. Rather, "[f]raud on the court occurs when the misconduct harms the integrity of the judicial process, regardless of whether the opposing party is prejudiced." *Id.*

Moreover, the court also excused the prosecutors' failure to disclose this critical information because, it reasoned, Defendants were not interested in advancing an alternative cause argument during trial in any event. The court is mistaken. (ER 57-60.) As discussed *infra*, the "essence" of Defendants' case was to advance a far more probable alternative cause, which the investigators purposefully covered up by suppressing harmful facts and manufacturing evidence to frame their favored Defendants.

Finally, Defendants' pretrial strategy and presentation at the hearing was necessarily based on the information they had at the time. Nowhere in its order does the court even attempt to consider how Defendants' pretrial arguments would have differed had the prosecutors been forthcoming regarding evidence that Edwin Bauer attempted to obstruct justice by fabricating a bribe story. Defendants could only make arguments based on what they knew at the time, not what they should have known – just as the court's ruling on the motion *in limine* was based on what it knew, not what it should have known.

B. The District Court Ignored the Prosecutors' Civil Discovery Obligations and Duty of Candor.

Early in the case, Defendants propounded discovery requests for all witness interviews, statements, and documents concerning the Moonlight Fire investigation and all communications with the Bauers.[40] (ER 618, 564 n.67, 276:7-13.) Regardless, the government never produced a "shred" of information regarding the false bribe allegation. In opposing the motion for fraud on the court, the government implicitly conceded that documents regarding the bribe investigation and related interviews existed, but asserted for the first time a specious claim of privilege.[41] (ER 393-95.) The court was not interested. In relying exclusively on its holding that *Brady* had no application to this matter, and that the government therefore had no obligation to produce this material, (ER 60:2-4), the court

[40] The prosecutors thus had a duty to supplement their written discovery responses and document productions "in a timely manner," even after the close of discovery. Fed. R. Civ. P. 26(e)(1)(A); *see also* Fed. R. Civ. P. 26(e) advisory committee's note to 1993 amendment ("Supplementations . . . should be made . . . with special promptness as the trial date approaches"); *Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc.*, 272 F.R.D. 350, 358 (W.D.N.Y. 2011).

[41] The government now attempts to claim that the documents were protected by the work product doctrine. (ER 395.) But that doctrine is not absolute, and the government never disclosed anything that would have enabled Defendants to even contest its assertion. (ER 276, 564 n.67.) Moreover, even if the work product doctrine had applied here, it of course creates no right to misrepresent the evidence to the court. Finally, the prosecutors were not the only persons to investigate the false bribe allegations, the FBI did as well. (ER 562.) FBI documents enjoy no protection under the work product doctrine, just as the fire investigation documents enjoyed no such protection.

overlooked not only the government's disclosure obligations under the Federal Rules of Civil Procedure, but the prosecutors' violation of their duty of candor to the court itself, *see, e.g.*, *United States v. Assoc. Convalescent Enters., Inc.*, 766 F.2d 1342, 1346 (9th Cir. 1985) ("[A]n attorney has a duty of good faith and candor in dealing with the judiciary"). Moreover, and perhaps even more puzzling, the court simply ignored the greater offense associated with the prosecutors' affirmative misrepresentation to the court that there was not a "shred" of evidence to implicate the Bauers. (ER 833:19.) Perhaps such prosecutorial misconduct is rampant for a reason.

C. Fraudulently Procured Tentative Rulings May be Redressed Under Rule 60(d)(3).

The court also found the government's fraudulently procured *in limine* ruling insignificant because the ruling was "tentative." (ER 57:10-21.) The court reasoned that "Defendants had the opportunity to challenge any [tentative] in limine ruling during trial and on appeal," and instead settled. (ER 26:25-27:2.) However, while fraud on the court is not dependent on finality, the prosecutors' affirmative act of dishonesty towards a court creates its own finality, regardless of whether Defendants can contest it later.

In *Hazel-Atlas*, fraud on the court did not disappear because Hazel settled the matter before exhausting appellate review. 322 U.S. at 253 (Roberts, J., dissenting). Here, the court failed to recognize that Rule 60(d)(3) not only

embraces fraud that succeeds, but also fraud that fails, so long as it "*attempts to* [] defile the court itself." *Stonehill*, 660 F.3d at 444 (emphasis added). Because the focus under Rule 60(d)(3) is on the court itself, focusing on whether the consequence of that fraud is final between the parties misapprehends the nature of the question presented.[42]

D. The District Court Applied the Wrong Standard by Focusing on Whether the Government's Fraudulent Concealment was Effective in Influencing the Court.

Relying on *Stonehill*, the district court concluded that concealment of the false bribe allegation does not "amount to fraud on the court" if the "withheld information would not have significantly changed the information available to the district court."[43] (ER 60:8-18 (citation and quotation marks omitted).) Here, however, the "trail of fraud" − from the inception of the investigation through its

[42] Moreover, while *in limine* rulings are always tentative, as noted by the district court, (ER 57:10-12), such rulings inform the parties what evidence the trial court is likely to admit and exclude, and are thus critical.

[43] Adopting the government's heavy reliance on the same case, the district court frequently cited *Appling*, including for the proposition that "non-disclosures alone generally cannot amount to fraud on the court." (ER 60:8-10.) But *Appling* is inapposite, as it involved a non-disclosure between counsel that was not directed at the court. 340 F.3d at 780. Unlike *Appling*, in this matter, the government's case is saturated with numerous acts of misdirection and deceit, all designed to mislead the court itself so as to drive the proceeding to an illegally motivated and sham conclusion. In service of this goal, the federal prosecutors abandoned their role as gatekeepers of the truth, aided and abetted the investigators' dishonesty, and made affirmative misrepresentations to the district court, while concealing critical and contrary evidence. This case has no relationship whatsoever to *Appling*.

prosecution − is long, and it radically changed the information that would have been available to the court had this matter been honestly pursued. Moreover, while this fraud on the court was effective, it need not have been. In *Hazel-Atlas*, the Supreme Court found Hartford's placement of a fraudulent article before the court in motion practice more than sufficient, concluding that Hartford was "in no position now to dispute" the effectiveness of its fraud. 322 U.S. at 247. The Ninth Circuit echoed this rule in *Pumphrey*, finding that the defendant was "in no position to dispute the effectiveness of the scheme in helping to obtain a favorable jury verdict."[44] 62 F.3d at 1133; *see also Dixon*, 316 F.3d at 1046 (stating "the perpetrator of the fraud" cannot "dispute the effectiveness of the fraud after the fact"). *Stonehill* does not stand for a contrary proposition.

Finally, even when viewed in isolation, there is no question that the prosecutors' misrepresentations and nondisclosure were effective, and that they "significantly changed information available to the district court." Edwin Bauer was a key percipient witness. He and his wife were the only individuals seen near the origin of the fire just after it started, some ten miles deep in a thickly wooded area. (ER 560.) Their son was spotted fleeing the area shortly after the fire started.

[44] The Supreme Court also explained in *Hazel-Atlas* that attempts to reconstruct the proceedings below taking into account the concealed information are "wholly impossible" and will not be done for the benefit of those who elect to defraud a court. 322 U.S. at 247; *see also Pumphrey*, 62 F.3d at 1132-33.

(ER 558.) That Edwin Bauer lied to federal investigators and obstructed justice in order to inculpate Sierra Pacific, while diverting attention from himself and his son, necessarily should have been part of the trial court's careful balancing under Federal Rule of Evidence 403 when evaluating the government's motion *in limine*. The government's conduct is precisely "that species of fraud which does[,] or attempts to, defile the court itself." *Stonehill*, 660 F.3d at 444.

VI. THE DISTRICT COURT APPLIED THE WRONG LEGAL STANDARD IN CONCLUDING THAT CAL FIRE'S UNDISCLOSED CONTINGENT FINANCIAL INTEREST DID NOT AMOUNT TO FRAUD ON THE COURT.

A. Defendants Established in Their Briefing that After-Discovered Evidence Regarding WiFITER and its Concealment Defiled The Court, But The District Court Ignored These Allegations.

Defendants alleged that WiFITER and its illegal financial incentives drove the investigators and White's supervisor Alan Carlson to target wealthy defendants to the exclusion of others.[45] (ER 542-57.) While Defendants knew WiFITER existed at the time of settlement, its true nature emerged after dismissal of the state actions. On October 15, 2013, the California State Auditor issued a report on

[45] Any argument that WiFITER was Cal Fire's exclusive problem misses a critical point. The government chose to make Cal Fire its partner in this jointly investigated fire and its partner in this jointly prosecuted action. Their jointly executed Official Report served as the foundation for both the federal and state actions. (ER 463:2-13.) The government designated lead investigator White as its first trial witness, without designating Reynolds at all. (ER 554 n.63.) In sum, lead investigator White's contingent interest in the outcome of the state action created a financially driven bias that necessarily infected not only the investigation, but the legitimacy of the government's regrettable efforts to collect on his conclusions.

WiFITER's illegality, thereby exposing the existence of critical documents that Cal Fire had withheld from Defendants. (ER 545-46.) Judge Nichols then ordered Cal Fire to produce them immediately. (ER 546-47.) When Cal Fire did, these records revealed that, at the time he was overseeing the Moonlight Fire matter, Alan Carlson had denied a request to use WiFITER funds to enhance Cal Fire's ability to investigate arsonists, saying, "it is hard to see where our arson convictions are bringing in additional cost recovery." (ER 548:3-4.) They also revealed that, on that same day, Carlson stated he was concerned WiFITER was "running in the red" and would remain so "unless someone is going to make a high % recovery." (ER 548:1-2.) White attempted to remedy the problem. Switching hats from investigator to bagman, White sent demand letters to Defendants directing them to pay the amount of $400,000 to WiFITER, or be sued. Had Defendants complied, their payment would have qualified as one of the largest WiFITER cash infusions since its inception in 2005. (ER 544, 549, 556.)

Defendants of course alleged that the mere existence of these undisclosed financial incentives constituted a fraud on the court. (ER 555-57.) The court rejected this argument, stating that "[e]ven assuming those alleged conflicts permeated this action" WiFITER "does not 'defile the court itself[.]'" (ER 55:11-16.) The court stated, "defendants do not explain how the existence of conflicts of interest by witnesses translates into a fraud on the court." (ER 55:12-14.) In

reframing the issue as merely "conflicts of interest by witnesses," the court wrongly minimized the issue so as to equate the pernicious effects of WiFITER with any ordinary witness bias. But, the integrity of wildfire investigators is essential because they have exclusive access to remote scenes, because the area of origin is perishable and easily spoiled, and because they have free reign to report on evidence and reach findings that almost always have a profound impact on whoever they declare responsible. (ER 439.)

The court ignored Defendants' allegations that "when law enforcement officers . . . have a concealed financial bias . . . 'the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are present for adjudication.'" (ER 555:15-20 (quoting *Intermagnetics*, 926 F.2d at 916).) By concealing an illegal financial scheme that motivated law enforcement to specifically target Defendants, the joint state/federal investigation and prosecution team pursued an action infused with hidden financial incentives and an undisclosed constitutional violation. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980) (emphasizing Due Process Clause imposes limits on prosecutors' partisanship, and stating that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious

constitutional questions"). The thoroughly falsified Official Report, with its underlying illegal motivations, is far worse than the falsified article in *Hazel-Atlas*.

B. The Concealment of WiFITER's Financial Incentives Warrants Relief for Additional Reasons.

The prosecutors themselves had a hand in advancing the WiFITER fraud, wrongly representing to the court that WiFITER was a benign public program established for altruistic purposes. (ER 831:27-832:4.) But their representations were reckless and contrary to then-existing evidence, knowledge of which must be imputed to the government in light of its "common interest" privilege and decision to partner with Cal Fire. (ER 542-51.) In rejecting these allegations, the court could point to no evidence supporting the government's earlier assertions. Under the higher standard to which government attorneys are held, *see* discussion *supra*, their reckless disregard for the truth contributed to this sham litigation and fraud on the court. *See Demjanjuk v. Petrovsky*, 10 F.3d 338, 354 (6th Cir. 1993).

VII. THE DISTRICT COURT ERRED BY FINDING THAT DEFENDANTS' ALLEGATIONS ARE DEPENDENT ON *BRADY V. MARYLAND*.

Notwithstanding the numerous legal principles Defendants provided to the court to aid in its review of their allegations, the court began its analysis by elevating in relative importance the Defendants' arguments regarding the application of *Brady*. Next, the court wrongly found that *Brady* would be essential before Defendants could prevail on their allegations pertaining to WiFITER and

the false bribe. Thereafter, it rejected any application of *Brady* to this civil matter. (ER 9-18, 52:14-16, 59:26-60:4.) Even though *Brady* violations are not necessary to prove fraud on the court here, the court's outright refusal to apply *Brady* in this context was error. The court framed the issue by stating that, while criminal cases implicate loss of liberty, this case is "strictly about money."[46] (ER 11:7-9.) However, "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citation omitted). Our Supreme Court has articulated a three-part test to assess "what specific safeguards" are necessary "to make a civil proceeding fundamentally fair." *Turner v. Rogers*, 131 S. Ct. 2507, 2517 (2011) (citing *Mathews*, 424 U.S. at 335). These factors are generally: the nature of the private interest affected, the comparative risk of erroneous deprivation without

[46] Here, federal prosecutors pled a state law claim that premised civil liability on fault or a violation of law. (ER 898:5-6, 901:14-19.) The government then used 36 C.F.R. § 261.5(c), a misdemeanor punishable "by a fine of not more than $500 or imprisonment for not more than six months or both," 36 C.F.R. § 261.1(b), to establish liability. (ER 841-43.) The district court attempted to minimize this regulation on the ground that the trial court had previously granted partial summary judgment for Defendants on this aspect of the pleadings. (ER 11-12 n.5.) But that ruling did not issue until May 31, 2012, shortly before trial. (ER 837-40.) The court also noted that the government did not seek criminal penalties in the civil case, (ER 11-12 n.5), but ignored that the government could have used a liability finding to support subsequent criminal charges.

procedural safeguards, and the nature and magnitude of countervailing interests if safeguards are provided. *Id.* at 2517-18 (quoting *Mathews*, 424 U.S. at 335).[47]

Although the court failed to consider any of these factors, the government's billion dollar damage claim amounted to an economic death penalty for Beaty, Howell, the Landowner Defendants,[48] and Sierra Pacific, which employs thousands. (ER 468 n.24.) Indeed, in a real sense, the consequences of this fraudulent matter "equal or exceed those of most criminal convictions." *See Demjanjuk*, 10 F.3d at 354.[49]

While the court essentially concluded that civil discovery made *Brady* superfluous, (ER 12:3-13:11), the "comparative 'risk' of an 'erroneous deprivation'" to private interests "with and without additional or substitute procedural safeguards" was incredibly high, especially when the government ignored its discovery obligations while its prosecutors took complete advantage of the court's misplaced trust.

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[47] While Defendants argued that *Brady* applies under the procedural due process standard from *Mathews*, 424 U.S. 319, Defendants also argued that the government attempted to prevent the judicial process from functioning in the usual manner, conduct that violates substantive due process, *see Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999).

[48] The Landowners comprise nine individuals and nearly twenty trusts for various family members. (ER 907-16.)

[49] While *Demjanjuk* dealt with an extradition that could have led to the death penalty, the Sixth Circuit's quote remains relevant; the government must comply with *Brady* for misdemeanor criminal citations whose fines are a pittance compared to the economic ruin threatened here.

Finally, the district court failed to identify any countervailing government interest to invoking *Brady* here, an omission that is not surprising since the interest of the government "is not that it shall win a case, but that justice shall be done." *Cervantes*, 330 F.3d at 1190-91 (quoting *Berger*, 295 U.S. at 88).

Although the Ninth Circuit and Supreme Court have not yet resolved the issue, courts have applied *Brady* in civil proceedings. *See, e.g.*, *Demjanjuk*, 10 F.3d at 352-54 (applying *Brady* to civil denaturalization and extradition proceedings); *United States v. Edwards*, 777 F. Supp. 2d 985, 986 (E.D.N.C. 2011) (applying *Brady* to civil commitment proceedings for sexual offenders); *see also EEOC v. Los Alamos Constr., Inc.*, 382 F. Supp. 1373, 1383 n.5 (D.N.M. 1974) ("*Brady* . . . orders that exculpatory information must be furnished a defendant in a criminal case. A defendant in a civil case brought by the government should be afforded no less due process of law."); *but see United States v. Project on Gov't Oversight*, 839 F. Supp. 2d 330, 342-43 (D.D.C. 2012) (collecting cases); *Brodie v. Dep't. of Health and Human Servs.*, 951 F. Supp. 2d 108, 118-20 (D.D.C. 2013). In light of the unique nature of this matter, and because the government premised its claims on alleged criminal conduct, the prosecutors also violated *Brady*.

VIII. THE DISTRICT COURT'S CONFLICT OF INTEREST WARRANTS REVERSAL AND REMAND TO A JUDGE OUTSIDE THE EASTERN DISTRICT OF CALIFORNIA.

After Chief Judge England vacated his district-wide recusal order, Judge Shubb declared he had no conflict and volunteered for the case. (ER 72-73.)

Judge Shubb issued his order denying Defendants' motion on April 17, 2015, at 2:45 p.m. Over the next two hours, the Sacramento AUSAs 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.[50] (Motion for Judicial Notice "MJN", Attachments 13, 19.) Defendants have since confirmed that, through his then-public Twitter account, titled "@nostalgist1," Judge Shubb "followed" @EDCAnews and thus received those Tweets.[51] (MJN, Attachments 14-15.) The mere existence of social network relationships between a judge and one of the parties[52] appearing before him creates

[50] "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. (MJN, Attachments 16-17.)

[51] 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. (MJN, Attachments 1-3.)

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

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's merits and the judge's reasoning, which are then directed to the judge in his capacity as a follower.[53]

Additionally, that evening at 9:51 p.m., Judge Shubb completed the feedback loop by posting on his @nostalgist1 public Twitter account: "Sierra Pacific still liable for Moonlight Fire damages." (MJN, Attachments 2, 5-6.) Just beneath this post, Judge Shubb linked to an article with the same title from the Central Valley Business Times. (MJN, Attachments 6-10.) Contrary to Judge Shubb's imprimatur, the title was false. Sierra Pacific was never found liable and has paid no damages. Indeed, Judge Nichols, the only neutral to evaluate the merits of this joint prosecution, found the government's partner unable to make a prima facie case against Defendants. In the federal settlement, Defendants expressly disclaimed liability and have never paid a cent in damages. (ER 765-75.)

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.

[53] This is especially true here where the other parties and attorneys to the action are not copied on those communications.

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 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. (MJN, Attachments 8-10.) 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.[54]

On Friday, September 11, 2015, Defendants filed a draft of this opening brief with a motion to exceed the word count limit. At that time, Judge Shubb's Twitter account was "public." (MJN, Attachments 2, 4, 24-27.) 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. (MJN, Attachment 22.) Before Defendants received mailed copies of the government's letter on September 16, Judge Shubb changed his

[54] The government would, of course, 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. (*See* MJN, Attachments 11-12.)

@nostalgist1 account from "public" to "protected," thus restricting access to "confirmed followers."[55] (MJN, Attachment 23.)

Section 455(a) of the Judicial Code provides that "[a]ny . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a); *Clemens v. U.S. Dist. Court for C.D. Cal.*, 428 F.3d 1175, 1178 (9th Cir. 2005) (citation omitted). A violation of Canon 3A(6) creates an appearance of partiality, requiring recusal under § 455(a). *See, e.g.*, *In re Boston's Children First*, 244 F.3d 164, 166, 168-71 (1st Cir. 2001). This conclusion follows even where public comments are revealed after judgment is entered, and the issue is thus raised for the first time on appeal. *United States v. Microsoft Corp.*, 253 F.3d 34, 107-08, 116-17 (D.C. Cir. 2001). As in *Microsoft*, the presently known extent of Judge Shubb's bias was not revealed until after final judgment. *See id*. at 108-09. Accordingly, Defendants raise this issue at the earliest opportunity. *See id.* at 109.

This Court has broad authority to remediate the appearance of judicial bias and partiality and should do so here. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (vacating judgment of disqualified judge under §

[55] However, Defendants had previously downloaded much of Judge Shubb's account. (MJN, Attachment 2.) 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. (MJN, Attachments 24-27.)

455(a)); *see also Microsoft Corp.*, 253 F.3d at 116 (imposing partial retroactive disqualification and vacating lower court order); *see also* 28 U.S.C. § 2106; *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 235 F.3d 1184, 1196 (9th Cir. 2000) (acknowledging authority to remand to different judge). That appearance here is further heightened by the fact that Judge England had already concluded that the impartiality of all Eastern District judges might reasonably be questioned, and by the unique circumstances surrounding Judge Shubb's decision to override that conclusion by volunteering to decide this motion.

CONCLUSION

The Moonlight Fire prosecution was an almost unimaginable effort to defile our system of justice. Beginning with the illegally motivated fraud at the heart of the investigation, moving then to the fictionalized Official Report, and continuing with the prosecutors' use of that report and others to support a sham endeavor to collect massive damages, this matter had one goal − to win at any cost. The fact that this operation was orchestrated by prosecutors − who, among so many other things, assisted with the Red Rock cover up, reassured dishonest investigators, and made false representations to the court to secure a critical ruling – makes it that much worse.

In *Hazel-Atlas*, our Supreme Court found the existence of a fraudulent article at the heart of a ruling was sufficient to find fraud on the court. The trail of

fraud in this matter, which includes not an article but a 300-page government document and so much more, makes the fraud detailed in *Hazel-Atlas* seem almost quaint. Judge Nichols had no problem calling this notorious matter what it was, saying the government lawyers' conduct was unlike anything he has seen in thirty years on the bench. Judge Shubb, however, ignored his own order, failed to give these Defendants a chance to respond, and made excuses for the prosecutors. For our system of justice, his decision must be reversed, and this matter should proceed to a hearing outside of the Eastern District of California.

STATEMENT OF RELATED CASES

There are no known related cases pending before this Court.

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DATED: November 6, 2015

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 15-15799

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Date: November 6, 2015

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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

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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

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

I. UNITED STATES CONSTITUTION

A. Amendment V.

No person shall be held to answer for a capital, or otherwi se infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time or war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprive of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Amendment XIV.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their

respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

II. UNITED STATES CODE

A. 28 U.S.C. § 455(a).

(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 practices law served

during 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;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes, pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civil organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding would substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding would substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not

required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

B. 28 U.S.C. § 1291.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

C. 28 U.S.C. § 1345.

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

D. 28 U.S.C. § 2106.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully

brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

III. CODE OF FEDERAL REGULATIONS

A. 36 C.F.R. § 261.1b.

Any 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.

B. 36 C.F.R. § 261.5(c).

The following are prohibited:

(a) Carelessly or negligently throwing or placing any ignited substance or other substance that may cause a fire.

(b) Firing any tracer bullet or incendiary ammunition.

(c) Causing timber, trees, slash, brush or grass to burn except as authorized by permit.

(d) Leaving a fire without completely extinguishing it.

(e) Causing and failing to maintain control of a fire that is not a prescribed fire that damages the National Forest System.

(f) Building, attending, maintaining, or using a campfire without removing all flammable material from around the campfire adequate to prevent its escape.

(g) Negligently failing to maintain control of a prescribed fire on Non-National Forest System lands that damages the National Forest System.

IV. FEDERAL RULES OF CIVIL PROCEDURE

A. Rule 12: Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing.

(a) Time to Serve a Responsive Pleading.

(1) ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) ***Right to Join.*** A motion under this rule may be joined with any other motion allowed by this rule.

(2) ***Limitation on Further Motions.*** Except as provide in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) ***When Some Are Waived.*** A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) ***When to Raise Others.*** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

B. Rule 26: Duty to Disclose; General Provisions Governing Discovery.

(a) Required Disclosures.

(1) ***Initial Disclosure.***

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible

things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure*. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses*. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) ***Disclosure of Expert Testimony.***

(A) *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to

provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

(3) ***Pretrial Disclosures.***

(A) *In General*. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those

the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections*. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of

Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length

of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information*. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required*. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) ***Trial Preparation: Materials.***

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts.***

(A) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***

(A) *Information Withheld*. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced*. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from

annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) ***Sequence.*** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) ***In General.*** A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the

additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan.

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure

to assert these claims after production—whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or

by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court

must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

C. Advisory Committee Note to Rule 26(e) (1993 Amendments)

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a "party," applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B),

changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

D. Rule 60: Relief From a Judgment or Order.

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(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.

(c) Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of judgment or order or the date of the proceeding.

(2) ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified for the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

V. FEDERAL RULES OF APPELLATE PROCEDURE

A. Rule 26.1: Corporate Disclosure Statement.

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

VI. FEDERAL RULES OF EVIDENCE

A. Rule 201: Judicial Notice of Adjudicative Facts.

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(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.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the

court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

B. Rule 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

VII. NINTH CIRCUIT RULES

A. Circuit Rule 28-2. Contents of Briefs.

In addition to the requirements of FRAP 28, briefs shall comply with the following rules:

28-2.1. Certificate as to Interested Parties *[Abrogated 7/1/90]*

28-2.2. Statement of Jurisdiction

In a statement preceding the statement of the case in its initial brief, each party shall demonstrate the jurisdiction of the district court or agency and of this Court by stating, in the following order:

(a) The statutory basis of subject matter jurisdiction of the district court or agency;

(b) The basis for claiming that the judgment or order appealed from is final or otherwise appealable, and the statutory basis of jurisdiction of this Court. *(Rev. 12/1/09)*

(c) The date of entry of the judgment or order appealed from; the date of filing of the notice of appeal or petition for review; and the statute or rule under which it is claimed the appeal is timely.

If the appellee agrees with appellant's statement of one or more of the foregoing matters, it will be sufficient for the appellee to state such agreement under an appropriate heading.

28-2.3. Attorneys Fees *[Abrogated 7/1/97]*

28-2.4. Bail / Detention Status

(a) The opening brief in a criminal appeal shall contain a statement as to the bail status of the defendant. If the defendant is in custody, the projected release date should be included.

(b) The opening brief in a petition for review of a decision of the Board of Immigration Appeals shall state whether petitioner (1) is detained in the custody of the Department of Homeland Security or at liberty and/or (2) has moved the Board of Immigration Appeals to reopen or applied to the district director for an adjustment of status. *(New 1/1/05; Rev.12/1/09)*

28-2.5. Reviewability and Standard of Review

As to each issue, appellant shall state where in the record on appeal the issue was raised and ruled on and identify the applicable standard of review.

In addition, if a ruling complained of on appeal is one to which a party must have objected at trial to preserve a right of review, e.g., a failure to admit or to exclude evidence or the giving of or refusal to give a jury instruction, the party shall state where in the record on appeal the objection and ruling are set forth. *(Rev. 12/1/09)*

28-2.6. Statement of Related Cases

Each party shall identify in a statement on the last page of its initial brief any known related case pending in this Court. As to each such case, the statement shall include the name and Court of Appeals docket number of the related case and describe its relationship to the case being briefed. Cases are deemed related if they:

(a) arise out of the same or consolidated cases in the district court or agency;

(b) are cases previously heard in this Court which concern the case being briefed;

(c) raise the same or closely related issues; or

(d) involve the same transaction or event.

If no other cases in this Court are deemed related, a statement shall be made to that effect. The appellee need not include any case identified as related in the appellant's brief.

28-2.7. Addendum to Briefs

Statutory. Pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules must be set forth verbatim and with appropriate citation either (1) following the statement of issues presented for review or (2) in an addendum introduced by a table of contents and bound with the brief or separately; in the latter case, a statement must appear referencing the addendum after the statement of issues. If this material is included in an addendum bound with the brief, the addendum must be separated from the body of the brief (and from any other addendum) by a distinctively colored page. A party need not resubmit material included with a previous brief or addendum; if it is not repeated, a statement must appear under this heading as follows: [e]xcept for the following, all applicable statutes, etc., are contained in the brief or addendum of _____. *(Rev. 12/1/09)*

Orders Challenged in Immigration Cases. All opening briefs filed in counseled petitions for review of immigration cases must include an addendum comprised of the orders being challenged, including any orders of the immigration court and Board of Immigration Appeals. The addendum shall be bound with the brief but separated from the brief by a distinctively colored page. *(New 7/1/07; Rev. 12/1/09)*

28-2.8. Record References

Every assertion in briefs regarding matters in the record shall be supported by a reference to the location in the excerpts of record where the matter is to be found. *(Rev. 7/1/98; 12/1/09)*

28-2.9. Bankruptcy Appeals *[Abrogated 12/1/09]*

VIII. CODE OF CONDUCT FOR UNITED STATES JUDGES

A. Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

The duties of judicial office take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

(A) *Adjudicative Responsibilities*.

(1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the

person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

(B) *Administrative Responsibilities*.

(1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court personnel.

(2) A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge.

(3) A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

(4) A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.

(5) A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

(C) *Disqualification.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding; (e)the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece,

and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

(D) *Remittal of Disqualification*. Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is

then willing to participate. The agreement should be incorporated in the record of the proceeding.

IX. CALIFORNIA GOVERNMENT CODE

A. Cal. Gov. Code § 16305.2.

(a) All money in the possession of or collected by any state agency or department, except for money in the Local Agency Investment Fund, is subject to Sections 16305.3 to 16305.7, inclusive, and is hereafter referred to as state money.

(b) Except as otherwise provided by this chapter or authorized by statute, any transfer, expenditure, or other use of state money knowingly committed by a state employee, outside of the State Treasury System is a misdemeanor, punishable by up to one year in a county jail, or a two-thousand-five-hundred-dollar ($2,500) fine, or both.

B. Cal. Gov. Code § 16305.3.

All state money shall be deposited in trust in the custody of the Treasurer, except when otherwise authorized by the Director of Finance, or unless deposited directly in the State Treasury. All state money deposited in trust in the custody of the Treasurer shall be held in a trust account or accounts and may be withdrawn only upon the order of the depositing agency or its disbursing officer. The provisions of Sections 16305.3 to 16305.7, inclusive, shall not be construed to repeal or amend any provision of law now requiring officers or employees to make daily, weekly or

monthly settlements with the Treasurer. All such money held by the State Treasurer in trust shall be subject to audit by the Department of Finance and shall also be subject to cash count, as provided in Sections 13297, 13298, and 13299 of this code.