

1 **Appendix A**

2
3 **The Truth About the Government's Origin-and-Cause Investigation**

4 The Moonlight Fire was first reported by the Red Rock Lookout at 2:24 p.m. on
5 September 3, 2007. (Rpt. of Inv. (Dkt. 596-31) at 15.) Forest Service Fire Prevention
6 Technician Dave Reynolds was dispatched to conduct an origin-and-cause investigation
7 and arrived on the scene a little over one hour later, at 3:30 p.m. (*Id.* at 14-15.) Reynolds
8 attempted to drive into the general area of the origin, but the intensity of the fire forced
9 him to turn back. (*Id.* at 15.) Cal Fire Battalion Chief Josh White was also dispatched
10 and arrived on scene that evening. (*Id.* at 16). White and Reynolds traveled together to
11 the heel of the fire at about 10:00 p.m. that night. (*Id.* at 17.) Because it was too hot and
12 dark to begin an origin-and-cause investigation, they decided to return in the morning.
13 (*Id.*)

14 At 6:30 a.m. the next day, September 4, 2007, White returned to the heel of the fire,
15 photographed the Howell's bulldozers that had been operating in the area when the fire
16 ignited, and began reading the burn indicators to determine where the fire began. (*Id.* at
17 17-18.) Examination of burn indicators—the physical marks left by a fire's action through
18 an area—is the accepted and standard technique used by professional fire investigators to
19 determine a fire's origin.¹ On the morning of September 4, White used macro-scale burn
20 indicators to identify the initial flanks of the fire. (*Id.* at 17-18.) At some point during
21 White's initial investigation of burn indicators, he left to meet with representatives from
22 Sierra Pacific and Howell's, who identified Bush and Crismon as the Howell's employees
23 who had been working in the area the day before and provided White with their contact
24 information. (*Id.* at 18.)

25 Mid-morning on September 4, 2007, Reynolds joined White and they continued to
26

27 ¹ Rpt. of Inv. (Dkt. 596-31) at 19; Wruble Depo., Nov. 4, 2011, 11 R.E. US-3191-
28 3193; Holbrook Depo., May 31, 2011, 5 R.E. US-1255-1261,1262-1266; Holbrook Depo.,
April 5, 2012, 5 R.E. US-1291; G. White Depo., Nov. 9, 2011, 10 R.E. US-2683-2687.)

1 examine burn indicators, following the advancing indicators along a skid trail until they
2 identified a general origin area. (*Id.* at 16-18.) They observed evidence in the general
3 origin area of heavy equipment use, including fresh water bars and marks from the
4 “grouser” or tracks of a bulldozer. (*Id.* at 18.) Inside the general origin area, the
5 investigators examined micro-scale indicators and identified the specific origin area where
6 they believed the fire ignited. (*Id.* at 18.) Within the specific origin area, they observed
7 numerous “rock strikes”—rocks with scraped and damaged surfaces consistent with
8 bulldozer operations. (*Id.* at 18-19.) The investigators did not find indications of any
9 other equipment or foot traffic in the area. (*Id.* at 20.)

10 Given the evidence of bulldozer tracks and rock strikes in the origin, the
11 investigators decided to interview the bulldozer operators before processing the scene.
12 (*Id.*) They went to Howell’s base camp to look for Bush and Crismon, found Bush there,
13 and interviewed him. (*Id.*) They talked to Crismon by phone and made arrangements to
14 meet with him at the fire, which they did at 4:00 p.m. on September 4. (*Id.*) The
15 investigators and Crismon drove together into the heel of the fire. (*Id.* at 21.) After
16 donning fire safety gear, they walked to the general origin area where Crismon, in a tape-
17 recorded interview, admitted he had been using his bulldozer to create water bars in the
18 specific origin area less than 30 minutes before finishing his work on the day the fire
19 ignited. (*Id.* at 21-22.) White drove Crismon back to his vehicle and Reynolds stayed on-
20 site to begin flagging burn indicators. (*Id.* at 22.) That evening, consistent with his
21 training, Reynolds placed blue flags to indicate a backing fire, yellow flags to indicate a
22 lateral fire, and red flags to indicate an advancing fire. (*Id.*) The general origin area was
23 also marked off with pink flagging tape. (*Id.*; Photos, 11 R.E. US-3135.)

24 Once he returned to the scene, White began to photo-document the area, creating
25 date- and time-stamped images of what the investigators had determined to be the origin.
26 At 6:21 p.m. on September 4, 2007, White took a photograph centering the area where the
27 rocks subsequently labeled as “E-2” and “E-3” were located and labeled it “specific origin
28 area.” (Photos, 11 R.E. US-3139.) At 6:22 p.m., White took photographs of the rocks in

1 the skid trail—including the so-called “white flag rock” that defendants claim is the secret
2 origin—which were labeled “rock strikes between tracks in skid trail.” (Photos, 11 R.E.
3 US-3141-3142.) They were not labeled “point of ignition,” “specific origin area,” or
4 anything similar. At 6:24 p.m., White took multiple photographs of the area that included
5 E-2 and E-3, and labeled these “rock strikes in specific origin area.” (Photos, 11 R.E. US-
6 3143- 3145.) The photographs labeled “specific origin area” do not include the white flag
7 rock. There is no white flag in any of the photographs White took on September 4.
8 (Photos, 11 R.E. US-3135-3151.)

9 When the investigators photographed the specific origin area on September 4, 2007,
10 they did so from outside of that area, because investigative protocol dictates the
11 investigators not walk in the area where they believe the fire started before processing the
12 scene and searching on their hands and knees for an ignition source. (J. White Depo.,
13 March 8, 2011, 11 R.E. US-3005-3009; J. White Depo., May 17, 2011, 11 R.E. US-3070-
14 3071.) Because it had become too dark to do so on September 4, the investigators stayed
15 outside the specific origin area until they could process it the next day. (J. White Depo.,
16 Nov. 18, 2010, 10 R.E. US-2828-2830; Reynolds Depo., Mar. 23, 2011, 8 R.E. US-2176-
17 2177.) However, multiple photos taken at 6:32 and 6:33 p.m. on September 4, 2007 depict
18 Reynolds walking in the area of the white flag rock, touching the rock, and taking a GPS
19 reading there; that area was safe for investigators to enter because it was not where they
20 had determined the fire began. (Photos, 11 R.E. US-3147-3149.)

21 The next morning, September 5, 2007, the investigators continued documenting the
22 scene beginning shortly after 8 a.m. (Photos, 11 R.E. US-3152.) They reviewed each of the
23 fire indicator flags that had been placed the day before and placed numbered placards
24 next to many of the burn indicators to document their conclusions as to what each
25 indicator showed (*e.g.*, advancing fire, backing fire, or lateral fire). (Rpt. of Inv. (Dkt. 596-
26 31) at 22; *see, e.g.*, Photos, 11 R.E. US-3153-3156.) Only after they had done this did they
27 enter the specific origin area.

28 The investigators’ last photograph of burn indicators taken on September 5, 2007 is

1 time-stamped at 9:25 a.m. (Photos, 11 R.E. US-3158.) At that point, the investigators
2 began to conduct a detailed search of the specific origin area. (Rpt. of Inv. (Dkt. 596-31) at
3 23.) They had identified six rocks in that area—two of which were later marked as E-2
4 and E-3—with markings consistent with bulldozer damage, and observed that the rock
5 strikes were in line with the bulldozer tracks. (*Id.*) The investigators got down on their
6 hands and knees and used a magnifying glass, and then a magnet, to search for competent
7 ignition sources. (Rpt. of Inv. (Dkt. 596-31) at 23; Reynolds Depo., March 23, 1011, 8 R.E.
8 US-2190-2193.) Their search area did not include the white flag rock, which was outside
9 of the specific origin area, some eight feet away. (Def. Rev. Supp. Br. at 59.)

10 During their sweep with the magnet, the investigators found and collected metal
11 fragments from around E-2 and E-3. (Rpt. of Inv. (Dkt. 596-31) at 23-24.) The metal
12 fragments were shiny and blued, indicating that they were fresh and had reached high
13 enough temperatures to be competent ignition sources.² Cal Fire employee Ivan Houser,
14 whom defendants have never accused of fraud, arrived after the investigators had swept
15 the magnet near E-3 and were in the process of sweeping it at E-2, and Houser watched
16 White collect the metal fragments.³ The investigators identified no other ignition source.
17 (Rpt. of Inv. (Dkt. 596-31) at 24.)

18 At 10:02 a.m. on September 5, 2007, the investigators were back at their truck
19 photographing the metal fragments they had found. (Photos, 11 R.E. US-3160-3161.)
20 Metallurgical analysis performed on the metal fragments during discovery confirmed the
21 fragments matched the chemical composition of the metal tracks on Crismon's bulldozer,
22 and that they had reached temperatures high enough to ignite the surrounding fuels.

23
24 ² Rpt. of Inv. (Dkt. 596-31) at 21; Photos, 11 R.E. US-3159-3160; J. White Depo., Feb
25 9, 2011, 11 R.E. US-2944-2945; J. White Depo., Nov. 16, 2010, 10 R.E. US-2724; J. White
26 Depo., Mar. 8, 2011, 11 R.E. US-3012; J. White Depo., May 17, 2011, 11 R.E. US-3061-
3062; Reynolds Depo., Mar. 23, 2011, 8 R.E. US-2169; Reynolds Depo., Mar. 24, 2011, 8
R.E. US-2219-2221.

27 ³ Houser Depo., April 18, 2011, 5 R.E. US-1310-1316; Houser Depo., April 19, 2011,
28 5 R.E. US-1331; Reynolds Depo., Mar. 22, 2011, 8 R.E. US-2142; J. White Depo., Mar. 8,
2011, 11 R.E. US-3003-3004, 3010-3012.

1 (Hendrickson Rpt., 4 R.E. US-1152-1155; Christiansen Rpt., June 14, 2011, 2 R.E. US-474-
2 475, 489-491, 496-498, 512-528.)

3 Because the investigators had located competent ignition sources within their
4 specific origin area, no further actions were required at the scene and it was released.
5 (Reynolds Depo., March 23, 2011, 8 R.E. US-2194.)

6 7 ***The GPS Reading***

8 Sierra Pacific argues that “the suppressed evidence reveals that on the evening of
9 September 4, the Moonlight Investigators were focused on a different rock in a skid trail
10 about 10 feet away from the ‘official’ E-2 and E-3 points of origin,” including the fact that
11 “Reynolds took his only GPS measurement during the investigation from this rock.” (Def.
12 Rev. Supp. Br. at 45.) That is false. As noted above, any investigative steps taken before
13 the specific origin area—the area where the investigators believed the fire started—was
14 processed had to occur outside that area, due to the risk of contamination. Because the
15 referenced GPS reading was taken on September 4, it had to occur somewhere the
16 investigators knew the fire did not start. Further, Reynolds’s GPS device had an error
17 rate of 30-40 feet, and thus could only be used to mark a general area, not a specific point
18 of ignition. (J. White Depo., Nov. 17, 2010, 10 R.E. US-2731-2739; Reynolds Depo., Nov. 1,
19 2012, 8 R.E. US-2265-2266.)

20 21 ***The Scene Photographs***

22 Sierra Pacific asserts that “White took no contemporaneous photos fixed on the
23 rocks he claimed to identify as his ‘points of origin’ and no photos of the location where he
24 testified that he collected the metal that supposedly started the fire.” (Def. Rev. Supp. Br.
25 at 45). That is false. White took multiple photographs on September 4, 2007 of the area
26 that included E-2 and E-3, including a close-up of the rock referred to as E-2. (Photos, 11
27 R.E. US-3143-3146.) White also took several photographs on September 4 and 5 of the
28 location where the metal fragments were collected. (Photos, 11 R.E. US-3139, 3143, 3145-

1 3146, 3157.) He then took more close-ups of E-2 and E-3 on September 8, 2007. (Photos,
2 11 R.E. US-3162-3163.)

3 In fact, defendants used the very photographs they now claim do not exist when
4 deposing White in the federal action. At White's deposition on February 8, 2011,
5 defendants used a photo he took on September 4, 2007, in asking him to draw where the
6 metal fragments were collected between E-2 and E-3. (J. White Depo., Feb. 8, 2011, 10
7 R.E. US-2892-2900.) Defendants used other photos White took in asking him to mark
8 items including E-2, E-3, and evidence of rock strikes in the specific origin area. (J. White
9 Depo., Feb. 8, 2011, 10 R.E. US-2896-2900.)

10 Sierra Pacific also notes that White took "two 'Overview of Indicators' photographs
11 to create a photographic record showing the substance of the investigators' primary scene
12 processing work" and claims that "[t]here is nothing whatsoever in either of these
13 photographs signifying any interest in the Moonlight Investigators' claimed points of
14 origin E-2 and E-3, a fact perfectly consistent with their after-the-fact fabrication of these
15 so-called points of origin." (Def. Rev. Supp. Br. at 48.) That is false. The two "Overview
16 of Indicators" photographs were taken at 9:16 a.m. and 9:25 a.m. on September 5, 2007,
17 (Photos, 11 R.E. US-3157-3158), and the investigators did not begin to process the specific
18 origin area until after the last such photo was taken. (*Id.*; Rpt. of Inv. (Dkt. 596-31) at 23.)
19 Until they had finished photographing the area and begun to process the specific origin
20 area on their hands and knees looking for an ignition source, they would not have entered
21 that area to place any flags or other markers, as explained above. (J. White Depo., March
22 8, 2011, 11 R.E. US-3005-3009; May 17, 2011, 11 R.E. US-3070-3071.) That no flagging or
23 evidence tents are seen in that area by 9:25 a.m. is in fact perfectly consistent with the
24 investigators' unwavering belief that the fire started within the specific origin area.

25 Sierra Pacific argues that "White refused to acknowledge that the photographs were
26 centered, like a gun sight, on the white flag, as doing so would reveal that he and Reynolds
27 were actually focused on a point of origin far different than the official points." (Def. Rev.
28 Supp. Br. at 54.) That is false. As noted in the United States' Opposition, at his March 9,

1 2011, deposition White did acknowledge that the flag was “centered” in the photos he was
2 shown. (U.S. Opp. at 46; J. White Depo., Mar. 8, 2011, 11 R.E. US-2987-2989; Mar. 9,
3 2011, 11 R.E. US-3030-3032.) Further, the white flag was not always centered. In fact, in
4 the two “Overview of Indicators” photographs that defendants describe as “critical,” (Def.
5 Rev. Supp. Br. at 48), the white flag is far off to the left side in one (Photos, 11 R.E. US-
6 3157), and outside the field of view in another. (Photos, 11 R.E. US-3158.) The
7 investigators took no close-up photographs of the white flag. Sierra Pacific itself admits
8 its own counsel could not see the white flag in the photographs taken by the investigators,
9 even after they “carefully reviewed” the native files. (Def. Rev. Supp. Br. at 49 n.29.)
10

11 ***The Absence of Flags at E-2 and E-3***

12 Sierra Pacific claims that “when asked why” the investigators “never documented,
13 flagged, or marked [E-2 and E-3] in any way . . . White said, ‘I don’t know.’” (Def. Rev.
14 Supp. Br. at 45.) That is false. When Sierra Pacific’s lead counsel William Warne asked
15 why White failed to place an indicator next to either of the rocks where White believed the
16 fire started, White explained that Cal Fire employee Ivan Houser had arrived at the scene
17 and they were in a hurry to leave. White stated that “it wasn’t until later” that he realized
18 he should have done more to mark E-2 and E-3. (J. White Depo., November 18, 2010, 10
19 R.E. US-2832-2833.)
20

21 ***The Collection of Metal Fragments***

22 Sierra Pacific argues that the fact that “there is one plastic bag containing metal
23 shavings” is “consistent with the Moonlight Investigators’ focus on a single point of origin”
24 and proves the shavings were collected at the white flag rock, not E-2 and E-3. (Def. Rev.
25 Supp. Br. at 49-50.) That is false. Houser, whom defendants do not accuse of fraud,
26 watched White collect the shiny, blued fragments from the government’s specific origin
27 area on September 5, 2007. Houser and the investigators testified consistently that he
28 arrived after they had swept the magnet near E-3 and were in the process of sweeping it

1 at E-2.⁴ Houser confirmed the fragments were collected in the ashy area inside the burn,
2 three-to-four feet from the skid trail (not at the white flag rock).⁵ After watching the
3 investigators collect the fragments, Houser walked the investigators back to the trucks
4 and watched them photograph the fragments. (*Id.*)

5 Sierra Pacific claims “White struggled to explain why – if he actually had found two
6 points of origin and collected metal from two separate spots – he would have put what he
7 claims are competent ignition sources into one bag.” (Def. Rev. Supp. Br. at 50 (emphasis
8 original).) That is false. White testified that he was not concerned about commingling the
9 fragments because he believed they came from the same source, at the same time, and
10 that both would be determined to be competent ignition sources. (J. White Depo., Nov. 19,
11 2010, 10 R.E. US-2858-2859.) When asked why he believed they were from the same
12 source, White stated that the fragments were taken from the same area, there were no
13 indications of any source other than Crismon’s bulldozer, there was no other machinery
14 working in the area, the spur trail appeared rarely used, Crismon said he had driven his
15 bulldozer in the spur trail, and the metal fragments appeared shiny and blued, indicating
16 they were fresh and left on the same day. (J. White Depo., Nov. 17, 2010, 10 R.E. US-
17 2761-2774, 2776-2785.) Although White acknowledged that commingling the fragments
18 may not have strictly complied with guidelines, he was not concerned that any cross-
19 contamination occurred. (J. White Depo., Nov. 19, 2010, 10 R.E. US-2860-2861.)

20 Extensive metallurgical analysis performed on the metal fragments during discovery
21 confirmed White’s beliefs to be true: there was no cross-contamination, the metal
22 fragments matched the chemical composition of the metal tracks on Crismon’s bulldozer,
23 and the fragments were fresh and had reached temperatures high enough to ignite the
24 surrounding fuels. (Hendrickson Rpt., 4 R.E. US-1152-1155; Christiansen Rpt., June 14,
25

26 ⁴ Houser Depo., April 18, 2011, 5 R.E. US-1310-1316; Houser Depo., April 19, 2011,
27 5 R.E. US-1331; Reynolds Depo., Mar. 22, 2011, 8 R.E. US-2142; J. White Depo., Mar. 8,
2011, 11 R.E. US-3003-3004, 3010-3012.

28 ⁵ Houser Depo., Apr. 18, 2011, 5 R.E. US-1308-1326; Houser Depo., Apr. 19, 2011, 5
R.E. US-1329-1330, 1336-1338, 1341-1343.

1 2011, 2 R.E. US-474-475, 489-491, 496-498, 512-528.)

2
3 ***Reynolds's Testimony***

4 Sierra Pacific claims that "Reynolds did not reveal until his state deposition in 2013
5 [sic], that he had been advised by the Moonlight Prosecutors that the white flag was a
6 'non-issue.'" (Def. Rev. Supp. Br. at 58.) That is false. The testimony Reynolds gave in
7 his November 15, 2011 federal deposition was entirely consistent with the testimony he
8 later gave in the state case, on November 1, 2012. In November 2011, Reynolds was asked
9 by defendants about the discussion of the white flag that occurred during the January
10 2011 meeting with counsel at the U.S. Attorney's Office. Reynolds told defendants at that
11 time that, in the January 2011 meeting, it was discussed that the white flag issue "was
12 something that was going to come up," but that it had "no significance." (Reynolds Depo.,
13 Nov. 15, 2011, 8 R.E. US-2237-2239.) A side-by-side comparison of Reynolds's testimony
14 on this issue in his federal and state depositions shows the falsity of Sierra Pacific's claim:
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Reynolds’s November 15, 2011 Deposition	Reynolds’s November 1, 2012 Deposition
<p>Q. And did you and Josh White attempt to reconcile between yourselves, in this January 2011 meeting what you testified to, that is, that the white flag nearby the rock upon which you’ve got a GPS unit, as photographed on 9-4-2007?</p> <p>A. We discussed that that was something that was going to come up; that neither of us remember there being a white flag, and that was the end of that.</p> <p>...</p> <p>Q. Did you discuss the impact of the photographs that show you with the GPS unit on top of that rock, which is nearby the white flag, in the meeting you had in January 2011?</p> <p>A. There was no impact.</p> <p>Q. . . . [W]e are focusing on what you guys discussed in January of 2011. What do you mean when you say “there was no impact”?</p> <p>A. Well, that rock and the supposed flag have no impact on anything. You apparently believe so, but I sit here today and I – I don’t know why we are spending the time we are on it myself. But you apparently have a reason.</p> <p>...</p> <p>Q. Did you discuss in January of 2011 the fact that the photographs that were taken in the area of origin had a significance as they related to your investigation?</p> <p>A. They had no significance. That’s what we discussed.</p> <p>Q. Are you saying that all the photographs had no significance?</p> <p>A. No, those photos had none.</p> <p>Q. Which photos?</p> <p>A. Any of that rock and the supposed flag.</p>	<p>Q. And in this conversation did they ask you questions as to whether or not you placed that white flag?</p> <p>A. yes.</p> <p>Q. And what was your answer in response to those questions?</p> <p>A. I have no recollection of placing the flag. And that’s – we saw it as a nonissue. And they said it was going to come up and saw it as a nonissue. I said I can’t tell you. I don’t know why it’s there.</p> <p>Q. You don’t know why what is there?</p> <p>A. The white flag.</p> <p>Q. Okay.</p> <p>A. And it just didn’t have any bearing on anything.</p> <p>Q. Well, did it concern you when you saw the photographs of the white flag?</p> <p>A. Did it concern me. I mean I still had problems with accepting that that white flag was there because I just don’t - - and if I remember right, Chief White said the same thing, is that he doesn’t recall the white flag being there.</p> <p>Q. But you could see it with your own eyes, correct?</p> <p>A. But you can see it. Yeah. I can accept the stem. The white flag I still have a problem with. It has to be attached to something so...</p> <p>...</p> <p>Q. But based on the photographs you saw, you had to concede that there was a white flag attached to the stem, right?</p> <p>A. I guess I had to.</p>
<p>Reynolds Depo., Nov. 15, 2011, 8 R.E. US-2237-2239.</p>	<p>Warne Dec., Ex. 47, Reynolds Depo. (Dkt. 597-18) at 43-44.</p>

1 ***Paul's Testimony***

2 Sierra Pacific asserts that "Cal Fire Unit Chief Bernie Paul later admitted in the
3 state case that the evidence and testimony surrounding the white flag caused him to
4 disbelieve the Moonlight Investigators." (Def. Rev. Supp. Br. at 55, 58.) That is false.
5 Paul's testimony was in response to a series of hypothetical questions based on the
6 misrepresentation that Reynolds had denied seeing a white flag in the photo he was
7 shown:

8 Q. By Mr. Thomas: Okay. Now, sir, I have a question for
9 you. *If* the investigator for the Moonlight Fire that actually had
10 the GPS unit on that rock and was there on the day this photo
11 was taken and took distance and nearing measurements to that
12 specific rock, under oath in deposition - - do you see that white
13 flag there.

14 A. Yes.

15 Q. With the post?

16 A. Yes.

17 Q. By Mr. Thomas: *If* that investigator denied under oath
18 seeing a white flag in this photograph, would you believe him?

19 A. No.

20 Q. Well, *if* the investigator for the U.S. Forest Service, who
21 had his GPS unit on that rock and who was there this day, was
22 shown this photograph in a deposition and denied that he had
23 seen a white flag in this location in this photograph, would you
24 question the credibility of that individual?
25
26
27
28

1 A. I would definitely ask why he can't see it when it's right
2 there in the photo.

3 Q. By Mr. Thomas: And *if* he denied seeing the white flag
4 and eventually admitted he sees a post but not a white flag,
5 would that call into question, in your mind, his credibility?
6

7 A. Either that or his ability to see colors or something.

8 Q. By Mr. Thomas: Well, *if* the investigator for the United
9 States Forest Service on the first several days of this fire denied
10 seeing a white flag in this photo even when it's blown up like
11 this and has perfectly good vision, would that cause you to
12 question that person's credibility and wonder why they are
13 testifying that way?
14

15 A. It would concern me, yes, it would.

16 (Warne Dec., Ex. 55, Paul Depo., (Dkt. 597-26) at 6-8 (emphasis added).)

17 As discussed in the United States' Opposition, Reynolds testified he saw the white
18 flag. (U.S. Opp. at 42-43.)

19 Paul has since rejected Sierra Pacific's claims about his testimony in a sworn
20 declaration submitted in connection with the state case. Paul testified that he was
21 "angr[y]" at being "misled by the attorneys who conducted my deposition," and stated: "To
22 suggest that I 'opined' in some sort of expert capacity that the origin and cause
23 investigation of the Moonlight Fire was dishonest is itself a dishonest argument by
24 Defendants." (Paul Dec., Oct. 30, 2013, 8 R.E. US-2055-2059.)
25

26 ***Dodds's Testimony***

27 Sierra Pacific argues that "Larry Dodds . . . finally conceded in May of 2013 (after
28 the conclusion of the federal action) during a state deposition that the white flag raises 'a

1 red flag,’ creates a ‘shadow of deception’ over the investigation, and caused him to
2 conclude ‘it’s more probable than not that there was some act of deception associated with
3 testimony around the white flag.’” (Def. Rev. Supp. Br. at 55.) That is false. Dodds
4 refused to affirm what Sierra Pacific claims he said:

5 Q. Do you believe, in light of all that you know about their
6 work, all that was suppressed, all that we have talked about this
7 morning, that it is more probable than not that these
8 investigators engaged in deception with respect to the work they
9 did in the general origin area, as we have discussed this
10 morning.

11 A. I truly believe I would need more data to have an opinion
12 on that. So much of what we have talked about has been in the
13 hypothetical and the theoretical today. I – in order to answer
14 that question, I truly would need to spend and I would need to
15 have more information in front of me.

16
17 (Warne Dec., Ex. 52, Dodds’ Depo., April 9, 2013, (Dkt. 597-23) at 54-55 (objections
18 omitted).)

19 Dodds did question why the investigators did not recall the white flag, but he
20 consistently refused to agree that the investigators engaged in wrongdoing. (*Id.* at 52-56.)
21 His testimony was that, even if it was unclear why the white flag was placed, the
22 investigators got the origin and cause right. (*Id.* at 53.)

23 Dodds later submitted a declaration in the state case in which he rejected Sierra
24 Pacific’s claims about his testimony:

25 I am concerned that pieces of what I said in deposition may be
26 presented in a way that does not reflect the truth of what I
27 really think, and I want the Court to know what I really think,
28

1 which is that I don't believe that Josh White or Dave Reynolds
2 deliberately or intentionally tried to deceive or be less than
3 truthful regarding their fire investigation. . . .

4 . . . I . . . do not believe that Reynolds or White were untruthful
5 or being deceptive in testifying that they do not remember the
6 white flag. Nor do I believe that they engaged in any act of
7 deception in their investigation.
8

9 (Dodds Dec., Oct. 29, 2013, 3 R.E. US-794, 796.)
10

11 ***The Draft Sketch***

12 Sierra Pacific claims that Reynolds's draft "Fire Origin Sketch" was "suppressed"
13 from the "Report of Investigation" and that this sketch is a "smoking gun" because it
14 "shows a single point of origin alongside the same skid trail, which Reynolds marked with
15 an 'x' and labeled 'P.O.' The key on this same form also confirms his intent, as it states
16 that 'x = point of origin.'" (Def. Rev. Supp. Br. at 47, 49 n.30.) That is false. As discussed
17 in the United States Opposition, no evidence was suppressed. (U.S. Opp. at 49-50.)
18 Moreover, the notation of "P.O." does not support Sierra Pacific's "secret origin" argument.
19 Reynolds's draft sketch does not depict the skid trail where the white flag rock was
20 located, E-2, or E-3, and it is unclear where Reynolds's notation of "P.O." would be in
21 relation to those points. (Draft Sketch, Warne Ex. 57, (Dkt. 597-28) at 2; Reynolds Depo.,
22 March 23, 2011, 8 R.E. US-2186; Reynolds Depo., Nov. 1, 2012, 8 R.E. US-2255-2256.)
23 Reynolds also testified at deposition that, like many wildland fire investigators, he used
24 the terms "P.O." and "point of origin" to refer to the origin area generally and not a specific
25 ignition spot. (Reynolds Depo., Nov. 15, 2011, 8 R.E. US-2234-2235; Reynolds Depo., Nov.
26 1, 2012, 8 R.E. US-2257-2258, 2262-2264.) Defendants' experts admit "P.O." can be used
27 in this manner. (G. White, 10 R.E. US-2691-2693; Holbrook, April 5, 2012, 5 R.E. US-
28 1292-1293.) Thus, even if the "P.O." notation was at the white flag rock, it only shows this

1 general area is where Reynolds believed the fire started.

2 Sierra Pacific claims that “[b]oth Reynolds and White denied any on-site connection
3 to the sketch” and Reynolds “attempted to distance himself from the sketch” at deposition.
4 (Def. Rev. Supp. Br. at 47 n.28, 49 n.30.) That is false. Reynolds acknowledged that the
5 sketch was a “working document,” but his testimony reflected uncertainty because he
6 could not recall whether he had prepared any of the sketch in the field. He stated that “to
7 the best of my recollection, it was not on scene. So [it must have been prepared] sitting
8 back at my desk.” (Reynolds Depo., March 23, 2011, 8 R.E. US-2185.) At later
9 depositions, Reynolds testified consistently that he prepared part of his paperwork on
10 scene and some back at the desk and was simply not certain exactly where or when the
11 sketch was prepared: “I’m still unclear as to whether it was in the field. I tend to think
12 this was done hastily at my desk after I had been notified I was relieved.” (Reynolds
13 Depo., Nov. 1, 2012, Dkt. 597-18, p. 5, 45; *see also* Reynolds Depo., Nov. 15, 2011, 8 R.E.
14 US-2250-2252.)

15 Sierra Pacific asserts that the distance and bearing measurements recorded on the
16 draft sketch were taken “from [the investigators’] two reference points directly to the same
17 rock where they had placed the white flag, triangulating and measuring to that location
18 with accuracy to a quarter-of-an-inch and to a single degree.” (Def. Rev. Supp. Br. at 47.)
19 Similarly, Sierra Pacific claims that “the Moonlight Prosecutors’ own designated surveying
20 expert David Wooley (as well as all defense surveying experts) testified that Reynolds’s
21 distance and bearing measurements intersected exactly at that white flag.” (Def. Rev.
22 Supp. Br. at 53.) This evidence is disputed. Experienced wildland fire investigator Alan
23 Carlson testified that the distance and bearing measurements intersected not at the white
24 flag, but at the center of the government’s specific origin area. (Carlson Depo., 2 R.E. US-
25 394.) And William Warne elicited the referenced testimony from Wooley by instructing
26 him to use a protractor on a flat piece of paper in a conference room, thereby introducing
27 numerous potential distortions into the calculation, including failure to account for ground
28 slope and where on the three-foot reference rock the person taking the measurements was

1 standing. Indeed, Wooley cautioned Warne that “[t]here is distortion” with the use of the
2 protractor, and Warne replied: “I understand. I know it is going to be an estimate.”
3 (Wooley Depo., 11 R.E. US-3176-3177.)
4

5 ***Destruction of White’s Notes and Files***

6 Sierra Pacific states that White “destroyed his notes and his contemporaneous
7 computer files before the federal action commenced,” even though “Cal Fire did not have
8 any policy requiring their destruction.” (Def. Rev. Supp. Br. at 52.) “With the notes gone,”
9 Sierra Pacific argues, “the Moonlight Investigators believed they were free to select and
10 shape the evidence, unimpeded by contemporaneous notes of what actually occurred when
11 the origin scene was processed.” (*Id.*) That is false. White testified at deposition that he
12 transferred all of his Moonlight Fire files and data to another computer because he was
13 required by Cal Fire’s standard protocol to do so when he changed jobs.⁶ Regarding his
14 field notes, White used them to prepare the narrative for the Report of Investigation and
15 got rid of them only after all of the information was transferred over, as was his custom
16 and practice for all fires. (J. White Depo., May 18, 2011, 11 R.E. US-3074-3079.) Cal Fire
17 had no retention policy for field notes in 2007 and it was White’s training to shred his field
18 notes after all of the information was transferred into a final report. (J. White Depo., May
19 18, 2011, 11 R.E. US-3074-3079, 3083.)
20

21 ***Matthews’s Opinion on the Location of the Origin***

22 Sierra Pacific, through the inadmissible opinion of Robert Wright, alleges that
23 USFS Special Agent “Matthews thought that the fire may well have originated in a
24 location different from where the investigators had alleged.” (Def. Rev. Supp. Br. at 32
25 n.23.) That is false. When defense counsel questioned Matthews on this issue at

26 ⁶ J. White Depo., March 8, 2011, 11 R.E. US-2966-2983; J. White Depo., May 17,
27 2011, 11 R.E. US-3063-3069; J. White Depo., May 18, 2011, 11 R.E. US-3074-3082, 3084-
28 3085; J. White Depo., Nov. 17, 2010, 10 R.E. US-2745-2755.

1 deposition, she testified that “there is no reason for me to believe that where Josh [White]
2 put the origin area wasn’t an ignition site for the Moonlight Fire.” (Matthews, May 16,
3 2013, 7 R.E. US-1831-1835.) Additionally, although Matthews testified that she may have
4 made the general origin area “a little bit bigger” to include additional evidence of rock
5 strikes up the hill, she admitted she was not there when the burn indicators were freshest
6 and that she deferred to the investigators who were on scene earlier and able to read the
7 burn indicators when they were fresh.⁷

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27 ⁷ Matthews Depo., May 16, 2013, 7 R.E. US-1820-1835; Matthews Depo., May 17,
28 2013, 7 R.E. US-1838-1839; Matthews Depo., April 26, 2011, 7 R.E. US-1799, 1802-1803,
1816-1817.