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SIERRA PACIFIC INDUSTRIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SIERRA PACIFIC INDUSTRIES, et al.,

Defendants.

AND ALL RELATED CROSS-ACTIONS.

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

**DEFENDANTS' REPLY IN SUPPORT OF
SUPPLEMENTAL BRIEFING REGARDING
THE MOONLIGHT PROSECUTORS'
FRAUD ON THE COURT**

Date: April 13, 2015
Time: 2:00 p.m.
Dept: Courtroom 5, 14th floor
Judge: Hon. William B. Shubb

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1 **I. INTRODUCTION**

2 The government has constructed the perfect companion piece to the rest of its misconduct
3 in the Moonlight Fire matter. During the investigation of this fire, the government found what it
4 wanted to find and either covered up or destroyed contrary or harmful evidence. During the
5 drafting of its opposition to Defendants’ briefing, the government collected a pile of unanalyzed
6 legal fragments and pieced them together to create a version of reality that has little relationship
7 to the truth. As was the case with the investigation and prosecution of this matter, the
8 government has again left behind and failed to reveal critical elements of what this Court
9 deserved – in this instance, a thoughtful a discussion of what actually constitutes fraud on the
10 court. As Judge Nichols found after his thorough review of the jointly prosecuted state actions,
11 this case has long been (and today remains), an effort to “steamroll the truth.” Cal. Dep’t
12 Forestry v. Howell, No. GNCV0900205, 2014 WL 7972097, *10 (Cal. Super. Ct. Feb. 4, 2014).
13 The government has now turned that effort on the law itself.

14 With respect to those limited portions of the government’s opposition that facially
15 comply with the Court’s order that the parties first identify “the test for fraud upon the court,” the
16 government has manufactured a set of rules and tests that do not exist as framed under
17 controlling Ninth Circuit authority. And, with respect to the Court’s order that the government
18 then assess whether Defendants’ allegations would constitute fraud on the court, the government
19 has (1) ignored the Court’s order that it assume Defendants’ allegations as true and (2) has then
20 misread the import of Ninth Circuit authority, cobbling together extraneous and untethered
21 fragments of language from courts that assessed factual circumstance far different from those
22 presented by this matter. Perhaps most notably, the government contorts itself in an effort to
23 avoid the actual rationale of Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1131 (9th
24 Cir. 1995). Any good faith explication of its facts and holding provide a clear path for what the
25 Ninth Circuit would expect a trial court to do with the Moonlight Fire matter, as do a host of
26 other Supreme Court and Ninth Circuit cases. In the end, the government’s brief is not so much
27 an analysis as it is a misleading fragmentation of Ninth Circuit and Supreme Court authority.

28

1 On November 24, 2014, this Court ordered of the parties before it the following: “Before
 2 evaluating the merits of Sierra Pacific’s accusations, the court will resolve the threshold issue of
 3 whether the alleged conduct giving rise to Sierra Pacific’s Rule 60(d)(3) motion constitutes
 4 “fraud on the court.” The Court instructed the parties to submit “focused briefing limited to . . .
 5 addressing whether, assuming the truth of Sierra Pacific’s allegations, each alleged act of
 6 misconduct separately or collectively constitutes ‘fraud on the court’ within the meaning of Rule
 7 60(d)(3).” (Docket No. 618.) Further emphasizing the limitations imposed on the parties by its
 8 order, the Court then instructed that “Sierra Pacific shall file its brief limited to the
 9 aforementioned issues by no later than January 15, 2015. The government shall file an
 10 opposition limited to these issues no later than February 17, 2015. Sierra Pacific shall then file a
 11 reply similarly limited to the identified issues no later than March 9, 2015.” (*Id.*) On January
 12 15, 2015, Defendants timely complied with this court’s instructions. On February 17, 2015, the
 13 government filed its brief, paying little if any real attention to the Court’s instructions and
 14 arguing the merits of nearly every contention while filing over 3500 pages of material, including
 15 three declarations, three separate appendices, and, among other things, lodging the full transcript
 16 of each of the depositions they cite in their expansive merit based arguments. As discussed
 17 below, there is no excuse for having creatively spun the facts while ignoring the Court’s order.

18 While the government used its “limited” opposition to roam freely through the expansive
 19 record in this matter – unchecked by this Court’s order or by what the record actually states – the
 20 government also found ways to use its “focused” briefing to: (1) besmirch the reputations of two
 21 seasoned federal prosecutors who, at least before they disclosed the government’s misconduct,
 22 were deemed sufficiently competent to lead the office’s wildland fire cost recovery unit and to
 23 join the Moonlight Fire team from another state. Today, however, the government belittles their
 24 qualifications, apparently the price to pay for daring to speak the truth about gross misconduct
 25 perpetrated by the government. To the extreme credit of former Assistant United States
 26 Attorneys Eric Overby and E. Robert Wright, they did so regardless.

27 Moreover, and perhaps most disturbingly, the government’s opposition demeans a highly
 28 respected member of California’s judiciary, specially appointed California Superior Court Judge

1 Leslie C. Nichols, when it dismissively and repeatedly refers to His Honor as “the county
2 judge”¹ and then fails to even acknowledge one of Judge Nichols’s two orders issued on
3 February 4, 2014. The government then falsely suggests to this Court that Judge Nichols
4 abdicated his duty by not thoroughly considering all of the evidence before him, by allowing
5 Defendants to put thoughts in his head, and by inattentively executing a draft order submitted to
6 him by Defendants. These charges are wholly without merit, and they are shameful.

7 But the government’s extracurricular efforts do not stop there. In what appears to be
8 another misguided effort to have its misconduct excused, the government has chosen to target its
9 false narrative against a single party – defendant timber company Sierra Pacific Industries –
10 apparently because it believes that the government’s gross misconduct against what it evidently
11 sees as a moneyed and unsympathetic defendant might therefore be forgiven. But doing so is yet
12 another insult to this Court and our system of justice. All parties are of course entitled to equal
13 justice, and justice evaporates for everyone if the government can corruptly pursue a company
14 simply for the promise of collecting a large money judgment. As Judge Nichols noted in his first
15 termination order regarding the companion state court actions he adjudicated, “corrupt intent
16 knows no stylistic boundaries.” Cal. Dep’t Forestry v. Howell, No. GN CV09-00205, 2014 WL
17 7972096, *10 (Cal. Super. Ct. Feb. 4, 2014) (quoting Slesinger v. The Walt Disney Co., 155 Cal.
18 App. 4th 736 (2007)).²

19 Defendants’ allegations are not focused on the abuse these prosecutors heaped upon a
20 single defendant. Instead, their allegations are focused on a scheme which defiled the Court and
21 damaged the integrity of our judicial system. Moreover, the effort to shine light on the
22 prosecutors’ conduct here is brought by eighteen Defendants – fifteen individuals and/or trusts
23 who own land in the Sierra Nevada mountains, a small timber management company, a small

24 _____
25 ¹ The government does so on seven occasions, mentioning His Honor’s last name just once in a footnote. (Opp. at 43 n.47.)

26 ² Judge Leslie C. Nichols’s decision was clearly the consequence of significant factual review and legal research.
27 Indeed, the Slesinger quote cited above comes from a case involving, like here, “deliberate and egregious
28 misconduct.” 155 Cal. App. 4th at 763. But the court in Slesinger took this same quote from a First Circuit
decision, Aoude v. Mobile Oil Corp., wherein the First Circuit wrote, “Because corrupt intent knows no stylistic
boundaries, *fraud on the court can take many forms.*” 892 F.2d 1115, 1118 (1st Cir. 1989) (emphasis added).

1 timber harvesting company, and Sierra Pacific Industries. Each of these parties were sued and
 2 wrongly prosecuted. Each was exposed to one billion dollars in damages. Each of these parties
 3 hired counsel to defend themselves against this “egregious” and “corrupt and tainted” matter for
 4 years. Cal. Dep’t Forestry v. Howell, 2014 WL 7972096, at *10. Each of the Defendants and
 5 each of their counsel have brought this motion to expose the reprehensible conduct that has
 6 defrauded not just one court, but two. As Judge Nichols stated in “the portion of the order that
 7 speaks in the Court’s own voice”³ the “misconduct in this case is so pervasive that it would serve
 8 no purpose to recite it all here.” Id. Judge Nichols also found that the discovery abuses were so
 9 egregious that they “threatened the integrity of the judicial process.” 2014 WL 7972097, at *16.
 10 While the reality of this matter is nowhere to be found in the government’s briefing, it has
 11 become perfectly clear over the course of the last five years that the notorious Moonlight Fire
 12 matter is highly unusual, exhibiting a trail of fraud that has resulted in rare legal decisions, as
 13 well as disclosures from federal prosecutors who worked on the Moonlight Fire.

14 The Moonlight Fire matter began with a fateful decision by federal and state investigators
 15 to cook their investigation and their resulting report so as to frame what they believed were the
 16 right Defendants. Thereafter, this key act of corruption only grew, as it became the basis of the
 17 complaint, the focal point of extensive perjury, the springboard for the prosecutors’ equally
 18 fateful decision to attempt to protect it and cover for it, while then adding to it through egregious
 19 efforts to protect the amount of money it might deliver through the lookout cover-up. These
 20 facts, and the extraordinary order from the only judge who has had the ability to review these
 21 facts, do not readily align with existing legal authority pertaining to fraud on the court, as each
 22 case is largely a consequence of its own facts. These cases do, however, provide this Court with
 23 ample authority to deal with this extraordinary matter. There will never be another huge
 24 wildland fire matter (1) that is jointly investigated by both Cal Fire and USFS investigators, (2)
 25 that is then jointly prosecuted by both state and federal prosecutors, (3) that is handled in a

26 _____
 27 ³ The government’s fails to mention Judge Nichols’s extremely thoughtful and well-written initial decision written
 28 in his own voice, which His Honor read from the bench on February 4, 2014. In fact, the government creates the
 impression that it does not exist. Defendants attach it hereto as Exhibit A. Defendants attach the second order he
 signed that day hereto as Exhibit B.

1 manner that compels two federal prosecutors – including the prosecutor who investigated and
 2 filed the matter – to report on serious ethical violations in the office and on the case, (4) that
 3 results in two former United States Attorneys from the Eastern District urging the government to
 4 dismiss the matter on moral and legal grounds, (5) that causes the State Auditor to investigate
 5 and publically disclose the existence of an illegal Cal Fire slush fund in which the lead
 6 Moonlight Fire investigator had a financial interest, and (6) that then resulted in a respected
 7 Superior Court Judge issuing a termination order for Cal Fire’s jointly prosecuted state action,
 8 along with what is one of the largest discovery sanction awards in our nation’s history.

9 Defendants have correctly cited both Supreme Court and Ninth Circuit authority and the
 10 Defendants allegations easily describe what the Ninth Circuit has repeatedly found constitutes a
 11 fraud on the court:”an unconscionable plan or scheme that is designed to improperly influence
 12 the court in its decision.” Pumphrey, 62 F.3d at 1131. That is precisely what has happened
 13 here. Defendants have more than alleged a colorable claim of fraud upon the court.

14 **II. JUDGE NICHOLS’S TERMINATION AND SANCTION DECISIONS ARE**
 15 **RELEVANT TO THIS COURT’S ASSESSMENT OF DEFENDANTS’ ALLEGATIONS**

16 The government argues the Judge Nichols’s findings “add nothing.” (Opp. at 59.) The
 17 government then states, “with the exception of one footnote, the county judge’s order is not
 18 about any alleged misconduct of the United States.” (Id.) It also argues, “[a]s can be seen from
 19 the first page of the order, it was written by Sierra Pacific’s lawyers” (Id. at 60.) Later, the
 20 government provides, “Sierra Pacific’s lawyers even took the liberty of telling the county judge
 21 his inner feelings, writing in a footnote that he was ‘deeply troubled’ that Reynolds denied in a
 22 deposition that he could see a white flag in a photograph after saying ‘to a table of friends’ in the
 23 U.S. Attorney’s Office that he could see a white flag in the photos.” (Id.) With respect to each
 24 of these assertions, the government is mistaken.

25 As a preliminary matter, the government’s references to Superior Court Judge Nichols as
 26 “the county judge” are not only an attempt to denigrate Judge Nichols, they are also false.⁴

27 ⁴ There are no longer “county judges” in the State of California. In 1998, California voters passed a constitutional
 28 amendment that provided for voluntary unification of superior courts and municipal courts in each county into a
 single State Superior trial court system. Following consolidation, the superior court assumed jurisdiction over all

1 (Opp. at 1, 59-61.) Judge Leslie C. Nichols is a Superior Court Judge who served as a judge in
 2 Santa Clara County for twenty-five years. 2014 WL 7972096, at *3. Highly respected, for six
 3 years he has served as a member the Assigned Judges Program, a committee chaired by
 4 California's Chief Justice Tani Cantil-Sakauye, which provides for the temporary assignment of
 5 judges based on factors such as a judge's experience and expertise. Id.

6 Next, though Defendants have not argued that the government is collaterally estopped by
 7 Judge Nichols's orders, the government argues the issue anyway, perhaps in an effort to
 8 neutralize the importance of His Honor's orders suggesting that, regardless of the outcome of Cal
 9 Fire's state appeal, these orders can never have a preclusive effect. This is not necessarily the
 10 case, as it turns on an analysis regarding the connection between both matters, a question which
 11 is beyond the scope of this brief. But this Court can still consider Judge Nichols's decisions in
 12 assessing the government's fraud on the court.

13 Moreover, the government would have this Court believe that Judge Nichols entered only
 14 one order on February 4, 2013. Of course, as with so many other representations the government
 15 makes in its brief, its suggestion is not accurate. Judge Nichols, in fact, signed not only the
 16 proposed order submitted by Defendants, 2014 WL 7972097, but also wrote and signed an order
 17 addressing identical issues, 2014 WL 7972096. With respect to Judge Nichols's decision to also
 18 sign Defendants' proposed order, His Honor included within the order written in his own a
 19 passage explaining the nature of his decision.⁵ Because this passage is so directly on point with
 20 respect to countering the government's baseless assertions, Defendants reproduce it in its
 21 entirety here:

22 matters handled by superior courts and municipal courts, municipal court judges became superior court judges, and
 23 the municipal courts were abolished. Snukal v. Flightways Mfg., Inc., 23 Cal. 4th 754, 763, n.2 (2000) (discussing
 24 Proposition 220). This enactment was just one of four major reforms in the late 1990s and early 2000s aimed at
 25 transferring the decentralized function of trial court operation to the State of California. In 1997, the California state
 26 legislature enacted the Lockyer-Isenberg Trial Court Funding Act, which created a statewide mechanism for trial
 27 court funding. Cal. Gov. Code §§ 77200 et seq. In 2001, the Trial Court Employment Protection and Governance
 28 Act mandated the transfer of all court employees from the counties to the state superior courts. Id. §§ 71600 et seq.
 Finally, the Trial Court Facilities Act of 2002 shifted the responsibility of all trial court facilities from the counties
 to the State of California. Id. §§ 70301 et seq. In sum, there are no "county courthouses" in the State of California,
 no "county court employees," and certainly no "county judges."

⁵ Well before the February 4, 2014, hearing on Defendants' termination order, Judge Nichols issued a minute order directing both sides to submit a proposed order for the court's review and consideration. Defendants did so, as did Cal Fire.

DOWNEY BRAND LLP

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On occasions, appellate courts have questioned court orders that appeared to merely ‘sign off’ on the proposed orders submitted by counsel. Because this Court is doing just that, in part, a few words of explanation are in order. As has been made abundantly clear in previous orders of this Court, and as shown by the circumstances of this case, this is a complex litigation matter. The undersigned has undertaken to personally review each of thousands of pages of written briefs, exhibits, submissions, deposition transcripts and video submissions of the same, motions, objections, and proposed orders. This list is not exhaustive. . . . [T]he Court asked counsel to submit in advance proposed orders which set forth findings and orders. The Court informed counsel that these orders would be subject to critical Trial Court and perhaps Appellate Court review, so they should set forth those matters which could be fully supported by the record. Counsel had the proposed orders before them during oral argument, so there were no surprises. The same is true concerning the proposed orders submitted for these hearings.

This portion of the order speaks in the Court’s own voice. It is not practical for the Court to scour the voluminous record to set forth every finding that would support the orders made here, nor does the law require anything like that degree of specificity. In the Court’s view, however, each party is entitled to submit detailed orders, which, if granted, can be defended on appeal. The good news is also the bad news. Every aspect of review, research, evidence evaluation, writing, and decision-making has been undertaken by the undersigned Trial Judge, and by no one else. The fact that the Court has signed Defendants’ proposed orders with few changes reflects only the reality that those orders are supportable in all respects. This document, which speaks in the Court’s own voice, and the other orders signed and filed today, are to be taken together as orders of the Court. To the extent there are any inconsistencies in those orders, the Court deems them immaterial.

2014 WL 7972096, at *7. Accordingly, the order that the government asserts Judge Nichols signed as the result of trickery, and without any serious reflection, was instead signed because Judge Nichols found it “supportable in all respects” after “personally review[ing] each of thousands of pages of written briefs, exhibits, submissions, deposition transcripts and video submissions of the same, motions, objections, and proposed orders.” *Id.* Judge Nichols also made notations and changes to the proposed order, further evidencing that he did not simply sign the order without thought and reflection as to the truth of the statements and findings contained therein. (See Docket No. 596-26 at 10, 24, 58.)

Judge Nichols actually refutes many of the arguments the government now launches at Defendants and, indirectly, at Judge Nichols. Judge Nichols muses whether Cal Fire thought

1 him a “gullible judge,” and squarely rejects that claim, stating “[i]t takes more time and effort for
 2 the Court to scrutinize Cal Fire’s papers for any persuasive arguments and evidence that may be
 3 found. The Court has undertaken that extra effort. The rights and interests of the parties require
 4 no less.” 2014 WL 7972096, at *5. Later, the Court “provides assurance that none of the
 5 evidence considered, in bulk or in particular, has overborne the Court’s critical faculties.” Id. at
 6 *6. Judge Nichols then states: “[t]he Court’s review of the whole record confirms that
 7 Defendants’ characterization of the misconduct is well established.” Id. at *10. These
 8 statements should more than sufficiently dissipate the government’s baseless and insulting
 9 accusations that Defendants “tricked” and “bamboozled” a respected and experience trial court
 10 judge such as Judge Nichols. (Opp. at 43 n.47.)

11 These statements similarly serve to refute the government’s contention that Defendants
 12 were so bold, and Judge Nichols so gullible and so lacking in contemplation, that they were able
 13 to tell Judge Nichols his own feelings. On this point, the government again chooses to ignore the
 14 portion of the opinion, written in Judge Nichols’s own words, that makes clear his feelings on
 15 the issue. He states that “[t]he sense of disappointment and distress conveyed by the Court is so
 16 palpable, because it recalls no instance in experience over forty seven years as an advocate and
 17 as a judge, in which the conduct of the Attorney General so thoroughly departed from the high
 18 standards it represents, and, in every other instance, has exemplified.” 2014 WL 7972096, at *9.
 19 Judge Nichols went on to find, in his own words, that “[t]he Court finds that Cal Fire’s actions
 20 initiating, maintaining, and prosecuting this action, to the present time, is corrupt and tainted. . . .
 21 Cal Fire’s conduct reeked of bad faith.” 2014 WL 7972096, at *10. Thus, contrary to the
 22 government’s reckless assertion, when Defendants employed the phrase “deeply troubled,” for
 23 the court’s consideration in its draft order, they actually fell far short of the court’s actual
 24 feelings about Cal Fire’s conduct in this case.

25 The court ultimately left that language untouched when it signed Defendants’ proposed
 26 order, located at 2014 WL 7972097, at *10, but it was fairly simple for Defendants to predict
 27 that Judge Nichols would find these words appropriate in light of the egregious nature of the
 28 conduct at the United States Attorney’s Office in preparing Reynolds for his deposition when

1 compared to what Reynolds was allowed to testify to during his deposition. As it turned out,
 2 Defendants' proposed language was especially appropriate given the level of distress Judge
 3 Nichols's expressed in the order that he carefully crafted and read from the bench. Defendants
 4 can only guess that the government chose not to acknowledge the existence of the order Judge
 5 Nichols's wrote in his "own voice" because His Honor's order so thoroughly and exquisitely
 6 refutes each and every one of the accusations the government now lodges against not only
 7 Defendants, but also against Judge Nichols. Defendants attach Judge Nichols's order to this
 8 reply directly for the convenience of this court's review and consideration.

9 **III. WHY THE TRUTH MATTERS**

10 Before responding to the government's discussion of the law and the legal standards that
 11 actually govern this motion or complaint, Defendant must first reply to one of the more shocking
 12 elements of the government's opposition: the government's repeated assertions that, because
 13 Sierra Pacific is obviously responsible for the fire, none of Defendants' allegations about the
 14 white flag or moving the point of origin or their allegations about the numerous lies that emanate
 15 from the investigator's multifaceted effort to cover up their actions have ever mattered. Not only
 16 are such arguments from federal prosecutors' appalling, they are perfectly aligned with the
 17 mentality that began on September 3, 2007. A grave miscarriage of justice occurred here
 18 because the investigators and the prosecutors ignored the importance of a scientific and
 19 systematic investigation and a fair adjudicative process. Winning was the goal, regardless of
 20 whether it led to the actual fire starter. Once that decision was made, evidence did not matter,
 21 the truth did not matter, and the fair administration of justice did not matter. Defendants begin at
 22 this spot because the importance of their allegations, and the wrongful nature of the
 23 government's prosecution and its opposition, cannot be properly understood without some sense
 24 of these critical issues.

25 Throughout its brief, the government contends that neither the investigators nor
 26 prosecutors engaged in acts of deceit. But in various instances, the government seems to tacitly
 27 acknowledge that they did so, by virtue of the fact that following such denials the government's
 28 brief immediately transitions to a "so what?" or "why does it matter?" defense. Thus, for

1 instance, the government contends that with respect to the abandoned point of origin marked
2 with a white flag, and the alleged points of origin E-2 and E-3, that “[a]ll three locations were in
3 Bush and Crismon’s work area.” (Opp. at 36.) Elsewhere, the government claims that,
4 “[p]erhaps the greatest insult to the jury would have been that Sierra Pacific did not even claim
5 the fire started at the white flag. To do so would have ensured a verdict for the United States,
6 since the flag was in Bush and Crismon’s work area and they saw no one else there all day.”
7 (Id.) Elsewhere, the government argues that the events that transpired at Red Rock lookout were
8 ten miles from the origin and therefore had nothing to do with how the fire started. (Id. at 10,
9 85, 101.) Thus, so what if the government’s lead investigator suppressed what was actually
10 happening at Red Rock when the fire started?

11 In essence, the government argues: so what if White, Reynolds, and Welton are all lying
12 under oath about the most important aspects of their investigation? In the government’s view,
13 even the abandoned point of origin which the investigators spent the morning of September 5,
14 2007, documenting (while ignoring altogether what they now claim were their only two points
15 origin) was still where Bush and Crismon were working. What difference does it make if the
16 investigators lied? The answer, of course, is that it makes all the difference because in this
17 tribunal, truth means everything.

18 While this is not something that attorneys working for our Department of Justice are
19 apparently willing to concede in this matter, a willingness to lie repeatedly under oath with a
20 camera rolling and attorneys present, whether about Red Rock, the white flag, the secret sketch,
21 or other matters, reveals a propensity towards dishonesty that would likely be even more
22 adventurous with no attorneys present. These investigators had exclusive access to the scene and
23 conducted their investigation with no one else watching. Their dishonesty, a fact finally
24 acknowledged by the government’s lead expert well after the federal settlement, is potentially
25 (1) a willingness to ignore footprints 200 feet further up the hill; (2) a willingness to destroy
26 evidence of a gasoline spill from a person cutting firewood on the western ridge; (3) a
27 willingness to suppress a delayed-fuse arson device timed to go off at 2:00 p.m. and set by a
28 suspected arsonist working for the USFS and who just moved into the area; (4) a willingness to

1 overlook witness interview information pointing to a different cause; (5) a willingness to cover-
2 up a confession from a third party who started the fire; and (6) a willingness to manufacture a
3 confession from someone they wanted to blame, as happened here.

4 Once an investigation is discovered to have been infused with dishonesty, it becomes
5 more than just lies about critical distances regarding the very foundation of the investigators
6 work, and more than about planting evidence. It is immediately about everything, making the
7 investigation worse than merely useless. Indeed, the Defendants allegations are centered on a
8 profoundly disturbing reality, which has now been corroborated, that this investigation was
9 simply a vehicle to affirmatively create or destroy evidence so as to frame these Defendants,
10 with an illegal slush fund creating the financial motive to do just that.

11 The investigators' deception regarding this central issue is far more meaningful than 10
12 feet, and it certainly does not mean that the investigators were 10 feet from being correct.
13 Indeed the plume of smoke seen in the air attack video demonstrates that the investigators' secret
14 point of origin and their fabricated but official points of origin all existed in an area too far down
15 the hill, roughly 150 to 200 feet from the smoke plume. Given the investigators' mindset, their
16 error is not surprising. As these investigators quickly processed the scene, the entire point of
17 that exercise was to pin blame on chosen defendants, not to find the truth. Thus, because they
18 were not engaged in a scientific exercise they were way off from where the fire actually started.
19 Once the mindset of these investigators is exposed, it is easy to also imagine that their "initial"
20 and secret point of origin may not have even been their first point of origin. Since this matter
21 clearly and convincingly demonstrates a willingness by these investigators to move their point of
22 origin in a failed effort to "strengthen" their case, it also demonstrates the distinct possibility that
23 the investigators suppressed other points of origin as well, that the white-flagged point of origin
24 is not their only other point, but perhaps their second or third, which they abandoned in favor of
25 a point more "connected" to their target defendants. Perhaps the investigators initially placed a
26 completely different point of origin near the area where the plume of smoke is shown in the
27 video, and thought better of it because it implicated the wrong party, a possibility suggested by
28 the testimony of Sierra Pacific employee Mike Mitzel, who saw another flagged area farther up

1 on the ridge a few days after the fire started.

2 That the Moonlight Fire investigators repeatedly demonstrated their willingness to testify
3 falsely regarding key issues going to the core of their conclusions is critical for broader reasons.
4 As reflected in the origin and cause report, the investigators, jointly led by Cal Fire's Joshua
5 White, purported to have "excluded" all other potential causes of the fire based on the alleged
6 absence of evidence of such causes. Thus, for instance, the report states, "there was no evidence
7 of any incendiary devices found in the origin" and "there were no cans, bottles, or other
8 refractive objects [which might focus sunlight and ignite a fire] found in the origin" and "there
9 was no evidence of smoking in the area."

10 All of these conclusions have but a single source of support, the testimony of Cal Fire's
11 Joshua White and the USFS's David Reynolds. The only "evidence" of the absence of evidence,
12 is Joshua White and David Reynolds' word. Thus, the government's suggestion that White and
13 Reynolds should be believed about the absence of such evidence regarding other causes, when
14 they have demonstratively lied under oath about the central aspects of their investigation is
15 absurd. There is a reason why the government's origin and cause expert Larry Dodds spent
16 more than a thousand hours examining the evidence, finally conceding in May of 2013 (after the
17 conclusion of the federal action) that the white flag raises "a red flag," creates a "shadow of
18 deception" over the investigation, and caused him to admit "I will give you that it's more
19 probable than not that there was [sic] some act of deception associated with testimony around the
20 white flag." That was an understatement.

21 Of course, Cal Fire Unit Chief Bernie Paul also admitted that the investigators' testimony
22 denying they knew anything about the white flag was "alone enough to cause you [Paul] to what
23 to toss the whole report out." Chief Paul's after-settlement testimony underscores some central
24 truths. When law enforcement officers are willing to prepare false reports, to testify falsely
25 about their investigation, to tell witnesses what they can and cannot say, to bury and conceal
26 evidence while manufacturing other evidence, it means the origin and cause report is simply a
27 work of fiction. Even worse, because wildfire evidence is fleeting, and because the investigators
28 have sole and exclusive control over the evidence while it exists and can be collected, the chance

1 to conduct a proper origin and cause investigation of the Moonlight Fire was lost forever, thus
2 forever and permanently interfering with the proper administration of justice.

3 Defendants have neither illusions nor pride with respect to what they have uncovered
4 regarding this corrupt investigation. A number of pieces to this puzzle are now in place, but
5 Defendants' realize those in control of the pieces might be congratulating themselves on what
6 Defendants failed to unearth. Indeed, Defendants realize that there are most likely numerous
7 pieces of critical evidence which have been destroyed, or which the investigators have not
8 revealed and, with the passage of time, will never be found. Such is the power of a process
9 where a financially motivated Cal Fire investigator takes charge of a fleeting crime scene and
10 where he and his USFS partner have the ability to close their eyes or the ability to simply never
11 report what they actually found and did.

12 Of course, the situation becomes far worse when our "gatekeepers" of justice, these
13 federal prosecutors, advise their investigators while preparing them for depositions that their
14 hidden photographs of their sole white flag (and all that it entailed) is a "a non-issue." The fact
15 that Reynolds ultimately revealed that the federal prosecutors showed him the photographs of
16 this key marker and told him it was "non-issue" is profoundly disturbing. The fact that these
17 same prosecutors have used their opposition to this complaint *for fraud on the court* to admit
18 that they did so is dumbfounding. This is the story of the Moonlight Fire.

19 IV. THE GOVERNMENT VIOLATED THIS COURT'S ORDER

20 This Court's order asking for "focused" and "limited" briefing was clear and specific. It
21 expressly directed the parties to analyze the acts of government misconduct Defendants alleged
22 while "**assuming the truth of . . . [those] allegations.**" (Docket No. 618 at 2:11-20 (emphasis
23 added).) The government not only violated this Order in its briefing, it openly defied it stating:

24 **We do not assume the truth of what Sierra Pacific says about**
25 **this Court's record**, including the content of our prior briefs or
26 the Court's prior orders or transcripts of depositions alleged to
show perjury.

27 (Opp. at 34:19-20 (emphasis added).)

28 It then proceeded to file three declarations and 202 documents comprising over 3,300

1 pages of deposition excerpts, exhibits, and expert witness reports. It also lodged some unknown
 2 number of original deposition transcripts. The government justifies this disregard of the Order
 3 by suggesting that it is simply relying on judicially noticeable documents or those necessarily
 4 incorporated into the complaint. But, even if the Order mentioned judicially noticeable
 5 documents (which it did not), the government’s own authority and its Request for Judicial Notice
 6 demonstrate that the vast majority of facts it relies upon are not judicially noticeable. First, such
 7 notice was never requested. Second, no documents were “attached” to the defense brief. The
 8 documents referenced in Defendants’ brief are not the same as those now offered by the
 9 government. Most importantly, the facts the government relies upon in the documents it offers
 10 are clearly “subject to reasonable dispute” – indeed, that is the whole reason that the government
 11 wants them considered. Fed. R. Evid. 201(b).

12 Not only did the government refuse to assume the truth of Defendants’ allegations, it
 13 inappropriately proceeded to ask the Court to weigh disputed facts and make credibility
 14 determinations. (Opp. at 38:9-11; 39:4-5; 39 n.45; 41:6-9; 41:17-19; 41:21-42:4; 42:11; 42:13-
 15 45:2; 43 n.47; 45:5-6; 53:14-16; 54:1-2; 54:6-12; 54:18-24; 60:1-25; 63:25-64:12; 64:21-23;
 16 65:4-6; 65:21-23; 65 n.62; 68 n.68; 70:1-5; 72:2-24; 78:8-12; 78:21-79:9; 82:2-84:17, 86:3-11;
 17 89:10-90:13; 93:24-94:13; 97:16-26; 99:12-26; 100:21-101:4; 104:2-105:10; 105:27-15; 107:8-
 18 109:19; 109 n.97; 110:21-112:22; 113:13-20.). Indeed, even the headings on the first page of its
 19 table of contents assert that Defendants’ “accusations” are false. (Opp. at i:26-38.) Rather than
 20 assuming truth and addressing whether the allegations, if true, would amount to fraud on the
 21 court, the government instead submits volumes of extrinsic evidence, attempts to contradict the
 22 allegations and argues from there. This is certainly not what the Court ordered.

23 The government suggests that it is appropriate to consider this bounty of extrinsic
 24 evidence because Federal Rule of Civil Procedure 12(b)(6) allows such consideration where the
 25 evidence is either “subject to judicial notice” or because “the document’s contents are alleged in
 26 or form the basis for the complaint.” (Opp. at 35:1-4.) However, for the vast majority of the
 27 documents and facts the government proffers, neither of these propositions are true.

28 Judicial notice is appropriate where a fact is not subject to reasonable dispute because it

1 is generally known within the trial court’s territorial jurisdiction or can be accurately determined
 2 from a source whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). The 1972
 3 Advisory Committee Notes to Rule 201 state that because the usual method of establishing
 4 adjudicative facts is through the introduction of evidence “[a] high degree of indisputability is
 5 the essential prerequisite” for judicial notice. The Ninth Circuit tends to be strict with its
 6 application of Rule 201(b). Von Grabe v. Sprint PCS, 312 F. Supp. 2d 1285, 1311 (S.D. Cal.
 7 2003). Significantly absent from the government’s Request for Judicial Notice is any request
 8 that the Court judicially notice the 146 deposition excerpts, nineteen expert witness reports or the
 9 three declarations that the government submitted in support of its opposition. (Compare United
 10 States’ Document Index in Support of Opposition to Rule 60(D) Motion, Docket No. 629-1
 11 (listing 202 documents), with United States’ Request for Judicial Notice in Support of
 12 Opposition to Motion for Relief from Judgment (“RJN”), Docket No. 631 (listing approximately
 13 nine documents).) The government’s failure to include these items in its Request suggests that it
 14 knew full well that disputed facts contained within depositions and declarations are not the type
 15 that are appropriately judicially noticed.

16 The government relies on United States v. Richie, 342 F.3d 903, 907-08 (9th Cir. 2003)
 17 for the proposition that documents attached to the complaint or incorporated into the complaint
 18 may be considered on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss without
 19 converting the motion into one for summary judgment. However, Richie makes clear that items
 20 such as affidavits and declarations are not appropriate subjects of judicial notice. Id. at 908. In
 21 Richie, the government asked the court to consider a declaration, eighteen exhibits attached to
 22 the declaration, notice published in newspapers, letters sent by the Drug Enforcement Agency to
 23 the defendants, and an envelope allegedly handwritten by the defendant. Id. at 906. The court
 24 rejected all of this evidence, first noting that declarations are typically not allowed as pleading
 25 exhibits. The court also noted that while it may take judicial notice of the “records and reports of
 26 administrative bodies,” the adjudicative facts in those records must be “indisputable.” Id. The
 27 fact that the DEA is an administrative body does not mean that the handwriting on an envelope
 28 mailed to it fits within the judicial notice exception. Id. Likewise, the fact that the deposition

1 testimony of the Moonlight fire investigators may be contained in a record previously filed with
2 a court does not make it truthful.

3 The government also relies on In re Stac Electronics Securities Litigation, 89 F.3d 1399,
4 1405 (9th Cir. 1996), for the proposition that documents whose contents are alleged in a
5 complaint, and whose authenticity no party questions, may be considered in ruling on a Rule
6 12(b)(6) motion. Id. 1405 n.4. This rule is not as broad as the government suggests. Indeed,
7 Richie notes that “the mere mention of the existence of a document is insufficient to incorporate
8 the contents of the document by reference.” 342 F.3d at 908. And, this rule is also subject to the
9 Rule of Evidence prohibition on taking judicial notice of a fact that is “subject to reasonable
10 dispute.” Fed. R. Evid. 201(b); Lee v. City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir.
11 2001) (indicating that it is error to resolve disputed facts in public records). For this reason, the
12 government’s reliance on Stac Electronics is unavailing. Unlike Stac Electronics, where the
13 court considered a prospectus quoted in the complaint to evaluate the Plaintiffs allegations of
14 omissions in an action for securities fraud, the government is asking this Court to rely on
15 documents not even mentioned in Defendants’ papers to resolve disputed factual questions.
16 Under the plain language of Federal Rule of Evidence 201(b), judicial notice is inappropriate.⁶

17 **V. THE GOVERNMENT MISSTATES THE LEGAL STANDARD**

18 Unfortunately, in the context of assessing the law relating to Rule 60(d)(3), the
19 government’s arguments are a collection pieces and components of cases, taken out of context,
20 that ignore Supreme Court and Ninth Circuit authority regarding fraud on the court in favor of
21 creating a series of false rules and limitations on this Court’s inherent power. Properly
22 understood, the law under Rule 60(d)(3) and this Court’s inherent power to do justice confirm

23 _____
24 ⁶For instance, the government falsely contends that Defendants utilized “parlor tricks” to fool Cal Fire law
25 enforcement officer White and David Reynolds to give testimony that upon close scrutiny is not perjurious at all;
26 and the government cites to portions of White and Reynolds’ testimony to cobble together an argument that a small
27 piece of their testimony might not be false and that Defendants’ characterization of it is incorrect, while ignoring
28 later testimony that proves Defendants’ version of the facts is correct. On these issues and others improperly argued
in the opposition, the government’s version of the facts is not aligned with the truth, as will be demonstrated during
any evidentiary hearing on this matter. To whatever extent this Court would like Defendants to respond to any of
the government’s improper and unsupported factual contentions, they are prepared to do so upon this Court’s
direction.

1 that Defendants⁷ have more than sufficiently alleged conduct that, if true, would easily constitute
 2 a fraud upon the court. The grave matters set forth in these allegations require Court supervised
 3 discovery and/or the appointment of a special master and a subsequent hearing.

4 **A. The Definition of Fraud Upon the Court Arises from This Court’s Inherent Powers**
 5 **to Effectuate Justice.**

6 The Supreme Court and Ninth Circuit cases teach that there is no bright line test for
 7 determining whether conduct constitutes “fraud on the court.” Instead, “fraud on the court
 8 remains a ‘nebulous concept’” In re Levander, 180 F.3d 1114, 1119 (9th. Cir. 1999)
 9 (quoting Broyhill Furniture Indus. Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080, 1085 (Fed.
 10 Cir. 1993).) As noted by the Ninth Circuit,

11 We have struggled to define the conduct that constitutes fraud on the court. Because the power
 12 to vacate for fraud on the court is so great, and so free from procedural limitations, we have held
 13 that not all fraud is fraud on the court[.] The line between mere fraud and fraud on the court has
 14 been difficult to draw. [M]ost attempts to state it seem to us to be merely compilations of words
 15 that do not clarify. Perhaps the principal contribution of all [the] attempts to define ‘fraud on the
 16 court’ and to distinguish it from mere ‘fraud’ is as a reminder that there is a distinction.

17 United States v. Estate of Stonehill, 660 F.3d 415, 444 (9th Cir. 2011) (internal citations and
 18 quotation marks omitted). Indeed, as noted by the Ninth Circuit in Levander, the court’s
 19 “inherent power, which is based on equity, not only springs forth from courts’ traditional power
 20 ‘to manage their own affairs so as to achieve the orderly and expeditious disposition of cases,’
 21 but also ‘furthers the pursuit of achieving complete justice by enabling the court to suspend those
 22 judgments whose enforcement.’” 180 F.3d at 1118 (citations omitted).

23 It is well-settled that “‘fraud upon the court’ should . . . embrace only that species of
 24 fraud which does or attempts to, defile the integrity of the court itself, or is a fraud perpetrated by
 25 officers of the court so that the judicial machinery cannot perform in the usual manner its
 26

27 _____
 28 ⁷ Defendants will generally refer to themselves when referencing their allegations, even when the government
 distorts the record by referring to those same allegations as belonging only to Sierra Pacific.

1 impartial task of adjudging cases that are presented for adjudication.” 7 *Moore’s Federal*
 2 *Practice* ¶ 60.33, at 515 (2d ed. 1978)) (adopted by Ninth Circuit in *Alexander v. Robertson*, 882
 3 F.2d 421, 424 (9th Cir. 1989)). Of course, any assessment of fraud on the court begins with
 4 “deference to the deep-rooted policy in favor of the repose of judgments” and recognition that
 5 “in most instances society is best served by putting an end to litigation after a case has been tried
 6 and judgment entered.” *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244
 7 (1944) (discussing rules of equity, which still apply, and the “term rule,” which was later
 8 abolished by the Federal Rules of Appellate Procedure). However, as also noted by the Supreme
 9 Court:

10 This equity rule, which was firmly established in English practice
 11 long before the foundation of our Republic, the courts have
 12 developed and fashioned to fulfill a universally recognized need
 13 for correcting injustices which, in certain instances, are deemed
 14 sufficiently gross to demand a departure from rigid adherence to
 15 the term rule. Out of deference to the deep rooted policy in favor
 16 of the repose of judgments entered during past terms, courts of
 equity have been cautious in exercising their power over such
 judgments. But where the occasion has demanded, where
 enforcement of the judgment is ‘manifestly unconscionable’, they
 have wielded the power without hesitation.

17 *Hazel-Atlas*, 322 U.S. at 244-45 (internal citations omitted).

18 Defendants’ Moonlight Fire allegations clearly address what would be, once
 19 demonstrated at a hearing, a “manifestly unconscionable” action. As discussed throughout this
 20 reply, the government’s suggestions to the contrary are entirely without merit.

21 **B. The Government’s Effort to Restate Ninth Circuit Authority so as to Render**
 22 **Defendants’ Allegations Irrelevant Is Not Supported by the Actual Law of Fraud on**
 23 **the Court.**

24 Defendants allege that the Moonlight prosecutors engaged in numerous egregious
 25 discovery abuses and intentional nondisclosures. To counter these charges, the government
 26 attempts to construct a wall around such conduct and its prosecutors, and informs the Court it
 27 cannot look at any of it. Repeatedly it argues that discovery violations and nondisclosures, even
 28 if the facts should have been disclosed to the Court itself, are not a fraud upon the court. (See,

1 e.g., Opp. at 18, 47, 54, 78.) Therefore, the government contends, Defendants' allegations in
2 these areas are beyond the reach of this Court's review under Rule 60(d)(3).

3 Unfortunately, the government's brief is a half-inch deep and a mile wide. It cites to 94
4 cases, but that effort merely reflects a process focused on finding a collection of disjointed
5 quotes to string together into an argument, with no real effort at serious legal analysis. In doing
6 so, the government provides little but a case name, and a sentence fragment. This method of
7 briefing is not helpful to the process set up by this Court, and it has required these Defendants to
8 look behind the curtain of the government's numerous cases so as to provide the Court with an
9 actual legal analysis. While laborious and lengthy due to the sheer number of cases the
10 government cited in its exercise, this process by Defendants has demonstrated that the
11 government's assertions regarding what this Court can review in exercising its inherent power in
12 this complaint for fraud on the court are almost entirely without merit. It also demonstrates that
13 Defendants' allegations are more than sufficient to constitute an action for what has been a most
14 egregious fraud on this Court.

15 **1. The Government Improperly Attempts to Draw the Curtains on**
16 **Any and All of Its Discovery and Nondisclosure Abuses.**

17 As further discussed below, in order to create distance between this Court and the
18 discovery and nondisclosure abuses of its prosecutors, the government creates from whole cloth
19 what it calls "binding precedent" from the Supreme Court's decision in United States v.
20 Beggerly, 524 U.S. 38 (1998) (Opp. at 105), flatly stating that "it is settled law that a
21 nondisclosure is not a fraud on the court – even if the facts should have been disclosed to the
22 court itself." (Opp. at 34 (citing Beggerly, 524 U.S. at 47).)⁸ The government creates this
23 "binding precedent" despite the fact that even the most cursory reading of Beggerly reveals that
24 it actually stands for close to the opposite proposition, at least with respect to the allegations in
25 this case, as will be discussed below.

26 _____
27 ⁸ The government then wrongly extends the false rule it manufactures from Beggerly to the issue of whether Brady
28 applies in a civil context. Just after the government announces its Beggerly rule, it finishes a syllogism: "A Brady
violation is a nondisclosure to a criminal defendant of material exculpatory evidence. Therefore, even if Brady
applied (sic) in civil cases, it could not establish a fraud on the court." (Opp. at 34.)

1 In any event, having created this “binding precedent” through its reading of Beggerly and
 2 other cases, the government then undertakes what it must view as an absolutely essential effort –
 3 to do whatever it can to clear away existing case support confirming this Court’s inherent power
 4 to consider discovery violations and failures to disclose when assessing a complaint for fraud
 5 upon the court. On this front, the government goes all out. It begins by ridiculing Judge Donald
 6 Lee’s well-reasoned Derzack case, which holds that “stonewalling, bad faith and lack of candor”
 7 in discovery can be part of the fraud on the court assessment because “the discovery process is
 8 an integral part of the judicial process.” Derzack v. Cnty. of Allegheny, Pa., 173 F.R.D. 400, 416
 9 (W.D. Pa. 1996), aff’d sub nom Derzack v. Cnty. of Alleghany Children & Youth Servs., 118
 10 F.3d 1575 (3d Cir. 1997). The government makes no effort to refute the logic or sensibility of
 11 Derzack’s analysis. Instead, it resorts to ridicule, scoffing at Derzack by stating “the source of
 12 [Defendants’] constructions is an old decision of a district court in Pennsylvania.” (Opp. at 12.)
 13 The government then sagely observes that the Derzack decision is from “a faraway district.” (Id.
 14 at 13.) Perhaps the government would accord more weight to a district court in New Mexico or
 15 Utah? The government then confidently concludes, “whatever the law may be in Pennsylvania,
 16 the lax standard applied in Derzack does not apply here.” (Opp. at 12.)

17 To answer the question posed by the government’s dismissal of Derzack – “what then is
 18 the standard in the Ninth Circuit regarding what a trial court can and cannot consider when
 19 exercising its inherent powers” – the government provides a ready answer: it points to a piece of
 20 language from the opinion in Coleman-Worthington Prods., Inc v. Schuller, 914 F.2d 1496 (9th
 21 Cir. 1990) (unpublished opinion), which states “[a] finding of fraud on the court is justified only
 22 by the most egregious misconduct *directed at the court itself*.” (emphasis added by government).
 23 Not only does the government cite to Coleman immediately after tearing down Derzack, it uses
 24 the same limiting language – “only by the most egregious misconduct *directed at the court itself*”
 25 – repeatedly throughout its brief. (See Opp. at 12, 33, 54, 63, and 71.) It even includes
 26 Coleman’s “directed to the court itself” limitation in its first argument heading, (id. at 11), and it
 27 thereafter asserts that “it is settled law that fraud on the court requires ‘egregious misconduct
 28 *directed to the court itself*.’” (Id. at 33 (quoting Coleman, emphasis by government)).

1 In any event, through using and elevating Coleman in this manner, the government
 2 apparently believes it can take out whole swaths of Defendants' allegations because, according to
 3 the government, not all of them were directed at the court itself. On so many fronts, the
 4 government is mistaken. Most obviously, in its zeal to construct some support for reigning in
 5 this Court's inherent powers on such matters (and shielding its prosecutors from the
 6 consequences of their wrongdoing), the government has raced to pronounce as "settled law"
 7 what is actually an "Unpublished Disposition." See Coleman, 914 F.2d at 1496. Coleman thus
 8 has no precedential value of any kind, settles nothing, and the government violates Circuit Rule
 9 36-3 by citing this pre-2007 case at all,⁹ let alone on four separate occasions for a cornerstone of
 10 its argument.¹⁰ (Opp. at 12, 33, 63, 71.)¹¹

11 Moreover, the government is wildly wrong about what "the law is here." While it is
 12 certainly true that Defendants have referenced the well-reasoned (and, actually, relatively recent)
 13 Derzack case from a district court in the State of Pennsylvania, they did so because Derzack
 14 contains a fraud on the court analysis involving significant discovery abuses and because
 15 Derzack's analysis, contrary to what the government asserts, is in line with both Supreme Court
 16

17 ⁹ Defendants cite and discuss Coleman only because they believe it is necessary to refute the government's
 18 contention that Coleman is Ninth Circuit precedent that has any bearing on this Court's analysis of this case.
 19 Defendants do not intend to suggest that citation to a case in contravention of Circuit Rule 36-3 is permissible.

20 ¹⁰ As it turns out, the government's favorite language from Coleman – "directed to the court itself" – was taken by
 21 Coleman without analysis from the faraway land of the Eighth Circuit, in America's heartland, from the ancient
 22 decision of In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180, 195 (8th Cir.1976),
 23 which, without analysis employed the language in its definition. But then it also turns out that the Eighth Circuit
 24 grafted this "directed to the court itself" construct from the even more faraway state of Connecticut and the
 25 positively archaic decision of United States v. International Telephone & Telegraph Corp., 349 F. Supp. 22, 29 (D.
 26 Conn.1972), aff'd sub nom. Nader v. United States, 410 U.S. 919 (1973).

27 ¹¹ The government also cites In re Napster, Inc. Copyright Litig., 479 F.3d 1078, 1097 (9th Cir. 2007), which in turn
 28 quotes Appling for the proposition that "fraud on the court requires 'an intentional, material misrepresentation
 directly aimed at the court[.]'" (See, e.g., Opp. at 54 n.19, 33 n.36, 54 n.53, 63 n.60, 71 n.72, 81 n.82 (emphasis
 added).) Not surprisingly, the In re Napster court never actually says that to find fraud on the court a party is
 "required" to show an "intentional, material misrepresentation directly aimed at the court." The court only says that
 even if it were to credit the evidence given in that case, "we would not conclude that this evidence establishes an
 intentional, material misrepresentation directly aimed at the court." 479 F.3d at 1097. Moreover, and perhaps more
 importantly, the parties in Napster were arguing the standard under the crime-fraud exception to the attorney-client
 privilege; although one of the theories advanced by appellees related to appellants' purported attempt to defraud the
 court, see id. at 1084, 1096-97, the case does not address a motion to vacate judgment for fraud on the court, see id.
 at 1082, 1090 (stating that the issue to be decided is "whether the district court properly ordered the disclosure of
 privileged attorney-client communications under the crime-fraud exception" and then engaging in that same
 analysis). Thus, Napster does not establish any standards for what this Court should consider with respect to a Rule
 60 motion.

1 and Ninth Circuit authority. Indeed, as discussed infra, the Ninth Circuit’s Pumphrey decision
 2 confirms that intentional non-disclosure and other discovery abuses are well within this Court’s
 3 review of whether Defendants’ allegations, once proven, amount to a fraud upon the court. See
 4 62 F.3d at 1132 (concluding that “the use of misleading, inaccurate, and incomplete responses to
 5 discovery requests, the presentation of fraudulent evidence, and the failure to correct the false
 6 impression created by [an expert’s] testimony” was sufficient to show a scheme to defraud the
 7 court).

8 **2. The Government Repeatedly Misstates Beggerly and Fails to**
 9 **Comprehend That Its Holding Supports Defendants’ Arguments**
 10 **Regarding the Scope of This Court’s Review.**

11 The government argues that Defendants cannot rely on Pumphrey and the “old Derzack
 12 case from Pennsylvania” for the proposition that “discovery violations – or even failure to
 13 disclose – are enough for a fraud upon the court.” (Opp. at 18.) In support, the government cites
 14 to what it calls the “the leading case” of Beggerly, 524 U.S. 38, and then summarizes its facts
 15 and holding with a single sentence, stating that the Supreme Court held that “the United States’
 16 failure to produce documents allegedly showing it did not own contested land, which had been
 17 requested in discovery, would “at best” form the basis for a motion alleging a fraud on the
 18 opposing party, not a fraud on the court which could be challenged years later.” (Opp. at 18
 19 (citing 524 U.S. at 46).) Later, the government takes the holding in Beggerly up a notch, stating
 20 “it is settled law that a nondisclosure is not a fraud on the court – even if the facts should have
 21 been disclosed to the court itself.” (Opp. at 34 (citing 524 U.S. at 47).)

22 Apparently confident in its analysis, the government makes Beggerly one of the pillars of
 23 its opposition. Indeed, it cites only two cases in its opposition with more frequency. On seven
 24 occasions throughout its brief, the government claims that Beggerly stands for the proposition
 25 that non-disclosure cannot serve as a basis for fraud upon the court. So confident is the
 26 government regarding Beggerly’s “binding precedent” on the irrelevancy of non-disclosures that
 27 it showcases Beggerly to support its strong criticism of these Defendants and their “legal lapses,”
 28 musing aloud that “one rarely encounters so many assertions of law that are precluded by
 binding precedent. Beggerly is not even acknowledged.” (Opp. at 105.) The government then

1 bitingly concludes its criticisms by stating, “the most charitable interpretation of all these legal
2 lapses is that Sierra Pacific fundamentally misunderstands the law.” (Id.)

3 Notwithstanding the government’s posturing, the reality is that it completely misreads
4 Beggerly, perhaps not a surprising fact since its legal research on these important cases is a
5 collection of fragments as opposed to any real effort to understand the import of what is being
6 said through a focused analysis of the cases themselves.¹² In fact, the government has no basis
7 whatsoever to claim that Beggerly creates “settled law” regarding how the non-disclosures in this
8 matter should be assessed. It has no basis whatsoever to declare that Beggerly creates “binding
9 precedent” which precludes this Court from considering its prosecutors’ egregious and pervasive
10 misconduct during discovery in this matter. Moreover, aside from getting caught up in a
11 moment of misguided lecturing regarding Defendants’ “legal lapses,” it has no reason
12 whatsoever to intimate that these Defendants intentionally did not “acknowledge its existence.”¹³
13 In any event, because Beggerly is such a large part of the government’s effort to prevent a
14 hearing on this matter, it is deserving of a full explication, as it actually stands for a proposition
15 that is nearly 180 degrees from what the government attempts to foist upon this process.

16 In 1950, Clark Beggerly, purchased two tracts of land on Horn Island off the coast of
17 Mississippi. Beggerly, 524 U.S. at 40. Thereafter, Congress and the government decided to
18 create a federal park on Horn Island, authorizing the Secretary of the Interior to begin buying
19 private tracts of land within the park’s boundary. Rightful owners would of course be entitled to

20 _____
21 ¹² Regarding Beggerly, the government essentially limits its “analysis” of this oft-cited decision to what is found on
22 page 23 of its opposition, where it provides: “Beggerly arose from a settled case. The Supreme Court held that a
23 judgment entered upon the settlement could not be vacated for fraud upon the court, even though the government
24 had failed to produce to the opposing party and the court documents allegedly showing it could not have owned the
land.” Actually, as discussed below, that is not even close to the ruling in Beggerly. Instead, the Supreme Court
held that a judgment entered upon the settlement could not be reversed by an inadvertent failure to disclose based on
an erroneous assumption by the government, despite a diligent and good faith search, that the document did not
exist.

25 ¹³ The government suggests that “Sierra Pacific” tried to avoid the import of this decision, stating, “this leading
26 Supreme Court decision is not acknowledged in Sierra Pacific’s brief.” (Opp. at 18.) But there is no truth to that
27 assertion. Indeed, Beggerly is a relatively easy case to miss, as it employs the phrase “fraud upon the court” just
28 once, uses the old “Rule 60(b)” nomenclature for fraud on the court as opposed to “Rule 60(d)(3)” and cites to
Hazel-Atlas only once, and for the commonly accepted proposition that overturning a case is reserved for “injustices
which . . . are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata.”
Beggerly, 524 U.S. at 46. In fact, Defendants should have used the Beggerly decision and discussed it liberally in
their own briefing; because the government raises it, Defendant do so in reply here.

1 payment. Id. With respect to Beggerly’s claimed ownership of two tracts, an issue arose as to
 2 whether Horn Island had ever been granted to a private landowner. If it had not, Beggerly would
 3 not have title, and the National Park Service could avoid paying anything. Id. Litigation ensued.
 4 The Beggerly opinion states that during discovery in then underlying case, “respondents sought
 5 proof of their title to the land.” Id. at 41. Thereafter, “Government officials searched public land
 6 records and told respondents that they had found nothing proving that any part of Horn Island
 7 had ever been granted to a private landowner.” Id. In 1982, in view of this lack of proof, the
 8 Beggerlys settled their action with the government. In 1991, still unsatisfied with the
 9 government’s earlier response, the respondents went to great lengths to find the documents the
 10 government searched for but failed to produce. As stated in the Supreme Court’s opinion:

11 Even after the settlement in the Adams litigation, however,
 12 respondents continued to search for evidence of a land patent that
 13 supported their claim of title. In 1991 they hired a genealogical
 14 record specialist to conduct research in the National Archives in
 15 Washington. The specialist found materials that, according to her,
 16 showed that on August 1, 1781, Bernardo de Galvez, then the
 17 Governor General of Spanish Louisiana, granted Horn Island to
 Catarina Boudreau. If the land had been granted to a private party
 prior to 1803, title presumably could not have passed to the United
 States as a result of the Louisiana Purchase. Respondents believed
 that the Boudreau grant proved that their claim to the disputed land
 was superior to that of the United States.

18 Armed with this new information, respondents filed a complaint in
 19 the District Court on June 1, 1994. They asked the court to set
 20 aside the 1982 settlement agreement and award them damages of
 “not less than \$14,500 per acre” of the disputed land. The District
 Court concluded that it was without jurisdiction to hear
 respondents’ suit and dismissed the complaint.

21 Id. at 41-42 (internal citations omitted).

22 Thereafter, additional litigation took place regarding issues associated with statutes of
 23 limitation and jurisdiction. Ultimately, the matter made its way to the Fifth Circuit as an
 24 independent action for fraud upon the court. After reviewing the factual and procedural history,
 25 the appellate court vacated the Beggerly settlement as unjust. The matter was then taken up by
 26 the Supreme Court, where – in the context of *this* factual backdrop – it overturned the appellate
 27 court’s decision. Relying upon its earlier decision in Hazel-Atlas, the Supreme Court stated,
 28

1 “[i]ndependent actions must, if Rule 60(b)¹⁴ is to be interpreted as a coherent whole, be reserved
2 for those cases of ‘injustices which, in certain instances, are deemed sufficiently gross to demand
3 a departure.’” Id. at 46. Thereafter, the Supreme Court ruled as follows:

4 The sense of these expressions is that, under the Rule, an
5 independent action should be available only to prevent a grave
6 miscarriage of justice. In this case, it should be obvious that
7 respondents’ allegations do not nearly approach this demanding
8 standard. Respondents allege only that the United States failed to
9 “thoroughly search its records and make full disclosure to the
10 Court” regarding the Boudreau grant. Whether such a claim might
11 succeed under Rule 60(b)(3), we need not now decide; it surely
12 would work no “grave miscarriage of justice,” and perhaps no
13 miscarriage of justice at all, to allow the judgment to stand. We
14 therefore hold that the Court of Appeals erred in concluding that
15 this was a sufficient basis to justify the reopening of the judgment
16 in the Adams litigation.

17 Id. at 47 (internal citations omitted).

18 Thus, as can be seen, the Supreme Court in Beggerly was more focused on the *innocent*
19 *nature* of the government’s non-disclosure under the facts of *that* action, as opposed to the fact
20 that there was a non-disclosure. The Supreme Court in fact highlights that the respondents were
21 merely alleging that the government did not “thoroughly search its records and make a full
22 disclosure.” Id. at 38-39. Moreover, the underlying Fifth Circuit opinion further confirms what
23 is clear in the Supreme Court’s opinion – that the non-disclosure in this matter was unintentional
24 and that it followed a good faith effort by the government to find the document in the first
25 instance. “Government officials reportedly had searched the National Archives during the quiet
26 title suit but had not discovered this document and thereafter erroneously advised the court and
27 the Beggerlys that Horn Island had never been privately disposed.” See Beggerly v. United
28 States, 114 F.3d 484, 486 (5th Cir. 1997), rev’d, 524 U.S. 38. It was only after an “exhaustive
search” that the respondents eventually found the document, and then only after they retained an
archival record specialist. The fact that the Supreme Court unanimously held that an innocent
failure to disclose does not constitute a gross or grave injustice is not only unsurprising, it
“should be obvious,” as the Court noted. There is not a shred of bad faith revealed in the record.

¹⁴ In 1998, when Beggerly was decided, Rule 60 had not yet been amended or renumbered so the Court correctly references Rule 60(b) to refer to an independent action for fraud upon the court.

1 There is not one single allegation that comes close to suggesting there was any intentional
 2 misconduct. There is nothing to suggest that there was an effort to conceal relevant information.
 3 As noted by the Court, the worst that could be said was that the government failed to conduct
 4 what the respondents claimed was a “thorough search.” But even there, the appellate court
 5 decision reveals that the respondents’ sense of what constituted a “thorough search” was
 6 apparently to move heaven and earth.¹⁵

7 In sum there is nothing remarkable about Beggerly. Unfortunately, what is remarkable is
 8 that the government would assert that Beggerly is “binding precedent” for this matter “that a
 9 nondisclosure is not a fraud on the court – even if the fact should have been disclosed to the
 10 court itself.” (Opp. at 34.) Why would they do so? The prosecutors well know that Defendants’
 11 allegations are brimming with charges of intentional misconduct and bad faith nondisclosure
 12 with the intent to frame these Defendants. To nevertheless repeatedly tell this Court that
 13 assessing such conduct is precluded by the “binding precedent” of Beggerly is just wrong.
 14 Moreover, to engage in such clear misstatements while lecturing these Defendants about their
 15 legal lapses is, we guess, something that simply must be endured as we move towards justice.

16 **3. The Government Fails to Recognize that Beggerly Actually**
 17 **Confirms This Court’s Power to Assess Nondisclosures in Its Fraud**
 18 **on the Court Analysis.**

19 Unfortunately, however, the government’s use of Beggerly is even worse than what is
 20 revealed by the discussion above. In addition to the Supreme Court confirming the “obvious”
 21 fact that an innocent failure to produce and disclosure after a thorough search was most
 22 decidedly not a “gross” or “grave” injustice, the Court in Beggerly immediately thereafter made
 23 a point of confirming that bad faith (as, for instance, alleged in this action) might very well
 24 constitute a gross or grave injustice that warrants departure from the doctrine of res judicata. In

25 ¹⁵ As noted in the underlying Fifth Circuit opinion, the effort that the respondents went through to eventually find
 26 this document after the government could not find it was significant. “Their disappointment with the results of the
 27 settlement led the Beggerlys to mount an exhaustive search for a land patent to support their claim of title. They
 28 wrote letters to public officials, made Freedom of Information Act requests, and searched land records in Alabama,
 Mississippi, Louisiana, and Washington, D.C. Finally, in 1991 the Beggerlys hired a genealogical record specialist
 who conducted research in the National Archives and discovered the Boudreau Grant which supported the
 Beggerlys’ claim of title.” 114 F.3 at 486.

1 addressing this aspect of its opinion, the Court said “such a case was Marshall v. Holmes, 141
 2 U.S. 589 (1891), in which the plaintiff alleged that judgment had been taken against her in the
 3 underlying action as a result of a forged document.”¹⁶ Beggerly, 524 U.S. at 47.

4 Thus, in addition to easily finding that an innocent non-disclosure, without bad faith or
 5 intent, would not constitute a grave miscarriage of justice, the Supreme Court felt compelled to
 6 immediately thereafter confirm that the loss of property through a discovered forgery would
 7 likely constitute a grave miscarriage of justice. While the Court in Beggerly does not expressly
 8 state that the bad faith withholding of a document causing a loss of property would necessarily
 9 be a grave miscarriage of justice, that consequence can certainly be inferred from the Court’s
 10 “sense of expression” on the matter (see id. at 47), and one can certainly expect that the Supreme
 11 Court’s opinion would have been a far different affair if there had been any evidence that the
 12 United States knew about the document sought by the Beggerlys, hid the document, and failed to
 13 reveal to the court that it existed. In many ways of course, that type of factual pattern is similar
 14 to the Moonlight Fire action, where, for instance, the fraudulent origin and cause report
 15 engineered the loss of Defendants’ property through a settlement engendered by a constellation
 16 of bad faith conduct; thus, the conduct here is more than similar to a forgery that causes the loss
 17 of property, as in Marshall. And, for instance, that type of factual pattern is similar to burying
 18 the existence of a critical third party’s false claim of a two million dollar bribe just before a

19 ¹⁶ In Beggerly, the Supreme Court then further highlighted its decision in Marshall, identifying the following
 20 language: “According to the averments of the original petition for injunction . . . the judgments in question would
 21 not have been rendered against Mrs. Marshall but for the use in evidence of the letter alleged to be forged. The case
 22 evidently intended to be presented by the petition is one where, without negligence, laches or other fault upon the
 part of petitioner, [respondent] has fraudulently obtained judgments which he seeks, against conscience, to enforce
 by execution.” Beggerly, 524 U.S. at 47.

23 In Marshall, the Court addressed the petitioner’s claim that the respondent had obtained multiple judgments against
 her in Louisiana state court based on a forged document and numerous lies relating to that document. 141 U.S. 589.
 24 The Court found that, through its equitable powers, it could properly grant relief against judgments obtained by
 means of fraud. Id. at 596. Finding that the judgment was fraudulently obtained, the Court reversed the judgment
 of the Louisiana trial court. Id. at 601. The Court reached this conclusion even though the petitioner could not
 25 “plead ignorance of the evidence introduced at trial,” because “relief could be granted by reason of the fact . . . that
 some of the necessary proof establishing the forgery . . . was discovered after the judgments at law were rendered,
 26 and after the legal delays within which new trials could have been obtained, and could not have been discovered
 sooner.” Id. Thus, although Marshall did not discuss fraud on the court per se, it nonetheless used its equitable
 27 power to vacate a judgment obtained by a fraud that the petitioning party had at least some knowledge of at the time,
 and, as now discussed, the Supreme Court in Beggerly’s fraud on the court analysis made a point of referencing its
 28 important analysis.

1 critical motion in limine. Again, the fact that the Supreme Court went through the exercise of
 2 clarifying what its holding does not mean is important, especially when contrasted with the
 3 government's willingness to use, counterfactually, Beggerly as "binding precedent" that
 4 precludes this Court's consideration of numerous allegations of bad faith regarding the
 5 withholding of documents and concealment of information. Beggerly does no such thing.

6 **4. The Government Misstates a Number of Other Cases in Its**
 7 **Misguided and Ill-Fated Effort to Render Defendants' Allegations**
 8 **Irrelevant.**

9 Case by case, the government builds a wall around the conduct of its prosecutors, but its
 10 wall is nothing but a house of cards. The cases cited to this Court in the government's
 11 opposition simply do not stand for the propositions the government advances.

12 *a. England v. Doyle*

13 The government repeatedly cites to England v. Doyle, 281 F.2d 304 (9th Cir. 1960), for
 14 the proposition that "the failure to produce evidence, without more, does not constitute fraud on
 15 the court." (Opp. at 13, 18, 34.) Indeed, in its section entitled "Discovery Violations and
 16 Failures to Disclose Cannot Establish a Fraud on the Court," the government cites to England
 17 and then proclaims, "Sierra Pacific's argument is thus foreclosed." (Opp. at 18.) However, as
 18 with essentially every case decision it employs, the government engages in no effort to examine
 19 just what the England decision actually teaches, nor does it explore the context of its
 20 pronouncement. Defendants therefore will.

21 In England, 281 F.2d 304, a bankruptcy trustee name England initiated an action which
 22 involved, among other things, an argument that Doyle had committed a fraud upon the court.
 23 The story is complicated, but trustee England essentially claimed that a woman named Mansfeldt
 24 delivered a significant sum of cash to her appointed agent Doyle, and that Doyle later damaged a
 25 creditor by giving the money back to Mansfeldt (who fled to Europe and spent it) before England
 26 could be appointed as bankruptcy trustee. The court's involvement arose when Doyle insisted
 27 that his agency relationship be terminated by the court before he would comply with Mansfeldt's
 28 instruction to him that he return her money. After receiving the termination order, but before the
 final adjudication of the bankruptcy and the appointment of the trustee, Doyle complied with

1 Mansfeldt's demands. Mansfeldt then went to Europe and came back broke. Thereafter, the
2 trustee filed an action against Doyle, claiming that he harmed the creditor and defrauded the
3 court.

4 The Ninth Circuit's rejection of this fraud upon the court argument is highly relevant
5 here. First, the Ninth Circuit went through the exercise of explaining the legal limitations of the
6 agent, that the money was not his, and that the trustee had no claim to it at the time of Doyle's ex
7 parte application to be terminated as Mansfeldt's agent. Stymied there, England argued he had
8 rights against Doyle because Doyle failed to reveal to the court during his ex parte application
9 the existence of a "binding and enforceable" stipulation that he would keep Mansfeldt's money
10 or give notice to the creditor that he would not. *Id.* at 308-10. On this front, England claimed
11 that the stipulation arose in the context of a hearing where Mansfeldt's counsel, the creditor's
12 counsel, and Doyle were all present. But the court rejected the existence of any such stipulation,
13 noting, among other things, that this "colloquy" had not even involved Doyle, who "was not
14 called upon during the discussion and made no statement of any kind," *id.* at 307, and, most
15 importantly, that there was also "no evidence that Mansfeldt had granted her attorney authority
16 to act on her behalf." *Id.* at 308. Thus, the Ninth Circuit merely held that these in-court
17 statements "did not amount to a binding stipulation, and therefore [Doyle], if he remembered the
18 statement at all, was not required to disclose it." *Id.* at 310. England also argued that appellee
19 Doyle committed a fraud upon the court by failing to disclose the bankruptcy referee's notice of
20 decision declaring Mansfeldt bankrupt. The court disagreed, but its reason for disagreeing is
21 what's important here. In particular, it found since there was no final bankruptcy adjudication,
22 Doyle "was not bound to disclose" something that "had no effect on the existing rights of the
23 parties." *Id.* at 311. Finally, and importantly, the Ninth Circuit concluded its review on both
24 issues by stating: "Thus, no material fact was concealed from the court; appellee had disclosed
25 all that was necessary to effect a judicial termination of his agency." *Id.*

26 Obviously, therefore, England has nothing to do with the proposition that the government
27 trumpets in its opposition. It is clearly not the case that "failures to disclose cannot establish a
28 fraud on the court" (Opp. at 18), as they most certainly can. Similar to the Supreme Court's

1 holding in Beggerly, the Ninth Circuit’s decision in England demonstrates nondisclosures may
 2 very well constitute a fraud on the court, *unless* they are innocent and/or immaterial. But the
 3 government does *not* use its opposition to proclaim the actual law, that *innocent mistakes cannot*
 4 *establish a fraud on the court*, or that *nonmaterial disclosures don’t create a fraud on the court*.
 5 Instead, the government’s opposition tries to shield this reality from the Court for a reason:
 6 *because* defendants have alleged that the government has engaged in a scheme to hide the truth
 7 from these defendants and the Court through a blizzard of intentional efforts to conceal material
 8 information at the heart of this matter. That is the essence of fraud upon the court, and the
 9 government’s willingness to actually flaunt England so as to suggest a contrary reality suggests
 10 that it might be doing the same with a whole host of cases. It is.

11 ***b. Valerio v. Boise Cascade Corp.***

12 The government also relies on Valerio v. Boise Cascade Corp., 80 F.R.D. 626 (N.D. Cal.
 13 1978). In the government’s own language, it claims that Valerio stands for the proposition that
 14 “a party’s failure to ‘make full disclosure to the Court’ does not constitute a fraud on the court.”
 15 (Opp. at 95 n.87 (emphasis added).) On at least six separate occasions, and with neither context
 16 nor analysis, it uses Valerio’s language: “nondisclosure to the court of facts allegedly pertinent to
 17 the matter before it, will not ordinarily rise to the level of fraud upon the court.” (See Opp. at 15,
 18 54, 92, 101 nn. 37, 87.) Once again, because Valerio comprises such a large part of the
 19 government’s argument, Defendants have no choice but to discuss what Valerio actually holds.

20 In Valerio, participants in a settlement resolving a class action filed a complaint seeking
 21 to vacate the judgment approving the settlement. They did so based on various claims, including
 22 that the private attorneys and Attorney General of California committed a fraud on the court. 80
 23 F.R.D. at 630 (1978). Ultimately, the district court found that no fraud on the court had been
 24 committed. The district court reasoned that the class action participants had not alleged any
 25 actual fraud on the court, but instead had merely alleged that their attorneys had “exercised poor
 26 judgment in recommending approval of the settlement.” 80 F.R.D. at 642. On appeal, the Ninth
 27 Circuit adopted the opinion of the district court. See Valerio v. Boise Cascade Corp., 645 F.2d
 28 699, 700 (9th Cir. 1981).

1 In evaluating whether the allegations against the attorneys were sufficient to support a
 2 finding of fraud on the court, the district court noted that the “precise parameters” of fraud on the
 3 court “remain undefined.” Valerio, 80 F.R.D at 641. The court then stated that based “largely
 4 upon the leading case of Hazel-Atlas . . . Professor Moore has suggested” that the definition of
 5 fraud on the court “embrace only that special species of fraud which does or attempts to defile
 6 the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can
 7 not perform in the usual manner its impartial task of adjudging cases.” Id. (quoting 7 *Moore’s*
 8 *Federal Practice* ¶ 60.33 at 512-13 (2d ed. 1970)). The court further clarified that “[g]enerally
 9 speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury,
 10 or the fabrication of evidence by a party in which an attorney is implicated, will constitute fraud
 11 on the court” and that “[l]ess egregious misconduct, such as nondisclosure to the court of facts
 12 allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the
 13 court.” Id. (quoting Int’l Tel. & Tel., 349 F. Supp. 22).

14 Based on this definition of fraud on the court, the Valerio court went on to find that the
 15 allegations of the class action participants did not rise to the level of fraud on the court.
 16 Importantly, however, the court noted that “the allegation that the class attorneys misrepresented
 17 Boise Cascade’s financial condition, if proven, would establish that fraud on the court had been
 18 committed,” as “deliberate misrepresentations of Boise Cascade’s financial condition would
 19 constitute an ‘unconscionable plan or scheme which is designed to improperly influence the
 20 court in its decision.” Id. at 642 (quoting England, 281 F.2d at 309). While the class action
 21 plaintiffs did eventually allege that the attorneys misrepresented Boise’s financial condition (in
 22 response to a motion to dismiss and not in the initial complaint regarding fraud on the court), the
 23 court found that the plaintiffs did not actually prove that there had been any misrepresentation
 24 regarding the financials. Id. at 643, 645.

25 In sum, Valerio’s holding is essentially meaningless with respect to the proposition posed
 26 by the government here. Indeed, Valerio actually confirms that deliberate misrepresentations to
 27 the Court do constitute a fraud on the court. See 80 F.R.D. at 641 (“Deliberate
 28 misrepresentations [to the court] of Boise Cascade’s financial condition would constitute an

1 “unconscionable plan or scheme which is designed to improperly influence the court in its
 2 decision.”) And, of course, “misrepresentations can be affirmative or based on omission.”
 3 Crowe v. County of San Diego, 608 F.3d 406, 435 (9th Cir. 2010). Additionally, despite relying
 4 on Valerio extensively throughout its brief, the government fails to acknowledge that Valerio
 5 adopts Professor Moore’s definition of fraud on the court, a definition that the government fails
 6 to enunciate a single time in its brief, despite the fact that the definition has been recognized by
 7 the Ninth Circuit in numerous opinions. See, e.g., Stonehill, 660 F.3d at 444; In re
 8 Intermagnetics, 926 F.2d at 916; Alexander, 882 F.2d at 424.

9 *c. Phoceene v. Sous-Marine*

10 In another effort to restrain this court’s ability to review the breadth of the government’s
 11 misconduct, the government cites Phoceene Sous-Marine, 682 F.2d 802, England, 281 F.2d 304,
 12 and Valerio, 645 F.2d 699, for a proposition not supported by Ninth Circuit authority. (See Opp.
 13 at 11, 13.) On page 11, the government writes: “As defined by the Ninth Circuit, a ‘fraud on the
 14 court’ is ‘an unconscionable plan or scheme which is designed to improperly influence the court’
 15 in its ‘ultimate decision on the merits.’” (Opp. at 11 (citing Phoceene, 682 F.2d 805) (internal
 16 citation omitted).) To create this additional limitation on what this court can review in the
 17 context of using its inherent powers, the government engages in a subtle deception. First, it
 18 declines to inform this Court that the entirety of the Ninth Circuit’s discussion regarding any
 19 standard for fraud on the court in that case is as follows:

20 Lecocq’s conduct clearly does not constitute a “fraud on the court”
 21 as that term has previously been defined in this Circuit. A “fraud
 22 on the court” is “an unconscionable plan or scheme which is
 23 designed to improperly influence the court in its decision.”
 24 Lecocq’s deception was clearly not an attempt to influence the
 25 court’s ultimate decision on the merits. Rather, it was apparently
 26 designed solely to delay trial of the matter. Accordingly, we
 27 conclude that Lecocq’s conduct does not constitute a “fraud on the
 28 court.”

25 Phoceene, 682 F.2d at 805 (quoting England, 281 F.2d at 309). Thus, the government has
 26 excised the essence of the Ninth Circuit’s language so as to arrive at and deliver the “ultimate
 27 decision” piece to their construction effort. Once completed, it peppers its brief with the results
 28

1 of its handiwork. (Opp. at 11, 41, 53, 77, 78.)

2 Next, and perhaps more importantly, the government avoids any analysis. Conducting an
3 analysis, however, reveals that the Ninth Circuit’s actual holding – or even the government’s
4 crafted version of its holding – cannot be read for the narrow proposition the government needs
5 to advance. In Phoceene, one of the defendants, Lecocq, travelled to France nine days prior to
6 the start of trial; while there, he had his sister, a nurse, send a telegram to the court stating that
7 Lecocq was under significant stress and needed to rest for forty-five days. 682 F.2d at 804. His
8 sister sent the telegram in the name of a physician affiliated with the hospital where his sister
9 worked, and by whom Lecocq had not yet been seen or examined. Id. Subsequently, Lecocq
10 repeatedly lied to the court about the origins of the telegram and whether he had been seen by
11 the doctor prior to the time it was sent. Id. Ultimately, “[t]he District Court found that in falsely
12 sending the . . . telegram, Lecocq had willfully deceived the court” and entered default judgment
13 against the defendants. Id. at 805. While the Ninth Circuit agreed that Phoceene’s conduct was
14 deceitful, it overturned the district court, holding that default judgment as a sanction was not
15 appropriate for conduct unrelated to the merits of the case. Id. at 807.

16 What the Phoceene court precisely meant by “ultimate decision” is somewhat unclear,
17 but when considered in its factual context – something the government fails to provide for any of
18 the cases that it proclaims represent the settled law of the Ninth Circuit – it is clear that Phoceene
19 ultimately required no more than the Stonehill court did nearly thirty years later. That is, the
20 fraud on the court must relate to issues that are not merely “tangential” to the “fundamental
21 question” of the case. Stonehill, 660 F.3d at 452. As the Ninth Circuit further explained in
22 Phoceene when discussing its inherent powers to enter a default judgment as a sanction, the
23 court stated that “Lecocq’s deception related not to the merits of the controversy but rather to a
24 peripheral matter: whether Lecocq was in fact too ill to attend trial on October 10.” 682 F.2d at
25 806. That the government attributes more meaning to this phrase than it is entitled serves as
26 simply another, albeit subtle, example of the deception that emanates from every page of its
27 brief. And the government’s willingness to do so when Defendants’ allegations here are all
28 focused on anything but a peripheral matter – whether the government and its prosecutors

1 assisted Cal Fire in framing these Defendants by fabricating their claimed origin, hiding key
 2 photos and diagrams, allowing and/or encouraging witnesses to lie under oath, and burying
 3 evidence of alternative causes – makes its misuse of Phoceene even worse.

4 **5. In Its Use of Selective Quotes From England, Valerio, and**
 5 **Phoceene, the Government Fails to Report Settled Law On the**
 6 **Actual Parameters for Assessing Fraud On the Court.**

7 In addition to misreading England, Valerio, and Phoceene, the government also ignores
 8 what the Ninth Circuit actually expects of trial courts when assessing fraud on the court. While
 9 Defendants do not disagree that the Ninth Circuit continues to cite to Phoceene and England for
 10 the proposition that fraud on the court may include conduct amounting to “an unconscionable
 11 plan or scheme which is designed to improperly influence the court in its decision,” the
 12 government avoids entirely the Ninth Circuit’s additional and critical clarifications regarding
 13 what actually might constitute fraud on the court.

14 Contrary to what the government would like this Court to believe, the Ninth Circuit’s law
 15 regarding fraud on the court did not freeze in the year 1960, when it decided England, or even in
 16 1981 when it affirmed Valerio. The government is silent about the fact that its favored language
 17 predates the Ninth Circuit’s adoption in 1989 of Professor Moore’s definition of fraud on the
 18 court in Alexander v. Robertson. 882 F.2d 421; see also In re Intermagnetics America, Inc., 926
 19 F.2d 912, 916 (9th Cir. 1991). Thus, in Intermagnetics, the Ninth Circuit stated:

20 This Court recently approved the following definition of fraud
 21 upon the court proposed by Professor Moore: “Fraud upon the
 22 court” should, we believe, embrace only that species of fraud
 23 which does or attempts to, defile the court itself, or is a fraud
 24 perpetrated by officers of the court so that the judicial machinery
 25 can not perform in the usual manner its impartial task of adjudging
 26 cases that are presented for adjudication.

27 926 F.2d at 916 (citing 7, Moore’s Federal Practice ¶ 60.33, at 515 (2d ed. 1978)). Moreover,
 28 since 1982, when Phoceene was decided, the Ninth Circuit has decided Levander, Pumphrey,
Stonehill, and a bevy of other cases making clear that there is no one finite, precise definition of
 fraud on the court. The government does not acknowledge this substantial clarification of what

1 constitutes fraud on the court in the Ninth Circuit.¹⁷ Regardless, this is the law as it applies to
2 this complaint.

3 **C. The Ninth Circuit Encourages and Expects Trial Courts to Use Their Inherent**
4 **Power to Review the Full Record Of Conduct Exhibited by a Party Accused of**
5 **Fraud on the Court.**

6 The Ninth Circuit has been clear: discovery nondisclosure and misrepresentations are in
7 fact relevant to the inquiry of whether a fraud on the court has been committed.

8 **1. Pumphrey v. K.W. Thomson Tool Company**

9 As discussed in Defendant's Supplemental Brief, Pumphrey, 62 F.3d 1128, involved a
10 wrongful death action wherein the defendant gun manufacturer participated in a scheme to
11 defraud the court by withholding evidence. The wrongful death issue in Pumphrey focused on
12 whether a gun would fire upon hitting the ground even though its safety was on. Id. at 1130.
13 Gun manufacturer Thompson had conducted some videotaped "drop tests" to assess and
14 document this safety issue. Id. Thompson's general counsel and vice president Edward Bartlett
15 was present, as was Thompson general manager, French. Id. In one video ("the trial video"), the
16 gun did not fire when dropped with the safety on; in another video ("the original video") the gun
17 did fire. Id. at 1131. Thereafter, the defendant's general counsel took steps to ensure that
18 plaintiffs in one wrongful death matter never discovered the condemning original video during
19 litigation. Id. at 1130.

20 The government's opposition dismisses Pumphrey as having no bearing on whether out
21 of court conduct should be considered by this court. It states: "Contrary to Sierra Pacific's
22 argument, Pumphrey was not about discovery violations or failures to disclose, but affirmative
23 "deception" of the jury "at trial." (Opp. at 18 (emphasis added).) Not true.

24 In Pumphrey, the Ninth Circuit's fraud on the court analysis *begins* with its focused
25 assessment on Thompson's (the gun manufacturer) failure to properly respond to a request for
26 production that should have included the original video and that its general counsel then

27 _____
28 ¹⁷ In fact, as discussed herein, Professor Moore's definition, adopted by the Ninth Circuit and used in numerous
fraud on the court cases, appears nowhere in the government's brief. There is a reason for its conspicuous absence.

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1 “mischaracterized the drop-tests” when answering interrogatories.¹⁸ After thoroughly
 2 discussing these discovery abuses, the Ninth Circuit noted in a single sentence Bartlett’s
 3 willingness to allow general manager French to testify falsely during the underlying trial.
 4 Thereafter, the Ninth Circuit made a point of returning to additional discovery abuses, noting that
 5 Bartlett was present during depositions at two additional wrongful death cases, where he sat on
 6 his hands while his general manager (French) lied again on these issues.¹⁹ After conducting this
 7 broad analysis, a single sentence of which pertained to trial, the Ninth Circuit laid out the
 8 fraudulent nature of Thompson and Bartlett’s conduct, focusing on the *entirety* of the scheme,

9 ¹⁸ The Ninth Circuit’s discussions regarding the critical relevance of these issues to its analysis are not easily
 10 missed, as they comprise the first two paragraphs of the Court’s opinion immediately following its introduction of
 11 its fraud upon the court analysis. First, it defines fraud upon the court as including “both attempts to subvert the
 12 integrity of the court and fraud by an officer of the court. Furthermore, it ‘must involve an unconscionable scheme
 13 which is designed to improperly influence the court in its decision.’” Pumphrey, 62 F.3d at 1131 (citations
 14 omitted). Next, it agrees with the “district court’s conclusion that Thompson, through Bartlett, perpetrated a fraud
 15 upon the court.” The court then launched into its reasoning, beginning as follows:

13 Prior to filming the videos, Thompson answered a request for production by
 14 stating that “defendant is not presently aware of any records relating to the
 15 testing of the Thompson Contender handguns. If records are later discovered,
 16 they will be made available pursuant to this request.” Contrary to that
 17 statement, however, the original video was never disclosed to Sparks at any
 18 time, despite the fact that Bartlett participated in filming the video, had
 19 possession of the video, and drafted later discovery responses.

17 Id. And immediately thereafter the Ninth Circuit considers *additional* discovery abuses, noting:

18 Barely one month after the drop-tests were conducted, Bartlett drafted an
 19 answer to Sparks’ interrogatories which mischaracterized the drop-tests. The
 20 answer admitted that during one test the Contender fired when dropped, but
 21 misstated that the drop was from five feet rather than three feet. The answer
 22 further misstated that both safeties were intentionally disengaged, when in
 23 fact the internal safety was unintentionally disengaged. The answer also
 24 misstated that there was no record of the test.

21 Id. at 1132.

22 ¹⁹ Again, it is difficult to understand why the government ignores this analysis. (Indeed, the government directly
 23 contradicts it, writing, “Pumphrey was not about discovery violations or failures to disclose, but affirmative
 24 deception of the jury “at trial” on the central case. (Opp. at 18 (citing Pumphrey, 62 F.3d at 1132).) In actuality, the
 25 Ninth Circuit continues to hammer on the importance of discovery abuses to the scheme it is reviewing. It writes:

24 Bartlett attended the trial at which French testified several times, without
 25 qualification, that he had never seen the Contender fire when dropped during
 26 tests. Additionally, French was deposed in two cases subsequent to *Sparks*
 27 involving the same gun. Bartlett was present at both depositions. In one case,
 28 French stated that he had never been able to engage the internal safety,
 disengage the external safety, and then drop the gun and have it fire. In
 another case, French stated that he had been able to jar the safety out of place
 when dropping the gun but had not been able to make it fire.

28 Pumphrey, 62 F.3d at 1132.

1 stating:

2 These undisputed facts reveal that Thompson, through Bartlett,
3 engaged in a scheme to defraud the court, and Sparks, through the
4 use of misleading, inaccurate, and incomplete responses to
5 discovery requests, the presentation of fraudulent evidence, and
6 the failure to correct the false impression created by French's
7 testimony. The end result of the scheme was to undermine the
8 judicial process, which amounts to fraud upon the court.

9 Pumphrey, 62 F.3d at 1132 (citing Hazel-Atlas, 322 U.S. at 245-46, 250 (1944) (deliberately
10 planned scheme to present fraudulent evidence constitutes fraud upon the court)).²⁰

11 While at this stage of the decision it is perfectly clear that discovery abuses are well
12 within the parameters of this court's power to assess fraud on the court, the Ninth Circuit goes on
13 to make the point even more clear by expressly referencing the importance our discovery rules
14 play in protecting the administration of justice, stating:

15 As the district court noted, Bartlett, as a licensed attorney, is aware
16 of the necessity for compliance with the rules of discovery and the
17 rules of professional responsibility. He is aware of the damage
18 failure to abide by these rules can wreck in the specific case at
19 hand and the larger framework of confidence in the adversary trial
20 system.

21 Id. at 1113.

22 The government has no answer to Pumphrey's careful analysis and decision, so it
23 dismisses it.²¹ In fact, without regard to the language in Pumphrey, the government concludes,

24 _____
25 ²⁰ Having concluded that there was a fraud upon the court under these facts – the failure to produce, the false
26 interrogatory, the false trial testimony, and the subsequent willingness of Bartlett to allow his manager to testify
27 falsely in subsequent deposition – the Ninth Circuit then addressed Thompson's argument "that there was no fraud
28 on the court because Bartlett believed the original video was taped over, and in 1982, no one at Thompson thought
that a videotape was a "document" or "record." Pumphrey, 62 F.3d at 1132. The Ninth Circuit responded, "even
taking the above as true, we nevertheless conclude that there is ample evidence of fraud on the court." Id. The Ninth
Circuit then recounted two specific instances of trial deception and Bartlett's provision of false answers in
subsequent depositions and "a misleading answer to the interrogatory regarding a drop-test." Id.

²¹ At one point, however, the government appears to state that Pumphrey is not sound law because it conflicts with
the Supreme Court's decision in Beggerly. In particular, the government argues the point as follows:

25 Relying on Pumphrey v. K.W. Thompson Tool Co. and the old Derzack case
26 from western Pennsylvania, the defendants assert that discovery violations – or
27 even a "failure to disclose" – are enough for a fraud on the court. That
28 argument cannot be reconciled with Supreme Court's subsequent decision in
Beggerly, holding that the United States' failure to produce documents allegedly
showing it did not own contested land, which had been requested in discovery,
would "at best" be the basis for a motion alleging fraud on the opposing party,

1 “Pumphrey was not about discovery violations or failures to disclose.” (Opp. at 18.) It does so
 2 despite the fact that a large portion of the court’s opinion in Pumphrey is devoted to describing
 3 the discovery and disclosure violations in the case, not all of which has even been recited here.
 4 Regardless of the governments’ opposition, Pumphrey disposes of page after page of arguments
 5 in the government’s opposition, where the government employs a patchwork of untethered
 6 sentence fragments to pitch false rules or tests, and where, ironically, the government lectures
 7 Defendants for their misunderstanding of the Pumphrey analysis. (See Opp. at 105.)

8 **2. Dixon v. C.I.R.**

9 Pumphrey is not the only decision where a failure to abide by discovery can have a
 10 significant impact on a court’s assessment of whether there has been a fraud on the court. In
 11 Dixon v. C.I.R., 316 F.3d 1041(9th Cir. 2003), the Ninth Circuit addressed an appeal by a group
 12 of taxpayers who alleged fraud on the court.²² These 1300 taxpayers had participated in a
 13 complex investment scheme which was sold as a legitimate investment that would allow the
 14 taxpayers to claim interest deductions on their individual tax returns. Id. at 1042. The IRS
 15 ultimately disagreed, finding the investments a sham and issuing notices of deficiency. Id. The
 16 investment advisor (Kersting) brought an action in Tax Court. Because of the number of
 17 taxpayers affected, the majority of the taxpayers entered into an agreement with the IRS.
 18 Therein, they agreed “to be bound by the decision of a test case trial involving representative
 19 taxpayers.” Id. at 1043. Two of the test case representatives were chosen by the taxpayers’
 20 counsel, and five were chosen by the IRS. Id. Thereafter the test case proceeded to trial before
 21 the Tax Court, and the judge concluded that the taxpayers would all be liable for deficiencies.

22 not a fraud on the court which could be challenged years later.

23
 24 (Opp. at 18) (citations omitted.) But, as discussed above, the government misstates the holding in Beggerly, and
 25 there is nothing about that holding – finding that innocent nondisclosures after an exhaustive search – which even
 remotely contradicts the holdings in either Pumphrey or Derzack, which hold that bad faith discovery tactics are
 clearly relevant for assessing fraud on the court.

26 ²² Although the government misread Pumphrey, it cited it on a number of occasions. That cannot be said about the
 27 Ninth Circuit’s critical decision in Dixon as it relates to this Court’s analysis. Although Defendants cited Dixon in
 their Supplemental Brief on seven occasions (Def. Supp. Brief at 6, 22, 60, 89, 104, 105, 135), the government fails
 28 to address it a single time in its opposition. That glaring omission is unfortunate, as Dixon is relevant to this motion
 for fraud on the court for two important reasons, and certainly warranted discussion from both sides.

1 Thompson, one of the taxpayers, gave the government critical testimony, stating that “he
2 believed that instruments creating the claimed interest would not be enforced,” as did Cravens,
3 another one of the test case representatives, “because his payment of capital gains taxes upon
4 exiting the Kersting investment program made him a particularly good representative.” Id. at
5 1044.

6 In reviewing the taxpayers’ complaint for fraud upon the court after the Tax Court’s
7 denial of it, the Ninth Circuit noted, “as it turns out, that which the Tax Court and other
8 participants believed to be a legitimate, representative proceeding, binding on the test case
9 petitioners and all those waiting in the wings, was anything but.” Id. Specifically, and among
10 other things, both Thompson and Craven had in fact entered into secret settlements with two IRS
11 attorneys on the action – McWade and Sims.²³ Id. After the IRS secured their victory on the test
12 case, and therefore against the remaining taxpayers by way of their agreement with them, the
13 IRS’s case began to fall apart when Thompson and Cravens began to pressure McWade and
14 Sims for the benefit of their secret agreements – special treatment more favorable than the class.
15 Id. at 1045. The Ninth Circuit writes, “This is when the McWade-Sims house of cards began to
16

17 ²³ With respect to these secret settlements, the Ninth Circuit noted that:

18 A condition of their settlements required Thompson and Cravens to remain test
19 case petitioners. McWade also convinced Cravens, who mistakenly believed his
20 liability was finalized by the settlement, to proceed *pro se*. With respect to
21 Thompson, McWade agreed to have Thompson’s tax deficiencies reduced in
22 proportion to his attorney’s fees, which exceeded \$60,000. At no point did
23 McWade or Sims reveal to the Tax Court or to any other taxpayer representative
24 that two of the test case petitioners’ cases had been settled, much less reveal the
25 conditions imposed on them. The deception continued with a cover-up, which
26 was carefully designed to prevent the Tax Court and other taxpayers from
27 learning of the secret settlement agreements. At Kersting’s deposition, which
28 McWade attended, Kersting’s lawyer objected to the presence of Thompson’s
attorney because of rumors that Thompson was attempting to settle. Knowing
that Thompson had, in fact, already settled, McWade remained silent. McWade
then misled the Tax Court by failing to disclose the settlement when he moved
to set aside the Thompson piggyback agreement, a pre-trial motion necessary to
ensure Thompson’s status as a test case petitioner. Deceptive silence matured
into overt misconduct when, during the course of the test case trial, it became
apparent that Thompson was going to testify about his settlement. McWade
quickly shifted his questions to unrelated matters.

Dixon, 316 F.3d at 1044.

1 collapse.” Id. Thereafter, senior IRS officers took over the case, found that McWade and Sims
2 had engaged in misconduct, and asked the Tax Court to determine the extent of the damage. Id.
3 When the Tax Court refused and proceeded to enforce the terms of the Thompson and Craven
4 settlements, the taxpayers appealed, and the Ninth Circuit remanded with instructions to hold an
5 evidentiary hearing. Id. Thereafter, incredibly, the Tax Court concluded that what had occurred
6 was harmless error, and so the taxpayers appealed the case again to the Ninth Circuit. Id. at
7 1046.

8 In its review of this conduct, the Ninth Circuit in Dixon noted that the IRS failed to
9 disclose their secret agreements to the court or the taxpayers. The Ninth Circuit also made a
10 point of highlighting and considering the deposition conduct of McWade and Sims, wherein they
11 failed to reveal that Thompson had in fact settled and wherein McWade remained silent about
12 Thompson’s deal when opposing counsel raised concerns about whether Thompson was
13 considering a deal. Id. at 1044. The Ninth Circuit also focused on the fact that McWade “misled
14 the Tax Court” during a pre-trial motion when he failed to disclose the settlement “when he
15 moved to set aside the Thompson piggyback agreement, a pre-trial motion necessary to ensure
16 Thompson’s status as a test case petitioner.” Id. It is of course Defendants’ allegation that the
17 government in this matter also misled the court by filing the primary fraudulent document in this
18 matter – the Moonlight Fire origin and cause report – with the court, by relying on and filing
19 White’s false declarations with the court, by allowing the matter to go forward even though its
20 investigators were lying under oath, and by filing, as discussed infra, a Rule 403 motion to
21 exclude argument that Ryan Bauer started the fire without complying with its duty of candor to
22 the Court and to these Defendants about its possession of critical evidence tending to prove just
23 that.

24 Thus, in finding a fraud on the court, the Ninth Circuit in Dixon assessed the IRS
25 lawyers’ decision to cover up critical evidence during depositions, during pre-trial motions, and
26 during the trial. Due to this conduct, and more, the Ninth Circuit found: “Here, the factual
27 findings of the Tax Court support the conclusion that a fraud, plainly designed to corrupt the
28 legitimacy of the truth-seeking process, was perpetrated on the trial court by McWade and

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1 Sims.” Id. at 1046. Moreover, some of the Ninth Circuit’s concluding language in Dixon can be
 2 seen as prescient in terms of its application to this matter. In discussing the fraud upon the court
 3 in Dixon, the Ninth Circuit said,

4 The Tax Court believed it was hearing a legitimate adversarial
 5 dispute when, in fact, the proceeding was a charade fraught with
 6 concealed motives, hidden payments, and false testimony. What
 did occur was clearly designed to defile the court itself, and there
 is no question that it was carried out by an officer of the court.

7 Id.

8 That is also what happened here. While the trial court was led to believe by federal
 9 prosecutors that it was hearing a legitimate adversarial dispute (an understandable assumption in
 10 light of the assumption made about federal prosecutors, as noted by the Supreme Court in Berger
 11 v. United States, 295 U.S. 78, 88 (1935)), the court was in reality presiding over a charade, as the
 12 Moonlight Fire matter was a case fraught with concealed motives and hidden payments
 13 (WiFITER), false testimony, and so many other acts of misconduct that the only judge who has
 14 assessed the evidence in this jointly investigated and prosecuted matter found that the
 15 misconduct was too extensive to fully recount. Had these prosecutors done their jobs and,
 16 among other things, prevented perjury, exposed the fraud in the origin and cause report, revealed
 17 the cover-up at Red Rock, allowed their investigators to supplement their reports, investigated
 18 and disclosed the existence of WiFITER and its impact on the findings in this jointly investigated
 19 matter, the Court in this matter would not have signed any settlement and would have dismissed
 20 the case instead.

21 **D. Under the Ninth Circuit’s decisions in *Dixon* and *Pumphrey*, Prejudice to**
 22 **Defendants Is Not an Element of this Court’s Assessment of these Allegations.**

23 While not addressed as such in the government’s opposition, the Ninth Circuit’s
 24 decisions in Pumphrey and Dixon are highly relevant to this Court’s assessment of the threshold
 25 issues presented by Defendants’ Supplemental Brief. In particular, the government spends a
 26 significant number of pages attempting to mislead this Court into thinking that prejudice is an
 27 important element of its decision here. The government’s “no-prejudice” arguments take on
 28

1 several forms, and it weaves each of them throughout dozens of pages of its opposition. For
 2 instance, the government argues that (1) Defendants knew most of what they now complain
 3 about; (2) Defendants were not diligent in uncovering the alleged fraud; (3) Defendants decided
 4 to settle despite what they knew; and (4) there has not been a grave miscarriage of justice
 5 because “there is no evidence that anyone but the defendants caused this fire that destroyed so
 6 much of the Plumas and Lassen National Forests. There will never be such evidence.”²⁴ With
 7 respect to each of these issues, the government argues again and again that these deficiencies
 8 should result in the Court dismissing Defendants’ allegations. The government is wrong.

9 The Ninth Circuit’s decision in Pumphrey strongly confirms that prejudice is irrelevant in
 10 a fraud on the court analysis. In Pumphrey, similar to what the government attempts to do here,
 11 Thompson argued that “interrogatory answers regarding the drop-test contained only immaterial
 12 and technical inaccuracies, and thus are insufficient to support a finding of fraud.” 62 F.3d at
 13 1133. And, similar to what the government attempts to do here, Thompson also argued “that
 14 Sparks’ failure to uncover the alleged fraud, after receiving Thompson’s interrogatory answers
 15 admitting the gun fired during a drop-test, should bar the action.” Id. at 1133.

16 The Ninth Circuit rejected these arguments, stating, “even assuming that Sparks was not
 17 diligent in uncovering the fraud, the district court was still empowered to set aside the verdict, as
 18 the court itself was a victim of the fraud.” Id. 1133. Not surprisingly the Ninth Circuit quoted
 19 Hazel-Atlas when stating, “Sparks’ failure to uncover the fraud during Sparks [litigation] does
 20 not bar this action.” Id.²⁵

21
 22 ²⁴ That the government would even make such an argument in the face of these allegations is strange. First, it is a
 23 violation of this Court’s order to argue such allegations. Moreover, as stated in the allegations, Defendants did not
 24 start this fire. They allege that they were framed by corrupt Cal Fire and USFS investigators, and by prosecutors
 25 who brought that effort into the realm of our system of justice, advancing it forward in violation of the rules of
 26 discovery, their ethical obligations as officers of the court, and their duties of candor. In addition to uncovering
 27 egregious and pervasive fraud by Cal Fire and the USFS, Defendants also found evidence – in keeping with the
 28 investigators’ effort to frame Defendants – that the investigators buried and ignored evidence of other culprits. For
 instance, as discussed infra in the context of the concealed \$2 million bribe, the government had such information as
 well, but it withheld that information from the Court and from these Defendants, despite filing a motion stating that
 the party who it inculpated was irrelevant to this action. Finally, to the extent the government today claims that
 there “will never be such evidence” of other culprits, that was never the case, but there was clearly much more
 evidence that will never be recovered in view of the nature of the investigation itself.

²⁵ The Ninth Circuit stated: “In Hazel-Atlas the Supreme Court reasoned that:

1 Pumphrey also forecloses the government’s argument that, at the end of the day,
 2 everyone can just go home because the Defendants still started the fire. (See Opp. at 103-105.)
 3 Thompson argued in Pumphrey that its nondisclosure was not material to whether Sparks
 4 prevailed or not, but the Ninth Circuit squarely rejected this argument. “Thompson’s argument
 5 misses the point. The issue here is not whether Sparks would have prevailed had the original
 6 video been produced. As we noted in Intermagnetics, ‘the inquiry as to whether a judgment
 7 should be set aside for fraud upon the court under Rule 60(b) focuses not so much in terms of
 8 whether the alleged fraud prejudiced the opposing party but more in terms of whether the alleged
 9 fraud harms the integrity of the judicial process.’” Pumphrey, 62 F.3d at 1132-33 (quoting
 10 Intermagnetics, 926 F.2d at 917). The government is making the exact same argument that
 11 Thompson made and which the Ninth Circuit rejected as irrelevant. The question for this Court
 12 is not whether Defendants would have prevailed at trial, but whether the government
 13 “undermined the judicial process” by committing the misconduct alleged by the defense. See id.
 14 at 1133.

15 Dixon v. United States, is also highly instructive in terms of rebutting the government’s
 16 no-prejudice arguments. In Dixon, the Ninth Circuit flatly rejected the IRS’s argument that no
 17 fraud upon the court occurred because the taxpayers were not prejudiced by the conduct, stating
 18 that “[t]he Tax Court, however, applied the wrong law when it imposed a requirement that
 19 taxpayers show prejudice as a result of the misconduct.” Dixon, 316 F.3d at 1046 (quoting
 20 Dixon v. Comm’r, 77 T.C.M. (CCH) 1630 (1999)). The court explained: “**Prejudice is not an**
 21 **element of fraud on the court.**” Id. (citing Hazel–Atlas, 322 U.S. at 238; Pumphrey, 62 F.3d at
 22

23 even if Hazel did not exercise the highest degree of diligence [the] fraud cannot be
 24 condoned for that reason alone. This matter does not concern only private parties....
 25 [and] tampering with the administration of justice in the manner indisputably shown
 26 here involves far more than injury to a single litigant. It is a wrong against the
 27 institutions set up to protect and safeguard the public, institutions in which fraud
 28 cannot complacently be tolerated consistently with the good order of society. Surely it
 29 cannot be that preservation of the integrity of the judicial process must always wait
 30 upon the diligence of the litigants. The public welfare demands that the agencies of
 31 public justice be not so impotent that they must always be mute and helpless victims
 32 of deception and fraud.

Pumphrey, 62 F.3d at 1133.

1 1132-33) (emphasis added). Thus, according to the Ninth Circuit, “[f]raud on the court occurs
 2 when the misconduct harms the integrity of the judicial process, regardless of whether the
 3 opposing party is prejudiced.” *Id.* (quoting *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir.
 4 1989)). **“Furthermore, the perpetrator of the fraud should not be allowed to dispute the
 5 effectiveness of the fraud after the fact.”** *Id.* (citing *Hazel-Atlas*, 322 U.S. at 247; *Pumphrey*,
 6 62 F.3d at 1133) (emphasis added). Thus, the Ninth Circuit found, [b]ecause the Tax Court
 7 applied the wrong legal standard, it abused its discretion.” *Id.* (citation omitted).

8 Thus, under controlling Ninth Circuit authority, any alleged lack of prejudice to these
 9 Defendants – whether it is called prejudice or something else by the government (i.e.,
 10 “miscarriage of justice”) – is entirely irrelevant to this Court’s analysis. *Id.* Despite the
 11 government’s overarching efforts to suggest otherwise, this Court’s focus is properly placed on
 12 “the integrity of the judicial process, regardless of whether the opposing party is prejudiced.” *Id.*

13 **E. While the Court Was In Fact Defrauded in This Matter, It Is Not Precluded from
 14 Also Assessing Attempts to Defraud the Court in Reaching Its Ultimate
 15 Determinations.**

16 Early in its opposition, the government fashions a “rule” and then relies upon it
 17 throughout its brief. This rule appears first as a heading on page 19; it reads: “Mere attempts
 18 cannot establish a fraud upon the Court.” Underneath the heading, the government further
 19 explains, “mere attempts [to defraud the court] cannot be sufficient, for that would be
 20 irreconcilable with the Supreme Court holding in *Beggerly* that relief from judgment for fraud
 21 on the court is ‘available only to prevent a grave miscarriage of justice.’” (Opp. at 19.) The
 22 government then puts an even finer point on its rule, proclaiming: “the controlling rule is that
 23 there can be no fraud on the court unless an attempt succeeded and the court was deceived.” (*Id.*
 24 at 20.) Once created, the government proclaims, “this rule defeats every accusation made by
 25 Sierra Pacific.” (*Id.*) It is in this context that the government criticizes Defendants for their
 26 reliance on the Ninth Circuit’s decision in *Pumphrey* for the proposition that attempts to defraud
 27 can be sufficient. Specifically, the government argues, “Sierra Pacific is even more clearly
 28 wrong when it cites *Pumphrey* for the proposition that “under controlling Ninth Circuit authority
 mere “attempts” to defraud the Court is (sic) sufficient to establish fraud on the Court.” (*Id.* at

1 19.) On all of this, the government is mistaken.

2 First, assuming the government’s rule can even be understood in the context of the
3 Moonlight Fire matter, there is no such “rule” in the Ninth Circuit and the government’s
4 “attempts-don’t-count” rule certainly does not stem from the Supreme Court’s decision
5 Beggerly, which simply states, “an independent action should be available only to prevent a
6 grave miscarriage of justice.” Beggerly, 524 U.S. at 47; see also Appling v. State Farm Mut.
7 Auto Ins. Co., 340 F.3d 769, 780 (9th Cir. 2003). From that unremarkable conclusion, the
8 government simply fashions its own rule because, it claims, a “mere attempt” cannot work a
9 grave miscarriage of justice. (Opp. at 19.) The government also concludes that a “mere
10 attempt” cannot “satisfy the requirement that deception be ‘critical to the outcome of the case,’
11 as required by Stonehill, 660 F.3d at 452.” (Id.)

12 But none of these sentence fragments has any particular relevance to this case or prevents
13 this Court’s assessment of whether an attempt to subvert or defile the administration of justice
14 could constitute a fraud on the court under Rule 60(d)(3). Under controlling case authority and
15 common sense, the mere attempt to defraud a court can easily constitute a gross injustice, and
16 this determination never turns on whether there was only an effort to defile the court or complete
17 success in doing so.²⁶ It is easy to see that a matter with dozens of shameless attempts to deceive
18 on numerous fronts may be far more egregious (and “grave”) than a case with a single effort that
19

20 ²⁶ The government’s reliance on Stonehill, 663 F.3d 415, to make or enhance its “attempts-don’t-count” rule is
21 misplaced, as the quote fragment it relies on from that case – “critical to the outcome of the case” – comes from the
22 Ninth Circuits’ analysis as applied to Stonehill’s peculiar facts regarding the “silver platter doctrine.” In particular,
23 the facts of that matter arose when the government was found to have withheld documents and made
24 misrepresentations under oath regarding the extent of its involvement in a Philippine government agency’s illegal
25 (under Philippine law) search and seizure of Stonehill’s financial records in the Philippines. In finding no fraud
26 upon the court, the Ninth Circuit found that “the government’s misrepresentations were relatively few and were
27 largely tangential to the fundamental question of U.S. participation.” Stonehill, 663 F.3d at 452.

28 Indeed, Ninth Circuit actually said: “First, in nearly all fraud-on-the-court cases, the misrepresentations went to the
central issue in the case. For example, in Levander and Pumphrey we vacated for fraud on the court when the
litigants intentionally misrepresented facts that were critical to the outcome of the case, showing the appropriate
“deference to the deep rooted policy in favor of the repose of judgments.” Id. (citing Hazel-Atlas, 322 U.S. at 244-
45). Stonehill therefore only confirms in the context of its own complex case analysis that fraud upon the court
must go to critical issues in the case, not tangential matters. Indeed, read in full, the Ninth Circuit’s analysis in
Stonehill confirms that attempts to defraud a court can establish fraud upon the court, as it cites favorably to
Moore’s Federal Practice “definition” of fraud upon the court – a definition (as discussed infra) which expressly
enshrines the sufficiency of “attempts” when assessing whether conduct establishes fraud upon the court. Id. at 444.

1 succeeded. Indeed, framing the “rule” so as to require that a court actually be deceived does
 2 violence to the court’s inherent power to vacate an action if, after reviewing the truth of matter, it
 3 finds by clear and convincing evidence that there was an serious attempt to defile the
 4 administration of justice.²⁷ In the end, where a court is attempting to exercise its inherent
 5 powers to dispense justice, assessing whether an egregious fraud “does or attempts to, defile the
 6 court itself,” Stonehill, 633 F.3d at 444, must always be left to the discretion of the court, not to
 7 rules conveniently constructed by the government when it has been accused of attempting to
 8 defraud (and actually defrauding) the court.

9 Second, notwithstanding the government’s characterizations, Defendants’ Supplemental
 10 Brief on this issue actually reads as follows:

11 Although under controlling Ninth Circuit authority mere
 12 “attempts” to defraud the Court is sufficient to establish fraud on
 13 the Court under Rule 60(d)(3), Pumphrey, 62 F.3d at 1131, the
 14 Moonlight Prosecutors succeeded in their attempt by actually
 15 misleading the Court, and through their misconduct procured a
 16 favorable and erroneous legal ruling that was a substantial factor in
 17 forcing Defendants to settle the action.

18 (Supp. Brief at 130.) Defendants argued as such because the Ninth Circuit in Pumphrey ruled
 19 that “fraud upon the court includes both attempts to subvert the integrity of the court and fraud
 20 by an officer of the court.” Pumphrey, 62 F.3d at 1131 (quoting Intermagetics, 926 F.2d at
 21 916). The government devotes but a footnote to attempting to explain away the holding in
 22 Pumphrey, arguing that its clear use of “attempt” language is dicta and then arguing, in the
 23 alternative, that “the word only modifies ‘to subvert the integrity of the court’ – ‘not fraud by an
 24 officer of the court.’ It thus appears to refer to attempted bribery of a judge and the like.” (Opp.

25 _____
 26 ²⁷ Moreover, as discussed infra, Defendants have alleged, and ultimately will prove at a hearing, that the
 27 government’s conduct did in fact deceive the Court. As set forth and alleged in the Defendants’ supplemental brief,
 28 the government, among other things, aided and abetted the investigators’ perjury on key issues; it concealed from
 the Court a critical third-party’s false claim of a massive bribe as the Court engaged in careful balancing associated
 with granting the government’s motion in limine regarding that third-party, and it submitted to the Court what it
 knew was a blatantly false origin and cause report. The government did not “attempt” these acts, it committed them,
 and its lack of candor and gamesmanship regarding the truth caused this Court to preside over a matter where the
 government’s egregious misconduct prevented the “judicial machinery” from performing “its impartial task.”
Stonehill, 660 F.3d at 444. In other words, here, the court “believed it was hearing a legitimate adversarial dispute
 when, in fact, the proceeding was a charade fraught with concealed motives, hidden payments, and false testimony.”
Dixon, 316 F.3d at 1047.

1 at 19 n.25.) But the government’s argument is not only baseless, it misrepresents the very thrust
 2 of the Ninth Circuit’s opinion in Pumphrey. Contrary to what the government would have this
 3 court believe, the language in Pumphrey is not the musings of a court that has gone off topic, but
 4 instead an effort by the Ninth Circuit to restate the language it used in its earlier holding
 5 regarding fraud upon the court in In re Intermagnetics America, Inc., 926 F.2d 912, 916 (9th
 6 Cir.1991). It did not do so as dicta, but so as to rebut any suggestion by Bartlett that he had not
 7 defrauded the Court.

8 Third, regarding the government’s strange effort to limit what the word “attempts” must
 9 be modifying (see Opp. at 19 n.25), the court’s analysis in Pumphrey is actually consistent with
 10 the concept that an attempt alone is sufficient for purposes of finding fraud on the court. The
 11 Ninth Circuit in Pumphrey was focused on a conduct “which undermined the judicial process.”
 12 62 F.3d at 1132. In this regard, it quoted the district court judge in the matter with favor: “As
 13 the district court noted, Bartlett, as a licensed attorney, ‘is aware of the necessity for compliance
 14 with the rules of discovery and the rules of professional responsibility.’” Id. at 1133.
 15 Additionally, and perhaps even more importantly, in addressing Bartlett’s argument that his
 16 effort (or attempt) to defraud was ineffectual and therefore could not constitute a fraud upon the
 17 court, the Ninth Circuit invoked the Supreme Court, finding that “Thompson is in no position to
 18 dispute the effectiveness of the scheme in helping to obtain a favorable jury verdict.” Id.
 19 (quoting Hazel-Atlas, 322 U.S. at 246-47 (holding that party who presented fraudulent evidence
 20 cannot disclaim its effectiveness after the fact)).

21 Fourth, reading the government proclaim – based on its own misreading of Ninth Circuit
 22 authority – that it has created a rule “that defeats every accusation” in a motion for fraud on the
 23 court is a painfully revealing boast for the government to make here. Moreover, that assessment
 24 rests with the sound discretion of this Court, flowing directly from its inherent powers of equity.
 25 The distinction between attempting to defraud a court and actually pulling it off is rather
 26 meaningless in view of what is at stake – the proper administration of justice. The government
 27 steps on remarkably thin ice when it claims that a federal prosecutor in the employ of our
 28 Department of Justice and working with federal and state law enforcement officers can “attempt”

1 to defraud a federal judge (as Defendants have most certainly alleged) and not be subject to the
 2 Court's inherent powers if such efforts fail. Obviously, the integrity of our system of justice is
 3 degraded whenever officers of the court engage in conduct designed to interfere with the orderly
 4 and equitable administration of justice, regardless of whether it succeeds. Finding otherwise
 5 would only encourage such efforts, especially if permitting the destruction of evidence and
 6 extracting a settlement from the victims of such conduct permanently cuts off the court's power
 7 to intercede and punish the perpetrators. In this regard, as the Supreme Court found, "tampering
 8 with the administration of justice in the manner indisputably shown here involves far more than
 9 an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard
 10 the public, institutions in which fraud cannot complacently be tolerated consistently with the
 11 good order of society." Hazel-Atlas, 322 U.S. at 247.

12 Fifth, perhaps because the conduct in this case appears to stem from an attitudinal posture
 13 that ultimately also drafted the opposition, the government's brief is strangely silent regarding a
 14 specific stanza of language that populates numerous briefs and cases relating to fraud upon the
 15 court, including numerous Ninth Circuit cases. The language comes from Moore's practice
 16 guide. A quick Westlaw search will reveal, however, that this language has been adopted
 17 frequently by a variety of Circuit courts, including by the Ninth Circuit on numerous occasions.
 18 It may even be one of the more common and accepted quotes regarding fraud upon the Court,
 19 and it can even be found in numerous cases cited in Defendants' brief. It reads as follows:
 20 "Fraud upon the court' should, we believe, embrace only that species of fraud which does or
 21 attempts to, defile²⁸ the court itself, or is a fraud perpetrated by officers of the court so that the
 22

23 ²⁸ As discussed earlier, the government creates its 'attempts-don't-count' rule by arguing that it can avoid the
 24 implication of Stonehill's version of this same language "to subvert the integrity of the court" because that language
 25 must only modify the word "subvert," which must mean bribing a judge. (Opp. at 19 n.25). That argument is lacks
 26 any real analysis and is specious. But the government would be precluded from making the same argument
 27 regarding this more favored definition. Because this language has been adopted by a variety of opinions, courts
 28 have had the chance to apply it to the type of conduct found here. For instance, in Dixon, the Ninth Circuit
 concluded by stating the IRS lawyers' broad misconduct is "noteworthy, not only **because it defiled the sanctity of
 the court** and the confidence of all future litigants, but also because it violated the rights of the test case petitioners
 and more than 1300 taxpayers who agreed to be bound by the outcome of the Tax Court proceeding." Dixon, 316
 F.3d at 1047. Thus, Dixon confirms that defilement is not focused on bribery and the word "attempt," therefore, is
 not in fact limited in the manner suggested by the government.

1 judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that
 2 are presented for adjudication.” Intermagnetics, 926 F.2d at 916 (quoting *7 Moore’s Federal*
 3 *Practice* ¶ 60.33, at 515 (2nd ed. 1978)); see also Levander, 180 F.3d at 1119; Alexander, 882
 4 F.2d at 424; Stonehill, 660 F.3d at 444. Defendants cited to this definition in their opening Rule
 5 60(d)(3) brief. The government has read and cited the numerous cases in its brief which employ
 6 this language. Moore’s adopted definition of fraud upon the court cannot, however, be found on
 7 a single page of the government’s lengthy opposition. Nevertheless, the Ninth Circuit’s most
 8 common definition of fraud on the court itself confirms that the government’s rule is baseless,
 9 and that “Sierra Pacific’s misguided claim” (Opp. at 19 n.25) is anything but.

10 **F. The Fourth Circuit’s Decision in Shaffer Remains Helpful to This Court’s Analysis.**

11 The government analyzes United States v. Shaffer Equipment Company, 11 F.3d 450
 12 (4th Cir. 1993), in the section of its brief arguing that government attorneys are held to a
 13 standard of conduct no higher than that applicable to attorneys for private litigants. But its
 14 discussion of Shaffer in this section seems oddly out of place, as Shaffer does not contain such a
 15 holding. Moreover, the gravamen of the government’s discussion of Shaffer focuses not on the
 16 standards applicable to government attorneys, but on Defendants’ misunderstanding, and thus
 17 incorrect description, of the procedural context and posture of Shaffer. Defense counsel regret
 18 their initial misunderstanding and misstatement regarding the procedural posture of Shaffer in
 19 their opening papers, but it was not intentional and, importantly, Shaffer remains instructive.
 20 While not binding on this Court, it still strongly supports Defendants’ request for relief here.

21 At bottom, Shaffer involved the misrepresentation and concealment of the “academic
 22 credentials and qualifications” of one EPA environmental consultant/expert, and the actions of
 23 two government attorneys in aiding and abetting his effort to conceal the true facts about his
 24 education during the course of discovery in a cost recovery action brought by the United States
 25 under CERCLA. The EPA consultant at issue (a Mr. Caron) had been responsible for decisions
 26 associated with the clean-up, including a decision to implement what ultimately was an
 27 unsuccessful solvent extraction remediation plan, which exacerbated by over \$1 million the
 28 government’s overall damage claim of some \$5 million. 11. F.3d at 453. While both the trial

1 court and the court of appeals observed that the consultant’s qualifications were relevant to the
2 propriety of the administrative record and whether certain clean-up expenditures were
3 reimbursable, nothing in Shaffer suggests that the question of the defendant’s liability altogether
4 turned on the “academic credentials and qualifications” of the consultant. Moreover, as the
5 defendants began probing deeper into the issue of the consultant’s qualifications, the Fourth
6 Circuit understood that the government itself brought the issue directly to the court’s attention.
7 Id. at 453-54.

8 On these facts, the Fourth Circuit reversed the trial court’s imposition of a terminating
9 sanction, and remanded the case for imposition of a sanction short of outright dismissal. Citing
10 to Chambers, 501 U.S. 32, the Fourth Circuit found that there is a “broader general duty of
11 candor and good faith required” of officers of the court “to protect the integrity of the entire
12 judicial process.” Shaffer, 11 F.3d at 458. The court cited to Hazel-Atlas for the rule that there
13 is a “general duty to preserve the integrity of the judicial process” which the government
14 attorneys in Shaffer violated. Id. The court found that, in repeatedly failing to advise the court
15 of “the Caron problem and the civil and criminal investigations relating to it,” and in “continuing
16 to litigate the matter unabated,” the government attorneys sufficiently “undermine[d] the
17 integrity of the judicial process” and violated “the general duty of candor that attorneys owe as
18 officers of the court.” Id. at 459. The court of appeal repeatedly referred to the issue as “fraud”
19 and held that “Caron’s conduct amounted to a fraudulent act by the EPA.” See id. at 461.

20 The Fourth Circuit nevertheless reasoned that lesser sanctions were sufficient in view of
21 the fact that “the orderly administration of justice and the integrity of the process have not been
22 permanently frustrated.” Id. at 463 (emphasis added). Through this ruling, the court of appeals
23 clearly agreed that the conduct of the federal attorneys had in fact threatened the integrity of the
24 judicial process. It merely observed that the threat had not permanently damaged this integrity
25 because the trial court could ameliorate the extent of the harm through limiting orders pertaining
26 to government’s available damages. Id. That conclusion is, in context, clearly a consequence of
27 the fact that the court of appeals did not seriously question that the defendants were liable. The
28 circuit court observed that “[e]vidence revealed that while some of the [transformer] fluid was

1 simply poured onto the ground, the predominant practice was to store the fluid drums and
 2 containers at the site, some of which later deteriorated and leaked fluid onto the ground,” and
 3 that the “EPA removed 4735 tons of contaminated soil” from the defendants’ facility, which
 4 involved the “storing and disposing of transformers and capacitors on its property” and that the
 5 defendants “modified transformer for customers, which often involved disposing of residual
 6 fluid.” Id. at 453. In apparent recognition that the defendants were clearly liable in some
 7 respect, the circuit court expressed concern that “through an outright dismissal, the defendants
 8 receive the benefit of a total release from their obligations under the environmental protection
 9 laws.” Id. at 463 (emphasis added).

10 On remand, the district court evaluated the propriety of the parties’ proposed consent
 11 decree resolving the matter, but used the opportunity to reiterate its findings that the
 12 government’s attorney had engaged in gross misconduct. United States v. Shaffer Equip. Co.,
 13 158 F.R.D. 80 (S.D.W.V. 1994). In this subsequent ruling, the district court confirmed its
 14 finding that the government’s attorney had violated their duty of candor to the court, and cited
 15 Ninth Circuit authority for the proposition that “[t]he duty of candor to the tribunal is a widely
 16 recognized one within the legal profession.” Id. at 87 (citing United States v. Assoc.
 17 Convalescent Enters., Inc., 766 F.2d 1342, 1346 (9th Cir. 1985)). The district court also
 18 explained the close nexus between the duty of candor to the court and the government attorneys’
 19 discovery obligations under the Federal Rules:

20 [W]hen Mr. Hutchins and Mr. Snyder breached their duty of
 21 candor to the Court they also flagrantly abused the discovery
 22 process. In failing to supplement Defendants’ discovery requests
 23 regarding Mr. Caron’s credentials with information that Mr.
 24 Snyder admitted was relevant, Mr. Snyder and his immediate
 25 supervisor, Mr. Hutchins, violated Rule 26(e) of the Federal Rules
 26 of Civil Procedure. Mr. Snyder and Mr. Hutchins violated Rule
 26(e)(1) and Rule 26(a)(2)(C) by failing to supplement
 27 information on an expert witness. Rule 26(e)(2) was ignored when
 28 Mr. Snyder failed to amend his prior objection to an interrogatory
 regarding Mr. Caron after he learned that the matter was indeed
 relevant and his previous objection to the questions was incorrect.

Id. at 87.²⁹

²⁹ Within this context, it is no wonder that the district court in Shaffer found no need to explain the higher duty that is undoubtedly owed by government lawyers charged not with winning, but with seeking justice. Just as in the

1 The district court also expressed “shock” upon learning that the Department of Justice’s
 2 Office of Professional Responsibility (“OPR”) had done nothing to censure the government
 3 attorneys for their transgressions. The district court quoted in full a letter containing OPR’s
 4 finding that while the government attorneys “engaged in repeated exercises of poor judgment in
 5 their handling of aspects of Shaffer[,] [it did not] however, find they engaged in intentional
 6 misconduct” and that it was “closing our file on this matter.” Id. at 88. This so-called “finding”
 7 by OPR drew the following response from the district court:

8 With such perfunctory treatment, two complete sentences, given to
 9 matters of ethics found to be worthy of at least a dozen paragraphs
 10 by the Fourth Circuit, it is no small wonder, but no excuse, that
 11 these attorneys behaved as they did. Quite frankly, it shocked this
 12 Court to learn of the Department of Justice’s superficial
 13 investigation and evaluation of the conduct of these attorneys. We
 14 are dealing here with a hodgepodge of bureaucratic bungling and
 15 cover up of abysmal proportions.

13 Id.

14 The facts in Shaffer and OPR’s response to them were certainly shocking and rightly
 15 characterized by the district court as a cover-up of “abysmal proportions.” But the “cover-up” in
 16 Shaffer involved the misrepresentations of one EPA environmental consultant concerning one
 17 issue – his educational background – which was first brought to the trial court’s attention by the
 18 government itself.

19 It is difficult to overstate just how much worse the conduct of the Moonlight Prosecutors
 20 is compared to that of the Shaffer prosecutors. As explained in detail throughout its briefing, the
 21 Moonlight Prosecutors engaged in a broad stratagem of obfuscation and acts of treachery that
 22 infected virtually every corner of the case, and which entailed, among so many other things:
 23 demonstrably perjurious written discovery responses prepared by the Moonlight Prosecutors
 24 themselves; perjury by law enforcement officers on the core question of liability (concerning the
 25 origin and cause of the fire) as the Moonlight Prosecutors sat on their hands, having previously
 26 instructed these witnesses it was a “non-issue”; concealment of critical facts from Defendants

27 Moonlight Fire case, the standards applicable to all lawyers were more than sufficient in Shaffer to establish the
 28 breach of ethics by the government attorneys in question.

1 and the Court about a false bribe allegation (known only to the Moonlight Prosecutors) by Edwin
 2 Bauer which generated a devastating pre-trial ruling prohibiting defendants from arguing to the
 3 jury that the Bauers or anyone else started this fire; false discovery responses and proffering false
 4 witness statements in an effort to cover up the facts of Red Rock, which are critically relevant to
 5 key questions affecting comparative fault by the government itself; submission of a perjured
 6 declaration on dispositive Rule 56 motions; submission of false origin and cause investigation
 7 reports for other fires as a component of what the Moonlight Prosecutors designated as “Trial
 8 Exhibit No. 1”; and the fact that the lead investigator from Cal Fire had an undisclosed
 9 contingent financial interest in the outcome of his investigation through an illegal off-books
 10 skimming operation kept hidden from state regulators by Cal Fire, as well as other publicly
 11 disclosed problems.

12 Unlike in Shaffer, none of these facts were brought to this Court’s attention by the
 13 government. Moreover, the Moonlight Prosecutors were not (like in Shaffer) attempting to
 14 protect an at least partially meritorious damage claim of some \$5 million, but were instead
 15 engaged in an effort to frame parties as liable for the Moonlight Fire, to extract not \$1 million,
 16 but \$1 billion from these Defendants, which include children, the elderly, and family owned
 17 businesses built over generations through hard work and dedication. That liability exposure
 18 threatened the very existence of one of the largest employers across many Northern California
 19 rural communities (responsible collectively for as many as 10,000 direct and indirect jobs), and
 20 thus threatened the potential economic collapse of various communities. If the transgressions by
 21 the prosecutors in Shaffer were properly characterized as having been of “abysmal proportions,”
 22 there may be no relative means to adequately describe what happened here. For his part, Judge
 23 Nichols (the only neutral arbiter to have considered the record³⁰) could only describe his own
 24 “palpable” “sense of disappointment and distress.” Cal. Dep’t of Forestry v. Howell, 2014 WL

25
 26 ³⁰ The government’s concealment from the Court and from Defendants of the false bribe allegation by Edwin Bauer
 27 was not brought to Judge Nichols’s attention, as Cal Fire’s involvement in that abuse is not yet known since
 28 Defendants have never had any ability to conduct discovery on that front. The point here is that the misconduct by
 the Moonlight Prosecutors is even worse than their joint prosecution partners at Cal Fire and the Office of the
 California Attorney General.

1 7972096, at *9. In the end, the Moonlight Prosecutors focus upon Defendants’ mistaken
 2 description of Shaffer’s procedural posture, while ignoring the import of its facts and legal
 3 analysis, does nothing to excuse the fraud they have perpetrated upon this Court.

4 **G. The Government Fails to Acknowledge Its Higher Standard of Conduct.**

5 The government does not dispute that attorneys representing the United States play a
 6 unique role within the judicial system as “representative[s] not of an ordinary party to a
 7 controversy, but of a sovereignty . . . [whose] interest in a . . . prosecution is not that it shall win
 8 a case, but that justice shall be done.” Berger, 295 U.S. at 88. The government also does not
 9 dispute that attorneys representing the United States are held to “higher standards of behavior.”
 10 United States v. Young, 470 U.S. 1, 25-26 (1985) (Brennan, J., concurring) (emphasis in
 11 original). Left with no other avenue, the government resorts to arguing that the unique role and
 12 the higher standard of behavior applicable to its attorneys have “nothing to do” with the fraud on
 13 the court analysis. (Opp. at 16.) If that assertion was credited, then what purpose would the
 14 heightened obligations applicable to government lawyers serve? Our government lawyers are
 15 tasked with ensuring “that justice shall be done,” and that task is obliterated when government
 16 attorneys engage in fraud that defiles the court or prevents the judiciary machinery from
 17 functioning in the usual manner its impartial task of adjudicating cases. The higher standards of
 18 behavior for government lawyers are thus even more incompatible and irreconcilable with
 19 perverting justice through fraud on the court.

20 To be clear, Defendants have not taken the position that a different legal standard or a
 21 different burden of proof applies on a Rule 60(d)(3) motion when government attorneys are
 22 accused of fraud on the court. Defendants do contend, however, that the heightened standards
 23 applicable to government attorneys should inform the analysis and serve as the lens through
 24 which this Court views the numerous instances of misconduct. In other words, the heightened
 25 standard of conduct serves as a measure of whether the government prosecutors engaged in
 26 conduct that constitutes “a wrong against the institutions set up to protect and safeguard the
 27 public.” Pumphrey, 62 F.3d at 1133 (quoting Hazel-Atlas, 322 U.S. at 246). Anything less
 28 would render the heightened duties of government lawyers meaningless.

1 The government attempts to ignore this critical and common sense conclusion through
 2 citation to Stonehill, 660 F.3d 41, which involved allegations that government attorneys had
 3 engaged in a fraud on the court. (See Opp. at 16.) Specifically, the government contends that
 4 Stonehill demonstrates that no “separate standard” applies to government attorneys because
 5 Stonehill only discusses the standard for fraud on the court under the traditional Rule 60(d)(3)
 6 matrix. As a preliminary matter, Stonehill did not consider the issue of whether a “separate
 7 standard” applies to government attorneys, or how the Rule 60(d)(3) standard relates to the
 8 higher standards of behavior applicable to government attorneys. Cases do not stand for
 9 propositions not considered by the court. Moreover, this argument again misses the point. The
 10 question is not whether a separate standard applies on this motion, but whether the conduct of
 11 the government attorneys, viewed through the lens of their heightened obligations, constitutes a
 12 fraud on the court within the meaning of Rule 60(d)(3). It most certainly does.

13 **VI.**
 14 **BRADY IMPOSES ADDITIONAL DISCLOSURE OBLIGATIONS AND SUPPORTS**
 15 **THE FINDING OF A FRAUD ON THE COURT**

16 Brady v. Maryland, 373 U.S. 83 (1963), is yet another disclosure requirement that the
 17 government violated in this case. Brady is by no means the lynchpin of the fraud on the court
 18 argument, as Defendants clearly show that the government committed a fraud on the court
 19 regardless of whether Brady applies to the facts of this case. Nonetheless, Brady provides yet
 20 another basis for this Court to grant relief under Rule 60(d)(3) because the government’s failure
 21 to produce critical exculpatory and impeachment evidence not only violated Defendants’ due
 22 process rights, but ultimately contributed to the fraud on the court.

23 **A. Brady Should Apply in Civil Cases with Potential Criminal Implications and**
 24 **Potential Liability of a Billion Dollars**

25 In attempting to refute the applicability of Brady, the government relies first and
 26 foremost on a rigid reading of due process. Under its version of due process, there are certain
 27 clear-cut requirements in criminal cases and other certain clear-cut requirements in civil cases.
 28 In offering this artificially constricted reading of due process, the government ignores the

1 recognized “truism . . . that ‘due process,’ unlike some legal rules, is not a technical conception
 2 with a fixed content unrelated to time, place and circumstances.” Mathews v. Eldridge, 424 U.S.
 3 319, 334 (1976) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)). Thus,
 4 “[d]ue process is flexible and calls for such procedural protections as the particular situation
 5 demands.” Id. (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1971)). The determination of
 6 whether due process is satisfied in a civil case “requires analysis of the governmental and private
 7 interests that are affected.” Id. (citing Arnett v. Kennedy, 416 U.S. 134, 167-68 (1975) (Powell,
 8 J., concurring in part); Goldberg v. Kelley, 397 U.S. 254, 263-66 (1970); Cafeteria Workers, 367
 9 U.S. at 895).

10 Recognizing that due process is a flexible and fact-specific standard, the Supreme Court
 11 has repeatedly articulated a three-part test used to determine “what specific safeguards are
 12 needed to make a civil proceeding fundamentally fair.” Turner v. Rogers, 131 S. Ct. 2507, 2510
 13 (2011) (citing Mathews, 424 U.S. at 335). These factors are: “(1) the nature of ‘the private
 14 interest that will be affected,’ (2) the comparative ‘risk’ of an ‘erroneous deprivation’ of that
 15 interest with and without ‘additional or substitute procedural safeguards,’ and (3) the nature and
 16 magnitude of any countervailing interest in not providing ‘additional or substitute procedural
 17 requirement[s].’” Id. (quoting Mathews, 424 U.S. at 335).

18 First, the stakes of this litigation are incredibly high and criminal liability is a real risk.
 19 All told, the government sought to recover over \$1 billion from these Defendants -- a recovery
 20 that might have bankrupted Defendants and left thousands of people out of jobs. Further, while
 21 government contends that Defendants only “claim” to have regarded this litigation as “one with
 22 criminal implications,” this statement is belied by the government’s own complaint, which
 23 plainly sets forth causes of action premised on Title 36 of the Code of Federal Regulations,
 24 section 261.5(c), and section 4435 of the California Public Resources Code, each of which
 25 provide for criminal penalties. (Am. Compl., Oct. 22, 2009, Docket No. 5 at 3.)³¹

26 _____
 27 ³¹ The government’s contention that this case had no potential criminal implications because Bush and Crismon
 28 chose not to exercise their privilege against self-incrimination is absurd. As countless criminal cases make clear,
 that the right against self-incrimination is not exercised has no bearing on whether criminal liability may be, or is,
 imposed.

1 Second, the “comparative ‘risk’ of an ‘erroneous deprivation’” of the private interests
 2 that will be affected “with and without ‘additional or substitute procedural safeguards’” is high,
 3 as evidenced by the facts of this case and the documents withheld from Defendants. Of course,
 4 at this point, Defendants do not know the entirety of what was not produced to them, and firmly
 5 believe that discovery and an evidentiary hearing will make even more obvious the high risk of
 6 an erroneous deprivation of their interests without Brady requirements in place.

7 Finally, “the nature and magnitude of any countervailing interest in not” requiring the
 8 government to make Brady disclosures is entirely lacking. See Turner, 131 S. Ct. at 2510.
 9 Indeed, the government’s sole argument as to why such disclosures should not be required is that
 10 this case is not criminal; they are unable to provide any countervailing interest, and instead argue
 11 only about what this case is not. The circumstances, risks, and interests present in this type of
 12 litigation thus compel the conclusion that Brady’s disclosure requirements should apply.

13 The “truism” recognized by the Supreme Court, along with these three factors, reveal the
 14 gross over-generalization by the government regarding the requirements and strictures of due
 15 process. In light of such a circumstantially-dependent inquiry, there can hardly exist a hard and
 16 fast rule that due process *never* requires Brady disclosures in a civil case. As evidenced by
 17 Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), no such rule exists.

18 Indeed, the prospective Attorney General, Loretta Lynch, recently confirmed that due
 19 process may require Brady’s application in certain civil cases. See Nomination of Loretta E.
 20 Lynch to be Attorney General of the United States, Questions for the Record, S. Comm. on the
 21 Judiciary, 114th Cong. 3 (Feb. 9, 2015) (questions from Sen. Vitter (R., Louisiana)). In so
 22 stating, Ms. Lynch cited to Demjanjuk, which rightly found that Brady applied although the
 23 case was a civil action brought by the government. Ms. Lynch’s statement evidences not only
 24 the importance of due process in civil litigation, just as in criminal litigation, but also the
 25 growing recognition that additional protections are needed in civil cases to protect against the
 26 overreaching power, and sometimes deceit, of the government.

27 Although the government later spends considerable time attempting to explain why
 28 Demjanjuk is distinguishable, the government remains silent on Demjanjuk when asserting that

1 the Federal Rules of Civil Procedure make Brady superfluous in a civil case. (Opp. at 31, 33.)
 2 The government ignores Demjanjuk on this point, of course, because the Sixth Circuit, in finding
 3 that Brady applied, obviously did not agree with this proposition. To the contrary, the court
 4 reasoned that the government attorneys' failure to comply with their civil discovery obligations
 5 only increased the need for Brady's application to certain civil cases.³² Based solely on the
 6 government's discovery violations, Demjanjuk found that the government's "attitude . . . was not
 7 consistent with [its] obligation to work for justice rather than for a result that favors its attorneys'
 8 preconceived ideas of what the outcome of the legal proceeding should be." Id. at 350. These
 9 preconceived ideas, and the attorneys' "personal conviction that they had the right man provided
 10 an excuse for recklessly disregarding their obligation to provide information specifically
 11 requested by Demjanjuk" under the Federal Rules of Civil Procedure. Id.

12 The Sixth Circuit's commentary in Demjanjuk fits the Moonlight Fire litigation perfectly.
 13 Here, the government sought to hold Defendants liable for the Moonlight Fire from day one
 14 because the government could obtain a potentially enormous recovery from them.³³ The rules of
 15 discovery, which presuppose that parties will participate in discovery fairly and honestly, did
 16 nothing to alter this course. Instead, the government's belief that Defendants were responsible
 17 informed all of its decisions regarding not only what evidence to produce but what evidence to
 18 conceal. As a direct result, any evidence – such as the evidence of the alleged bribe – suggesting
 19 that anyone but Defendants might be responsible for the Moonlight Fire was not disclosed. The
 20 government's failure to engage fairly in the civil discovery process in this case makes painfully
 21 obvious that Brady is anything but superfluous in ensuring due process in certain civil litigation.
 22 Accordingly, for the same reasons the Sixth Circuit found that the circumstances of Demjanjuk

23 _____
 24 ³² On this point, the government's citation to Degen v. United States, 517 U.S. 820 (1996), is inapposite. (Opp. at
 25 33.) Degen addresses the concern that a party who is the defendant in simultaneous civil and criminal cases brought
 26 by the government will be able to use civil discovery to gain an advantage in the criminal case. 517 U.S. at 826-27.
 27 While the Court addressed the differences between Brady and the Federal Rules of Civil Procedure, id. at 825-26,
 28 the Court made no absolute finding that the availability of one precludes the other. In any event, the concern
 addressed in Degen is the opposite of the concern at issue here – namely, that the government took advantage of the
 fact that Defendants had only the civil rules, and not Brady, available to conduct discovery and used this advantage
 to commit a fraud on the court.

³³ This belief is confirmed by the fact that Sierra Pacific was listed as a defendant by the Moonlight Investigators
 within twenty-four hours after the investigation began.

1 warranted the application of Brady in a civil case, this Court should find that Brady applies here.

2 The government focuses on attempting to distinguish the facts and the fact-specific
3 conclusions of Demjanjuk, and subsequent Sixth Circuit cases, from the facts of this case. But
4 Defendants do not take the position that Demjanjuk's facts are the same as those here, and the
5 government's argument therefore misses the mark. Instead, Defendants contend that here, as in
6 Demjanjuk, in light of the import, magnitude, and potential criminal liability of this case, and the
7 clear lack of effectiveness of other mechanisms including the Federal Rules of Civil Procedure,
8 due process required the government to disclose all evidence favorable to the defense,
9 "irrespective of the good or bad faith of the prosecution." Brady, 373 U.S. at 87. The
10 government does not meaningfully explain why due process does not require it to produce such
11 evidence here, nor can it.³⁴ Such a requirement would clearly doom not only the government's
12 position with respect to much of the evidence it wrongfully withheld in this case, but also its
13 argument that its discovery violations and other misconduct was committed in good faith and is
14 thus excusable.

15 **B. The United States Interjected Its *Brady* Violations Into This Court to Influence Its**
16 **Adjudicative Process**

17 The United States contends that Brady violations are "violations of a personal due
18 process right," and from that premise, argues that all such violations "occur outside of court" and
19 none are "directed to the court itself." (Opp. at 33-34.) Notably, the United States analyzes this
20 issue in the abstract, without acknowledging the facts demonstrating that the United States
21 intentionally injected its Brady violations into this Court and its adjudicative process.

22 As Defendants noted in their supplemental brief, the United States brought a motion in
23 limine styled "Motion to Exclude Argument of Government Conspiracy and Cover Up," in
24 which it claimed Defendants were advancing a "conspiracy theory" based in part on the fact
25 "that Cal Fire has a fire cost recovery program" (Docket No. 487 at 2-4.) The United

26 _____
27 ³⁴ For the same reason, the government's citation to the numerous cases contained in footnote 35 offer no assistance
28 to the government's position. (Opp. at 32 n.35.) In light of the fact that due process depends on circumstances, the
fact that other cases have rejected a civil Brady requirement does nothing to meaningfully explain why due process
does not impose such requirements in this case.

1 States characterized the allegations regarding this program as “flimsy,” suggested that this
 2 program served a legitimate and altruistic purpose, and argued that the existence of the program
 3 “does not support an inference that investigators concealed evidence.” (*Id.* at 3.) At the time the
 4 United States advanced this motion, Defendants had received extraordinarily little information
 5 regarding the cost recovery program, and that which Defendants did have was based on their
 6 own discovery efforts. Critically, Defendants had not obtained the documents revealing that Cal
 7 Fire had established the illegal WiFITER³⁵ slush fund or the documents showing the
 8 motivational bias it instilled in those involved with the Moonlight Fire investigation, including
 9 Joshua White. Without this key information that should have been disclosed by the government
 10 under Brady, Defendants lacked the means to demonstrate any conspiracy to pin the blame on
 11 well-heeled defendants. Thus, as the government points out in its opposition, Defendants told
 12 the Court that they would not argue a conspiracy based on “a program that encourages agents to
 13 blame fires on companies who are most likely able to pay for them,” which is precisely what
 14 counsel should do where there is insufficient evidence to support a particular theory at trial. (*See*
 15 Docket No. 531 at 2.) With Defendants hamstrung by the lack of Brady disclosures, the Court
 16 granted the motion in limine and foreclosed Defendants from arguing that government
 17 investigators were part of any conspiracy concerning the handling, retention, or expenditure of
 18 wildland fire monies collected.³⁶

19 Additionally, the United States filed various motions in limine in a calculated effort to

20 ³⁵ The government refuses to call WiFITER by its name, instead opting to use the euphemism “the State Fund.”
 21 (*Opp.* at 86 (“Sierra Pacific calls the account ‘WiFITER.’ This brief calls it what it is: ‘the State Fund.’”).) This
 22 nomenclature is not accurate, and even worse, it is misleading. As found by the California State Auditor, WiFITER
 23 was not a state-sanctioned account, but rather an “outside account” that, contrary to state law, was not subject to
 24 oversight by the Legislature. Therefore, it was not a state account as the government suggests, but rather an outside
 25 account created in order to circumvent state fiscal controls.

26 ³⁶ The government contends that because Defendants told the Court that they would not argue a conspiracy
 27 regarding the cost recovery program at trial, Defendants cannot complain about the resulting ruling. (*Opp.* at 91
 28 (“The Court’s ruling only held Sierra Pacific to its word . . . the court ruled exactly how Sierra Pacific requested.”).)
 This circular argument misses the point. Defendants were forced to concede this aspect of the motion because the
 government failed to provide Defendants with the information necessary to oppose the motion.

In a similar vein, the government suggests Defendants were not “forthright” when stating that this in limine ruling
 “contributed to the increased risks of trial and was a substantial factor in causing Defendants to settle.” (*Opp.* at 91
 & fn. 86.) Most unfavorable pretrial rulings contribute to the increased risks of trial, and thus contribute to the
 settlement calculus. This in limine ruling was no different. Defendants were in a position where, despite evidence
 suggesting there was motivational bias, they lacked the means to prove it before a jury.

1 keep much of the evidence relating to the Bauers away from the jury and to preclude Defendants
 2 from arguing that someone else started the fire. In these motions, the United States
 3 misrepresented to the Court that there was not a “shred” of evidence tending to show Ryan
 4 Bauer may have started the Moonlight Fire, even though the United States knew that Edwin
 5 Bauer had made false statements to federal investigators regarding an alleged bribe that tended
 6 to demonstrate his son’s potential involvement in the ignition of the fire. Defendants opposed
 7 these motions in limine by providing the facts known to them at that time, which did not include
 8 any of the evidence of the false bribe since the United States had purposefully withheld this
 9 information from the defense and this Court despite an obligation to produce it under Brady as
 10 well as its duty of candor. Based on the incomplete record resulting from the lack of Brady
 11 disclosures, the Court precluded Defendants from eliciting evidence to argue that someone else
 12 started the fire.

13 Critically, the government largely premised its arguments in these motions in limine on
 14 the lack of evidence supporting the defense theories. But that evidence was lacking only
 15 because the government had withheld it from Defendants in violation of Brady as well as its civil
 16 discovery obligations. Thus, through these motions in limine, the government utilized and
 17 capitalized on its Brady violations to secure favorable pretrial rulings from the Court, rulings that
 18 significantly influenced the settlement calculus. Consequently, this is not a situation where the
 19 Brady violations remained isolated “outside the court” as the United States suggests, but rather a
 20 situation in which the government directly injected its Brady violations into this Court, and in
 21 doing so, manipulated the adjudicative process to its benefit.

22 **C. The Government’s Discussion of Brady v. Giglio Material Is Irrelevant**

23 The government suggests that its duty to disclose with respect to the cost recovery
 24 program and WiFITER does not arise under Brady, but rather under Giglio v. United States, 405
 25 U.S. 150 (1972), because it is (according to the government) “at most impeachment evidence.”
 26 (Opp. at 94 (“Of course, Sierra Pacific really means Giglio not Brady.”).) Notably, the
 27 government makes no such claim with respect to the evidence that Edwin Bauer concocted a
 28 false \$2 million bribe, as such evidence is also clearly exculpatory in nature. Regardless, the

1 distinction between Giglio and Brady, as well as the distinction between impeachment and
2 exculpatory evidence, are distinctions without a difference for the purpose of the analysis here.

3 In United States v. Bagley, 473 U.S. 667 (1985) the Supreme Court noted that it had
4 previously “rejected any such distinction between impeachment evidence and exculpatory
5 evidence.” Id. at 676. Further, the Supreme Court observed that evidence that could be used to
6 impeach a government witnesses “by showing bias or interest” is “evidence favorable to an
7 accused.” Id. (citing Brady, 373 U.S. at 87); see also Horton v. Mayle, 408 F.3d 570, 578 (9th
8 Cir. 2005) (noting that Bagley extended duty to disclose evidence favorable to the accused to
9 include impeachment evidence showing bias or interest). For this reason, the Supreme Court
10 held that “impeachment evidence . . . as well as exculpatory evidence, falls within the Brady
11 rule.” Id. (citing Giglio, 405 U.S. at 154); see also United States v. Cerna, 633 F. Supp. 2d 1053,
12 1055 (N.D. Cal. 2009) (“Brady material is normally understood to include Giglio material as
13 well.”).

14 Thus, under Supreme Court precedent, the failure to disclose impeachment evidence can
15 constitute a Brady violation. See United States v. Gordon, 844 F.2d 1397, 1403 (9th Cir. 1988)
16 (“Under Brady, the suppression by the prosecution of evidence favorable to an accused upon
17 request violates due process where the evidence is material either to guilt or innocence
18 Favorable evidence includes impeachment evidence.”); Benn v. Lambert, 283 F.3d 1040, 1058
19 (9th Cir. 2002) (“In determining whether the suppression of impeachment evidence is
20 sufficiently prejudicial to rise to the level of a Brady violation, we analyze the totality of the
21 undisclosed evidence ‘in the context of the entire record.’”) (quoting United States v. Agurs, 427
22 U.S. 97, 112 (1976)). The government’s characterization of the cost recovery program and
23 WiFITER as mere Giglio “impeachment evidence” is therefore not determinative.

24 **D. The Federal Government Cannot Avoid Its Brady Violation by Claiming Its State**
25 **Counterpart Had the Information.**

26 Regardless of whether defined as Brady material, Giglio material, or both, the
27 government contends that its failure to disclose WiFITER information (but not the Bauer bribe)
28

1 does not constitute a Brady violation “because the state files are not in possession of the United
 2 States.” (Opp. at 95.) The government confidently states that even when “information in state
 3 control might be helpful to the defendant,” the federal “prosecution is under no obligation to turn
 4 over materials not under its control.” (Id. (quotation marks and citation omitted).)

5 In support of this contention, the government primarily relies on four cases: United
 6 States v. Aichele, 941 F.2d 761 (9th Cir. 1991), United States v. Dominguez-Villa, 954 F.2d 562
 7 (9th Cir. 1992), United States v. Gatto, 763 F.2d 1040 (9th Cir. 1985), and United States v.
 8 Chen, 754 F.2d 817 (9th Cir. 1985). (See Opp. at 95-96.) Two of these cases do not even
 9 mention Brady or Giglio. Indeed, Gatto is a case about the duties to disclose material pursuant
 10 to discovery requests under Federal Criminal Procedure Rule 16(a)(1), a rule that by its very
 11 terms only applies to material in the “government’s possession, custody, or control.” See Fed.
 12 R. Crim. P. 16(a)(1). Similarly, Dominguez-Villa is not about duties to disclose under Brady or
 13 Giglio. The third case, Aichele, is distinguishable on its facts,³⁷ and the fourth, Chen, has been
 14 clarified to make clear that prosecutors have a duty to learn of any favorable evidence known to
 15 the others acting on the government’s behalf in the case, including the police.³⁸ In any event,
 16 there is no evidence this Court should consider in the instant motion to establish what the
 17 government prosecutors knew, and when they knew it.

18 Conspicuously, the government fails to cite to several more recent cases that are directly
 19 on topic, United States v. Price, 566 F.3d 900 (9th Cir. 2009), and Cerna, 633 F. Supp. 2d 1053.
 20 In Price, the court states that “[u]nder longstanding principles of constitutional due process,

21 _____
 22 ³⁷ In Aichele, 941 F.2d at 764, the defendant contended that the government violated Brady by failing to disclose
 23 impeachment materials relating to a government witness that were contained in a California Department of
 24 Corrections file under the control of California officials. 941 F.2d at 764. Unlike the facts in this case, there was no
 25 indication in Aichele that the federal government had any connection whatsoever to the California Department of
 26 Corrections, whether by joint investigation, joint litigation, or by having used a California Department of
 Corrections employee as an agent of some sort. Yet, the government uses the case to support its assertion that it had
 no duty to disclose the bias created by WiFITER despite the fact that the federal government had agreed to jointly
 investigate and jointly litigate the Moonlight Fire and that the federal government used Joshua White, a state
 investigator, as its lead investigator and lead expert witness.

27 ³⁸ The government cites Chen, 754 F.2d at 824, for the proposition that the government had “no duty to volunteer
 28 information that it does not possess or of which it is unaware.” However, subsequent to Chen, the Supreme Court
 clarified in Kyles v. Whitley, 514 U.S. 419 (1995), that in fact prosecutors have a duty to *learn* of any favorable
 evidence known to the others acting on the government’s behalf in the case, including the police.

1 information in the possession of the prosecutor *and* his investigating officers that is helpful to the
 2 defendant, including evidence that might tend to impeach a government witness, must be
 3 disclosed to the defense prior to trial.” 566 F.3d at 903. The Ninth Circuit noted that it “is
 4 equally clear that a prosecutor cannot evade this duty simply by becoming or remaining ignorant
 5 of the fruits of his agents’ investigations.” *Id.* The *Price* court found a *Brady* violation based on
 6 a prosecutor’s “failure to fulfill his duty to learn of and disclose favorable evidence that likely
 7 was in the possession of his lead investigating officer.” *Id.* Importantly, the “lead investigating
 8 officer” in the case was a *local* officer with the Portland Police Department. *Id.* The Ninth
 9 Circuit stated that the “district court misunderstood the law” when it ruled that “no *Brady*
 10 violation occurred in this case because the prosecutor did not *personally* have in his possession
 11 the evidence.” *Id.* at 908 (emphasis in original). Under *Kyles*, 514 U.S. at 438, the district
 12 court’s reliance on the “prosecutor’s lack of personal knowledge of the *Brady* material
 13 demonstrated a clearly erroneous understanding of the law.” *Price*, 566 F.3d at 908. Here, the
 14 government has the same erroneous view of the law.

15 *Cerna*, 633 F. Supp. 2d 105, is another case that is directly on point the government
 16 noticeably fails to acknowledge in its brief. In *Cerna*, the Northern District of California
 17 evaluated *Brady* duties in the context of a federal prosecution arising out of a joint federal and
 18 state investigation. *Id.* at 1054-55. The court said that when “federal prosecutors have state
 19 police working on their behalf, it seems clear that the reasoning of *Kyles* requires federal
 20 prosecutors ‘to learn of any favorable evidence known to others acting in the government’s
 21 behalf’ including any local police acting on its behalf in the investigation.” *Id.* at 1059
 22 (emphasis in original). The *Cerna* court explained that “despite the separate sovereignty
 23 concept,” there are avenues that can lead to *Brady* duties in “the federal-state context.” *Id.* One
 24 of these “avenues” is when a state or local officer is a “lead investigating agent,” in which case
 25 “the federal prosecutor has a “duty to learn of and to disclose favorable evidence that likely was
 26 in the possession of his or her lead investigating agent.” *Id.*

27 Josh White, a state investigator, was undisputedly acting as a “lead investigating agent”
 28 for the federal government on the Moonlight Fire. Federal investigator Dave Reynolds testified

1 that White served as the lead investigator. Indicative of that role, White drafted and signed the
 2 Moonlight Fire Origin and Cause Report along with federal investigator Diane Welton. The
 3 United States designated White, but not Welton, as its expert witness, and intended to call White
 4 at trial to testify about his investigation and origin and cause conclusions, which served as the
 5 very foundation of its case against these Defendants. In fact, before trial, the government
 6 indicated that it did not intend to call its investigator Reynolds as a witnesses, and would call
 7 Welton only to the extent the “need arises.” The government apparently had no need to call
 8 these federal investigators because of its reliance on lead investigator White.

9 In light of these facts, the government has no basis to contend that it had no duty to
 10 disclose material related to the bias of White simply because this evidence was allegedly
 11 contained in records of a “different sovereign.” Instead, Price and Cerna stand for the fact that
 12 the government not only had to disclose what they *knew* White possessed that was favorable to
 13 the defense, but also to *learn of* any materials that White possessed that should be disclosed. It
 14 is known from discovery in the state case that White in fact possessed significant knowledge and
 15 materials regarding to the state cost recovery program and the WiFITER fund; given White’s
 16 lead on the Moonlight Fire investigation and his prominent role in the federal case, the United
 17 States had an obligation to find this knowledge and material and disclose it.

18 Yet, while Josh White’s relationship to the federal prosecution alone is enough to support
 19 a duty to disclose the bias created by WiFITER, it is worth noting that the federal government
 20 not only had agreed to investigate the Moonlight Fire jointly, but also had agreed to litigate it
 21 jointly. See United States v. Gupta, 848 F. Supp. 2d 491, 493-94 (S.D.N.Y. 2012).³⁹ The
 22 federal and state prosecutors together reviewed evidence, prepped witnesses, attended

23 _____
 24 ³⁹ In Gupta, 848 F. Supp. 2d 491, the Southern District of New York held that the U.S. Attorney’s Office had a
 25 duty, under Brady, to disclose memoranda and notes created by and held by the Securities Exchange Commission
 26 (“SEC”). The court said that “any argument that the Government’s duty does not extend so far merely because
 27 another agency, not the USAO, is in actual possession of the documents created or obtained as part of the joint
 28 investigation is both hypertechnical and unrealistic.” Id. at 493 (internal quotations omitted). In holding that the
 USAO had a duty to disclose SEC materials, the court focused on the fact that the USAO and SEC had conducted
 parallel investigations of the defendant and had interviewed witnesses together and consulted each other in
 preparing memoranda. Id. at 493-94. The court noted that “when it comes to Brady disclosures, the relevant
 context is one of fact-gathering” and thus for Brady purposes it is “enough that the agencies are engaged in joint
 fact-gathering.” Id. at 494.

1 depositions and hearings, and more. Therefore, it should strike this Court as highly improbable
 2 that throughout the course of these intimate activities the federal prosecutors learned nothing of
 3 their *lead investigator's* interest in the very fund to which state action damages would go. And
 4 even if they didn't, they still had a duty to learn and disclose. Therefore, the federal government
 5 cannot avoid its Brady violation by claiming that its state counterpart had all the information.

6 **E. The Government Had an Obligation to Turn over *Brady* Material by the Point in**
 7 **Time that the Disclosure Could Be Effectively Used.**

8 The government suggests that because Defendants settled before trial, any obligation
 9 under Brady to turn over information relating to WiFITER never arose. (Opp. at 96.) In support
 10 of this argument, the government relies on United States v. Ruiz, 536 U.S. 622, 633 (2002),
 11 which found that the Constitution does not require the government to disclose “impeachment
 12 evidence prior to entering a plea agreement with a criminal defendant.” (Id.) While true that no
 13 hard-and-fast rule requires the government to disclose Brady/Giglio materials prior to a plea
 14 deal, that does not mean that the government may hold on to Brady/Giglio materials indefinitely
 15 so long as there remains any possibility that a defendant will plead/settle. A prosecutor has a
 16 duty to disclose Brady material “without any request therefor, at least by the point in time that
 17 the disclosure can be effectively used.”⁴⁰ Cerna, 633 F. Supp. 2d at 1056 (citing Kyles, 514 U.S.
 18 at 433, 437).

19 This action settled just three days prior to trial, long after the parties had concluded fact
 20 and expert discovery, briefed motions for summary judgment, proposed jury instructions, and
 21 submitted witness lists, exhibit lists and trial briefs. By that late juncture, the time for the
 22 government to produce Brady material had long passed, as just a few weeks prior, the United
 23 States filed motions in limine seeking to exclude certain evidence relating to WiFITER and Ryan
 24 Bauer based on the supposed lack of evidence supporting defense theories of investigative bias
 25 and alternative causes of the fire. Certainly, at that point in time, having directly put these issues

26 _____
 27 ⁴⁰ In Price, the Ninth Circuit stated that Brady material “must be disclosed to the defense prior to trial.” 566 F.3d at
 28 900 (emphasis added). However, other, older cases have stated that Brady does not “necessarily require that the
 prosecutors turn over exculpatory material before trial.” Gordon, 844 F.2d at 1403 (emphasis added); see also
Cerna, 633 F. Supp. 2d at 1057 (“defense has no automatic right to Brady material prior to trial”).

1 in play for court evaluation, the government had an obligation to disclose its Brady material so
 2 that Defendants could “effectively use” the information in opposing the motions.⁴¹ Accordingly,
 3 the government had a duty to disclose Brady materials prior to the time of settlement, and its
 4 suggestion to the contrary fails.

5 **F. The Government Cannot Blame Defendants for Its Brady Violations.**

6 Finally, the government argues that Defendants are precluded from asserting any Brady
 7 violation because of the so-called “lack of diligence” of Sierra Pacific in obtaining documents
 8 relating to the cost recovery program and WiFITER account. (Opp. at 98.) The government
 9 makes no “diligence” argument with respect to the false bribe allegation, as Defendants had no
 10 knowledge of the allegation and the need seek discovery on the topic. While the concept of
 11 “diligence” has application in other civil contexts, e.g. amending a scheduling order, that concept
 12 has no application to the analysis of whether the due process rights of a defendant have been
 13 violated because the government failed to turn over exculpatory information.

14 The only case the government cites, Aichele, 941 F.2d at 764, says nothing about
 15 diligence. (Opp. at 99.) The government acknowledges as much, asserting that Aichele stands
 16 for the different proposition that when ““a defendant has enough information to be able to
 17 ascertain the supposed Brady material on his own, there is no suppression by the government.””
 18 (Id. (quoting Aichele, 941 F.2d at 764.) The government fails to disclose, however, that this
 19 aspect of Aichele is dictum and has been criticized by subsequent cases. For example, in Benn,
 20 the Ninth Circuit noted that the “Aichele court then added, by way of dictum, that if a defendant
 21 can ascertain the material on his own, there is no suppression” and stated that “[c]ertainly, that
 22 observation is overbroad, at the very least.” 283 F.3d at 1061.

23 Not only is the government’s argument legally untenable, but factually too. In their
 24 supplemental brief, which Defendants again incorporate here, Defendants discussed their efforts
 25 to conduct discovery on WiFITER during the federal action, which yielded very little, as well as
 26

27 ⁴¹ In fact, in the context of a civil case, one could argue that the United States must turn over all Brady materials at
 28 least prior to the close of discovery so that the defense has an opportunity to use the information to conduct any
 necessary follow-up.

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1 their efforts to conduct WiFITER discovery in the state action, which was met with stonewalling
 2 by the state, required extensive motion practice, and resulted in no less than three orders
 3 requiring Cal Fire to produce documents. (See Docket No. 625 at 108:22-116:19.) On the
 4 record before the Court, there is no basis to argue, let alone conclude, that Defendants were not
 5 “diligent” in attempting to discover that which the government suppressed.

6 **VII.**
THE GOVERNMENT RELIES ON ISSUES THAT ARE NOT RELEVANT TO THE
FRAUD ON THE COURT INQUIRY

7 **A. The Settlement Does Not Preclude This Court From Setting Aside the Judgment**
 8 **under Rule 60(d)(3).**

9 The government argues at length that the judgment should not be set aside in this case
 10 because the parties settled. The government argues that, “[i]n most circumstances, a settlement
 11 cannot work a grave miscarriage of justice, because settlement is fundamentally a compromise
 12 that both sides consider more advantageous than the risks and burdens of trial.” (Opp. at 23:14-
 13 16.) The government cites no actual support for this proposition.

14 The government attempts to support its own settlement rule by stating that the Supreme
 15 Court in Beggerly held that a “judgment entered upon the settlement could not be vacated for
 16 fraud on the court, even though the United States failed to produce to the opposing party and the
 17 court documents allegedly showing it could not have owned disputed land.” (Opp. at 23:20-23.)
 18 But the government’s word choice is unfortunate, as the actual holding in Beggerly says
 19 otherwise. In fact, the Beggerly decision reflects that the Supreme Court treated the settlement
 20 as irrelevant to its determination. Properly understood, Beggerly demonstrates that the
 21 impediment to finding fraud on the court was that the government’s failure to produce a
 22 document followed a good-faith search and was innocent and unintentional. 524 U.S. at 44-46.
 23 Despite the settlement between the parties, the Supreme Court made clear that if the
 24 circumstances involved bad faith, such as a forgery, its decision may very well have been
 25 different. Id. at 47.

26 The ruling is similar in Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 641-42 (1978),
 27 adopted in full, 645 F.2d 699, even though the government’s choice of words regarding that case
 28 appear to say something different. Specifically, the government states, “The only circumstance

1 in which there might be a fraud on the court in a settled case is if the court was deceived in
 2 approving the settlement.” (Opp. at 26:5-6 (emphasis added).) To be clear, however, Valerio
 3 rejected a class representative’s effort to overturn a settlement entered into by the class’s former
 4 attorneys because they failed to advise the court of certain issues pertaining to the agreement. 80
 5 F.R.D. at 641. In reaching its conclusion that the acts complained of “obviously [did] not”
 6 constitute a fraud on the court, the Valerio court focused on the nature of the misstatement and
 7 the quality of the fraud itself. Id. at 640-43. There was no discussion related to how or whether
 8 a settlement might alter or make more difficult the court’s analysis. Instead, similar to the
 9 Supreme Court’s review in Beggerly, the court focused on the nature of the misrepresentations it
 10 confronted, compared them to the standard established by Hazel-Atlas, and then denied the
 11 motion for fraud on the court. 80 F.R.D. at 641-42. Thereafter, also similar to the Supreme
 12 Court’s analysis in Beggerly, where it made clear that bad faith conduct would likely have
 13 changed its analysis, 524 U.S. at 47, the court in Valerio made clear that its decision might very
 14 well have been different if the class lawyers had “affirmatively misrepresented [the defendant’s]
 15 financial condition.” Id. at 643.

16 In a further misguided effort to support its rule, the government also misstates the
 17 holding in Latshaw v. Trainer Wortham & Co., 452 F.3d 1097, 1099 (9th Cir. 2006), using that
 18 case in the context of its fraud on the court analysis to proclaim, “Rule 60 ‘is not intended to
 19 remedy the effects of a deliberate and independent litigation decision that a party later comes to
 20 regret through second thoughts or subsequently-gained knowledge’” (Opp. at 25.) Once
 21 again, the government’s argument is mistaken.

22 In Latshaw, the plaintiff was essentially duped by her attorney into settling her lawsuit.
 23 452 F.3d at 1099. In this regard, one of her two attorneys misrepresented that she could be liable
 24 for attorneys’ fees if she did not settle, and that both attorneys were resigning from her case so it
 25 was in her interest to settle. Id. at 1099-1100. The plaintiff thus agreed to accept the settlement
 26 offer, and the attorney effectuated the settlement by signing her own name and forging her
 27 colleague’s name on the document filed with the court. Id. at 1099.

28 When the plaintiff discovered the true facts, she brought a motion seeking to vacate the

1 judgment and rescind the settlement agreement. The district court denied her motion, and the
 2 appellate court affirmed. Significantly, the plaintiff based her motion on numerous grounds
 3 under Rule 60, and the appellate court’s decision systematically discusses why the district court
 4 did not abuse its discretion in denying the plaintiff’s motion under Rule 60(b)(1) (relief from
 5 judgment for mistake, inadvertence, surprise, or excusable neglect), Rule 60(b)(3) (relief from
 6 judgment for fraud by an adverse party), and Rule 60(b)(6) (relief from judgment for
 7 extraordinary circumstances).

8 Importantly, the Latshaw court’s observation that Rule 60 “is not intended to remedy the
 9 effects of a deliberate and independent litigation decision that a party later comes to regret” is
 10 delivered in the context of a decision heavily focused on Rule 60(b)(1) and the conduct that took
 11 place between Latshaw and her counsel, as well as the reasons why that conduct caused her to
 12 settle with the defendants.⁴² To provide context for the excerpt cherry-picked by the
 13 government, the court squarely puts the “second thoughts” portion of its decision within a Rule
 14 60(b)(1) analysis as follows:

15 We agree that Rule 60(b)(1) is not intended to remedy the effects
 16 of a litigation decision that a party later comes to regret through
 17 subsequently-gained knowledge **that corrects the erroneous legal
 18 advice of counsel. For purposes of subsection (b)(1), parties
 19 should be bound by and accountable for the deliberate actions
 20 of themselves and their chosen counsel.**

19 Id. at 1101 (emphasis added to reflect portions excluded by the government). By omitting select
 20 portions of this excerpt, the government misleadingly suggests that the court’s analysis in this
 21 area of its opinion applies to fraud on the court, when in reality the court expressly limits this
 22 aspect of its discussion, and this particular quote, to its discussion of the alleged Rule 60(b)(1)
 23 fraud between Latshaw and her counsel. This “second thoughts” language therefore has nothing
 24

25 _____
 26 ⁴² The version of Rule 60 then in effect did not contain a separate subdivision authorizing courts to set aside a
 27 judgment for fraud on the court. Instead, the rule contained subdivision (b)(6), which stated that the court may
 28 relieve a party from a final judgment for “any other reason justifying relief from the operation of the judgment.”
 There was also a paragraph following subdivisions (b)(1)-(6) that contained the following sentence: “This rule does
 not limit the power of a court . . . to set aside a judgment for fraud upon the court.” Fed. R. Civ. P. 60(b) (pre-2007
 amendment).

1 to do with the fraud on the court analysis presented here.⁴³ Indeed, the court makes that fact
2 abundantly clear in yet another portion of its analysis, stating:

3 [N]either of Latshaw's alleged mistakes are among those that Rule
4 60(b)(1) is intended to remedy. . . . Latshaw's beliefs do not
5 provide grounds to rescind her acceptance. These mistakes, if true,
6 arose from attorney misconduct. A party will not be released from
7 a poor litigation decision made because of inaccurate information
8 or advice, even if provided by an attorney. Latshaw's decision to
9 accept the offer was deliberate and independent. In such
10 situations, regret caused by new knowledge does not justify
11 rescinding a decision.

12 Latshaw, 452 F.3d at 1101-02. Thus, what is critical about Latshaw is not its analysis or decision,
13 but again what the government neglects to state about its decision. Once again, the government's
14 omissions here are crucial. Since the Ninth Circuit pinned its analysis and language on fraud
15 between parties under Rule 60(b)(1), it is not surprising for the court to have made the
16 observations trumpeted by the government, but it is surprising the government fails to put them in
17 context.

18 When the Ninth Circuit ultimately comes to its fraud on the court analysis in Latshaw,
19 which does not begin until page 1104 of that opinion, it dispenses with this 'attorney versus
20 client' fraud and negligence easily, and focuses its analysis on whether the court itself was
21 defrauded. Specifically, the Ninth Circuit concludes, "[e]ven though it may have been fraud to
22 forge a signature and the fraud may have reached the court, [Latshaw's counsel's] alleged conduct
23 falls far short of 'defiling the court itself' and hardly resembles an 'unconscionable plan or
24 scheme which is designed to improperly influence the court in its decision.'" Latshaw, 452 F.3d
25 at 1104. Thus, Latshaw's reasoning is on all fours with the Ninth Court's reasoning in Pumphrey,
26 which held:

27 [T]he inquiry as to whether a judgment should be set aside for
28 fraud upon the court under Rule 60(b) focuses not so much in
terms of whether the alleged fraud prejudiced the opposing party
but more in terms of whether the alleged fraud harms the integrity

⁴³ Importantly, it was critical to the court's ruling in Latshaw that the plaintiff had brought her motion on the basis of fraud perpetrated by her own attorneys. The Ninth Circuit's holding denying relief under Rule 60(b)(1) was heavily influenced by the observation that the plaintiff had an adequate remedy at law: a suit for malpractice. Id. at 1101 ("Such mistakes are more appropriately addressed through malpractice claims."). Since the plaintiff in Latshaw had an adequate remedy "at law," the court did not find it necessary to resort to "equity" and rescind the settlement agreement.

1 of the judicial process.

2 62 F.3d at 1133 (quoting Intermagnetics, 926 F.2d at 917) (citing Hazel-Atlas, 322 U.S. at 264).

3 The government also invokes Judge Breyer's opinion in Roe v. White, 03-04035 CRB,
 4 2009 WL 4899211 (N.D. Cal. Dec. 11, 2009), to suggest that the fraud on the court doctrine
 5 usually does not apply to settled cases, and that it certainly does not apply if courts do not "look
 6 behind" the agreement itself. (See Opp. at 26:11-19.) The government apparently missed the
 7 fact that Judge Breyer's opinion was only advisory; His Honor did not actually rule on the Rule
 8 60(d)(3) motion before him because the district court lacked jurisdiction while the case was
 9 pending on appeal. 2009 WL 4899211, at *1. But the government's mistreatment of this case
 10 goes deeper than this single omission. In addition to representing to this Court that Judge Breyer
 11 held something he did not hold, the government also mistakenly states that the Ninth Circuit
 12 affirmed this advisory opinion. (Opp. at 26:20-21 (citing "Roe v. White, No. C 03-04035 CRB,
 13 2009 WL 4899211, *3 (N.D. Cal. Dec. 11, 2009), **aff'd, 395 Fed. App'x 470, 471 (9th Cir.**
 14 **2010)**") (emphasis added).) The government is incorrect. Even a cursory read of the opinion at
 15 395 Fed. App'x 470 reveals that the Ninth Circuit was affirming a different opinion of Judge
 16 Breyer in the same case, which had been appealed to the Ninth Circuit in 2008. See Roe ex rel.
 17 Rodriguez Borrego v. White, 395 Fed. App'x 470 (9th Cir. 2010) (case number 08-15891, with
 18 the prefix reflecting the appeal was filed in 2008). The Judge Breyer opinion cited by the
 19 government was issued on December 11, 2009, and was never appealed. Indeed, it could not
 20 have been, as the district court noted at the outset of its order that it lacked "jurisdiction to deny
 21 Defendant's Motion" because the case was already on appeal. 2009 WL 4899211, at *1.

22 Moreover, and perhaps more importantly, the Ninth Circuit's decision cited by the
 23 government and a subsequent decision by Judge Breyer actually undermine the government's
 24 contention that settlement generally acts as a bar to vacating judgment based on a fraud on the
 25 court. In the unpublished opinion cited by the government, the Ninth Circuit actually
 26 acknowledged that several news stories had emerged suggesting that a former attorney for the
 27 plaintiffs may have committed fraud upon the court. 395 Fed. App'x at 472. The Ninth Circuit
 28 affirmed the court's order denying the defendant's motion but then stated that "the district court

1 may, on motion or sua sponte, reopen the case and take such other actions as may in its
2 discretion be appropriate.” Id.

3 On remand, Judge Breyer did in fact permit defendants discovery to investigate whether
4 a fraud on the court had occurred. (No. C 03-04035 CRB, Docket No. 1039 at 3:21-4:19.) If, as
5 the government contends, settlement were truly a bar to relief under Rule 60 unless the court
6 “looked behind the agreement,” then Judge Breyer would not have allowed the defendants to
7 conduct any discovery,⁴⁴ since His Honor already explained that there had been no fraud in
8 connection with the agreement. But Judge Breyer did eventually permit this discovery, stating:

9 [A]fter all, as we know and we’ve repeatedly said, this was a
10 settlement. And the only question the Court had in connection
11 with the settlement was, was it fair to the plaintiffs? . . . Not
12 whether it was fair to the defense, and not whether it was fair to, in
13 some sense, the process. Though, if one carries that out, I think
14 that there is some suggestion, some suggestion that if the process
15 is so corrupted that one could potentially demonstrate, potentially
16 demonstrate a fraud upon the court. . . . [S]o far you haven’t
17 identified anything that I would think demonstrates a corruption of
18 the process such that it would warrant setting aside the settlement
19 or demonstrating a fraud upon the Court But you’re saying to
20 me and you made it clear at the very outset, you said: Look, all I
21 want to do is do some discovery here Because if I had [certain
22 information] in mind or in hand, I then can try to demonstrate why
23 having those documents created the corruption of the process that
24 would then warrant setting aside the motion.

25 (Case No. C-03-04035-CRB, Docket No. 1039 (Hearing Tr., October 14, 2011) at 3:21-4:19.)

26 Thus, Judge Breyer actually confirmed a proposition exactly opposite from the one the
27 government attributes to him, as he recognized the possibility that even if the settlement was
28 “fair” on its terms, it might nonetheless be the result of such a corrupt process that a finding of
fraud on the court under Rule 60(d)(3) is warranted. (See id.)

Following its misleading discussion of Roe v. White, the government inserts a string cite
to several out-of-circuit opinions, purportedly in support of its proposition that many courts
“have recognized that there can be no fraud on the court in a settled case unless the order

⁴⁴ And certainly the Ninth Circuit would not have explained that Judge Breyer had authority to “take such other actions as may in [his] discretion be appropriate.” 395 Fed. App’x at 472; see also Case No. C-03-04035-CRB, Docket No. 1039 (Hearing Tr., October 14, 2011) at 10:23-11:1 (“Also, I’m guided somewhat . . . by some of the language of the Ninth Circuit, which really did send the case back to me for any proceedings that I thought were appropriate.”).

1 approving the settlement itself was obtained by deception.” (Opp. at 26 n.31.) Defendants have,
 2 however, analyzed these additional cases, and not one of them actually articulates the alleged
 3 “rule” advanced by the government, or otherwise suggests that fraud on the court in a settled
 4 case is limited in the way the government contends. Instead, like the Supreme Court in
 5 Beggerly, these courts all acknowledge that the relevant inquiry in determining whether a
 6 judgment should be set aside based on a fraud on the court is whether the alleged fraud is
 7 egregious enough that it undermines the integrity of the judicial process. Defendants include a
 8 portion of their research on the government’s string cited cases in the footnote below, and
 9 parenthetical reference to what each case actually stands for.⁴⁵ The results of this research are
 10 not surprising. As noted earlier, in Beggerly the Supreme Court was not focused on whether the
 11 court was defrauded “in approving the settlement itself” (as the government proposes), but on
 12 the nature of the alleged underlying wrong, and whether it was innocent or in bad faith. See 524
 13 U.S. at 44-47.

14 After providing this legally insignificant string cite, the government proclaims, “We have
 15 searched for decisions rejecting this principle and found none.” (Opp. at 26:22-27:1.) The
 16 reason the government found no cases rejecting this self-made “principle” is because it is not the
 17 law and does not exist, so there is nothing for cases to reject.⁴⁶ Thus, the government’s assertion
 18 is meaningless. It is rather simple to construct numerous “rules” and “principles,” only to then
 19 support them by stating that no decision or authority exists to the contrary.

20 Perhaps knowing that the cases it relies upon do not withstand scrutiny, the government

21 _____
 22 ⁴⁵ See, e.g., Superior Seafoods, Inc. v. Tyson Foods, Inc., 620 F.3d 873, 878 (8th Cir. 2010) (recognizing that relief
 23 for fraud on the court is available “where it would be ‘manifestly unconscionable’ to allow the judgment to stand”);
 24 Baltia Air Lines, Inc. v. Transaction Mgmt, Inc., 98 F.3d 640, 643 (D.C. Cir. 1996) (noting that fraud upon the court
 25 pertains to instances “involving far more than an injury to a single litigant”); In re Leisure Corp., 2007 WL 607696,
 26 at *6 (N.D. Cal. Feb. 23, 2007) (“To constitute fraud on the court, the alleged misconduct must harm the integrity of
 27 the judicial process”); Petersville Sleigh Ltd. v. Schmidt, 124 F.R.D. 67, 72 (S.D.N.Y. 1989) (noting that fraud on
 28 the court “embrace[s] only that species of fraud which does or attempts to, defile the court itself “); Int’l Tel. & Tel.
 Corp., 349 F. Supp. at 29 (same); In re NWFEX, Inc., 384 B.R. 214, 226 (Bankr. W.D. Ark. 2008) (“Typically, cases
 involving fraud on the court involve two parties, one of whom has, by fraudulent means directed specifically at the
 operation (or machinery) of justice itself, gained an advantage over his opponent”); In re Mucci, 488 B.R. 186, 193
 (Bankr. D.N.M. 2013) (noting that fraud on the court involves “the most egregious conduct”).

⁴⁶ Indeed, because this is not the law, it is irrelevant that the Court never “looked behind” the parties’ settlement
 agreement in this case. There is simply no requirement that the government’s misconduct be directly tethered to the
 settlement agreement. (See Opp. at 27.)

1 goes to great length attempting to avoid the cases cited by Defendants, but its effort is
2 unavailing. It first argues that in Hazel-Atlas, 322 U.S. 328, judgment was not entered based
3 upon a settlement agreement, so it is inapposite. (Opp. at 28:4-13.) But the government’s
4 slippery distinction only matters if its starting point for assessing this Supreme Court case is
5 actually correct, that a judgment in a settled case can only be set aside for fraud on the court
6 when the court actually “looks behind” the agreement. As already explained above, its
7 proposition is completely lacking in support, and is in fact contrary to the holding in Hazel-
8 Atlas, which is the true “leading” Supreme Court case addressing fraud on the court.

9 In Hazel-Atlas, the Supreme Court implicitly recognized that a court should grant relief
10 from a judgment obtained by fraud on the court even when the underlying action in which the
11 fraud was committed involved a settlement agreement. 322 U.S. at 243. Judgment was entered
12 in that case against Hazel after Hartford appealed the district court’s judgment and the appellate
13 court reversed. Following the reversal, Hazel tried to investigate the rumors it had heard about
14 the article’s true author, but was unable to find any evidence of the fraud because Hartford, in
15 perpetuating its fraudulent scheme, had already gotten to the alleged author and convinced him
16 to keep up the charade. Id. at 241-42. The Supreme Court was completely untroubled by this
17 procedural history and only commented upon it in the context of providing the relevant
18 background of the case. See id.

19 The government next attempts to distinguish Herring v. United States, 424 F.3d 384 (3rd
20 Cir. 2005), a case Defendants cite as illustrating the willingness of at least one court to examine
21 substantively a motion to vacate judgment based on fraud on the court, where the judgment at
22 issue was based on a fifty-year-old settlement agreement. See id. at 390-92. The government
23 believes it is important that the Third Circuit found no fraud existed and that the settlement came
24 after a merits-based judgment was entered (see Opp. at 28:14-22), but the point of this case is not
25 the outcome but the court’s willingness to engage in the analysis despite the passage of time. If
26 settlement were truly a bar to review in the manner suggested by the government, then the
27 Herring court would not have conducted a lengthy discussion of the merits in the first place.

28 With respect to Black v. Suzuki Motor Corporation, No. 2:04-CV-180, 2008 WL

1 2278663, *3 (E.D. Tenn. May 30, 2008), the government argues that it “is not even about relief
 2 from judgment under Rule 60.” But the case begins with the following explanation by the court:
 3 “This matter is before the Court on the ‘Renewed Motion For Summary Judgment And Renewed
 4 Motion To Set Aside Settlement Agreement’ In reality, the motion seeks an order setting
 5 aside the settlement agreement of the parties . . . pursuant to the Court’s inherent power to
 6 dismiss an action wherein a party has committed fraud on the court and the Court will treat it as
 7 such.” Id. at *1. Thus, the court treated the motion as arising under Rule 60 and its analysis is
 8 on point.

9 The government set up yet another straw-man by stating that Aoude v. Mobil Oil
 10 Corporation, 892 F.2d 1115, 1118-19 (1st Cir. 1989), is not about settlement at all, but as the
 11 government must know, the Defendants did not cite Aoude for any purpose relating to
 12 settlement. Instead, they cited it to explain the importance of a court’s ability to address and
 13 rectify fraud that is committed against the judiciary:

14 Courts cannot lack the power to defend their integrity against
 15 unscrupulous marauders; if that were so, it would place at risk the
 16 very fundament of the judicial system.” Aoude v. Mobil Oil
 17 Corp., 892 F.2d 1115, 1119 (1st Cir. 1989). As the First Circuit so
 18 precisely stated in Aoude, it is “[s]urpassingly difficult to conceive
 19 of a more appropriate use of a court’s inherent power than to
 20 protect the sanctity of the judicial process – to combat those who
 21 would dare to practice unmitigated fraud upon the court itself. To
 22 deny the existence of such power would . . . foster the very
 23 impotency against which the Hazel-Atlas Court specifically
 24 warned. Id.

25 (Defs.’ Supp. Brief at 18:25-19:4.)

26 Next, the government attempts to distinguish Broyhill Furniture Industries, Inc. v.
 27 Craftmaster Furniture Corporation, 12 F.3d 1080, 1087 (Fed. Cir. 1993), and Southerland v.
 28 Oakland County, 77 F.R.D. 727, 730-31 (E.D. Mich. 1978), on the ground that these cases ended
 in consent decrees, i.e., “an order of the court adjudicating the case.” (Opp. at 29:10-19.) But
 again, this is a false distinction, since neither Rule 60 itself nor Hazel-Atlas or its progeny
 purport to limit the relief available under Rule 60(d)(3) based on the manner in which a case
 ended.

In the end, the government strains itself and this process to find support for the

1 proposition that a judgment in a case that settles may only be set aside for fraud upon the court
 2 “if the court was deceived in approving the settlement.” (Opp. at 26:6.) It is telling that the one
 3 piece of authority the government never addresses is the plain language of the rule itself. This is
 4 because the text of Rule 60 unequivocally applies to any “judgment, order, or proceeding,” and
 5 makes no distinction regarding its application to final dispositions such as stipulated judgments,
 6 consent judgments, or settlement orders. See Fed. R. Civ. P. 60. Instead of accepting the plain
 7 language as meaning what it says, and the case authority, the government grafts inapplicable
 8 sentence fragments, conflates issues, and even injects examples of its own misconduct about
 9 which Defendants purportedly knew⁴⁷ as reasons why the parties’ settlement agreement should
 10 preclude this Court from exercising its inherent authority to set aside the judgment that was
 11 precipitated by the government’s wrongful acts. But none of these efforts are successful,
 12 because from Hazel-Atlas to Beggerly, from Latshaw to Levander, controlling case law is
 13 perfectly consistent with the broad language of Rule 60, and it teaches that a settlement
 14 agreement establishes no special or peculiar bar of any kind to the court’s assessment regarding
 15 whether there has been a fraud on the court.

16 **B. The Government’s Contention that Defendants Pretended to Settle Attempts to**
 17 **Controvert Facts that Must be Presumed True, Violates This Court’s Order, and**
 18 **Must be Disregarded on This Motion.**

19 In their portion of the Joint Status Report (Docket No. 612) the government wrongly
 20 asserted that Defendants only “pretended to settle” the federal Moonlight Fire action, while
 21 ignoring the fact that these Defendants have already paid over \$30 million to the government as
 22 part of this so-called pretend settlement. Nevertheless, because the government made this false
 23 assertion, Defendants addressed it fully in their opening brief (Docket No. 625 at 35:3-36:23)
 24 with a complete factual recitation surrounding the government’s baseless claim that this was only

25 _____
 26 ⁴⁷ Specifically, the government repeats its argument from the previous section that Defendants “knew of almost
 27 every alleged act of misconduct set forth in their motion.” (Opp. at 24:5-6.) In reality, as discussed in more detail
 28 infra, there were many significant facts evidencing misconduct by the government which Defendants were not
 aware of before they entered the settlement agreement. But even if there were not, some knowledge of the
 government’s fraud does not prevent this Court from vacating the judgment. See Hazel-Atlas, 322 U.S. at 241, 244
 (“At the time of the trial . . . , the attorneys of Hazel received information [of the fraud,]” but later holding that,
 despite the earlier knowledge, “[e]very element of the fraud here disclosed demands the exercise of the historic
 power of equity to set aside fraudulently begotten judgments.”).

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1 a “pretend” settlement. Defendants explained why a press release correcting misstatements by
2 the government attorneys was necessary to mitigate the government’s efforts to poison the
3 Plumas County jury pool. Those facts, as alleged, which are to be presumed true according to
4 the Court’s order on this motion, state, in part, as follows:

5 At no time before the entry of Judge Nichols’s February 4, 2014,
6 Orders, wherein he found by “clear and convincing evidence” that
7 the Moonlight Fire investigation and prosecution were “corrupt
8 and tainted,” had Defendants even considered the possibility of
9 seeking to set aside the judgment in the federal action. Further
10 underscoring the absurdity of the Moonlight Prosecutors’ assertion
11 that the federal settlement was a charade is the fact that Defendants
12 have now paid the United States well over \$30 million as part of
13 the federal settlement, and the fact that Sierra Pacific has conveyed
14 to the United States thousands of acres of land. Defendants can
15 assure the Court that these payments and land conveyances most
16 certainly are not “pretend.”

17 (Docket No. 625 at 35:3 - 36:23).

18 This court ordered that all facts alleged by Defendants would be presumed true. In
19 violation of the Court’s order, the government attempts to challenge the veracity of these
20 allegations, and again cites to the same press release, claiming once again that “when Sierra
21 Pacific entered the settlement agreement and caused it to be filed with the Court, it already
22 intended to bring this motion and have the judgment set aside.” (Oppo. at 11:6-11.)

23 In making this assertion, the government once again fails to discuss the context in which
24 counsel’s statement was made. Moreover, the government ignores the fact that Sierra Pacific is
25 but one of many parties that have sought relief under Rule 60(d)(3). In the end, because these
26 arguments go beyond Defendants’ allegations, they should be ignored by this Court, as should all
27 the other arguments by the government that go beyond or attempt to controvert Defendants’
28 allegations.

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1 **C. The Government’s Assertion that Defendants’ Awareness of Some Components of**
2 **the Fraud Fails as A Matter of Law and Ignores the Numerous Components of the**
3 **Fraud Defendants Uncovered After the Settlement.**

4 **1. The Government’s Assertion that Defendants’ Awareness of Some**
5 **Components (But Admittedly Not All) of the Fraud Bars Relief**
6 **under Rule 60(d)(3) Has Been Squarely Rejected By the Supreme**
7 **Court.**

8 In relying on the Seventh Circuit’s case Oxford Clothes, XX, Inc. v. Expeditors Int’l of
9 Washington, Inc., 127 F.3d 574 (7th Cir. 1997), the government contends that “no deception—
10 not even perjury—can be a fraud on the court if the opposing party either contested it or
11 possessed facts or evidence to contest it before judgment.” (Opp. at 20:21-21:1.) This assertion
12 completely ignores the relevant facts in Hazel-Atlas and binding precedent of Pumphrey.

13 In Hazel-Atlas, the Supreme Court explicitly acknowledged that “[a]t the time of the trial
14 in the District Court . . . , the attorneys of Hazel received information [about the fraud]. Hazel’s
15 attorneys did not at that time attempt to verify the truth of the hearsay story of the article’s
16 authorship, but relied upon other defenses which proved successful.” 322 U.S. at 241.⁴⁸ After
17 the appellate court reversed and remanded with a directive that the district court vacate its
18 original judgment, only then did Hazel-Atlas attempt to investigate the fraud. Id. at 242. That
19 investigation was unsuccessful, however, because Hartford’s agents had already convinced the
20 purported author to keep up the act. Id. Thus, Hazel-Atlas “capitulated” and settled the action.
21 Id. at 243. The majority acknowledges that Hazel-Atlas obtained “indisputable proof” of these
22 facts after they were brought to light in a subsequent action. Id. It was inconsequential to the
23 Supreme Court that Hazel-Atlas received information relating to the fraud during trial, but did

24 ⁴⁸ In light of this quote, which is taken directly from the majority’s opinion in Hazel-Atlas, the Court can put to rest
25 the government’s contention that “Sierra Pacific tries to avoid this rule by sleight of hand, claiming that the
26 Supreme Court set aside the judgment in Hazel-Atlas Glass Co. even though the defrauded party had evidence of the
27 fraud at the time of settlement. [Citation omitted.] That was only the dissenting justices’ view—not the Court’s.”
28 (Opp. at 22:5-8.) Again, the quote provided above acknowledging that Hazel-Atlas had some knowledge of
Hartford’s fraud (whether in the form of admissible evidence or otherwise) is taken directly from the majority’s
opinion. See 322 U.S. at 242. Whether that knowledge came in the form of admissible testimony or otherwise, the
point remains the same, that pre-judgment knowledge does not foreclose relief under Rule 60(d)(3). Defendants did
not attempt to slice the bologna as thin as the government, and the only reason why the government is trying to align
Defendants with the Hazel-Atlas dissent is because the government is making the exact same contention that the
Hazel-Atlas majority disregarded, that Defendants were purportedly aware of certain instances of misconduct before
judgment was entered and are therefore precluded from having the judgment set aside. The Supreme Court did not
buy this argument in 1944 and this Court should not buy it today.

1 not act on it. Id. at 245-46. The Court disagreed that Hazel-Atlas had not been diligent, but
2 explained that, even if Hazel could have done more to uncover the fraud, “Hartford’s fraud
3 cannot be condoned for that reason alone. . . . Surely it cannot be that preservation of the
4 integrity of the judicial process must always wait upon the diligence of litigants.” Id. at 246.

5 The Ninth Circuit was directly in line with this reasoning when it ruled in Pumphrey that
6 the plaintiff was not precluded from having the judgment vacated based on a showing that the
7 court had been defrauded, even “after receiving [the defendant’s] interrogatory answers
8 admitting [certain aspects of the fraud.]” 62 F.3d at 1133. Indeed, citing the Hazel-Atlas
9 majority, the Pumphrey court recognized that the opposing party’s knowledge is not a
10 consideration because the inquiry is whether the judicial process was harmed, not what effect the
11 fraud had on other litigants. Id. (“[E]ven assuming that [the plaintiff] was not diligent in
12 uncovering the fraud, the district court was still empowered to set aside the verdict, as the court
13 itself was a victim of the fraud.”) (emphasis added).

14 The government also relies on Appling and Levander in support of its proposition that
15 only after-discovered fraud is grounds for vacating a judgment based on a fraud committed on
16 the court, but the conduct in Appling was far less severe than the conduct at issue here and
17 misapprehends Levander. Appling concerned the defendant’s counsel’s actions in responding to
18 a subpoena for information from an individual without that third party’s authorization, and
19 assuring plaintiffs’ counsel that the third party had no documents or information related to the
20 litigation. 340 F.3d at 773. The individual “was never shown a copy of the objections” to the
21 subpoena, served in his name, and was never “consulted with respect to their contents.” Id. at
22 774. The plaintiffs pointed to three documents that would have been produced but for this fraud
23 by the defendant’s counsel. Id. The Ninth Circuit found that this conduct was “aimed only at
24 the [plaintiffs] and did not disrupt the judicial process because the [plaintiffs] through due
25 diligence could have discovered the non-disclosure.” Id. at 780. But the Appling court’s
26 determination that this nondisclosure did not amount to a fraud on the court was largely the
27 consequence of a misquote of Levander. Specifically, Appling cites Levander for the rule that
28 “[n]on-disclosure, or perjury by a party or witness, does not, by itself, amount to fraud on the

1 court,” but omits the key words “generally” and “normally” used by Levander to describe when
 2 fraud on the court may be found. Compare Appling, 340 F.3d at 780, with Levander, 180 F.3d
 3 at 1119 (“Generally, non-disclosure by itself does not constitute fraud on the court. . . .
 4 Similarly, perjury by a party or witness, by itself, is not normally fraud on the court.” (emphasis
 5 added)). Thus, even the Levander court acknowledges that non-disclosure and/or perjury may,
 6 under the right circumstances, constitute a fraud on the court.⁴⁹ Given the Appling court’s
 7 misquote of the law of the Ninth Circuit – set forth in Levander and reaffirmed by Stonehill – its
 8 reasoning is unpersuasive and should be given little weight.⁵⁰

9 In short, the government completely ignores (as did the Seventh Circuit in Oxford
 10 Clothes) the Supreme Court’s recognition that fraud on the court may be found even where the
 11 party asserting fraud on the court has information about the opposing side’s fraudulent conduct

12 _____
 13 ⁴⁹ The government also cites to Levander to suggest that because Defendants were aware of some of the alleged
 14 fraud prior to the settlement, Defendants are now precluded from challenging the government’s misconduct as a
 15 fraud on the court because, to the extent they intended to challenge this misconduct at all, the opportunity to do so
 16 was at trial. (See Opp. at 21:8-16.) As discussed above, however, Hazel-Atlas is clear that having the opportunity
 17 to challenge fraudulent conduct at trial does not preclude a later finding of fraud on the court. There, Hazel
 18 suspected the fraud but did not challenge the article’s origins at trial, instead “rely[ing] upon other defenses which
 19 proved successful.” 322 U.S. 238. Perhaps more to the point, both Levander and Gleason, 860 F.2d 556 – a Second
 20 Circuit case cited by the government and discussed in Levander – presuppose that a trial or other proceeding
 21 wherein the perjured testimony could be challenged actually occurred. These cases do not stand for the proposition
 22 that the decision not to go to trial to challenge any suspected perjury bars later relief for fraud on the court resulting
 23 from that perjury. Finally, also discussed elsewhere, the government strategically ignores that Defendants
 24 discovered much of the government’s fraud “after the fact,” and that Defendants have not yet had the opportunity to
 25 discover what other acts of fraud the government committed that simply have not yet come to light.

19 ⁵⁰ The government also cites two Eastern District cases in support of its contention that pre-judgment knowledge of
 20 some fraud precludes recovery under Rule 60(d)(3). (See Opp. at 21:22-22:4.) First, in Arnold v. County of El
 21 Dorado, 2012 WL 3276979, *5 (E.D. Cal. Aug. 9, 2012), Magistrate Judge Hollows ruled on a defendant’s motion
 22 for terminating sanctions and, in examining the various sanctions available and their bases, remarked about the
 23 tension that exists between certain cases that authorize the dismissal of cases based on perjury, and other cases,
 24 including Stonehill and Levander, which explain that “perjury by a party or witness, by itself, is not normally fraud
 25 on the court.” (Internal quotations omitted.) Judge Hollows then commented that “it appears that in the setting
 26 aside or reopening judgments context, perjury will not be grounds for upsetting a judgment when the fact of the
 27 untruth was known and could have been challenged during the proceeding itself. Levander, 180 F.3d at 1120.”
 28 This language is dicta, since the motion pending before Judge Hollows was not based on Rule 60 at all (indeed, no
 judgment had yet been entered), and given its provisional nature (“it appears that . . .”), does not purport to reiterate
 the holdings of Stonehill and Levander as binding.

Second, in Wright v. U.S., 2001 WL 1137255, *9 (E.D. Cal. Aug. 21, 2001), Magistrate Judge Drozd
 recommended, in the context of a motion to dismiss filed by defendants, that a pro se plaintiff’s request to set aside
 an earlier judgment be denied. In responding to the pro se plaintiff’s request, which was made to avoid a dismissal
 based on res judicata, Judge Drozd remarked that “Federal Rule of Civil Procedure 60(b) provides that a court may
 relieve a party from a final judgment, order or proceeding for, among other reasons, newly discovered evidence
 which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) or fraud,
 misrepresentation or other misconduct of an adverse party.” Nothing about this statement contravenes Defendants’
 position here.

1 but does not act on that information at trial or prior to judgment. Hazel-Atlas, 322 U.S. at 241.
 2 The government is incorrect in stating that only “after-discovered fraud” can constitute fraud on
 3 the court. To the extent that Oxxford Clothes supports this reading, it is non-binding and
 4 directly contradicts well-established Supreme Court precedent.

5 What the government is really arguing is that there can be no prejudice here because
 6 Defendants purportedly knew some (but admittedly not all) of these facts at the time they agreed
 7 to settle. However, as discussed elsewhere in this brief at length, prejudice is not an element the
 8 Court may consider. See Dixon, 316 F.3d at 1046 (“Prejudice is not an element of fraud on the
 9 court.”) (citing Hazel-Atlas, 322 U.S. at 238; Pumphrey, 62 F.3d at 1132-33).

10 **2. Numerous Fraudulent Actions By the Government, Which**
 11 **Individually Would Support Relief Under Rule 60(d)(3), Were Not**
 12 **Known to These Defendants Before Entry of Judgment.**

13 Even if the government’s claim that knowledge of misconduct before entry of judgment
 14 bars relief under Rule 60(d)(3) were correct (it is not), there is no question that much of the
 15 government’s fraud here was not known to Defendants until after entry of judgment. Indeed, the
 16 government’s contention that Defendants settled “knowing everything with the slightest
 17 significance discussed in the [Defendants’] supplemental brief” is contrary to the allegations in
 18 Defendants’ opening brief, which must be assumed true for purposes of this motion. The
 19 following facts and the timing of their discovery after the Court entered the judgment in this
 20 matter are alleged in detail in Defendants’ opening briefing. Nevertheless, in view of the
 21 government’s false timeline of events (which must be ignored on this motion pursuant to the
 22 Court’s order) Defendants summarize some of these after-acquired facts for the Court’s
 23 convenience here:

24 **a. Defendants Discovered Eddie Bauer’s False Allegation of a \$2 Million**
 25 **Bribe by Defense Counsel after Entry of the Federal Judgment.**

26 As alleged in much more detail elsewhere in this briefing and in Defendants’ opening
 27 brief, Defendants knew nothing about the false allegation by Eddie Bauer that counsel for Sierra
 28 Pacific had communicated a \$2 million bribe to secure a confession by his son Ryan taking
 responsibility for starting the fire. Bauer communicated this allegation directly to the

1 government’s lead attorneys, Kelli Taylor and Richard Elias, in spring 2012 and they concealed
 2 this information in direct violation of their duty of candor to the tribunal, and in violation of their
 3 discovery obligations. Having done so, they defrauded the court by securing a ruling based on a
 4 FRE 403 motion where the court was required to carefully balance such factors, thus
 5 successfully precluding Defendants from arguing that anyone else may have started the
 6 Moonlight Fire. This was the central issue in the case. As alleged in Defendants’ opening
 7 briefing, the Court’s ruling prohibiting Defendants from “eliciting evidence to argue that
 8 someone else started the fire” was a critical ruling that was a substantial factor in forcing
 9 Defendants to settle the federal action. This is fraud on the court perpetrated by officers of the
 10 court, and alone would be sufficient to set aside the judgment under Rule 60(d)(3) and vacate the
 11 action. Given its importance to this Court’s assessment, Defendants have devoted an entire
 12 section of this briefing to this issue.

13 ***b. Defendants Discovered the Moonlight Prosecutors’ Role in***
 14 ***Encouraging False Testimony Concerning Transplanted Evidence and***
 15 ***False Points of Origin after Entry of the Federal Judgment.***

16 At the time the federal judgment was entered, Defendants did not have information to
 17 prove the Moonlight Prosecutors themselves affirmatively assisted Moonlight Fire investigator
 18 David Reynolds’s stratagem to give false testimony regarding his false points or origin, and the
 19 fact that he and White transplanted evidence collected from the white flag rock to the alleged
 20 points of origin, E2 and E3. To be sure, and only because of Defendants’ successful motion to
 21 compel his testimony on this front, law enforcement officer Reynolds eventually admitted that
 22 he attended a January 2011 meeting at the United States Attorney’s Office in the Eastern District
 23 of California with law enforcement officer White, special agent Welton, and the federal and state
 24 prosecutors, Taylor and Winsor. But it was not until the last day of his state deposition, on
 25 November 1, 2012, after the federal settlement had been reached, when Reynolds testified as
 26 follows concerning the January 2011 meeting: “And they said it was going to come up and saw it
 27 as a nonissue.” With that new information, the perjured testimony by Reynolds (and Joshua
 28 White for that matter) became not just a matter wherein officers of the court were failing to
 correct perjury in the record after the fact, but one in which these officers of the court had

1 participated on the front end in securing or facilitating the false testimony. Taylor apparently
 2 appreciates the import of this issue, because in her declaration she attempts to minimize her
 3 involvement and mislead the Court by stating the following:

4 On March 21, 2011, I defended the out of town deposition of
 5 U.S.F.S. investigator Diane Welton; so one of my colleagues met
 6 with and prepared Dave Reynolds for his deposition. Those
 7 colleagues then defended Reynolds' deposition on March 22, 23
 8 and 24, 2011. I attended part of the deposition on March 22, 2011
 9 via phone.

8 (Docket No. 629 [Taylor Decl.])⁵¹ Of course, Taylor's declaration on this front violates the
 9 Court's order, as it goes well beyond assuming the truth of the allegations pleaded by
 10 Defendants. Nevertheless, her statement is incomplete and fails to fully reveal important facts.
 11 In January 2011, Taylor spent the better part of a day with Reynolds preparing him at his
 12 upcoming deposition, which of course is when Reynolds was told it was all a "non-issue," thus
 13 essentially receiving permission to provide false testimony. Notably, Taylor does not deny
 14 having met with Reynolds, and never states how many times she met with him, thus leaving
 15 open the possibility (indeed likelihood) for multiple meetings even beyond the infamous January
 16 2011 meeting that has thus far been revealed. As a consequence, Taylor's declaration raises
 17 more questions than it answers. But to the extent the government contends that perjury in a
 18 deposition can never constitute fraud on the court unless an attorney is involved in procuring it,
 19 Reynolds November 1, 2012, deposition testimony provided new information following entry of
 20 judgment not previously known to these Defendants which supports relief under Rule 60(d)(3)
 21 on that ground.

22 ***c. Defendants Discovered the Lead Investigator's Contingent Financial***
 23 ***Interest in The Outcome of His Investigation After Entry of the Federal***
 24 ***Judgment.***

24 It was not until after the federal settlement that Defendants learned of the illegality of
 25 WiFITER and received the documentary evidence showing:

- 26 • How it actually biased investigators;

27 _____
 28 ⁵¹ Taylor omits from her declaration the fact that she attended portions of Reynolds' March 22, 2011 deposition in person, as reflected on the transcript and video tape of that deposition.

- 1 • How it was controlled by Cal Fire employees Joshua White, Alan Carlson and
- 2 others;
- 3 • How Cal Fire management concealed this account from state regulators;
- 4 • How Cal Fire management and its inside counsel (officers of the court) knew the
- 5 account was illegal;
- 6 • How it was used to fund expensive “junkets” to expensive hotels in San Diego, a
- 7 beach front resort in Pismo Beach, and the wine country;
- 8 • How desperately Alan Carlson (Joshua White’s mentor) wanted the next “high %
- 9 recovery” because WiFITER was “running in the red”;
- 10 • How it was nothing more than a bank account of illegally skimmed money
- 11 controlled by rogue Cal Fire employees; and,
- 12 • How it was never a separate public trust fund as represented to this Court by the
- 13 federal Moonlight Prosecutors.

14 Documents revealing all of these facts were wrongfully withheld by Cal Fire, the United
 15 States’ joint prosecution partner, until long after entry of judgment in the federal action. And
 16 Defendants only learned of them by chance – when the California State Auditor happened to
 17 reveal a critical email, which Cal Fire withheld from Defendants, in its publically disclosed audit
 18 of the illegal account on October 15, 2013. In addition to proving the existence of Joshua
 19 White’s undisclosed contingent financial/beneficial interest in the outcome of his investigation,
 20 it further demonstrated a violation of California Rule of Professional Conduct 7-107(C). Cal
 21 Fire’s in-house counsel, with the cooperation of Cal Fire’s litigation counsel, actively suppressed
 22 evidence of WiFITER’s illegality and its impact on wildland fire investigations, thereby
 23 defrauding this Court. As explained in detail in Defendants’ moving papers, the “imperative of
 24 judicial integrity” as discussed by the Supreme Court in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct.
 25 1684, 6 L. Ed. 2d 1081 (1961), cannot possibly tolerate circumstances where law enforcement
 26 officers have any undisclosed contingent beneficial interest in an investigation which is the basis
 27 for governmental prosecution.

28 To the extent that the government has proffered any evidence that it contends contradicts

1 these facts, its submission must be ignored on this motion. The Court made clear in its ruling
 2 that it will not be resolving any factual disputes at this juncture in the proceeding. In any event,
 3 any contention that Defendants knew these facts before entry of the federal judgment is
 4 demonstrably incorrect.

5 The government's effort to minimize the import of White's contingent interest is without
 6 merit. Firstly, it contravenes the Court's directive to assume all allegations as true. Moreover,
 7 the government's contention that White's undisclosed contingent interest did not invade the
 8 federal action since White allegedly had no financial interest in any recovery by the federal
 9 government misses the point. White conducted his "investigation," picked his chosen
 10 defendants, destroyed his field notes and computer files, manufactured evidence and concealed
 11 evidence and packaged those efforts in the form of his Joint Report, all while having a
 12 contingent financial interest in the outcome. That Joint Report is the foundation of the federal
 13 action. Indeed, the Moonlight Prosecutors listed the Joint Report as their Trial Exhibit No. 1.
 14 For the government to suggest that the federal action was unaffected by White's undisclosed
 15 contingent financial interest in the outcome of his investigation ignores reality. Moreover, the
 16 bulk of White's deposition was conducted in the context of the state action, in which he
 17 undeniably held a contingent interest. Indeed, Cal Fire did not finally shut down WiFITER until
 18 2013, after pressure began mounting when the Wall Street Journal and the Los Angeles Times
 19 began running articles about the evidence Defendants had collected concerning this illegal off-
 20 books account. Although Cal Fire now claims it shut down WiFITER in late 2012, that was still
 21 long after White gave his testimony under the belief that WiFITER stood to gain as much as
 22 \$400,000 of any proceeds of the state litigation--money from which White himself would
 23 benefit.

24 ***d. Defendants Discovered Evidence Proving the Falsity of Testimony by***
 25 ***Government Expert Chris Parker After Entry of the Federal Judgment.***

26 It was not until after entry of the federal judgment that Defendants learned for the first
 27 time that during his federal deposition, USA expert witness Chris Parker testified falsely about
 28 or concealed the very purpose of WiFITER, which he conceived of and helped create in 2005

1 while employed with Cal Fire. It was only after the California State Auditor issued its October
 2 15, 2013, report that Defendants learned that Parker had written an email which stated the
 3 purpose of the account was to give Cal Fire control over money that was unencumbered by
 4 restrictions on expenditure of state funds. Cal Fire's in-house counsel, with the cooperation of
 5 Cal Fire's litigation counsel, actively suppressed evidence of WiFITER's illegality and its
 6 impact on wildland fire investigations, thereby defrauding this Court. With respect to this issue,
 7 Taylor's declaration is silent, except for general statements about WiFITER, which raise more
 8 questions than they answer. In any event, the government's contention that Defendants knew
 9 this particular fact before entry of the federal judgment is demonstrably incorrect.

10 *e. Defendants Discovered the Government's Expert's Admission that The*
 11 *Moonlight Fire Investigators' Testimony was Deceptive After Entry of*
 12 *the Federal Judgment.*

12 The fraudulent nature of law enforcement officers White and Reynolds' testimony about
 13 the central aspect of their investigation was recognized by the joint origin and cause expert for
 14 the United States and Cal Fire, Larry Dodds. Dodds spent more than a thousand hours
 15 examining the evidence, finally conceding in May of 2013 (after the conclusion of the federal
 16 action) during a state deposition that the white flag raises "a red flag," creates a "shadow of
 17 deception" over the investigation, and caused him to admit "I will give you that it's more
 18 probable than not that there was [sic] some act of deception associated with testimony around the
 19 white flag."⁵² Dodds did not make these concessions during his federal deposition. He did so
 20 only later, in his state deposition after the federal settlement. Likewise, Cal Fire Unit Chief
 21 Bernie Paul, who was only disclosed in the state action as a Cal Fire expert after the federal
 22 settlement, admitted in the state case that the evidence and testimony surrounding the white flag

23 _____
 24 ⁵² In violation of the Court's order, the government attempts to controvert the truth of *one* of Defendants' allegations
 25 about Dodds, and falsely claims in its briefing that Dodds refused to make one of the listed admissions. In support,
 26 the government cites to two pages in Dodds' deposition. (Docket No. 597-23, page 55-56). While it is true that
 27 Dodds was *initially* extremely evasive on one point and tried repeatedly to avoid answering the questions put to him,
 28 he eventually conceded the truth, as reflected about 100 pages later in the deposition transcript, when he admitted, "I
 will give you that it's more probable than not that there was [sic] some act of deception associated with testimony
 around the white flag." (Docket No. 597-23, p. 74 [Dodds 4/9/13 Depo, p. 1038:4-8]). The government does not
 even attempt to deny that Dodds said the white flag raised a red flag, or that he admitted that a "shadow of
 deception" hung over the investigation. Nor does the government deny that all of this testimony was given after the
 federal settlement.

1 caused him to disbelieve the Moonlight Investigators. Chief Paul also admitted that the
 2 investigators’ testimony denying they knew anything about the white flag was “alone enough to
 3 cause you [Paul] to want to toss the whole report out.”

4 None of these admissions had been obtained until after entry of the federal settlement
 5 through no fault of these Defendants. The government attempts unsuccessfully to manufacture
 6 the appearance that the false narrative proffered by its witnesses is merely a fantasy of
 7 Defendants borne of parlor tricks and gimmicks. The government is wrong, and in so arguing
 8 they violate the Court’s clear directive that the parties are to confine their briefing to the standard
 9 for fraud on the court while assuming the facts alleged to be true. Nevertheless, nowhere in its
 10 papers does the government address or even acknowledge that its own expert Larry Dodds, and a
 11 Unit Chief and expert for Cal Fire, are apparently laboring under the same delusions as the
 12 Defendants.

13 *f. Defendants Discovered Facts Proving that Diane Welton Lied in*
 14 *Deposition about Where the Fire May Have Started After Entry of the*
 15 *Federal Judgment.*

16 At some point prior to October of 2008, AUSA Bob Wright retained several expert
 17 consultants and, on or about October 2, 2008, visited the fire site with consultants along with
 18 another government attorney. When they arrived in the area, they were joined by Moonlight
 19 Investigators White from Cal Fire and Welton from the USFS. When driving back into town in
 20 a pickup truck with White and Welton, Welton told Wright “there’s something that we need to
 21 tell you.” Welton then explained that USFS investigator Special Agent in Charge Marion
 22 Matthews, who had visited the alleged origin five days after the fire began, had wanted the
 23 investigators to declare a larger alleged origin area for the fire.

24 But the general area of origin in a wildfire origin and cause investigation is merely a tool
 25 to help narrow the search down to the specific point of origin. Wildfire investigators do not
 26 expand the general area of origin after they have already found the point of origin. Importantly,
 27 when Matthews made her comments, White and Welton had already claimed to have located the
 28 *specific points of origin*. Thus, Matthews’ desire to expand the alleged general origin area
 further up the hill than had been “found” by the investigators would have made no sense unless

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1 she believed the fire started further up the hill, which of course it did as proven by the aerial
2 video.⁵³

3 As stated in Defendants' earlier briefing, Welton suppressed the harmful key fact
4 regarding Matthews during her deposition. On August 15, 2011, Welton testified as follows:

5 Q: Was there any discussion that you recall at the scene about the
6 general area of origin being potentially larger than the area that
7 was bounded by the pink flagging?

8 A: I don't recall having that discussion.

9 Q: Did Marion Matthews at any point in time ever express to you
10 the thought that she believed the general area of origin should have
11 been bigger, both uphill and downhill?

12 A: Not that I recall.

13 Defendants learned of this revelation regarding Welton for the first time in 2014. The
14 fact that she made her comments to Wright in the presence of Cal Fire's Joshua White destroyed
15 any possible privilege, as Magistrate Judge Brennan's order confirms that White's status as an
16 expert makes any discussions in his presence discoverable. Any contention that Defendants
17 knew of Welton's perjury on this front before entry of the federal judgment is demonstrably
18 incorrect.

19 ***g. Defendants Discovered Facts Proving That the Moonlight Prosecutors
20 Had Reason to Know the Fire Started Elsewhere After Entry of the
21 Federal Judgment.***

22 After the federal settlement, Defendants learned that the government failed to disclose
23 certain exculpatory evidence associated with the Air Attack video. Specifically, the government
24 attorneys did not provide Defendants with the handwritten notes created by their expert, Larry
25 Dodds, a fire origin and cause expert jointly retained by the federal and state prosecutors under
26 their Joint Prosecution Agreement. Defendants deposed Dodds first in the federal action and,
27 after the federal settlement, again in the state action. In his later state deposition, Dodds
28 produced handwritten notes that he prepared while he was retained as an expert in the federal
action, but which the Moonlight Prosecutors had never produced or disclosed to Defendants.

⁵³ To help put this in perspective, ocean search and rescue teams do not expand the territory of their search *after* they have already found the stranded vessel, and neither do wildland fire investigators *after* they have already found the point of origin of a fire.

1 The notes reveal that Dodds struggled in consultation with the Moonlight Prosecutors to
 2 reconcile the location of the government’s alleged origin with the Air Attack video, particularly
 3 joint federal/state expert Chris Curtis’s placement of the alleged origin in the video frames.

4 For example, in his handwritten notes, Dodds writes: “Chris Curtis testified to separation
 5 between the GAO [government’s alleged origin] & the smoke seen in the AA [Air Attack]
 6 video.” Dodds confirmed during his state deposition that these notes reflect his understanding of
 7 Curtis’s federal testimony. When questioned in the state action about this note, Dodds admitted
 8 that during a meeting with the federal prosecutors, Curtis discussed his opinion about the
 9 “separation” between the smoke and the government’s origin. Thus, it was only after settlement
 10 of the federal action that Defendants learned that a jointly retained federal and state expert Chris
 11 Curtis had concluded and announced to a group including the federal prosecutors that he was
 12 concerned that the aerial video showed that the alleged point of origin was not yet burning at
 13 3:09 p.m. some three hours after the fire was alleged to have started there. Defendants did not
 14 learn this until Dodds’ notes on his discussions with Curtis were revealed in the context of the
 15 state action. Of interest, Taylor is silent in her declaration regarding Curtis’ announcement to
 16 her and others during the federal action, and its import, and so is the government’s brief.
 17 Instead, she claims in her declaration she was unaware of Dodds’s note, which begs more
 18 questions.⁵⁴ What about Chris Curtis’s statement to her? Who else did she speak with besides
 19 Curtis who believed the fire had not yet burned the alleged origin when the video was taken?
 20 What information did other members of the prosecution team have? Again, Taylor’s declaration
 21 raises more questions than it answers.

22 ***h. Defendants Discovered Additional Facts Tending To Show Intent After***
 23 ***Entry of the Federal Judgment.***

24 Defendants learned for the first time in 2014 that former Assistant United States Attorney
 25 E. Robert Wright, who initiated the Moonlight Fire federal action, was forbidden from working
 26 on the case in January 2010, shortly after raising ethical concerns regarding disclosures in

27 ⁵⁴ Even if it were true that Taylor was unaware of this exculpatory evidence in the form of Dodds’s note in his
 28 federal expert files, Taylor’s statement that she was unaware is irrelevant. Prosecutors have an obligation under
Brady to search out, locate, and turn over the exculpatory evidence, especially when it is held by their own agents.
 Ignorance is not a defense under Brady under these circumstances.

1 another wildland fire action he was handling. Wright was engaged in a struggle with civil chief
 2 David Shelledy, who pressured Wright not to disclose a document that would have revealed a
 3 \$10 million overcharge in the government's damage claim against private litigants in another
 4 case. These facts tend to show intent as they are consistent with the conclusion that the
 5 transgressions of the government in the Moonlight Fire action are not a function of
 6 incompetence or inadvertence, but instead are purposeful. None of these facts concerning
 7 Wright's termination from the Moonlight Fire matter, or Shelledy's misconduct in other cases
 8 were known until 2014.

9 *i. The Neutral Evaluation of the Facts by Hon. Leslie C. Nichols*

10 As indicated in their opening briefing, fraud on the court under Rule 60(d)(3) must be
 11 established by a clear and convincing evidence standard. While Defendants were aware of some
 12 of the investigators and prosecutors' acts of malfeasance, it was not until February 4, 2014, in
 13 the context of the state court action, that Defendants received orders from Hon. Leslie C.
 14 Nichols, the first neutral arbiter to have considered the body of evidence concerning the
 15 investigation and the Moonlight Fire prosecution. Judge Nichols prepared an order written in his
 16 own voice (not by Defendants, as falsely alleged by the government) and which he read word-
 17 for-word from the bench on February 4, 2014, to a packed courtroom. Therein, he found after
 18 spending countless hours reviewing every piece of evidence provided by both sides, including
 19 videotaped testimony, that the investigation and prosecution were, among so many other things,
 20 "corrupt and tainted," that the acts of Cal Fire were "too much for the administration of justice to
 21 bear" that his sense of "disappointment and distress" was "palpable," that the Moonlight Fire
 22 investigators had "repeatedly" testified falsely under oath, that the Joint Report contained
 23 numerous falsehoods, and that Joshua White had destroyed his field notes and computer files in
 24 bad faith. Importantly, Judge Nichols ruled that his findings were supported by the higher "clear
 25 and convincing" evidence standard. None of this information was available to Defendants until
 26 February 4, 2014.

DOWNEY BRAND LLP

1 **D. The Government's Contention that there Can Be No Fraud on the Court Because It**
 2 **Provided Some Material upon which Defendants Now Rely is Mistaken.**

3 Large portions of the government's opposition are devoted to arguing that there is no
 4 relief available under Rule 60(d)(3) because it produced certain documents in discovery that
 5 revealed a portion of what Defendants allege was a broad scheme to defraud the court. Put
 6 differently, and by way of example, the government argues that perjury by a witness, even with
 7 an officer of the court's participation, can never give rise to relief under Rule 60(d)(3) when the
 8 facts revealing the perjury can be found in documents produced in discovery. The government
 9 advances the same argument with respect to the presentation of perjured declarations to the
 10 Court, as well as perjured interrogatory responses, false exhibits, and false diagrams. But while
 11 the government devotes no less than seven sections of its brief to this issue, it fails to cite a
 12 single case in support of its novel proposition. There is no case authority to support this wholly
 13 invented rule, and the government's argument fails for at least four independent reasons.

14 First, as explicated herein, the government's claim that Defendants' motion is not based
 15 on suppressed evidence, and that the government produced everything, is incorrect. In this
 16 regard, the government goes so far as to assert that:

17 Sierra Pacific can say a thousand times that some piece of
 18 evidence was "suppressed"; the truth is the United States produced
 19 in discovery the very evidence Sierra Pacific relies on in its
 20 motion. Responsible people do not call this fraud on the court.
 They call it litigation under the Federal Rules.

21 (Opp. at 49:13-16.)

22 The government is mistaken. For instance, the government admits that it *never* provided
 23 Defendants with evidence of Edwin Bauer's false claim that defense counsel offered him a \$2
 24 million bribe to secure his son's confession for starting the fire. Certainly concealing that fact
 25 alone is easily as significant as hiding the drop-test video in Pumphrey, or the actual progeny of
 26 an article on the novelty of the claimed invention in Hazel-Atlas. That evidence alone, which
 27 the government concealed from the Court and Defendants while making a successful motion
 28 under Federal Rule of Evidence 403, justifies relief under Rule 60(d)(3) and termination of the
 action. Indeed, in its Opposition, the government remains evasive about the body of documents

1 and evidence that exist concerning this issue, not a single one of which has ever been produced.

2 In addition to the false allegation of the bribe, there are numerous other instances of
3 fraud, evidence of which was obtained from sources other than the government after the entry of
4 judgment in the federal action. Those issues are fully responsive to the government's false claim
5 that it produced everything and suppressed nothing. In the end, "peeling back the layers of the
6 onion" to discover the government's fraud on the court took Defendants four years in two
7 different forums, and involved painstaking discovery. Had Defendants relied on the
8 government's representations in its verified interrogatory responses, responses to requests for
9 admission, or the origin and cause report prepared by the Moonlight Investigators – as
10 Defendants would have been able to if the government had conducted an honest investigation
11 and prosecution – they would never have discovered any of these instances of fraud.

12 Second, the Court can and should reject the government's arguments in this regard
13 because they contravene the clear directive of this Court's November 24, 2014, order. The Court
14 is not resolving disputed issues of fact, and the parties are to assume all of Defendants'
15 allegations are true. (Docket No. 618.) Defendants have alleged that the government
16 investigators and prosecutors acted within a carefully planned stratagem designed to
17 intentionally mislead this Court and intentionally subvert the judicial process. The government
18 was to take those allegations as true. But in an apparent effort to set up some form of affirmative
19 defense that does not exist, or perhaps in an effort to buttress its denial of these allegations, the
20 government claims that because it was the source of some of this evidence, its misconduct could
21 not have been intended to defraud. But the government's allegation squarely contradicts
22 Defendants' allegation, which must be assumed true. For this reason, and because these sections
23 of the government's brief violate the Court's order regarding the scope of permissible briefing,
24 the Court should ignore them.

25 Third, the government's contention that there can be no fraud on the court if the
26 defrauding party is also the source of the evidence that reveals a certain aspect of the fraud is
27 wrong as a matter of law. Specifically, Ninth Circuit precedent forecloses the government's
28 argument that, because it provided pieces of evidence pointing in the direction of fraud,

1 contained within a quarter of a million pages of documents, it is somehow exonerated from any
 2 claim that they committed a fraud on the court. In Pumphrey, the Ninth Circuit addressed a
 3 similar argument. There, defendant’s counsel provided answers to interrogatories “admitting
 4 that the gun fired during a drop test.” 62 F.3d at 1133. The gun company therefore later argued
 5 that there was no fraud on the court because the defendant provided these answers and the
 6 plaintiff “fail[ed] to uncover the alleged fraud, after receiving [these] interrogatory answers . . .
 7 .” Id. This argument is fundamentally the same one the government makes here – that because
 8 it provided Defendants with the means to uncover at least some aspects of the fraud it
 9 perpetrated, there is no fraud on the court. The Ninth Circuit squarely rejected this argument,
 10 stating: “Nor do we agree with [the defendant] that [the plaintiff’s] failure to uncover the alleged
 11 fraud, after receiving [the defendant’s] interrogatory answers admitting that the gun fired during
 12 a drop test, should bar this action.” Id. The court relied on several reasons, not the least of
 13 which was that “even assuming [the plaintiff] was not diligent in uncovering the fraud, the
 14 district court was still empowered to set aside the verdict, as the court itself was the victim of
 15 fraud.” Id. (citing Hazel-Atlas, 322 U.S. at 246).

16 Ultimately, the question is whether the Court was defrauded, and the government makes
 17 no showing, because it cannot, that it revealed all the pertinent documents in meaningful form so
 18 as to allow the Court itself to appreciate the full nature and extent of the fraud here. Indeed, with
 19 so many acts of evasion, the government failed to act with candor to the court and the parties, for
 20 example telling its investigators that the white flag and its attendant concerns were a “non-
 21 issue,” and worked to impede Defendants’ ability to defend themselves at every turn.

22 Accepting the government’s position on this issue would be to approve of litigation
 23 misconduct in an expansive way. Under the government’s bizarre version of “litigation under
 24 the Federal Rules,” lawyers working under our Department of Justice are apparently free to
 25 encourage and/or sit on their hands with respect to false testimony, produce false documents or
 26 false exhibits, advance false arguments to the court, or conceal material facts critical to the
 27 court’s rulings, so long as the true facts can be gleaned somewhere among the thousands and
 28 thousands of documents produced at some point by counsel. In essence, the government asserts

1 that litigation is a game, in which all conduct – including fraud – is acceptable so long as the
 2 party committing the fraud leaves a trail of breadcrumbs so that the opposing party, through
 3 diligent discovery born of deep skepticism, can follow the trail and, if it is lucky, reveal the truth.
 4 This tactic is precisely the one the government apparently believes it took with respect to the
 5 Red Rock Lookout Tower and its answer to Defendants’ interrogatory about the activities that
 6 took place there. The government’s false response is apparently absolved because Defendants
 7 chose to keep digging for more facts, ultimately leading the government to provide the
 8 information it should have provided to begin with.

9 That the government embraces this mode of litigation explains so much about what went
 10 wrong in the Moonlight Fire action. But that is not legitimate advocacy, especially by those
 11 charged with seeking justice, and it most definitely is not what “litigation under the Federal
 12 Rules” is designed to be, nor is it consistent with any proper search for the truth. Indeed, this
 13 conception of “litigation” is incongruent with the Supreme Court’s directive that “[t]he United
 14 States Attorney is the representative not of an ordinary party to a controversy, but of a
 15 sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at
 16 all; and whose interest . . . is not that it shall win a case, but that justice shall be done.” Berger v.
 17 United States, 295 U.S. 78, 88 (1935). The government apparently took to heart Berger’s
 18 statement that it may prosecute cases “with vigor,” but missed the corollary point that “while
 19 [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones.” Id. It is therefore
 20 the duty of the government, in prosecuting a case, to “refrain from improper methods.” Id. The
 21 conception of advocacy advanced by the government disposes with this requirement in one fell
 22 swoop. As with so many of its other positions on this motion, that the United States would
 23 advance such an argument is reason for alarm far beyond the confines of this action.

24 Fourth, the government’s contention that it produced all documents is not supported by
 25 Defendants’ allegation. In an effort to rebut these allegations, in violation of the Court’s order,
 26 Assistant United States Attorney Taylor uses her declaration to outline what she produced and
 27 when she produced it. Because it violates the Court’s order, Defendants object to it and ask that
 28 it either be stricken or ignored in its entirety. In the event the Court nevertheless reviews and

1 considers it, Taylor's declaration is more significant for what it fails to state and ultimately raises
2 more questions than it answers. For example, Taylor says nothing in her declaration about the
3 January 2011 joint meeting with the Deputy Attorney General to prepare David Reynolds for
4 deposition. She fails to reveal what she told Reynolds about his testimony concerning the false
5 points of origin and the transplanted evidence. Taylor says essentially nothing about the
6 transplanted evidence, the false points of origin, or the white flag other than to identify which
7 documents were produced and when. Taylor never claims she did not realize White and
8 Reynolds were lying, nor does she state that she believes their testimony was truthful. Instead of
9 addressing any of these key issues, Taylor instead attempts to create the misimpression that she
10 did not prepare Reynolds for his deposition, and that she did not personally attend any portion of
11 his deposition, when in fact she did prepare him and did attend portions of his deposition in
12 person.

13 As indicated elsewhere in this briefing, Taylor's declaration says nothing at all about the
14 alleged bribe, and provides nothing regarding the universe of evidence that surely exists relating
15 to this issue. Taylor provides no statement about why she failed to disclose to the court facts of
16 the bribe allegation in the context of her successful motion to preclude evidence regarding the
17 Bauers. Surely if the non-disclosure was inadvertent, she would have said so, and given her
18 belated and baseless claim of privilege, she gives every indication that this concealment was
19 purposeful.

20 With respect to all of the abuses associated with the Red Rock Lookout Tower, Taylor is
21 silent about one of the central issues –her false interrogatory response for which she secured a
22 false verification under penalty of perjury by Larry Craggs. Taylor distracts from this critical
23 issue by only focusing on those documents she produced. She provides no discussion about
24 whether she knew Welton was testifying falsely, no discussion about why she prepared a false
25 interrogatory response, and no discussion about whether she knew the witness statements were
26 false. Essentially, Taylor claims that so long as she buries some of the related documents in a
27 pile of a quarter million unrelated documents, the government can be dishonest about the true
28 facts unless and until Defendants find the needle in the haystack, at which time the government

1 may simply pivot toward the truth without consequence.

2 With respect to WiFITER, Taylor claims to have been ignorant about the true facts. But
3 as explained more fully elsewhere in this briefing, her ignorance of facts associated with
4 WiFITER, which are directly relevant to the credibility of the lead investigator regarding all that
5 the investigators found in the course of their investigation, and all that they destroyed, provides
6 no excuse for this nondisclosure. Taylor's protestations that she knew little if anything about
7 WiFITER are contradicted by her motion in limine representation to the Court that WiFITER
8 was "a separate public trust fund." Moreover, her contention that she knew little or nothing
9 about this fund only serves to underscore that these representations to the Court made recklessly.
10 Taylor also begins her declaration stating that she has personal knowledge about everything in
11 the declaration. She then claims that the United States had no documents concerning WiFITER.
12 But she provided no foundation as to how she made that determination on behalf of the entire
13 United States.

14 Similarly, Taylor's declaration with respect to the Lyman, Sheep, and Greens Fires
15 provides more questions than answers. With respect these three fires, Defendants demonstrated
16 that the investigatory conclusions regarding these fires were bogus and manufactured to buttress
17 the claims against these Defendants for the Moonlight Fire. Tellingly, Taylor claims that she did
18 not intend to call any of the investigators of those other fires as trial witnesses. But Taylor never
19 explains herself in this regard; she never addresses whether she understood the reports of these
20 other fires were fraudulent, or whether she understood the investigators had given false
21 testimony about them. Moreover, it is worth noting that Defendants uncovered the fraud
22 regarding these investigations largely through cross-examination of Cal Fire and other witnesses,
23 and not through documents Taylor produced.

24 Notably, Taylor provides no discussion about her interactions with Assistant United
25 States Attorney Overby. She gives no information about whether he raised ethical concerns with
26 her, and if so which concerns – an important and relevant topic, as he essentially told
27 Defendants' counsel that he was leaving the Moonlight Fire prosecution in disgust. She also
28 provides no discussion about former Assistant United States Attorney Neil MacDonald or

1 whether he raised ethical concerns. Interestingly, Taylor does not deny that when Overby left
 2 the Moonlight Fire prosecution team, he admonished her that she worked for the “Department of
 3 Justice, not the Department of Revenue,” or with other words to that effect.

4 At bottom, whether some of the documents produced by the government might be used
 5 against it as evidence that the government engaged in a fraud upon the court does not exculpate
 6 the government. There is no question that many of the governments’ fraudulent acts were not
 7 revealed by the government or their documents, and were instead affirmatively suppressed.
 8 Ultimately, there is no safe harbor under controlling authority for the government’s conduct
 9 here, nor should there be. Indeed, to the extent the government possessed so much of the
 10 evidence that reveals its misconduct, this fact does not erase the fraud on the court – it
 11 underscores it.

12 **E. The Government Raises Ethical Violations Untethered to the Issues Before the**
 13 **Court on this Rule 60(d)(3) Motion**

14 At every opportunity, the government has made a point of raising two instances of
 15 “professional misconduct” by lawyers for Sierra Pacific. Predictably, its opposition brief is no
 16 different. Because of that, Sierra Pacific briefly addresses these issues, even though they have
 17 nothing to do with whether the government engaged in a fraud on the court.

18 The first incident pertains to a Sierra Pacific lawyer attending a public tour in the
 19 mountains of Northern California. Four years ago, the U.S. Forest Service invited the public to a
 20 presentation regarding the implementation of a federal law relating to forest management, the
 21 Herger-Feinstein Quincy Library Group Forest Recovery Act. The Herger-Feinstein legislation
 22 was, among other things, supposed to create defensible fuel zones in the area where the
 23 Moonlight Fire began, but its implementation had been significantly delayed. Lead counsel for
 24 Sierra Pacific, William Warne, asked an associate at his firm, Michael Schaps, to attend this
 25 public presentation. The associate made the long drive to the town of Chester, and when he
 26 arrived, learned that the event was not as anticipated. As it turned out, the Herger-Feinstein
 27 presentation involved attendees riding in government vehicles, filling out volunteer forms, and
 28 close interactions with U.S. Forest Service employees who drove the vehicles. Members of the

1 press were present as well. These U.S. Forest Service employees asked the associate questions
 2 about his background and interest in the Herger-Feinstein Act. In response, the associate did not
 3 reveal his affiliation as an attorney for Sierra Pacific or his work on the Moonlight Fire litigation.

4 The government learned what had transpired and filed a motion for a protective order and
 5 sanctions. At the time, the government did not contend that the associate's attendance at the
 6 Herger-Feinstein presentation violated any ethical rules, and did not contend that the associate
 7 was restricted from communicating with employees of the U.S. Forest Service outside the
 8 presence of counsel, but did contend that the associate had violated ethical rules by not
 9 disclosing his affiliation as an attorney for Sierra Pacific. While Sierra Pacific disagreed with
 10 this characterization, the Court did find that an ethical violation had occurred. In addressing this
 11 issue in the briefing that was filed, lead counsel William Warne assured the Court that it had
 12 been and would continue to be his policy for attorneys working on the case to identify their
 13 relationship to Sierra Pacific and their involvement in the litigation before talking with
 14 government employees about the Moonlight Fire.⁵⁵ The Court then ordered counsel to do so.

15 Throughout the remainder of the case, defense counsel did their best to scrupulously
 16 comply with this order. Accordingly, when one of their experts, a Bureau of Alcohol, Tobacco,
 17 and Firearms agent, asked whether he could contact two of his former colleagues in the ATF to
 18 ask questions about a suspected arsonist, Sierra Pacific attorney Meghan Baker instructed him to
 19 clearly identify himself as a consultant working for Defendant Sierra Pacific on the Moonlight
 20 Fire litigation. The consultant attests under penalty of perjury that he carried out this instruction.
 21 The government learned about this contact, and filed a motion for contempt and for a protective
 22 order, arguing that the consultant had not identified himself as required and, contrary to its
 23 earlier arguments, that the California Rules of Professional Conduct precluded contact with all
 24 federal employees. Judge Brennan denied the request to hold counsel in contempt, but did find
 25 that an ethical violation occurred by virtue of the consultant's contact with the federal

26 _____
 27 ⁵⁵ The government wrongly asserts in its brief that Mr. Schaps was "acting on instructions from William Warne,
 28 Esq., when he misrepresented himself as only an interested member of the public in order to obtain evidence ex
 parte from line employees of the Forest Service." (Opp. at 7.) While Mr. Warne did instruct his associate to attend
 the event, he did not instruct him to "obtain evidence ex parte from line employees of the Forest Service."

1 employees. In so ruling, Judge Brennan acknowledged that under California case law, such
 2 contact would not constitute an ethical violation, but found this California case law unpersuasive
 3 because of differences in federal and state evidence rules on party opponent admissions.⁵⁶ Sierra
 4 Pacific sought reconsideration of this aspect of the ruling on February 8, 2011; that motion was
 5 still under submission with the district court judge at the time of the settlement and dismissal
 6 order on July 18, 2012. (Docket No. 328.)

7 Counsel for Sierra Pacific fully appreciate how critical the Rules of Professional
 8 Responsibility are to our profession and to the practice of law, and acknowledge that any
 9 violation of the rules, even when inadvertent, should be subject to critical scrutiny. But these
 10 incidents are not relevant to incidents punctuating the prosecutors' long running scheme to
 11 defraud this Court. At each turn, they engaged in gross acts of misconduct, repeatedly breaching
 12 their ethical responsibilities and their obligations to this Court.

13 The prosecutors are not fooling themselves. They know that these incidents are simply a
 14 vehicle to suggest that their victims and accusers are guilty of imperfection too, "so who are they
 15 to accuse us?" But this effort to manufacture a false equivalency between these two incidents
 16 and what the prosecutors themselves have done in this matter is absurd. This aspect of the
 17 government's briefing should for be read for precisely what it is – an effort by the government to
 18 distract the Court from the gross misconduct these prosecutors engaged since the removal of
 19 AUSA Robert Wright.

20 **VIII.**
 21 **DEFENDANTS HAVE ALLEGED CONDUCT THAT CONSTITUTES A FRAUD UPON**
 22 **THE COURT**

23 Defendants have already addressed most of the arguments advanced by the government
 24 regarding the fraud on the court inquiry. In light of that, Defendants have not attempted to

25 ⁵⁶ Under the Eastern District Local Rules, California cases regarding the California Rules of Professional Conduct
 26 are adopted as part of the standards of professional conduct in this court. (E.D. Local Rule 180(e).) For that reason,
 27 Sierra Pacific argued in its motion for reconsideration: "Judge Brennan's ruling provides no reasonable basis for
 28 construing Rule 2-100 differently in federal court than in California court, and also fails to account for his own
 previous order's express blessing of precisely what counsel for Sierra Pacific did. If allowed to stand, it will affect
 the reputations of three attorneys who have not violated any established ethical limitations Finally, it will
 impose a different standard of conduct on attorneys practicing in this Court than applies in California court—even
 though Local Rule 180(e) expressly incorporates the California standard." (Docket No. 328 at 1-2.)

1 rehash all of the instances of fraud in this brief. A few instances of the fraud, however, are
 2 worth revisiting in light of the government's opposition arguments, and these are addressed
 3 briefly below. Additionally, a few of the themes that the government repeatedly returns to in its
 4 opposition, and that have not already been addressed above, are addressed below.

5 **A. Fraud on the Court Exists Where Government Prosecutors Conceal Evidence That**
 6 **Its Material Witness Fabricated Bribery Allegations to Bolster His Story While**
 7 **Simultaneously Moving to Obtain a Favorable Pretrial Ruling Based on that "Lack**
 8 **of Evidence."**

8 Edwin Bauer was a critical witness in this case. He was also the subject of significant
 9 scrutiny by these Defendants. According to the undisputed testimony set forth in Defendants'
 10 opposition to the United States' Federal Rule of Evidence 403 motion in limine, a private
 11 patrolman discovered Bauer and his wife Jennifer Bauer deep in the woods shortly after the fire
 12 was first reported, so close to the fire's inception that they were in the spray of the fire retardant
 13 bomber that flew overhead. He told the patrolman they were looking for their son, Ryan Bauer,
 14 who had told him that he was going to be in the area cutting firewood that day. One thing not
 15 included in Defendants' motion in limine opposition was the fact that Bauer just told the
 16 Moonlight Prosecutors that Mr. Warne and Sierra Pacific Industries had purportedly offered his
 17 son \$2 million if he would just say that he started the Moonlight Fire. And that's only because
 18 the government did not tell Defendants about this representation. Nor did it tell this Court before
 19 it granted the government's motion, and issued a devastating ruling barring Defendants from
 20 arguing that any other party may have been responsible for having ignited the Moonlight Fire.

21 Bauer's false allegation of a multi-million dollar bribe by Downey Brand incriminates
 22 both Bauer and his son in a failed attempt to secure their safety regarding this matter – a final
 23 piece in a long running effort to make sure that the government succeeded in pinning blame on
 24 the wrong (but far wealthier) parties. The government opposition's sardonic treatment of
 25 Bauer's false claim of a bribe, coupled with the fact that it, uncharacteristically, does nothing to
 26 explain it by offering extrinsic evidence, speaks volumes. The government hid this material
 27 evidence from the Court during its critical June 26, 2012, motion in limine to exclude evidence
 28 pertaining to Ryan Bauer. Today, it is no more forthcoming.

1 The government’s arguments violate the first rule of holes: when you’re in one, quit
 2 digging. Quibbling about Defendants’ quotation marks around the word “shred” does nothing to
 3 change the fact that during its all-important Federal Rule of Evidence 403 motion, when asking
 4 the Court to engage in a careful fact-specific balancing inquiry about whether to admit evidence
 5 that someone other than Defendants started the fire, the government knew, but did not reveal
 6 facts in its sole possession – facts that were clearly material to the Court’s inquiry. In its
 7 opposition, the government scrambles for an excuse that does not exist, specifically quoting its
 8 initial statement to the Court that there was no “shred of physical evidence or expert support.”
 9 From that, it argues that there was no misrepresentation because it did not actually tell the Court
 10 that there was no evidence at all.⁵⁷ (Opp. at 100:28-20.) Such arguments from lawyers working
 11 for our Department of Justice are distressing. Essentially, the government suggests that it is fine
 12 for them to make arguments so long as they are based on omissions and that it is somehow
 13 acceptable to allow the Court to proceed based on half-truths. But of course it cannot.

14 In Tiverton Board of License Commissioners v. Pastore, 469 U.S. 238 (1985), the Supreme
 15 Court stated, “It is appropriate to remind counsel that they have a ‘continuing duty to inform the
 16 Court of any development which may conceivably affect the outcome’ of the litigation.” Id. at
 17 240, 105 S. Ct. at 686 (quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J.
 18 concurring)). In Shaffer Equipment Company, the government attorneys “omitted” mentioning
 19 that a material witness misrepresented his academic credentials and that he was being criminally
 20 investigated.⁵⁸ Here, the government omitted information revealing that a material witness was

21 ⁵⁷ Though a detailed examination of the government’s representation is irrelevant on this motion, at the time of the
 22 motion there in fact was “physical evidence,” including the sawdust on Ryan Bauer’s clothing and the chain saw in
 23 his pickup as he raced down the mountain to his girlfriend’s house shortly after the fire started. There was also
 “expert support” in the form of arson expert Steve Carmen’s testimony. These facts are not relevant at this juncture,
 but they demonstrate that then, as now, the government slices the baloney quite thin.

24 ⁵⁸ Of course, in Shaffer, the trial court terminated the action for the government’s fraudulent omissions. While the
 25 Fourth Circuit reversed in favor of imposing a lesser sanction short of outright dismissal, it affirmed the finding that
 26 the government attorneys had violated their duty of candor to the court. Reading the case as a whole, the court of
 27 appeal appears to have reversed the imposition of terminating sanctions largely because the government’s deceit
 28 pertained to the qualifications of an expert whose decisions associated with the clean-up arguably exacerbated the
 government’s damage claim. In this regard, \$1 million (of an overall \$5 million claim) was incurred on a solvent
 extraction remediation method that was unsuccessful, which the government then attempted to impose that expense
 on defendants. Nothing in Shaffer suggests that defendants had any prospect of avoiding liability altogether had the
 expert qualification issue been properly disclosed. Thus, in light of nature of the government’s deception and its
 impact on the case, the court of appeal affirmed the findings that the government attorneys violated their ethical

1 fabricating evidence of a bribe and that a federal investigation ensued. There can be no question
 2 that the allegation as pled shows that the prosecutors violated their duty of candor to this court,
 3 and that it was part of a broader scheme to affect the administration of justice in this case. There
 4 can be no question that regardless of the state of discovery in the case, they had an affirmative
 5 obligation as officers of the court to reveal the existence of the bribe allegation to Defendants
 6 and to the Court. The fact that they affirmatively filed a motion to keep all Bauer evidence away
 7 from the jury and to preclude Defendants from arguing that the Bauers, or anyone else, was
 8 responsible for the fire made their duty to disclose this key information that much more critical.
 9 The government's present effort to backpedal from the language that it employed in its in limine
 10 motion is perhaps now understandable, because -- as it turns out -- there was far more than a
 11 "shred" of evidence that the Bauers were prevaricating regarding their actions, conversations and
 12 observations that day in the forest when the fire started. It is undisputed that Edwin Bauer and
 13 his wife were present in the area of the fire shortly after it started, searching for their son, who
 14 they understood was cutting wood in the area.⁵⁹ When interviewed by fire investigators on
 15 September 7, Edwin Bauer falsely attempted to blame one of Howell's bulldozer operators for
 16 the fire. He claimed that while looking for his son shortly after the fire began, he stopped and
 17 asked one of the bulldozer operators how the fire started. He reported that the operator replied
 18 that a "bulldozer hit a rock." He offered no explanation as to how the operator could reach such
 19 a conclusion so quickly. The Moonlight Investigators never scrutinized this allegation, never
 20 asked the bulldozer operators whether it was true, and never asked the operators why, if they saw

21 obligations, including the duty of candor, and left it to the trial court to fashion an appropriate sanction short of
 22 outright dismissal. Shaffer, 11 F. 3d at 463.

23 Here, the government's fraud on the Court and these Defendants regarding its suppression of the false bribe was
 24 directly related to the core question of liability in the case, and whether another individual was responsible for the
 fire. The government's intentional concealment of this material information constitutes a classic fraud on the court,
 a critical component of an overarching scheme to thwart the proper administration of justice.

25 ⁵⁹ Defendants alleged that Ryan Bauer, who ran a side business cutting and selling firewood, told his parents that he
 26 was going to out to cut firewood on the morning of September 3. He had a modified "hot-rodged" chain saw with
 greater horsepower and a lack of key fire safety components. He testified that he went to his favorite place to cut
 27 firewood, which is the same area where the Moonlight Fire started. After the fire started, he encountered a Lassen
 County deputy sheriff as he sped away with a chain saw in his pickup. Four days later, he offered an unsolicited
 28 false alibi that he was with his girlfriend all day, which was never followed up by Moonlight Investigators. This
 was the first of many lies and attempts at misdirection by Bauer, who ultimately invoked the Fifth Amendment in
 response to questions regarding his involvement with the fire.

1 the nascent ignition, they were unable to suppress the fire. These facts suggest that the
 2 Moonlight Investigators concluded that this conversation never happened, and both bulldozer
 3 operators denied having made any such statement.

4 On this front, Bauer is consistent, as he again attempted to deflect attention from himself
 5 and his son shortly before the federal trial when he was served with a trial subpoena by
 6 Moonlight Prosecutors Kelli Taylor and Richard Elias in the spring of 2012. At that time he told
 7 Taylor and Elias that his son's counsel, Susanville attorney Eugene Chittock, told him that
 8 Downey Brand was willing to give Ryan Bauer \$2 million in exchange for admitting that he
 9 started the Moonlight Fire. Bauer repeated this misrepresentation to federal investigators and,
 10 eventually, long after the federal settlement, to Downey Brand's lead trial counsel, Bill Warne.
 11 In this regard, Bauer's revelation amounted to an "I'm still in control" jab he could not stop
 12 himself from delivering after Warne told him that he could not return the hard drive copy he
 13 possessed by way of a court order in the state litigation. In any event, defense counsel was
 14 fascinated and promptly called Chittock, the person Bauer identified as having delivered the
 15 bribe for Mr. Warne and Sierra Pacific.

16 The government spends much of its time in an effort to persuade this Court to accept
 17 Edwin's bribery allegation as true. For example, it attempts to call into question Chittock's
 18 emphatic denial by offering Edwin Bauer's further misstatement that Chittock told him "it could
 19 have happened." Aside from the fact that Bauer's iteration of Chittock's reaction is not an
 20 "allegation" that Defendants pled and that the parties should treat as true (whereas Chittock's
 21 version of events was pled and should be assumed true), there is no reason to believe that
 22 Bauer's further embellishment of his original lie would not also be false.

23 The government also urges the Court to ignore the law and Defendants' allegation that
 24 the Moonlight Prosecutors "concluded that the allegation was false" based on the fact that
 25 Defendants pled the allegation on information and belief. (Opp. at 99:12-18.) However,
 26 allegations based on information and belief must be accepted as true on a motion to dismiss.
 27 Blantz v. California Department of Corrections, 727 F.3d 917, 925 n.6 (9th Cir. 2013). The
 28 government goes on to opine that "[w]e do not know whose version of this 'he said, she said' is

1 true.” (Opp. at 99:14-15.) But in reviewing the Court’s order regarding this briefing, which
 2 directs the parties to “assum[e] the truth of Sierra Pacific’s allegations,” we *do* know what
 3 version to accept as true. (Docket No. 618 at 2:11-16.) It is telling that, unlike other areas of its
 4 briefing, the government makes no attempt to directly rebut this allegation about its conclusions
 5 by revealing them in the declarations of the Moonlight Prosecutors it offered on this motion.
 6 More importantly, if there is currently a question about the truth of the matter, that question only
 7 exists because the government ignored its duty to disclose the evidence to both the Court and
 8 counsel at a critical stage, long before the case reached this juncture. Indeed, this is but one
 9 example of the very harm caused by fraud on the court. The government intentionally concealed
 10 material evidence about a false bribe, denying Defendants and the Court the opportunity to
 11 conduct an investigation into its progeny as well as any ability to derive conclusions as to what it
 12 means about the Bauers’ involvement in starting the fire. That it withheld this evidence at a time
 13 when the Court was engaged in a sensitive balancing of factors to make a decision on whether
 14 Bauer related material would be allowed into evidence, and whether Defendants would be
 15 permitted to argue that someone other than themselves ignited this fire, is yet another example of
 16 just how far these prosecutors were willing to go to protect the viability of their favored
 17 conclusions. This is precisely the kind of conduct courts look to when assessing whether a party
 18 engaged in fraud on the court.

19 Regardless, Defendants’ “information and belief” regarding the Moonlight Prosecutors’
 20 conclusions about this allegation is sufficient, particularly given the history of sanctions motions
 21 in this case. There is little question about what the government would have done if it truly
 22 believed in the months leading up to trial that Sierra Pacific’s lead trial counsel, a partner and
 23 Executive Committee member of Sacramento’s oldest and largest law firm, had actually offered
 24 a multi-million dollar bribe to a key witness in a billion dollar case. It would not only have been
 25 the subject of another sanctions motion, but the centerpiece of a major criminal indictment under
 26 18 U.S.C. Section 1512,⁶⁰ along with front page news and the rightful destruction of Downey

27 ⁶⁰ In pertinent part, 18 USC § 1512, provides, “[w]hoever . . . corruptly persuades another person, or attempts to do
 28 so, with intent to . . . influence . . . the testimony of any person in an official proceeding . . . shall be fined under
 this title or imprisoned not more than 20 years, or both.”

1 Brand’s reputation in this community. Indeed, in view of their duty of candor to the tribunal, the
 2 Moonlight Prosecutors had an absolute obligation as a matter of pure logic to report the bribe
 3 allegation to the Court regardless of whether Bauer was being truthful since it necessarily
 4 demonstrates that either an attorney in the case was attempting to subvert the judicial process (if
 5 Bauer is to be believed), or that a material witness was, if Bauer was lying, which he of course
 6 was.

7 The fact that the government now attempts to persuade the Court that Downey Brand and
 8 Sierra Pacific offered a bribe – despite the fact that it does not believe it is true and despite the
 9 fact that the Court ordered the parties to assume the truth of Defendants’ allegations on this
 10 briefing – is emblematic of the manner in which it has proceeded in this case from beginning to
 11 end. It purports to offer “evidence” (when ordered not to) to “demonstrate” this absurdity to the
 12 Court, even though it is the only party that had an opportunity to probe the facts, and it does so
 13 with no regard for the reputations of a respected firm and member of the bar.⁶¹ This is yet
 14 another example of the advantage to be gained by hiding evidence, which is why such tactics are
 15 not permitted and why it is vital that they be rooted out and redressed.

16 Ignoring their broader duty of candor, including their “continuing duty to inform the
 17

18 ⁶¹ As “evidence” that Mr. Warne offered the bribe, the government states that: “[t]he claim that there was only one
 19 phone call between Mr. Chittock and Downey Brand is highly improbable, since they are co-counsel for the same
 20 party on at least one major case that was actively litigated throughout 2012.” (Opp. at 99:18-21.) However, Sierra
 21 Pacific never made such a claim as to “Downey Brand.” The actual allegation was: “Mr. Chittock informed the
 22 federal employees that all they would find was a record of a single phone call he had received from Sierra Pacific’s
 23 counsel Warne, who was in the process of scheduling the continued deposition of Ryan Bauer” and “[a]fter finding
 24 nothing beyond a record of that single call, the federal employees left.” (Supp. Brief at 128:1-8.) The significance
 25 of the manner in which the government twisted these alleged facts is two-fold. First, it aggregates “phone calls from
 26 Warne on the Moonlight matter” with “phone calls from Downey Brand” in a manner implying that Mr. Chittock or
 27 Downey Brand misrepresented the number of phone calls between Mr. Chittock and Mr. Warne to this Court.
 28 Second, it takes the focus off what the federal investigators found, which at this stage, only the government knows
 because it buried this information and stifled Defendants’ ability to discover the true facts. The government then
 builds on (what it knows is) a fiction by submitting as “evidence” the docket and captions from the case Lassen
 Municipal Utility District v. Kinross Gold, 2:11-cv-00255 MCE KJN (United States Request for Judicial Notice,
 filed 2/17/15 (DKT 631) at 1:24-27). Significantly, the Kinross captions demonstrate that neither Mr. Warne nor
 any other Downey Brand attorney of record on this case are attorneys of record in the Kinross matter. It is
 unremarkable that a firm which at the time had well over 100 attorneys works on multiple cases with other attorneys
 throughout the region. Using six-degrees-of-separation to suggest that because one Downey Brand attorney is
 working with Chittock another Downey Brand attorney on an unrelated matter must have offered Chittock’s client a
 bribe is ridiculous. The fact that such innuendo would be offered to the Court to bolster Edwin Bauer’s original
 fabrication by the only party with sole possession of a complete factual record is more than disconcerting, but
 unfortunately not inconsistent with so many other acts taken by the Moonlight Prosecutors on this matter.

1 Court of any development which may conceivably affect the outcome” of the litigation as
 2 described by the Supreme Court, the government’s argument that it was acceptable to withhold
 3 from Defendants (and the Court) any notice whatsoever of the bribery allegation because
 4 attorney notes are work product, is without any merit, unduly narrows the scope of the
 5 information that the government concealed, and side-steps the law at issue. “Attorney notes” are
 6 merely one potential manifestation of the evidence that may exist regarding this allegation.⁶²
 7 Parties of course have an ongoing duty to supplement their initial disclosures “in a timely
 8 manner” upon determining that their initial disclosures are materially incomplete or inaccurate.
 9 Fed. R. Civ. P. 26(e)(1)(A). They also have a duty to supplement disclosures about every person
 10 likely to have information and the subject of that information. Fed. R. Civ. P. 26(a)(1)(A); *id.*
 11 26(e)(1)(A). The duty to supplement continues even after the close of scheduled discovery. See
 12 Adv. Comm. Notes on 1993 Amendments to Fed. R. Civ. P. 26(e) (“Supplementations . . .
 13 should be made . . . with special promptness as the trial date approaches”); Star Direct Telecom,
 14 Inc. v. Global Crossing Bandwidth, Inc., 272 F.R.D. 350, 358 (WDNY 2011) (“[T]he duty to
 15 supplement continues even following the close of discovery”). Here, documents concerning this
 16 bribe were clearly called for by several of Defendants’ Rule 34 document requests.

17 In any event, there is no authority for the proposition that an attorney may unilaterally
 18 withhold all information regarding a material issue – including the existence of the issue itself –
 19 and do so at such a critical time because they can conceive of a potential privilege that may apply
 20 to a particular document or a portion of a particular document. See Fed. R. Civ. P. 26(b)(5)(A)
 21 (requiring a party to expressly claim a privilege and describe the nature of the document in a
 22 manner that will enable other parties to assess the claim). That is not how our system works.

23
 24 ⁶² Though the government’s brief indicates that “attorney notes” exist, it provides no indication about what other
 25 evidence exists. Unlike its other arguments for which it offers over 3500 pages of documentation and declarations
 26 from the Moonlight Prosecutors, Taylor’s declaration is eerily silent about what she knew about this issue, when she
 27 knew it, and what she discovered and/or received from the federal investigators or Bauer. She provided no
 28 information about all the evidence of the bribe allegation that may exist, and in what form it exists. Indeed, one
 wonders why, if it is clear that this is not information that required disclosure to the Court and Defendants’ counsel,
 the government is still reluctant to shine the light of truth on these facts. Instead, it proclaims: “[w]e had no
 obligation to share such information with the defendants before judgment, and we will not share it with them now.”
 (Opp. at 100:4-6.)

1 But for the government's concealment, any privilege claim regarding documents related to the
 2 bribery allegation would have been addressed by the Court in due course. The government's
 3 failure to provide notice that an issue even existed subverted this process. Taylor's attempt to
 4 find cover by alleging the parties agreed not to require privilege logs for privileged materials
 5 created during the pendency of the action is unavailing. Because she provided no information
 6 about what documents concerning the bribe exist, she necessarily provides no evidence that
 7 every piece of evidence concerning the bribe was privileged. Moreover, even assuming for the
 8 sake of argument a piece of a document concerning the bribe contained privileged material, there
 9 was never any agreement that a party could withhold an entire document or body of materials on
 10 the ground that a portion of one document constitutes work product.

11 The Moonlight Prosecutors' belated and baseless privilege assertion is extremely
 12 disconcerting for yet another reason. According to their view of the duty of candor, announced
 13 for the first time in their opposition to this motion, they were free to make devastating Federal
 14 Rule of Evidence 403 exclusionary motions (which here were granted), while withholding from
 15 the Court and Defendants *any and all* relevant information so long as the information came into
 16 their possession through attorney witness interviews, as reflected in attorney interview notes.
 17 This begs the question, what other information did they withhold from this Court on this basis?
 18 By their reasoning, they were perfectly free to also have withheld from the Court an *actual*
 19 *confession* by Bauer or someone else for having ignited the fire. According to the Moonlight
 20 Prosecutors, they were free to conceal such a confession by a third party from defendants and the
 21 Court, while making a motion and securing an order prohibiting defendants from arguing that
 22 anyone else may be responsible for the fire.⁶³ That the United States Department of Justice
 23 actually advanced this argument here is reason for alarm far beyond this case.

24 The government also engages in a bizarre effort to justify its withholding of this
 25 information because, under Brady, "the accusation that Sierra Pacific's lawyers offered a bribe

26 _____
 27 ⁶³ The government would similarly have been utterly sanguine in concealing the confession, while simultaneously
 28 arguing there was not a "shred of physical evidence or expert support" for Defendants' position, given that an
 outright confession by a third party is neither physical or expert evidence. According to the government, such half-
 truths are perfectly consistent with their duty of candor.

1 for a false confession is inculpatory, not exculpatory.” (Opp. at 103.) But that assertion, of
2 course, is wrong and provides no cover whatsoever. The fact that Edwin Bauer communicated a
3 false bribe to the government is exculpatory to these Defendants as the existence of that effort
4 tends to prove that the Bauers had something to do with starting the fire and were concerned
5 enough about Defendants’ efforts to expose the potential that they would risk a criminal violation
6 of law so as to further implicate Sierra Pacific, thereby driving attention from themselves.

7 Despite this clear duty to provide notice that this information existed, the government
8 brazenly claims, despite its sordid conduct, that it has no duty to “do Sierra Pacific’s job for it”
9 and that “the lawyers should have interviewed the witnesses themselves.” (Opp. at 102:14-19.)
10 Frankly, such an assertion is outrageous. Defendants had already taken the deposition of Edwin
11 Bauer. As alleged, the government came into possession of this exculpatory information when it
12 served Bauer – after the close of discovery and when the parties were in the midst of arguing pre-
13 trial motions. When the government violated Rule 26 by failing to update its disclosures with
14 subsequently discovered material information, it actively prevented Defendants from knowing
15 that a major new material piece of evidence had been created. The same is true with respect to
16 the government’s violation of its duty of candor to the tribunal. Without such notice, Defendants
17 were deprived of the opportunity to interview witnesses, move the court for further discovery, or
18 challenge privilege assessments. Here, none of these options were available because the
19 government never brought the issue to the fore, which dramatically undermined the court’s
20 processes and subverted its truth-seeking function.

21 Revealing this information to either Defendants or the Court would have been damaging
22 to the government’s case as it showed that Edwin Bauer was willing to make false claims to
23 federal investigators in order to divert attention from his son and bolster the case against
24 Defendants. The question is therefore raised: why? And the answer to that question certainly
25 deserved to be explored through the immediate reopening of discovery and the involvement of
26 the Court. This grave piece of evidence may have also revealed that, ultimately, it was Bauer
27 and/or the allegation that was the subject of a federal criminal investigation. In any event, the
28 prosecutors’ decision to conceal this material from Defendants in the Brady context violates

1 clearly established federal law. See Amado v. Gonzalez, 758 F.3d 1119,1125, 1139 (9th Cir.
2 2014) (noting that suppressed impeachment materials may be used to show that a witness had a
3 motive to embellish the truth and even to lie). A failure to disclose it to the Court violates, at a
4 minimum, the duty of candor. There can be no question the alleged bribe is evidence that was
5 disclosed to the government personally and which should have been brought before the Court
6 either because one of the government's primary witnesses was engaging in criminal misconduct
7 or because the counsel for these Defendants before the Court were doing so.

8 In sum, someone is lying, and reaching a conclusion as to who is lying would seem
9 imperative in view of the present posture of this case. If Bauer manufactured the existence of a
10 bribe, violating federal criminal statutes which carry a penalty of 20 years, the government
11 should immediately investigate him. Obviously, they should have done so immediately after the
12 visit to Chittock revealed the obvious falsity of his assertions. The fact that the government
13 apparently did not do so reveals a good portion of what this Court needs to know regarding the
14 prosecution of this matter. If Bauer manufactured this evidence, and Downey Brand knows that
15 he absolutely did, it means something quite serious, and certainly suggests a willingness to have
16 altered all kinds of evidence so as to draw attention away from his son. But even that was not
17 enough to deter the government's focus on its targeted Defendants and, more specifically, Sierra
18 Pacific, an attitude and corruption that revealed itself through this matter, and which has led to
19 the tragedy this District now must confront.

20 In light of the facts we now know regarding Bauer's claim of a bribe, and the significant
21 fraud on the court this element alone portends, Sierra Pacific's lead trial counsel would request
22 that this court immediately direct and supervise a full investigation into this previously concealed
23 evidence, with of course a full investigation into any and all contacts that Mr. Warne and or his
24 team and/or Sierra Pacific had with Mr. Chittock, and that it do the same regarding what the
25 prosecutors actually did when their own investigation of Bauer's preposterous claim turned up
26 nothing. This neutral investigation would of course also look into just why the prosecutors
27 thereafter apparently did nothing to prosecute Bauer's crime but instead actively concealed its
28 apparent existence, *despite* its Federal Rule of Evidence 403 motion to keep all Bauer evidence

1 away from the jury, and to prevent defendants from arguing that another party is responsible for
 2 the Moonlight Fire, as the government represented to this court, there was not a “shred” of
 3 evidence supporting any relevance to this matter.

4 There is a reason that these prosecutors quietly shelved this matter when they did. And
 5 there is a reason that they did not prosecute Bauer for his conduct. This court, these Defendants,
 6 and the public have a right to know that Downey Brand did not make such a bribe on behalf of
 7 its clients and they have a right to know why Bauer claimed that it did. They also have a right to
 8 know why the federal prosecutors did nothing to Bauer for attempting to interfere with an
 9 investigation, in violation of 18 USC § 1519. An individual such as Bauer willing to risk twenty
 10 years in jail clearly has a higher stake in affecting the outcome of the matter than any claim of
 11 innocence would suggest. If what appears to be revealed by this conduct is true, Bauer only
 12 remains free because misguided prosecutors did actually forget that they were working for the
 13 Department of Justice, as stated by AUSA Eric Overby, and had become so blinded by the
 14 pursuit of a pay day that a grave miscarriage of justice has indeed occurred. This issue goes
 15 beyond this case. The public not only has a right to know, but to be protected from future
 16 criminal violations. When that neutral investigation reveals the truth about this hidden bribe
 17 allegation, finds that it was manufactured, and that the government was willing to “run the risk”
 18 of not prosecuting it, this matter should be vacated and those responsible should be held
 19 accountable.

20 **B. The Entire “Trail Of Fraud” in this Matter, From the Original Investigation,**
 21 **Through Discovery, and Including Judicial Filings, Are Fully Subject to this**
 22 **Court’s Review and Establish a Fraud on the Court.**

23 With no analysis, the government cites to Hazel-Atlas on two occasions for the
 24 unqualified proposition that “fraud on the court is a rule of equity for ‘after-discovered fraud.’”
 25 (Opp. at 2,70.) But Hazel-Atlas actually states something different, simply acknowledging that
 26 fraud on the court is a “rule of equity to the effect that under certain circumstances, one of which
 27 is after-discovered fraud, relief will be granted against judgments regardless of the term of their
 28 entry.” Hazel-Atlas, 322 U.S. at 244. Thus, properly understood, the Supreme Court’s decision
 in Hazel-Atlas merely acknowledges that fraud discovered after a judgment is simply one

1 circumstance wherein a court can exercise its inherent powers to vacate and dismiss an action,
2 not the only circumstance as suggested by the government.

3 The fact that Hazel-Atlas acknowledges a far broader spectrum for the court to operate in
4 than urged by the government is revealed within the opinion in two ways. Specifically, in
5 addition to finding that “after-discovered” evidence is only one circumstance for the court’s
6 consideration, Hazel-Atlas also teaches that the court can find fraud upon the court even if that
7 fraud was not the primary basis of the court’s earlier determination. In this regard, the Court
8 reversed the Third Circuit’s decision to deny fraud on the court on that ground; on this issue, the
9 Supreme Court addressed a party’s construction of a false article to affect the patent office and
10 subsequent litigation, noting:

11 They conceived [the false article regarding the patent] in an effort
12 to persuade a hostile Patent Office to grant their patent application,
13 and went to considerable trouble and expense to get it published.
14 Having lost their infringement suit based on the patent in the
15 District Court wherein they did not specifically emphasize the
16 article, they urged the article upon the Circuit Court and prevailed.
17 They are in no position now to dispute its effectiveness.

18 Hazel-Atlas, 322 U.S. at 247.

19 Thus, the Supreme Court confirms that fraud upon the court does not depend on the
20 effective of the fraudulent effort, and went on to overturn the Third District’s decision in part
21 because the Third District’s determination that the article wasn’t a primary basis of its decision
22 was the wrong question. Id.

23 Finally, in overturning the Third Circuit’s finding of no fraud upon the court, the
24 Supreme Court focused on what it called the “trail of fraud” associated with the conduct of
25 Hartford and its counsel, beginning with executing the plan regarding the article, using it to
26 deceive the Patent Office, then “without break” the District Court, and then the Circuit Court of
27 Appeals. Id.

28 For these reasons and more, the government’s arguments that fraud discovered before
settlement is not relevant to this court’s determinations here is misplaced. Specifically, for
instance, its effort to claim that what happened at Red Rock is not a part of this court’s analysis
is not supported by law. The government prosecutors participated in the Red Rock cover-up by

1 creating and having the USFS sign a false interrogatory response. It did so in an effort to assist,
 2 at least initially, in preventing Defendants from uncovering an effort to conceal the action that
 3 took place in that tower at the time the fire broke out. The government’s effort to excuse its
 4 conduct, for instance by saying that spotting a marijuana pipe is not an “activity” is beyond
 5 specious, and made worse by the fact that they attempt to ignore the fact that Juska smelled the
 6 heavy odor of marijuana on Lief, that Lief put the illegal contraband in his back pocket when it
 7 was discovered, and that Juska was able to surprise this lookout while he was inattentively
 8 urinating on his feet. All of these activities should have been readily disclosed by these
 9 prosecutors, and their efforts to excuse their failure to do so ring hollow.

10 Ultimately, the entirety of this matter, regardless of whether it was previously addressed
 11 by the court in another context, makes up the “scheme” which this court should now assess in
 12 the context of this motion, which is focused not on the parties but on the injury caused by such
 13 conduct on this court. The “trail of fraud” in this matter is long, beginning on the day of the fire,
 14 continuing through the fraudulent investigation and the investigators’ sham report, extending
 15 through the use of that report by government lawyers in the context of litigation, and the
 16 prosecutors’ protection of these investigators while they tried to cover their tracks during their
 17 investigation, and culminating in the concealment of a critical false bribe.

18 Case law confirms that this court can view all of this “sordid story,” Hazel-Atlas, 322
 19 U.S. at 243, when assessing this broad scheme to defraud this Court. Whether portions of this
 20 scheme were uncovered before the forced settlement or after, it is still one scheme or “trail of
 21 fraud,” fully subject to this Court’s assessment.

22 **C. Given the Stage of the Proceedings, the Government Is Obligated to Assume the**
 23 **Truth of Defendants’ Allegations That the Moonlight Prosecutors Participated in**
 24 **the Fraud.**

25 Throughout its opposition, the government contends that its attorneys did not participate
 26 in any misrepresentations, and that the Court is therefore precluded from finding that a fraud
 27 occurred. Specifically, and among other things, the government prosecutors contend that that
 28 they did not attribute a false statement to J.W. Bush (Opp. at 54), and that they did not

1 misrepresent any facts about the three fires (Opp. at 78), WiFITER (Opp. at 88, 92), or about the
2 \$2 million bribe (Opp. at 100). The government’s argument is baseless.

3 To begin, the Ninth Circuit has repeatedly employed the definition of fraud on the court
4 set forth in *Moore’s Federal Practice*. See *In re Intermagnetics*, 926 F.2d at 916. Moore’s
5 definition explains that fraud on the court includes “only that species of fraud which does or
6 attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the
7 judicial machinery can not perform in the usual manner” 7 J. Moore & J. Lucas, *Moore’s*
8 *Federal Practice* ¶ 60.33 (2d ed. 1978) (emphasis added). Thus, a fraud upon the court can be
9 found when a matter that defiles or attempts to defile the court itself, i.e., without the
10 involvement of an officer of the court, or when a fraud is perpetrated by officers of the court in a
11 way that prevents the “judicial machinery” from performing in its normal way. Here, the
12 Court’s review is made easier because the egregious fraud in this matter operated pervasively on
13 both levels. Not only does this matter constitute a species of fraud that “defiled the sanctity of
14 the court and the confidence of all future litigants,” *Dixon*, 316 F. 3d. at 1047, but these officers
15 of the court thoroughly participated in throwing numerous wrenches into this Court’s judicial
16 machinery.

17 As officers of the court, prosecutors do not have the liberty to watch while the
18 administration of justice is so thoroughly corrupted by their own star witnesses, only to
19 thereafter wash their hands of any responsibility when the scheme is finally exposed. By
20 presiding over this action and allowing it to unfold under their supervision, these prosecutors
21 participated in every sense of that word. They were responsible for controlling the litigation and
22 had a responsibility to serve as this court’s “gatekeepers.” In that role, it was their obligation to
23 make sure that the investigators’ fraud was exposed and that it did not prevent the “judicial
24 machinery” from properly operating. Every omission by these prosecutors, every failure to alert
25 this Court to what was taking place during discovery, and every instance where they sat on their
26 hands while their investigators testified dishonestly comprises their participation in this fraud.

27 Moreover, in addition to countless omissions, they participated in the construction of a
28 blatantly false interrogatory response on Red Rock, they actively put the investigators at ease

1 with respect to giving false testimony on the white flag, assuring them in advance that it was a
 2 “non-issue,” and they actively concealed Bauer’s allegations of a false bribe. They submitted
 3 what they knew (or recklessly failed to realize) was a blatantly false report, and they submitted
 4 White’s false declaration as well, all acts which contributed to the court’s impression that it was
 5 presiding over a fair dispute, when in fact the court was presiding over a lie which was actively
 6 advanced for three years. The impact of all of these acts and omissions cannot be overstated, and
 7 it was especially effective here since lawyers working for our Department of Justice were the
 8 perpetrators. See Berger, 295 U.S. at 88. As discussed by the Ninth Circuit in Dixon, the
 9 prosecutors helped create the court’s impression that it was presiding over a “adversarial dispute
 10 when, in fact, the proceeding was a charade” Dixon, 316 F.3d at 1047.

11 Moreover, the prosecutors’ claim that they did not participate in the misconduct is only
 12 argument, and not allowed at this stage of the proceeding. The Defendants’ allegation in this
 13 area are clear:

- 14 • With respect to their falsified points of origin, that White and Reynolds
 15 perjured themselves when confronted during deposition about the white
 16 flag, and that the Moonlight Prosecutors assisted and encouraged this
 17 false testimony by telling Reynolds that the white flag was a “non-issue”
 and by failing to intervene or correct the record. (See Defs.’ Supp. Brief
 at 43-60.)
- 18 • With respect to the interviews of J.W. Bush, that the Moonlight
 19 Prosecutors failed to disclose on motion practice before this Court that
 20 Bush denied ever thinking or believing that the cat tracks scraped a rock
 21 to cause the fire, that there was a dispute over the statement that
 Investigator Reynolds prepared and had Bush sign, and that the
 22 Moonlight Prosecutors misrepresented that Bush repeated to
 Investigator White what he had supposedly told Reynolds, even though
 23 an audio tape of the interview revealed exactly the opposite. (See Defs.’
 Supp. Brief at 60-65.)
- 24 • With respect to the three fires, that the Moonlight Prosecutors
 25 misrepresented in their discovery responses, trial brief, and in summary
 judgment briefing that Defendants caused these fires, when in fact they
 26 knew that each of the investigations was scientifically flawed in multiple
 ways and, at least for one of the fires, that even the investigators
 27 testified there was no final conclusion about the cause of the fire. (See
 Defs.’ Supp. Brief at 82-89.)

- 1 • With respect to WiFITER, that the Moonlight Prosecutors argued to this
2 Court in motions in limine that there was no evidence of a conspiracy,
3 even though the government’s joint prosecution partner, Cal Fire,
4 subsequently produced in the state actions documents evidencing
5 financial motive to blame wildfires on wealthy defendants, and
6 misrepresented that WiFITER was a “separate public trust fund” when it
7 was in fact secret, not public, as confirmed by multiple audits that
8 occurred after the federal action settled. (See Defs.’ Supp. Brief at 107-
9 122.)
- 10 • With respect to the alleged \$2 million dollar bribe, which is addressed in
11 greater detail supra, that the Moonlight Prosecutors withheld evidence
12 directly relevant to their motion in limine to preclude Defendants from
13 introducing evidence that the Moonlight Fire was started by a third
14 party, i.e., that a critical third party witness, Edwin Bauer, had made the
15 false claim that either Sierra Pacific or its trial counsel had offered
16 money in exchange for testimony from his son, Ryan, that Ryan had
17 started the Moonlight Fire. The Moonlight Prosecutors investigated this
18 claim and determined it was false but never disclosed it to Defendants,
19 and then subsequently filed and prevailed on their motion in limine,
20 based on FRE 403. (Defs.’ Supp. Brief at 122-131.)

21 These allegations will be supported by the record evidence at the hearing and are more
22 than sufficient to allege a fraud on this Court. The government’s failed effort to deflect these
23 facts with supposed contrary evidence should be ignored or stricken.

24 **D. The Government Cannot Divorce Itself from the Conduct of Its Joint Prosecution
25 Partner**

26 In an effort to distance itself from the misconduct of the state prosecutors, and even more
27 specifically the failure to disclose the WiFITER documents, the government discounts the
28 importance of the joint prosecution agreement and claims that Judge Nichols’s findings in the
related state case are irrelevant. (Opp. at 59, 93.) Regardless of whether the federal prosecutors
themselves can be personally liable for the misconduct of its joint prosecutors, the actions of the
state prosecutors can, and do in this case, support a finding of fraud on the court.

 In Pumphrey, the Ninth Circuit held that the general counsel for the defendant was acting
as an officer of the court and in that capacity committed a fraud on the court, despite the fact that
the lawyer was not a member of the trial team, “was not admitted to practice in the District . . . ,
did not enter an appearance . . . , was not admitted pro hac vice, and did not sign any documents

1 filed with the court.” 62 F.3d at 1130-31. Instead, the court found that the lawyer was acting as
 2 an officer of the court based on the fact that he “participated significantly in [the case] by
 3 attending the trial on [the defendant’s behalf], gathering information to respond to discovery
 4 requests and framing the answers, and participating in the videotaping of both the trial video and
 5 the original video.” 62 F.3d at 1131.

6 Similarly here, the government admits that the very purpose of the joint prosecution
 7 agreement was to “engage in joint litigation efforts” based on the “two sovereign’s common
 8 interest.” (Opp. at 94.) Certainly these “joint efforts” included gathering information regarding
 9 the investigation into the origin and cause of the Moonlight Fire, framing answers for discovery
 10 responses, and engaging experts to test theories on sparks, wildfire spread, and more. Also, it is
 11 now known that the government had joint meetings with the state prosecutors at its office in
 12 Sacramento, during which the entities jointly prepped witnesses for depositions. Finally, and
 13 most importantly, the state prosecutors actually attended many of the federal depositions, and
 14 similar to Pumphrey, the lead state attorney was in the courtroom for the federal pre-trial
 15 conference, at which the federal motions in limine were argued and ruled upon, including the
 16 motion in limine resulting in part on the federal prosecutor’s misrepresentations regarding
 17 WiFITER. Certainly this amount of involvement in the federal litigation meets and exceeds the
 18 standard set in Pumphrey for determining whether an attorney is acting as an “officer of the
 19 court” whose actions can support a claim of fraud on the court.

20 Indeed, just as the general counsel in Pumphrey “undermined the judicial process,” by
 21 “fail[ing] to take action” to disclose the video, to correct the request for production and
 22 interrogatory responses, and to “correct the false impression” created by an expert’s testimony,
 23 here the state prosecutors also had every opportunity during the course of this litigation to
 24 correct various deceptions that defrauded the court. 62 F.3d at 1130-33. And just as in
 25 Pumphrey, the state prosecutors here were “licensed attorney[s], . . . aware of the necessity for
 26 compliance with the rules of discovery and the rules of professional responsibility [and] aware of
 27 the damage failure to abide by these rules can wreck in the specific case at hand and the larger
 28 framework of confidence in the adversary trial system.” Id. at 1133.

1 While the government certainly would like for its assertion at the conclusion of its brief
2 to be true—that “alleged misconduct by Cal Fire concerning the State Fund cannot establish a
3 fraud on the court [and the] United States cannot fairly be denied the benefit of a judgment based
4 on alleged misconduct by someone else”—sadly they are mistaken. (Opp. at 114-15.)

5 Pumphrey makes clear that all officers of the court are responsible for upholding the integrity of
6 the judicial system and that fraud on the court can be found based on the actions of any officer,
7 even one not participating as a member of the trial team. Given that the conduct of the state
8 attorneys involved in the joint litigation effort most certainly can establish a fraud on the court,
9 Judge Nichols’s finding that the state attorneys failed to prevent a corrupt investigation and
10 litigation of the Moonlight Fire is not only relevant but provides persuasive evidence of the fraud
11 perpetrated on this court.

12 **E. The Government’s Attacks On Bob Wright and Eric Overby Are Without Merit.**

13 While the government attempts to contend that nondisclosures can never cause a fraud on
14 the court, controlling authority confirms that innocent nondisclosures generally cannot cause a
15 fraud on the court but intentional nondisclosures most certainly can. Because this Court
16 considers intent, evidence regarding whether the government’s conduct was intentional here is
17 relevant to this Court’s review. If certain prosecutors in the office have engaged or attempted to
18 engage in acts of deceit on other wildland fire cases, it would tend to show a pattern and
19 practice, and that their actions on the Moonlight Fire were not the consequence of mistakes or
20 inadvertence, but were instead deliberate and purposeful. Such evidence is made admissible
21 under the Federal Rules of Evidence.

22 Perhaps sensing this reality, the government attempts to recast Wright’s declaration as,
23 instead, evidence of the government’s “propensity for withholding evidence.” Having recast the
24 evidence, the government then argues that propensity evidence is inadmissible under Fed. Rule.
25 Evid. 404(b). This argument contravenes controlling authority, which holds that evidence of
26 earlier behavior is admissible “for other purposes ‘such as proof of motive, opportunity, intent,
27 preparation, plan, knowledge, identity, or absence of mistake or accident’” Boyd v. City &
28 Cnty. of San Francisco, 576 F.3d 938, 946-47 (9th Cir. 2009) (quoting Fed. R. Evid. 404(b)).

1 As a consequence, evidence provided by former Assistant United States Attorney Wright
 2 regarding his experiences with Shelledy on two other wildland fire cases in the same year he
 3 filed the Moonlight Fire matter is admissible to show Shelledy's intent here. Although the
 4 government has been ordered to limit its briefing to the facts as alleged in the Defendants'
 5 opening briefing, presuming those allegations to be true, the government has nevertheless
 6 provided declarations from three government attorneys. These declarations should be ignored
 7 given the procedural posture of the instant motion. Nevertheless, because these declarations
 8 attempt to besmirch the character of Wright, Wright understandably insisted on preparing another
 9 declaration in response to these allegations, and to explain in detail the falsity of the
 10 government's declarations. In this regard, Wright has reviewed the allegations contained in
 11 Shelledy's declaration, and those within United States Attorney Benjamin Wagner's. As Wright
 12 indicates in his declaration, the factual assertions levied against him and against former
 13 Moonlight Fire prosecutor Eric Overby, who is deceased, are false. A copy of Wright's
 14 supplemental declaration is served and filed herewith.⁶⁴

15 IX. 16 CONCLUSION

17 The government's opposition largely substitutes character assassination for serious legal
 18 analysis. Ultimately, it says nothing that should dissuade this Court from allowing these
 19 Defendants to move forward with their complaint for fraud on the court. As these Defendants
 20 have alleged (and will prove), during the government's investigation of this fire, it, among other
 21 things, manufactured evidence, buried key photographs and diagrams, told witnesses what they
 22 could and could not say. During the prosecution of this matter, the government sat on its hands
 23 as the investigators repeatedly lied under oath on the most key issues of their investigation,
 24 instructed witnesses to sign blatantly false interrogatory responses, and withheld material

25 ⁶⁴ Defendants note that, as time passed after the government filed its opposition attacking, among others, former
 26 Wright, he felt compelled to quickly prepare and execute a declaration almost immediately thereafter, and then
 27 another one several days later. Wright did so out of concern that if he were to suffer an accident or a serious and
 28 immediate health problem, he might lose the chance to clear his good name, as is now the case for Overby, who
 passed in 2013. Ultimately, Wright had time to execute a final and fuller declaration, which has been submitted
 with this motion. The earlier versions of Wright's declarations have been preserved and will be provided to the
 extent requested by the Court.

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1 evidence from the Court and Defendants. In this vein, it also breached its duty of candor to the
2 Court regarding the existence of critical exculpatory evidence it learned on the eve of its Rule
3 403 motion.

4 As Defendants' reply demonstrates, the government's opposition violates the Court's
5 order, manufactures whatever legal conclusions it needs to support its misguided effort to keep
6 this Court from reviewing the evidence of its scheme to defraud it, and attacks those who have
7 been handed the ugly job of exposing its corruption. In its brazen assertion that "each and every
8 allegation is false," the government has gone "all in" with its effort to prevent the truth from
9 being known to this court and the public.

10 Frankly, there is nothing new here, as it emanates from a sense of invulnerability on the
11 part of the government that has driven this case from the start. Defendants are profoundly aware
12 of the position they have been forced into by the government as they address these serious issues.
13 They know that doing so necessarily sounds offensive – how does one expose such conduct
14 without being diminished by doing so? Regardless, Defendants and their counsel will continue
15 to do so. As officers of the court and as advocates for the victims of this tragedy, we have no
16 choice but to carry out this obligation.

17 Essentially, when assessing a complaint for fraud on the court, the government would
18 have this Court believe that so long as the Court itself is kept sufficiently in the dark to have
19 blessed a settlement, then the government can basically use whatever means of abuse and
20 dishonesty it chooses to achieve what it wants. Thankfully – for the benefit of all citizens who
21 find themselves confronted by the litigation might of the government – that is not the law. Both
22 the Supreme Court and Ninth Circuit resoundingly confirm this Court's power to control and
23 respond to the litigation conduct of those who file, discover, and prosecute a case before it.
24 Having such latitude is consistent with the Court's inherent power to administer justice with
25 respect to all cases and parties. The Court should allow the next stage of this proceeding to take
26 place.

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