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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

Plaintiff,

v.

SIERRA PACIFIC INDUSTRIES, et
al.,

Defendants,

AND ALL RELATED CROSS-ACTIONS.

CIV. NO. 2:09-02445 WBS AC

MEMORANDUM AND ORDER

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

1 I. Brief Factual and Procedural Background

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

19 On August 9, 2009, the Office of the California
20 Attorney General filed an action in state court on behalf of Cal
21 Fire to recover its damages caused by the Moonlight Fire (the
22 "state action"). That same month, on August 31, 2009, the United
23 States Attorney filed this action on behalf of the United States
24 to recover its damages caused by the Moonlight Fire (the "federal
25 action"). The two cases proceeded independently, but the
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1 government¹ and Cal Fire operated pursuant to a joint prosecution
2 agreement.

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

13 Under the terms of the settlement agreement, Sierra
14 Pacific Industries agreed to pay the government \$47 million,
15 Howell's Forest Harvesting Company agreed to pay the government
16 \$1 million, and other defendants agreed to pay the government \$7
17 million. (Settlement Agreement & Stipulation ¶ 25 (Docket No.
18 592).) Sierra Pacific Industries also agreed to convey 22,500
19 acres of land to the government. (Id.) At the request of the
20 parties and pursuant to the settlement agreement, the court
21 dismissed the case with prejudice on July 18, 2012 and directed
22 the clerk to enter final judgment in the case. (Id.)

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

25
26 ¹ All references to the "government" in this Order refer
27 to the United States government and, where appropriate, the
28 Assistant United States Attorneys who represented the government
in this case.

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

7 II. Legal Standards

8 A. Federal Rule of Civil Procedure 60

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

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

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

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

4 Despite the limitations in Rule 60(b), “[c]ourts have
5 inherent equity power to vacate judgments obtained by fraud.”
6 United States v. Estate of Stonehill, 660 F.3d 415, 443 (9th Cir.
7 2011) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991)).
8 Rule 60(d)(3) preserves this inherent power and recognizes that
9 Rule 60 does not “limit a court’s power to . . . set aside a
10 judgment for fraud on the court.” Fed. R. Civ. P. 60(d)(3);
11 accord Applying v. State Farm Mut. Auto. Ins. Co., 340 F.3d 769,
12 780 (9th Cir. 2003) (“Federal Rule of Civil Procedure 60(b)
13 preserves the district court’s right to hear an independent
14 action to set aside a judgment for fraud on the court.”); Estate
15 of Stonehill, 660 F.3d at 443 (“Rule 60(b), which governs relief
16 from a judgment or order, provides no time limit on courts’ power
17 to set aside judgments based on a finding of fraud on the
18 court.”).² Because defendants failed to file a timely Rule 60(b)
19 motion, they are forced to argue that the judgment in this case

20 ² Prior to the amendments to the Federal Rules of Civil
21 Procedure in 2007, the savings clause for fraud on the court was
22 contained in Rule 60(b), thus courts referred to Rule 60(b) as
23 preserving a court’s inherent power to set aside a final judgment
24 for fraud on the court. As part of the stylistic amendments in
25 2007, the savings clause language was moved from subsection (b)
26 to subsection (d)(3). Compare Fed. R. Civ. P. 60(b) (2006)
27 (“This rule does not limit the power of a court to entertain an
28 independent action . . . to set aside a judgment for fraud on the
court.”), with Fed. R. Civ. P. 60(d)(3) (amended 2007) (“This
rule does not limit a court’s power to: . . . (3) set aside a
judgment for fraud on the court.”); see also Fed. R. Civ. P. 60
(2007 amendments cmt.) (“The language of Rule 60 has been amended
as part of the general restyling of the Civil Rules to make them
more easily understood and to make style and terminology
consistent throughout the rules. These changes are intended to
be stylistic only.”).

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

3 B. Definition of "Fraud on the Court"

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

13 Relief for fraud on the court must be "reserved for
14 those cases of 'injustices which, in certain instances, are
15 deemed sufficiently gross to demand a departure' from rigid
16 adherence to the doctrine of res judicata." United States v.
17 Beggerly, 524 U.S. 38, 46 (1998) (quoting Hazel-Atlas Glass Co.
18 v. Hartford-Empire Co., 322 U.S. 238, 244 (1944), overruled on
19 other grounds by Standard Oil Co. v. United States, 429 U.S. 17
20 (1976)). The Ninth Circuit has repeatedly emphasized that
21 "[e]xceptions which would allow final decisions to be
22 reconsidered must be construed narrowly in order to preserve the
23 finality of judgments." Abatti v. Comm'r of the I.R.S., 859 F.2d
24 115, 119 (9th Cir. 1988); see also Appling, 340 F.3d at 780;
25 Dixon v. C.I.R., 316 F.3d 1041, 1046 (9th Cir. 2003).

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

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

12 “In determining whether fraud constitutes fraud on the
13 court, the relevant inquiry is not whether fraudulent conduct
14 ‘prejudiced the opposing party,’ but whether it “harm[ed]” the
15 integrity of the judicial process.’” Estate of Stonehill, 660
16 F.3d at 444 (quoting Alexander v. Robertson, 882 F.2d 421, 424
17 (9th Cir. 1989)); see also Estate of Stonehill, 660 F.3d at 444
18 (“Fraud on the court involves ‘far more than an injury to a
19 single litigant’” (quoting Hazel-Atlas Glass Co., 322
20 U.S. at 246)). Although “one of the concerns underlying the
21 ‘fraud on the court’ exception is that such fraud prevents the
22 opposing party from fully and fairly presenting his case,” this
23 showing alone is not sufficient. Abatti, 859 F.2d at 119; see
24 also Abatti, 859 F.2d at 118 (“[W]e have said that it may occur
25 when the acts of a party prevent his adversary from fully and
26 fairly presenting his case or defense. . . . Fraud on the court
27 must involve ‘an unconscionable plan or scheme which is designed
28 to improperly influence the court in its decision.’” (quoting

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

5 “Non-disclosure, or perjury by a party or witness, does
6 not, by itself, amount to fraud on the court.” Applying, 340 F.3d
7 at 780; accord In re Levander, 180 F.3d at 1119 (“Generally, non-
8 disclosure by itself does not constitute fraud on the court. . .
9 . Similarly, perjury by a party or witness, by itself, is not
10 normally fraud on the court.”); see also Hazel-Atlas Glass Co.,
11 322 U.S. at 245 (“This is not simply a case of a judgment
12 obtained with the aid of a witness who, on the basis of after-
13 discovered evidence, is believed possibly to have been guilty of
14 perjury.”).

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

24 Non-disclosure by an officer of the court or perjury by
25 or suborned by an officer of the court may amount to fraud on the
26 court only if it was “so fundamental that it undermined the
27 workings of the adversary process itself.” Estate of Stonehill,
28 660 F.3d at 445; see also 11 Charles Alan Wright, Arthur R.

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

12 As the Ninth Circuit has recognized, “the term ‘fraud
13 on the court’ remains a ‘nebulous concept.’” In re Levander, 180
14 F.3d at 1119 (quoting Broyhill Furniture Indus., Inc. v.
15 Craftmaster Furniture Corp., 12 F.3d 1080, 1085 (Fed. Cir.
16 1993)). Nonetheless, it “places a high burden on [the party]
17 seeking relief from a judgment,” Latshaw v. Trainer Wortham &
18 Co., Inc., 452 F.3d 1097, 1104 (9th Cir. 2006), and the party
19 seeking relief must prove fraud on the court by clear and
20 convincing evidence, Estate of Stonehill, 660 F.3d at 443-44.

21 C. Inapplicability of *Brady v. Maryland*

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

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

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

12 "Due process is a flexible concept, and its procedural
13 protections will vary depending on the particular deprivation
14 involved.'" Goichman v. Rheuban Motors, Inc., 682 F.2d 1320,
15 1324 (9th Cir. 1982) (quoting Morrissey v. Brewer, 408 U.S. 471,
16 481 (1972)); see also Mathews v. Eldridge, 424 U.S. 319, 335
17 (1976) (identifying the first consideration in the procedural due
18 process inquiry as "the private interest that will be affected by
19 the official action").⁴ In a criminal case, the government is

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

22 ⁴ The Supreme Court has not yet indicated whether Brady
23 derives from a criminal defendant's procedural or substantive due
24 process rights. See Castellano v. Fragozo, 352 F.3d 939, 968
25 (5th Cir. 2003) (discussing the differing views expressed in
26 Albright v. Oliver, 510 U.S. 266 (1994)); see also Martin A.
27 Schwartz, The Supreme Court's Unfortunate Narrowing of the
28 Section 1983 Remedy for Brady Violations, 37-MAY Champion 58, 59
(May 2013) ("The Supreme Court has never definitively held
whether Brady is based on substantive or procedural due
process."). The court need not resolve this issue because the
differences between criminal and civil cases would render Brady
inapplicable to civil cases regardless of whether its protections

1 seeking to deprive a defendant, who is presumed to be innocent,
2 of his liberty. The "requirement of due process . . . in
3 safeguarding the liberty of the citizen against deprivation
4 through the action of the State, embodies the fundamental
5 conceptions of justice which lie at the base of our civil and
6 political institutions.'" Mooney v. Holohan, 294 U.S. 103, 112
7 (1935). In contrast to a criminal case where there is a
8 potential loss of liberty, a civil action such as this is
9 strictly about money. Except that the government happens to be
10 the plaintiff, this case is no different from any other civil
11 case in which one party pursues recovery of damages allegedly
12 caused by the other party. The government did not seek to
13 deprive any defendant in this case of liberty or impose any other
14 consequences akin to a criminal conviction.⁵ It therefore stands

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16 derive from the procedural or substantive components of the Due
17 Process Clause. Here, defendants rely exclusively on the
18 protections of procedural due process in arguing that Brady
19 applies to this civil case. (See Defs.' Reply at 56:1-17
20 (applying the procedural due process balancing test from Mathews,
21 424 U.S. 319).)

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

Section 4435 provides:

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

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

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

9
10 a misdemeanor.

11 Cal. Pub. Res. Code § 4435. In their Second Amended Complaint,
12 the government did not assert a claim under section 4435, but
13 relied on that section to generally allege that the ignition of
14 the fire was prima facie evidence of defendants' negligence.
15 (See Second Am. Compl. ¶¶ 26-27.) Similarly, in denying
16 defendants' motion for summary judgment as to prima facie
17 negligence, Judge Mueller regarded section 4435 as relevant to
18 the burdens at trial, not as an independent claim. (See May 31,
19 2012 Order at 17:4-18:12 (Docket No. 485) (discussing section
20 4435 and concluding that defendants will have the "burden at
21 trial to present sufficient evidence that the bulldozer was not
22 negligently maintained, operated, or used".) The government did
23 not seek to hold any of the individual defendants liable for a
24 violation of section 4435 and could not have pursued a state law
25 misdemeanor charge in federal court.

26 Section 261.5(c) prohibits "[c]lausing timber, trees,
27 slash, brush or grass to burn except as authorized by permit."
28 36 C.F.R. § 261.5(c). Under § 261.1b, "[a]ny violation of the
prohibitions of this part (261) shall be punished by a fine of
not more than \$500 or imprisonment for not more than six months
or both pursuant to title 16 U.S.C., section 551, unless
otherwise provided." Id. § 261.1b. The government relied on §
261.5(c) in its Second Amended Complaint only to allege that
"[c]lausing timber, trees, brush, or grass to burn except as
authorized by permit is prohibited by law." (Second Am. Compl. ¶
29.) The government did not, and could not, pursue the criminal
fine or imprisonment contemplated by § 261.5(c) in this civil
case. Judge Mueller also found that § 261.5(c) was inapplicable
to this case because the fire did not start on federally-owned
land and entered judgment in favor of defendants on the
government's state law claims "insofar as plaintiff relies on 36
C.F.R. § 261.5(c) for the underlying violation of law." (May 31,
2012 Order at 19:1-20:2.)

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

12 Defendants have not cited and this court is not aware
13 of a single case from the Supreme Court or Ninth Circuit applying
14 Brady to a civil case.⁶ In fact, all of the Supreme Court and
15 Ninth Circuit cases defendants rely on for this proposition are
16 cases assessing the conduct of prosecutors⁷ in criminal cases.
17 (See Defs.' Revised Supplemental Briefing at 3, 19-20 (Docket No.
18 625-1) ("Defs.' Br.") (relying on Youngblood v. West Virginia,

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20 ⁶ In Pavlik v. United States, the Ninth Circuit
21 "assume[d], without deciding, that the principle enunciated in
22 Brady v. Maryland applies in the context of [National Oceanic and
23 Atmospheric Administration] civil penalty proceedings." 951 F.2d
24 220, 225 n.5 (9th Cir. 1991).

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

1 547 U.S. 867, 869-70 (2006) (criminal case addressing Brady);
2 Kyles v. Whitley, 514 U.S. 419, 438 (1995) (habeas petition based
3 on Brady violation); United States v. Young, 470 U.S. 1, 25-26
4 (1985) (Brennan, J., concurring) (criminal case addressing
5 prosecutorial misconduct); Imbler v. Pachtman, 424 U.S. 409, 424
6 (1976) (discussing prosecutorial immunity in suits under 42
7 U.S.C. § 1983); Berger v. United States, 295 U.S. 78, 88 (1935)
8 ("The United States Attorney is the representative not of an
9 ordinary party to a controversy, but of a sovereignty whose
10 obligation to govern impartially is as compelling as its
11 obligation to govern at all; and whose interest, therefore, in a
12 criminal prosecution is not that it shall win a case, but that
13 justice shall be done." (emphasis added)); Tennison v. City &
14 County of San Francisco, 570 F.3d 1078, 1087 (9th Cir. 2009) (42
15 U.S.C. § 1983 claim based on Brady violations in underlying
16 criminal case); Morris v. Ylst, 447 F.3d 735, 744 (9th Cir. 2006)
17 (criminal case addressing Brady and prosecutor's duty to
18 investigate suspected perjury); United States v. Chu, 5 F.3d
19 1244, 1249 (9th Cir. 1993) (criminal case addressing
20 prosecutorial misconduct in questioning of witness); Benn v.
21 Lambert, 283 F.3d 1040, 1062 (9th Cir. 2002) (habeas petition
22 based on Brady violation)).)

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

1 1993)); see also Brodie v. Dep't of Health & Human Servs., 951 F.
2 Supp. 2d 108, 118 (D.D.C. 2013) ("Brady does not apply in civil
3 cases except in rare situations, such as when a person's liberty
4 is at stake. . . . With only three exceptions, . . . courts
5 uniformly have declined to apply Brady in civil cases.").

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

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

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

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

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

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

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

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

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

1 misconduct by the government without suggesting that a heightened
2 standard applied because it was the government that engaged in
3 the conduct at issue. 660 F.3d at 445-52. Instead, the
4 standards the Ninth Circuit articulated and applied were the same
5 as those which govern the ability to seek relief for fraud on the
6 court by non-government parties.⁸ See, e.g., id. at 444-45
7 (discussing Levander and Pumphrey, which assessed allegations of
8 fraud on the court by non-government attorneys); see also id. at
9 445 ("In order to show fraud on the court, Taxpayers must
10 demonstrate, by clear and convincing evidence, an effort by the
11 government to prevent the judicial process from functioning 'in
12 the usual manner.'"); accord Dixon, 316 F.3d at 1046-47 (finding
13 fraud on the court perpetrated by government tax attorneys under
14 the same standards governing fraud on the court by non-government
15 attorneys).

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

20 III. Analysis

21 Initially, it does not appear that any of the alleged
22 acts of fraud tainted the court's decision to enter the
23 stipulated judgment. The government argues quite persuasively
24 that none of those acts therefore may form the basis for setting
25

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

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

4
 5 ⁹ See Superior Seafoods, Inc. v. Tyson Foods, Inc., 620
 6 F.3d 873, 880 (8th Cir. 2010) (affirming the denial of relief for
 7 fraud on the court when "[t]he court entered its consent judgment
 8 based on the written document provided by the parties after
 9 extensive negotiation" and explaining that "the court was not
 10 required to look behind or interpret that written document to
 11 ensure that the meeting of minds reflected therein was not, in
 12 fact, against the wishes of Mr. Kemp and his attorney"); Pfotzer
 13 v. Amercoat Corp., 548 F.2d 51, 52 (2d Cir. 1977) (affirming
 14 denial of relief for fraud on the court and noting that "'it
 15 sufficed for the court to know the parties had decided to settle,
 16 without inquiring why'" (quoting Martina Theatre Corp. v. Schine
 17 Chain Theatres, Inc., 278 F.2d 798, 801 (2d Cir. 1960))); Roe v.
 18 White, No. Civ. 03-04035 CRB, 2009 WL 4899211, at *3 (N.D. Cal.
 19 Dec. 11, 2009) ("The alleged fraud 'did not improperly influence
 20 the court' because the judgment was based on the parties'
 21 voluntary settlement and not an adjudication on the merits. . . .
 22 The purported falsity of Plaintiffs' allegations is irrelevant to
 23 the settlement agreement, and to the resulting judgment.
 24 Accordingly, any fraud in no way affected the proper functioning
 25 of the judicial system."); In re Leisure Corp., No. Civ. 03-03012
 26 RMW, 2007 WL 607696, at *7 (N.D. Cal. Feb. 23, 2007) (explaining
 27 that an alleged lack of disclosure did not amount to fraud on the
 28 court because it "was not material to the bankruptcy court's
 assessment of the Settlement Agreement"); Petersville Sleigh Ltd.
v. Schmidt, 124 F.R.D. 67, 72 (S.D.N.Y. 1989) (finding that
 alleged fraud surrounding the source of settlement funds did not
 amount to fraud on the court because the court "never inquired,
 nor was it told, the source of those funds"); United States v.
Int'l Tel. & Tel. Corp., 349 F. Supp. 22, 36 (D. Conn. 1972)
 (concluding that a failure to disclose a motivating factor of the
 government's decision to enter settlement negotiations could not
 amount to fraud on the court when the court "had a limited role
 in approving" the consent decree and the government's "decision
 to negotiate a settlement of the [] case w[as] simply not
 relevant to such an inquiry"); In re Mucci, 488 B.R. 186, 194
 (Bankr. D. N.M. 2013) ("[I]f the Court did not rely on fraudulent
 conduct in entering the judgment from which the party seeks
 relief, the judgment should not be set aside. . . . The Court
 entered the Stipulated Judgment setting forth terms of the
 settlement between the Plaintiffs and Defendant and approving the
 settlement based on the stipulation of the parties, not based on

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

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

12 With the exception of any allegations subsequently
13 addressed in this Order, defendants concede they knew of the
14 following alleged instances of fraud on the court prior to
15 settling the federal action: (1) that the government advanced an
16 allegedly fraudulent origin and cause investigation and allegedly
17 allowed investigators to testify falsely about their work,
18 (Defs.' Br. at 58:2-9); (2) that the government allegedly
19 misrepresented J.W. Bush's admission that a bulldozer rock strike
20 caused the Moonlight Fire, (id. at 63:26-28); (3) that the
21 government proffered allegedly false testimony in opposition to
22

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

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

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

19 In Hazel-Atlas Glass Co., however, the Supreme Court
20 indicated that it was addressing relief from a judgment gained by
21 fraud on the court because of "after-discovered fraud." See
22 Hazel-Atlas Glass Co., 322 U.S. at 244 ("From the beginning there
23 has existed along side the term rule a rule of equity to the
24 effect that under certain circumstances, one of which is after-
25 discovered fraud, relief will be granted against judgments
26 regardless of the term of their entry."); Hazel-Atlas Glass Co.,
27 322 U.S. at 245 ("This is not simply a case of a judgment
28 obtained with the aid of a witness who, on the basis of after-

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

13 While the Court in Hazel-Atlas Glass Co. contemplated
14 relief only for "after-discovered fraud," it recognized that
15 Hazel-Atlas Glass Co. ("Hazel") had "received information" about
16 the fraud prior to entry of judgment and, when the significance
17 of the suspected fraud became clear, had "hired investigators for
18 the purpose of verifying the hearsay by admissible evidence."
19 322 U.S. at 241-42. Hazel was unable to confirm the fraud
20 because the witness who could have revealed it lied to Hazel's
21 investigators at the behest of defendants. Id. at 242. In
22 rejecting the appellate court's finding that Hazel was not
23 entitled to relief because it "had not exercised proper diligence
24 in uncovering the fraud," the Court concluded, "We cannot easily
25 understand how, under the admitted facts, Hazel should have been
26 expected to do more than it did to uncover the fraud." Id. at
27 246 (emphasis added). The Court went on to explain that, "even
28 if Hazel did not exercise the highest degree of diligence [in

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

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

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

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

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

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

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

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

20 That defendants cannot cite such a case comes as no
21 surprise to this court. "The concept of fraud upon the court
22 challenges the very principle upon which our judicial system is
23 based: the finality of a judgment." Herring v. United States,
24 424 F.3d 384, 386 (3d Cir. 2005). Moreover, this is not just a
25 case in which a party seeks the extreme relief of setting aside a
26 final judgment. Defendants here seek to set aside a final
27 judgment entered only because of their own strategic choice to
28 settle the case with full knowledge of the alleged fraud.

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

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

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

7 For the eight allegations of fraud that
8 defendants knew of at the time of settlement, there can be no
9 question that they had the opportunity to expose the alleged
10 fraud at trial. During depositions, defendants' counsel
11 repeatedly cross-examined witnesses on the very issues defendants
12 now claim constitute fraud on the court. (See, e.g., Defs.' Br.
13 at 45:3-15, 52:9-12, 52:20-53:17, 61:23-28, 62:24-28, 67:20-23,
14 78:20-80:7, 83:18-20, 84:3-11, 103:3-7.) In their trial brief,
15 defendants expressed their intent to expose the fraud at trial
16 and had every opportunity to do so. (See, e.g., Defs.' Trial Br.
17 at 1:11-13 (Docket No. 563) ("But, as the facts of this case
18 show, their investigation was more than just unscientific and
19 biased. When the investigators realized that their initial
20 assumptions were flawed, they resorted to outright deception.");
21 July 2, 2012 Final Pretrial Order at 17:21-22 (Docket No. 573)
22 (denying the government's motion in limine in part and allowing
23 defendants "to introduce evidence that there was an attempt to
24 conceal information from the public or the defense").)

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

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

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

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

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

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

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

20
21 This matter does not concern only private parties.
22 There are issues of great moment to the public in a
23 patent suit. Furthermore, tampering with the
24 administration of justice in the manner indisputably
25 shown here involves far more than an injury to a
26 single litigant. It is a wrong against the
27 institutions set up to protect and safeguard the
28 public, institutions in which fraud cannot
complacently be tolerated consistently with the good
order of society. Surely it cannot be that
preservation of the integrity of the judicial process
must always wait upon the diligence of litigants. The
public welfare demands that the agencies of public
justice be not so impotent that they must always be
mute and helpless victims of deception and fraud.

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

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

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

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

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

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

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

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

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

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

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

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

16 1. Allegations Surrounding the White Flag

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

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

4 a. Reynolds' Deposition Testimony

5 First, defendants allege that in January 2011, the
6 government had a pre-deposition meeting with Reynolds at which
7 they discussed the white flag. Defense counsel obviously knew
8 about that meeting before settlement because they questioned
9 Reynolds at length about it at his earlier deposition on November
10 15, 2011. (See, e.g., Reynolds Nov. 15, 2011 Dep. at 1053:16-21
11 ("Q: And do you recall your testimony, sir, is that someone in
12 the January--roughly January 2011 meeting at the D.O.J.'s office
13 or the U.S. Attorney's Office asking questions about the white
14 flag, correct? A: Yes."); see also Reynolds Nov. 15, 2011 Dep.
15 at 1062:21-2063:8, 1064:7-14, 1065:13-24, 1101:7-14.) At that
16 deposition, Reynolds testified that he did not "recall for sure"
17 what the government counsel "contribute[d] to the discussion"
18 about the white flag. (Reynolds Nov. 15, 2011 Dep. at 1068:7-
19 22.)

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

24 Q: And in this conversation did they ask you questions
25 as to whether or not you placed that white flag?

26 A: Yes.

27 Q: And what was your answer in response to those
28 questions?

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

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

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

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

1 Q: I have blown it up for you on a laptop here, Mr.
2 Reynolds.

3 And if I could have you look at the very center of
4 that photograph and tell me if you recognize a white
flag with a post on it? . . .

5 THE WITNESS: I see what looks like a chipped rock
6 there.

7 Q. BY MR. WARNE: And do you see the flag?

8 A. No.

9 Q. You don't see any white flag?

10 A. It looks like a chipped rock right there
11 (indicating).

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

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

18 Q. There is a white flag right there (indicating).
19

20 A. Okay.

21 Q. Do you see it?

22 A. Well, I don't really see a flag. It almost looks
23 like a wire here.

24 Q. That's right. And do you see the flag on top of
it, sir?

25 A. I guess if that's what that is.

26 Q. And you don't recall where that came from?
27

28 A. No.

1 . . .

2 Q. You don't recognize a white flag there?

3 A. Hard to say that that's a white flag but I do see a
4 stem--

5 Q. But you don't recall--

6 A. --that looks like it's one.

7 Q. It looks like it's a white flag, correct?

8 A. It looks like a white flag.

9

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

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

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

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

9 b. Dodds' and Paul's Deposition Testimony

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

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

1 Defendants do not allege that either witness testified
2 differently and thus falsely during any deposition in the federal
3 action. As to Dodds, defendants allege only that he "did not
4 make these concessions during his federal deposition." (Id. at
5 87:19.) So what? There is no allegation that Dodds committed
6 perjury, let alone that the government was a party to any
7 perjury.

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

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

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

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

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

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

21 c. Welton's Deposition Testimony

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

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

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

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

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

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

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

24 A: Not that I can recall.

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

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

1 not, however, deny that the conversation occurred. Welton
2 testified only that she did not recall an alleged conversation
3 that occurred almost four years prior to her deposition. Even
4 assuming that Welton's testimony could be considered perjury,
5 perjury by a witness alone cannot amount to fraud on the court.
6 See, e.g., Appling, 340 F.3d at 780 ("Non-disclosure, or perjury
7 by a party or witness, does not, by itself, amount to fraud on
8 the court."); Hazel-Atlas Glass Co., 322 U.S. at 245 ("This is
9 not simply a case of a judgment obtained with the aid of a
10 witness who, on the basis of after-discovered evidence, is
11 believed possibly to have been guilty of perjury."). Having
12 already deposed Matthews at length about her conversation with
13 Welton about the area of origin, (see, e.g., Matthews Apr. 26,
14 2011 Dep. at 174:22-176:8, 177:17-178:3), defendants could not
15 have been deceived by Welton's inability to remember.

16 Alleging that Welton told AUSA Wright about the
17 conversation, defendants apparently seek to make the government a
18 party to Welton's allegedly perjured testimony. According to
19 defendants, however, Welton told Wright about the conversation on
20 October 2, 2008, and Wright was then forbidden from working on
21 the case in January 2010. Wright was therefore neither present
22 for nor privy to the substance of Welton's August 15, 2011
23 deposition. While it would ordinarily be reasonable to infer
24 that one attorney's knowledge is shared by all of the attorneys
25 working on a case, the allegations in this case preclude such an
26 inference. Not only was AUSA Wright removed from this case, he
27 has since left the United States Attorney's Office and
28

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

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

17 2. Dodds' Handwritten Notes

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

24
25 ¹¹ Defendants of course do not argue that Wright, whom
26 they obviously believe to be their star witness, should have
27 voluntarily disclosed his conversation with Welton about the area
28 of origin prior to his removal from the case. Had this mere non-
disclosure been by any other AUSA, the court has no doubt that
defendants would accuse that AUSA of egregious misconduct.

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

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

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

25
26 ¹² Defendants initially argued that two sets of notes were
27 not produced. Dodds did not transcribe the second set of notes
28 until after the federal action settled. As defendants appear to
concede in their reply brief, failing to disclose handwritten
notes that did not yet exist cannot amount to fraud on the court.

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

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

18 Nonetheless, even if the government should have known

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

1 about Dodds' handwritten notes and the notes would have aided
2 defendants, non-disclosure generally "does not constitute fraud
3 on the court." See, e.g., In re Levander, 180 F.3d at 1119. The
4 allegations regarding Dodds' undisclosed notes do not even rise
5 to the level of the previously discussed affirmative
6 misrepresentations made by counsel in Applying, which the Ninth
7 Circuit held did not constitute fraud on the court. See Applying,
8 340 F.3d at 774.

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

12 3. The State Wildfire Fund

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

26 For example, after settlement of the federal action,
27 the California State Auditor issued a formal report on October
28 15, 2013 that criticized the State Wildfire Fund. (Defs.' Br. at

1 110:12-16.) Among the findings, the State Auditor found that the
2 State Wildfire Fund “was neither authorized by statute nor
3 approved’” and “was not subject to Cal Fire’s normal internal
4 controls or oversight by the control agencies or the
5 Legislature.’” (Id. at 110:18-27 (citing the California State
6 Auditor’s report titled, “Accounts Outside the State’s
7 Centralized Treasury System”).) After repeated motions to compel
8 in the state action, Cal Fire also produced numerous documents
9 allegedly raising concerns about the impartiality of its
10 investigators in light of the State Wildfire Fund. (Id. at
11 111:21-25, 112:3-8.) For example, an email from Cal Fire
12 Northern Region Chief Alan Carlson allegedly “denied a request to
13 use [the State Wildfire Fund] to enhance Cal Fire’s ability to
14 investigate arsonists because, he said, ‘it is hard to see where
15 our arson convictions are bringing in additional cost recovery.’”
16 (Id. at 113:2-4.) Documents also allegedly showed that Cal Fire
17 management sought to conceal the fund from state regulators, knew
18 the fund was illegal, and used the fund to pay for destination
19 training retreats. (Id. at 112:21-22, 113:5-20.)

20 Defendants contend that their post-judgment discoveries
21 revealing the true nature and inherent conflicts created by the
22 State Wildfire Fund support their claim of fraud on the court
23 based on four distinct theories: (a) the federal government made
24 reckless misrepresentations¹⁴ to the court to obtain a favorable

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

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

9 a. Alleged Reckless Misrepresentations by the
10 Government

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

27
28 the government, this theory has no legs to stand on.

1 Judge Mueller granted the government's in limine motion
2 "as to conspiracy." (July 2, 2012 Final Pretrial Order at
3 17:21.) In their instant motion, defendants recognize that Judge
4 Mueller's ruling "was not necessarily a surprise given the
5 limited evidence then available to the Court," but nonetheless
6 argue that, in light of what was subsequently discovered about
7 the State Wildfire Fund, the government was reckless in its
8 representations to the court about the legitimacy of the fund.
9 (Defs.' Br. at 110:10-11, 115:17-10.)

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

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

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

25 Notwithstanding the questionable footing of defendants'
26 position, allegations of reckless conduct cannot give rise to
27 fraud on the court. The Ninth Circuit has indicated that fraud
28

1 on the court requires proof of "an intentional, material
2 misrepresentation directly 'aimed at the court.'" In re Napster,
3 Inc. Copyright Litig., 479 F.3d 1078, 1097 (9th Cir. 2007),
4 abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter,
5 558 U.S. 100, 105 n.1, 114 (2009);¹⁵ see also In re Napster, Inc.
6 Copyright Litig., 479 F.3d at 1097-98 (emphasizing that the
7 evidence does not suggest that defendants selected the contract
8 terms "with the intent to defraud the courts"). The Ninth
9 Circuit has also explained that it has "vacated for fraud on the
10 court when the litigants intentionally misrepresented facts that
11 were critical to the outcome of the case, showing the appropriate
12 'deference to the deep rooted policy in favor of the repose of
13 judgments.'" Estate of Stonehill, 660 F.3d at 452 (quoting
14 Hazel-Atlas Glass Co., 322 U.S. at 244-45) (emphasis added).
15 Allowing reckless conduct to amount to fraud on the court would
16 also be inconsistent with the Ninth Circuit's explanation that a
17 finding of fraud on the court "must involve an unconscionable
18 plan or scheme which is designed to improperly influence the
19 court in its decision." Pumphrey, 62 F.3d at 1131 (internal
20 quotations marks omitted).

21 Although defendants appear to concede that reckless
22

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

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

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

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

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

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

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

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

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

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

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

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

16 Nonetheless, the court need not resolve this issue
17 because defendants' theory attributing fraud on the court to Cal
18 Fire's general counsel and litigation counsel relies on their
19 failure to comply with their alleged obligation to disclose
20 evidence about the State Wildfire Fund under Brady. (See Defs.'
21 Br. at 119:1-17.) As this court has already explained, Brady
22 does not apply in this civil action. Absent some duty to
23 disclose imported from Brady, non-disclosures to defendants alone
24 cannot amount to fraud on the court. See, e.g., Appling, 340
25 F.3d at 780; In re Levander, 180 F.3d at 1119; Valerio, 80 F.R.D.
26 at 641, adopted as the opinion of the Ninth Circuit in 645 F.2d
27 at 700. Any allegations based on Cal Fire's counsel's failure to
28

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

3 c. Chris Parker's Deposition Testimony

4 Chris Parker, a former Cal Fire investigator, was an
5 expert witness for the government and the creator of the State
6 Wildfire Fund. During his deposition in this action, Parker
7 allegedly testified that the State Wildfire Fund was "created
8 only for altruistic purposes" and did not "suggest that the
9 account was established to circumvent state fiscal controls."
10 (Defs.' Br. at 109:17-19.) This testimony was allegedly false or
11 concealed the true nature of the State Wildfire Fund because the
12 2013 audit report revealed that Parker "had written an email
13 which stated the purpose of the account was to give Cal Fire
14 control over money that was unencumbered by restrictions on
15 expenditure of state funds." (Id. at 87:2-4.)

16 Assuming Parker testified falsely at his deposition,
17 the Supreme Court and Ninth Circuit have unequivocally held that
18 perjury by a witness alone cannot amount to fraud on the court.
19 See, e.g., Hazel-Atlas Glass Co., 322 U.S. at 245 ("This is not
20 simply a case of a judgment obtained with the aid of a witness
21 who, on the basis of after-discovered evidence, is believed
22 possibly to have been guilty of perjury."); Appling, 340 F.3d at
23 780 ("[P]erjury by a party or witness[] does not, by itself,
24 amount to fraud on the court."). Defendants do not allege that
25 the government had any knowledge of this alleged perjured
26 testimony. Even assuming Cal Fire's counsel knew of the false
27 testimony, defendants' theory of fraud on the court tied to Cal
28 Fire's counsel relies on a questionable extension of Pumphrey and

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

3 d. Mere Existence of the State Wildfire Fund

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

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

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

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

6 After the settlement, defendants learned that Ryan's
7 father, Edwin Bauer, had told the government that Downey Brand
8 LLP or Sierra Pacific Industries had offered Ryan two million
9 dollars if he would state that he had started the Moonlight Fire.
10 (Id. at 127:10-19.) Edwin allegedly filed a police report of the
11 bribe attempt and the FBI interviewed him and Ryan's lawyer about
12 it. (Id. at 127:19-20.) According to defendants, revealing the
13 alleged bribe to the court or defendants "would have been
14 damaging to the government's case, as it would have tended to
15 prove that Edwin Bauer made a false assertion to strengthen the
16 government's claims against Sierra Pacific while diverting
17 attention from his son." (Id. at 128:21-24.) Defendants further
18 contend that the false bribe allegation shows "a willingness on
19 the part of the Bauers to manufacture evidence harmful to an
20 innocent party and an effort to deflect attention away from
21 someone who may have actually started the fire." (Id. at 128:26-
22 28.)

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

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

10 "[I]n limine rulings are not binding on the trial
11 judge, and the judge may always change his mind during the course
12 of a trial." Ohler v. United States, 529 U.S. 753, 758, n.3
13 (2000); (see also July 2, 2012 Final Pretrial Order at 17:2-5
14 ("The following motions have been decided based upon the record
15 presently before the court. Each ruling is made without
16 prejudice and is subject to proper renewal, in whole or in part,
17 during trial.").) Defendants in fact filed written objections to
18 the tentative ruling, but the parties reached a settlement
19 agreement before Judge Mueller had the opportunity to address
20 those objections. That Judge Mueller's ruling was only tentative
21 minimizes its significance in the fraud on the court inquiry.

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

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

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

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

17 MR. WARNE: But the evidence pertaining to those two
18 individuals goes directly to the quality of the
19 investigation

20 THE COURT: There is no evidence that -- there is no
21 evidence suggesting that arson was the cause of this
22 fire, is there? Your point is that the investigation
23 didn't consider that fully.

24 MR. WARNE: Actually, there is as much evidence -- and
25 we don't intend to play it this way to the jury, but
26 there is as much evidence suggesting that there was
27 another perpetrator of this fire, be it arson or a
28 chain saw or something else, as there is the
circumstantial evidence that the government is relying
upon to say that the bulldozer started the fire. . . .
The government's case is fully and completely based on
circumstantial evidence and opinion evidence, as is
the arguments we're making with respect to the
investigation and what it left behind without looking
into various other possibilities.

1 THE COURT: Why can't you make that point generally
2 without referencing Mr. Bauer or Mr. McNeil?

3 MR. WARNE: Because it is the essence of our case
4 there, as I indicated in footnote 3, with respect to
5 what I understood this Court's ruling was as it
6 relates to an effort by the government to really,
7 apologize, mischaracterize our motion or our case as
8 trying to prove that Mr. Bauer is an arsonist. Our
9 case is focused on the investigation.

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

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

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

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

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

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

27 5. Removal of AUSA Wright from the Case

28 Former AUSA Wright was originally assigned to lead the

1 Moonlight Fire case, but was allegedly "forbidden from working on
2 the case in January 2010, shortly after raising ethical concerns
3 regarding disclosures in another wildland fire action he was
4 handling." (Defs.' Reply at 90:24-91:1.) Defendants do not
5 articulate how removal of Wright from the Moonlight Fire case
6 could amount to fraud on the court. It is the exclusive
7 prerogative of the United States Attorney to determine how to
8 staff any case in his office. Defendants argue only that the
9 removal of Wright "tend[s] to show" the government's fraudulent
10 intent and that its alleged misconduct was purposeful. (Id. at
11 90:22-91:8.) It neither shows nor suggests any such thing.

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

14 In the state action, Judge Nichols issued two
15 decisions¹⁶ condemning misconduct by Cal Fire and its attorneys
16 and ultimately dismissed the state action with prejudice and
17 ordered sanctions in favor of defendants because of Cal Fire's
18 misconduct. Defendants acknowledge that Judge Nichols' findings
19 in the state action have no preclusive or binding effect in this

20 ¹⁶ The government criticizes Judge Nichols for having
21 adopted the detailed proposed findings submitted by Downey Brand
22 LLP with only two minor edits. As a companion to that order,
23 however, Judge Nichols first issued an order that "speaks in the
24 Court's own voice." See Cal. Dep't of Forestry v. Howell, No. GN
25 CV09-00205, 2014 WL 7972096, at *7 (Cal. Super. Ct. Feb. 4,
26 2014). Judge Nichols repeatedly emphasized that he had belabored
27 to review all of the evidence and did not simply sign the
28 proposed order. See id. at *7, *12 ("The fact that the Court has
signed Defendants' proposed orders with few changes reflects only
the reality that those orders are supportable in all respects. .
. . The Court does not wish on any appellate tribunal the task
undertaken by the undersigned: the personal review of every
document and video deposition submitted in the case. This task
required countless hours of study and consideration.").

1 case. Not only was the government not a party in the state
2 action, it did not have the opportunity to argue or brief any of
3 the issues before Judge Nichols. More importantly, Judge
4 Nichols' findings and criticisms were levied against Cal Fire and
5 its counsel. See Cal. Dep't of Forestry v. Howell, No. GN CV09-
6 00205, 2014 WL 7972096 (Cal. Super. Ct. Feb. 4, 2014); Cal. Dep't
7 of Forestry v. Howell, No. GN CV09-00205, 2014 WL 7972097 (Cal.
8 Super. Ct. Feb. 4, 2014).

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

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

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

6 IV. Conclusion

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

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

22 Dated: April 17, 2015

23
24 

25 WILLIAM B. SHUBB
26 UNITED STATES DISTRICT JUDGE
27
28