EXHIBIT M

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. SIERRA PACIFIC INDUSTRIES, et al., Defendants.	Case No. 2:09-CV-02445 JAM-EFB ORDER DENYING SIERRA PACIFIC INDUSTRIES' MOTION FOR RECONSIDERATION OF DISCOVERY ORDER

This matter comes before the Court on Defendant Sierra Pacific Industries' ("SPI") Motion for Reconsideration of Discovery Order (Doc. #107). Plaintiff United States of America opposes the motion (Doc. #111).

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 10, 2010, the United States Forest Service invited the public to a series of seven tours of a Forest Service Project on the Plumas National Forest. Michael Schaps ("Schaps"), an associate attorney with Downey, Brand, counsel of record for SPI, attended the public tour, along with other

members of the public. During the tour, Schaps communicated with a number of Forest Service employees. At no time did Schaps inform those employees that he was an attorney with the law firm representing SPI in this pending litigation.

Upon learning that Schaps attended the tour and asked questions to Forest Service employees, the United States filed a Motion for Protective Order to Bar Improper *Ex Parte* Contacts and Produce Evidence of *Ex Parte* Contracts; And Prohibit Use of Evidence Obtained From *Ex Parte* Contacts (Doc. #68) before the Honorable Edmund F. Brennan, Magistrate Judge. After extensive briefing and a hearing, Magistrate Judge Brennan granted the United States' Motion for a Protective Order (Doc. #92). SPI now asks this Court to reconsider and set aside Magistrate Judge Brennan's Order.

II. OPINION

A. Legal Standard

28 U.S.C. § 636(b) and E.D. Cal. Local Rule 303 govern the standard for a Motion for Reconsideration. The district court "may reconsider any pretrial matter . . . where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 363(b)(1)(A); E.D. Cal. Local Rule 303(f). The standard of review under § 636(b)(1)(A) is highly deferential; see United States v. Abonce-Barrera, 257 F.3d 959, 968-69 (9th Cir. 2001), and does not permit the reviewing court to substitute its own judgment for that of the magistrate judge's. Grimes v. City & County of San Francisco, 951 F.2d 236, 241 (9th Cir. 1991).

B. Magistrate Judge's Opinion

Magistrate Judge Brennan held that Rule 2-100 of the Rules of Professional Conduct of the State Bar of California ("California Rules") was violated by SPI's counsel's communication with Forest Service employees during the August 10, 2010 public tour.

1. Legal Standard

Rule 2-100 is a "no contact rule" which states that "[w]hile representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

Rule 2-100 contains a "public body"/"public officer" exception to the no contact rule. Subsection (C)(1) states that "[t]his rule shall not prohibit communications with a public officer, board, committee, or body." According to a proposed, but not formally adopted, opinion by the California state bar, the public officer exception allows for contact with a represented party or employee if the communication is with:

> a person to whom a communication would be constitutionally protected by the First Amendment right to petition the government. Such a person would be one who, for example, has the authority to address, clarify or alter governmental policy; to correct a particular grievance; or to address or grant an exemption from regulation.

Proposed Formal Opinion Interim No. 98-0002. Thus, the Proposed Formal Opinion focuses primarily on the level of the public official's authority to determine whether the public official

exception applies. The public officials at issue in the unadopted opinion were line police officers, and they were determined not to be of the requisite level of authority to be covered by the public officer exception.

2. Magistrate Court's Analysis

Magistrate Judge Brennan found that the public officer exception of subsection (C)(1) does not apply to the instant case. "Schaps' actions were not an exercise of a First Amendment right to seek redress of a particular grievance, but were rather an attempt to obtain evidence from these employees." Doc. #92 at 10. Schaps asked questions that went well beyond attending a public information tour of a project site. "[T]he facts show and the court finds that he was attempting to obtain information for use in the litigation that should have been pursued through counsel and through the Federal Rules of Civil Procedure governing discovery." Id. Additionally, the court found no evidence to support a conclusion that Schaps was communicating with a policy-making official or persons with authority to change a policy or grant some specific request for redress that Schaps was presenting. Id. at 11.

Accordingly, the court found that the "public officer" exception of Rule 2-100 (C)(1) has no application in this case and granted the government's motion for a protective order and discovery sanctions. The court ordered SPI to identify all federal employees contacted without knowledge of counsel for the United States in this matter to date, as well as the dates and circumstances of each contact, and to produce originals and copies of all recordings or documents relating to such

communications.

C. Analysis

Magistrate Judge Brennan's decision is not clearly erroneous or contrary to law. Magistrate Judge Brennan found that the Forest Service workers with whom SPI's counsel communicated, do not have decision-making powers and have no authority to redress a grievance. He also found that Schaps was not exercising his First Amendment right to petition the government, but was instead engaged in an attempt to discover and gather evidence and statements from those employees for use in litigation. This Court finds that Magistrate Judge Brennan's factual findings and application of the law to be supported by the record and proper analysis. SPI argues that Magistrate Judge Brennan failed to acknowledge and/or address the actual text of Rule 2-100. In particular, SPI argues that the Forest Service is a "public body" under 2-100(c)(1) and its counsel's communications with any employee of the Forest Service is permitted. This argument is without merit. Magistrate Judge Brennan's Order is fully consistent with the plain meaning of the terms "public officer" and "public body." These terms clearly denote something more than any and all government employees.

This Court agrees with Magistrate Judge Brennan's conclusion that SPI's interpretation of Rule 2-100 would carry the "public-official" exception to Rule 2-100 too far. If the State Bar had intended "public officer" or "public body" to mean all government employees it would have said as much. The term "public body" does not mean an individual and SPI's argument that the Forest Service is a "public body" is irrelevant given the undisputed fact that all of Schaps' communications were with individual employees of the

Forest Service. As the government argues, in common usage, "public body" implies a multi-member group of individuals who derive authority from their collective action, such as a city council or Congress. It is impossible for this Court, as it was for Magistrate Judge Brennan, to reconcile SPI's argument for "unfettered access" to all government employees with the unpublished state bar opinion. Holding otherwise would create the unprecedented situation where attorneys for private litigants would be permitted to speak to any government employee about any subject for the purpose of obtaining information to be used against the government in litigation.

Finally, this Court believes it is important to make clear that it is troubled by SPI's counsel's behavior and decisions with respect to this particular incident. Such conduct is out of the ordinary and the Court takes SPI's counsel at its word that it will not occur again. Local Rule 180 explicitly prohibits "any conduct that degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice." E.D. Cal. Local Rule 180(e). The ABA Model Rules forbid all "conduct involving dishonesty, fraud, deceit, or misrepresentation." Model Rule of Professional Conduct R. 8.4(c). These rules not only forbid affirmative false statements of fact, but misleading omissions. "Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative statements." Model Rule of Professional Conduct 4.1, Comment 1. Here, Schaps was instructed to "attempt to stay confidential" (Schaps' Decl. (Doc. #107-1) ¶ 5). Such an

instruction is difficult to reconcile with SPI's position that it had nothing to hide and did nothing wrong. Instead of identifying himself as counsel for SPI, Schaps stated only his full name and that he was a member of the public. Schaps' Decl. ¶ 17. Even if Schaps did not make an affirmative false statement, omitting that he represents SPI is an ethical lapse because Schaps was not at the Forest Service tour simply as an interested citizen, but as an attorney gathering evidence to be used in litigation. While Schaps had an absolute right to attend the tour, as a practicing attorney he is held to a higher standard of ethical behavior than a general member of the public, particularly when he is intimately involved in litigation against the tour's sponsor. Such is clearly the intent behind Local Rule 180(e) and Rule 2-100. Zealous advocacy overcame professional responsibility in this particular instance. It should not, and, the Court is certain, will not happen again.

III. ORDER

For the reasons set forth above,

SPI's Motion for Reconsideration is DENIED. SPI shall comply with Magistrate Judge Brennan's Order (Doc. #92) within seven (7) days from the date of this Order.

IT IS SO ORDERED.

Dated: January 10, 2011

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

EXHIBIT N

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff, No. CIV S-09-2445 KJM EFB

vs.

SIERRA PACIFIC INDUSTRIES, et al.,

Defendants. ORDER

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On July 19, 2011, the United States filed a motion to find counsel for Sierra Pacific Industries in contempt. Dckt. No. 242. The motion is predicated on alleged intentional violations of the court's earlier orders prohibiting unauthorized, ex parte contacts with a represented party. The undersigned held a hearing on the motion on September 7, 2011. For the reasons explained below, the court denies the motion to find counsel in contempt, but finds that the conduct of Sierra Pacific's counsel, which is addressed herein, violated California Rule of Professional Conduct 2-100.

I. Background

A. This Court's Previous Order

On November 16, 2010, this court found that one of Sierra Pacific's attorneys had violated Rule 2-100 (the no-contact rule) by communicating directly with employees of the

United States Forest Service about the subject matter of this litigation without the consent of attorneys for the United States. Dckt. No. 92 at 8-12. The court ordered Sierra Pacific to "identify all federal employees contacted without the knowledge of counsel for the United States in this matter to date." *Id.* at 12. The court's order also contained the following language: "the court accepts SPI counsel's representation that counsel will identify [their] relationship to Sierra Pacific and involvement in this litigation before seeking out and interviewing particular government employees about issues related to the Moonlight Fire. [And] . . . to notice the deposition of control group federal employees if and when [counsel] wish to ask them questions." *Id.* at 12-13.

Sierra Pacific moved for reconsideration of this order. Dckt. No. 107. The then-assigned district judge denied that motion and affirmed the undersigned's ruling that Sierra Pacific's counsel had violated Rule 2-100, and further found that counsel's conduct in failing to reveal to the United States Forest Service employees that he represented Sierra Pacific was an ethical lapse. *See* Order, Dckt. No. 124, at 5-7. Judge Mendez admonished, "[f]inally, this Court believes it is important to make clear that it is troubled by SPI's counsel's behavior and decisions with respect to this particular incident. Such conduct is out of the ordinary and the Court takes SPI's counsel at its word that it will not occur again." *Id.* at 6.[1]

B. Carman

Sierra Pacific has retained Steven Carman, a retired Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives, as an expert in this case. Carman Decl., Dckt. No. 280-1 at 3, 1. On June 6, 2011, Carman met with counsel for Sierra Pacific, Downey Brand attorneys Meghan Baker, Thomas Marrs, and William Warne. *Id.* at 4. They discussed a former forest service employee, Michael McNeil, who is suspected of setting a series of arson fires and

[1] Judge Mendez found that Sierra Pacific's counsel had committed additional ethical violations beyond the violations discussed in this court's order. To the extent that the United States seeks relief for violations of Judge Mendez's order, it must seek relief before the district judge assigned to this case.

who may have been in the area of the Moonlight Fire at the time it started. *Id.* at 3-4. The attorneys told Carman that McNeil had been arrested by two ATF agents, Karl Anglin and Michael Hidalgo, in October 2007, "on charges related to terrorist threats and possibly an arson in Southern California." *Id.* at 4.

Carman told the attorneys that Anglin and Hidalgo had been his friends and associates for many years, and suggested that he contact them to find out whether they had been involved in investigating McNeil as a serial arsonist. *Id.* at 5. The attorneys agreed that he could contact Anglin and/or Hidalgo. *Id.* The attorneys told Carman that "they also wanted be to be clear in any conversations that [Carman] was working for the defense of Sierra Pacific Industries on a case brought against the company by the U.S. Attorney's office." *Id.* at 5-6.

Carman called Anglin on the same day. *Id.* at 6. Carman declares that he told Anglin:

> . . . instead of working on the side of the federal government, I was working opposite them. I said I had actually been hired by a law firm that was representing the largest logging company (and I may have mentioned that I thought it was the largest private land owner) in California. I told Karl that the Civil Division of the U.S. Attorney's office in Sacramento had filed a $1 billion lawsuit against this company. . . . I explained that it was related to a large wildland fire in Northern California that occurred on Labor Day, 2007. I do not think I mentioned the names "Moonlight fire" or "Sierra Pacific Industries" because with Karl being in Los Angeles and not working directly in Northern California, I did not think either name would mean a thing to him. I am sure however that I did state I was opposite the U.S. government because I explained to Karl that it felt really strange working against the U.S. Attorney's office after having worked with them for twenty years on fire cases.

Id. at 6-7. Carman declares that he asked Anglin for "public information" regarding McNeil. *Id.* at 7.

In contrast, Anglin declares that Carman told him during this phone call "that he had been retained as an expert by a law firm representing a 'large client' involved in a civil lawsuit involving a wild-land fire in Northern California." Anglin Decl., Dckt. No. 242-8 at 2. He declares: "Based on Mr. Carman's statements to me, I never understood that the lawsuit in which he was working was brought by the United States and was being civilly prosecuted by the United States Attorney's Office . . . it was my understanding based on the comments made by

Mr. Carman that the lawsuit involved private parties and not the United States. Had I known that Mr. Carman was working for a party against the United States, I would not have provided him information . . . ." Anglin Supp. Decl., Dckt. No. 287-4 at 2.

Carman then wrote an email to Hidalgo. Carman Decl., Dckt. No. 280-1 at 8. The email stated that Carman was "across from the Civil side of the US Attys office in Sacramento" but did not mention the name of the client he was working for or the name of the fire. *Id.* Carman sent the email to the wrong address, so it was not received by Hidalgo. *Id.* at 8-9.

Carman declares that on June 9, 2011, Hidalgo called Carman, and Carman told Hidalgo that he "was across from the U.S. Attorney in Sacramento in a civil case involving a big wildland fire and that I was working for a company that was being sued by the government for $1 billion . . . . Like my discussion with Karl Anglin, I do not specifically recall mentioning the names 'Sierra Pacific Industries,' 'Downey Brand' or the 'Moonlight fire' because again I did not think any of those names would mean anything to Mike [Hidalgo]." *Id.*

In contrast, Hidalgo declares that Carman told him "that he has been retained as an expert by a law firm representing a client involved in a civil lawsuit involving a wild land fire in Northern California." Hidalgo Decl., Dckt. No. 242-9 at 2. Hidalgo further declares: "At no point did Mr. Carman ever tell me that the case in which he was retained was brought by the United States, or that the client was Sierra Pacific Industries." *Id.* He declares that: "Mr. Carman never 'expressly mentioned that [he] was working on a civil defense case 'across from the Civil side of the US Attys office in Sacramento'. . . . [He] certainly never explained that the lawsuit was brought by the United States and was being civilly prosecuted by the United States Attorney's Office, and I never understood that to be the case . . . . Had I known that Mr. Carman was working for a party against the United States, I would not have provided him information." Dckt. No. 287-5 at 2.

Carman asked Hidalgo questions about McNeil. Carman Decl., Dckt. No. 280-1 at 9-10.

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Hidalgo gave Carman information about his investigation of McNeil. *Id.* at 10. He stated that he had not investigated McNeil for arson. *Id.* According to Carman, Hidalgo "told me that if I would like to come to Los Angeles, he would accompany me to the jail to interview McNeil." *Id.* Carman declares that Hidalgo "indicated that . . . I could ask questions regarding McNeil related to the case I was working and that any evidence of criminal activity would be something [Hidalgo] could follow up on or pass off to other agents." *Id.* at 11. Carman told him that he would have to get permission from the attorneys he was working with. *Id.*

Carman declares that Hidalgo later told him that Hidalgo had contacted Diane Welton at the United States Forest Service to get information about McNeil. *Id.* Welton told Hidalgo that she had been instructed not to talk about the Moonlight Fire because it was the subject of an active case. *Id.*

Carman further declares that the joint interview with McNeil did not happen because the Downey Brand attorneys told Carman that "the U.S. Attorney's office in Sacramento had alleged that I may somehow have violated a protective order when I spoke with Karl Anglin and Mike Hidalgo." *Id.* at 12.

Carman declares that "I learned nothing from either man that related directly to the Moonlight fire or my investigation of it . . . . All of the information about McNeil that I addressed in my report came either from deposition testimony or the 2008 newspaper report discussing McNeil in light of the Euler prosecution in Southern California. In my conversations with [Anglin] and [Hidalgo], I discovered that ATF had investigated McNeil for impersonating an ATF official, not for setting numerous fires in Southern California." *Id.* at 13.

C. Bundy

Scott Biddle, a current Bureau of Land Management employee and a former seasonal Forest Service employee, posted a slideshow of photographs of the Moonlight Fire on YouTube in 2008. Biddle Decl, Dckt. No. 287-2 at 2. Biddle was not a federal government employee at the time of the contact. Opp'n to Mot. For Contempt, Dckt. No. 297 at 5.

Dean Bundy, an expert witness retained by Sierra Pacific, emailed Biddle on March 9, 2011, asking for photographs and video of the fire. Biddle Decl., Dckt. No. 287-2 at 2. Bundy told Biddle that he was investigating the Moonlight Fire, but did not say that the investigation was for a lawsuit or that he was working for Sierra Pacific. *Id.* Biddle asked Bundy "what kind of investigation are you doing? Is this a private lawsuit, or a federal investigation?" *Id.* Bundy responded, stating "this is a private lawsuit involving a number of parties related to that fire." *Id.* Bundy did not tell Biddle that he was working for Sierra Pacific, or that the lawsuit was brought by the United States. Dckt. No. 287-2 at 2. Nor did Bundy ask whether Biddle was a federal employee. *Id.* Biddle did not respond to the email. Baker Decl., Dckt. No. 297-1 at 5.

Meghan Baker, counsel for Sierra Pacific, declares that Bundy contacted Biddle without her consent or knowledge. *Id.* at 4-5. After Bundy contacted Biddle, Bundy told Baker about the contact. *Id.* at 5. She "did not perceive any issue with the communications . . . since Mr. Biddle was a seasonal employee who no longer worked for the U.S. Forest Service"[2] but reminded Bundy "not to contact any current U.S. Forest Service or government employees without first obtaining permission from Downey Brand." *Id.*

D. Novak

On August 18, 2011, while this motion was pending before this court, Grant Novak, an analyst at ICF International, a consulting firm retained by Sierra Pacific in this case, emailed Ryan Tompkins, a current Forest Service employee. Dckt. No. 287-3 at 2. Novak asked for information regarding damages caused by the Moonlight Fire. *Id.* at 3. Tompkins did not provide him with information. *Id.* Counsel for Sierra Pacific did not work directly with Novak and did not know of or approve the contact with Tompkins. Dckt. No. 297-1 at 5-6.

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[2] Baker declares that "I did not understand Mr. Biddle to be employed by the U.S. Forest Service (or any other government agency) at the time that Mr. Bundy e-mailed him." Dckt. No. 297-1 at 7.

II. Analysis

The United States argues that Carman's contacts with the two ATF agents, Bundy's contact with a former Forest Service Employee, and Novak's contact with a current Forest Service Employee, violate this court's November 2010 order and also independently violate ethical rules. Dckt. No. 287 at 7.

Sierra Pacific argues that its attorneys' and experts' conduct does not violate this court's order because the order "presupposes that counsel for Sierra Pacific can and will contact non-party federal employees during this litigation" and that the conduct at issue does not violate Rule 2-100 because Carman did not contact a represented party about the subject of the representation; Biddle was not a government employee at the time he was contacted by Bundy; and Novak's contact with Tompkins was not at the direction of or with the knowledge of counsel. *See* Dckt. No. 280 at 11-20; Dckt. No. 297 at 5-8.

A. Violation of Rule 2-100

Sierra Pacific violated Rule 2-100 by allowing Carman to contact Anglin and Hidalgo. As this court already explained to Sierra Pacific in its November 16, 2010 order, Rule 2-100 of the California rules states: "[w]hile representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

Sierra Pacific argues that Carman's contacts with Anglin and Hidalgo did not violate Rule 2-100 because the agents are not a "party" under the rule, and the communications were not about the "subject of the representation." Dckt. No. 280 at 16.[3] For the purposes of Rule 2-100,

[3] The United States points out that Sierra Pacific did not raise these arguments in prior briefs regarding Michael Schaps' communications with the United States Forest Service employees. *See* Dckt. No. 287 at 14. The United States argues that these arguments are barred by the law of the case doctrine. *Id.* at 11. Because the arguments fail in any event, the court does not address whether they are barred by the law of the case doctrine.

a "party" is defined as "(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." Rule 2-100(B). Here, Anglin and Hidalgo fall under 2-100(B)(2)–they are United States employees, and their statements might constitute admissions on the part of the United States.

Fed. R. Evid. 801(d)(2) defines a party admission as "a statement made by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Carman attempted to elicit statements from Anglin and Hidalgo about McNeil's arrest and their investigation of him. He spoke to them while they were United States employees about their investigation of McNeil. To the extent that they performed such an investigation regarding McNeil, they did so in their official capacities. In addition, any information that the agents had about McNeil, and relayed to Carman, was obtained in the scope of their employment.

Sierra Pacific argues that Anglin and Hidalgo's statements do not constitute admissions on the part of the United States because the agents are not of the requisite level of authority to speak on behalf of the United States. Sierra Pacific relies on a California Court of Appeal case, *Snider v. Superior Court*, 113 Cal. App. 4th 1187 (2003), which found that Rule 2-100 had not been violated where the employees who had been contacted were not officers, directors and managing agents of the organization; had not been interviewed about their own actions and omissions, but merely their percipient knowledge; and were not "high-ranking executives and spokespersons" with the authority to make an admission on behalf of the organization. But *Snider* is not persuasive here because that case applied California evidence law, whereas federal evidence law applies here. *See id.* at *129 (citing California evidence law for the proposition

that "'Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized to make a statement...concerning the subject matter of the statement.' This has been interpreted in California as only applying to high-ranking organizational agents who have actual authority to speak on behalf of the organization.").

Sierra Pacific also argues that Rule 2-100 does not apply because Carman did not communicate with the agents "about the subject of the representation." Dckt. No. 280 at 19. But, indeed, the very purpose of the contact was to do just that. The United States' position in this litigation is that McNeil had nothing to do with the Moonlight Fire and Sierra Pacific was seeking through the ex parte contacts with ATF agents to establish the opposite. Sierra Pacific also argues that because the government claims that McNeil was not involved in the cause and origin of the Moonlight fire Carman's contact with the ATF agents was therefore not about the subject of the U.S. Attorney's office's representation. According to Sierra Pacific, the agents "were just two government employees who happened to have information interesting to Sierra Pacific." *Id.* But obviously, Carman attempted to elicit information from the agents for the purpose of using it in this litigation. Sierra Pacific sought information regarding McNeil in order to gather evidence to bolster its theory that McNeil set the Moonlight Fire.

Finally, Sierra Pacific rehashes the argument it previously presented to this court and to Judge Mendez in the context of Schaps' contact with the United States Forest Service employees--that the contact did not violate 2-100 because the "public officer" exception to the rule applies. For the reasons laid out in this court's November 2010 order and Judge Mendez's order, this argument is again rejected here.

The contacts made by Sierra Pacific's other retained experts–Bundy and Novak–did not violate Rule 2-100. At the time Bundy contacted Biddle, Biddle was not a United States employee. Dckt. No. 297 at 5. *See Lott v. United States*, 2008 WL 2923437, *1 (N.D. Cal. 2008) (Rule 2-100 is not violated if an attorney contacts a former employee of the opposing

party). Because Rule 2-100 applies only to attorneys' direct or indirect communications with parties, and Sierra Pacific's counsel did not approve or know of Novak's contacts with Tompkins, the Novak contact does not violate Rule 2-100.[4] *Cf. Midwest Motor Sports v. Arctic Sales, Inc.*, 347 F.3d 693, 699 (8th Cir. 2002) (holding that the no-contact rule was violated where there was evidence in the record that an expert's contacts were not only ratified, but were directed by counsel).

B. Violation of this Court's Order

The United States asks that this court hold counsel for Sierra Pacific in contempt for violating the court's November 16, 2010 order. Dckt. No. 242-1 at 1. As noted above, the court found that one of Sierra Pacific's attorneys had violated Rule 2-100 by communicating directly with employees of the United States Forest Service without the consent of the United States' attorneys. Dckt. No. 92 at 8-12. The court found that Sierra Pacific's attorney's purpose in communicating with the Forest Service employees was to "obtain information and evidence to use in this litigation against the government." In addition, the court found that the "public officer" exception to Rule 2-100 did not apply because the attorney did not seek redress of a grievance, but to obtain evidence for this litigation. Dckt. No. 92 at 8, 10. The order stated, "under either Cal. Rule 2-100, or the rule that its language tracks, Rule 4.2, the communications with the employees here were prohibited." Dckt. No. 92 at 12.

The court ordered Sierra Pacific to "identify all federal employees contacted without the knowledge of counsel for the United States in this matter to date" and barred SPI from "using information obtained through such contacts in this litigation." *Id.* at 12. The court's order also contained the following language: "the court accepts SPI counsel's representation that counsel will 'identify [their] relationship to Sierra Pacific and involvement in this litigation before

[4] Sierra Pacific's attorneys had told all of their experts and consultants "that they were not to have any contact with any government employee or agency regarding the Moonlight Fire without first obtaining permission from counsel." Dckt. No. 297 at 4.

seeking out and interviewing particular government employees about issue related to the Moonlight Fire. [And] . . . to notice the deposition of control group federal employees if and when [counsel] wish to ask them questions.'" *Id.* at 12-13.

Sierra Pacific argues that the contacts by Carman, Bundy and Novak do not violate the order because the order did not explicitly prohibit Sierra Pacific from contacting government employees to obtain information about the Moonlight Fire. Dckt. 280 at 13. Sierra Pacific argues that its attorneys complied with the portion of the order that required counsel to identify their relationship to Sierra Pacific and their involvement in this litigation before seeking out and interviewing government employees about issues related to the Moonlight Fire, because Sierra Pacific's attorneys told their experts to do so. *Id.*

It is true that this court's order, while finding that Sierra Pacific's attorney had violated Rule 2-100 by the prior ex parte contacts, did not contain language explicitly prohibiting counsel from violating the rule again in the future. Such a directive should hardly be necessary. The undersigned trusted that counsel would conform their conduct to the analysis set out in the opinion and the opinion issued by Judge Mendez. It appears, regrettably, that such trust may have been misplaced.

The order stated:

> Likewise, the court accepts SPI counsel's representation that counsel will 'identify [their] relationship to Sierra Pacific and involvement in this litigation before seeking out and interviewing particular government employees about issues related to the Moonlight Fire. [And]. . . to notice the deposition of control group federal employees if and when [counsel] wish to ask them questions." Jt. Stmt. at 33, 42 (quoting August 27, 2010 Warne letter). Counsel must hold themselves to that representation and must not engage in such contact in the future.

Dckt. No. 92 at 12-13. This language was copied from Sierra Pacific's brief. Sierra Pacific argues that the court's quotation of this language gave tacit approval for Sierra Pacific's counsel to engage in unconsented contacts with government employees. Unfortunately, the language does not include an explicit assurance that Sierra Pacific's counsel would obtain the consent of

the United States' counsel before making the contacts described. Obviously, the manifest intent of the order was that Sierra Pacific's counsel would do so in order to comply with Rule 2-100.

Now, the court amends its previous order to clearly and unmistakably include the following directive: Sierra Pacific's counsel shall comply with all applicable ethical rules, including, but not limited to, Rule 2-100; and shall ensure that their experts or anyone else acting on behalf of Sierra Pacific's counsel do not engage in conduct that, if done by an attorney, would violate Rule 2-100.

The United States contends that Sierra Pacific violated this court's November 16, 2010 order because Carman did not properly identify himself to the two agents. This issue is problematic. The contrast between Carman's declaration and the agents' declarations is striking. *Cf.* Hidalgo's Supp. Decl., Dckt. No. 287-5, at p. 2, para. 3 (declaring that "Carman never expressly mentioned that [he] was working on a civil defense case 'across from the Civil side of the US Attys office in Sacramento'. . ."; "never explained that the lawsuit was brought by the United States and was being civilly prosecuted by the United States Attorneys' office"; and that he would not have given Carman information if he had known that Carman was working for a party against the United States); and Anglin's Supp. Decl., Dckt. No. 287-4 at 2 ("it was my understanding based on the comments made by Mr. Carman that the lawsuit involved private parties and not the United States") with Carman's Decl., Dckt. No. 280-1 at 6-7, 9 (declaring that he told Anglin "instead of working on the side of the federal government, I was working opposite them. I said I had actually been hired by a law firm that was representing the largest logging company . . . in California. I told [Anglin] that the Civil Division of the U.S. Attorney's Office in Sacramento had filed a $1 billion lawsuit" and that he told Hidalgo that he was "was across from the U.S. Attorney in Sacramento in a civil case involving a big wildland fire and that I was working for a company that was being sued by the government for $1 billion").

It is very difficult to reconcile these conflicting accounts. If both accounts are to be taken as true it would appear that Carman attempted to identify himself, but the communication was an

abject failure. Based on their declarations, the agents who were contacted certainly did not understand that Carman was working for a company that was being sued by the United States. Although Carman admits that he did not specifically state that he worked for Sierra Pacific, he attempted to communicate that he was adverse to the United States in the litigation. If both accounts are true, Carman's statements to Anglin and Hidalgo substantially complied with the November 16 order. *See Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 891 (9th Cir. 1982) (substantial compliance is a defense to a finding of civil contempt).

Neither did Bundy or Novak's conduct violate the November 16 order.[5] As noted above, Biddle was not a United States employee at the time Bundy contacted him, and Novak's contact with Tompkins was undertaken without the knowledge or consent of counsel for Sierra Pacific. Thus, the language in the order prohibiting "counsel" from contacting "employees" does not bar these contacts. Thus, counsel for Sierra Pacific did not violate the explicit language of the November 16 order, and the undersigned does not find them in contempt of that order.

C. Remedy for Sierra Pacific's Second Violation of Rule 2-100 to Date

As explained above, the court finds that Sierra Pacific's counsel did not directly violate the expressed language of this court's earlier order, but did violate Rule 2-100 for the second time in the course of this litigation.

The proper remedy for violating Rule 2-100 stems from its purpose. Rule 2-100 was intended to "preserve the attorney-client relationship from an opposing attorney's intrusion and interference." *HTC Corp. v. Technology Properties Ltd.*, 715 F. Supp.2d 968, 974 (N.D. Cal. 2010), citing *Jackson v. Ingersoll-Rand Co.*, 42 Cal. App. 4th 1163, 1167 (1996). A remedy for violating Rule 2-100 should not be punitive, because "punishment for violation of the Rules of Professional Conduct is a matter within the purview of the State Bar, not of a court presiding

[5] The undersigned does not rule on whether Bundy's statements, including that he wanted information for "a private lawsuit involving a number of parties related to that fire" violated Judge Mendez's order in this case.

over the affected case." *Id.* (citing *McMillan v. Shadow Ridge at Oak Park Homeowner's Ass'n*, 165 Cal. App. 4th 960, 968 (Cal. Ct. App. 2008)). The proper remedy must rectify "whatever improper effect the attorney's misconduct may have had in the case before it." *McMillan*, 165 Cal. App. 4th at 968.

Thus, the proper remedy here is to exclude all evidence or information obtained through the improper contacts. However, Carman declares that he "learned nothing . . . that related directly to the Moonlight fire or my investigation of it." Dckt. No. 280-1 at 12-13. To the extent that Carman learned anything through the improper contacts, or that he or anyone else used information that he obtained through these contacts to gain any other evidence, such evidence must be excluded.

As this is Sierra Pacific's second violation of Rule 2-100, it is unclear whether Sierra Pacific has engaged in additional improper contacts. Sierra Pacific is ordered to disclose its contacts, as set forth below.

III. Conclusion

Accordingly, it is hereby ORDERED that:

1. The United States' motion to hold counsel for Sierra Pacific in contempt is denied.

2. The court finds that counsel for Sierra Pacific have again violated Cal. Rule Prof. Conduct 2-100.

3. Within seven days of the date of this order, Sierra Pacific shall identify to counsel for the United States all communications its counsel or any of its agents, including expert witnesses, have had with persons who may have been employed by United States at the time of the communication without the knowledge of counsel for the United States relating to the Moonlight Fire or any of the issues presented by this litigation.

4. Any evidence that Carman obtained through his contacts with Anglin and Hidalgo, or any evidence otherwise stemming from the contacts, shall be excluded at trial.

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5. This court's November 16, 2010 order is amended as follows. Counsel in this case are ordered to comply with all applicable ethical rules, including, but not limited to, Rule 2-100, and to ensure that their experts do not engage in conduct that, if done by an attorney, would violate Rule 2-100.

DATED: November 18, 2011.

EXHIBIT O

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. SIERRA PACIFIC INDUSTRIES, et al., Defendants,	CIV. NO. 2:09-02445 WBS AC ORDER
AND ALL RELATED CROSS-ACTIONS.	

The court has today entered an Order denying defendants' motions to set aside the judgment and for a temporary stay of the settlement agreement in this action. There is accordingly no longer anything pending before this court in this matter. All claims were dismissed with prejudice on July 18, 2012, and this case has been closed. Plaintiff's motion to disqualify defense counsel (Docket No. 613) is therefore DENIED as moot.

Dated: April 17, 2015

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

EXHIBIT P

FILED

2010 OCT 22 PM 3:08

CLERK SUPERIOR COURT
COUNTY OF STANISLAUS

BY

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Attorneys for Plaintiffs RONALD J. MALIK, an individual; VAN DER MEER, LLC, a California limited liability company; MEDCAL, LLC, a California limited liability company

SUPERIOR COURT OF CALIFORNIA

COUNTY OF STANISLAUS

RONALD J. MALIK, an individual; VAN DER MEER, LLC, a California limited liability company; MEDCAL, LLC, a California limited liability company,

Plaintiffs,

v.

SPERRY VAN NESS COMMERCIAL REAL ESTATE ADVISORS; DOES 1-10, inclusive,

Defendants.

CASE NO. 659272

COMPLAINT

By Fax

This case has been assigned to Judge ROGER M. BEAUCHESNE Department 24, for all purposes including Trial.

1. Plaintiff Ronald J. Malik ("Malik") is an individual who resides in California.

2. Plaintiff Van der Meer, LLC ("Van der Meer") is a California limited liability company with its principal place of business in the County of Stanislaus.

3. Plaintiff MedCal, LLC ("MedCal") is a California limited liability company with its principal place of business in the County of Stanislaus.

4. Plaintiffs are informed and believe, and thereon allege, that Defendant Sperry Van Ness Commercial Real Estate Advisors ("Sperry Van Ness") is a corporation with its principle place of business in Irvine, California. On information and belief, Sperry Van Ness is doing business in the County of Stanislaus, California.

5. The true names and capacities of the Defendants sued herein as DOES 1 through 10, inclusive, are unknown to Malik, Van der Meer, and MedCal ("Plaintiffs") at the time of filing this Complaint, and therefore Plaintiffs sue said Defendants under such fictitious names. Plaintiffs will amend this Complaint to insert the true name and capacities of the fictitiously named Defendants when the same become known to Plaintiffs.

6. At all times mentioned in this Complaint, each of the Defendants was the agent, servant, or employee of each of the other Defendants, and in doing the acts alleged in this Complaint was acting within the course and scope of that agency, employment or representation, with the knowledge, consent, and approval of each of the other Defendants.

JURISDICTION AND VENUE

7. The Court has subject matter jurisdiction over this action.

8. Venue is proper in this Court as the events giving rise to this action occurred in the County of Stanislaus, California, the contracts underlying this action were entered into and are to be performed in the County of Stanislaus, California, and the real property that is the subject of the underlying transaction involved in this action is also situated in the County of Stanislaus.

GENERAL ALLEGATIONS

A. Defendant Sperry Van Ness and Darrell Souza

9. Defendant Sperry Van Ness is a commercial real estate firm with offices worldwide. On its website, Sperry Van Ness represents that its affiliates have completed more than $39 billion dollars in sales volume on more than 12,000 transactions in the last four years alone. On information and belief, Sperry Van Ness is ranked as one of the most recognized commercial real estate brands in the United States.

10. Darrell Souza ("Souza") is a real estate broker who resides in Modesto, California. Plaintiffs are informed and believe, and thereon allege, that Souza is, and at all times relevant herein was, the Managing Director of the Modesto office of Sperry Van Ness.

11. Plaintiffs are informed and believed, and thereon allege, that Sperry Van Ness initially recruited Souza to join its company sometime in or around January 2002. At that time, however, Souza did not have a valid real estate brokerage license.

12. Plaintiffs are informed and believed, and thereon allege, that Souza originally received his brokerage license on or about July 3, 1986. However, on or about October 7, 1997, the Department of Real Estate ("DRE") revoked this license. Approximately three years later, Souza petitioned the DRE to reinstate this license. On or about October 24, 2000, the DRE denied the petition. Souza again petitioned the DRE to reinstate his license several years later. On or about January 29, 2003, the DRE finally granted this request.

13. Accordingly, between October 1997 and January 2003, Souza did not have a valid real estate brokerage license due to the DRE revocation. Notwithstanding this fact, Sperry Van Ness recruited Souza to serve as the Managing Director of the Modesto office, and represented to Plaintiffs and to members of the public that Souza met the Sperry Van Ness standard of "character, competency and certainty."

14. Sperry Van Ness has and continues to tout Souza and his real estate acumen. For example, on its website, Sperry Van Ness represents that:

- "Darrell Souza serves as a senior advisor for Sperry Van Ness specializing in land development and multifamily transactions as well as industrial/warehouse, office and retail sales throughout California."
- "Souza also has extensive experience in distressed property sales."
- "His clients include numerous Fortune 500 financial institutions. With over 29 years of experience, Souza has completed over $250 million in sale, management and leasing transactions."
- "Prior to joining Sperry Van Ness, Souza served as a Commercial Associate with Prudential Commercial where he earned the Leading Edge Award for four consecutive years, qualifying in the top five percent of 1,500 offices and 42,000 associates."
- "Previously, Souza served as the owner of JBS Financial from 1992 to 1996. He was also the owner of Realty World J-bar, Inc. from 1989 to 1996, where for three consecutive years he led his office to Realty World System's Top Commercial Office out of 2200 office locations and winning Office of the Year in 1992."
- "Souza has completed several advanced real estate courses from the CCIM institute."

15. Sperry Van Ness has also given Souza numerous awards for outstanding achievement in commercial real estate. Plaintiffs are informed and believe, and thereon allege, that Souza received the Sperry Van Ness Partners Circle award in 2004 and 2005. He also received the Sperry Van Ness Achievers award in 2006 and 2007. Sperry Van Ness represents that Souza falls within the top 2% of all its commercial agents nationwide.

B. Plaintiffs Malik and Van der Meer

16. Malik is a businessman in Stanislaus County, and owns limited liability companies which he uses to purchase and sell real estate. These companies include (but are not limited to) Van der Meer and MedCal.

17. On or about August 9, 2002, Malik formed Van der Meer for the purpose of buying and selling real estate. Since the inception of this company, Malik has been its sole member, and as such "has the exclusive right, power and authority to manage direct, and control all of the business and affairs of [Van der Meer] and to transact business on its behalf."

18. Malik initially named Larry W. Anderson as the manager of Van der Meer, but amended the Operating Agreement on or about October 12, 2005, to name Souza as the manager. Malik entrusted this responsibility to Souza in large part because of his affiliation with Sperry Van Ness, its excellent reputation in the commercial real estate industry, and the awards and accolades that Sperry Van Ness had bestowed on Souza.

19. The Articles of Organization for Van der Meer expressly provide that "[n]o action of the Manager may be taken without the prior written consent of the Member."

20. Moreover, the Van der Meer Operating Agreement also expressly provides that "[t]he Manager shall have no power to take any action under [sic] without the prior written consent of the Sole Member."

21. On or about August 2002, September 2003, and December 2006, Malik, through Van der Meer, effectuated the purchase of the land described in Exhibit A to the Van der Meer Deed of Trust. The parcels listed therein are vested in either Malik or Van der Meer's names. The property is located on or around Dale Road, Stoddard Road, and Kiernan Avenue in Modesto, California.

C. Plaintiff MedCal

22. On or about November 19, 2005, Malik formed MedCal for the purpose of buying and selling real estate. Since its inception, Malik has been the company's sole member, and as such "has the exclusive right, power and authority to manage direct, and control all of the business and affairs of [MedCal] and to transact business on its behalf."

23. Malik named Souza as the manager of MedCal in the Operating Agreement. Again, Malik entrusted this responsibility to Souza in large part because of his affiliation with Sperry Van Ness, its excellent reputation in the commercial real estate industry, and the awards and accolades that Sperry Van Ness had bestowed on Souza.

24. Like the Van der Meer Operating Agreement, the MedCal Operating Agreement also expressly provides that "[t]he Manager shall have no power to take any action without the prior written consent of the Sole Member."

25. On or about November 30, 2007, Malik, through MedCal, effectuated the purchase of the land described in Exhibit A to the MedCal Deed of Trust. The parcel listed therein is vested in either Malik or MedCal's name. The property is located on Kiernan Avenue in Modesto, California.

D. Dumas International, LLC is Formed under a Fraudulent Document

26. In 2003, Souza learned that certain parcels of land owned by Glen and Jeannette Bell ("Bell Property") were being foreclosed upon by the Internal Revenue Service. Souza recommended that Malik take first position on the loan, which Malik ultimately did. Rather than execute this transaction as an individual, Malik wanted to effectuate the deal through a limited liability company. Malik suggested that his attorney draft an operating agreement for a new limited liability company, but Souza represented that he had authored many such agreements, and offered to write this one for Malik. Malik agreed, and in approximately October 2003, Souza wrote the Operating Arrangement for Dumas International, LLC ("Dumas International"), a Delaware limited liability company.

27. Malik instructed Souza to draft the Operating Agreement. Souza listed himself as the sole member and manager of Dumas International, and verbally informed Malik that the

necessary documents were taken care of and that Dumas International was qualified to do business in California. Both Malik and Souza agreed and understood that Dumas International was set up and funded by Malik, and that its sole purpose was to take first position on the loan for the Bell Property for the benefit of Malik.

28. After Souza formed Dumas International, Malik, believing he was the rightful owner of Dumas International, issued a check to Souza in the amount of $425,000.00 to effect the acquisition of the Bells' promissory note ("Bell Note"). On or about December 10, 2003, the lender to Glen and Jeannette Bell assigned its right, title, and interest in the Bell Property to Dumas International. Also on or about December 10, 2003, the lender executed an Absolute Assignment of Deed of Trust to Dumas International on the Bell Property.

29. On or about October 22, 2008, Malik learned for the first time that Souza was acting in contravention of their agreement, and that Souza was transacting business on behalf of Dumas International that was not for Malik's benefit. Malik now believes that Souza intended to use Dumas International to defraud Malik from the outset.

E. **Souza Abuses his Authority as Manager of Van der Meer, Dumas International, and MedCal**

30. On or about May 21, 2007, ostensibly acting in his capacity as manager of Van der Meer but without authorization from Malik, Souza executed a Deed of Trust with Assignment of Rents ("Van der Meer Deed of Trust") as trustor in which he named Sperry Van Ness Souza & Associates Commercial Real Estate Advisers ("Sperry Van Ness & Associates") as the beneficiary. The purported purpose of the Van der Meer Deed of Trust was to use certain property owned by Van der Meer and/or Malik ("Van der Meer Property") to secure "payment of the sum of $4,000,000.00 with interest thereon according to the terms of a promissory note or notes of even date . . . made by Trustor, payable to order of [Sperry Van Ness & Associates] . . .." Malik and Van der Meer were unaware of the existence of a $4 million dollar promissory note made payable to Sperry Van Ness & Associates, Malik had never executed any such agreement as the sole member of Van der Meer or otherwise, and Souza never produced the original of said promissory note to Malik.

31. On or about January 30, 2008, ostensibly acting in his capacity as manager of MedCal but without authorization from Malik, Souza executed a Deed of Trust with Assignment of Rents ("MedCal Deed of Trust") as trustor in which he named Sperry Van Ness & Associates as the beneficiary. The purported purpose of the MedCal Deed of Trust was to use certain property owned by MedCal and/or Malik ("MedCal Property") to secure "payment of the sum of $4,000,000.00 with interest thereon according to the terms of a promissory note or notes of even date : . . made by Trustor, payable to order of [Sperry Van Ness & Associates] . . . ." Malik and MedCal are unaware of the existence of a $4 million dollar promissory note made payable to Sperry Van Ness & Associates, Malik has never executed any such agreement as the sole member of MedCal or otherwise, and Souza has not produced the original or a copy of said promissory note to Malik.

32. In late 2007 and through 2008, Malik began negotiations with his lenders to refinance the loans he has for the Van der Meer Property and MedCal Property. Malik is informed and believes and thereon alleges that Souza was aware of these negotiations.

33. Although Souza executed the Van der Meer Deed of Trust on May 21, 2007, and the MedCal Deed of Trust on January 30, 2008, Souza did not record either deed until October 2, 2008, at which time he recorded both.

34. On October 22, 2008, Souza wrote a letter to Malik ("October 22 Letter"). In his October 22 Letter, Souza raised numerous issues for the first time:

- Souza informed Malik that "the Glen Bell IRS lien has been decided by the Judge."
- Souza represented that Malik owes Sperry Van Ness & Associates approximately $793,226.00 for real estate commissions, but with certain credits relating to the Bell Property, the total is actually $476,460.00. Souza stated that payment of this balance would conclude all Dumas International business.
- Souza represented that he would no longer accept phone calls from or attend meetings with Malik. Souza stated that he had executed all of his duties in managing Malik's companies based solely on Malik's verbal instructions, but that because he was no longer willing to speak with Malik, he would need all further instructions in writing.

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35. Immediately upon receiving the October 22 Letter, Malik removed Souza from his managerial positions in Van der Meer and MedCal, and amended the relevant operating agreements accordingly.

36. On October 24, 2008, Malik responded through counsel to Souza's October 22 Letter ("October 24 Letter") and explained that he has no knowledge of agreements entitling Souza to receive commissions from Malik. In addition, Malik demanded a full accounting for Dumas International and a full report and accounting as to what occurred with respect to the "Glen Bell IRS lien."

37. On or about October 31, 2008, Souza responded in writing to Malik's counsel, and again made a claim for $476,460.00 ("October 31 Letter"). In the October 31 Letter, Souza referred Malik to the Van der Meer Deed of Trust and MedCal Deed of Trust, which he had only just recorded on October 2, 2008. Souza represented that Sperry Van Ness & Associates holds those deeds as security for money that Malik purportedly owes to Sperry Van Ness & Associates, and that Malik authorized him to execute the deeds in a letter dated May 9, 2007 ("May 9 Letter").

38. The May 9 Letter in which Malik purportedly authorizes the deeds as security is a fabrication and the substance is entirely false. Malik never signed such a document, and never saw that letter before Souza sent it to Malik's counsel with the October 31 Letter.

39. Malik is presently negotiating with a financial institution that is poised to refinance the Van der Meer Property. Failure by Malik to successfully refinance that property would result in the initiation of foreclosure proceedings by the bank which presently holds two notes on the Van der Meer Property. The institution presently holding the notes informed Malik in writing, and by agreement, that it will initiate foreclosure proceedings unless Malik refinances the Van der Meer property immediately. Malik is also refinancing the MedCal property, the success of which is directly tied to his ability to refinance the Van der Meer property. Specifically, as part of his agreement with the institution presently holding the notes on the Van der Meer Property, he agreed to increase his equity stake in the Van der Meer Property and Malik is doing so through use of the additional funds he obtains by refinancing the MedCal Property. Thus, both properties must be refinanced immediately.

40. Souza and Sperry Van Ness & Associates claim to the Van der Meer Property and to the MedCal Property clouded Malik and Van der Meer's title to the Van der Meer Property and Malik and MedCal's title to the MedCal Property. It also depreciated the property's market value, and prevented Malik and Van der Meer and MedCal from enjoying the use of their property and premises in the manner most beneficial to Malik and Van der Meer and MedCal's interests as its owner. Moreover, it also prevented Malik and Van der Meer and MedCal from refinancing the loan for those properties.

F. The Lawsuit

41. On or about November 10, 2008, Plaintiffs filed a lawsuit against Souza in California Superior Court, Stanislaus County, for slander of title, cancelation of an instrument constituting cloud on title to real property, civil extortion, intentional inference with contractual relations, intentional interference with prospective economic advantage, breach of fiduciary duty, declaratory relief, an accounting, fraud, and breach of contract. On or about August 11, 2009, Plaintiffs entered into a Settlement Agreement with Souza.

42. On or about July 15, 2010, Souza was arrested on suspicion of grand theft and forgery in connection with his dealings with Plaintiffs Malik, Van der Meer and MedCal.

43. Despite the foregoing events, Sperry Van Ness continues to represent on its website that Souza is a qualified affiliate with the "character, competency and certainty" to assist clients with commercial real estate transitions.

FIRST CAUSE OF ACTION

Negligent Hiring

44. Plaintiffs incorporate the allegations above as though fully set forth herein.

45. Plaintiffs are informed and believe, and thereon allege, that Souza is, and at all times relevant herein, was the actual agent, servant, or employee of Defendant, and in doing the acts alleged in this Complaint, Souza was acting within the course and scope of that agency, employment or representation.

46. In the alternative, Souza is, and at all times relevant herein, was the ostensible agent of Defendant because Sperry Van Ness intentionally, or by want of ordinary care, caused

Plaintiffs to believe that Souza was its agent. For example, Defendant allowed Souza to use the Sperry Van Ness name, job title and logo, advertised Souza on its website, and honored Souza with several prestigious company awards. Plaintiffs are informed and believe, and thereon allege, that these actions were designed to lure commercial real estate customers such as Plaintiffs to use Sperry Van Ness real estate offices.

47. Souza is, and at all times relevant herein, was incompetent, unfit and/or unqualified to serve as the Managing Director of the Modesto office of Sperry Van Ness and to serve as a commercial real estate broker.

48. Plaintiffs are informed and believe, and thereon allege, that Defendant knew or reasonably should have known that Souza was incompetent, unfit and/or unqualified, but that Defendant nevertheless recruited and subsequently hired Souza to join its organization. Alternatively, Defendant failed to exercise reasonable care to discover whether Souza was incompetent, unfit and/or unqualified prior to hiring him.

49. Due to his incompetence, unfitness, and/or lack of qualification, Souza caused Plaintiffs to suffer injury, damage, loss and/or harm in an amount to be proven at trial.

SECOND CAUSE OF ACTION

Negligent Supervision

50. Plaintiffs incorporate the allegations above as though fully set forth herein.

51. Plaintiffs are informed and believe, and thereon allege, that Defendant has, and at all times relevant herein, had the authority to supervise and/or monitor the activities of Souza.

52. Defendant knew, or reasonably should have known, that allowing Souza to broker, manage, direct, and/or control real property and related businesses would create an unreasonable risk of harm to persons such as Plaintiffs and/or their property. Notwithstanding this actual or imputed knowledge, Defendant permitted Souza to engage in such activities, and to this day, still allows Sousa to engage in such activities under the auspices of Sperry Van Ness.

53. Due to his incompetence, unfitness, and/or lack of qualifications, Souza caused Plaintiffs to suffer injury, damage, loss and/or harm in an amount to be proven at trial.

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THIRD CAUSE OF ACTION

Negligent Retention

54. Plaintiffs incorporate the allegations above as though fully set forth herein.

55. Plaintiffs are informed and believe, and thereon allege, that Defendant has, and at all times relevant herein, had the authority to suspend or terminate the employment and/or agency, whether actual or ostensible, of Souza.

56. Defendant knew or reasonably should have known that Souza was incompetent, unfit and/or unqualified, and likely to harm to persons such as Plaintiffs and/or their property in view of the activities of his employment or and/agency.

57. In light of the foregoing, the circumstances were such that the only reasonable action is, and at all times relevant herein was, for Defendant to suspend and/or terminate Souza.

58. Defendant has failed to suspend and/or terminate Souza.

59. Due to his incompetence, unfitness, and/or lack of qualifications, Souza caused Plaintiffs to suffer injury, damage, loss and/or harm in an amount to be proven at trial.

FOURTH CAUSE OF ACTION

Negligent Misrepresentation

60. Plaintiffs incorporate the allegations above as though fully set forth herein.

61. By allowing Souza to use the Sperry Van Ness name, job title and logo, by advertising Souza on its website, and by honoring Souza with several prestigious company awards, Defendant represented to Plaintiffs and to the public that Souza was a qualified, competent, and trustworthy commercial real estate agent. Moreover, in its advertising, Defendant represented that all its affiliates, including Souza, have the "character, competency and certainty" to assist clients with commercial real estate transitions.

62. All of these representations were false. Defendant knew or reasonably should have known that Souza was incompetent, unfit and/or unqualified to serve as the Managing Director of the Modesto office of Sperry Van Ness and to serve as a commercial real estate broker.

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63. Plaintiffs are informed and believe, and thereon allege, that Defendant knew or should have known that these representations were false. Alternatively, Defendant made these representations without any reasonable ground for believing that these representations were true.

64. Plaintiffs are informed and believe, and thereon allege, that Defendant made these representations with the intent to induce Plaintiffs to retain Souza and Sperry Van Ness in connection with commercial real estate transactions. In fact, Plaintiffs retained Souza in large part because of his affiliation with Sperry Van Ness, its excellent reputation in the commercial real estate industry, and the awards and accolades that Sperry Van Ness had bestowed on Souza.

65. Plaintiffs were ignorant of the falsity of the representations at the time these representations were made by Defendant and at the time Plaintiffs took the actions herein alleged. Plaintiffs did not discover the falsity of these representations until they instituted civil litigation against Souza and uncovered his fraud and gross misconduct during the course of that lawsuit.

66. As a proximate result of these misrepresentations, Plaintiffs have been harmed in an amount to be proven at trial.

FIFTH CAUSE OF ACTION

Unfair Business Practices (Cal. Bus. & Prof. Code § 17200)

67. Plaintiffs incorporate the allegations above as though fully set forth herein.

68. Plaintiffs are informed and believe, and thereon allege, that Defendant has engaged in unfair competition as defined by California Business and Professions Code Sections 17200 et seq. in that Defendant has used unfair and/or deceptive business and issued false advertising.

69. These unfair and/or deceptive business practices, acts and advertising would likely deceive, and in fact, have deceived members of the public, including Plaintiffs. Plaintiffs have lost money or property as a result of Defendant's unfair competition.

70. Plaintiffs are entitled to restitution from Defendants, and Defendants should be ordered to disgorge any and all profits attributable to the acts of unfair and/or deceptive competition alleged herein.

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PRAYER FOR RELIEF

WHEREFORE Plaintiffs pray for judgment against Defendant as follows:

1. For general, special, and consequential damages on the first, second, third and fourth causes of action,
2. For restitution and injunctive relief on the fifth cause of action;
3. For attorney fees and costs to the extent allowed by law;
4. For such other and further relief as the court deems just and proper.

DATED: October 22, 2010

DOWNEY BRAND LLP

By: _____
WILLIAM R. WARNE
MEGHAN M. BAKER
Attorney for Plaintiffs
RONALD J. MALIK, VAN DER MEER, LLC; and MEDCAL, LLC

EXHIBIT Q

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF STANISLAUS

RONALD J. MALIK, an individual; VAN DER MEER, LLC, A California limited liability company; MEDCAL, LLC, a California limited liability company,

Plaintiffs,

v.

SPERRY VAN NESS INTERNATIONAL CORPORATION, a Delaware Corporation, dba SPERRY VAN NESS COMMERCIAL REAL ESTATE ADVISORS; Does 1-10, inclusive,

Defendants.

CASE NO. 659272

NOTICE OF LIEN

TO ALL PARTIES:

NOTICE IS HEREBY GIVEN that pursuant to various agreements between plaintiffs above-named and Premier Valley Bank, a California banking corporation, Premier Valley Bank claims and holds a security interest in and a lien upon all claims by plaintiffs which are the subject matter of this action, and all proceeds and products thereof, subject only to any prior lien of plaintiffs' legal counsel for attorneys fees and costs.

The lien of Premier Valley Bank is based upon modifications and other accommodations regarding one or more commercial loans and guaranties.

CURTIS LEGAL GROUP
A Professional Law Corporation

Dated: July 19, 2011

By _____
MICHAEL B. IJAMS
Attorneys for Lien Holder and Secured Party Premier Valley Bank

EXHIBIT R

B4 (Official Form 4) (12/07)

FILED SB

United States Bankruptcy Court
Eastern District of California

IN RE: 11-91692 Case No. 11 MAY 11 PM 3:48

Van Der Meer, LLC Chapter 11

Debtor(s)

CLERK, U.S. BANKRUPTCY CT.
EASTERN DIST. OF CA.
MODESTO, CA.

LIST OF CREDITORS HOLDING 20 LARGEST UNSECURED CLAIMS

Following is the list of the debtor's creditors holding the 20 largest unsecured claims. The list is prepared in accordance with Fed. R. Bankr. P. 1007(d) for filing in this chapter 11 [or chapter 9] case. The list does not include (1) persons who come within the definition of "insider" set forth in 11 U.S.C. § 101, or (2) secured creditors unless the value of the collateral is such that the unsecured deficiency places the creditor among the holders of the 20 largest unsecured claims. If a minor child is one of the creditors holding the 20 largest unsecured claims, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m).

(1) Name of creditor and complete mailing address including zip code	(2) Name, telephone number and complete mailing address, including zip code, of employee, agent or department of creditor familiar with claim who may be contacted	(3) Nature of claim (trade debt, bank loan, government contract, etc.)	(4) Indicate if claim is contingent, unliquidated, disputed or subject to setoff	(5) Amount of claim [if secured also state value of security]
Downey Brand LLP 621 Capital Mall, 18th Floor Sacramento, CA 95814				659,554.00
Commerical Architecture 616 14th Street Modesto, CA 95354				12,437.00
GDR Engineering, Inc. PO Box 1033 Ceres, CA 95307-1033				5,287.00

DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF A CORPORATION OR PARTNERSHIP

I, [the president *or* other officer *or* an authorized agent of the corporation][*or* a member *or* an authorized agent of the partnership] named as the debtor in this case, declare under penalty of perjury that I have read the foregoing list and that it is true and correct to the best of my information and belief.

Date: May 11th-11 Signature: [signature]

Ronald J. Malik, Sole Member
(Print Name and Title)

5

EXHIBIT S

OFFICE OF THE

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Marlisa Ferreira

INVESTIGATION REPORT/SUPPLEMENTAL GMH1

D.A. File No.:

Intake No.: 79263

Agency Name & No: FBI 329B-SC-3232153

Report of: Gerard Hilgart, Criminal Investigator

Violation: 487 PC/18 U.S.C. 1344

Date of Report: August 11,2015

Suspect/Defendant: MALIK, Ronald Joseph

[redacted]

MALIK, Edna Isaac

[redacted]

DANIEL, Janine Shamiran

[redacted]

Intake No.: 794263
Report of: Hilgart

KUFNER, Marcus
[redacted]

Victim: BANK OF AMERICA

Synopsis:

I, Investigator Hilgart, was assigned to conduct further investigation on this matter. To that end I worked with the United States Attorney's Office and obtained Federal Grand Jury Subpoenas for supporting documents from Bank of America and Old Republic Title Companies.

Narrative:

I, served the Federal Grand Jury Subpoena #2013-80-01 upon Bank of America by mail to the following:

Bank of America
Legal Order Processing
2001 E. Washington Street
Phoenix, AZ 85004

I served the Federal Grand Jury Subpoena #2013-80-02 upon a local branch of Old Republic Title Company at the below listed address:

Old Republic Title Company
1140 Scenic Drive, Suite110
Modesto, CA 95350

In response to the subpoenas I received the requested documents which included the Lender File from Bank of America as well as the Title and Escrow files from Old Republic Title relating to the Short Sale of [redacted] that closed on or about 11/02/2012.

The Bank of America documents of particular interest include:

- Written correspondence from Bank of America to Ronald Malik regarding alternatives to foreclosure, namely Short Sale or Deed in Lieu of Foreclosure.
- An Appraisal Report dated 11/13/2007 listing an appraised value of $1,400,000, prepared by Son N. Tran.

- An Appraisal Report dated 09/04/2012 listing appraised value as $235,000, prepared by Steven C. Vaughn of Fearrand Appraisal.

  A Broker Price Opinion (BPO) listing value at $629,000, completed by Paul Muro with PMZ Real Estate.

- An Appraisal Review dated 09/14/2012 indicating the previous appraisal, by Steven Vaughn on 09/04/2012 should not be accepted. This review also mentions the BPO dated 09/07/2012 listing the value as $629,000.

- An Appraisal report dated 10/04/2012 listing appraised value of $358,000, prepared by Leslyn Georgis of West Coast Appraisal services.

- A Residential Listing Agreement dated July 9, 2012 wherein Ronald Malik (Seller) employs New Destiny (Broker) to sell the real property in the City of [redacted] County of [redacted], described as [redacted]. The listing price on this agreement was $350,000. It is signed by Ronald Malik and lists Michael Anderton with New Destiny Real Estate as Broker and Agent. It lists an address of [redacted] for New Destiny and Mr. Anderton.

- California Residential Purchase Agreement and Joint Escrow Instructions dated August 16, 2012. This document listed Janine S Daniel as making an offer to purchase the property at [redacted] for $375,000. It reported the Listing Agent as New Destiny R.E. and the Selling Agent as Atlas Realty/Financial Services. It was signed by Janine S. Daniel as the buyer and Ronald J. Malik as the seller. It listed Agnes Benjamin as the agent for the Selling Firm, Atlas Realty/Financial Services and Michael Anderton as the agent for the Listing Firm, New Destiny R.E.

  There was a Short Sale Addendum, apparently attached, that was dated August 17,2012. It was signed by Janine S. Daniel as the buyer and Ronald Malik as the seller.

  There was a check drawn on the account of Janine S. Daniel, payable to "title company" for $2000, dated August 16, 2012. The word "deposit" was written on the memo line and appeared to be signed by Janine Daniel.

- Short Sale Third-Party Authorization Form listing Michael Anderton, Broker New Destiny as "Designated Representative". This forms appears to be signed by Ronald Malik.
- California Residential Purchase Agreement and Joint Escrow Instructions dated September 25, 2012 listing an offer from Janine S. Daniel to purchase the property at [redacted] for $223,300. Under Finance terms it lists a $2,000 Initial Deposit, a First Loan in the amount of $178,700 and Balance of

Purchase Price or Down payment as $42,600. It was signed by Janine S. Daniel as Buyer and Ronald Malik as Seller. It listed Atlas Realty/Financial Services as the Selling Firm represented by Agnes Benjamin and New Destiny R. E., represented by Michael Anderton as the Listing Firm.

- Short Sale Addendum dated September 25, 2012 signed by Janine S. Daniel as Buyer and Ronald Malik as Seller.
- Another copy of what appears to be the same check drawn on the account of Janine S. Daniel, payable to "title company" for $2,000. The date has been changed to read 09-25-2012.
- Short Sale Purchase Contract Addendum dated September 25, 2012. This document was signed, on both pages, by Ronald Malik as Seller and Janine Daniel as Buyer. The document lists 12 conditions that the signing parties agree to as part of the Short Sale Contract, including:

> "3. The Parties acknowledge and agree that the Subject Property must be sold through an 'Arm's-Length' Transaction. 'Arm's length" means two unrelated parties characterized by a selling price and other terms and conditions that would prevail in a typical real estate sales transaction. No party to this contract is a family member, related by blood or marriage, business associate or shares a business interest with the mortgagor (Sellers)."
>
> "4. The Parties Acknowledge and agree that neither the Buyers nor the Sellers nor their respective Brokers/Agents have any agreements written or oral that will permit the Seller or the Seller's family member to remain in the property as renters or regain ownership of said property at any time after the execution of the Short Sale transaction. This includes if the seller is retaining a direct or indirect ownership or possessory interest in the property and/or has a formal or informal option to obtain such an interest in the future."
>
> "6. The Parties acknowledge and agree that none of the parties shall receive any proceeds from this transaction."
>
> "10. The Parties acknowledge and agree that this Short Sale transaction will not constitute appraisal fraud, flipping, identity theft and/or straw buying."
>
> "11. The Parties acknowledge and agree that any misrepresentation or deliberate omission of fact that would induce the Bank of America, Investor or a Mortgage Insurer to agree to the terms of a short payoff that would not have been approved had all the facts been known, constitutes Short Sale Fraud and may subject the responsible Party to civil and/or criminal liability."

"12. The Parties acknowledge and agree that this Addendum together, with the Sales Contract, shall constitute the entire and sole agreement between the Parties with respect to the Sale of the Subject property and supersede any prior agreements, negotiations, understandings, optional contracts or other matters, whether oral or written, with respect to the subject matter hereof. To the extent that any term or condition contained within the Short Sale Contract is contradictory or inconsistent with this Addendum, the Parties agree that this Addendum shall supersede. No alterations, modifications or waiver of any provision hereof shall be valid unless in writing and signed by Parties, FHA, VA, government agencies, any investor and/or mortgage holder hereto."

- Short Sale Real Estate Licensee Certification dated September 25, 2012. This document lists Ronald Malik as Seller, Michael Anderton as the Real Estate Licensee representing Seller, Janine Daniel as Buyer and Agnes Benjamin as the Real Estate Licensee representing Buyer. It bears the signature of Michael Anderton and Agnes Benjamin. It lists eight acknowledgements that the signers agree to. Of particular note are the following:

  "3. Licensee representing Seller acknowledges and agrees that, in his or her professional opinion, Property has been listed on the appropriate Multiple Listing Service at a listing price intended to generate open market competitive offers to purchase Property and not at an artificially low or high listing price. Licensee representing Seller further acknowledges and agrees that his or her marketing efforts were in fact and 'in spirit' aimed toward maximizing the selling price of Property from a ready, willing and able buyer. Licensee has not engaged in any conduct that restricts or limits offers from buyers, including but not limited to cash offers, using disparaging language regarding the property or tenants, or unreasonably restricting access."

  "5. Licensee acknowledges and agrees that Licensee is not engaging in appraisal fraud, flipping (a predatory lending practice whereby a recently acquired property is resold for a considerable profit with an artificially inflated value within a short period of time, as defined by the Federal Bureau of Investigation), identity theft and/or straw buying. Licensee has disclosed all agreements or understandings relating to the current sale or subsequent sale of Property of which Licensee is aware or should be aware. Licensee is not aware of any other agreements or understandings that call for the subsequent sale of the Property within 30 days of the current sale, the assignment of the property to the Seller or the option for the Seller to purchase."

  "6. Licensee acknowledges and agrees that he or she is not receiving any compensation, remuneration or benefit from the completion of this Residential Purchase Agreement other than what has been disclosed in the

preliminary and certified HUD-1 closing settlement statements. Licensee is not aware of any arrangement or compensation or other remuneration to Seller, Buyer, Licensees or other lien holders, either directly or indirectly related to the purchase agreement, that has been or will be paid outside the official terms of closing as presented un the purchase contract and the preliminary and certified HUD-1 closing settlement statements."

"7. Licensee acknowledges and agrees that he or she has disclosed to Bank of America any known relationship to Buyer or ownership interest in Buyer's company, and Licensee representing Seller further acknowledges that he or she has no existing business relationship with Buyer and/or Seller other than the purchase of Property according to the terms and conditions of the purchase contract."

"8. Licensee acknowledges and agrees that any misrepresentation or omission of a material fact may subject the responsible party to civil and/or criminal liability."

Narrative to be continued.

Supervisor _____

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INVESTIGATION REPORT/SUPPLEMENTAL GMH#3

D.A. File No.:

Intake No.: 794263

Agency Name & No: FBI 329B-SC-3232153

Report of: Gerard Hilgart, Criminal Investigator

Violation: 487 PC/18 USC 1344

Date of Report: October 16, 2015

Suspect/Defendant: **MALIK, Ronald Joseph**

[redacted]

MALIK, Edna Isaac

[redacted]

DANIEL, Janine Shamiran

[redacted]

Intake No.: 794263
Report of: GMH

KUFNER, Marcus
[redacted]

Victim: BANK OF AMERICA

Narrative:

I obtained and served Federal Grand Jury Subpoena #2013-80-03 upon the local branch of Wells Fargo Bank for bank records related to Janine S. Daniel. In response to this subpoena I received account information for several accounts under the name Janine S. Daniel. They all listed her address as [redacted]

Of particular interest were the following transactions:

- August 12, 2012 $2,000 check written by Janine Daniel to Old Republic Title as a down payment on [redacted].
- November 1, 2012 wire transfer from Janine Daniel to Old Republic Title in the amount of $223,932.07 corresponding to the purchase price of [redacted]
- Posted December 5, 2012, check written by Ronald Malik to Janine Daniel in the amount of $2,196.66
- Posted December 5, 2012, check written by Ronald Malik to Janine Daniel in the amount of $15,000. "Lease 1709" written on the memo line.
- Posted February 18, 2013 check written by Ronald Malik to Janine Daniel in the amount of $17,500.
- Posted April 2, 2013, Bank of America cashier check in the amount of $45,000 to Janine Daniel. Ronald Malik's account is with Bank of America.
- Posted April 2, 2013, Bank of America cashier check in the amount of $5,000 to Janine Daniel.

It appears, after a summary review of documents, that Janine Daniel functioned as a straw buyer in this transaction and never actually lived at [redacted]. Rather Ronald and Edna Malik continued to live there contrary to the Short Sale Purchase Agreement. It also appears that Mr. Malik repaid Ms. Daniel for, at least a large portion, of the purchase price of the property.

This concludes a summary of the investigation as it stands at this time.

Supervisor _____