APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15799

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SIERRA PACIFIC INDUSTRIES, INC.; W.M. BEATY AND ASSOCIATES, INC.; ANN MCKEEVER HATCH, as trustee of the Hatch 1987 revocable trust; RICHARD L. GREENE, As Trustee of the Hatch Irrevocable Trust; BROOKS WALKER, JR., As Trustee of the Brooks Walker, Jr. Revocable Trust and the Della Walker Van Loben Sels Trust for the issue of Brooks Walker, Jr.; BROOKS WALKER III, individually and as trustee of the Clayton Brooks Danielsen, the Myles Walker Danielsen, and the Benjamin Walker Burlock trust, the Margaret Charlotte Burlock Trust; LESLIE WALKER, individualy and as trustee of the Brooks Thomas Walker Trust, the Susie Kate Walker Trust and the Della Grace Walker trusts; WELLINGTON SMITH HENDERSON, JR., as Trustee of the Henderson Revocable Trust; ELENA D. HENDERSON; MARK W. HENDERSON, as Trustee of the Mark W. Henderson Revocable Trust; JOHN C. WALKER, individually and as trustee of the Della Walker Van Loben Sels trust for the issue of John C. Walker; JAMES A. HENDERSON; CHARLES C. HENDERSON, as Trustee of the Charles C. and Kirsten Henderson Revocable Trust; JOAN H. HENDERSON; JENNIFER WALKER,

individually and as trustee of the Emma Walker Silverman Trust and the Max Walker Silverman Trust; KIRBY WALKER; LINDSEY WALKER, AKA Lindsey Walker-Silverman, individually and as trustee of the Reilly Hudson Keenan Madison Flanders Keenan Trust; EUNICE E. HOWELL, DBA Howell's Forest Harvesting Company, individually,

Defendants-Appellants.

D.C. No. 2:09-cv-02445-WBS-AC

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb. Senior District Judge, Presiding

Before: Sidney R. Thomas, Chief Judge, Mary H. Murguia, Circuit Judge, and Jon P. McCalla,[*] District Judge.

Opinion by Chief Judge Thomas.

Filed July 13, 2017

OPINION

THOMAS, Chief Judge:

We are asked to decide whether certain allegations of fraud, some of which were known before the parties settled and some of which came to light

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[*] The Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee, sitting by designation.

after settlement, rise to the level of fraud on the court such that relief from the settlement agreement is warranted under Federal Rule of Civil Procedure 60(d)(3). Because the instances of alleged fraud known before settlement cannot justify relief, and the instances discovered after settlement do not rise to the level of fraud on the court under Rule 60(d)(3), we affirm.

I.

This case arises from a forest fire that broke out on private property near the Plumas National Forest in northern California on September 3, 2007. The Moonlight Fire, as it came to be known, eventually burned 46,000 acres of the Plumas and Lassen National Forests and resulted in the United States bringing a civil action against private forestry operators, Sierra Pacific Industries, Inc. ("Sierra Pacific") and Howell's Forest Harvesting Company ("Howell"), and other individuals to recover damages for that fire.

A.

Sierra Pacific contracted with Howell to conduct logging operations on the land where the Moonlight Fire is believed to have started. On the morning of the fire, two Howell employees had been operating bulldozers in the area, but they left without inspecting the site for sparks or signs of fire.

After the fire was spotted from a U.S. Forest Service ("Forest Service") lookout tower in the early afternoon, Forest Service investigator Dave Reynolds visited the site where the fire was believed to have started. Reynolds interviewed JW Bush, one of the Howell employees who had been working at the site

that morning, but the site was too hot to investigate further at the time.

Reynolds returned to the site the following day with Josh White, an investigator from the California Department of Forestry and Fire Protection ("Cal Fire"). According to the Origin and Cause Investigation Report jointly released by the Forest Service and Cal Fire, that day the investigators identified a "general origin area" and a "specific origin area" based on fire indicators in the area. On September 4th and 5th, White and Reynolds took numerous photos and measurements of relevant points within the origin site, and they placed numbered markers and colored flags to mark certain fire indicators and other evidence.

Sierra Pacific and the other defendants allege that White and Reynolds identified a specific point of origin that they marked with a single white flag, and took measurements and photographs of that point. The government denies that the investigators identified this point as the specific point of origin. Instead, the government notes that the investigators took photos of two other rocks, which appeared to have marks from bulldozer blades or treads, and which were ultimately identified in the final report as the points of origin for the fire. Investigators White and Reynolds also used a magnet to search the area and identified metal shavings near these two rocks, which they collected as evidence. Diane Welton, another Forest Service investigator, joined the investigation and visited the origin site on September 8th. Welton agreed with the other investigators' assessment of the fire's origin.

Cal Fire and the Forest Service released their joint Origin and Cause Investigation Report in June 2009. The report concluded that one of the Howell bulldozers had caused the fire by striking a rock, which created a spark that ignited forest litter on the ground and eventually broke out into a fire that spread into the surrounding forest.

B.

The United States filed this action against Sierra Pacific, Howell, and a number of individual defendants (collectively, "the Defendants") in August 2009. The government sought nearly $800 million in damages caused by the Moonlight Fire and compensation for the resources spent fighting it. The California Attorney General's office, representing Cal Fire, filed a state court action against the Defendants earlier the same month. The U.S. Attorney and the California Attorney General entered into a joint prosecution agreement, but the two cases proceeded separately.[1]

The parties in this federal case engaged in extensive discovery and motion practice over the next three years. Most relevantly, the government produced a number of documents during discovery that led the Defendants to believe that the government had engaged in fraud during and after its investigation of the Moonlight Fire, in an attempt to blame the fire on them. Specifically, the Defendants discovered photographs and an early sketch that

[1] Cal Fire and the California Attorney General's office took no part in the federal case, and the U.S. Attorney's office took no part in the state case.

appeared to place the point of origin in a slightly different spot than the final report; an aerial video of the smoke plume that allegedly undermined the government's point-of-origin determination; an expert report that had used the wrong slope angle in modeling fire dynamics and had not been corrected; and evidence regarding alleged employee misconduct at the Forest Service's Red Rock Lookout Tower before the fire was spotted. The Defendants also alleged at various points in the pre-trial proceedings that the government had advanced a fraudulent Origin and Cause report based on these cover-ups; had misrepresented the investigator's interview with Howell employee JW Bush shortly after the fire started; had misrepresented evidence regarding other forest fires started by Howell; had proffered false testimony by the investigators regarding the origin of the fire; and had failed to adequately investigate arson as a possible cause of the fire, particularly in light of evidence that wood cutter Ryan Bauer had been using a chainsaw in the vicinity of the fire on the day it began.

The government moved *in limine* to exclude much of the evidence supporting the Defendants' theories of fraud and concealment, and the district court granted this motion in part. The court's final pre-trial order precluded the Defendants from introducing evidence to show conspiracy but permitted them "to introduce evidence that there was an attempt to conceal information from the public or the defense." The Defendants also wanted to present evidence that the government had failed to investigate possible arson by Ryan Bauer, though the Defendants disavowed any intention of actually proving that Bauer started the

fire. The court permitted the Defendants to introduce "evidence indicating arson was not considered to show weaknesses in the investigation following the fire" but precluded evidence demonstrating that a particular person, such as Bauer, had started the fire. Nonetheless, the court's oral ruling explained that the Defendants would be permitted to present evidence that Bauer was "near the scene, seen by witnesses, and there was no follow-up" during the fire investigation. The court's written order specifically stated that each of these *in limine* rulings was "made without prejudice and [was] subject to proper renewal, in whole or in part, during trial."

Three days before trial was set to begin, the parties reached a settlement agreement under which the Defendants agreed to pay $55 million and transfer 22,500 acres of land to the government.[2] The terms also specified:

> The Parties understand and acknowledge that the facts and/or potential claims with respect to liability or damages regarding the above-captioned actions may be different from facts now believed to be true or claims now believed to be available ("Unknown Claims"). Each Party accepts and assumes the risks of such possible differences in facts and potential claims and agrees that this Settlement Agreement shall remain effective notwithstanding any such differences .... Accordingly, this Settlement

[2] Sierra Pacific agreed to pay $47 million and transfer 22,500 acres; Howell's agreed to pay $1 million; Beaty and the other landowners agreed to pay $7 million.

> Agreement, and the releases contained herein, shall remain in full force as a complete release of Unknown Claims notwithstanding the discovery or existence of additional or different claims or facts before or after the date of this Settlement Agreement.

Following entry of the settlement agreement, the district court entered judgment dismissing the case with prejudice at the parties' request.

The state case proceeded after settlement of the federal case. While the state proceedings were pending, several other instances of alleged misrepresentation and fraud came to light. The state case was ultimately dismissed with prejudice before going to trial, and the California Superior Court imposed terminating sanctions on Cal Fire's attorneys, concluding that they had engaged in "pervasive misconduct" and "a systematic campaign of misdirection with the purpose of recovering money from the Defendants."

In the federal case, the Defendants then filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(d)(3), arguing that the government's alleged misrepresentations throughout the investigation and litigation constituted fraud on the court. That motion is the subject of this appeal.

In addition to the misrepresentations that the Defendants raised prior to settlement, which it re-alleged in the Rule 60(d)(3) motion, the Defendants also alleged newly-discovered fraud. First, Defendants had learned that Ryan Bauer's father, Edwin Bauer, had accused Sierra Pacific's legal counsel (apparently

falsely) of offering him a bribe to say that his son started the fire. The Defendants alleged that the government knew of this false bribe accusation but fraudulently failed to disclose it, despite representing to the court that there was not a "shred" of evidence pointing to Bauer. The Defendants also alleged that they had learned that the government had instructed the fire investigators to lie about the significance of the white flag by telling them it was a "non-issue" during a meeting prior to the investigators' depositions.

Finally, the Defendants cited a new report issued by the California State Auditor that some of the funds recovered in state wildfire cases were being put into an extra-legal account called the Wildland Fire Investigation Training and Equipment Fund ("WiFITER"), rather than into the state treasury. In their Rule 60(d)(3) motion, the Defendants alleged that the government had misrepresented the nature of the fund in this federal case. The Defendants also alleged that Cal Fire's Investigator White stood to benefit from the fund and that his improper financial incentives had tainted the entire wildfire investigation on which the government had relied.

After an initial status conference on the Rule 60 motion, the district court ordered the parties to submit briefing on the "threshold question" of "whether, assuming the truth of the Defendants' allegations, each alleged act of misconduct separately or collectively constituted 'fraud on the court' within the

meaning of Rule 60(d)(3)."[3] The district court also asked the parties to identify whether the Defendants had learned of each alleged act before or after the settlement and dismissal of the case.

After holding an oral hearing on the Rule 60 motion, the district court denied the motion in a detailed written order. With respect to the alleged fraud that the Defendants had known about before settlement—namely the conflicting evidence regarding the point of origin and the alleged misconduct at the lookout tower—the district court concluded that this conduct could not constitute fraud on the court because the doctrine only allows relief from judgment for "after-discovered fraud." *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).

With respect to the allegations of fraud that the Defendants claimed to have discovered only after settlement, the district court concluded that relief was barred by the specific terms of the settlement; alternatively, it concluded that relief was unwarranted because the new allegations surrounding the white flag testimony were unsupported by the record, the government did not have a duty to disclose the false bribe accusation made by Edwin Bauer, and the government had not committed fraud on the court through its representations about Cal Fire's WiFITER fund.[4] The

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[3] After the original district court judge recused herself from hearing the Rule 60 motion, the case was eventually assigned to a different judge within the Eastern District of California.

[4] The district court also discussed and rejected the Defendants' allegations regarding an investigator's handwritten notes, and

district court concluded that, because none of these allegations constituted fraud on the court, the totality of the government's conduct similarly failed to rise to that level.

The same day that the district court denied the Defendants' motion, the U.S. Attorney's Office for the Eastern District of California posted eight tweets about the outcome of the case via its Twitter account. That evening, a Twitter account allegedly owned by the federal district judge presiding over the Rule 60 motion, which followed the U.S. Attorney's account, posted a tweet with a link to a news article about the Moonlight Fire. The tweet contained the title of the news article, "Sierra Pacific still liable for Moonlight Fire damages," as well as a link to the article itself.

The Defendants timely appealed the denial of their Rule 60 motion, arguing that the district court erred in failing to grant the motion and that the judge should be retroactively recused based on the activity of the Twitter account allegedly belonging to him. The district court had jurisdiction over this case under 28 U.S.C. §1345, and we have jurisdiction to hear the appeal under 28 U.S.C. § 1291 because the denial of a Rule 60 motion for relief from judgment is a final, appealable order. *See United States v. Estate of Stonehill*, 660 F.3d 415, 443 (9th Cir. 2011).

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the removal of one of the Assistant United States Attorneys who originally worked on the case. Because the Defendants did not discuss those allegations on appeal, they are waived. *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

In the context of Rule 60(d)(3), we "review denials of motions to vacate for abuse of discretion."[5] *Id.* at 443. Under this standard, we review questions of law de novo, *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009), and "[a] district court by definition abuses its discretion when it makes an error of law," *Koon v. United States*, 518 U.S. 81, 100 (1996) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)). We review the district court's findings of fact for clear error. *Hinkson*, 585 F.3d at 1261. A district judge's failure to sua sponte recuse himself or herself is reviewed for plain error where, as here, the issue was not raised in the district court.[6] *United States v. Spangle*, 626 F.3d 488, 495 (9th Cir. 2010).

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[5] The Defendants argue that *de novo* review is appropriate because, by asking the parties to brief only the legal sufficiency of the Defendants' allegations, the district court created a procedural posture akin to a Rule 12(b)(6) motion to dismiss. Yet a motion under Rule 60(d)(3) is grounded in the court's inherent power to set aside a judgment. Such an action "is based on equity," and we "review a district court's decision to deny equitable relief for an abuse of discretion." *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003). Abuse of discretion review is therefore appropriate here.

[6] The Defendants argue that they had no opportunity to raise this issue in the district court because the challenged tweet was not posted until after judgment was entered. But evidence submitted by the Defendants shows that the same Twitter account had posted several other news articles about the case while proceedings were still ongoing. The Defendants therefore had an opportunity to raise the issue below, and only plain error review is available on appeal.

II.

A.

Federal Rule of Civil Procedure 60 enumerates several possible grounds for setting aside a judgment. While Rule 60(c) sets a one-year time limit for a Rule 60(b)(3) motion based on "fraud ... , misrepresentation, or misconduct," Rule 60(d)(3) provides that "[t]his rule does not limit a court's power to ... set aside a judgment for fraud *on the court*" (emphasis added). Therefore, relief based on fraud on the court is not subject to the one-year time limit. *Appling*, 340 F.3d at 784.[7] Because its motion was made more than a year after the entry of judgment in this case, Sierra Pacific moved for relief under Rule 60(d)(3) and therefore must show fraud on the court, rather than the lower showing required for relief under Rule 60(b)(3).

A court's power to grant relief from judgment for fraud on the court stems from "a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry." *Hazel-Atlas*, 322 U.S. at 244 (citing *Marine Ins. Co. v. Hodgson*, 11 U.S. (7 Cranch) 332 (1813); *Marshall v. Holmes*, 141 U.S. 589 (1891)). However, the Supreme Court has noted that "[o]ut of deference to the deep-rooted policy in favor of the repose of judgments ..., courts of equity have been cautious in exercising [this] power." *Id.* (citing *United States v.*

[7] At the time of *Appling*, Rule 60(b) contained the language now in Rule 60(d)(3), preserving the court's right to set aside a judgment for fraud on the court.

Throckmorton, 98 U.S. 61 (1878)). Thus, relief from judgment for fraud on the court is "available only to prevent a grave miscarriage of justice." *United States v. Beggerly*, 524 U.S. 38, 47 (1998).

Our own cases, similarly, have emphasized that "not all fraud is fraud on the court." *In re Levander*, 180 F.3d 1114, 1119 (9th Cir. 1999). "In determining whether fraud constitutes fraud on the court, the relevant inquiry is not whether fraudulent conduct 'prejudiced the opposing party,' but whether it 'harmed the integrity of the judicial process.'" *Estate of Stonehill*, 660 F.3d at 444 (internal alterations omitted) (quoting *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989)). Fraud on the court must be an "intentional, material misrepresentation." *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1097 (9th Cir. 2007), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009). Thus, fraud on the court "must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131 (9th Cir. 1995) (quoting *Abatti v. Commissioner*, 859 F.2d 115, 118 (9th Cir. 1988)).

In addition, the relevant misrepresentations must go "to the central issue in the case," *Estate of Stonehill*, 660 F.3d at 452, and must "affect the outcome of the case," *id.* at 448. In other words, the newly discovered misrepresentations must "significantly change the picture already drawn by previously available evidence." *Id.* at 435. In that vein, "[m]ere nondisclosure of evidence is typically not enough to constitute fraud on the court, and 'perjury by a party

or witness, by itself, is not normally fraud on the court'" unless it is "so fundamental that it undermined the workings of the adversary process itself." *Id.* at 444-45 (quoting *In re Levander*, 180 F.3d at 1119). However, perjury may constitute fraud on the court if it "involves, or is suborned by, an officer of the court." 12 J.W. MOORE, MOORE'S FEDERAL PRACTICE § 60.21[4][c]; *see In re Intermagnetics Am., Inc.*, 926 F.2d 912, 917 (9th Cir. 1991). Despite Sierra Pacific's arguments to the contrary, our Court and the Supreme Court have consistently applied this standard for fraud on the court even in cases involving government attorneys, rather than creating some different standard for these cases. *Beggerly*, 524 U.S. at 47; *Pizzuto*, 783 F.3d at 1181; *Estate of Stonehill*, 660 F.3d at 449.

Finally, relief for fraud on the court is available only where the fraud was not known at the time of settlement or entry of judgment. *See, e.g.*, *Hazel-Atlas*, 322 U.S. at 244 (allowing relief for "after-discovered fraud); *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1243-45 (9th Cir. 2016) (analogizing to fraud on the court, where crucial information was concealed until after settlement and entry of judgment), *overruled on other grounds*, 137 S. Ct. 1178 (2017); *Pumphrey*, 62 F.3d at 1133 (finding fraud on the court where crucial information was concealed and came to light after entry of judgment); *In re Levander*, 180 F.3d at 1120 (same). This limitation arises because issues that are before the court or could potentially be brought before the court during the original proceedings "could and should be exposed at trial." *In re Levander*, 180 F.3d at 1120 (citing *Gleason v. Jandrucko*, 860 F.2d 556, 560 (2d Cir. 1988)); *see*

also id. at 1119-20 (explaining that there is no fraud on the court where "the plaintiff had the opportunity to challenge the alleged perjured testimony or non-disclosure because the issue was already before the court"). As the district court correctly explained, allowing parties to raise issues that should have been resolved at trial amounts to collateral attack and undermines "the deep rooted policy in favor of the repose of judgments." *Hazel-Atlas*, 322 U.S. at 244.

The decision in *Hazel-Atlas* does not undermine this principle, despite the Defendants' argument that the moving party in that case had some knowledge of the fraud prior to trial and settlement. First, as we have already noted, the Court's opinion in *Hazel-Atlas* specifically stated that relief is available for "after-discovered fraud." *Id.* And second, the majority opinion in *Hazel-Atlas* explained that Hazel-Atlas Glass Company had indeed attempted to uncover the suspected fraud before trial, but it had been thwarted by a witness who blatantly lied about the relevant issue. *Id.* at 242-43. After settlement and entry of judgment, it came to light that the witness had been contacted by Hartford- Empire's attorneys shortly before he lied to Hazel-Atlas's attorneys, and that Hartford-Empire had compensated the witness shortly thereafter with an $8,000 payment for his lie. *Id.* Thus, the key information in *Hazel-Atlas* was revealed only after entry of judgment, ultimately supporting the proposition that relief is available only for fraud discovered after judgment is entered.

Similarly, despite some earlier language suggesting otherwise, *see Pumphrey*, 62 F.3d at 1133, our decision in *Appling v. State Farm* clarified that

where the moving party "through due diligence could have discovered" the alleged perjury or non-disclosure, such fraud does "not disrupt the judicial process" and thus does not constitute fraud on the court. 340 F.3d at 780. Thus, a finding of fraud on the court is reserved for material, intentional misrepresentations that could not have been discovered earlier, even through due diligence.

B.

Under the standard described above, the district court properly concluded that Sierra Pacific cannot demonstrate fraud on the court regarding any of the alleged fraud it discovered before settlement. In addition to the fact that these allegations do not constitute "after-discovered fraud," *Hazel-Atlas*, 322 U.S. at 244, Sierra Pacific had explicitly stated its intention to raise the alleged fraud at trial, and the court's *in limine* ruling permitted it "to introduce evidence that there was an attempt to conceal information from the public or the defense." Thus, "the plaintiff had the opportunity to challenge the alleged perjured testimony or non-disclosure because the issue was already before the court," *In re Levander*, 180 F.3d at 1119-20, and these allegations cannot be grounds for subsequent relief after Sierra Pacific voluntarily settled instead of going to trial.[8]

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[8] *Hazel-Atlas* does not undermine this conclusion because, unlike in that case where the plaintiffs tried and failed to gain information about the fraud before trial, the Defendants here received numerous documents through discovery that allegedly demonstrated fraud, and they were prepared to present this evidence at trial.

The district court therefore did not abuse its discretion in finding that there was no fraud on the court related to the photographs, sketches, and investigator testimony about the white flag; the aerial video and erroneous expert report; the misconduct at the lookout tower; the government's interview with the Howell employee; the other fires allegedly started by Howell; or the lack of an arson investigation.

C.

Nor do the instances of alleged fraud discovered after settlement constitute actionable fraud on the court warranting Rule 60 relief. To begin with, the district court correctly noted that the express settlement terms appear to preclude any relief, even for newly discovered facts or evidence. In agreeing that the "Settlement Agreement ... shall remain in full force as a complete release of Unknown Claims notwithstanding the discovery or existence of additional or different claims or facts before or after the date of this Settlement Agreement," it appears that the Defendants bound themselves not to seek future relief, even for fraud on the court. Thus, the district court did not abuse its discretion by finding that relief is precluded on this ground.

Even if the terms of the settlement agreement did not bar relief, the district court properly concluded that relief is unwarranted because the allegations of after-discovered fraud fail to rise to the level of fraud on the court. The Defendants allege three instances of alleged fraud or misrepresentation that they did not discover until after settlement. They argue that each of these allegations demonstrates fraud on the court, and that the district court erred by failing to assume

the truth of the allegations, given its specific instructions that the parties brief only the legal sufficiency of the Defendants' claims. Yet, even assuming the truth of these allegations,[9] we conclude that they do not constitute fraud on the court.[10]

1

First, the Defendants have consistently alleged that Investigators White and Reynolds testified falsely about their investigation of the fire's origin, specifically regarding the white flag that allegedly marked the initial "concealed" point of origin. The only allegation of after-discovered fraud regarding this dispute is the Defendants' new allegation that the government attorneys actually suborned this perjury by instructing White and Reynolds to lie in their testimony.[11] During his deposition in the state case, Reynolds mentioned a January 2011 meeting in which the government attorneys spoke with the fire

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[9] Because we conclude that these allegations do not demonstrate fraud on the court even if taken as true, we need not decide whether the district court erred in failing to assume their truth.

[10] The Defendants also argue that the district court erred by requiring that they act with diligence in attempting to discover the alleged fraud before trial, and that the court made clearly erroneous findings of fact as to whether the Defendants had been diligent. Because none of the alleged instances of fraud rise to the level of fraud on the court regardless of the Defendants' diligence, we need not and do not reach this issue.

[11] As the Defendants conceded in the district court, they had received the photographs of the white flag and the earlier point of origin sketch during discovery, and the Defendants questioned White and Reynolds extensively about the white flag during their lengthy depositions.

investigators and told them that the issue of the white flag was likely to come up and that the attorneys "saw it as a nonissue." According to the Defendants, this language is tantamount to the attorneys telling the investigators to conceal any relevant information about the white flag.

Assuming the truth of the Defendants' allegation on this point,[12] Reynolds' testimony still does not establish that the investigators were instructed to lie. The attorneys' comment that they saw the white flag as a "nonissue" is merely an opinion about the relative importance of an element of the case; it is not an instruction to commit perjury. As the government accurately notes, it is not fraud on the court for a party's attorneys to have their own theory of the case and discuss it with their witnesses. Moreover, the Defendants knew about this meeting before settlement, as Reynolds had explained in his deposition in the *federal* case that the investigators had met with the attorneys and had discussed the insignificance of the white flag. The slightly different language used by Reynolds in his state deposition did not "significantly change the picture already drawn by previously available evidence," *Estate of Stonehill*, 660 F.3d at 435, nor does it demonstrate that any "grave miscarriage of justice" occurred, *Beggerly*, 524 U.S. at 47. Accordingly, the district court did not abuse its discretion by denying relief on this ground.

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[12] It was proper for the district court to consider the transcript of Reynolds's deposition that included the "nonissue" comment, which the Defendants filed with the district court in support of their Rule 60 motion.

The Defendants' second allegation of after-discovered fraud is that the government failed to disclose Edwin Bauer's accusation that Sierra Pacific's legal counsel had offered him a bribe to say that his son started the fire. According to the Defendants, this information constituted exculpatory evidence as to the Defendants because it suggests that Edwin Bauer was trying to point investigators away from his son, who may have actually started the fire, by claiming that his son was asked to falsely confess in exchange for a bribe. The Defendants argue that, by withholding this information, the government secured a "critical" *in limine* ruling limiting the evidence that the Defendants could present regarding its arson theory. The Defendants also contend that the district court failed to accept as true its allegation that this *in limine* ruling prejudiced the Defendants.

We uphold the district court's conclusion that relief was unwarranted on these grounds. To begin with, it was not error for the district court to look at the content of the earlier *in limine* rulings and conclude that the Defendants were not prejudiced by these rulings. In the analogous context of a motion to dismiss, a court can consider matters of public record even when assuming the truth of the allegations, *United States v. 14.02 Acres of Land More or Less in Fresno Cty.*, 547 F.3d 943, 955 (9th Cir. 2008), and the district court here was likewise permitted to consider the record of earlier proceedings even when assuming the truth of the Defendants' allegations. The court's oral discussion of the *in limine* ruling specifically explained that the Defendants would be permitted to

present evidence that Bauer was "near the scene, seen by witnesses, and there was no follow-up." The Defendants thus overstate the impact of the *in limine* ruling that was allegedly secured through the government's nondisclosure of the bribe allegation, as the Defendants were still allowed to present evidence relating to its arson theory. Moreover, the district court expressly stated that this ruling was subject to reconsideration during trial. In this context, it was not clearly erroneous for the district court to find that the Defendants were not prejudiced by the ruling.

Next, because the district court correctly concluded that *Brady* does not generally apply in civil proceedings, *see Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009); *Fox ex rel. Fox v. Elk Run Coal Co.*, 739 F.3d 131, 138-39 (4th Cir. 2014), the government did not have a specific duty to disclose the false bribe information, beyond its standard discovery obligations. Under the high standard for a Rule 60(d)(3) motion, a mere discovery violation or non-disclosure does not rise to the level of fraud on the court. *Appling*, 340 F.3d at 780. In addition, the Defendants could have obtained this information by interviewing Edwin Bauer on their own. *See* Fed. R. Civ. P. 26(b)(1) (allowing consideration of "the parties' relative access to relevant information" in determining discovery obligations).

Furthermore, despite the Defendants' confidence in the probative value of the false bribe accusation, the government's failure to disclose this information "do[es] not significantly change the story as presented to the district court" prior to settlement, given that the

Defendants already possessed other circumstantial evidence of arson. *Estate of Stonehill*, 660 F.3d at 452. For all of these reasons, the district court did not abuse its discretion by denying relief on this ground.

3

The Defendants' third allegation is that the government committed fraud on the court by misrepresenting the true nature of Cal Fire's WiFITER fund, which was later determined by the California State Auditor to be structured such that it was "open to possible misuse." The Defendants allege that, because the WiFITER fund was not subject to adequate oversight, the funds were used improperly to send Cal Fire investigators to luxury retreats and purchase expensive equipment. The Defendants concede that Cal Fire's Investigator White had no contingent financial interest in the outcome of the federal case currently before us, because none of the federal recovery was destined for the WiFITER fund, but they argue that White's contingent interest in the outcome of the *state* case tainted the entire fire investigation on which both cases relied.

Because our case law requires that a party show willful deception rather than simply reckless disregard for the truth, *e.g.*, *Napster*, 479 F.3d at 1097, White's contingent financial interest only rises to the level of fraud on the court if the government knew about White's interest and wilfully concealed it. Here, the United States' only affirmative representations about the nature of the WiFITER fund were that it was "a separate public trust fund to support investigator training and to purchase equipment for investigators" and that it was "a public program

established to train and equip fire investigators." The Defendants admitted in the district court that they had no evidence that the United States knew of the improper nature of the WiFITER fund; the Defendants alleged only that the government had a duty to fully investigate any agency it was working with and root out any improper motives.[13] The Defendants now argue that Cal Fire's knowledge of the fund's impropriety should be imputed to the United States due to the two entities' joint prosecution agreement, but the Defendants waived this argument by failing to raise it below. *Padgett*, 587 F.3d at 985 n.2.

Similarly, the United States could not have had a duty to disclose documents that it did not possess relating to the WiFITER fund. The United States represented to the district court that it did not know about or have access to any documents demonstrating the true nature of the fund, and the district court ruled that the Defendants would have to subpoena any such documents from Cal Fire. The Defendants have not challenged the United States' representation that it did not possess these documents. The Defendants have therefore failed to show that the United States knew about the fund's improprieties and made "intentional, material misrepresentation[s]" on this point. *Napster*, 479 F.3d at 1097. Accordingly, the district court did not abuse its discretion by denying relief on this ground.

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[13] Indeed, a 2009 internal audit report had failed to reveal any problems with the WiFITER fund.

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Finally, the Defendants argue that the district court failed to consider the totality of the United States' conduct, which the Defendants label a "trail of fraud." *See Hazel-Atlas*, 322 U.S. at 250. Contrary to the district court's assertion that "the whole can be no greater than the sum of its parts," a long trail of small misrepresentations—none of which constitutes fraud on the court in isolation—could theoretically paint a picture of intentional, material deception when viewed together. Nonetheless, the instances of possible misinformation in this case do not constitute fraud on the court within the meaning of Rule 60, because almost all of the evidence of alleged fraud was received by the Defendants through discovery and thus was known to them when they made the decision to settle. The three instances of alleged fraud that came to light after settlement, even when viewed together, do not "significantly change the picture already drawn by previously available evidence." *Stonehill*, 660 F.3d at 435. Therefore, the district court did not abuse its discretion by denying relief based on the totality of the circumstances.

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In sum, none of the allegations of after-discovered fraud, either individually or as a whole, establish that the government committed fraud on the court within the meaning of Rule 60. Accordingly, the district court did not err in denying the Defendants' motion for relief for judgment under Rule 60(d)(3).

III.

The Defendants argue that the district court judge assigned to the Rule 60 motion should be

recused because of an appearance of bias created by activity on a Twitter account that does not bear his name, but is allegedly controlled by him. As explained above, the Defendants could have raised this issue in the district court following either of the disputed Twitter account's pre-judgment tweets. Because they failed to do so, plain error review applies. *Spangle*, 626 F.3d 495. The Defendants also filed a motion for judicial notice and a motion for leave to supplement their reply brief with further information regarding the contents of this Twitter account and other related documents. We deny both motions as moot because, under the plain error standard, the allegations do not warrant retroactive recusal even if the judge is the owner of the account.

The Code of Conduct for United States Judges "prescribes ethical norms for federal judges as a means to preserve the actual and apparent integrity of the federal judiciary." *United States v. Microsoft Corp.*, 253 F.3d 34, 111 (D.C. Cir. 2001). To this end, Canon 2 of the Code instructs judges to "avoid impropriety and the appearance of impropriety in all activities." Canon 3A(4) prohibits *ex parte* communications or any "communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers," and Canon 3A(6) provides that "[a] judge should not make public comment on the merits of a matter pending or impending in any court."[14] Canon 3C instructs that a

[14] For purposes of this rule, pending matters include those that have been resolved by the court or judge in question but remain pending on appeal. Code of Conduct for United States Judges cmt. 3A(6).

judge must disqualify himself or herself in a proceeding where his or her impartiality could reasonably be questioned, mirroring the provision of 28 U.S.C. § 455(a) which mandates that a United States judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The test for recusal under these provisions is "an objective test based on public perception." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008).

The Defendants argue that the judge's alleged "following" of the U.S. Attorney's office on Twitter created an appearance of bias, in violation of Canon 2, and constituted an *ex parte* communication, in violation of Canon 3A(4). They also argue that the judge's alleged tweet on the evening of his ruling created a further appearance of bias and constituted an impermissible public comment on the substance of a pending case (given the impending appeal), violating Canon 3A(6). Because of these violations, the Defendants argue that the judge was required to recuse himself under Canon 3C and 28 U.S.C. § 455(a). Even assuming that the judge owned or controlled the disputed Twitter account, these arguments fail.

The claim that an unknown account, not identified with a judge or the judiciary, followed a public Twitter account maintained by the U.S. Attorney does not provide a basis for recusal here. As we know, Twitter is a news and social networking service where users post comments, restricted to 140 characters, in "tweets." A Twitter account holder may "follow" other Twitter account holders, meaning that

the "following" user will receive all of the tweets generated by the other user. Some Twitter users restrict their posts to a private audience. But news organizations, celebrities, and even high-up government officials use Twitter as an official means of communication, with the message intended for wide audiences. Thus, without more, the fact that an account holder "follows" another Twitter user does not evidence a personal relationship and certainly not one that, without more, would require recusal.[15] Thus, assuming the account belonged to the district judge, the judge did not plainly err in not recusing himself because he "followed" the U.S. Attorney's office on Twitter.[16]

For similar reasons, the fact that the Twitter account "followed" the U.S. Attorney does not mean

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[15] Of course, there are circumstances in which use of social media may create concern. For example, the Judicial Conference of the United States' Committee on Codes of Conduct has issued an opinion noting that "identifying oneself as a 'fan' of an organization" on social media may create the appearance of impropriety. Comm. on Codes of Conduct, Advisory Opinion 112. The ABA's formal opinion on social media similarly notes that a "judge must be mindful that [an electronic social media] connection *may* give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal." ABA Formal Opinion 462 (Feb. 21, 2013) (emphasis added). Nothing suggests that following a Twitter account under the circumstances here rises to the level of creating an appearance of impropriety.

[16] As explained above, the Defendants could have raised this issue in the district court following either of the pre-judgment tweets. Doing so would have allowed a full development of the record. However, because the Defendants' failed do so, plain error review applies. *Spangle*, 626 F.3d 495.

that the public tweets published by the U.S. Attorney constituted improper *ex parte* communications. The relevant opinion from the Committee on Codes of Conduct explains that concerns of improper communication arise in the context of "the exchange of frequent messages, 'wall posts,' or 'tweets' between a judge or judicial employee and a 'friend' on a social network who is also counsel in a case pending before the court." Comm. on Codes of Conduct Advisory Opinion 112. The situation in the current case, however, does not present the type of circumstance that the Committee warned against in its opinion. Here, none of the challenged tweets were specifically directed from the U.S. Attorney to the judge, nor have the Defendants alleged that there were any personally directed tweets. Thus, the public tweets did not constitute communication from the U.S. Attorney to the judge. Rather, the relevant tweets from the U.S. Attorney's account constituted news items released to the general public, intended for wide distribution to an anonymous public audience. Under the circumstances, the social media activity alleged to have occurred in this case did not constitute prohibited *ex parte* communication.

Finally, the Defendants also allege that the judge's action in tweeting the link to an allegedly erroneous news article requires recusal. Assuming the challenged tweet was from the judge's account, it still does not warrant retroactive recusal in this case. The tweet consisted only of the title and link to a publicly available news article about the case in a local newspaper, without any further commentary. Under the standard of review applicable at this stage, the district judge did not plainly err in not recusing

himself because he tweeted the link to this news article.

The Defendants rely heavily on *United States v. Microsoft Corp.*, 253 F.3d at 107, but in fact the conduct in *Microsoft* was far more problematic: the judge in that case had given numerous secret interviews to the press, in which he spoke extensively about his views on the merits of the case. *Id.* at 107-11. Even in *In re Boston's Children First*, which the Defendants cite for the proposition that a violation of Canon 3A(c) requires recusal for even the *appearance* of partiality, the judge had expressed her own views about the case in a published letter to the editor and an interview with a reporter. 244 F.3d 164, 166 (1st Cir. 2001). Here, in contrast, the tweets allegedly posted by the judge expressed no opinion on the case or on the linked news articles. Although "the analysis of a particular section 455(a) claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue," *Holland*, 519 F.3d at 913, these cases nonetheless help put the circumstances of the current case in context.

Under the facts and circumstances present here, the single challenged tweet does not amount to "public comment on the merits of a [pending] matter" in violation of Canon 3A(6). Even if the judge's choice of the particular article he posted and its allegedly inaccurate title could be construed as public commentary, as the Defendants argue, not every violation of the Code of Conduct creates an appearance of bias requiring recusal under § 455(a). *Microsoft*, 253

F.3d at 114-15. Here, the three relevant tweets—containing only links to news articles, and coming from an account not publicly identifying a member of the judiciary—do not create an appearance of bias such that recusal is warranted under § 455(a).

For these reasons, under the plain error standard we conclude that there was no appearance of bias created by the instances of alleged conduct in this case, so retroactive recusal is not warranted. Vacatur of the district court's order is therefore also unwarranted. Nonetheless, this case is a cautionary tale about the possible pitfalls of judges engaging in social media activity relating to pending cases, and we reiterate the importance of maintaining the appearance of propriety both on and off the bench.

IV.

In deference to the longstanding policy in favor of the repose of judgments, courts have consistently required a very high showing for relief for judgment on the basis of fraud on the court. After voluntarily settling this case and asking the district court to enter judgment based on that settlement, the Defendants' allegations of newly discovered fraud fail to meet this high standard. We therefore affirm the district court's denial of the Defendants' motion for relief from judgment under Rule 60(d)(3), and we decline to order vacatur or direct retroactive recusal.[17]

AFFIRMED.

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[17] In making this decision, we do not express any opinion as to the veracity of either party's factual assertions, attempt to decide any of the underlying issues, or express any opinion as to the troubling issues discussed in the state court opinion. Nor do we make any findings as to the alleged use of the judge's Twitter account, which was an issue undeveloped in the district court. Those questions must be resolved, if at all, in another forum.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15799

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
SIERRA PACIFIC INDUSTRIES, INC.; *et al.*,
Defendants-Appellants.

D.C. No. 2:09-cv-02445-WBS-AC

Before: Sidney R. Thomas, Chief Judge, Mary H. Murguia, Circuit Judge, and Jon P. McCalla,[*] District Judge.

Filed October 17, 2017

ORDER

The panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has

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[*] The Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee, sitting by designation.

requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are

DENIED.

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CIV. NO. 2:09-02445 WBS AC

UNITED STATES OF AMERICA,
Plaintiff,
v.
SIERRA PACIFIC INDUSTRIES, *et al.*,
Defendants.

Filed October 17, 2017

MEMORANDUM AND ORDER

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."

I. Brief Factual and Procedural Background

On September 3, 2007, a fire ignited on private property near the Plumas National Forest. The fire, which became known as the Moonlight Fire, burned for over two weeks and ultimately spread to 46,000 acres of the Plumas and Lassen National Forests. The day after the fire started, California Department of

Forestry and Fire Protection ("Cal Fire") investigator Joshua White and United States Forest Service ("USFS") investigator David Reynolds sought to determine the cause of the fire. As a result of the joint investigation, Cal Fire and the USFS ultimately issued the "Origin and Cause Investigation Report, Moonlight Fire" ("Joint Report"). The Joint Report concluded that the Moonlight Fire was caused by a rock striking the grouser or front blade of a bulldozer operated by an employee of defendant Howell's Forest Harvesting Company. After winning a bid to harvest timber on the private property, Sierra Pacific Industries had hired that company to conduct logging operations in the area.

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

To say that this case was litigated aggressively and exhaustively by all parties would be an understatement. When the court entered judgment almost two years ago, the docket had almost six hundred entries, which included contentious discovery

[1] All references to the "government" in this Order refer to the United States government and, where appropriate, the Assistant United States Attorneys who represented the government in this case.

motions and voluminous dispositive motions. Almost three years after the federal action commenced, it was set to proceed to jury trial on July 9, 2012 before Judge Mueller and was expected to last no more than thirty court days. Three days before trial, the parties voluntarily participated in a settlement conference and reached a settlement agreement.

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

More than two years later, on October 9, 2014, defendants filed the pending motion to set aside that judgment. After Judge Mueller recused herself, the case was reassigned to the undersigned judge. After conferring with the parties, the court required limited briefing addressing the threshold issue of whether the alleged conduct giving rise to defendants' motion constitutes "fraud on the court." The court now addresses that limited issue.

II. Legal Standards

A. Federal Rule of Civil Procedure 60

To preserve the finality of judgments, the Federal Rules of Civil Procedure limit a party's ability to seek

relief from a final judgment. Rule 60(b) enumerates six grounds under which a court may relieve a party from a final judgment:

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

Fed. R. Civ. P. 60(b). A motion seeking relief from a final 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 it would rely on one or more of the first three grounds for relief but was not filed within a year of the entry of final judgment.

Despite the limitations in Rule 60(b), "[c]ourts have inherent equity power to vacate judgments obtained by fraud." *United States v. Estate of Stonehill*, 660 F.3d 415, 443 (9th Cir. 2011) (citing

Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991)). Rule 60(d)(3) preserves this inherent power and recognizes that Rule 60 does not "limit a court's power to ... set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3); *accord Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003) ("Federal Rule of Civil Procedure 60(b) preserves the district court's right to hear an independent action to set aside a judgment for fraud on the court."); *Estate of Stonehill*, 660 F.3d at 443 ("Rule 60(b), which governs relief from a judgment or order, provides no time limit on courts' power to set aside judgments based on a finding of fraud on the court.")[2] Because defendants failed to file a timely Rule 60(b) motion, they are forced to argue that the judgment in this case should be set aside for fraud on the court, and the court must assess defendants' allegations under this narrowly defined term.

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[2] Prior to the amendments to the Federal Rules of Civil Procedure in 2007, the savings clause for fraud on the court was contained in Rule 60(b), thus courts referred to Rule 60(b) as preserving a court's inherent power to set aside a final judgment for fraud on the court. As part of the stylistic amendments in 2007, the savings clause language was moved from subsection (b) to subsection (d)(3). *Compare* Fed. R. Civ. P. 60(b) (2006) ("This rule does not limit the power of a court to entertain an 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.").

B. Definition of "Fraud on the Court"

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

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

Fraud on the court "'embrace[s] only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.'" *Appling*, 340

F.3d at 780 (quoting *In re Levander*, 180 F.3d at 119) (alteration in original). A finding of fraud on the court "must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131 (9th Cir. 1995) (internal quotations marks omitted); *see also Appling*, 340 F.3d at 780 ("Fraud on the court requires a 'grave miscarriage of justice,' and a fraud that is aimed at the court." (quoting *Beggerly*, 524 U.S. at 47)).

"In determining whether fraud constitutes fraud on the court, the relevant inquiry is not whether fraudulent conduct 'prejudiced the opposing party,' but whether it "'harm[ed]" the integrity of the judicial process.'" *Estate of Stonehill*, 660 F.3d at 444 (quoting *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989)); *see also Estate of Stonehill*, 660 F.3d at 444 ("Fraud on the court involves 'far more than an injury to a single litigant....'" (quoting *Hazel-Atlas Glass Co.*, 322 U.S. at 246)). Although "one of the concerns underlying the 'fraud on the court' exception is that such fraud prevents the opposing party from fully and fairly presenting his case," this showing alone is not sufficient. *Abatti*, 859 F.2d at 119; *see also Abatti*, 859 F.2d at 118 ("[W]e have said that it *may* occur when the acts of a party prevent his adversary from fully and fairly presenting his case or defense.... Fraud on the court *must* involve 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" (quoting *Toscano v. Comm'r of the I.R.S.*, 441 F.2d 930, 934 (9th Cir. 1971) (internal citation omitted) (emphasis added)). At the same time, a showing of prejudice to the party seeking relief is not required. *Dixon*, 316 F.3d at 1046.

"Non-disclosure, or perjury by a party or witness, does not, by itself, amount to fraud on the court." *Appling*, 340 F.3d at 780; *accord In re Levander*, 180 F.3d at 1119 ("Generally, nondisclosure by itself does not constitute fraud on the court.... Similarly, perjury by a party or witness, by itself, is not normally fraud on the court."); *see also Hazel-Atlas Glass Co.*, 322 U.S. at 245 ("This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury.").

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

Non-disclosure by an officer of the court or perjury by or suborned by an officer of the court may amount to fraud on the court only if it was "so fundamental that it undermined the workings of the adversary process itself." *Estate of Stonehill*, 660 F.3d at 445; *see also* 11 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus & Adam N. Steinman, *Federal Practice and Procedure* § 2870 (3d ed. 2014) ("[T]here is a powerful distinction between perjury to which an attorney is a party and that with which no attorney is involved .... [W]hether perjury constitutes a fraud on the court should depend on whether an

attorney or other officer of the court was a party to it."). Non-disclosure by an officer of the court, however, does not rise to this level if it had a "limited effect on the district court's decision" and the withheld information would not have "significantly changed the information available to the district court." *Estate of Stonehill*, 660 F.3d at 446.

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

C. Inapplicability of *Brady v. Maryland*

Relying on *Brady v. Maryland*, 373 U.S. 83 (1963), defendants argue that the government is held to a higher standard than non-government parties not just in criminal cases but in civil cases as well.[3] In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective

[3] Some of defendants' arguments come within *Giglio v. 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 consideration of the government's heightened disclosure obligations in a criminal case under *Giglio*.

of the good faith or bad faith of the prosecution." 373 U.S. at 87. Its holding relied on the rights of a criminal defendant under the Due Process Clause of the Fourteenth Amendment and the "avoidance of an unfair trial to the accused." *Id.*; *see also Lisenba v. California*, 314 U.S. 219, 236 (1941) ("As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.").

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

[4] The Supreme Court has not yet indicated whether *Brady* derives from a criminal defendant's procedural or substantive due process rights. *See Castellano v. Fragozo*, 352 F.3d 939, 968 (5th Cir. 2003) (discussing the differing views expressed in *Albright v. Oliver*, 510 U.S. 266 (1994)); *see also* Martin A. Schwartz, *The Supreme Court's Unfortunate Narrowing of the 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 derive from the procedural or substantive components of the Due Process Clause. Here, defendants rely exclusively on the protections of procedural due process in arguing that *Brady* applies to this civil case. (See Defs.' Reply at 56:1-17 (applying

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

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the procedural due process balancing test from *Mathews*, 424 U.S. 319).)

[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

The differences between discovery in criminal and civil cases also underscore the need for *Brady* only in criminal cases. In a criminal case, a defendant is "entitled to rather limited discovery, with no general

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> can be determined which person's negligence caused such fire, such person is guilty of a misdemeanor.

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

Section 261.5(c) prohibits "[c]ausing timber, trees, slash, brush or grass to burn except as authorized by permit." 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]ausing 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.)

right to obtain the statements of the Government's witnesses before they have testified." *Degen v. United States*, 517 U.S. 820, 825 (1996). A defendant in a civil case, on the other hand, is "entitled as a general matter to discovery of any information sought if it appears 'reasonably calculated to lead to the discovery of admissible evidence.'" *Id.* at 825-26. The Supreme Court has explained that "[t]he Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000). The expansive right to discovery in civil cases and the Federal Rules of Civil Procedure thus provided defendants with constitutionally adequate process to mount an effective and meaningful defense to this civil action.

Defendants have not cited and this court is not aware of a single case from the Supreme Court or Ninth Circuit applying *Brady* to a civil case.[6] In fact, all of the Supreme Court and Ninth Circuit cases defendants rely on for this proposition are cases assessing the conduct of prosecutors[7] in criminal

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

[7] In what cannot have been an inadvertent choice, defendants exclusively refer to the government attorneys in this case as "prosecutors." Referring to the plaintiff's attorneys in 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

cases. (*See* Defs.' Revised Supplemental Briefing at 3, 19-20 (Docket No. 625-1) ("Defs.' Br.") (relying on *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (criminal case addressing *Brady*); *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (habeas petition based on *Brady* violation); *United States v. Young*, 470 U.S. 1, 25-26 (1985) (Brennan, J., concurring) (criminal case addressing prosecutorial misconduct); *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (discussing prosecutorial immunity in suits under 42 U.S.C. § 1983); *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, *in a criminal prosecution* is not that it shall win a case, but that justice shall be done." (emphasis added)); *Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1087 (9th Cir. 2009) (42 U.S.C. § 1983 claim based on *Brady* violations in underlying criminal case); *Morris v. Ylst*, 447 F.3d 735, 744 (9th Cir. 2006) (criminal case addressing *Brady* and prosecutor's duty to investigate suspected perjury); U*nited States v. Chu*, 5 F.3d 1244, 1249 (9th Cir. 1993) (criminal case addressing prosecutorial misconduct in questioning of witness); *Benn v. Lambert*, 283 F.3d 1040, 1062 (9th Cir. 2002) (habeas petition based on *Brady* violation)).)

Outside of the Ninth Circuit, "courts have only in rare instances found *Brady* applicable in civil

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in this case as prosecutors does not convert them into criminal prosecutors within the meaning of *Brady*.

proceedings, mainly in those unusual cases where the potential consequences 'equal or exceed those of most criminal convictions.'" *Fox ex rel. Fox v. Elk Run Coal Co., Inc.*, 739 F.3d 131, 138-39 (4th Cir. 2014) (quoting *Demjanjuk v. Petrovsky*, 10 F.3d 338, 354 (6th Cir. 1993)); *see also Brodie v. Dep't of Health & Human Servs.*, 951 F. Supp. 2d 108, 118 (D.D.C. 2013) ("*Brady* does not apply in civil cases except in rare situations, such as when a person's liberty is at stake .... With only three exceptions, ... courts uniformly have declined to apply *Brady* in civil cases.").

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

The Sixth Circuit recognized that even though *Brady* did not apply in civil cases, "it should be extended to cover denaturalization and extradition cases where the government seeks denaturalization or extradition *based on proof of alleged criminal activities* of the party proceeded against." *Id.* at 353 (emphasis added); *see also id*. (indicating that *Brady* would not apply if "the government had sought to denaturalize Demjanjuk only on the basis of his

misrepresentations at the time he sought admission to the United States and subsequently when he applied for citizenship").

In extending *Brady* to the proceedings in *Demjanjuk*, the Sixth Circuit explained that the "consequences of denaturalization and extradition equal or exceed those of most criminal convictions," "that Demjanjuk was extradited for trial on a charge that carried the death penalty," that the government attorneys were from the Office of Special Investigations ("OSI"), which is a unit within the Criminal Division of the Department of Justice, that the government attorneys were frequently referred to as prosecutors during the proceedings, and that the Director of OSI believed *Brady* applied to the proceedings. *Id.* at 353-54. Unlike in *Demjanjuk*, this case was brought by the Civil Division of the United States Attorney's Office, the government did not seek to prove that defendants engaged in serious criminal conduct potentially subject to capital punishment, and a judgment in favor of the government would not have subjected defendants to consequences akin to those following a criminal conviction.

Because *Brady* is understandably inapplicable to this civil case, defendants' reliance on criminal cases discussing a prosecutor's heightened duties in light of *Brady* and other distinctly criminal rights is misguided. Lawyers representing the United States, like lawyers representing any party, must of course comport with the applicable rules governing attorney conduct. As defendants appear to concede, those ethical standards, or any self-imposed standard by the executive branch, do not affect the showing necessary

to prove fraud on the court, and the court should not, as defendants argue, assess the conduct of the government through the lens of any heightened obligation.

The Supreme Court and Ninth Circuit have repeatedly analyzed claims of fraud on the court by government attorneys without suggesting that their conduct is to be evaluated in light of any heightened obligations. In *Beggerly*, the government had brought a quiet title action. 524 U.S. at 40. Defendants sought proof of their title to the land during discovery and, after searching public land records, the government informed defendants that it had not found any evidence showing that the land in dispute had been granted to a private landowner. *Id*. at 40-41. After judgment was entered pursuant to a settlement the parties reached on the eve of trial, defendants discovered a land grant in the National Archives that supported their claim. *Id*. at 41. Defendants sought to vacate the judgment for fraud on the court because "the United States failed to 'thoroughly search its records and make full disclosure to the Court'" regarding the land grant. *Id*. at 47. Without suggesting that a heightened standard governed the government's conduct during discovery or litigation, the Supreme Court held that defendants were not entitled to relief from the judgment. The Court concluded that "it surely would work no 'grave miscarriage of justice,' and perhaps no miscarriage of justice at all, to allow the judgment to stand." *Id*.

In *Appling*, the Ninth Circuit discussed *Beggerly* without mentioning that the alleged misconduct was committed by the government and referred to the

government only as the prevailing party. *See Appling*, 340 F.3d at 780 (describing *Beggerly* as "holding that allegations that the prevailing parting [sic] failed during discovery in the underlying case to 'thoroughly search its records and make full disclosure to the Court' were not fraud on the court").

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

The court therefore finds that *Brady* is inapplicable to this civil case and that the conduct of

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[8] In their brief, defendants mis-cite *Estate of Stonehill* as mentioning a "higher standard of behavior" for government 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.

the government is to be assessed under the same standards as a non-government party when analyzing whether that conduct amounts to fraud on the court.

III. Analysis

Initially, it does not appear that any of the alleged acts of fraud tainted the court's decision to enter the stipulated judgment. The government argues quite persuasively that none of those acts therefore may form the basis for setting aside the settlement agreement and stipulated judgment. The argument certainly has logical appeal and finds support in a plethora of lower court decisions.[9] The Supreme Court,

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[9] *See Superior Seafoods, Inc. v. Tyson Foods, Inc.*, 620 F.3d 873, 880 (8th Cir. 2010) (affirming the denial of relief for fraud on the court when "[t]he court entered its consent judgment based on the written document provided by the parties after extensive negotiation" and explaining that "the court was not required to look behind or interpret that written document to ensure that the meeting of minds reflected therein was not, in fact, against the wishes of Mr. Kemp and his attorney"); *Pfotzer v. Amercoat Corp.*, 548 F.2d 51, 52 (2d Cir. 1977) (affirming denial of relief for fraud on the court and noting that "'it sufficed for the court to know the parties had decided to settle, without inquiring why'" (quoting *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 278 F.2d 798, 801 (2d Cir. 1960))); *Roe v. White*, No. Civ. 03-04035 CRB, 2009 WL 4899211, at *3 (N.D. Cal. Dec. 11, 2009) ("The alleged fraud 'did not improperly influence the court' because the judgment was based on the parties' voluntary settlement and not an adjudication on the merits .... The purported falsity of Plaintiffs' allegations is irrelevant to the settlement agreement, and to the resulting judgment. Accordingly, any fraud in no way affected the proper functioning of the judicial system."); *In re Leisure Corp.*, No. Civ. 03-03012 RMW, 2007 WL 607696, at *7 (N.D. Cal. Feb. 23, 2007) (explaining that an alleged lack of disclosure did not amount to fraud on the court because it "was not material to the bankruptcy court's assessment of the Settlement Agreement"); *Petersville Sleigh Ltd. v. Schmidt*, 124

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

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 any affidavits or testimony from the Plaintiffs or Mr. Ely. The Court did not look behind the parties' stipulation."); *In re NWFX, Inc.*, 384 B.R. 214, 220 (Bankr. W.D. Ark. 2008) ("To prove fraud on the court, the movant must establish that the officer of the court's misrepresentation or nondisclosure was *material* to 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.").

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

With the exception of any allegations subsequently addressed in this Order, defendants concede they knew of the following alleged instances of fraud on the court prior to settling the federal action: (1) that the government advanced an allegedly fraudulent origin and cause investigation and allegedly allowed investigators to testify falsely about their work, (Defs.' Br. at 58:2-9); (2) that the government allegedly misrepresented J.W. Bush's admission that a bulldozer rock strike caused the Moonlight Fire, (*id.* at 63:26-28); (3) that the government proffered allegedly false testimony in opposition to defendants' motion for summary judgment, (*id.* at 69:3-4); (4) that the government failed to take remedial action after learning that the air attack video allegedly undermined its origin and cause theory, (*id.* at 74:3-4); (5) that the government created an allegedly false diagram, (*id.* at 77:8-9); (6) that the government failed to correct an allegedly false expert report, (*id.* at 79:20-80:11); (7) that the government allegedly misrepresented evidence regarding other wildland fires, (*id.* at 88:5-6); and (8) that the government allegedly covered up misconduct at the Red Rock Lookout Tower, (*id.* at 104:9-11).

Despite knowing of and having the opportunity to persuade the jury that the government engaged in the aforementioned alleged misconduct, defendants chose to settle the case and forgo the jury trial. Relying exclusively on *Hazel- Atlas Glass Co.*, defendants now argue that the calculated decision to settle the case

with full knowledge of the alleged fraud does not bar their ability to seek relief for fraud on the court.

In *Hazel-Atlas Glass Co.*, however, the Supreme Court indicated that it was addressing relief from a judgment gained by fraud on the court because of "after-discovered fraud." *See Hazel-Atlas Glass Co.*, 322 U.S. at 244 ("From the beginning there has existed along side the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry."); *Hazel-Atlas Glass Co.*, 322 U.S. at 245 ("This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury."); *accord O.F. Nelson & Co. v. United States*, 169 F.2d 833, 835 (9th Cir. 1948) ("Nor is it a case of after discovered fraud, where an appellate court, after the expiration of the term, has an equitable right, in a proceeding in the nature of a bill of review, to set aside its judgment on proof of fraud in its procurement as in ... *Hazel-Atlas Glass Co.*") (internal citation omitted); *Demjanjuk*, 10 F.3d at 356 ("The Supreme Court has recognized a court's inherent power to grant relief, for 'after-discovered fraud,' from an earlier judgment 'regardless of the term of [its] entry.'" (quoting *Hazel-Atlas Glass Co.*, 322 U.S. at 244)).

While the Court in *Hazel-Atlas Glass Co.* contemplated relief only for "after-discovered fraud," it recognized that Hazel-Atlas Glass Co. ("Hazel") had "received information" about the fraud prior to entry of judgment and, when the significance of the suspected fraud became clear, had "hired

investigators for the purpose of verifying the hearsay by admissible evidence." 322 U.S. at 241-42. Hazel was unable to confirm the fraud because the witness who could have revealed it lied to Hazel's investigators at the behest of defendants. *Id*. at 242. In rejecting the appellate court's finding that Hazel was not entitled to relief because it "had not exercised proper diligence in uncovering the fraud," the Court concluded, "We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to *uncover* the fraud." *Id*. at 246 (emphasis added). The Court went on to explain that, "even if Hazel did not exercise the highest degree of diligence [in uncovering the fraud,] Hartford's fraud cannot be condoned for that reason alone." *Id*.

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

Justice Roberts' dissenting opinion underscores the factual assumptions the majority relied on because his primary disagreement with the majority was that an evidentiary hearing was necessary to determine whether Hazel in fact knew of the fraud before entry of judgment. In his dissent, Justice Roberts belabors facts that are entirely absent from the majority

opinion and from which he believes a trier of fact could find that Hazel knew of the fraud prior to entry of judgment. *See id.* (Roberts, J., dissenting). He concludes,

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

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

In sum, all of the justices in Hazel-Atlas Glass Co. agreed that Hazel would have been barred from seeking relief if it knew of the fraud prior to settlement and entry of judgment. They disagreed only as to whether the limited evidence before the Court was sufficient to find—as the majority did—that Hazel had suspicions, but had not yet uncovered the fraud and could therefore seek relief based on "after-discovered fraud."

At the opposite end of the spectrum, defendants here concede they knew of the eight instances of alleged fraud prior to reaching a settlement and the stipulated entry of judgment pursuant to that settlement. In fact, at the time they settled the case, defendants possessed and understood the purported significance of the very documents and testimony they now rely on in support of their motion before the court. According to defendants, these documents prove the alleged fraud and, unlike in *Hazel-Atlas Glass Co.*, would have presumably been admissible at trial. *See id.* at 241-43. Other than *Hazel-Atlas Glass Co.*, which does not support defendants' position, defendants

have not cited and this court is not aware of a single decision in which a court set aside a final judgment because of fraud on the court when the party seeking relief knew of and had the evidence to prove the fraud prior to entry of judgment.

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

The significance of defendants' decision to settle with the government cannot be overstated. A settlement, by its very nature, is a calculated assessment that the benefit of settling outweighs the potential exposure, risks, and expense of litigation. Here, the parties acknowledged these competing considerations in their settlement agreement: "This settlement is entered into to compromise disputed claims and avoid the delay, uncertainty, inconvenience, and expense of further litigation." (Settlement Agreement & Stipulation ¶ 12.) In any lawsuit, it is not uncommon for the parties to disagree not only on the ultimate issues in the case, but also about whether witnesses are telling the truth or the opposing party complied with its discovery obligations. Any settlement agreement would become just a meaningless formality if a settling party could

set aside that agreement at any later time based upon alleged fraud the party knew of when entering into the agreement.

In explaining why perjury by a witness and non-disclosure alone generally cannot amount to fraud on the court, the Ninth Circuit has also emphasized that such fraud "could and should be exposed at trial." *In re Levander*, 180 F.3d at 1120; *accord George P. Reintjes Co., Inc. v. Riley Stoker Corp.*, 71 F.3d 44, 49 (1st Cir. 1995) ("The possibility of perjury, even concerted, is a common hazard of the adversary process with which litigants are equipped to deal through discovery and cross-examination .... Were mere perjury sufficient to override the considerable value of finality after the statutory time period for motions on account of fraud has expired, it would upend the Rule's careful balance." (internal citation omitted)); *Great Coastal Exp., Inc. v. Int'l Bhd. of Teamsters, Chauffeurs*, 675 F.2d 1349, 1357 (4th Cir. 1982) ("Perjury and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out as early as possible. In addition, the legal system contains other sanctions against perjury.").

For the eight allegations of fraud that defendants knew of at the time of settlement, there can be no question that they had the opportunity to expose the alleged fraud at trial. During depositions, defendants' counsel repeatedly cross-examined witnesses on the very issues defendants now claim constitute fraud on the court. (*See, e.g.*, Defs.' Br. at 45:3-15, 52:9-12, 52:20-53:17, 61:23-28, 62:24-28, 67:20-23, 78:20-80:7, 83:18-20, 84:3-11, 103:3-7.) In their trial brief,

defendants expressed their intent to expose the fraud at trial and had every opportunity to do so. (*See, e.g.*, Defs.' Trial Br. at 1:11-13 (Docket No. 563) ("But, as the facts of this case show, their investigation was more than just unscientific and biased. When the investigators realized that their initial assumptions were flawed, they resorted to outright deception."); July 2, 2012 Final Pretrial Order at l7:21-22 (Docket No. 573) (denying the government's motion in limine in part and allowing defendants "to introduce evidence that there was an attempt to conceal information from the public or the defense").)

To the extent defendants argue that any tentative in limine ruling would have limited their ability to prove the alleged fraud, their argument must fail. Defendants had the opportunity to challenge any in limine ruling during trial and on appeal. Instead, defendants elected to forgo the normal procedures of litigating a dispute. Allowing defendants to knowingly bypass an appeal and seek relief now would erroneously allow "fraud on the court" to "become an open sesame to collateral attacks." *Oxxford Clothes XX, Inc. v. Expeditors Intern. of Wash., Inc.*, 127 F.3d 574, 578 (7th Cir. 1997); *see also Oxxford Clothes XX*, Inc., 127 F.3d at 578 ("A lie uttered in court is not a fraud on the liar's opponent if the opponent knows it's a lie yet fails to point this out to the court. If the court through irremediable obtuseness refuses to disregard the lie, the party has—to repeat what is becoming the refrain of this opinion—a remedy by way of appeal. Otherwise 'fraud on the court' would become an open sesame to collateral attacks, unlimited as to the time within which they can be made by virtue of the express provision in Rule 60(b) on this matter, on civil

judgments."); *Abatti*, 859 F.2d at 119 ("Appellants might have been successful had they argued their version of the agreement on a direct and timely appeal from the decisions against them, but their argument does not change the finality of the decisions now.").

The litigation process not only uncovered the alleged fraud, it equipped defendants with the opportunity to prove it. Instead, defendants made the calculated decision on the eve of trial to settle the case knowing everything that they now claim amounts to fraud on the court. *Cf. Latshaw*, 452 F.3d at 1099 ("Generally speaking, Rule 60(b) is not intended to remedy the effects of a deliberate and independent litigation decision that a party later comes to regret through second thoughts ...."). A party's voluntary settlement with full knowledge of and the opportunity to prove alleged fraudulent conduct cannot amount to a "grave miscarriage of justice," *Beggerly*, 524 U.S. at 47. To argue otherwise is absurd.

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

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

When fraud is aimed at the court, the injured party's lack of diligence in uncovering the fraud does not necessarily bar relief. In *Hazel-Atlas Glass Co.*, the Supreme Court held that relief in that case was not precluded even if Hazel "did not exercise the highest degree of diligence" in uncovering the fraud. 322 U.S.

at 246. The Court explained that it could not "condone[ ]" the fraud based on a party's lack of diligence because the fraud was perpetrated against the court:

> This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the 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.

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

On the other hand, the Ninth Circuit has held that fraud "perpetrated by officers of the court" did not amount to fraud on the court when it was "*aimed only at the [party seeking relief]* and did not disrupt the

judicial process because [that party] through due diligence could have discovered the nondisclosure." *Appling*, 340 F.3d at 780 (emphasis added). In *Appling*, plaintiffs had served a subpoena on Henry Keller, who was a former executive of the defendant. *Id*. at 774. Defendant's counsel responded to the subpoena on behalf of Keller and orally assured plaintiffs' counsel that Keller did not have any documents or knowledge relevant to the litigation. *Id*.

After the district court granted summary judgment in favor of defendant, plaintiffs discovered that "Keller had not authorized State Farm to respond on his behalf, [ ] was never shown a copy of the objections or consulted with respect to their contents," and in fact had a document and video and had made a statement that were relevant and favorable to plaintiffs. *Id.* The Ninth Circuit concluded that, although a non-disclosure by counsel that was aimed only at the opposing party and could have been discovered through due diligence might have "worked an injustice, it did not work a 'grave miscarriage of justice.'" *Id.* at 780; *see Appling*, 340 F.3d at 780 ("Fraud on the court requires a 'grave miscarriage of justice,' and a fraud that is aimed at the court." (quoting *Beggerly*, 524 U.S. at 47)).

Similarly, in *Gleason v. Jandrucko*, the plaintiff sought to set aside a judgment entered pursuant to the parties' settlement for fraud on the court. 860 F.2d 556 (2d Cir. 1988). After the case had settled and judgment was entered, the plaintiff uncovered alleged fraud by the defendant police officers. *Id.* at 558. The Second Circuit nonetheless concluded that the plaintiff was not entitled to relief because he "had the opportunity

in the prior proceeding to challenge the police officers' account of his arrest." *Id.* at 559. Instead of pursuing the relevant discovery to uncover the fraud and challenging the police officers' account of his arrest through litigation, the plaintiff "voluntarily chose to settle the action." *Id.* The Ninth Circuit relied on *Gleason* when explaining that perjury or non-disclosure cannot amount to fraud on the court when the party seeking relief had "the opportunity to challenge" the alleged fraud through discovery that could have been performed and evidence that could have been introduced at trial. *In re Levander*, 180 F.3d at 1120.

With the exception of evidence that simply did not exist at the time of settlement and entry of judgment, defendants uncovered most of the evidence underlying their allegations of fraud through discovery in the state action that occurred after the federal action concluded. Since defendants were able to successfully obtain the evidence to show the alleged fraud through discovery in the state action, the court can discern no reason why they could not have obtained that same evidence through diligent discovery in the federal action. As the Ninth Circuit has explained, a grave miscarriage of justice simply cannot result from any fraud that was directed only at defendants and could have been discovered with the exercise of due diligence.

Even as to allegations of fraud on the court that defendants could not have discovered through diligence before settlement and entry of judgment, the terms of the settlement agreement in this case bar relief, at least as to alleged fraud aimed only at

defendants. In their settlement agreement, defendants not only willingly settled the case in light of the facts they knew, but expressly acknowledged and accepted that the facts may be different from what they believed:

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

(*See* Settlement Agreement & Stipulation ¶ 25.) Defendants were not obligated to include this language in the settlement agreement and, when defendants believed at the time of settlement that the case was based on "outright deception," (Defs.' Trial Br. at 1:13), it might have seemed more appropriate to exclude 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 reviewing and revising each term in the settlement agreement. A grave miscarriage of justice cannot result from enforcing the clear and deliberate terms of a settlement agreement. If the court were to simply ignore the express language of a settlement agreement, parties to such an agreement could never

obtain a reasonable assurance that a settlement was indeed final.

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

1. Allegations Surrounding the White Flag

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

a. Reynolds' Deposition Testimony

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

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

> Q: And in this conversation did they ask you questions as to whether or not you placed that white flag?
>
> A: Yes.
>
> Q: And what was your answer in response to those questions?
>
> A: I have no recollection of placing the flag. And that's—we saw it as a nonissue. And they

> said it was going to come up and saw it as a nonissue.

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

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

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

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

> And if I could have you look at the very center of that photograph and tell me if you recognize a white flag with a post on it? ...
>
> THE WITNESS: I see what looks like a chipped rock there.
>
> Q. BY MR. WARNE: And do you see the flag?
>
> A. No.
>
> Q. You don't see any white flag?
>
> A. It looks like a chipped rock right there (indicating).

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

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

> Q. There is a white flag right there (indicating).
>
> A. Okay.
>
> Q. Do you see it?
>
> A. Well, I don't really see a flag. It almost looks like a wire here.
>
> Q. That's right. And do you see the flag on top of it, sir?
>
> A. I guess if that's what that is.
>
> Q. And you don't recall where that came from?
>
> A. No.
>
> ...

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

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

Q. But you don't recall—

A. —that looks like it's one.

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

A. It looks like a white flag.

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

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

Even if Reynolds' reluctance in acknowledging the flag was not so easily understood, he ultimately testified that the white flag was in the picture. Assuming that an attorney's encouraging and then suborning perjury during a deposition could amount to fraud on the court even though it is not "aimed at the court," *Appling*, 340 F.3d at 780 (quoting *Beggerly*,

524 U.S. at 47), the government never encouraged nor suborned perjury with respect to Reynolds' deposition testimony. Accordingly, the January 2011 pre-deposition meeting and Reynolds' subsequent deposition testimony about the white flag fail to amount to any type of fraud, let alone fraud on the court.

b. Dodd's and Paul's Deposition Testimony

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

[10] Defendants may be playing loose with their 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 deposition. (*See,*

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

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

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

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

could somehow be elevated to fraud on the court, the finality of every judgment relying on expert testimony could always be called into question.

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

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

c. Welton's Deposition Testimony

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

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

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

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

> Q: Was there any discussion that you recall at the scene about the general area of origin being potentially larger than the area that was bounded by the pink flagging?
>
> A: I don't recall having that discussion.
>
> Q: Did Marion Matthews at any point in time ever express to you the thought that she believed the general area of origin should have been bigger, both uphill and downhill?
>
> A: Not that I can recall.

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

According to defendants, Welton "lied" during her deposition when she testified that she did not recall

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

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

the very case he originally pursued on behalf of the government.

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

2. Dodds' Handwritten Notes

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

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

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

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

That defendants even suggest the alleged fraud regarding the air attack video is remotely analogous to the fraud in *Pumphrey* underscores the looseness with which defendants want the court to view conduct required to allege fraud on the court. The similarities between defendants' allegations in this case and *Pumphrey* end at the fact that both include a video. Unlike in *Pumphrey*, there is no allegation in this case that the air attack video was recorded for a fraudulent purpose or concealed from defendants. *See Pumphrey*,

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

62 F.3d at 1130-32. Defendants and the government simply, albeit strongly, disagree about what inferences can reasonably be drawn from the smoke plume and the experts' placement of the alleged points of origin in the air attack video.[13]

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

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[13] Although defendants quote *Pumphrey* as having focused on the defendant's "failure to disclose," (Defs.' Br. at 13 n.12), that language appears only in the editorial description of the case and is absent from the opinion. *Pumphrey* did not involve mere non-disclosure. Although a significant video was not disclosed, defendant's general counsel "engaged in a scheme to defraud the jury, the court, and [plaintiff], through the use of misleading, inaccurate, and incomplete responses to discovery requests [about the undisclosed video], the presentation of 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.

or any other witness about the alleged inconsistency between the smoke plume and alleged points of origin.

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

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

3. The State Wildfire Fund

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

For example, after settlement of the federal action, the California State Auditor issued a formal report on October 15, 2013 that criticized the State Wildfire Fund. (Defs.' Br. at 110:12-16.) Among the findings, the State Auditor found that the State Wildfire Fund "'was neither authorized by statute nor approved'" and "'was not subject to Cal Fire's normal internal controls or oversight by the control agencies or the Legislature.'" (*Id.* at 110:18-27 (citing the California State Auditor's report titled, "Accounts Outside the State's Centralized Treasury System").) After repeated motions to compel in the state action, Cal Fire also produced numerous documents allegedly raising concerns about the impartiality of its investigators in light of the State Wildfire Fund. (*Id.* at 111:21-25, 112:3-8.) For example, an email from Cal Fire Northern Region Chief Alan Carlson allegedly "denied a request to use [the State Wildfire Fund] to enhance Cal Fire's ability to investigate arsonists because, he said, 'it is hard to see where our arson convictions are bringing in additional cost recovery.'" (*Id.* at 113:2-4.) Documents also allegedly showed that Cal Fire management sought to conceal the fund from state regulators, knew the fund was illegal, and used the fund to pay for destination training retreats. (*Id.* at 112:21-22, 113:5-20.)

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

misrepresentations[14] to the court to obtain a favorable in limine ruling pertaining to the State Wildfire Fund; (b) Cal Fire's general counsel and litigation counsel should be treated as officers of the federal court and thereby committed fraud on the court when they failed to disclose the true nature of the State Wildfire Fund; (c) Chris Parker testified falsely about the State Wildfire Fund during his deposition; and (d) the very existence of the State Wildfire Fund constitutes a fraud on the court.

a. Alleged Reckless Misrepresentations by the Government

In one of its in limine motions, the government sought to exclude argument of a government conspiracy and cover-up. (U.S.'s Omnibus Mot. in Limine at 2:1 (Docket No. 487).) While the motion focused on the alleged misconduct surrounding the events at the Red Rock Lookout Tower, the government also argued that defendants sought to prove a conspiracy based, in part, on the State Wildfire Fund. The government explained that "a portion of assets recovered from Cal Fire's civil recoveries can be allocated to a separate public trust fund to support investigator training and to purchase equipment for investigators (e.g., investigation kits and cameras)." (*Id*. at 3:28-4:3.) It argued that the existence of the

[14] Although defendants make a passing reference to the government's "intentional misconduct" of "fail[ing] to disclose" the State Wildfire Fund to defendants, (Defs.' Br. at 117:8-9), 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 the government, this theory has no legs to stand on.

State Wildfire Fund "does not support an inference that investigators concealed evidence" and that "[a] public program established to train and equip fire investigators is hardly evidence of a multi-agency conspiracy." (*Id.* at 3:27-4:4.)

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

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

> The U.S. mischaracterizes Defendants' arguments in order to knock down a straw man. Defendants have not argued—and do not intend to argue—a "conspiracy" among the USFS, CDF, and their respective counsel, 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 ....

(Defs.' Opp'n to U.S.'s Mot. in Limine at 3:4-8 (Docket No. 531).) Defendants do not explain how any reckless misrepresentations by the government persuaded

Judge Mueller to tentatively preclude defendants from arguing a theory defendants expressly disavowed.

Notwithstanding the questionable footing of defendants' position, allegations of reckless conduct cannot give rise to fraud on the court. The Ninth Circuit has indicated that fraud on the court requires proof of "an intentional, material misrepresentation directly 'aimed at the court.'" *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1097 (9th Cir. 2007), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 105 n.1, 114 (2009);[15] *see also In re Napster, Inc. Copyright Litig.*, 479 F.3d at 1097-98 (emphasizing that the evidence does not suggest that defendants selected the contract terms "with the intent to defraud the courts"). The Ninth Circuit has also explained that it has "vacated for fraud on the court when the litigants *intentionally* misrepresented facts that were critical to the outcome of the case, showing the appropriate 'deference to the deep rooted policy in favor of the repose of judgments.'" *Estate of Stonehill*, 660 F.3d at 452 (quoting *Hazel-Atlas Glass Co.*, 322 U.S. at 244-45) (emphasis added). Allowing reckless conduct to amount to fraud on the court would also be inconsistent with the Ninth Circuit's explanation that a finding of fraud on the court "must

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[15] In *Napster*, the Ninth Circuit was assessing whether defendants had committed fraud on the court thereby vitiating the attorney-client privilege under the crime-fraud exception to the privilege. 479 F.3d at 1096-98. Although the Ninth Circuit does 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).

involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Pumphrey*, 62 F.3d at 1131 (internal quotations marks omitted).

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

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

Defendants have not cited and this court is not aware of a single circuit that has joined the Sixth Circuit in allowing something less than intentional conduct to arise to fraud on the court. *See, e.g., Herring v. United States*, 424 F.3d 384, 386 & n.1 (3d Cir. 2005) (recognizing *Demjanjuk*'s holding, but requiring proof

of "an intentional fraud"); *United States v. MacDonald*, 161 F.3d 4, 1998 WL 637184, at *3 (4th Cir. 1998) (rejecting *Demjanjuk*'s holding and describing that position as the "minority view"); *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1266-67 (10th Cir. 1995) (rejecting *Demjanjuk*'s holding and requiring "a showing that one has acted with an intent to deceive or defraud the court"). In disagreeing with the Sixth Circuit, the Tenth Circuit explained, "A proper balance between the interests underlying finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing—what can properly be characterized as a deliberate scheme to defraud—before relief from a final judgment is appropriate under the *Hazel-Atlas* standard." *Robinson*, 56 F.3d at 1267.

Even if this court was at liberty to depart from Ninth Circuit precedent and was inclined to examine the government's conduct under the reckless disregard for the truth standard, the reasons the Sixth Circuit concluded that the government acted with a reckless disregard in *Demjanjuk* are not present in this case. As previously discussed, *Demjanjuk* did not examine the government's reckless failure to disclose through the lens of its obligations in a civil case. The Sixth Circuit concluded that the denaturalization and extradition proceedings in that case were one of the rare instances in which *Brady* extended to a civil case and thus the OSI prosecutors had a "constitutional duty" to produce the exculpatory evidence. The Sixth Circuit's application of *Brady* was inextricably entwined with its finding of fraud of the court: "This was fraud on the court in the circumstances of this

case where, by recklessly assuming Demjanjuk's guilt, they failed to observe their obligation to produce exculpatory materials requested by Demjanjuk." *Demjanjuk*, 10 F.3d at 354.

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

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

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

Relying on *Pumphrey*, defendants argue that Cal Fire's general counsel and litigation counsel were "officers of the court" as the term is used when examining allegations of fraud on the court. In *Pumphrey*, plaintiff filed suit and proceeded to trial in Idaho and local counsel represented defendants throughout the litigation. 62 F.3d at 1131. Defendant's

general counsel was not admitted to practice in Idaho or admitted *pro hac vice* and never made an appearance or signed a document filed with the court. *Id*. at 1130-31. The Ninth Circuit nonetheless found that he was an "officer of the court" for purposes of assessing fraud on the court because he "participated significantly" by attending trial on defendant's behalf, gathering information during discovery, participating in creating the fraudulent video, and maintaining possession of the fraudulent and undisclosed video. *Id*. at 1131.

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

Nonetheless, the court need not resolve this issue because defendants' theory attributing fraud on the court to Cal Fire's general counsel and litigation counsel relies on their failure to comply with their alleged obligation to disclose evidence about the State Wildfire Fund under *Brady*. (*See* Defs.' Br. at 119:1-17.) As this court has already explained, Brady does not apply in this civil action. Absent some duty to disclose imported from *Brady*, non-disclosures to defendants alone cannot amount to fraud on the court.

See, e.g., Appling, 340 F.3d at 780; *In re Levander*, 180 F.3d at 1119; *Valerio*, 80 F.R.D. at 641, *adopted as the opinion of the Ninth Circuit in* 645 F.2d at 700. Any allegations based on Cal Fire's counsel's failure to disclose information about the State Wildfire Fund therefore cannot amount to fraud on the court.

c. Chris Parker's Deposition Testimony

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

Assuming Parker testified falsely at his deposition, the Supreme Court and Ninth Circuit have unequivocally held that perjury by a witness alone cannot amount to fraud on the court. *See, e.g., Hazel-Atlas Glass Co.*, 322 U.S. at 245 ("This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury."); *Appling*, 340 F.3d at 780 ("[P]erjury by a party or witness[] does not, by itself, amount to fraud on the court."). Defendants do not allege that the government had any knowledge of this alleged perjured testimony.

Even assuming Cal Fire's counsel knew of the false testimony, defendants' theory of fraud on the court tied to Cal Fire's counsel relies on a questionable extension of *Pumphrey* and an impermissible extension of *Brady*. Parker's deposition testimony simply does not rise to fraud on the court.

d. Mere Existence of the State Wildfire Fund

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

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

To introduce the allegation of fraud on the court based on the government's failure to inform the court and defendants of an alleged bribe by Downey Brand

LLP or Sierra Pacific Industries, defendants spend four pages detailing the facts and circumstances allegedly showing that Ryan Bauer may have started the Moonlight Fire. (*See* Defs.' Br. at 122:6-126:6.) Ryan lived in Westwood, California and was allegedly near the area of origin with a chainsaw when the Moonlight Fire ignited. At the time of settlement and entry of judgment, defendants knew all of the information detailed in their brief that allegedly shows Ryan may have started the fire.

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

As one of their eighteen motions in limine, the government sought to exclude any evidence seeking to show that the Moonlight Fire was caused by a

potential arsonist, including Ryan. (U.S.'s Omnibus Mot. in Limine at 5:1-7.) Defendants opposed the motion, putting forth the allegations recited in its current motion. Judge Mueller tentatively denied the motion "insofar as defendants may use evidence indicating arson was not considered to show weaknesses in the investigation following the fire," but excluded defendants from "elicit[ing] evidence to argue that someone else started the fire." (July 2, 2012 Final Pretrial Order at 18:1-6.) Based on this tentative in limine ruling, defendants claim the court was defrauded by the government's failure to disclose the alleged bribe to the court and defendants while arguing that there was "no evidence" of arson.

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

Moreover, that defendants would now claim that even though the ruling was only tentative it somehow prevented them from "elicit[ing] evidence to argue that someone else started the fire" boggles the judicial

mind. It may seem plausible based on their statement in their current brief that they "always intended to argue that one or more of the Bauers may have caused the fire either intentionally or unintentionally, whether via arson, with a chainsaw, spilled gasoline, or through careless smoking." (Defs.' Br. at 126:4-6.) It is concerning to this court, however, that defendants would so flippantly make this representation now when defendants' lead counsel made the opposite representation to Judge Mueller during the hearing on the motions in limine:

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

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

> MR. WARNE: But the evidence pertaining to those two individuals goes directly to the quality of the investigation ....
>
> THE COURT: There is no evidence that—there is no evidence suggesting that arson was the cause of this fire, is there? Your point is that the investigation didn't consider that fully.
>
> MR. WARNE: Actually, there is as much evidence—*and we don't intend to play it this*

> *way to the jury*, but there is as much evidence suggesting that there was another perpetrator of this fire, be it arson or a 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.
>
> THE COURT: Why can't you make that point generally without referencing Mr. Bauer or Mr. McNeil?
>
> MR. WARNE: Because it is the essence of our case there, as I indicated in footnote 3, with respect to what I understood this Court's ruling was as it relates to *an effort by the government to really, apologize, mischaracterize our motion or our case as trying to prove that Mr. Bauer is an arsonist. Our case is focused on the investigation*.

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

When asked at oral argument on this motion about his representations to Judge Mueller, Mr. Warne suggested he was simply feigning agreement with Judge Mueller's tentative ruling to avoid any suggestion that the ruling could weaken defendants' case. As Judge Mueller explained at the hearing on the motions in limine, however, her tentative ruling was based on the suggestion of one of defendants' counsel. (*See* June 26, 2012 Tr. at 67:19-24 ("The exclusion of

arson defenses generally. My current plan is to deny, but consider some kind of limiting instruction; that is, the defense represents it will not attempt to show that someone else started the fire, but wished to introduce evidence showing the investigation was biased. Mr. Schaps referenced this approach earlier."); *see also* June 26, 2012 Tr. at 45:2-18).

At the very least, it remains a mystery how a tentative in limine ruling based on defendants' own suggestion can transform into a "substantial factor in forcing Defendants to 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 the bribe allegation amounts to fraud on the court relies heavily on *Brady*, which does not extend to this civil case. Absent application of *Brady*, the government was under no obligation to disclose the alleged bribe. In fact, if the government attorneys had disclosed the alleged bribe, they could have just as easily been criticized for spreading a scandalous rumor in attempt to intimidate defendants.

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

changed the information available to the district court." *Id*. at 446.

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

5. Removal of AUSA Wright from the Case

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

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

In the state action, Judge Nichols issued two decisions[16] condemning misconduct by Cal Fire and its attorneys and ultimately dismissed the state action with prejudice and ordered sanctions in favor of defendants because of Cal Fire's misconduct. Defendants acknowledge that Judge Nichols' findings in the state action have no preclusive or binding effect in this case. Not only was the government not a party in the state action, it did not have the opportunity to argue or brief any of the issues before Judge Nichols. More importantly, Judge Nichols' findings and criticisms were levied against Cal Fire and its counsel. *See Cal. Dep't of Forestry v. Howell*, No. GN CV09-00205, 2014 WL 7972096 (Cal. Super. Ct. Feb. 4, 2014); *Cal. Dep't of Forestry v. Howell*, No. GN CV09-00205, 2014 WL 7972097 (Cal. Super. Ct. Feb. 4, 2014).

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[16] The government criticizes Judge Nichols for having adopted the detailed proposed findings submitted by Downey Brand LLP with only two minor edits. As a companion to that order, however, Judge Nichols first issued an order that "speaks in the Court's own voice." *See Cal. Dep't of Forestry v. Howell*, No. GN CV09-00205, 2014 WL 7972096, at *7 (Cal. Super. Ct. Feb. 4, 2014). Judge Nichols repeatedly emphasized that he had belabored to review all of the evidence and did not simply sign the 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.").

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

Judge Nichols, moreover, based his decision to impose terminating sanctions on Cal Fire's discovery abuses and his determination that Cal Fire "prejudiced [defendants'] ability to go to trial." *Cal. Dep't of Forestry*, 2014 WL 7972096, at *4. Findings in that context and under that legal standard are not relevant to the determination of whether alleged misconduct by the federal government constituted fraud on the court. As the Ninth Circuit has explained, prejudice to the opposing party may be considered when assessing fraud on the court, but fraud on the court exists only if there is "'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" *Abatti*, 859 F.2d at 118 (quoting *Toscano*, 441 F.2d at 934). Judge Nichols' findings that Cal Fire prejudiced defendants' ability to go to trial in the state action thus do not aid this court in determining whether defendants' allegations about the federal government amount to a "'grave miscarriage of justice,'" *Appling*, 340 F.3d at 780 (quoting *Beggerly*, 524 U.S. at 47).

IV. Conclusion

Defendants made a calculated decision to settle this case almost two years ago, and a final judgment

was entered pursuant to their agreement. To set that judgment aside, the law requires a showing of fraud on the court, not an imperfect investigation. Defendants have failed to identity even a single instance of fraud on the court, certainly none on the part of any attorney for the government. They repeatedly argue that fraud on the court can be found by considering the totality of the allegations. Here, the whole can be no greater than the sum of its parts. Stripped of all its bluster, defendants' motion is wholly devoid of any substance.

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

Dated: April 17, 2015

[handwritten: signature]
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

C074879, C076008

DEPARTMENT OF FORESTRY AND FIRE PROTECTION, *et al.*,

Plaintiffs and Appellants,

v.

EUNICE E. HOWELL, *et al.*,

Defendants and Respondents.

(Super. Ct. Nos. CV09-00205 (lead), CV09-00231, CV09-00245, CV10-00255, CV10-00264)

CERTIFIED FOR PARTIAL PUBLICATION*

APPEAL from a judgment of the Superior Court of Plumas County, Leslie C. Nichols, Judge. (Retired judge of the Santa Clara Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part and reversed in part.

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* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication from inception through the end of part I.B. of the Discussion as well as the Disposition.

Filed December 6, 2017

A wildfire started in Plumas County on September 3, 2007, and burned approximately 65,000 acres over the course of multiple weeks. This fire, dubbed the "Moonlight Fire," was at the center of several actions filed by plaintiffs Department of Forestry and Fire Protection (Cal Fire), Grange Insurance Association, and multiple landowners[1] in 2009 and 2010 against defendants Eunice E. Howell, individually, and on behalf of Howell's Forest Harvesting (hereafter Howell)—the designated lead defendant and respondent; Kelly Crismon; J.W. Bush; Sierra Pacific Industries (Sierra Pacific); W.M. Beaty and Associates, Inc. (Beaty); and multiple landowner

[1] Cal Fire's action was deemed the lead case in this complex civil litigation (Plumas Super. Ct. No. CV09-00205). Landowner plaintiffs include, in order of appearance: case No. CV09-00231: Gary L. Brown and Sharon Brown; William R. Butler and Peggie L. Butler; Janet Farmer; Andrea C. Fox and Lynn K. Fox; William C. Goss; K. Ronald Morgan and Dorothea D. Morgan, individually and as trustees of the Orion Trust, LTD, dated October 1, 1993, and the Evergreen Trust, dated 1985; Patricia Qualls; George B. Wieck and Dorta Lee Wieck; Donald J. Wilson; Richard A. Guy and Edith E. White; case No. CV10-00255: James H. Brandt and Ellen E. Brandt, individually and as trustees of the James H. Brandt Trust, dated October 7, 2004; and case No. CV10-00264: Robert V. Kile and Dawn A. Kile, as cotrustees of the Kile Family Trust, dated October 13, 2004; Erik Weber and Sally Weber; Robert Cross; Kenneth J. Zeits and Jessie Zeits, as cotrustees of the Zeits Family Trust; and John Cosmez and Christine Cosmez. Grange Insurance Association appeared to recover damages paid to some of these landowner plaintiffs (case No. CV09-00245).

defendants (landowner defendants)[2] for recovery of fire suppression and investigation costs and for monetary damages.

On the eve of trial in July 2013, the consolidated actions were dismissed following a hearing on a motion for judgment on the pleadings and for presentation of a prima facie case pursuant to *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367 (*Cottle*)[3]

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[2] Landowner defendants include Ann McKeever Hatch, as trustee of the Hatch 1987 Revocable Trust; Richard L. Greene, as trustee of the Hatch Irrevocable Trust; Brooks Walker, Jr., as trustee of the Brooks Walker, Jr., Revocable Trust and the Della Walker Van Loben Sels Trust for the Issue of Brooks Walker; Jr.; Brooks Walker III, individually and as trustee of the Clayton Brooks Danielsen Trust, the Myles Walker Danielsen Trust, the Margaret Charlotte Burlock Trust, and the Benjamin Walker Burlock Trust; Leslie Walker, individually and as trustee of the Brooks Thomas Walker Trust, the Susie Kate Walker Trust, and the Della Grace Walker Trust; Wellington Smith Henderson, Jr., as trustee of the Henderson Revocable Trust; Elena D. Henderson; Mark W. Henderson, as trustee of the Mark W. Henderson Revocable Trust; John C. Walker, individually and as trustee of the Della Walker Van Loben Sels Trust for the Issue of John C. Walker; James A. Henderson; Charles C. Henderson, as trustee of the Charles C. and Kirsten Henderson Revocable Trust; Joan H. Henderson; Jennifer Walker, individually and as trustee of the Emma Walker Silverman Trust and the Max Walker Silverman Trust; Kirby Walker; and Lindsey Walker or Lindsey Walker-Silverman, individually and as trustee of the Reilly Hudson Keenan Trust and the Madison Flanders Keenan Trust.

[3] *Cottle* allows a trial court overseeing complex civil litigation to require a party to present a prima facie claim establishing some element of their cause of action prior to trial in a nonstatutory procedure established by the trial court based on its "inherent equity, supervisory and administrative powers." (*Cottle*, *supra*, 3 Cal.App.4th at pp. 1376-1377, 1381.)

after the trial court concluded Cal Fire could not as a matter of law state a claim against Sierra Pacific, Beaty, or landowner defendants, and that no plaintiff had presented a prima facie case against any defendant. After judgment was entered, the trial court awarded defendants costs without apportionment amongst plaintiffs. It also ordered Cal Fire to pay to defendants attorney fees and expert fees totaling more than $28 million because defendants as prevailing parties were entitled to recover attorney fees on either a contractual basis or as private attorneys general, or alternatively as discovery sanctions. The trial court additionally imposed terminating sanctions against Cal Fire. Plaintiffs appeal, challenging both the judgment of dismissal (case No. C074879) and the postjudgment awards (case No. C076008).[4] Plaintiffs also request that any hearings on remand be conducted by a different judge.

In the published portion of this opinion, we conclude the trial court's order dismissing the case as to all plaintiffs based on their failure to present a prima facie case at a pretrial hearing under the authority of *Cottle* must be reversed because the hearing was fundamentally unfair: Plaintiffs were not provided adequate notice of the issues on which they would be asked to present their prima facie case. However, we conclude the trial court did properly award judgment on the pleadings against Cal Fire. In light of these conclusions, in the unpublished portion of this opinion, we find the trial court's award of costs to defendants as prevailing parties as to any plaintiff

[4] The two appeals were consolidated for purposes of oral argument and decision only.

but Cal Fire is necessarily vacated, and because the trial court did not apportion costs, we must remand the costs award to the trial court for further proceedings to determine which costs Sierra Pacific, Beaty, and landowner defendants may recover from Cal Fire. Also in the unpublished portion of this opinion, we conclude the trial court erred in awarding attorney fees to the prevailing parties, and that the award of monetary discovery sanctions must be reversed and remanded for further proceedings. We affirm, however, the imposition of terminating sanctions against Cal Fire. Finally, we reject plaintiffs' requests that we order any remand proceedings be heard by a different judge.

FACTUAL AND PROCEDURAL BACKGROUND

Cal Fire's investigation of the Moonlight Fire determined that the fire started on property owned by landowner defendants and managed by Beaty. Sierra Pacific purchased the standing timber on the property, and contracted with Howell, a licensed timber operator, to cut the timber. On the day the Moonlight Fire began, two of Howell's employees, Bush and Crismon, were working on the property installing water bars.[5] Cal Fire's investigators concluded the fire began when the bulldozer Crismon was operating struck a rock or rocks, causing superheated metal fragments from the bulldozer's track to splinter off and eventually to ignite surrounding plant matter, and that the fire was permitted to spread when Bush and Crismon failed to timely complete a required

[5] Water bars are berms or mounds designed to control erosion.

inspection of the area where they had been working that day.

Over the course of four years, the parties engaged in extensive discovery and pretrial motions in both this consolidated action and in a concurrent federal action. The trial court designated the state court action as complex litigation under California Rules of Court, rule 3.403(b) and Standard 3.10 of the California Standards of Judicial Administration. About three months before trial was to commence, retired Judge Leslie C. Nichols was appointed to preside over all proceedings in this case. Beginning in June 2013, Judge Nichols ruled on nearly 100 motions in limine and reviewed the thousands of pages that made up the record in the case, including the trial briefs submitted by the parties on July 15, 2013. In a footnote in its trial brief, Sierra Pacific purportedly moved for judgment on the pleadings as to Cal Fire, contending Cal Fire had not asserted a cause of action pursuant to Health and Safety Code sections 13009 or 13009.1,[6] which were the sole basis for Cal Fire to recover its fire suppression and investigation costs. Sierra Pacific asserted Cal Fire's claims premised on common law should be dismissed prior to trial.

On July 22, 2013, exactly one week before trial was set to commence, the trial court issued a "notice to counsel." In that notice, the trial court indicated that during the previously scheduled pretrial hearing—set for July 24, 25, and 26 (if necessary)—it would be prepared to hear any motions for judgment

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[6] Undesignated statutory references are to the Health and Safety Code.

on the pleadings defendants intended to advance; it would share its views on the likelihood certain jury instructions would be presented; it would address whether common law claims could be asserted; it would also discuss with counsel and issue rulings regarding issues raised during the hearing including whether expert testimony would be required to present evidence of the standard of care, and, if so, the viability of claims and evidence supporting them. The court also indicated it "may, with the assistance of counsel, identify claims or issues susceptible to the conduct of a hearing authorized by *Cottle*[, *supra*,] 3 Cal.App.4th [at page] 1381 ... that is to determine whether a prima facie case can be established before the start of the trial."

At the end of this pretrial hearing, the trial court entered orders dismissing the case based on its finding that all plaintiffs failed to make a prima facie showing that they could sustain their burden of proof against any defendant, and granting an oral motion for judgment on the pleadings against Cal Fire only as to Sierra Pacific, Beaty, and landowner defendants, based on its finding that sections 13009 and 13009.1 did not provide a legal basis for relief as to those parties.[7] Judgment of dismissal was entered in favor of defendants on July 26, 2013.

Approximately six months after the judgment of dismissal was entered, the trial court heard plaintiffs' motions to tax defendants' costs. Following extensive

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[7] One plaintiff, California Engels Mining Company, dismissed the case against defendants with prejudice in exchange for a waiver of costs on the eve of trial and is not subject to the challenged order of dismissal.

briefing and argument by the parties, the trial court awarded costs to all defendants, for which it made all plaintiffs jointly and severally liable.

Postjudgment, the trial court also heard defendants' motions for attorney fees, expenses, and discovery sanctions. In September 2013, the trial court established a phased briefing schedule for the motions, with the parties to first focus on entitlement to the fees, expenses, and sanctions, and thereafter to focus on the proper amount, if any, of such an award. In late October 2013, after defendants had filed their opening briefs in the first phase of postjudgment motions, defendants informed the trial court they had learned of new evidence Cal Fire had failed to produce during pretrial discovery in violation of previous court orders. As a result of this development, Cal Fire acknowledged it had " 'inadvertently' " failed to produce the document in question and some 5,000 other pages of responsive documents. The trial court ordered Cal Fire to produce the documents, and all responsive documents, by the end of October 2013. Cal Fire produced about 5,000 pages of documents and, at a court appearance in early November 2013, represented to the trial court that it had produced all responsive documents. A couple of weeks later, at the end of its brief relating to the earlier production of documents, Cal Fire acknowledged that there were an additional 2,000 pages of responsive documents that still had not been produced. It produced those documents in late November 2013.

The trial court found it was appropriate to assess monetary and terminating sanctions against Cal Fire for engaging in pervasive discovery abuses. Among the

enumerated exemplar abuses the trial court identified were Cal Fire's failure to produce responsive documents in violation of court orders, false deposition testimony by Cal Fire's lead investigator, falsification of interview statements incorporated into Cal Fire's discovery responses, spoliation of Cal Fire's investigator's notes, and inclusion of false reports in Cal Fire's discovery responses. The trial court also found defendants were entitled to cost-of-proof expenses for disproving Cal Fire's denial of certain requests for admission. Finally, the trial court found defendants were entitled to attorney fees as prevailing parties both on a contractual basis (Civ. Code, § 1717) and because the case resulted in a public benefit (Code Civ. Proc., § 1021.5).

Based both on its inherent authority and the Civil Discovery Act (Code Civ. Proc., § 2016.010 et seq.), the trial court imposed terminating sanctions in favor of all defendants and against Cal Fire. In addition, the trial court collectively awarded Beaty and landowner defendants attorney fees and expert witness fees of $6,146,901.41 as "a prevailing party," and made Cal Fire liable for the entirety of the award. The trial court also ordered Cal Fire to pay an equal amount as a sanction, but stated that the entire obligation established by the order was $6,146,901.41. The trial court also collectively awarded attorney fees of $1,166,155 and expert costs of $405,586.08 to Howell, Bush, and Crismon, either as discovery sanctions or prevailing parties. Finally, the trial court awarded Sierra Pacific attorney fees and expert fees and costs of $21,881,484, as discovery sanctions or in the alternative as a prevailing party.

Additional factual and procedural information is provided as relevant in the ensuing discussion.[8]

DISCUSSION

I. Challenges to Judgment of Dismissal

Plaintiffs collectively challenge the trial court's judgment of dismissal by challenging, on both procedural and substantive grounds, its order finding plaintiffs had not presented a prima facie case. Cal Fire also separately challenges the trial court's order granting judgment on the pleadings based on its conclusion sections 13009 and 13009.1 do not permit Cal Fire to state claims arising from common law negligence theories. We reverse the trial court's judgment of dismissal based on its *Cottle* hearing because we conclude the conduct of that hearing violated defendants' procedural due process rights.[9] However, we affirm the trial court's judgment of dismissal to the extent it was premised on its grant of judgment on the pleadings because we agree sections 13009 and 13009.1 do not incorporate common law theories of negligence as a basis for recovery.

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[8] We deny the multiple requests for judicial notice made in this court because the information presented therein, relating to the federal litigation premised on the Moonlight Fire and the amount of notice given prior to a *Cottle* hearing in two unrelated cases, is not relevant or necessary to our resolution of the issues on appeal in cases Nos. C074879 and C076008. (Evid. Code, §§ 452, 459.)

[9] We would address plaintiffs' challenge to the dismissal based on the *Cottle* hearing regardless of how we rule on the dismissal pursuant to the motion for judgment on the pleadings because judgment on the pleadings was entered only as to one plaintiff and some of the defendants.

A. Cottle Hearing

Plaintiffs challenge the trial court's dismissal of the action, raising procedural and substantive challenges to the trial court's provision of notice of a hearing based on *Cottle* and its finding that plaintiffs failed to present a prima facie case in support of their causes of action. Based on our conclusion that the hearing suffered prejudicial procedural errors, we need not reach the parties' substantive challenges to the trial court's order. As a result of this conclusion, we reverse the trial court's judgment of dismissal premised on its finding plaintiffs failed to present a prima facie case in support of their causes of action.

1. Additional Background

One week before trial was to commence, the trial court issued a two-page notice to counsel, in which it decreed *sua sponte* that during the already scheduled pretrial hearing set to commence in two days' time, it would hear any oral motions for judgment on the pleadings any defendant wished to advance; it would share its views on the likelihood that certain jury instructions would be given and its views on some arguments advanced by the parties on whether general negligence claims could be advanced; it would hear discussion and issue rulings regarding the necessity of expert testimony, and the effect of that ruling on the viability of claims asserted; it would work with counsel to minimize evidentiary disputes and to organize exhibits and evidence; and it "may, with the assistance of counsel, identify claims or issues susceptible to the conduct of a hearing authorized by *Cottle*[, *supra*,] 3 Cal.App.4th [at page]

1381 ... that is to determine whether a prima facie case can be established before the start of the trial."

When they appeared for the pretrial hearing on July 24, 2013, the parties presented bench briefs on some of the issues identified in the trial court's notice and asserted their preparedness to discuss others. Sierra Pacific proceeded to move for judgment on the pleadings as to all of Cal Fire's claims, for failure to state a cause of action. Before presenting arguments on that motion, Sierra Pacific also stated its intention to move "under *Cottle* for the Court to require a prima facie showing from all plaintiffs on various issues." Argument on the motion for judgment on the pleadings took the entirety of the morning session that day, with Cal Fire being invited to submit a written opposition to the motion "promptly."

During the afternoon session, defendants identified two "insurmountable" causation issues for all plaintiffs: (1) the fire was reported within the two-hour window after cessation of yarding activity that would trigger inspection requirements under California Code of Regulations, title 14, section 938.8,[10] and Bush was returning to conduct an inspection within that two-hour window but by the time he arrived the fire was already burning

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[10] California Code of Regulations, title 14, section 938.8, subdivision (a) provides in relevant part: "The timber operator or his/her agent shall conduct a diligent aerial or ground inspection within the first [two] hours after cessation of felling, yarding, or loading operations each day during the dry period when fire is likely to spread. The person conducting the inspection shall have adequate communication available for prompt reporting of any fire that may be detected ...."

uncontrollably; and (2) as it is alleged the fire remained in an "incipient state" for an hour and a half, there is no evidence a diligent inspection would have detected the fire. Additionally, defendants argued there was no evidence that different conduct by any defendant other than Howell, Bush, or Crismon would have changed the outcome on September 3, 2007, to support plaintiffs' claims of negligent supervision, negligent hiring, negligent retention, or negligent maintenance. Defendants also argued there was an absence of evidence of Howell's or Beaty's violation of the standard of care because no plaintiff had offered an expert to testify in that regard and Howell's policies could not be used to establish the standard of care.

Thus, it was not until later in the afternoon session on July 24, 2013, that the issues on which plaintiffs would be called to present a prima facie case were even identified. Counsel for plaintiffs presented argument and offers of proof on the afternoon of July 24. On July 25, counsel for Cal Fire and Howell presented a substantial amount of evidence and argument regarding the causation and standard of care issues highlighted by counsel for defendants the previous day, and defendants presented counter-arguments and challenged the offers of proof of evidence presented. Toward the end of the day on July 25, the trial court directed defendants to prepare a proposed order laying out the deficiencies in plaintiffs' case to be distributed that night, with an opportunity to cure to be given the following day.

Then, on July 26, 2013, when court reconvened, the parties argued the motion for judgment on the pleadings. It was not until that motion was submitted

that plaintiffs were permitted to again present their prima facie case, at which time plaintiffs objected to the *Cottle* procedure as applied in this case, and presented further arguments relating to the *Cottle* "motion." During this time period, the parties also presented briefs to the court on any number of other issues still undecided, including, for example, jury instructions, whether expert testimony was required to establish the standard of care and breach thereof, and the motion for judgment on the pleadings. Late in the afternoon on July 26, the trial court deemed the case submitted and entered an order dismissing the case based on its finding that plaintiffs failed to establish a prima facie case.

2. Legal Background

Cottle involved an action filed by approximately 175 owners and renters of residential property who sued the property developers for personal injuries, emotional distress, and property damage arising from development on a site that was previously used as a depository for hazardous waste and byproducts. (*Cottle*, *supra*, 3 Cal.App.4th at pp. 1371-1372.) During discovery, the plaintiffs responded to an interrogatory asking for a detailed description of the illness they claimed to suffer from exposure to chemical substances by stating generally that they had not yet identified any injuries caused by chemical exposure but reserving the right to assert a claim if more information became available. (*Id.* at p. 1372.)

On November 7, 1990, the trial court issued a case management order requiring that each plaintiff file and serve by February 1, 1991, a statement establishing a prima facie claim for personal injury

and/or property damage, including details as to exposure, injury, and expert support with regard to any personal injury claim. (*Cottle*, *supra*, 3 Cal.App.4th at p. 1373.) The plaintiffs filed their statements on January 7, 1991, in which they stated it was " 'virtually impossible' " to determine the specific chemicals to which they were exposed or when and that none had been diagnosed with an injury directly caused by exposure to any chemical present at or around the development, and that their treating physicians did not have the benefit of knowing they were exposed to toxic chemicals. (*Ibid.*) The court set a hearing on March 4, 1991, on a motion to dismiss their claims for failure to make a prima facie showing. (*Id.* at p. 1374.) On March 12, 1991, the trial court found the plaintiffs had shown a prima facie case for their emotional distress and property damages claims but not their personal injury claims, and tentatively ordered exclusion of all evidence that plaintiffs suffer any particular physical injury based on exposure to chemicals at the development unless the plaintiffs could demonstrate by May 31, 1991, that viable claims for personal injury existed. (*Ibid.*)

The plaintiffs submitted supplemental statements on May 31, 1991, including declarations from a toxicologist and two neuropsychologists. (*Cottle*, *supra*, 3 Cal.App.4th at p. 1375.) On June 27, 1991, the trial court conducted a hearing to determine whether the supplemental statements established a prima facie showing for personal physical injury. (*Ibid.*) The trial court concluded no witness presented any statement or testimony establishing to a reasonable medical probability that any hazardous or toxic substance caused any injury or illness in any

plaintiff. (*Ibid.*) Accordingly, on July 2, 1991, the trial court entered an order in limine excluding all evidence of personal injury. (*Ibid.*)

In defending the trial court's authority to issue such an order, the Court of Appeal, Second Appellate District, Division Seven, reasoned that courts have "inherent equity, supervisory and administrative powers" derived from the Constitution, in addition to statutory authority to control the proceedings which they oversee. (*Cottle*, *supra*, 3 Cal.App.4th at p. 1377.) Thus, *Cottle* explained, " ' " '[c]ourts have inherent power ... to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council.' " That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation ... in order to insure the orderly administration of justice.' " (*Id.* at p. 1378.)

Thus, *Cottle* recognized that "courts have the power to fashion a new procedure in a complex litigation case to manage and control the case before them." (*Cottle*, *supra*, 3 Cal.App.4th at p. 1380.) Although *Cottle* did not set forth any precise guidelines, it encouraged consideration of "the totality of the circumstances," and concluded the timing of the order in that case was "crucial to its legitimacy." (*Ibid.*) The exclusion order was issued a month prior to the anticipated start of a one- to two-year-long trial and after discovery was closed. (*Ibid.*) Therefore, *Cottle* approved the trial court's use of its inherent powers to manage complex litigation by ordering exclusion of evidence when the plaintiffs are unable to

establish a prima facie case prior to the start of trial. (*Id.* at p. 1381.)

Cottle further rejected the plaintiffs' contention that they were deprived of due process, holding, "[e]ven though the nature of the proceedings in the court changed, it was clear that what the court wanted was for petitioners [(the plaintiffs)] to make a prima facie showing of their physical injury claims. Accordingly, [the plaintiffs] had notice of what was actually required of them as well as extensive opportunity to present evidence and argue the issue." (*Cottle*, *supra*, 3 Cal.App.4th at p. 1384.)

In the nearly three decades since *Cottle* was decided, two published cases have affirmed a trial court's use of *Cottle*-type proceedings. In *Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal.App.4th 187, 193, Lockheed Martin sought coverage under numerous policies for pollution-related liability. The trial court organized the litigation, involving that suit and others, into phases with one phase set to be tried to a jury. (*Id.* at p. 195.) Prior to trial, the trial court (Judge Leslie C. Nichols, who was also the trial judge here) conducted a *Cottle* hearing that "require[ed] the parties to produce evidence to support a prima facie case on every issue for which the party had the burden of proof." (*Lockheed*, at p. 195.) Lockheed Martin submitted evidence, including a series of declarations from employees and experts, of 14 accidents it claimed resulted in the release of pollutants at a specific location. (*Id.* at pp. 211, 213.) When Lockheed Martin failed to prove its claim of coverage for contamination at one location, the trial court excluded evidence

leading to dismissal of its indemnity claims. (*Id.* at p. 195.) While no specific timeline is described in *Lockheed*, it is apparent the litigation lasted 10 years and there was ample time provided for the parties to accumulate declarations and other evidence prior to the hearing. (*Id.* at pp. 193, 213-214.)

And, in *Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1243-1245, a case involving several hundred plaintiffs with toxic tort claims, the trial court required offers of proof demonstrating causation to be submitted with an amended complaint to be filed following the sustaining of a demurrer. The reviewing court indicated it had "significant concerns about a procedure requiring detailed sworn affidavits at the pleading stage," but assumed the order was valid because the plaintiffs had not raised any issues challenging it. (*Id.* at p. 1245, fn. 3.)

The infrequent application of *Cottle* is perhaps unsurprising in light of extensive scrutiny of its reasoning. In the dissent to *Cottle*, authored by Justice Johnson, it was highlighted that until *Cottle*, "resort to a trial court's inherent authority to craft new rules of civil procedure [was] only a proper exercise of inherent powers when made necessary because of the *absence* of any statute or rule governing the situation. Thus, the rationale for devising new rules of procedure has historically been one of necessity. In other words, to fill a void in the statutory scheme, a court had a duty to create a new rule of procedure in the interests of justice and in order to exercise its jurisdiction." (*Cottle*, *supra*, 3 Cal.App.4th at p. 1391 (dis. opn. of Johnson, J.).) And none of the prior judicially created procedures involved deciding the merits of a cause of

action thereby removing it from a jury's consideration. (*Ibid.*)

Subsequent authority too has challenged the scope of the court's inherent authority relied upon in *Cottle*. *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967, citing *Cottle,* acknowledged the courts' "fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them," but observed the courts' powers to fashion new procedures is not boundless (*id*. at pp. 967-968). Rather, "inherent power may only be exercised to the extent not inconsistent with the federal or state Constitutions, or California statutory law." (*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 762 (*Slesinger*); see *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351-1352; see also *Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 296-300 [vacating trial court's order requiring statements from plaintiffs demonstrating prima facie showing of causation because it required early and unilateral disclosure of expert witness information rather than the mutual and simultaneous disclosure contemplated by the discovery statutes]; *First State Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 324, 330, 333-336 [rejecting trial court's case management order because it required resolution of choice of law before any dispositive motion could be filed, which conflicts with statutes authorizing filing of motions for summary judgment or summary adjudication].) Thus, "[a]lthough broad in scope, this inherent power to fashion novel procedures is not unlimited. A court cannot adopt an innovative rule or procedure without carefully weighing its impact on the constitutional

rights of the litigants." (*In re Amber S.* (1993) 15 Cal.App.4th 1260, 1264-1265.)

So too has the use of other motions in limine to hear disguised dispositive motions been criticized. For example, a court may employ its inherent powers, including the " 'inherent power to control litigation and conserve judicial resources,' " to use a motion in limine to test whether a complaint states a cause of action. (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 951; see *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 284-285.) However, in limine motions are designed to prevent admission of evidence where it would be impossible to " ' "unring the bell" ' " if the evidence is presented to the jury, not to replace statutorily prescribed dispositive motions. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1593.) Nonetheless, trial courts have used motions in limine to dismiss a cause on the pleadings, to examine the sufficiency of the evidence, or to require a party to make an offer of proof tantamount to an opening statement, which in effect amounts to a demurrer to the evidence or motion for nonsuit. (*Id.* at pp. 1593-1594; see *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 701-702.) Reviewing courts are "becoming increasingly wary of this tactic" in large part because the procedural shortcuts "circumvent procedural protections provided by the statutory motions or by trial on the merits; ... risk blindsiding the nonmoving party; and, in some cases, ... could infringe a litigant's right to a jury trial." (*Amtower*, *supra*, at p. 1594.)

Concerns about procedural shortcuts may also implicate constitutional issues. "Both the federal and state Constitutions compel the government to afford persons due process before depriving them of any property interest. (U.S. Const., 14th Amend. ['nor shall any state deprive any person of life, liberty, or property, without due process of law']; Cal. Const., art. I, § 7, subd. (a) ['A person may not be deprived of life, liberty, or property without due process of law ....']).)" (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212 (*Today's Fresh Start*).) This requires that a party at risk of loss be given notice and an opportunity to be heard, " 'at a meaningful time and in a meaningful manner.' " (*Ibid.*) This is a flexible requirement, varying with the circumstances of any given case. (*Id.* at pp. 212-213.) The function of the legal process afforded by these constitutional mandates is to minimize the risk of erroneous decisions. (*Id.* at p. 212.) And, if due process was not afforded before an order depriving the party of his or her interest was entered, we must reverse the order. (*Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1550.)

3. Analysis

In determining whether due process was afforded here, we adopt the balancing test set forth in *Mathews v. Eldridge* (1976) 424 U.S. 319, 335 [47 L.Ed.2d 18, 33]. (*Today's Fresh Start*, *supra*, 57 Cal.4th at p. 213.) This requires us to consider, " 'first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute

procedural safeguards; and, third, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.' " (*Ibid.*)

That there is a private interest affected here is of little doubt. "Due process requires notice before a dismissal of a case may be entered." (*Lee v. Placer Title Co.* (1994) 28 Cal.App.4th 503, 510; see *Cordova v. Vons Grocery Co.* (1987) 196 Cal.App.3d 1526, 1531; see also *Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 561, fn. 7.) For, if a plaintiff's case is dismissed without due process, that party's right of access to the courts is infringed. (See generally *Payne v. Superior Court* (1976) 17 Cal.3d 908, 914.) Having established that a right requiring procedural due process protections is implicated, we consider the remaining factors.

The risk of an erroneous deprivation was high as a result of the procedures implemented in this case. Plaintiffs were not provided advance notice of the issues they would be asked to address at the hearing, which resulted in a dismissal of their entire actions. Rather, they were notified by the trial court two days before the hearing, and one week before a multi-month trial was to commence, that it "may" identify issues, with the aid of counsel, on which to conduct a *Cottle* hearing. However, *Cottle* and the cases that have implemented it provided parties weeks or months to collect information to present a prima facie case on a select and enumerated issue, and then provided the presenting party an opportunity to cure any perceived deficiencies in that presentation. None of that was

provided here. While also arguing a motion for judgment on the pleadings, and jury instructions, plaintiffs were required on a half-day's notice to present a prima facie case on causation and on standard of care, without being given an adequate or meaningful opportunity to contact their witnesses or to gather the required information, even from the extensive discovery that had already been completed. Had the trial court identified the issues it perceived deficient upon reading the trial briefs or even in the notice to counsel, it could have continued trial to provide plaintiffs an adequate opportunity to present their prima facie case and to cure any deficiencies. Without doing so, plaintiffs did not have the requisite meaningful notice and opportunity to avoid dismissal of their entire case.

The only identifiable governmental interest impacted by the provision of additional procedural protections, i.e., advance notice of the issues to be presented and a meaningful opportunity to gather evidence to present, are the fiscal and administrative burden of conducting trial as scheduled. However, this too could have been ameliorated had the trial court identified the issues for which it required a prima facie presentation immediately following its review of the trial briefs—apparently the precipitating force behind its decision to utilize *Cottle* to narrow the issues of the case—two full weeks before trial was to commence. For example, the trial court could have continued trial at that point, which would have permitted the court to contact jurors and to adjust the courthouse schedule to allow time for the *Cottle* hearing to be noticed and heard, with an opportunity to cure any deficiencies before an order was entered. Additionally, this

interest is minor in contrast to the potential for erroneous dismissal of the entire case through the procedures implemented.

Balancing these factors, on the facts before us, we conclude plaintiffs' due process rights were infringed by the manner in which the trial court noticed and conducted the *Cottle* hearing. Accordingly, we reverse the judgment of dismissal premised on the trial court's July 26, 2013 order finding plaintiffs failed to establish a prima facie case.

B. Judgment on the Pleadings

As noted above, during the pretrial hearing less than a week before trial was to commence, Sierra Pacific made an oral motion for judgment on the pleadings as to the claims presented by Cal Fire.[11] The gist of the motion was that sections 13009 and 13009.1, on which Cal Fire's claims were necessarily premised,[12] limited recovery for direct liability and did not incorporate common law theories of negligence. Cal Fire disagreed, arguing use of the word

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[11] Beaty and landowner defendants also joined in the motion, and Sierra Pacific argued it was applicable to all defendants excepting Howell, Crismon and Bush.

[12] In its complaint, Cal Fire sought to recover its fire suppression costs under sections 13009 and 13009.1. To that end, it alleged that all defendants violated California Code of Regulations, title 14, section 938.8 (requiring inspection following certain timber operations) and were negligent in starting the Moonlight Fire and allowing it to spread; additionally, against Beaty and the landowner defendants, it alleged negligent management and use of land; against Sierra Pacific, Beaty, the landowner defendants, and Howell, it also alleged negligent supervision and inspection; and against Sierra Pacific alone it alleged negligence based on a peculiar risk.

"negligently" in section 13009 incorporates common law theories of negligence into permissible grounds for recovery of fire suppression and investigation costs. The trial court granted judgment on the pleadings to defendants Sierra Pacific, Beaty, and landowner defendants (leaving only Cal Fire's claims against Howell, Bush, and Crismon). Cal Fire now appeals that order, claiming use of the word "negligently" in the statute incorporates common law theories of negligence, including vicarious liability, and that the inclusion of a corporation as a " '[p]erson' " in section 19 requires the same conclusion. We conclude the trial court did not err in awarding judgment on the pleadings.

In construing sections 13009 and 13009.1, we extend no deference to the trial court's interpretation, but instead review the question of law regarding statutory construction de novo. (*John v. Superior Court* (2016) 63 Cal.4th 91, 95.) " 'Our primary task in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose. [Citation.] We consider first the words of a statute, as the most reliable indicator of legislative intent.' " (*Id.* at pp. 95-96.) We construe the language in the context of the entire statutory framework, with consideration given to the policies and purposes of the statute. (*Jones v. Superior Court* (2016) 246 Cal.App.4th 390, 397.) In so construing the statute, we may not "insert what has been omitted, or ... omit what has been inserted." (Code Civ. Proc., § 1858.) We also recognize that " ' "where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different

legislative intent existed with reference to the different statutes." ' " (*Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1108 (*Alameda Produce*).)

At common law, there was no recovery of government-provided fire suppression costs; that recovery is purely a creature of statute. (*City of Los Angeles v. Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009, 1020 (*Shpegel-Dimsey*).) A governmental decision to provide tax-supported services, such as police or fire responses to emergencies, is a legislative policy determination. (*Id.* at p. 1018.) Thus, " 'in the absence of a statute expressly authorizing recovery of public expenditures [(i.e., police, fire and other emergency services)], "the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service." ' " (*Ibid.*) Therefore, Cal Fire's ability to recover its fire suppression costs is strictly limited to the recovery afforded by statute.

The statutes in question here, sections 13009 and 13009.1, provide as follows. In pertinent part, section 13009, subdivision (a) states that "[a]ny person ... who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him or her to escape onto any public or private property ... is liable for the fire suppression costs incurred in fighting the fire and for the cost of providing rescue or emergency medical services, and those costs shall be a charge against that person...." Section 13009.1 states that "[a]ny

person ... who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him or her to escape onto any public or private property ... is liable for both of the following: [¶] (1) [t]he cost of investigating and making any reports with respect to the fire[;] [and] [¶] (2) [t]he costs relating to accounting for that fire and the collection of any funds pursuant to Section 13009, including, but not limited to, the administrative costs of operating a fire suppression cost recovery program ...." (§ 13009.1, subd. (a).) A "person" for purposes of these statutes is "any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company." (§ 19.)

As the language of the statute itself does not clearly delineate the impact of the inclusion of the term "negligently," we turn to legislative history for guidance. In 1931, the Legislature enacted chapter 790, which provided that an owner whose property was damaged could recover from "[a]ny person who: [¶] (1) [*p*]*ersonally or through another*, and (2) [w]ilfully, negligently, or in violation of law, commits any of the following acts: (1) [s]ets fire to, (2) [a]llows fire to be set to, (3) [a]llows a fire kindled or attended by him to escape to the property, whether privately or public owned, of another" or "[a]ny person" who allowed a fire burning on his property to escape to another's property "without exercising due diligence to control such fire." (Stats. 1931, ch. 790, §§ 1-2, p. 1644, italics added.) Chapter 790 also permitted recovery of the expenses of fighting such fires "by the party, or by the federal, state, county, or private agency incurring such expenses." (Stats. 1931, ch. 790, § 3, p. 1644.)

Prior to this enactment, there was no statute authorizing the government to recover its fire suppression or investigation costs.

In 1953, the Legislature enacted chapter 48, codifying section 13007 et seq., including, in particular, section 13009, which *generally* appears to replicate the language of the 1931 enactment. (Stats. 1953, ch. 48, §§ 1-3, p. 682.) As enacted, former section 13009 permitted recovery of "[t]he expenses of fighting any fires mentioned in Sections 13007 and 13008 ... against any person made liable by those sections for damages caused by such fires." (Stats. 1953, ch. 48, § 3, p. 682.) At that time, section 13007 permitted an owner whose property was damaged to recover against "[a]ny person who *personally or through another* wilfully, negligently, or in violation of law, sets fire to, allows fire to be set to, or allows a fire kindled or attended by him to escape to, the property of another, whether privately or publicly owned ...." (Stats. 1953, ch. 48, § 1, p. 682, italics added.)[13] Section 13008 made liable "[a]ny person" who allowed

[13] Though section 19, which provides the statutory definition of "person," had not been enacted when the initial statute providing for recovery of fire suppression costs came into effect in 1931, it was enacted prior to this 1953 enactment of former sections 13007, 13008, and 13009. (See Stats. 1939, ch. 60, gen. prov. 19, pp. 483-484, amended by Stats. 1994, ch 1010, § 151, p. 6095 [adding "limited liability company" to the statutory definition of "person"].) At that time, it included, as it does today, "corporation" as a person. (Stats. 1939, ch. 60, gen. prov. 19, p. 484.) The Legislature was presumptively aware of this when it enacted section 13009 in 1953. (*People v. Scott* (2014) 58 Cal.4th 1415, 1424 ["the Legislature ' "is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof." ' ")

a fire burning on his property to escape to another's property "without exercising due diligence to control such fire." (Stats. 1953, ch. 48, § 2, p. 682.) Thus, through reference by incorporation to section 13007, former section 13009 allowed for recovery against a person who acted "personally or through another." (Stats. 1953, ch. 48, §§ 1, 3, p. 682.)

Then, in 1971, apparently in reaction to the decision in *People v. Williams* (1963) 222 Cal.App.2d 152, in which the State was deemed unable to recover its fire suppression costs against a defendant who set a fire that burned out of control within the boundaries of his own property, the Legislature amended section 13009. (*People v. Southern Pacific Co.* (1983) 139 Cal.App.3d 627, 637 (*Southern Pacific*).) As amended, former section 13009 read, in pertinent part: "Any person who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him to escape onto any forest, range or nonresidential grass-covered land is liable for the expense of fighting the fire and such expense shall be a charge against that person." (Stats. 1971, ch. 1202, § 1, p. 2297.) As relevant to our present inquiry, while the 1971 amendment addressed the boundary limitation identified in *Williams*, the amendment also removed the reference by incorporation to section 13007's language imposing liability on any person who acted "personally or through another." (Compare Stats. 1953, ch. 48, § 1, p. 682 with Stats. 1971, ch. 1202, § 1, p. 2297.)

None of the subsequent amendments to section 13009 in 1982, 1987, 1992, or 1994 have re-inserted or otherwise incorporated the "personally or through

another" language that would expressly provide for the application of vicarious liability concepts. (Cf. Stats. 1982, ch. 668, § 1, p. 2738; Stats. 1987, ch. 1127, §1, p. 3846; Stats. 1992, ch. 427, § 91, pp. 1627-1628; Stats. 1994, ch. 444, § 1, pp. 2410-2411.) Neither did the Legislature include such language in section 13009.1, when it was added in 1984 or amended in 1987. (§ 13009.1, added by Stats. 1984, ch. 1445, § 1, pp. 5058-5059, as amended by Stats. 1987, ch. 1127, § 2, pp. 3846-3847.) Instead, as relevant to our inquiry, both sections 13009 and 13009.1 persist in imposing liability on "[a]ny person ... who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him or her to escape onto any public or private property ...." (§§ 13009, subd. (a); 13009.1, subd. (a).) In contrast, section 13007 remains as it was codified in 1953 and still permits liability to be imposed on "[A]ny person who *personally or through another* wilfully, negligently, or in violation of law, sets fire to, allows fire to be set to, or allows a fire kindled or attended by him to escape to, the property of another ...." (§ 13007, italics added.)

Cal Fire argues we should not construe the presence of the "personally or through another" language in section 13007 and its absence in sections 13009 and 13009.1 as indicative of any legislative intent to preclude application of vicarious liability concepts in the latter sections. We disagree. Cal Fire's claim that the language is surplusage in section 13007 is unavailing. For, "[i]t is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage."

(*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1038.) Moreover, the presence of the language in section 13007, a similar statute on a related subject, and its omission from sections 13009 and 13009.1 is significant in ascertaining legislative intent from the statutes' language. (*Alameda Produce*, *supra*, 52 Cal.4th at p. 1108.) Nor do we find it incongruous that the Legislature may have afforded a longer reach in recovery efforts to an owner whose property was damaged than it afforded those who expended funds fighting or investigating the fire. Therefore, based on the plain language of the statute, when read in the context of the statutory framework as a whole, we conclude the Legislature did not incorporate concepts of vicarious liability into sections 13009 or 13009.1.

We also reject Cal Fire's contention that other common law theories of direct liability including negligent supervision, negligent hiring, negligent inspection, negligent management and use of property, and peculiar risk have been grafted into sections 13009 and 13009.1 through inclusion of the term "negligently." The adverb "negligently" carries the connotation that the tortious actor " 'failed to comply with a standard of conduct with which any ordinary reasonable man *could* and *would* have complied: a standard requiring him to take precautions against harm.' " (Black's Law Dict. (10th ed. 2009) p. 1198, col. 2.) Here, "negligently" is an adverb modifying three potential verb phrases: (1) sets a fire, (2) allows a fire to be set, or (3) allows a fire kindled or attended by him or her to escape. (§§ 13009, subd. (a), 13009.1, subd. (a).) To read the statute as permitting liability where a "person" negligently

supervised, managed, hired, or inspected another who set or allowed to be set a fire, is simply too attenuated a construction to be plausible. Moreover, Cal Fire has not cited for this court any published case that has imposed liability under such circumstances, and we have not found any such cases.

The most apropos potential case we encountered was *County of Ventura v. Southern California Edison Co.* (1948) 85 Cal.App.2d 529. There, a power company was found to be liable to the county and fire protection district for costs of fighting a fire that occurred when a power line came into contact with a telephone line and pole, all of which were owned by the power company, as a result of the power company's negligent construction and maintenance of its lines. (*Id.* at p. 531.) The power company argued the statute in effect, which imposed liability for the expense of fighting fires on "[a]ny person who: (1) [*p*]*ersonally or through another*, and (2) [w]ilfully, negligently, or in violation of law, ... (1) [s]ets fire to, (2) [a]llows fire to be set to, [or] (3) [a]llows a fire kindled or attended by him to escape to the property ... of another ... ," did not provide a basis for liability against the power company. (*Id.* at pp. 531-532, italics added.) The Court of Appeal disagreed, finding that while liability perhaps could not be found based on the first prong—sets fire to—without there being some direct act, liability could be premised based on the second prong—allows fire to be set to—where the allegedly negligent actor could "be charged with knowledge of the condition of its equipment, [and] took no steps to prevent the occurrence of fire, which was the reasonably foreseeable consequence of that condition." (*Southern California Edison,* at pp. 532-533.)

However, liability in that case was not based on section 13009 in its present form, but on a former statute that allowed recovery against a person who acted "personally or through another," and still imposed liability not on a third party with some responsibility to supervise or oversee the actor, but on the actor itself that failed to properly maintain its own equipment that directly caused the fire. It is, therefore, unavailing to extend liability in this case to defendant landowners, the property manager (Beaty), or timber purchaser (Sierra Pacific).

We are not persuaded otherwise by the cases cited by our esteemed colleague in his dissent or by the cases proffered by Cal Fire. For instance, as the dissent acknowledges, *Haverstick v. Southern Pacific Co.* (1934) 1 Cal.App.2d 605, though it affirms a judgment in favor of the plaintiff landowner for property damage and personal injuries against the railroad for the negligence of its employees, the opinion does not make clear or indeed even mention which section of chapter 790 was the basis of the plaintiff's claim for damages. (Dis. opn., *post*, at pp. 2-3.) It is axiomatic that cases are not authority for propositions not considered therein (*Siskiyou County Farm Bureau v. Department of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 437, fn. 11), and here, because it is not articulated in the opinion, we cannot say whether *Haverstick* is interpreting the section of chapter 790 that premised liability on direct actions of a person or actions engaged in personally or through another. *People ex rel. Grijalva v. Superior Court* (2008) 159 Cal.App.4th 1072 did not have to address whether there was legal responsibility for a fire because the real parties in interest admitted

responsibility (*id.* at p. 1075); indeed, it focused on whether the affirmative defenses of comparative fault or failure to mitigate damages could be raised against the government in light of its immunity (*id.* at pp. 1077-1079). And, *People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 596 concerned only whether it was error to award a new trial based on a particular declaration of counsel purporting to establish a claim of juror misconduct, and whether it was error to instruct the jury on the amount of firefighting expenses incurred by the State in fighting a particular fire. *Southern Pacific*, *supra*, 139 Cal.App.3d 627 involved a fire that started on railroad property and spread to surrounding property. The pertinent question presented to the court in *Southern Pacific* was whether a jury instruction that permitted liability for fire suppression costs based on the defendant's failing to extinguish a fire that it was not found to have kindled was erroneous. (*Id.* at pp. 636-637.) *Southern Pacific* concluded that because section 13009 did not incorporate the language of section 13008, the instruction was erroneous. (*Southern Pacific*, at p. 638.) It, however, found the error harmless because there was substantial evidence the fire was likely to have been caused by sparks or particles emitted by trains. (*Id.* at pp. 638-639.) In its interpretation of former section 13009, *Shpegel-Dimsey*, *supra*, 198 Cal.App.3d at pages 1019 through 1020 held only that the City could not recover fire suppression costs because the defendant was not one of the classes of persons held liable and the City's property was not one of the classes of property protected by the statute as it existed at the time of the fire in 1980.

Moreover, subdivisions (a)(2) and (3), added to sections 13009 and 13009.1 in 1987, extended liability for cost recovery to "[a]ny person ... (2) other than a mortgagee, who, being in actual possession of a structure, fails or refuses to correct, within the time allotted for correction, despite having the right to do so, a fire hazard prohibited by law, for which a public agency properly has issued a notice of violation respecting the hazard, or (3) including a mortgagee, who, having an obligation under other provisions of law to correct a fire hazard prohibited by law, for which a public agency has properly issued a notice of violation respecting the hazard, fails or refuses to correct the hazard within the time allotted for correction, despite having the right to do so ...." (Stats. 1987, ch. 1127, §§ 1-2, pp. 3846-3847.) Were it possible for section 13009 or 13009.1 to be applied to one who did not through his direct action proximately cause the fire, i.e., to set a fire or allow it to be set, there would have been no cause to amend the statute to extend liability to one who has the right and responsibility to cure a noticed fire hazard but fails to do so. That person, whether he or she is in actual possession as owner, lessor, lessee, mortgagor, or mortgagee, would have been liable for his or her negligent use and management of the property under the "allows a fire to be set" prong of subdivision (a)(1) of sections 13009 and 13009.1. We will not read sections 13009 and 13009.1 in such a way as to make inclusion of subdivisions (a)(2) or (3) of sections 13009 or 13009.1 nugatory. (*Harris v. Superior Court* (2011) 53 Cal.4th 170, 188 [we avoid statutory interpretations that "render part of an enactment nugatory"].)

Therefore, we conclude neither that inclusion of the term "negligently" in sections 13009 and 13009.1 nor that the statutory definition of "person" to include a corporation, incorporates common law theories of negligence into the statutes. And further that sections 13009 or 13009.1 do not provide for vicarious liability. Accordingly, the trial court did not err in awarding judgment on the pleadings to Sierra Pacific, Beaty, and landowner defendants with regard to Cal Fire's claims. On remand following our reversal of the judgment of dismissal premised on the trial court's July 26, 2013 order finding plaintiffs failed to establish a prima facie case (see pt. I.A.3., *ante*, at pp. 18-20), Cal Fire is barred from pursuing claims against any defendant based on common law theories of negligence that have not been expressly included in sections 13009 or 13009.1. In reality, for reasons discussed in unpublished part II.B.4. of this opinion, *post*, we suspect it is unlikely there will be any opportunity on remand for Cal Fire to pursue claims against any defendant. [END OF FULLY PUBLISHED PT. I.]

II. Challenges to Postjudgment Awards*

Plaintiffs also challenge the trial court's postjudgment awards, specifically the orders awarding costs to defendants as prevailing parties and the orders mandating Cal Fire to pay attorney fees and expert fees and expenses to defendants either as prevailing party awards or as discovery sanctions. Cal Fire also challenges any order awarding costs of proof based on disproving denials to requests for admission.

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* See footnote, *ante*, page 1.

We conclude any order for costs as prevailing parties premised on the *Cottle* proceeding are necessarily vacated, and because the trial court did not apportion costs, the order awarding costs based on the judgment on the pleadings is remanded for further proceedings. As to discovery sanctions, we conclude it was not error for the trial court to impose monetary and terminating sanctions, but the manner in which it imposed monetary sanctions was an abuse of discretion. Therefore, we remand for further proceedings to determine an appropriate sanction award. However, we conclude it was error for the trial court to award attorney fees to defendants as prevailing parties against Cal Fire. Finally, there is no order awarding costs of proof for us to review on appeal.

A. Costs

The trial court entered three separate orders awarding costs. To Beaty and landowner defendants, the trial court awarded costs in the sum of $583,173.15. To Sierra Pacific, it entered an award of costs in the sum of $2,852,209.34. And, to defendants Howell, Bush, and Crismon, the trial court awarded costs in the sum of $417,604.06. The trial court did not apportion the costs awards among the multiple plaintiffs but instead made each plaintiff jointly and severally liable for the entire amount of each costs award.

In light of our reversal of the trial court's judgment of dismissal premised on its finding that plaintiffs had failed to establish a prima facie case (the *Cottle* proceeding), its postjudgment order awarding costs to defendants as prevailing parties is necessarily vacated. (*Ducoing Management, Inc. v. Superior Court*

(2015) 234 Cal.App.4th 306, 314 ["A disposition that reverses a judgment automatically vacates the costs award in the underlying judgment even without an express statement to this effect."].) However, as discussed above, the trial court properly awarded judgment on the pleadings to defendants Sierra Pacific, Beaty, and landowner defendants and against plaintiff Cal Fire. Therefore, an award of costs to defendants Sierra Pacific, Beaty, and landowner defendants as prevailing parties against Cal Fire is appropriate. Nonetheless, because the trial court's orders awarding costs did not differentiate between costs incurred by defendants in response to Cal Fire's action as opposed to other plaintiffs' actions, we are unable to ascertain which costs, if any, were properly awarded to Sierra Pacific, Beaty, and landowner defendants as prevailing parties against Cal Fire. On remand, the trial court may award statutorily allowable costs to Sierra Pacific, Beaty, and landowner defendants to the extent these defendants incurred costs defending against Cal Fire's action. (Code Civ. Proc., §§ 1032, 1033.5.)

B. Discovery Sanctions

The trial court entered postjudgment discovery sanctions against Cal Fire including both monetary sanctions totaling $28,765,365.89 and terminating sanctions based on its finding that Cal Fire had engaged in pervasive and gross discovery abuses. The trial court awarded to Beaty and landowner defendants the sum of $6,146,901.41 (comprised of attorney fees and expert witness fees), as an alternative to an award of attorney fees, as a prevailing party. The trial court awarded

cumulatively to Howell, Bush, and Crismon, as an alternative to a prevailing party attorney fee award, the sum of $1,571,741.28 (comprised of attorney fees and expert witness fees adjusted by a lodestar factor of 1.2). Finally, it awarded to Sierra Pacific sanctions of $21,100,723.20 (comprised of attorney fees and expert witness fees, costs, and expenses adjusted by a lodestar factor of 1.2), again as an alternative to an attorney fee award.[14]

On appeal, Cal Fire argues the trial court did not have jurisdiction to impose terminating sanctions, that the terminating sanctions imposed were improperly punitive and not factually supported, and that monetary sanctions were improper because the trial court did not make the requisite findings required by Code of Civil Procedure section 2023.030. We conclude the trial court had jurisdiction to enter terminating and monetary sanctions and it did not err in imposing terminating sanctions. However, the manner in which it imposed monetary sanctions was an abuse of discretion.

1. Additional Background

In awarding discovery sanctions, the trial court found that beginning in July 2010 and continuing through 2013, Cal Fire committed multiple acts that

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[14] This amount does not include the award of $650,634 adjusted by a 1.2 lodestar (for a total of $780,760.80) ordered by the trial court to Sierra Pacific as fees incurred in making its motion for fees, expenses, and/or sanctions. Thus, though the total amount the trial court ordered Cal Fire to pay to Sierra Pacific in its order awarding fees, expenses, and/or sanctions was $21,881,484, the total amount of sanctions and prevailing party attorney fees awarded was $21,100,723.20.

amounted to a "gross abuse" of the Civil Discovery Act. Specifically, the trial court found that Cal Fire investigator Joshua White engaged in spoliation when he destroyed his field notes; he also created a false "Origin and Cause Investigation Report" (the Moonlight report), the false narrative of which was injected in the litigation in July 2010 when Cal Fire provided the Moonlight report—in lieu of factual statements—in its response to interrogatories; and White continued the same false narrative by testifying untruthfully at his deposition in November 2010. Thus, the trial court concluded monetary sanctions as a result of discovery abuses began accruing in July 2010 in the form of all defense expenses incurred from that point forward, including all attorney fees. Moreover, the trial court concluded, "[a]ll of Defendants' defense expenses are, in one way or another, inextricably intertwined with the falsehoods and omissions in the Origin and Cause [Investigation] Report."

In addition to monetary sanctions, the trial court found terminating sanctions were appropriate because "Cal Fire and its counsel engaged in a stratagem of obfuscation that infected virtually every aspect of discovery in this case." The trial court noted that the pattern and practice of obfuscation began during discovery and continued even after the trial court had entered judgment and found Cal Fire's " 'willful,' " "repeated and egregious" discovery abuses impaired defendants' rights and " 'threatened the integrity of the judicial process.' " The trial court also found that less severe sanctions would be unworkable and ineffectual because Cal Fire's discovery abuses

had "permeated nearly every single significant issue in this case."

The trial court found that "Cal Fire's actions initiating, maintaining, and prosecuting this action, to the present time [(postjudgment)], [are] corrupt and tainted. Cal Fire failed to comply with discovery obligations, and its repeated failure was willful." In concluding discovery sanctions were appropriate, the trial court stated, "In the end, Cal Fire and its counsels' vast array of discovery abuses suggests that they perceive themselves as above the rule of law. With their abuses infecting virtually every aspect of the discovery process, from false testimony, to pervasive false interrogatory responses, to spoliation of critical evidence, to willful violations of the Court's Orders requiring production of WiFITER [(Wildland Fire Investigation Training and Equipment Fund)] documents, Defendants and the Court simply have no reason to believe that these Defendants can receive, or could ever have received, a fair trial under these circumstances." In ordering terminating sanctions, the trial court relied on authority provided by Code of Civil Procedure section 2023.030 in addition to a separate line of case law, "as augmented by the inherent powers of the Court," to issue the "most severe sanction" to dismiss the case with prejudice because it found Cal Fire "engaged in misconduct ... that is deliberate, that is egregious, and that renders any remedy short of dismissal inadequate to preserve the fairness of the trial."[15]

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[15] Contrary to Cal Fire's claim, we do not believe the trial court's rulings on discovery sanctions are an improper decision on the merits of the case depriving Cal Fire of its right to a jury

In reaching these conclusions, the trial court highlighted multiple exemplar discovery abuses it found were committed by Cal Fire.

a. *WiFITER fund documents*

Cal Fire was ordered by the trial court to produce all responsive documents relating to the "Wildland Fire Investigation Training and Equipment Fund" (the WiFITER fund) by April 30, 2013.[16] At that time it produced 7,206 responsive documents amounting to 27,915 pages. During argument of the motions in limine a couple months later, Cal Fire argued any evidence concerning the WiFITER fund should be excluded at trial as irrelevant because defendants could not point to anything in the discovery they had received that demonstrated the WiFITER fund was improper or illegal, or that it provided any incentive for Cal Fire to conduct its fire investigations for any purpose other than to discover the truth. Based on Cal Fire's representations and argument, and the evidence known to defendants at that time, the trial

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trial. Rather, the trial court is required to consider the evidence presented to determine whether a misuse of the discovery process has occurred. Here, the claimed misuses included false testimony by a witness and false discovery responses. Thus, the trial court was obliged, upon receiving defendants' motions for sanctions, to consider and weigh the evidence presented to it to make a determination on the merits of the claims of discovery abuse.

[16] WiFITER was a fund established without statutory authorization by Cal Fire and managed by the California District Attorneys Association. The fund, which was established to promote fire investigations and improve training, collected more than $3.6 million dollars through civil cost recovery negotiated settlements before it was closed in April of 2013 following a report from the State Auditor.

court granted Cal Fire's motion in limine to exclude any reference to the WiFITER fund.

Then, on October 21, 2013, counsel for Sierra Pacific informed counsel for Cal Fire that it had learned from an independent source (a State Auditor's report issued Oct. 15, 2013) of a responsive document that had not been produced by Cal Fire. As subsequently ordered by the trial court, on October 31, 2013, Cal Fire produced "a jumbled mix of documents"—more than 5,000 pages—that ought to have been produced by the April 30, 2013 deadline. Thereafter, on November 22, 2013, after Cal Fire had represented to the trial court that it had produced "everything," Cal Fire produced an additional 2,000 pages of documentation, in violation of the trial court's first and second orders to produce responsive documents.

The Attorney General presented various theories why the documents were not timely produced, notably, error by Attorney General staff in inadvertently failing to mark pages for production or in inadvertently skipping clumps of pages in their review or software errors in marking pages for production during Attorney General staff review. Nonetheless, the trial court found that Cal Fire's belated production had violated discovery rules and had prejudiced defendants in their ability to adequately conduct depositions, argue, and support or oppose motions, strategize their case, and engage in settlement negotiations because they were lacking relevant information. The trial court also found it would have ruled differently on the aforementioned motion in limine if the information had been disclosed timely

and that "some of these [belatedly produced] documents belie Cal Fire's own representations to this Court that there was no evidence whatsoever that the WiFITER fund was improper." The trial court concluded Cal Fire's failure to produce a large volume of relevant documents in violation of the trial court's repeated orders to do so, even if inadvertent, demonstrated a lack of seriousness on behalf of Cal Fire in fulfilling its obligation to comply with the discovery rules that amounted to a gross violation of the rules and an affront to the trial court.

b. *Lead investigator's deposition testimony*

The trial court noted there was a "significant dispute between the parties as to whether the investigators properly met the standard of care associated with wildland fire origin and cause investigations," and noted that it was not the trial court's role in this context to resolve this dispute. Nonetheless, in the context of determining whether discovery sanctions should be imposed, the trial court was bound to consider "whether Cal Fire abused the legal process through the false testimony of its lead investigator on the Moonlight Fire, Joshua White." White and the United States Forest Service investigator, Dave Reynolds, who conducted the joint origin and cause investigation together, were the primary scene investigators. They began processing the scene on September 4, 2007, and identified two points of origin the following morning and labeled those points as E-2 and E-3 in the Moonlight report. When asked why White did not mark the E-2 or E-3 points with a white flag (which is indicated by the

Moonlight report as a marker for either evidence or a point of origin), take any photographs to document those sites as points of origin, or otherwise document the "most important points in his investigation" until three days later, White provided no explanation and merely responded, "I don't know." Neither could Reynolds explain why there were five photographs, produced in discovery but not attached to the Moonlight report, taken the morning of September 5, 2007, from two selected reference points that seem to center on a white flag, or why the only GPS measurement taken was from the rock directly adjacent to that white flag.

White was able to explain the purpose of the blue, red, and yellow indicator flags seen in the photographs, but denied even seeing the white flag, which the trial court acknowledged was more readily seen when viewed enlarged on a computer screen. After being shown the image in that manner, White retracted his assertion that there was no white flag but continued to profess ignorance of how the flag came to be there. He persisted in denying that he placed the flag, could not explain why it was there, and also maintained he was unaware that Reynolds had placed any white flag for any reason. Neither White nor Reynolds recalled placing any white flags to mark evidence or points of origin, though Reynolds posited the white flag was "very likely ... a flag [he] put down but ... discounted ... later." Additionally, the trial court found that none of the photographs omitted from the Moonlight report demonstrates any interest in points E-2 and E-3, which White identified in the report as the points of origin.

White also disavowed knowledge of a "Fire Origin" sketch—prepared by Reynolds—which depicts the two reference points that coincide with the reference points of the omitted photographs, and distance and bearing measurements from those reference points that intersect at a labeled point of origin marked with an "x" in the same location as the white flag depicted in the omitted photographs, even though photos indicate White would have at least seen the sketch when he took photographs of metal fragments. In another matter, White had testified that to locate a point of origin, one would establish two reference points and take measurements, and that this would be " 'the very foundation of an origin and cause report.' " (Italics omitted.) Nonetheless, here White testified he did not know where the measurements denoted on the sketch intersected, denied having seen the sketch until after the Moonlight report was complete, and indicated he did not learn of the sketch until sometime in 2008.

The trial court explained that White's testimony on the "most central issues" in the case was not credible, demonstrated Cal Fire's pattern of obfuscation and bad faith denial of the truth during discovery, and greatly increased the expense of litigation because "[h]ad [the investigators] testified truthfully from the start, as required, [fn. omitted] Defendants would have likely spent nothing, or very little, as the case most likely could not have advanced." The trial court also castigated Cal Fire's lead counsel for failing to intervene to stop its witnesses from testifying untruthfully. Specifically, Reynolds had discussed whether there was a white flag in a photograph during a meeting with counsel but later

denied seeing the flag in the photo when placed under oath in his deposition. The trial court was similarly insulted by Cal Fire's willingness to present a declaration from White even after the case was dismissed wherein he continued to advance his "absurd[]" deposition testimony regarding the white flag.

c. *Falsification of interview statements*

(i) J.W. Bush interview

White and Reynolds interviewed Bush, a Howell employee working on the day the Moonlight Fire began, on two occasions. The first interview, conducted September 3, 2007, was summarized but was not recorded. The second interview, on September 10, 2007, was both recorded and summarized. The summaries were incorporated into the Moonlight report, which was provided in lieu of a narrative in discovery responses, and the tape-recording of the second interview was provided in discovery.

In his summary of the September 3, 2007 Bush interview, Reynolds claims Bush attributed the cause of the fire to a Caterpillar bulldozer's tracks scraping rock. However, in the September 10, 2007 interview, as revealed by a transcript of the interview recording produced in discovery, when asked whether he *ever* believed that to be the cause of the fire, Bush flatly denied having that belief and denied having told anyone that a rock strike started the fire. Nonetheless, in White's summary of the September 10, 2007 Bush interview, which was incorporated into the Moonlight report provided as a discovery response to interrogatories, White indicated " 'Bush reiterated the same information he had provided to ... Reynolds,' "

i.e., that the fire was caused by a bulldozer striking a rock. When White was asked during his deposition about the inconsistency between his summary and the transcript of the recorded interview he offered no explanation for the discrepancy.

(ii) Ryan Bauer interview

The summary of the interview with Ryan Bauer, who was cutting firewood with an altered chainsaw in the area near where the Moonlight Fire began, included by White in the Moonlight report, omits Bauer's unsolicited, demonstrably false alibi in which he volunteered, " 'I was with my girlfriend all day. She can verify that if I'm being blamed for the fire.' " Rather, the Moonlight report indicates Bauer noticed the fire from his girlfriend's house and had gone toward the fire to see if he could assist in removing equipment. The omission of Bauer's voluntary statement renders the Moonlight report misleading with respect to his potential involvement. The Moonlight report was provided as an interrogatory response in lieu of a particularized response, though the recording of the interview was produced in discovery. Therefore, the trial court found, "[h]ad Defendants relied on Cal Fire's verified interrogator[y] [responses], this information would never have been discovered."

(iii) Red Rock lookout interviews

On the day the fire started, Caleb Lief was manning the nearest federal lookout tower, known as Red Rock. The Moonlight Fire was reported from this tower at 2:24 p.m. At about 2:00 p.m., another federal employee, Karen Juska, went to the tower to bring supplies and for maintenance. When she walked up

the steps to the tower, she found Lief standing on the catwalk of the tower urinating on his bare feet, supposedly as a homeopathic cure to athlete's foot fungus. When she walked into the cabin at the tower, she spied a glass marijuana pipe, which Lief placed in his back pocket; and, when he handed her the radio to repair, she smelled a heavy odor of marijuana on Lief's hand and on the radio.

None of this information, which the trial court deemed relevant to the inquiry whether Lief was properly performing his function, was contained or referenced in the written summaries of the interviews of Lief and Juska conducted and prepared by Reynolds's replacement, United States Forest Service special agent Diane Welton. The summaries are incorporated in Cal Fire's verified interrogatory responses in lieu of factual statements. The record indicates White learned of Lief's conduct sometime in 2008, but did not feel he had sufficient information to include it in the Moonlight report. Additionally, Juska testified Welton instructed her not to speak of these issues prior to her interview, and her draft report indicated she was asked to omit information because Lief's conduct was not being investigated.

d. *Spoliation of evidence*

White destroyed his field notes prepared during his investigation, a fact which he attempted to justify because his " 'field notes were destroyed only after the information in them was transferred to his Report [(the Moonlight report)], which was and is the common practice' " and that he " 'transferred all of the case file information to his laptop computer, so all this electronic information [is] in fact preserved.' " The

trial court expressly found White not to be a credible witness in this regard. As proof supporting this finding, the trial court cited White's failure to record any information in the Moonlight report regarding placement of the white flag, photographs taken of the white flag, measurements and a GPS reading of the location of the rock where the white flag was placed, or the sketch in which the flag location was marked as the point of origin. Defendants discovered this all happened prior to the release of the scene only through discovery of Reynolds's notes from the United States Forest Service.

Additionally, because White had destroyed his copious field notes, the trial court found he was able to effectively and conveniently escape meaningful cross-examination because he could claim a lapse of memory when confronted with inconsistencies. White claimed not to remember the white flag, not to remember learning of the marijuana paraphernalia and odor at the Red Rock lookout, and not to remember why his report of the September 10 interview with Bush is directly opposite of the transcript of that interview. The trial court deduced that had the notes not been destroyed, White's intent may have been revealed. That Cal Fire has since made it an official practice to destroy field notes is not helpful to Cal Fire's position in defending White's voluntary spoliation of evidence in the present case.

e. *Inclusion of other false origin and cause reports*

Incorporated in the Moonlight report was a report about another fire—the Lyman Fire. The Moonlight report indicated that the investigation of the Lyman

Fire revealed that it too was ignited when a bulldozer operated by a Howell employee struck a rock. However, the lead investigator of the Lyman Fire flatly contradicted that conclusion by testifying that the cause of the Lyman Fire was undetermined. The false report about the Lyman Fire was included in verified interrogatory responses in lieu of narrative factual statements.

2. Legal Principles

As noted above, the trial court relied on two separate sources of authority to impose discovery sanctions on Cal Fire: statutory authority provided by the Civil Discovery Act and common law authority premised on the court's inherent authority as described in *Slesinger*, *supra*, 155 Cal.App.4th 736. The trial court appeared to premise its award of monetary sanctions on the statutory authority alone, but its order imposing terminating sanctions was based on both sources of its authority. Thus, we discuss both the common law and statutory authority of the trial court to impose sanctions for discovery abuses.

Code of Civil Procedure section 2023.030 permits the trial court to impose as sanctions against anyone who has engaged in a misuse of the discovery process monetary sanctions, issue sanctions, evidence sanctions, terminating sanctions, or contempt sanctions. Code of Civil Procedure section 2023.010 provides that the following, among others, are misuses of the discovery process: failing to respond or to submit to an authorized method of discovery; making, without substantial justification, an unmeritorious objection to discovery; making an evasive response to discovery;

and disobeying a court order to provide discovery. Other sanctionable discovery abuses include providing false discovery responses and spoliation of evidence. (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223 [terminating sanctions for intentional spoliation of evidence]; *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 333-334 [sanctions for willfully false discovery responses].)

Under this statutory scheme, the trial court has broad discretion in selecting the appropriate sanction, and we must uphold the trial court's determination absent an abuse of discretion. (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390 (*Los Defensores*).) Thus, we will reverse the trial court only if it was arbitrary, capricious, or whimsical in the exercise of that discretion. (*Ibid.*) As pertinent here, monetary sanctions, in an amount incurred, including attorney fees, by anyone as a result of the offending conduct, must be imposed unless the trial court finds the sanctioned party acted with substantial justification or the sanction is otherwise unjust. (Code Civ. Proc., § 2023.030, subd. (a).) However, terminating sanctions are to be used sparingly because of the drastic effect of their application. (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604 (*Lopez*); see *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 613-616.) Thus, under the statutory scheme, trial courts should select sanctions tailored to the harm caused by the misuse of the discovery process and should not exceed what is required to protect the party harmed by the misuse of the discovery process. (*Lopez*, *supra*, at p. 604.) Therefore, sanctions are generally imposed in an incremental approach, with terminating sanctions

being the last resort. (*Ibid.*) However, even under the Civil Discovery Act's incremental approach, the trial court may impose terminating sanctions as a first measure in extreme cases, or where the record shows lesser sanctions would be ineffective. (*Lopez,* at pp. 604-605; see *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1516-1519; *Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913, 928-929.)

Similarly, there exists a line of case law that authorizes the imposition of terminating sanctions as a first remedy based on the inherent power of the court in certain circumstances. In *Slesinger*, *supra*, 155 Cal.App.4th 736, a private investigator hired by the plaintiff entered onto the defendant's private property and trespassed into the facility that disposed of the defendant's confidential and privileged documents, improperly removed documents from both locations, and provided those documents to the plaintiff. The plaintiff then repeatedly disavowed knowledge of how it got those documents, claimed they were not used in the litigation, and failed to produce the documents in discovery despite appropriate requests for production. (*Id.* at pp. 741, 744-747, 768.) Based on this deliberate and egregious wrongdoing and the trial court's perception that no other remedy would adequately address the plaintiff's misconduct, the trial court exercised its inherent authority to protect the integrity of the judicial process and issued terminating sanctions against the plaintiff. (*Id.* at p. 756.) *Slesinger* upheld the trial court's exercise of discretion in imposing terminating sanctions based on the plaintiff's conduct, holding that "when a plaintiff's deliberate and egregious misconduct makes any sanction other than dismissal inadequate to ensure a

fair trial, the trial court has inherent power to impose a terminating sanction." (*Id.* at pp. 740; see *id.* at pp. 765, 777.)

Under either schema, in reviewing the trial court's determination, "[w]e defer to the court's credibility decisions and draw all reasonable inferences in support of the court's ruling." (*Lopez*, *supra*, 246 Cal.App.4th at p. 604.) To the extent the trial court's decision to issue sanctions depends on factual determinations, we review the record for substantial evidence to support those determinations. (*Los Defensores*, *supra*, 223 Cal.App.4th at p. 390.) Thus, our review " 'begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trial court].' " (*Id.* at pp. 390-391.) It is with these principles in mind that we review the trial court's finding that Cal Fire willfully misused the discovery process.

3. Monetary sanctions.

We are not persuaded there is substantial evidence to support a finding that Cal Fire engaged in a misuse of the discovery process by providing an origin and cause report that did not include information regarding what happened at the Red Rock lookout tower given the evidence relating to the timing and circumstances of White's learning about Lief's actions and history. Neither are we persuaded that omission of Bauer's unsolicited false alibi amounted to a falsehood rendering presentation of the Moonlight report a misuse of the discovery process, though the omission certainly made the Moonlight report

misleading regarding Bauer's potential involvement in the fire's inception. Nonetheless, there is substantial evidence to support other factual findings made by the trial court that Cal Fire engaged in discovery abuses.

For example, by repeatedly presenting without limitation the Moonlight report that contained the false statement by Bush and the false Lyman Fire report as a discovery response (other than to interrogatories seeking identification of documents relating to contentions), Cal Fire engaged in sanctionable conduct by providing false discovery responses, even if it also provided responsive documents that permitted defendants to uncover the falsehoods and errors in the investigation report. And by White's providing untruthful or evasive deposition testimony regarding the white flag and destroying his field notes regarding the investigation, despite a reasonable expectation of civil litigation, Cal Fire again misused the discovery process. Finally, by failing to timely provide the responsive WiFITER fund documents pursuant to court order on two separate occasions, Cal Fire engaged in yet another discovery violation. Thus, even in the absence of the discovery abuses that the trial court found based on exclusion of information about Lief and Bauer from the Moonlight report, we cannot conclude it was unreasonable, arbitrary, or capricious for the trial court to conclude that monetary sanctions were warranted in light of Cal Fire's numerous other discovery violations.

That said, we must also consider Cal Fire's contention that the amount of the monetary sanction is unreasonable. Monetary sanctions may include "the

reasonable expenses, including attorney's fees, incurred by anyone as a result of [the] conduct" that comprises the misuse of the discovery process. (Code Civ. Proc., §2023.030, subd. (a).) Here, Cal Fire claims the trial court failed to make the requisite finding that the attorney fees and expert fees and expenses it awarded were incurred as a result of the discovery abuses, rendering its award of those fees and expenses an abuse of discretion. We agree the trial court abused its discretion in awarding certain attorney fees and expert fees and expenses as discovery sanctions. Therefore, we reverse the award of monetary sanctions and remand the matter for a further hearing.

The trial court entered three orders awarding discovery sanctions to be paid by Cal Fire. To Sierra Pacific, the trial court awarded $21,881,484, which comprised *all* of the attorney fees, expert fees, and other expert expenses it incurred in defending both the state action and the concurrent federal action since their inception, as adjusted by the 1.2 lodestar multiplier.[17] To Howell, Bush, and Crismon, the trial court awarded $1,571,741.28, which comprised attorney fees dating back to 2009 for defense of liability issues in the state court case and discovery and other issues in both the state and federal courts and expert fees to test Cal Fire's theory regarding how the fire began. And to Beaty and landowner defendants, the trial court awarded $6,146,901.41, which comprised *all* attorney and expert fees they incurred in both the federal and state court actions.

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[17] See footnote 14, *ante*, page 32.

The trial court reasoned that Cal Fire's discovery abuses "were the cause of all defense expenses incurred" after July 3, 2010, and that "[a]ll ... defense expenses are, in one way or another, inextricably intertwined with the falsehoods and omissions" in the Moonlight report. Thus, it did not limit the sanctions to attorney fees or expert fees incurred *after* the discovery misuses it found occurred, but awarded attorney fees and expert fees beginning at the inception of litigation. Defendants offer two authorities for the proposition that *all* expenses incurred in litigation may be imposed as sanctions. Both are inapposite.

In *Qualcomm Inc. v. Broadcom Corp.* (S.D.Cal., Jan. 7, 2008, No. 05cv1958-B (BLM)) 2008 U.S.Dist. Lexis 911,[18] the district court relied on the Federal Rules of Civil Procedure and the inherent authority of courts to sanction litigants to prevent abuse of the judicial process when it awarded the defendant all its attorney fees and costs incurred in litigation. (2008 U.S.Dist. Lexis 911, pp. *27, *63.) However, neither basis for the court's ruling in *Qualcomm* applies here. Unlike the federal court in *Qualcomm*, the trial court here had no inherent power to impose monetary sanctions for misconduct absent statutory authority. (See *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 809.) Rather, the trial court's authority to issue discovery sanctions was delineated in Code of Civil Procedure section 2023.030. Thus, the trial court was limited to awarding only those "reasonable

[18] *Qualcomm* was vacated in part on other grounds as stated in *Qualcomm Inc. v. Broadcom Corp.* (S.D.Cal., Apr. 2, 2010, No. 05cv1958-B (BLM)) 2010 U.S.Dist. Lexis 33889.

expenses, including attorney's fees, incurred by anyone as a result of" a misuse of the discovery process. (Code Civ. Proc., § 2023.030, subd. (a).) Therefore, it was an abuse of discretion for the trial court to award sanctions beyond those authorized by section 2023.030, including any attorney or expert fees incurred *prior to* Cal Fire's misuses of the discovery process and any fees that were not the result of those misuses.

Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal.App.4th 1152 is equally unavailing. There, the court found it was error for the trial court to deny a motion for sanctions based on former Code of Civil Procedure section 128.5 and former Code of Civil Procedure section 2023. (*Sherman*, *supra*, at pp. 1163-1164.) Here, no defendant moved for sanctions pursuant to Code of Civil Procedure section 128.5, which *would* permit a trial court to " 'order a party ... to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay,' " and no order may be issued based on that section " 'except on notice contained in a party's *moving or responding papers*, or [on] the court's own motion, after notice and opportunity to be heard.' " (*Sherman*, *supra*, at p. 1164, quoting former Code Civ. Proc., § 128.5, subds. (a) and (c), respectively.) And *Sherman* does not stand for the proposition that monetary discovery sanctions may be awarded that exceed the statutory authority set forth in Code of Civil Procedure section 2023.030.

In general, the motions seeking fees as discovery sanctions and accompanying declarations provide

ample evidence of *when* fees were incurred by defendants but do little to explain how those fees were incurred as a result of Cal Fire's discovery abuses. Therefore, we are unable to ascertain from the record which attorney fees and expert fees and expenses were incurred as a result of the discovery misuses for which we have concluded there is substantial evidence in the record to support imposition. However, we do note, for example, that in their motion for sanctions, Howell, Bush, and Crismon asserted they incurred $405,586.08 in expert fees to test Cal Fire's theory that the fire was caused by a hot metal particle being splintered from a bulldozer track upon a rock strike, including $223,404.26 in expert fees they claim were incurred as a direct result of Cal Fire's failure to test its ignition theory prior to issuing the Moonlight report. While the information obtained as a result of this expert analysis may have been used in the course of depositions and in reviewing discovery to reveal that the Moonlight report was deficient or even false, they have not shown that the fees were incurred *as a result* of *discovery violations* engaged in by Cal Fire. Accordingly, we reverse the trial court's award of monetary discovery sanctions and remand this matter to the trial court to conduct a hearing to determine the "reasonable expenses, including attorney's fees, incurred by [defendants] as a result of" Cal Fire's misuses of the discovery process. (Code Civ. Proc., § 128.5, subd. (a).)

4. Terminating sanctions

a. *Jurisdiction to impose postjudgment*

As noted above, after judgment was entered, the trial court considered defendants' motions for

discovery sanctions against Cal Fire, and granted the motions by imposing both monetary and terminating sanctions against Cal Fire. Cal Fire does not dispute the trial court's jurisdictional capacity to award monetary sanctions but argues the trial court lacked jurisdiction to impose a terminating sanction postjudgment, claiming the latter sanction is a second judgment violating the one final judgment rule. We disagree.

Generally speaking, " 'there can be only one final judgment in a single action.' " (*Cuevas v. Truline Corp.* (2004) 118 Cal.App.4th 56, 60.) And, an order of dismissal constitutes a judgment if it is in writing, signed by the court, and filed in the action. (Code Civ. Proc., § 581d; *Etheridge v. Reins Internat. California, Inc.* (2009) 172 Cal.App.4th 908, 913.) Thus, when the trial court entered its order dismissing the actions based on its grant of the motion for judgment on the pleadings and its determination that plaintiffs had failed to present a prima facie case, as discussed earlier in our opinion, the trial court entered judgment in this action (case No. C074879). If, as Cal Fire contends, the trial court's order imposing terminating sanctions is also a judgment, this subsequent order would be jurisdictionally problematic. (See Code Civ. Proc., § 916, subd. (a) ["[T]he perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."].)

Here, postjudgment and after an appeal of the judgment was perfected (case No. C074879), the trial court elected to "impose[] terminating sanctions" on Cal Fire and ordered that "[t]erminating sanctions shall issue against Cal Fire." Contrary to Cal Fire's assertion, this order is not a judgment. The order does not purport to dismiss the action nor otherwise equate with rendition of judgment. (See *Good v. Miller* (2013) 214 Cal.App.4th 472, 475.) In fact, generally, this is not even a separately appealable order. (Code Civ. Proc., § 904.1; but see *Nickell v. Matlock* (2012) 206 Cal.App.4th 934, 940 ["An order granting terminating sanctions is not appealable, and the losing party must await the entry of the order of dismissal or judgment *unless* the terminating order is inextricably intertwined with another, appealable order."].) Rather, the trial court's order awarding terminating sanctions has no effect at all unless and until the trial court enters a judgment of dismissal or other order effectuating its award of terminating sanctions. The trial court may enter such a judgment as to remaining defendants—i.e., not Sierra Pacific, Beaty, or landowner defendants in whose favor judgment of dismissal was entered pursuant to an award of judgment on the pleadings as discussed in part I.B., *ante*—following remand in case No. C074879 pursuant to our reversal of the judgment of dismissal premised on the trial court's July 26, 2013 order finding plaintiffs failed to establish a prima facie case.

Moreover, this postjudgment proceeding is collateral to the appeal because it is based on Cal Fire's alleged prejudgment discovery abuses, for which sanctions proceedings could have occurred regardless of the outcome of the appeal of the judgment. (See

Gridley v. Gridley (2008) 166 Cal.App.4th 1562, 1587; see also *Day v. Collingwood* (2006) 144 Cal.App.4th 1116, 1124-1125.) Indeed, though motions concerning discovery are generally to be heard no less than 15 days before the date initially set for trial (Code Civ. Proc., § 2024.020, subd. (a)), the Civil Discovery Act does not on its face limit the ability of the trial court to impose sanctions for violation of its provisions to prejudgment motions for sanctions. If we were to construe the Civil Discovery Act as being so limited, it would permit the absurd situation in which those who have misused the discovery process can avoid penalty if they are able to keep their misuse secret until after that deadline passes. Neither can we construe the Civil Discovery Act as allowing only monetary sanctions postjudgment, as Cal Fire argues. If the trial court were prevented from exercising its discretion in this collateral postjudgment proceeding to impose whatever sanction it deems appropriate, the effect could prejudice the party seeking sanctions and cause an undue waste of judicial resources. For, if, as here, the underlying judgment of dismissal is reversed and remanded (as here), issues and evidence that would have been excluded or a case that should be the subject of terminating sanctions would have to be litigated simply because the discovery misuse came to the trial court's attention postjudgment. We are not persuaded the Civil Discovery Act should be construed to allow such a result. Therefore, the trial court had jurisdiction to impose terminating sanctions.

b. *Propriety of order imposing terminating sanctions*

As discussed in part II.B.2., *ante*, terminating sanctions are authorized both by the Civil Discovery Act and by common law. Here, the trial court relied on both Code of Civil Procedure section 2023.030 and its inherent authority when it imposed terminating sanctions against Cal Fire. The trial court found that Cal Fire's " 'willful,' " "repeated and egregious" misuses of the discovery process "permeated nearly every single significant issue in this case" to an extent that " 'threatened the integrity of the judicial process' " and made it implausible that defendants could ever receive a fair trial. The trial court further stated that "Cal Fire's actions in initiating, maintaining, and prosecuting this action, to the present time [(postjudgment)] [are] corrupt and tainted. Cal Fire failed to comply with discovery obligations, and its repeated failure was willful .... Cal Fire's conduct reeked of bad faith .... [C]al Fire failed to comply with discovery orders and directives, destroyed critical evidence, failed to produce documents it should have produced months earlier, and engaged in a systematic campaign of misdirection with the purpose of recovering money from Defendants." It also found that less severe sanctions would be unworkable and ineffectual, which certainly implies that it considered imposing monetary, issue, and evidentiary sanctions and found them insufficient.

As discussed above, there is substantial evidence to support the trial court's finding that Cal Fire: (1) failed to comply with discovery orders to produce several thousand pages of the WiFITER fund

documents on two separate occasions, and that the failure to comply, even if not deliberate, evinced a disregard for the discovery process; (2) repeatedly presented false, misleading, or evasive discovery responses by presenting—without limiting comment—the Moonlight report as a responsive document even though it contained a statement of causation falsely attributed to Bush and a Lyman Fire report falsely attributing fault to Howell; (3) presented false or evasive deposition testimony by White; and (4) engaged in spoliation when White improperly destroyed his field notes despite probable civil litigation. There is also certainly evidence in the record to suggest that the existence of the WiFITER fund caused investigators to have a motive for bias in their investigation of wildfires that may result in a civil cost recovery; that Cal Fire mislead the trial court about what would be contained in the WiFITER fund documents that were not timely produced thereby causing exclusion of the WiFITER fund documents from trial; and that the Moonlight report excluded information that probably should have been included or investigated, including Bauer's unsolicited alibi, Lief's questionable conduct, and any reference to or explanation for the white flag. In view of this cumulative evidence, we cannot find the trial court abused its discretion in imposing terminating sanctions based on its finding Cal Fire engaged in egregious and deliberate misconduct that made any other sanction inadequate to protect the judicial process and to ensure a fair trial.

C. Attorney Fees

Defendants moved for attorney fees as prevailing parties (1) on a contractual basis, pursuant to Health and Safety Code sections 13009 and 13009.1, Civil Code section 1717, and Code of Civil Procedure section 1021.8, and (2) because the action resulted in the enforcement of important rights affecting the public interest, pursuant to Code of Civil Procedure section 1021.5 and *Serrano v. Priest* (1977) 20 Cal.3d 25, 46-47. The trial court agreed that defendants were entitled to attorney fees as prevailing parties on both bases. Cal Fire contends the trial court erred in awarding attorney fees on either basis. We conclude there is no contractual basis for attorney fees in the instant matter, and the trial court abused its discretion in awarding attorney fees based on Code of Civil Procedure section 1021.5.

Before we begin our analysis of the merits of the trial court's orders awarding attorney fees to defendants as prevailing parties, we must address some basic issues appearing on the face of those orders. The trial court awarded to Sierra Pacific $21,100,723.20 in attorney fees, expert fees, expert expenses, and expert costs as prevailing party to be recovered exclusively from Cal Fire. However, of this amount, only $17,088,753.60 may even potentially be recovered as *attorney fees* on the bases presented. (See Civ. Code, § 1717 [providing for award of attorney fees to prevailing party in an action on a contract]; see also *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1148 [Code Civ. Proc., § 1021.5 authorizes recovery of attorney fees, not expert

witness fees or expenses].)[19] Additionally, of the cumulative amount of $6,146,901.41 in attorney fees and expert fees the trial court collectively awarded to Beaty and landowner defendants, only $4,837,720.50 in *attorney fees* awarded in the order have the potential of being awarded on these bases. The trial court collectively awarded to Howell, Bush, and Crismon as prevailing parties attorney fees of $1,166,155; however, Howell, Bush, and Crismon are not prevailing parties as to any plaintiff in light of the conclusions we reach in part I., *ante.* The attorney fee award to those three defendants is necessarily vacated.

1. No contractual basis.

One of the bases on which the trial court purportedly relied in awarding attorney fees to the prevailing defendants was Civil Code section 1717, which provides that where a contract "specifically provides" for recovery of attorney fees and costs following an action to enforce a contract, the trial court may award reasonable attorney fees to the prevailing party. Here, however, there is no contract "specifically provid[ing]" for recovery of attorney fees. Rather, the trial court relied on language in sections 13009 and 13009.1, which provide in relevant part that the charge for fire suppression costs, rescue or emergency medical service costs constitute "a debt of that person [found liable under sections 13009 or 13009.1], and is

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[19] We note also that the trial court awarded expert fees as part of its costs award to Sierra Pacific, despite the absence of any Code of Civil Procedure section 998 offer in the record. That costs award has been reversed and remanded, as discussed in part I., *ante.*

collectible by the person, or by the federal, state, county, public, or private agency, incurring those costs in the same manner *as in the case of an obligation under a contract, expressed or implied*" (§§ 13009, subd. (a) & 13009.1, subd. (e), italics added), combined with Code of Civil Procedure section 1021.8, which provides that when the Attorney General prevails in a civil action based on sections 13009 and 13009.1, *inter alia*, the Attorney General is to be awarded his or her "costs of investigating and prosecuting the action, *including expert fees, reasonable attorney*[] *fees, and costs*" (Code Civ. Proc., § 1021.8, subd. (a), italics added). We conclude these statutes, even when taken together, do not support a finding that there was a contractual basis for awarding attorney fees to defendants.

Contrary to the necessarily implied assertion of defendants that sections 13009 and 13009.1 create a contract between the parties, "the instant statutes only specify that the listed costs [recoverable under the statutes] are debts deemed collectible by the state 'in the same manner' as contract obligations. Such language does not transform the liability into a contract ...." (*Department of Forestry & Fire Protection v. LeBrock* (2002) 96 Cal.App.4th 1137, 1141-1142.) "The statutory language regarding how the state may collect the costs listed is merely a procedural mechanism. There is no contract between the parties that expressly, or even impliedly, provides for recovery of attorneys fees." (*Id.* at p. 1142.) Neither is the *statutory* mandate that the Attorney General recover his or her attorney fees in a case premised on Health and Safety Code sections 13009 or 13009.1, as codified in Code of Civil Procedure section 1021.8, cause to

construe sections 13009 and 13009.1 as otherwise forming a contractual basis on which to recover fees. Rather, as with a great many other statutory provisions providing for recovery of attorney fees, Code of Civil Procedure section 1021.8 is a unilateral *statutory* basis for fee recovery. (*LeBrock*, *supra*, at p. 1142 ["[M]any statutory provisions which ... provide for attorney[] fees are one-sided. They expressly shift fees to advance public interests, such as encouraging citizens to put fire safety measures in place."].) Therefore, as a *statutory* rather than *contractual* authorization for fee recovery, it does not trigger the reciprocity provisions of Civil Code section 1717. (*LeBrock*, *supra*, at pp. 1141-1142.)

Accordingly, we conclude the trial court erred in awarding attorney fees to defendants as prevailing parties on a contractual basis pursuant to Health and Safety Code sections 13009 and 13009.1, Civil Code section 1717, and Code of Civil Procedure section 1021.8.

2. Public benefit

The other statutory basis on which the trial court purportedly awarded attorney fees was that codified in Code of Civil Procedure section 1021.5, which states in part that "[u]pon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement ... are such as to make the award

appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." On appeal, Cal Fire contends the trial court erred in awarding attorney fees on this basis because (1) it improperly weighed the public benefit against the benefit defendants received rather than weighing the financial burden incurred by defendants against their potential exposure, and (2) the judgment did not confer a public benefit. We conclude the trial court abused its discretion in awarding attorney fees on this basis because it failed to consider the comparative financial burden and exposure defendants faced in litigation as required by Code of Civil Procedure section 1021.5.

"[T]he necessity and financial burden requirement [of Code of Civil Procedure section 1021.5] ' "really examines two issues: whether private enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys." ' [Citations.] The 'necessity' of private enforcement ' " ' "looks to the adequacy of public enforcement and seeks economic equalization of representation in cases where private enforcement is necessary." ' " ' " (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214-1215.) In determining the financial burden on litigants for purposes of the second prong of this inquiry, "courts have quite logically focused not only on the costs of the litigation but also any offsetting financial benefits that the litigation yields or reasonably could have been expected to yield. ' "An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the

lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.' " ' " (*Id.* at p. 1215.) Where, however, the party "had a 'personal financial stake' in the litigation 'sufficient to warrant [the] decision to incur significant attorney fees and costs in the vigorous prosecution [or defense]' of the lawsuit, an award under [Code of Civil Procedure] section 1021.5 is inappropriate." (*Millview County Water Dist. v. State Water Resources Control Bd.* (2016) 4 Cal.App.5th 759, 768-769.)

Here, there is no indication the trial court considered defendants' litigation costs or potential financial benefits or burdens defendants would realize through litigation. Rather, the trial court went on at length to justify its finding that defendants conferred a significant public benefit in the course of their defense of the action by exposing and leading to the closure of the WiFITER fund, by prevailing on a summary adjudication in which the trial court interpreted a regulation (Cal. Code Regs., tit. 14, § 938.8) as not creating a legal duty on landowners for fires caused by third parties, and by exposing dishonesty, investigative corruption, and a pervasive violation of discovery rules by a public entity. The trial court found that "motivation due to some personal interest, which all defendants must undeniably have, is not fatal to an award of fees under [Code of Civil Procedure] section 1021.5." The trial court continued, stating that "[t]he question this Court must answer is whether the broad public benefits conferred by the Moonlight Fire litigation were simply coincidental to the defense of the case. While the Court is aware that any successful defense benefits the defendant, it also finds that the benefits conferred upon the citizens of

California went far beyond the stake these Defendants had in defending themselves and were not merely coincidental in nature."

The trial court did not in any way discuss or appear to weigh the financial burden defendants incurred in pursuing their defense of the litigation or any potential financial exposure defendants faced in the litigation, and there does not appear to have been any effort on the part of defendants to present evidence in their motions for fees, expenses, and sanctions to permit the trial court to engage in such an inquiry. Additionally, it does not appear that if the court had engaged in such an inquiry, it could reasonably have found defendants' costs in pursuing their legal victory transcended their personal interest in avoiding liability to warrant an award of attorney fees pursuant to Code of Civil Procedure section 1021.5. For, even though the attorney fees, expert fees, and other costs incurred by defendants here are substantial, so too was the potential liability defendants faced in the litigation. For instance, we know Cal Fire sought to recover from defendants fire suppression, investigation, accounting, and administrative costs in the amount of $8,441,309.99. Additionally, if Cal Fire prevailed, defendants would also have been liable to the Attorney General for what would amount undoubtedly to several million dollars for "all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs." (Code Civ. Proc., § 1021.8, subd. (a).) Moreover, although there was no evidence presented on the issue, there is some indication other plaintiffs sought damages in the tens of millions of dollars. All told, the financial exposure defendants faced was

decidedly not out of proportion with the financial burden they incurred in defending the action. Therefore, the trial court erred in awarding attorney fees to defendants as prevailing parties on this basis as well.

D. Costs of Proof Award

Defendants moved for attorney fees pursuant to Code of Civil Procedure section 2033.420, subdivision (a) because Cal Fire failed to admit the truth of certain matters in response to propounded requests for admission. On appeal, Cal Fire contends the trial court erred in awarding attorney fees for defendants because "defendants did not, and could not, disprove the truthfulness of Cal Fire's responses to the requests for admission at issue." We do not reach the merits of this contention because, despite the trial court's apparent finding that defendants were entitled to these costs of proof, it did not actually make any separate award of costs of proof pursuant to Code of Civil Procedure section 2033.420. Thus, Cal Fire has failed to demonstrate any error on the face of the record for this court to review with regard to an order awarding costs of proof pursuant to Code of Civil Procedure section 2033.420 because it has not shown there is any such award. (See *Gonzalez v. Rebollo* (2014) 226 Cal.App.4th 969, 976.)

III. Challenges to Judge*

Finally, plaintiffs request that we require any remand proceedings be conducted by a different trial judge. We are obligated to consider this request by Code of Civil Procedure section 170.1, subdivision (c),

* See footnote, *ante*, page 1.

which states: "At the request of a party ... an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court."

Here, plaintiffs claim the request should be granted because "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).) The facts, as plaintiffs see them, are that Judge Nichols deprived them, without a legitimate reason, of a trial on the same law and evidence that a judge who had previously heard law and motion proceedings and another court in a separate but related federal case had deemed sufficient to proceed to trial. Additionally, plaintiffs assert there is a reasonable doubt Judge Nichols would be impartial after reversal, especially because the procedures employed here were unfair, and because Judge Nichols is a visiting retired judge forced to hear a lengthy trial in a remote and rural location.

Our review of the record does not reveal any evidence of prejudice or bias on the part of Judge Nichols that would warrant his disqualification on remand. And erroneous rulings are not themselves sufficient evidence of bias to warrant removal. (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 59-60.) Accordingly, we conclude the interests of justice do not warrant any order from this court requiring that future trial court proceedings be conducted by a different judge.

DISPOSITION

In case No. C074879, the judgment of dismissal as to Cal Fire's claims against Beaty, Sierra Pacific, and landowner defendants is affirmed. The judgment of dismissal as to all other claims is reversed, and the matter is remanded to the trial court for further proceedings.

In case No. C076008, the postjudgment award of costs to defendants Sierra Pacific, Beaty, and landowner defendants as prevailing parties against Cal Fire is remanded for further proceedings to calculate an appropriate award for costs incurred in defending Cal Fire's action pursuant to Code of Civil Procedure sections 1032 and 1033.5. All other postjudgment orders awarding costs to prevailing parties are necessarily vacated as a result of our conclusion in case No. C074879. The postjudgment award of attorney fees to defendants Howell, Bush, and Crismon is also necessarily vacated, as they are no longer prevailing parties as to any plaintiff. Additionally, we reverse the postjudgment awards of attorney fees to defendants Sierra Pacific, Beaty, and the landowner defendants as prevailing parties against Cal Fire. We also reverse the postjudgment order imposing monetary discovery sanctions against Cal Fire and remand for further proceedings to determine the recoverable expenses pursuant to Code of Civil Procedure section 2023.030. The postjudgment order imposing terminating sanctions against Cal Fire is affirmed.

Plaintiffs and appellants, other than Cal Fire, are entitled to their costs on appeal in case No. C074879. (Cal. Rules of Court, rule 8.278(a)(1), (2).) All parties

are responsible for their own costs in case No. C076008. (*Id.*, rule 8.278(a)(5).)

BUTZ, J.

I concur:

NICHOLSON, Acting P.J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

C074879, C076008

DEPARTMENT OF FORESTRY AND FIRE PROTECTION, *et al.*,

Plaintiffs and Appellants,

v.

EUNICE E. HOWELL, *et al.*,

Defendants and Respondents.

(Super. Ct. Nos. CV09-00205 (lead), CV09-00231, CV09-00245, CV10-00255, CV10-00264)

CERTIFIED FOR PARTIAL PUBLICATION*

APPEAL from a judgment of the Superior Court of Plumas County, Leslie C. Nichols, Judge. (Retired judge of the Santa Clara Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part and reversed in part.

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* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication from inception through the end of part I.B. of the Discussion as well as the Disposition.

Filed December 6, 2017

ROBIE, J.

I respectfully dissent.

First, the majority finds that the trial court's decision to grant judgment on the pleadings to Sierra Pacific, Beaty, and landowner defendants was proper because Health and Safety Code sections 13009 and 13009.1[1] do not incorporate common law theories of negligence, including vicarious liability, to hold anyone besides a direct actor liable for the cost of that fire's suppression. I cannot agree.

As the majority notes, section 13009 states in relevant part, "[a]ny person (1) who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him or her to escape onto any public or private property ... is liable for the fire suppression costs incurred in fighting the fire and for the cost of providing rescue or emergency medical services, and those costs shall be a charge against that person." Section 13009.1 repeats the basic language of section 13009 concerning who may be held liable for the cost of fire suppression. Further, section 19 of the same code defines a person as "any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company." A plain reading of these statutes appears to extend liability for the cost of fire suppression to corporations or companies through vicarious liability.

[1] Further section references are to the Health and Safety Code.

"Any person" as used in sections 13009 and 13009.1 includes companies and corporations (see § 19); these entities can only act through their agents and thus can only be found negligent through vicarious liability. (*Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 782 [" 'corporations necessarily act through agents' "].) To read otherwise would ignore the definition of "person" contained in the Health and Safety Code. Thus, sections 13009 and 13009.1 can be read to impose liability for the costs of fire suppression through vicarious liability.

I believe the statutory history supports this interpretation. As my colleagues note, chapter 790, enacted in 1931, imposed liability for the cost of property damage to "Any person who: [¶] (1) *Personally or through another*, and [¶] (2) Wilfully, negligently, or in violation of law, commits any of the following acts: [¶] (1) Sets fire to, [¶] (2) Allows fire to be set to, [¶] (3) Allows a fire kindled or attended by him to escape to the property, whether privately or public owned, of another." (Stats. 1931, ch. 790, § 1, p. 1644, italics added.) This language appears to mirror modern day section 13007. Chapter 790, section 2, imposes liability for cost of property damage to "*Any person* who allows any fire burning upon his property to escape to the property, whether privately or publicly owned, of another, without exercising due diligence to control such fire." (Stats. 1931, ch. 790, § 2, p. 1644, italics added.) This language appears to mirror modern day section 13008. Importantly, section 2 omits the language "[p]ersonally or through another" that is found in the first section of chapter 790.

Three years after the enactment of chapter 790, this court in *Haverstick v. Southern Pac. Co.* (1934) 1 Cal.App.2d 605, found sufficient evidence to hold the "Southern Pacific Company (a Corporation)" liable to a landowner after a train operated by Southern Pacific caught fire during a run from Galt to Ione and, through the lack of "ordinary care and diligence" of Southern Pacific's employees, the fire was allowed to spread from Southern Pacific's property to the landowner's property. There was "[n]o real explanation" for how the fire started. (*Id*. at pp. 605, 607, 610.) Although the opinion does not specify whether the railroad's liability was predicated upon section 2, this appears to be so because the employees of the railroad did not kindle or set any fire, but merely allowed fire burning on the railroad's property to spread to the property of another through a lack of due diligence. (Compare Stats. 1931, ch. 790, §§ 1 and 2; see also *People v. Southern Pacific Co.* (1983) 139 Cal.App.3d 627, 636-638 [under §§ 13007 and 13009, a jury must find a defendant negligently started or kindled a fire, not merely negligently failed to extinguish it].) Because liability was likely predicated pursuant to section 2 (Stats. 1931, ch. 790), the railroad was found vicariously liable based on the language "[a]ny person" and not the additional language of "[p]ersonally or through another" found in section 1.

In 1939, the Health and Safety Code was enacted and included section 19, which defined a person as "any person, firm, association, organization, partnership, business trust, corporation, or company." (Stat. 1939, ch. 60, p. 484, § 19.) The code did not include a section devoted to fire protection. Then in

1953, chapter 790 was codified into the Health and Safety Code and sections 13007, 13008, and 13009 were enacted, each reflecting the language used in chapter 790 sections 1 through 3 respectively. (Stats. 1953, ch. 48, p. 682, §§ 1-3.) Section 13009, explicitly referenced sections 13007 and 13008 and allowed for the collection of fire suppression costs when someone was responsible for a fire as described by those sections. Then, after *People v. Williams* (1963) 22 Cal.App.2d 152, it appears the Legislature *rewrote* section 13009 (not merely transferred the language from a prior chapter) to allow for liability in the situation where a fire does not escape to another's property. During the rewrite, the Legislature removed references to section 13007 and 13008; however, this time it had the benefit of the definition of "person" within the same code as the fire prevention statutes and *Haverstick*'s finding of liability upon a corporation through the acts of its employees. Thus, when the Legislature wrote "any person" without the language "who personally or through another," it still intended to extend liability to those who must act vicariously through their agents.

The majority concludes that such an interpretation would render the language "who personally or through another" in section 13007 meaningless. However, the interpretation the majority gives to section 13009, renders the definition of "person" meaningless and would result in corporations or companies never being held liable for fire suppression costs. This is highlighted by the example given in the majority opinion. The opinion distinguishes *County of Ventura v. So. Cal. Edison Co.* (1948) 85 Cal.App.2d 529, from the present case

because it was decided before section 13009 removed reference to section 13007 and because liability was imposed "not on a third party with some responsibility to supervise or oversee the actor, but on the actor itself that failed to properly maintain its own equipment that directly caused the fire." While the first reason distinguishing the case is sound, I do not see how Southern California Edison Co. is a direct actor. "The trial court found the cause of the fire to be the negligent construction and maintenance of the transmission and telephone lines by the Edison Company." (*Ventura County v. So. Cal. Edison Co.*, *supra*, 85 Cal.App.2d at p. 531.) As a corporation, the Edison Company *cannot* act. (See *Snukal v. Flightways Manufacturing, Inc.*, *supra*, 23 Cal.4th at p. 782.) Its agents/employees *can act* by constructing and maintaining or by imposing policies for the adequate construction and maintenance of company equipment. It was the employees' failure to act in such a way that led to the vicarious liability of the Edison Company. I do not see a meaningful difference between the negligence of a company when the cause of a fire was an employee's overt act versus the same employee's failure to act.

Cases brought under section 13009 involving companies or organizations further highlight this point. In *People ex rel. Grijalva v. Superior Court* (2008) 159 Cal.App.4th 1072, 1075-1076, a water conservation district admitted liability after a complaint was filed for breach of contract, negligence, negligence per se, and public nuisance, when "[a] spark from construction equipment operated by an employee of [the water conservation district] started a brush fire." Although liability was admitted, the start

of this fire is nearly identical to the start of the Moonlight Fire here (spark from equipment operated by an employee), but because it is phrased as a failure to act by the organization, which resulted in a public nuisance, the majority opinion would deem it properly brought.

Also in *People v. Southern Pacific Co.*, *supra*, 139 Cal.App.3d at pages 632, 636 through 640, the court found a jury instruction harmless and the verdict holding Southern Pacific liable for fire suppression costs proper when a spark from a train started a fire. The negligence theory relied upon was "negligent maintenance or *operation* of the fire extinguisher, and ... failure to clear combustible vegetation from the right-of-way in the area where the fire started." (*People v. Southern Pacific Co.*, *supra*, 139 Cal.App.3d at p. 633, italics added.) As in *People ex rel. Grijalva*, the theory of negligence can be stated as an overt act of an employee and as a failure of that employee to act in some way that then caused the fire. On this note, whether a company's negligence proximately caused the fire is still a question left to the fact finder and could serve to negate liability for fire suppression where an employee's acts do not comport with company policy and cannot be said to be a product of the company's negligence.

Finally, I do not believe a reading of section 13009 that includes vicarious liability renders subdivision (a)(2) and (a)(3) of that section meaningless. The majority states that "[w]ere it possible for section 13009 and 13009.1 to be applied to one who did not through his direct action proximately cause the fire ... there would have been no cause to amend the

statute to extend liability to one who has the right and responsibility to cure a noticed fire hazard but fails to do so." Not so. Four years before the amendment of section 13009 in 1987, *People v. Southern Pacific Co.*, *supra*, 139 Cal.App.3d at pages 636 through 637, held it error to instruct the jury that it could find liability under section 13009 solely on a theory that the defendant negligently failed to extinguish a fire, without finding the defendant was negligently responsible for kindling a fire. The court "conclude[d] that liability for firefighting expenses under section 13009 is limited to the situations in which liability for property damage exists under section 13007" and that a defendant must be found to have been responsible through its negligent conduct to have started or kindled the fire. (*People v. Southern Pacific Co.*, *supra*, 139 Cal.App.3d at p. 638.) Section 13009, subdivision (a)(2) and (a)(3) allow for liability upon a showing that a fire occurred on the property and someone with the right to correct a fire hazard failed to do so when notified. This subdivision does not require a showing that the conduct of failing to maintain the property actually kindled the fire or that the fire originated on the property in question.

This interpretation is supported by *City of Los Angeles v. Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009. There, a court found a company was not liable under the pre-1987 version of section 13009 for fire suppression costs despite the company being notified 55 times of fire code violations. (*City of Los Angeles*, at p. 1015.) Although the company was in violation of the fire code, the chemicals it stored were not spontaneously combustible and the fire that ignited on the property was alleged only to have grown because

of the company's negligence, not to have started because of negligence. (*Id.* at pp. 1015-1016.) Thus, the company fell "within none of the classes of persons held liable" under section 13009. (*City of Los Angeles*, at pp. 1019-1020.) The court noted that the amendment to section 13009 would have made the company unequivocally liable for fire suppression costs because it failed to correct a fire hazard prohibited by law. (*City of Los Angeles*, at p. 1019, fn. 2.)

For these reasons, I believe sections 13009 and 13009.1 can be read to hold companies vicariously liable for the acts of their employees. I cannot agree with my colleagues' conclusion to the contrary.

With this interpretation of the statute and the resulting denial of the motion for judgment on the pleadings, I too would reverse the award of costs to defendants, but in its entirety, not just for the reasons the majority finds the court's ruling infirm.

Further, I believe, the trial judge was not fair and impartial in much of the proceedings, and it is clear to me that he became embroiled and acted impulsively and thus erred in many other ways. For example, I agree with the majority's conclusion to reverse for fundamental due process reasons the *Cottle*[2] ruling of the trial court. However, this sua sponte action by the trial court demonstrates how profoundly biased the trial judge was.

In this same vein, I cannot agree to affirm the terminating sanctions imposed for discovery abuses. The number of documents to be produced was

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[2] *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367.

enormous. Therefore, late production of 7,000 pages, while not minor, must be considered in context. Terminating sanctions are to be a last resort "and should be used sparingly," after lesser sanctions are not sufficient. (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604.) "A trial court must be cautious when imposing a terminating sanction because the sanction eliminates a party's fundamental right to a trial, thus implicating due process rights." (*Ibid.*) There is no indication the trial court imposed intermediate sanctions. After all, he could have refused admission of certain evidence which was the subject of abuse. Or he could have deemed as admitted facts that were the subject of late discovery. He also could have imposed monetary sanctions as an intermediate remedy. But, just as the trial court acted impulsively in ruling on an oral motion for judgment on the pleadings and in abruptly raising on its own motion and imposing the *Cottle* remedy one week before trial, the trial court impulsively granted terminating sanctions.

Not only did the trial court fail to consider incremental sanctions, the court also failed to justify why those incremental sanctions would not have been effective. My colleagues also fail to justify why incremental sanctions for the discovery violations would not have been effective. Indeed, judgment on the pleadings and dismissal had already been entered in favor of a majority of defendants, thus making terminating sanctions at this stage of the proceedings overkill and not "required to protect the interests of the party entitled to but denied discovery." (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.*, *supra*, 246 Cal.App.4th at p. 604.) "The trial court

should select a sanction that is ' " 'tailor[ed] ... to the harm caused by the withheld discovery.' " ' " (*Ibid.*) Here, terminating sanctions were not tailored to the harm caused by the withheld discovery because the case had already been resolved as to a majority of the defendants at the time the court imposed the terminating sanctions.

Further, I do not believe that terminating sanctions were justified by CalFire's conduct. The majority finds, and I agree, that substantial evidence did not support a finding of misuse of discovery practices where the Ryan Bauer interview and the Red Rock lookout interviews were concerned. Despite this finding, however, the majority opinion cites these two instances as justification for terminating sanctions. Further, neither the trial court nor the majority opinion found CalFire deliberately withheld thousands of WiFITER documents, and merely conclude that CalFire's conduct "evinced a disregard for the discovery process." The terminating sanctions appear to rest on this nonwillful conduct and Investigator White's willful conduct of preparing a misleading report, giving false deposition testimony, and destroying his field notes. Where the destruction of the field notes is concerned, however, it should be noted that law enforcement officers routinely destroy their notes once they have prepared a report and that it was White's routine practice to do so, in addition to being CalFire's official practice at the time of the hearing. I do not see White's destruction of his notes as rising to the level of intentional spoliation. Thus, the only conduct left that evinced a deliberate misuse of the discovery process was White's misleading report and false deposition testimony. Surely, a lesser

sanction could have been structured to deal with this one person's conduct. (See *Lopez v. Watchtower Bible & Tract Society of New York, Inc.*, *supra*, 246 Cal.App.4th at pp. 604-606 [terminating sanctions not proper when party willfully withheld documents because record did not reflect that court could not have obtained compliance with lesser sanctions].)

Finally, I also cannot agree that any remand be before the same trial judge, who I believe was manifestly biased and did not provide a fair and impartial forum for litigation of an enormously important case with vast ramifications beyond the facts of this proceeding. The conduct of the trial court in making the *Cottle* ruling, granting judgment on the pleadings and then issuing postjudgment terminating sanctions were not the actions of a fair and impartial judge.

/s/ .

Robie, J.

Appendix E

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

C074879, C076008

DEPARTMENT OF FORESTRY AND FIRE PROTECTION, *et al.*,

Plaintiffs and Appellants,

v.

EUNICE E. HOWELL, *et al.*,

Defendants and Respondents.

(Super. Ct. Nos. CV09-00205 (lead), CV09-00231, CV09-00245, CV10-00255, CV10-00264)

Filed December 8, 2017

ORDER CERTIFYING OPINION FOR PUBLICATION

[NO CHANGE IN JUDGMENT]

THE COURT:

The opinion in the above-entitled matter filed on December 6, 2017, was certified for partial publication in the Official Reports. For good cause it now appears that the opinion should be published in full in the

Official Reports and it is so ordered. There is no change in judgment.

FOR THE COURT:

NICHOLSON, Acting P.J.

ROBIE, J.

BUTZ, J.

Appendix F

SUPERIOR COURT OF CALIFORNIA
COUNTY OF PLUMAS
UNLIMITED JURISDICTION

Case No. CV09-00205 (lead file)
(non-lead cases CV09-00231, CV09-00245, CV09-00306, CV10-00255, CV10-00264)

CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION,

Plaintiff,

v.

EUNICE E. HOWELL, INDIVIDUALLY AND DOING BUSINESS AS HOWELL'S FOREST HARVESTING, *et al.*,

Defendants.

AND CONSOLIDATED ACTIONS.

Endorsed February 4, 2014

ORDER GRANTING SIERRA PACIFIC'S MOTION FOR FEES, EXPENSES AND MONETARY AND TERMINATING SANCTIONS

I. INTRODUCTION

Through this Order, the Court grants Defendants' Motions for Fees, Expenses and/or Sanctions against

Cal Fire.[1] With respect to Defendants' request for sanctions in particular, the Court finds that Cal Fire has, among other things, engaged in the pervasive and systematic abuse of California's discovery rules in a misguided effort to prevail against these Defendants, all of which is an affront to this Court and the judicial process. As more specifically set forth below, the Court finds that Cal Fire's conduct has been egregious and, in order to protect the integrity of the Court and the judicial system, holds that this conduct warrants both monetary and terminating sanctions. As also set forth herein, the Court finds additional legal bases for which to award Defendants reasonable attorneys' fees and certain expenses.

II. RELEVANT BACKGROUND

The Moonlight Fire broke out on the afternoon of September 3, 2007, on a hillside near Moonlight Peak in Plumas County, roughly ten miles south of the town of Westwood, California. The fire ultimately burned approximately 65,000 acres[2] before it was fully

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[1] Defendants' Motions for Fees, Expenses and/or Sanctions are brought against Cal Fire and its counsel exclusively. Defendants have confirmed that they do no not seek such relief against the other Plaintiffs. Accordingly, this Court's analysis is focused on Cal Fire and the improper litigation conduct of its investigators, employees, experts, and primary counsel, as well as the collaborative and improper efforts of the two federal investigators, Reynolds and Welton, as further discussed herein.

[2] Because the Moonlight Fire eventually burned approximately 45,000 acres of United States land, these Defendants were also sued Moonlight Fire eventually burned approximately 45,000 acres of United States land, these Defendants were also sued by the United States, and resolved that action through settlement shortly before its scheduled trial in July of 2012.

contained several weeks later. On August 9, 2009, Cal Fire filed this action seeking its suppression and investigative costs associated with the Moonlight Fire from Sierra Pacific Industries, Eunice Howell d/b/a Howell's Forrest Harvesting, J.W. Bush, KelJy Crismon, W.M. Beaty and Associates, and the Landowner Defendants (collectively "Defendants"). Following the lead of Cal Fire, several other private party Plaintiffs filed suit against these Defendants seeking damages arising from the Moonlight Fire.[3] Ultimately, six separate actions were filed, consolidated for purposes of discovery, and eventually consolidated for purposes of a trial on liability.

Litigation ensued for years and continues to this day. The parties have propounded numerous requests for production, produced and received thousands of documents, taken hundreds of days of depositions, propounded hundreds of interrogatories and numerous requests for admission, and hired, collectively, more than 60 experts to opine on numerous fields of expertise, including, but not limited to, the standards and procedures associated with wildland fire origin and cause investigations, fire science, ignition principles, metallurgy, photogrammetry, land surveying, weather, bulldozer operations and maintenance, and various aspects of forest management and attendant regulations.

On April 30, 2013, the Chief Justice, through the Assigned Judges Program, issued an order appointing

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[3] On July 26, 2013, Plaintiff Cal Engels reached a stipulated settlement with all Defendants, dismissed its action with prejudice, as confirmed on the record with this Court, and is no longer a party to this matter.

the undersigned to serve as the judge on this matter for all purposes. In the weeks and months following that appointment, the Court considered thousands of pages of pleadings and documents in this multi-party consolidated matter in order to prepare for a lengthy trial which was set to begin Ju1y 29, 2013, and which generated a jury pool comprising roughly four percent of the population of Plumas County. As part of this effort, the undersigned spent several days at the Portola courthouse reviewing all of the files and records, including numerous pleadings related to discovery disputes, most of which were adjudicated before the Court-appointed discovery referee, Judge David Garcia (Ret.), who issued findings and recommendations for this Court's consideration. Additionally, pursuant to a stipulation by the parties, the Court reviewed background materials provided by Cal Fire regarding the standards and procedures for wildfire investigations and origin and cause determinations.

The undersigned held a Case Management Conference with the parties on June 6, 2013. Thereafter, the Court conducted a trial readiness conference on Ju]y 1, 2013, the focus of which was to address various pretrial issues and to rule upon nearly one hundred motions in limine, 65 of which were filed by Cal Fire, and 32 of which were filed by Defendants. The briefing and exhibits on the motions in limine exceeded a thousand pages, and discussed a number of issues relevant to the case and its lengthy prosecution. The Court tentatively denied a great majority of Cal Fire's motions in limine, and did the same with the great majority of Defendants' motions.

The Court tentatively granted a few motions, including one discussed *infra*.

On July 15, 2013, the parties submitted lengthy trial briefs outlining their positions on the facts and applicable law. On July 22, 2013, after reviewing these extensive submissions, this Court issued an order advising the parties that they should come to the scheduled July 24, 2013, pretrial hearing prepared to make a prima facie showing under the holding in *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, which is focused on the proper and efficient administration of justice in such complex matters.[4] The Court also advised the parties that the hearing would likely be lengthy, and that they should be prepared to stay until the end of the week.

On July 26, 2013, at the end of a three-day pretrial hearing, the Court signed two dismissal orders in these actions. One of the Court's orders issued with prejudice, was premised on the holding in *Cottle* and resulted from Plaintiffs' joint failure during the lengthy pretrial hearing to make a *prima facie* showing that any of them could sustain their burden of proof against Defendants. The second order also issued with prejudice, was focused on Cal Fire's action exclusively and dismissed that action against Sierra

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[4] As this Court has previously noted in "a complex litigation case which has been assigned to a judge for all purposes, a court may order the exclusion of evidence if the plaintiffs are unable to establish a *prima facie* claim prior to the start of trial." (*Cottle*, *supra*, 3 Cal.App.4th at 1381.) Similarly, the "burden is on the plaintiff to establish a *prima facie* showing of negligence against the defendant, and, if he fails to do so, that a nonsuit may be properly granted." (*Mastrangelo v. West Side Union High School Dist. of Merced County* (1935) 2 Cal.2d 540, 546.)

Pacific, W.M. Beaty and Associates and the Landowner Defendants pursuant to an oral Motion for Judgment on the Pleadings, the intent for which Sierra Pacific initially raised in its trial brief, but which was extensively argued and briefed during the three-day pretrial hearing. In any event, with respect to its ruling on the Motion for Judgment on the Pleadings, the Court found that Health & Safety Code Sections 13009 and 13009.1 (hereinafter referred to throughout as sections 13009 and 13009.1) provide Cal Fire no legal basis to bring this action against Sierra Pacific, W .M. Beaty and Associates, or the Landowner Defendants. On July 26, 2013, this Court also executed judgments for Defendants consistent with the scope of the dismissal orders. On September 20, 2013, Cal Fire filed a notice of appeal of this Court's orders.

On September 12, 2013, Defendants filed an ex parte application requesting, among other things, a bifurcated briefing schedule on their forthcoming Motion for Fees, Expenses, and/or Sanctions. Cal Fire filed a written opposition. On September 18, 2013, the Court issued an order setting a schedule that directed the parties to file their briefing on the motion in phases. Specifically, the Court directed the parties to initially focus their briefing on Defendants' claim of entitlement to fees, expenses, and/or sanctions (Phase I briefing). Thereafter, to the extent necessary based on the Court's review of the Phase I briefing, the Court's order directed the parties to focus on the proper award, if any, of fees, expenses and/or sanctions (Phase II briefing).

Defendants timely filed their Phase I opening brief on October 4, 2013. On October 24, 2013, before Cal Fire filed its Opposition, Defendants notified the Court that they had learned of newly discovered evidence. Specifically, Defendants learned that Cal Fire had failed to produce a critical document that was responsive to Sierra Pacific's earlier discovery request of October 4, 2012. Defendants advised the Court that this document was subject to an April 10, 2013, Court order, issued after numerous hearings before Judge Garcia, wherein Defendants argued that Cal Fire was wrongly withholding or delaying the production of documents relating to the Wildland Training and Equipment Fund (hereinafter "WiFITER fund").[5] Specifically, the Court's order expressly commanded Cal Fire to finally produce all responsive, non-

[5] When Cal Fire sent its August 4, 2009, demand letters to these Defendants regarding the Moonlight Fire, it advised each of the prospective Defendants that Cal Fire had expended approximately $8.1 million in suppressing and investigating the Moonlight Fire, and that Cal Fire would file civil cost recovery actions against each of the Defendants under sections 13009 and 13009.l within 30 days of their receipt of the letter unless they wrote a check to the Genera] Fund in the amount of approximately $7.7 million and a separate check to WiFITER in the amount of $400,000, care of the California District's Attorneys' Association (hereinafter "CDAA"). The CDAA had been administering the WiFITER fund at the request of Cal Fire in exchange for a fee based on percentages associated with what Cal Fire deposited in the WiFITER fund and what it expended from the same fund. For reasons not explained in the record, Cal Fire filed its action against these Defendants on August 9, 2009, five days after its demand letter, as opposed to 30 days as initially stated.

privileged WiFITER documents by "no later than" April 30, 2013.

Defendants' briefing also revealed to this Court that Defendants first learned of Cal Fire's failure to produce all responsive WiFITER documents through the chance issuance of a public audit report regarding WiFITER, issued by the California State Auditor's office. Among other things, the State Auditor's report (hereinafter "the Audit") found the WiFITER fund to be in violation of California law. In reaching this conclusion, the Audit revealed the existence of an important document regarding Cal Fire's intent in forming WiFITER. Thereafter, counsel for Sierra Pacific notified Cal Fire on October 21, 2013, of its failure to produce what the State Auditor found to be a critical WiFITER document. Sierra Pacific's counsel also advised Cal Fire that its failure to do so was in violation of the Court's April 30, 2013, order and demanded Cal Fire's immediate production of the document now identified in the Audit as well as any and all other documents that Cal Fire had failed to produce. Finally, Sierra Pacific argued that Cal Fire's failure was relevant to its Motion for Fees, Expenses and Sanctions.

Sierra Pacific's counsel's communication to Cal Fire precipitated an admission by Cal Fire that it had "inadvertently" failed to produce the email identified by the Audit, as well as more than 5,000 pages of other relevant WiFITER documents. Defendants brought what it learned from Cal Fire's counsel to the attention of this Court through the Court's clerk. Cal Fire also brought the matter to the Court's attention through an ex part[handwritten:e] application filed

October 29, 2013, which sought a modification to the briefing schedule based on its discovery of these materials.

On October 30, 2013, the Court conducted a telephonic hearing with all the parties. During that hearing, the Court once again ordered Cal Fire to produce all responsive WiFITER documents this time, by no later than October 31, 2013. The Court confirmed this order in writing on November 7, 2013. As set forth in that order, the Court denied Cal Fire's ex parte application, but slightly modified the briefing schedule so as to give the parties the opportunity to submit sur-replies addressing the relevance, if any, of Cal Fire's belated production.

On October 31, 2013, Cal Fire produced more than 5,000 pages of documentation to Defendants, most of which Cal Fire conceded had never before been produced. The following day, November 1, 2013, Cal Fire timely filed its opposition to the Phase I briefing.

On November 12, 2013, Sierra Pacific filed an ex parte application seeking additional time to file its reply brief due to issues with Cal Fire's belatedly produced WiFITER documents. · During a telephonic hearing regarding the application, Cal Fire's counsel represented that Cal Fire had produced all responsive documents and argued there was no valid basis to further modify the briefing schedule in the November 7, 2013, order. At the close of this telephonic hearing, the Court denied Sierra Pacific's application for additional time. Defendants timely filed their reply in support of the Phase I briefing on November 15, 2013.

On November 22, 2013, Cal Fire timely filed its sur-reply regarding its belated production of 5,000

pages of WiFITER documents. At the end of that brief, Cal Fire disclosed that additional WiFITER documents had not been produced. Later that day, November 22, 2013, and after receiving an email from Sierra Pacific's counsel earlier that same day which reminded Cal Fire of its ongoing obligation under the Court's orders to produce any and all responsive WiFITER documents, Cal Fire belatedly produced more than 2,000 additional pages of responsive documentation, much of which had not been previously produced.

Defendants addressed this additional belated production in their sur-reply filed December 3, 2013, arguing that Cal Fire's second belated production not only violated the Court's orders of April 10, 2013, and October 30, 2013, but that it was also contrary to Cal Fire's representations to this Court in opposition to Defendants' ex parte application to extend the briefing timelines regarding the belated production.

On December 2, 2013, the Court issued a Case Management and Briefing Order to address issues raised by counsel in their recent submissions. Specifically, in their opening brief, Defendants invited the Court to request further briefing focused on Cal Fire's alleged dishonesty and investigative corruption. In its opposition briefing, Cal Fire asserted that it and its employees were absolutely immune from monetary sanctions. In their reply, Defendants argued that, if that were true, which Defendants dispute, the Court had authority to issue terminating sanctions. In objections to evidence, Cal Fire asserted that the request for terminating sanctions was a new matter, and that an argument about its investigators lying in

deposition testimony was a new matter, to which Cal Fire should have an opportunity to respond. Accordingly, to address and alleviate any concern about fair process, the Court allowed the parties to submit supplemental briefing on these matters pursuant to a schedule that coincided with the existing briefing schedule. The parties timely filed those submissions.

While the briefing on the Motions for Fees, Expenses and/or Sanctions was still ongoing, the parties engaged in separate but related motion practice regarding a belatedly produced email that Defendants cited in their November 15, 2013, submission (hereinafter the "disputed email"). On November 25, 2013, Cal Fire asserted that this disputed email was privileged, had been inadvertently produced, and must be returned to Cal Fire. On December 19, 2013, Defendants filed a motion under Code of Civil Procedure section 2031.285 seeking to resolve this privilege claim. In that motion, Defendants argued that Cal Fire's claim of privilege was illegitimate since the disputed email was never privileged and/or confidential, since it was already in the Court's public files or, in the alternative, because Cal Fire had already waived any such privilege for various reasons to the extent it ever existed. Thereafter, on December 20, 2013, this Court issued another briefing order, directing Cal Fire to immediately file any related motion it intended to file on the issue of privilege and/or waiver, and setting a briefing schedule for opposition and reply briefing in order to resolve the matter forthwith. On December 23, 2013, Cal Fire filed a motion regarding its claim of privilege regarding the disputed email. Defendants

and Cal Fire then timely filed their oppositions and replies in accordance with this Court's briefing schedule. In order to give guidance to counsel with respect to the final briefing due January 24, 2014, this Court informed the parties through the Court's clerk on January 16, 2014, that counsel should proceed on the assumption that Sierra Pacific's motion would be granted and Cal Fire's motion would be denied. The Court stated that this guidance was being provided in order to permit briefing and was not a warrant that the rulings would issue as suggested by this guidance; those rulings are the subject of a separate written order issued by this Court.

The parties timely filed their Phase II briefing: Defendants submitted their opening briefs on December 13, 2013, Cal Fire submitted its opposition on January 8, 2014, and Defendants submitted their reply on January 24, 2014. Additionally, pursuant to the Court's direction in its December 2, 2013, Case Management and Briefing Order, the parties also submitted proposed orders on the Motions for Fees, Expenses and/or Sanctions on January 24, 2014.

III. FINDINGS

This Court has carefully reviewed and fully considered the extensive briefing on the Motions for Fees, Expenses and/or Sanctions, including the Phase I briefing, Phase II briefing, the supplemental briefing regarding the belated WiFITER productions, the supplemental briefing regarding Cal Fire's alleged dishonesty, corruption and the imposition of terminating sanctions, all declarations and evidence filed in support of and in opposition to said briefing,

and all objections to evidence and responses thereto.[6] Additionally, the Court has carefully reviewed and fully considered the cross-motions, and all related briefing and submissions, regarding Cal Fire's claim of privilege over the disputed email. Now, having spent extensive time reviewing what the Court conservatively estimates amounts to thousands of

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[6] With respect to the objections to evidence, unless otherwise stated, to the extent this Court cites any evidence in this Order which is the subject of an objection to evidence, or to the extent that any evidence cited herein is necessary to this order, the parties are to assume that the Court has considered and overruled any such objection unless noted otherwise.

The Court however must specifically address Defendants' objections to the Declaration of Joshua White submitted by Cal Fire in support of its Phase I briefing. Therein, Mr. White offers statements regarding the white flag about which he was cross-examined. However, Mr. White also offers an opinion regarding the issue of causation, an opinion that was not proffered by Cal Fire at any time earlier in the case, and which differs from the statements in the *Cottle* proceeding that counsel for Cal Fire attributed to Mr. White from the Origin and Cause Report, and which was specifically addressed in the Court's *Cottle* rulings. The Court has reviewed the Defendants' Phase I briefing carefully, and can find no issue, fact or argument that places in issue matters of causation addressed in Mr. White's declaration. The Court also finds that the new opinion from Mr. White contravenes the Court's order governing the permissible contours of Mr. White's expert opinions in view of Cal Fire's refusal to subject him to an expert deposition pursuant to Code of Civil Procedure section 2034. Accordingly, the Court shall grant Defendants' motion to strike that portion of Mr. White's declaration.
[handwritten: *Counsel Paul Gordon's reading from at the hearing in Court on February 4, 2014]

[handwritten: LCN,
Judge]

pages of legal briefing, declarations and exhibits, and having heard oral argument from all parties through a two-day hearing, the Court hereby finds as follows:

A. Defendants Are Entitled to Sanctions

On July 24, 2013, the Court began the pre-trial proceedings by reading from and issuing a written order which referenced the standards applicable to the California Attorney General's Office, specifically noting:

> The California Attorney General is among the well-qualified counsel representing plaintiffs. The mission statement of the Attorney General provided that, among other laudable goals, the Attorney General will enforce and apply all our laws fairly and impartially; and will encourage economic prosperity, and safeguard natural resources for this and future generations. Of course, all attorneys are bound by Business and Professions 6068(c), "to counsel and maintain those actions, proceedings, or defenses only as appears to him or her just... "

Similarly, the California Supreme Court has emphasized the vital importance of a fair prosecution and outcome in an action brought by a public entity:

> A fair prosecution and outcome in a proceeding brought in the name of the public is a matter of vital concern both for defendants and for the public, whose interests are represented by the government and to whom a duty is owed to ensure that the judicial process remains fair and untainted by an improper motivation on the part of

> attorneys representing the government. Accordingly, to ensure that an attorney representing the government acts evenhandedly and does not abuse the unique power entrusted in him or her in that capacity—and that public confidence in the integrity of the judicial system is not thereby undermined—a heightened standard of neutrality is required for attorneys prosecuting public-nuisance cases on behalf of the government.

(*County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 57.) Against this backdrop, it is this Court's responsibility to carefully assess the conduct of Cal Fire and its counsel in this matter and to reach a determination that ultimately advances the goal of ensuring that California courts remain "a place where justice is judicially administered." (*See Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 763-65.)

Code of Civil Procedure section 2023.030 grants courts the authority to impose monetary, issue preclusion, evidentiary, terminating, and contempt sanctions for discovery misuse. Section 2023.010 provides a nonexclusive list of the types of misconduct that are considered to be "misuse" and which may be remedied. These include employing discovery methods in a manner that causes undue burden and expense, making unmeritorious objections to discovery, and giving evasive responses to discovery. (Code Civ. Pro.§ 2023.010 (c), (e), and (f).) Other sanctionable discovery abuses include providing false discovery responses, providing evasive, misleading or false

deposition testimony, and spoliation of evidence. (See e.g. *Michaely v. Michaely* (2007) 150 Cal.App.4th 802, 809 (deposition testimony); *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804 (discovery responses); *Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223 (spoliation); *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1 (spoliation).)

The trial court has broad discretion in selecting discovery sanctions, subject to reversal only for abuse. (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1293; *Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913, 928-29.) "The court must examine the entire record in determining whether the ultimate sanction should be imposed." (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796; *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1246 (the court must consider "the totality of the circumstances").) To do this, a court must carefully consider all discovery abuses, past and present. (*Liberty Mut. Fire Ins. Co. v. LcL Adm'rs, Inc.* (2009) 163 Cal.App.4th 1093, 1106-1107 (rejecting the argument that "past discovery abuses have no place in deciding whether to impose terminating sanctions," and holding that "the sanctioned party's history as a repeat offender is not only relevant, but also significant, in deciding whether to impose terminating sanctions").) The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should "'attempt[] to tailor the sanction to the harm caused by the withheld discovery.'" (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36.) Where the abuses are clear, it is an abuse of discretion for the trial court not to

impose sanctions under section 2023.030. (*Doppes v. Bentley Motors, Inc.* (2008) 174 Ca1.App.4th 967, 992.)

1. Cal Fire Has Engaged In Pervasive Discover Abuses.

With respect to assessing Cal Fire's conduct and the conduct of its primary counsel, this Court is vested with discretion to resolve conflicting evidence and make whatever credibility determinations are necessary, and its decisions in such matters are reviewed under an abuse of discretion standard. (*See Michaely v. Michaely, supra*, 150 Cal.App.4th at 809 (affirming sanctions award and stating trial judge is "in an excellent position to make credibility findings").) The Court's finding are provided herein only by way of example so as to illustrate instances which reveal the pervasive nature of Cal Fire's discovery abuses, and this Order should not be construed as an assessment that Cal Fire's transgressions are limited to these examples.

(a) Cal Fire's Violation Of This Court's Orders Requiring Production of All WIFITER Documents

Cal Fire belatedly produced two tranches of relevant documents that were not only subject to Sierra Pacific's discovery request, but also to two court orders. On October 31, 2013, Cal Fire produced a disorganized mass of more than 5,000 documents, well after the Court had ordered Cal Fire to produce all non-privileged documents by no later than April 30, 2013, and well after the parties had made their arguments regarding the relevance of WiFITER in the context of motions in limine, tentatively ruled upon in favor of Cal Fire by this Court on July 1, 2013. On

November 22, 2013, Cal Fire produced more than 2,000 additional pages of documentation, well after this Court had ordered on October 30, 2013, that it produce all unproduced documents by no later than October 31, 2013, and also after Cal Fire's earlier representation to this Court when opposing Sierra Pacific's ex parte application for more time to address the belated production that Cal Fire had now produced "everything."

Cal Fire's belated productions not only violated the discovery rules and this Court's orders, the Court finds that they severely prejudiced Defendants. By the time Defendants received the documents, dozens of WIFITER depositions had been conducted, numerous motions pertaining to WIFITER had been heard and ruled upon by the Court, including motions in limine, settlement conferences had been held, and case strategies were formulated. These actions were taken without the benefit of complete information, and there are a number of documents which reveal information that is inconsistent with the testimony of Cal Fire's witnesses and with Cal Fire's representations to this Court regarding Cal Fire's own understandings regarding WiFITER and whether it was legal. Had Cal Fire timely produced these documents, the information revealed by them may have opened up new avenues of cross-examination during the deposition of Cal Fire's witnesses that, in turn, may have forced the disclosure of even more damaging information, an assumption this Court is willing to make in view of Cal Fire's inexcusable failure to produce these documents, a failure that this Court finds akin to spoliation, at least in terms of its impact

on these Defendants before the major motions on WiFITER were addressed.

With respect to those motions, the Court finds that some of the belatedly produced documents reveal information which would have caused this Court to rule differently on the WiFITER motions in limine. In fact, some of these documents belie Cal Fire's own representations to this Court that there was no evidence whatsoever that the WiFITER fund was improper.[7] Had Cal Fire's failure to comply with the

[7] For instance, Defendants informed this Court that they identified well over a thousand pages of previously unproduced internal Cal Fire emails pertaining to WiFITER that support what Defendants argued in their own motion in limine on WiFITER and in opposition to Cal Fire's regarding the impact of this fund on the bias of Cal Fire and its investigators, including documents demonstrating that those within Cal Fire's Civil Cost Recovery Unit overseeing the Moonlight Fire were fixated on the cash flowing in and out of the illegal WIFITER account. For instance, various belatedly produced documents, which were generated within Cal Fire shortly before the Moonlight Fire, are supportive of Defendants' assertion that the Moonlight Fire's ultimate case manager Alan Carlson was seeking out "high % recoveries" to keep WIFITER from "being in the red" and also favored using WiFITER funds for training and tools that that would bring in more money, writing in one belatedly produced email, "it is hard to see where our arson convictions are bringing in additional cost recovery." The belatedly produced documents also reveal an internal tension concerning Cal Fire's conduct regarding WiFITER and an effort to conceal that conduct. For instance, when Alan Carlson pushed to apportion more money on one collection matter to WiFITER, as opposed to where it belonged in the General Fund, he was rebuffed by his supervisor because Cal Fire's general counsel had informed him that "the point is to keep a low profile" and if they take too large "a cut off the top of a recovery" it might "look fishy." This is the essence of scienter, and it certainly reveals that Cal Fire knew that its

discovery rules and to abide by the Court's order occurred during trial, it surely would have been grounds for severe monetary, evidentiary and/or terminating sanctions under section 2023 and the Court's power to enforce its orders. (*Liberty Mut. Fire Ins. Co. v. LCL Administrators, Inc.* (2008) 163 Cal.App.4th 1093).)

Importantly, the Court finds that Cal Fire's failure to produce such a large volume of relevant documents - the discovery of which only occurred through the chance publication of certain information recovered from Cal Fire by a third party that was not under any order of production but found the information within Cal Fire regardless—reveals a lack of seriousness on the part of Cal Fire that is an affront to this Court.[8] This Court is not contesting Cal Fire's assertion of inadvertence, but the timely production of documents under our discovery rules and good faith compliance with court orders requires seriousness of purpose, focus and effort. The fact that a party can claim inadvertence says nothing about how serious Cal Fire took its obligations to comply. But Cal Fire's

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actions were improper, a fact which Cal Fire and its counsel failed to reveal in Cal Fire's motion in limine regarding WiFITER.

[8] Cal Fire contends that it opened its doors to the State Auditor in April of 2013, and that the State Auditors' agents found the documents supportive of its conclusions on their own. The fact that individuals from a different public agency—who would naturally have far less familiarity with Cal Fire's record keeping systems than Cal Fire's own record keepers—still found documents which Cal Fire failed to produce, *despite* this Court's order to produce, deep affront to this Court, and a further basis for the sanctions discussed herein.

claim to this Court on November 14, 2013, that it had finally produced everything, when in fact it had still not produced more than 2,000 pages of documents, certainly does. Additionally, Cal Fire's gross violations of the discovery rules, and its related violation of this Court's orders with respect to such a large bank of documents, even if "inadvertent," is not inconsistent with its other gross violations of the discovery rules, some of which, as discussed below, this Court finds were purposeful and calculated to enhance its chance of success on the merits.

(b) Cal Fire's Lead Investigator Repeatedly Failed to Testify Honestly Regarding One of the Most Important Aspects of His Origin and Cause Investigation

As noted above, this Court has reviewed various publications relating to wildland fire origin and cause investigations. With respect to this order, that review was helpful, as some understanding is necessary in the context of this Court's assessment of the importance of Cal Fire's lead investigator's testimony with respect to his origin and cause work.[9] Each of these publications, as well as each of the origin and cause experts retained by the parties in this case, speak of the necessity of investigators adhering to

[9] Specifically, this Court's review included relevant sections of various fire investigation publications submitted by the parties to this Court in May of 2013, including "NFPA 921: Guide For Fire And Explosion Investigations," the National Wildfire Coordinating Group's (NWCG) "Wildfife Origin & Cause Detennination Handbook," and its companion and interagency wildland fire investigation training course and manual known as FI-210.

accepted standards in order to maximize the accuracy of their work, and to scientifically and systematically process a wildland fire scene so as to ultimately narrow their search and systematically discover the fire's point of origin. Once found, the investigator is to search for an ignition source (because such sources are almost always located at the point where the fire started) so as to determine the fire's cause, while designating the point of origin with a white flag.[10] Thus, for instance, Cal Fire's own origin and cause expert Larry Dodds testified that being off by eight feet on the point of origin could make a world of difference in terms of determining the correct cause. Thus, NFPA 921 states that it is nearly always the case that if an investigator cannot properly locate a fire's point of origin, the investigator will likely not be able to accurately determine its cause. Here, there is significant dispute between the parties as to whether

[10] Under the NWCG Handbook and FI-210, a white flag is used to designate evidence or the point of origin. Here, both Cal Fire's lead investigator Josh White and Cal Fire's retained origin and cause expert Larry Dodds conceded under oath that white flags are typically used to designate the point of origin, a fact supported by investigator Reynolds' sketch of the Moonlight Fire scene (a document which was not contained or discussed in the Official Report) that contains precise measurements triangulated from two chosen and marked reference points that intersect at a spot marked with an "x" and specifically designated as the "point of origin" on the sketch. Dodds testified under oath that he confirmed these measurements intersected at a rock on a skid trial, and that his work revealed the same rock was marked by these investigators with a white flag. Under FI-210, investigators are also trained to use other flag colors in order to properly mark a tire's progression: blue designates a backing indicator, yellow designates a lateral indicator, and red designates an advancing indicator.

the investigators properly met the standard of care associated with wildland fire origin and cause investigations, and it is not this Court's task to resolve those disputes. However, in the context of assessing the Defendants' motion for sanctions under section 2023, it is this Court's responsibility to review whether Cal Fire abused the legal process through the false testimony of its lead investigator on the Moonlight Fire, Joshua White. This Court finds that Cal Fire, through White, repeatedly did so.

The Moonlight Fire origin and cause investigation was jointly conducted by agents from Cal Fire and the United States Forest Service. Cal Fire's Joshua White and the USFS's Reynolds were the primary scene investigators. They testified that they processed the scene in accordance with FI-210, beginning on September 4, 2007, and that they discovered two points of origin the next morning at shortly before 10:00 a.m. on or near a "spur trail" which is generally depicted in certain photographs taken by White. They also testified that their two points of origin, designated as E-2 and E-3 in the joint "Origin and Cause Investigation Report" (the "Official Report") were their only points of origin. White testified that neither of them ever placed any white flags to mark evidence of these points of origin, an assertion confirmed by Reynolds, until he ultimately changed his story on the last day of testimony. In addition to not marking these official points of origin with a white flag, White also confirmed that they never took any photographs of E-2 and E-3 in order to document their status as points of origin. When White was asked why he did nothing to document the most important points

in his investigation, he could not explain and said "I don't know."

Notwithstanding White's testimony, discovery revealed of a number of photographs taken by White during the morning of September 5, the first five of which were not included in the Official Report. White admitted that he took each of these photos, and that he took them from two chosen reference points, three from reference point 1, and two from reference point 2. But White could not explain or was unwilling to explain the fact that there is a white flag in the center of each one of these photos, a fact which is more easily revealed when the native files are viewed and enlarged on a computer screen. In fact, after White testified that they had not placed any white flags during the scene investigation, he was shown a copy of the very first photograph he took on the morning of September 5. In response to questioning, he explained the purpose and placement of blue indicator flags, yellow indicator flags, and red indicator flags which are more easily seen in this photograph. Once that process was complete, Sierra Pacific's counsel asked, "What about the white flag?" White testified, "There is no white flag," an assertion he was forced to retract once counsel showed him the native file of the same photograph enhanced on a computer screen, as well as the native files of four additional photographs, all taken by White, one after the other, from just behind two reference points, with the same white flag hanging on the same metal stem alongside the same rock in each one.

After admitting the existence of the white flag, investigator White continued to feign ignorance,

testifying that he never placed any white flags for any reason, and that he was unaware of his co-investigator Reynolds placing any white flag for any reason. Counsel ultimately moved on to another piece of evidence, which was also left out of the Official Report: a Fire Origin Sketch, depicting a rough approximation of the scene and drawn on a federal investigative form in the possession of Reynolds. The sketch depicts reference point 1 and reference point 2, along with distance and bearing measurements taken from each as confirmed by Reynolds, with distance measured with precision to a quarter of inch and bearings to a single degree, both intersecting at a single point. The sketch contains a single point marked with an "x" and alongside that "x" there is a handwritten "P.O", which is shorthand for "point of origin," a fact also confirmed by a key at the base of the form, which reads "x=point of origin." Cal Fire's origin and cause expert Dodds, and other experts, including Cal Fire expert Chris Curtis, confirmed under oath that the measurements found on the Reynolds' sketch intersect at the same point as marked by the white flag depicted in five separate photographs, as taken from the same reference points noted on the sketch itself.

White used his deposition to distance himself from this sketch, testifying that he did not know where the measurements intersected and that he had not even seen Reynolds' sketch until well after the Official Report was completed. He also testified that he only learned of the existence of this sketch through confidential discussions with counsel.[11] But White's

[11] Notwithstanding White's testimony in this matter, White's own photograph of the metal fragment he and Reynolds claim to

professed ignorance regarding his actions on the Moonlight Fire investigation stand in stark contrast to White's testimony in a different Cal Fire collection matter, *Cal Fire v. Dustin White*, wherein, on August 8, 2008, White testified that, "aside from trying to get the absolute measurement to be able to go and recreate that point of origin so that I establish two reference points. Then I take those measurements. *That's the very foundation of an origin and cause report*."

White took several other critical photographs on September 5, 2007, one at 9:16 a.m. and 9:25 a.m. which he referred to as "overview of the indicators." Each of those photos reveal the substance of the investigators' work, the blue backing, yellow lateral and red advancing indicators, along with evidence tents to identify certain burn indicators. But there is nothing in either of those photographs which signifies any interest in their claimed points of origin E-2 and E-3. The absence of any flag or evidence placards at the official points of origin must be contrasted with the investigators' significant effort to place numerous other colored flags and evidence placards within the area of origin to create a photographic record of their primary points of interests. More importantly, in addition to the absence of any markings or white flags at or near what they identified as their official points

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have collected at E-2 and E-3, which he took on the hood of his pickup truck at 10:02 a.m. just before releasing the scene 15 minutes later, belie his testimony that he did not see the Reynolds sketch until much later. In one of two photos taken of the metal on piece of white paper, one can see the left edge of the Reynolds' sketch just underneath the piece of paper on which White is photographing the metal.

of origin, enhancing the native version of the 9:16 a.m. scene "overview" photo on a computer screen shows the presence of the same white flag on a metal stem at the same point on the skid trail to the south of the official points of origin that White had photographed an hour earlier that morning five separate times, all showing the same white flag. Once the presence of this white flag was shown to the Moonlight investigators through the use of computer screen native photographs with magnification, both of them testified that they could not explain why it was there, despite the fact that the very purpose of their overview photo was to create a record of the most important indicators of their work, including, of course, their placement of a white flag.

In order to show Cal Fire's obfuscation and bad faith denials of the truth during discovery, the Court has gone to great lengths to explicate significant portions of the investigators' work on marking, photographing, measuring, and sketching a single point of origin, using a process that investigator White readily conceded in the earlier Cal Fire case was the "foundation" of any origin and cause report. The Court's effort on this front was necessary in order to properly show just how incredible the investigators' testimony was on the most central issues in this case—indeed, on the very basis upon which this action was brought. The fact that Defendants' counsel were forced to depose these investigators under conditions where the investigators continually attempted to steamroll the truth by simply denying or expressing ignorance of the obvious greatly increased the expense of this litigation. Had they testified truthfully from the

start, as required,[12] Defendants would have likely spent nothing, or very little, as the case most likely could not have advanced.

Unfortunately, Cal Fire's lead counsel, officers of this Court who should be "operating under a heightened standard of neutrality" greatly exacerbated the problem by failing to intercede and put a stop to what their witnesses were doing under oath. Doing nothing, permitting such testimony to take place creates a tremendous burden on this Court by allowing a meritless matter to go forward when the lead attorneys in charge of its prosecution should be exercising their responsibility throughout to only advanced just actions.[13]

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[12] "Based upon the logic of undisputable public policy, the duty to truthfully and fully respond [in discovery] has been described as follows: Parties must state the truth, the whole truth, and nothing but the truth." (*Scheiding v. Dimwiddie Const. Co.* (1999) 69 Cal. App. 4th 64, 74 [internal quotation omitted].)

[13] Reynolds was given White's depositions by the federal attorneys in this case as those transcripts were produced, and Reynolds testified that he read those transcripts. Thereafter, Cal Fire's lead counsel attended a meeting in January of 2011 at the US Attorneys' office, where Reynolds was shown the reference point photos and admitted seeing a white flag. When Reynolds was deposed a couple of months later in the consolidated state actions, he denied knowing about the white flag, denied ever placing it, and testified that it looked like a "chipped rock" to him. This Court is deeply troubled by two things on this front: that one of the primary Moonlight investigators would admit one thing to a table of "friends" and then refuse to admit the same thing once put under oath. The Court is perhaps even more troubled that Cal Fire's lead counsel would be present at the meeting with Reynolds and still sit idly by as Reynolds, a person Cal Fire hired

Finally, there was nothing about the dismissal of these actions which caused any change of heart within Cal Fire. Cal Fire had little if any regard for its discovery obligations and responsibilities when this action began, and that disregard continued through the briefing phases discussed in this Order. In addition to violating Court orders after dismissal, the Court also finds that White's Phase I declarations to this Court, wherein he repeated and advanced the absurdity of his deposition testimony regarding the white flag in effort to avoid the consequences of his actions, are also an affront to this Court, as is Cal Fire's counsel's willingness to allow such a declaration to be filed.

(c) Cal Fire's Lead Falsified J.W. Bush's Interview Statement, and Incorporated that Falsification Into Its Interogatory Responses

The Moonlight investigators interviewed J.W. Bush twice. The first, conducted by federal investigator Dave Reynolds on September 3, 2007, was summarized in writing but not tape recorded. The second interview, by Joshua White on September 10, 2007, was summarized in writing and recorded. White incorporated both written interview statements into the Origin and Cause Report. He did not include the audio recording of the second interview, but Defendants obtained it in discovery. In its interrogatory responses verified by Alan Carlson, Cal Fire invoked section 2030.230 and elected to

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as a consultant, denied in his deposition what he had conceded in Cal Fire's counsel's presence serveral weeks earlier.

incorporate by reference documents in lieu of providing factual statements. Cal Fire incorporated both reports in its interrogatory responses.

In their moving papers, Defendants presented evidence that Josh White's report of the September 10 interview falsely attributes to Mr. Bush an admission of liability regarding Cal Fire's rock strike theory. Specifically, Dave Reynolds' summary of the September 3, 2007, interview claims that Bush said he "Believes Cat [Caterpillar Bulldozer] tracks scraped rock to cause fire." During White's September 10 interview of Bush, White asked Bush whether he had ever said he believed the dozer scraped a rock and started the fire, and Bush flatly denied having done so, a fact which the interview transcript confirms. Nevertheless, despite the fact that Bush clearly stated during his September 10 interview that he never told anyone that a rock strike started the fire, White's written interview summary, advanced into the Official Report and then into this civil matter through Cal Fire's interrogatory responses, provides that, "Bush reiterated the same information he had provided to 1-1 Reynolds," a rather surprising statement since the most important component of Reynolds' written summary of his September 3 interview with Bush is his claim that Bush said he believes that "a Cat scraped a rock and started the fire" and one of the most important components of White's interview with Bush is his statement that he never told anyone what caused the fire and that he did not know.[14] When

[14] Cal Fire's own expert Bernie Paul testified that he thought this discrepancy between the tape and the written statement was

White himself was confronted during his deposition on February 2, 2011, with the glaring inconsistency between the actual tape of his September 10, 2007, and his written summary of the same he could not explain it, instead responding, "No. I don't know why."

(d) Cal Fire Falsified the Ryan Bauer Interview, and Incorporated that False Interview In Its Interrogatory Responses.

There is no dispute that the summary of the interview of Ryan Bauer that White included in the Origin and Cause Report omits Ryan Bauer's unsolicited false alibi, where he volunteered, "I was with my girlfriend all day. She can verify that if I'm being blamed for the fire." Cal Fire's effort to defend this gross omission from Bauer's interview summary by pointing out that the summary mentions that Bauer said he "noticed the fire ... from his girlfriend's house," is misplaced. The inclusion of that information does nothing to ameliorate the misleading character of the interview report. Cal Fire makes no effort to defend its incorporation of this material into its verified interrogatory responses. Had Defendants relied on Cal Fire's verified interrogatories, this information would never have been discovered.

(e) Cal Fire Included False Red Rock Interviews In Interrogatory Responses

On the day of the fire, the closes federal lookout, known as the Red Rock lookout tower, was being manned by Caleb Lief. At roughly 2:00 p.m., Karen

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"either malicious and evil or it's incompetence." (Ex. 61 at 789:7-14.)

Juska, another federal employee, was in the process of responding to Liefs request that she come to the tower to repair or replace a radio. When Juska arrived in her USFS pickup truck, she parked just beneath the tower, walked up its steps, and caught Lief standing on the cat-walk in front of her, urinating on his bare feet, which he later claimed was a cure for athlete foot fungus. Immediately thereafter, they walked into the cabin, and, sometime thereafter, Juska spies a glass marijuana pipe on the counter, which Lief then placed in his back pocket. When he later handed her the radio, she smelled the heavy odor of marijuana on his hand and on the radio. All of this information was relevant to whether Lief was properly performing his function, but none of it was contained or referenced in the written summaries of the interviews that were taken of the two of them by Reynolds' replacement, USPS special agent Diane Welton. Juska testified that she was instructed by Welton not to talk about these issues, just before her interview began, Cal Fire does not deny that the witness statements of Karen Juska and Caleb Leif from the Red Rock Lookout omit critical information about misconduct at the tower, and that they are incorporated in verified interrogatory responses. Instead, it offers two excuses for this gross misconduct. First, Cal Fire's attorneys claim that what happened at Red Rock is irrelevant. Cal Fire is incorrect, as found by this Court when it denied Cal Fire's motion in limine regarding Red Rock.[15] Next, Cal Fire claims that Joshua White was

[15] With respect to the relevancy, the Court has already found the facts associated with the misconduct at Red Rock relevant when it denied Plaintiffs' motion in limine to exclude that evidence from trial. Moreover, Cal Fire's own experts and White

never certain that the marijuana use at the tower occurred on September 3, 2007, and that he had no obligation to follow up and discover the true facts. But White's testimony reveals that Welton told him about marijuana use at the tower, and he had a responsibility as an investigator to look into it immediately. Finally, Cal Fire claims that the incorporation of false witness statements in the Official Report and in verified interrogatory responses were merely acts of misfeasance, not malfeasance. The Court finds that neither of these assertions is a legitimate excuse, and that Cal Fire's conduct with respect to its discovery responses regarding Red Rock were yet another violation of the discovery rules.[16]

(f) There Is No Justification for Joshua White's Spoliation of His Notes

Discovery revealed that investigator White destroyed his investigatory field notes, and Reynolds testified that White's notes were substantial. The Court finds that Cal Fire's effort to justify this destruction is of no consequence, because according to White, his "field notes were destroyed only after the information in them was transferred to his Report,

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have consistently testified that the timing of the report from Red Rock at 2:24 p.m. is a key piece of the causation analysis, and that a delayed report of the fire from an impaired lookout would impact the analysis.

[16] In its interrogatory responses verified by Alan Carlson, Cal Fire invoked CCP § 2030.230 and elected to incorporate by reference documents in lieu of providing factual statements, including the fraudulent Red Rock interview statements. Having done so, Cal Fire had a duty to ensure they were accurate, but it failed to do so.

which was and is the common practice" and that he "transferred all of the case file information to his laptop computer, so all this electronic information as in fact preserved."

The Court does not find White credible. The record evidence proves that White did not incorporate his notes into the Report. During their scene processing of the alleged origin, Reynolds and White placed a white flag next to a rock in a skid trail, White photographed it six times, measured to it from two reference rocks with each investigator holding one end of a measuring tape, took distance and bearing measurements to the rock to the 1/4 of an inch, took their only GPS reading from that rock, took three photos of Reynolds taking the GPS measurement from that rock, and sketched it and labeled it "P.O." before releasing the scene. These actions are evidenced in Reynolds' notes that were obtained in discovery from the United States. According to Reynolds, White also took copious notes during the scene processing of the alleged origin, which he later destroyed. Certainly White's notes would have chronicled at least some of these actions taken by the investigators, and yet none of this information was "transferred to his Report" as claimed.

More importantly, the destruction of White's notes is what has allowed him to conveniently escape for the most part meaningful cross-examination in most instances by claiming a Japse of memory when confronted with inconsistencies. By way of example, White claims he cannot remember the white flag. If Defendants had access to his notes, surely they would have shed light on the white flag, just as Reynolds'

notes did. White claims he does not remember when Diane Welton informed him of marijuana at the Red Rock Lookout, or when the alleged use occurred, so as to excuse his omission of these facts. Notes of his conversations with Welton and the timing of them would have been relevant to establishing White's intent. White claims he cannot recall why he reported the opposite of what J. W. Bush told him during the September 10th interview. Notes of that interview (which White admits he took and later destroyed) certainly might have shown White's intent. Cal Fire's effort to excuse White's misconduct based on the supposed absence of evidence of intent (facilitated by White's destruction of the very notes in question) is intolerable. (See Civ. Code § 3517.)

Cal Fire next seeks refuge in the fact that it has formally adopted White's destructive practices as its institutional policy, albeit after White's destruction of his own his investigatory materials in this case. This assertion proves two equally troubling facts. First, it proves that White voluntarily destroyed his notes. Second, it proves that Cal Fire's Civil Cost Recovery Unit, which exists for the sole purpose of pursuing claims under Health and Safety Code section 13009 through the legal system, has an institutional policy of destroying evidence in direct violation of the Code of Civil Procedure.

(g) Cal Fire Included False Origin and Cause Reports for the Lyman Fire and Other In Its Interrogatory Responses.

With respect to the Lyman Fire, Cal Fire does not even attempt to deny that the conclusion of the Origin and Cause Report for that fire prepared by Lester

Anderson was false. There is no dispute that his conclusion, that a Howell's bulldozer ignited the Lyman Fire, was flatly contradicted by the lead investigator of the Lyman Fire, Officer Greg Gutierrez, who testified that the cause was properly classified as undetermined.

Cal Fire never addresses this discrepancy, and instead only focuses on the suspicious delay in the preparation of the Lyman Fire report by Mr. Anderson—after Moonlight, even though Lyman burned before Moonlight. Cal Fire attributes this delay to a trip Mr. Anderson took to Idaho. But Cal Fire misses the two key issues. First, Cal Fire fails explain how Mr. Anderson determined Howell ignited the fire when he claimed to have been following Mr. Gutierrez's lead and yet Gutierrez reached no determination. Second, Cal Fire fails to address the fact that in its interrogatory responses verified by Alan Carlson, Cal Fire invoked section 2030.230 and incorporated by reference the origin and cause report for the Lyman Fire in lieu of providing facts about that fire. Those responses were demonstrably false, as confirmed by Gutierrez's testimony.

In the end, Cal Fire and its counsels' vast array of discovery abuses suggests that they perceive themselves as above the rule of law. With their abuses infecting virtually every aspect of the discovery process, from ~~perjury~~ [handwritten: false testimony], to pervasive false interrogatory responses, to spoliation of critical evidence, to willful violations of the Court's Orders requiring production of WIFITER documents, Defendants and the Court simply have no reason to believe that these Defendants can receive, or

could ever have received, a fair trial under these circumstances.

2. Cal Fire Witnesses Provided Evasive, Misleading and/or Dishonest Deposition Testimony.

Based on the foregoing, the Court finds that throughout this litigation Cal Fire witnesses provided evasive, misleading, contradictory and false deposition testimony on numerous topics, from the origin and cause investigation, to the suppression of witness information, to WiFITER. In doing so, Cal Fire's agents not only betrayed their oath "to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the constitutional rights of all men to liberty, equality and justice," but, as it pertains to this Court, they betrayed the primary purpose of judicial system—to reveal the truth. "Based upon the logic of undisputable public policy, the duty to truthfully and fully respond [in discovery] has been described as follows: Parties must state the truth, the whole truth, and nothing but the truth." (*Scheiding v. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64, 74 [internal quotations omitted].)

Cal Fire attempts to avoid the consequences of its testimonial choices by arguing without citation that "neither California Code of Civil Procedure section 2023.030 nor relevant case law create a right to discovery sanctions for alleged 'perjury.'" Cal Fire is incorrect. (See *Michaely, supra*, 150 Cal.App.4th at 808-10 (affirming sanctions on the "vast majority" of the issues in dispute where a party gave evasive, untruthful, inconsistent and/or contradictory

deposition testimony). For example, in *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, the Supreme Court declined to review a decision where "[t]he Court of Appeal concluded that a 'blatantly false' interrogatory response, even if not technically 'evasive,' must qualify as a sanctionable 'misuse' of the discovery process." (*Id.* at 300.) Thus, section 2023.030 and California case authority confirm this Court's authority to impose monetary sanctions for evasive, misleading, or outright false discovery responses, whether written or verbal. (*Ibid.*; see also *Palm Valley Homeowners Assn v. Design MTC* (2000) 85 Cal.App.4th 553 (holding that "the conduct listed in section 2023.030 as sanctionable discovery abuses is not exclusive"); *Saxena v. Goffney* (2008) 159 Cal.App.4th 316 (explaining that willfully false answers are tantamount to "giving no answer at all" and is clearly sanctionable under section 2023.030).)

Cal Fire also argues that it is not subject to sanctions for deposition abuses because Defendants have not "proven" perjury and have not "proven that the joint investigation was false or fraudulent" because no trial has occurred. But Cal Fire misconstrues the current procedural posture of the case and the controlling authorities. First, there is no California case holding that a trial court must hold an evidentiary hearing before imposing sanctions under section 2023, and there is no authority for Cal Fire's assertion that section 2023 sanctions cannot be imposed unless a trial has already taken place. Indeed, section 2023 .030 (a) provides that the Court, "after notice to the affected party, person, or attorney, and after opportunity for hearing," may impose monetary and nonmonetary sanctions for discovery

abuse." The statute does not require an evidentiary hearing; only notice and an opportunity to be heard, which Cal Fire and its attorneys undeniably received. (*Seykora v. Superior Court* (1991) 232 Cal.App.3d 1075, 1082 ("[t]he 'opportunity to be heard,' in the context of a hearing on the issue of (monetary) sanctions (under § 128.5) does not mean the opportunity to present oral testimony").) As with all discovery motions, the Court is empowered to evaluate the evidence and make findings now, based on the materials and evidence that all the parties have elected to submit for the Court's consideration.

3. Cal Fire Provided Evasive, Misleading and/or Dishonest Discovery Responses.

The Court finds that Cal Fire also repeatedly disregarded its obligation to provide complete and straightforward responses to written discovery requests. Cal Fire attempts to justify its evasive, misleading, and/or false answers to numerous straightforward questions by noting that Cal Fire amended certain responses not once, not twice, but three times. But this argument only serves to underscore the abuse: Cal Fire had an obligation to provide complete and straightforward answers in its initial written responses. Defendants should not have had to engage in protracted meet-and-confer efforts, only to receive responses that time-and-time again failed to comply with the Code. Cal Fire also suggests that its incomplete and evasive response regarding the timing of the pre-deposition meeting between Reynolds and Office of the Attorney General where they discussed the white flag is justified because "Defendants already knew the date." Nothing in the

Code allows a party to evade its discovery obligations because that party believes the information is known, especially when the discovery is a request for admission, the primary purpose of which is not to discover information but to establish facts. Cal Fire's discovery responses exemplify exactly the type of "evasive and quibbling" responses that have been the subject of the most severe sanctions. (See *Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, 1617 (affirming terminating sanctions where a party provided "evasive and quibbling" responses to discovery requests).

4. Cal Fire's Spoliation of Evidence.

"Spoliation of evidence means the destruction or significant alteration of evidence or the failure to preserve evidence for another's use in pending or future litigation." (*Williams, supra*, 167 Cal.App.4th at 1223.) Such conduct is condemned because it "can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both." (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 18; *Williams, supra*, 167 Cal.App.4th at 1223) ("While there is no tort cause of action for the intentional destruction of evidence after litigation has commenced, it is a misuse of the discovery process that is subject to a broad range of punishment, including monetary, issue, evidentiary, and terminating sanctions.").)

The Court finds that Cal Fire spoiled critical evidence when its lead investigator destroyed his contemporaneous field notes relating to the Moonlight Fire. Cal Fire suggests that this does not constitute a sanctionable abuse because White destroyed the records before Cal Fire filed this lawsuit. But pre-litigation destruction is sanctionable when, as here, litigation is reasonably anticipated. (See e.g. *Williams, supra*, 167 Cal.App.4th 1215 (affirming terminating sanctions due to spoliation where a party allowed documents to be destroyed pre-litigation); *Apple Inc. v. Samsung Electronics Co., Ltd.* (N.D. Cal. 2012) 881 F.Supp.2d 1132).) Cal Fire suggests these cases are distinguishable because its pre-litigation destruction occurred "pursuant to a regular policy or practice," but the evidence establishes that Cal Fire did not have such a policy—its lead investigator unilaterally destroyed the notes on his own accord, which allowed him to cover up his initial origin analysis and avoid meaningful cross-examination about it by claiming a lapse of memory or by testifying in ways that his actual written record would have prevented. Accordingly, the Court does not find Cal Fire's argument persuasive.

5. Cal Fire's Belated WiFTER Document Production and Related Abuses.

By chance, Defendants uncovered additional discovery abuses after this Court entered judgment, including the fact that Cal Fire violated two separate discovery orders by failing to produce thousands of critical WiFITER documents, which resulted in not just one, but two belated post-judgment productions. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67

Cal.App.4th 1152 (affirming terminating sanctions where party failed to produce documents before trial). Also revealed post-judgment was that Cal Fire had purposefully withheld damaging documents from discovery based on specious claims of privilege, including the disputed email. Critically, the thousands of documents produced post-judgment, as well as the disputed email in particular, exposed the fact that Cal Fire had provided evasive and/or false deposition testimony regarding WiFITER during discovery *and* provided evasive and misleading responses to written discovery requests on that same topic. Cal Fire's disregard for the discovery process and the orders of this Court continues to this day because it continues to withhold as many as 40,000 pages of WiFITER documents from production.

Cal Fire attempts to characterize its post-judgment abuses as merely an "inadvertent" failure to produce WiFITER documents, and then argues that this "inadvertent" failure does not constitute a discovery abuse "that warrants any sanction, let alone terminating sanctions." As a preliminary matter, "willfulness" is *not* a requirement for the imposition of discovery sanctions. (*Deyo, supra*, 84 Cal.App.3d at p. 787.) Besides, "[w]illfulness does not require wrongful intentions. A simple lack of diligence may be deemed willful where the party knew he had an obligation, had the ability to comply, and failed to do so." (*Ibid.*) More to the point, Cal Fire's argument fails to acknowledge the full scope and impact of its two post-judgment WiFITER document productions, which exposed the violation of two separate court orders, revealed the existence of an untenable privilege claim, and revealed numerous instances of evasive, misleading

and false discovery responses *and* deposition testimony regarding WiFITER. Additionally, the belatedly produced documents revealed that Cal Fire secured a tentative motion in limine ruling excluding WiFITER by falsely representing to this Court, just as it had in its discovery responses, that there was "zero" evidence WiFITER was a corrupt scheme or that it had any impact on investigations. Thus, the two belated productions reveal Cal Fire's abuses to be worse than previously known. (See *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 996-997 ("In this case, the trial court had to impose terminating sanctions once it was learned during trial that Bentley still had failed to comply with discovery orders and directives and Bentley's misuse of the discovery process was even worse than previously known.")

6. Cal Fire's Conduct Warrants Monetary Sanctions.

Section 2023.030 (a) provides: "the court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." (See also *Abandonato v. Coldren* (1995) 41 Cal.App.4th 264,268 (sanctions are compensatory in nature in that they include "those reasonable expenses 'directly related to and in furtherance of the litigation'") (disapproved of on other grounds)); *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 at *9 (S.D. Cal.) (imposing more than $8 million dollars in discovery sanctions - the total amount of fees incurred—against party and its attorneys who "intentionally withheld

tens of thousands of decisive documents from opponent in an effort to win this case").)

The Court finds that, starting in 2010 through and including 2013, Cal Fire's actions constituted a gross abuse of the Discovery Act and that many of Cal Fire's abuses were a deliberate effort to use its discovery to advance Cal Fire's effort to collect suppression costs from these Defendants. Having reviewed thousands of pages of evidence in the context of assessing Cal Fire's discovery abuses, the Court finds that Joshua White engaged in acts of spoliation and falsified the Official Report in numerous ways before the litigation commenced. When Cal Fire elected to inject that false narrative into the litigation through Cal Fire's July 2010 false interrogatory responses, and when White continued that same false narrative by not testifying truthfully in November 2010, "the reasonable expenses, including attorney's fees, incurred by [Defendants] as a result of [Cal Fire's] conduct" under section 2023 began to accrue.[17]

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[17] If Cal Fire and/or its lead investigator had instead elected to immediately testify truthfully with respect to the white flag and immediately revealed under oath the investigative dishonesty, the case would have been brought to a quick conclusion and the Defendants would have been able to avoid the significant expense of this matter. Instead, Cal Fire used this Court's processes to advance the investigators' false narrative in an effort to win, while its counsel failed to exercise their responsibility to halt that effort—a series of decisions which led to massive legal expenditures by these Defendants in an effort to expose the truth, notwithstanding Cal Fire's effort in this matter to conceal it. (*See Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 199 ("Litigation is supposed to be a search for truth. Here the defense abandoned its part of the search in favor of tactics that

The Court therefore finds that Cal Fire's discovery abuses from July 2010 forward were the cause of all defense expenses incurred from that point forward.

Awards of monetary sanctions need not be supported by a "strict accounting" of expenses. (*See On v. Cow Hollow Properties* (1990) 222 Cal.App.3d 1568, 1577 Moreover, and perhaps more importantly, Cal Fire's discovery abuses, and Defendants' requests for sanctions, are not limited to just the white flag cover-up. Indeed, in its July 2010 false interrogatories responses, Cal Fire refused to provide substantive responses and instead invoked CCP § 2030.230, thus incorporating by reference the entire Official Report, and all of its misrepresentations concerning the core issues in this case. All of Defendants' defense expenses are, in one way or another, inextricably intertwined with the falsehoods and omissions in the Origin and Cause Report.

Cal Fire and its attorneys claim immunity from monetary sanctions, citing Government Code section 821.6 and arguing that "the Deputy Attorneys General and CAL FIRE employees involved in this case are absolutely immune from liability for their conduct in investigating the Moonlight Fire and litigating to recover fire suppression costs." Cal Fire is mistaken. While Government Code section 821.6 certainly provides governmental actors immunity from suit in various settings, it does nothing to strip this Court of its power to oversee, control and adjudicate the conduct of the parties before it who invoke its

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made plaintiff's pretrial discovery more burdensome. It is appropriate that the defense now pay for that burden.").)

jurisdiction. (*See e.g. City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381 (affirming discovery sanctions against city and county attorneys).)

The cases Cal Fire relies upon to assert immunity from liability relate exclusively to situations where public employees are subject to separate suits for malicious prosecution. (See, e.g. *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280 (action for injunctive relief brought against district attorney); *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426 (wrongful discharge lawsuit brought against county officers); *Strong v. California*, (2011) 201 Cal. App.4th 1439 (negligence lawsuit brought against CHP); *Randle v. City and County of San Francisco* (1986) 186 Cal.App.3d 449 (negligence lawsuit brought against police officer, prosecutor, and municipality).) The holdings in these cases are irrelevant with respect to the Court's authority to oversee the conduct of all parties that appear before it and do nothing to limit or narrow the responsibility of all public employees and their counsel to adhere to the high standards required of them when they invoke California's legal system. In every such case, all parties necessarily submit to the court's inherent power to administer justice.

In all matters, the Court maintains the ability to adjudicate the conduct of all parties and their counsel, be they public or private, in order to protect the integrity of the court. Finding otherwise would do grave damage to the integrity of the judicial process and the public's confidence in it, especially for those who find themselves defendants in actions brought by

a public agency that perceives itself immune from the court's oversight and control.

7. Cal Fire's Conduct Warrants Terminating Sanctions.

The Court also finds that terminating sanctions are appropriate. Cal Fire and its counsel engaged in a stratagem of obfuscation that infected virtually every aspect of discovery in this case. That pattern and practice of disregard began during the discovery process and continued after this Court entered judgment. The repeated and egregious violations of the discovery laws not only impaired Defendants' rights, but have "threatened the integrity of the judicial process." (*Doppes, supra,* 174 Cal.App.4th at 992.) The abuses have been "willful, preceded by a history of abuse, and demonstrate that less severe sanctions would not produce compliance with the discovery rules." (*Ibid.* (citation omitted).) Even if issue or evidentiary sanctions were available to the Court, such sanctions would be unworkable and ineffectual because Cal Fire's discovery abuses have permeated nearly every single significant issue in this case. (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1293.) Stated differently, lesser sanctions would not weed out the discovery abuses in this case, making terminating sanctions an appropriate remedy. (Cf. *United States v. Waterman* (8th Cir. 1984) 732 F.2d 1527, 1532 ("[W]e see no place in due process of law for positioning the jury to weed out the seeds of untruth planted by the government.").

Cal Fire advances several procedural arguments against the imposition of terminating sanctions. For

the reasons discussed below, the Court does not find these arguments persuasive.

a. *Jurisdiction*

Cal Fire argues that this Court lacks jurisdiction to impose terminating sanctions, that Cal Fire's appeal excised the option of termination from this Court's discretion if it determines it must sanction Cal Fire's conduct in this litigation. The Court finds Cal Fire's argument at odds with common sense and case authority.

The Court of Appeals has held that an appeal of a judgment on the merits does not divest the trial court of jurisdiction to impose sanctions because such an order is "collateral" to the judgment. (*Day v. Collingwood* (2006) 144 Cal.App.4th 1116, 1120.) Cal Fire attempts to distinguish this controlling authority as applying only to monetary sanctions, thereby suggesting that the trial court retains jurisdiction to impose one type of sanction authorized by Code of Civil Procedure section 2023.030, but lacks jurisdiction to impose another type of sanction authorized by that same Code provision. Such a distinction would lead to absurd results, senselessly allowing courts to sanction the more minor discovery abuses while rendering it powerless to redress the most egregious discovery abuses.

Common sense dictates that the jurisdictional analysis does not turn on what type of sanction the trial court chooses. Rather, as the Supreme Court has confirmed, the analysis turns on whether an order imposing sanctions, regardless of the type, embraces matters collateral to the judgment. (*See Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180,

191 (a pending appeal does not stay proceedings on "collateral" matters).) Numerous courts have confirmed that sanctions are collateral in nature because the proceedings do not concern the merits of the underlying lawsuit, but rather whether there has been an abuse of the judicial process. (Day, supra, 144 Cal.App.4th at 1125 ("[A] sanctions motion is a collateral proceeding that is not directly based on the merits of the underlying proceeding."); *Cooter & Gell v. Hartmarx Corp.* (1990) 496 U.S. 384, 396 (A sanctions proceeding "requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate"); *Emerson v. Eighth Judicial Dist. Court of State of Nevada* (Nev. 2011) 263 P.3d 224, 228 ("[A]ttorney misconduct and any resulting sanctions are wholly separate and distinct from adjudicating the merits of an underlying claim because they are affronts on the judicial process unrelated to the substantive merits of a proceeding.").) Thus, a trial court retains jurisdiction to impose sanctions for discovery abuses notwithstanding an appeal of the judgment. (*Day, supra*, 144 Cal.App.4th at 1125; see also *Gonzales v. Surgidev Corp.* (N.M. 1995) 120 N.M. 151, 155-156 ("We disagree that the court loses jurisdiction to order sanctions once the judgment is accepted on appeal or the case is no longer before the court …. [S]anctions clearly are collateral to or separate from the decision on the merits"); Jackson v. Cintas Corp. (11th Cir. 2005) 425 F.3d 1313, 1316 ("We have consistently held that motions for sanctions raise issues that are collateral to the merits of an appeal.").)

Cal Fire attempts to suggest otherwise by claiming that an order terminating this action cannot be "reconciled" with an appellate court decision that Cal Fire "should be allowed to proceed to trial." The fallacy of this argument is readily apparent when the bases for a trial court order and appellate decision are identified. A trial court order terminating this action because Cal Fire abused the discovery process is not irreconcilable with an appellate court decision that Cal Fire alleged sufficient facts on the face of its Complaint to give rise to liability under Health and Safety Code section 13009. Similarly, a trial court order terminating this action because Cal Fire abused the discovery process is not irreconcilable with an appellate court decision that Cal Fire articulated sufficient facts to make a *prima facie* case. Consequently, even if Cal Fire were to prevail on its appeal, nothing about the appellate court decision would affect a trial court order imposing terminating sanctions based on discovery abuses. And, the reverse is also true: if Defendants were to prevail on the appeal instead, nothing about that appellate court decision would affect a terminating sanctions order.

Cal Fire's jurisdictional argument also runs afoul of the statute governing jurisdiction after an appeal, which provides: "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon, *but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."* (Code Civ. Proc. § 916 (emphasis added).) Thus, correctly framed, the question is whether the appealed judgment would affect a terminating sanction order, not whether the terminating sanction order would impact the appealed

judgment. While the judgment could arguably be affected by an order allowing Cal Fire to amend its complaint to allege new facts (thereby potentially frustrating the order granting judgment on the pleadings), or by an order reopening discovery (thereby potentially frustrating the *Cottle* order), the judgment would not be affected by an order imposing terminating sanctions for discovery abuses.

Cal Fire argues that *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, stands for the proposition that the trial court lacks jurisdiction to issue any post-judgment order that could dispense of further proceedings on the merits. But *Varian* recognizes that a court retains jurisdiction over any "collateral" matter, even if that collateral matter "may render the appeal moot." (35 Cal.4th at 191.) Here, while affirmance of the judgment could theoretically eliminate the need for the appellate court to reach the issues addressed in a terminating sanctions order, or vice versa, nothing about a terminating sanctions order would render any aspect of the issues on appeal moot. The bases for the judgment and the bases for a terminating sanction order are separate and distinct, providing alternative, but not mutually exclusive, paths for appellate analysis and review as part of what will ultimately be a consolidated appeal.

On this issue, *United Professional Planning, Inc. v. Superior Court* (1970) 9 Cal.App.3d 377, is instructive. In that case, the appellate court held that the trial court retained jurisdiction to expunge a lis pendens, even though such an order could have the practical effect of depriving a party of the remedies sought on appeal. (*Id.* at 383-86.) The appellate court

explained: "the possibility that the final judgment will be rendered meaningless is inherent in the very power conferred upon the trial court to expunge the lis pendens." (*Id*. at 384-385.) Critically, the appellate court emphasized that the "effectiveness of an appeal is not any more greatly affected by expungement after the notice of appeal has been filed than it would have been had the order for expungement been made prior to the perfection of the appeal."[18] (*Id*. at 385.)

Similarly, here the effectiveness of the appeal is not more greatly affected by an order imposing terminating sanctions after the notice of appeal has been filed than it would have been had an order for terminating sanctions been entered prior to the

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[18] As another example, the perfection of an appeal from a judgment on the merits also does not divest the trial court of jurisdiction over a motion for new trial even though such a motion may result in rendering the pending appeal ineffective or moot. (See *In. re Waters' Estate* (1919) 181 Cal. 584, 585-87; *Neffy v. Ernst* (1957) 48 Cal.2d 628, 634.) As one court recently explained, a trial court retains jurisdiction to hear and determine post-judgment motions for new trial because, inter alia, such "proceedings in many cases are addressed not to the merits of the decision, but rather to the fairness of the procedures followed at trial." (*Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 52; see also 4 Cal. Jur. § 19 (2007) ("Since proceedings on a motion for new trial are not in the direct line of the judgment, but are independent and collateral, an appeal from a judgment does not divest a trial court of jurisdiction to hear and determine such a motion). As discussed above, sanctions proceedings also lie outside the direct line of the court's judgment and raise issues independent of and distinct from the merits of the underlying action. Therefore, a motion for terminating sanctions concerns matters "not affected by the judgment," over which the trial court retains jurisdiction despite a pending appeal. (See Civ. Proc. Code§ 916(a).)

perfection of the appeal. Stated differently, the practical effect of a terminating sanction order on the appealed judgment would be exactly the same regardless of whether such a sanction was imposed before or after the filing of a notice of appeal. As a result, depriving the trial court of jurisdiction to issue terminating sanctions would provide no greater protection to the appellate court's jurisdiction while unnecessarily delaying sanctions proceedings. Accordingly, the trial court's power to impose a terminating sanction for discovery abuses, like its power to expunge a lis pendens, can be exercised at any stage of the litigation, including after the final judgment has been entered. Cal Fire's self-serving arguments otherwise should be rejected.

b. *The Court Is Not Adjudicating the Merits of the Case*

Cal Fire argues that this Court cannot impose terminating sanctions because to do so would require adjudication of the merits of the underlying lawsuit, specifically, the "fundamental factual issue" of where and how the Moonlight Fire started. But sanctions proceedings are not based on the merits of the underlying case, but rather on whether there has been an abuse of the judicial process. (*Emerson, supra*, 263 P.3d at 228 (explaining that "misconduct and any resulting sanctions are wholly separate and distinct from adjudicating the merits of an underlying claim because they are affronts on the judicial process unrelated to the substantive merits of a proceeding"); see also *Day, supra*, 144 Cal.App.4th at 1125; *Cooter, supra*, 496 U.S. at 396.) Accordingly, this argument does not have merit.

c. *Timeliness*

Because section 2023.030 contains no temporal restrictions, this Court's authority to impose sanctions under section 2023.030 extends beyond the close of discovery, and even beyond the time of trial. (See *Sherman v. Kinetic Concepts* (1998) 67 Cal.App.4th 1152 (reversing trial court's refusal to impose post-trial sanctions for defendant's misuse of the discovery process, holding "[n]either the code nor any case law mandates that discovery sanctions must be imposed prior to the rendering of the verdict.").) However, timeliness is still an important consideration. Whether a request for sanctions is timely "is subject to the trial court's discretion because it is a fact-specific analysis." (*London v. Dri-Honing Corp.* (2004) 117 Cal.App.4th 999, 1007.)

Cal Fire argues that the sanctions request is untimely, but the case it relies upon to advance this argument, *Colgate-Palmolive v. Franchise Tax Board*, (1992) 10 Cal.App.4th 1768, is inapposite. *Colgate* involved one, clear-cut discovery abuse by the plaintiff: the belated production of documents on the second day of trial. (*Id.* at 1788-89.) After trial concluded, and more than a year and a half after this single discovery abuse had been fully exposed, the defendant sought monetary sanctions. The trial court denied the request, finding that the defendant should have sought sanctions sooner and, in any event, had not been prejudiced by the late production. After emphasizing that a trial court "has broad discretion in imposing discovery sanctions, subject to reversal only for arbitrary, capricious or whimsical action," the

appellate court found that the trial court did not abuse its discretion. (*Id.* at 1789.)

Unlike *Colgate*, Cal Fire has not engaged in one dear-cut discovery violation, but rather has engaged in a pattern and practice of discovery abuses that took weeks, months, and years to expose through painstaking discovery efforts. Moreover, unlike *Colgate*, a half-year did not elapse during which time no discovery abuse occurred. Although Cal Fire's pattern and practice of disregard for the process began during discovery, it has continued after this Court entered judgment, even up until the present day. Because of that, the Court finds *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, more instructive on the timeliness issue. In that case, the plaintiff fortuitously learned of the existence of documents the defendant withheld from production after the trial concluded and a verdict had been returned for the defense. Based on this discovery, the plaintiff sought a new trial and sanctions. (*Id.* at 1155.) The trial court found the request "untimely" and held that the court "was without jurisdiction" to award sanctions "after the case is over with." (*Id.* at 1155, 1160.) The appellate court reversed, finding the request timely and holding that the trial court "had not only the power, but the duty to sanction" the defendant for its conduct. (*Id.* at 1155.)

Similar to *Sherman*, Defendants here fortuitously learned that Cal Fire had failed to produce critical WiFITER documents after judgment had been entered. Indeed, Cal Fire concedes that Defendants did not uncover its failure to produce thousands ofWiFITER documents and other "related ... WiFITER

discovery abuse" until months after this Court entered judgment, a process that has continued to the present. Defendants could not have sought terminating sanctions for these discovery abuses sooner, which is why Cal Fire does not, and reasonably cannot, challenge the sanctions request for its post-judgment abuses on timeliness grounds, but rather on the grounds that these transgressions, standing alone, do not "justify terminating sanctions." The Court is mindful that post-judgment discovery abuses are not analyzed in a vacuum, but rather viewed in light of all prior, pre-judgment transgressions. (*Liberty Mut., supra*, 163 Cal.App.4th at 1106-1107. Defendants unquestionably requested sanctions associated with its post-judgment discovery abuses in a timely manner, and since that request is timely, all of Cal Fire's pre-judgment abuses must be considered in assessing terminating sanctions.

In sum, this Court finds that, under the circumstances of this case, Defendants' sanctions request is timely. (*London, supra*, 117 Cal.App.4th at 1009 (stating that whether a request for sanctions is timely "is subject to the trial court's discretion because it is a fact-specific analysis").

B. Defendants Are Entitled to Cost of Proof Expenses pursuant to Code of Civil Procedure section 2033.420.

Defendants are also entitled to cost of proof expenses pursuant to Code of Civil Procedure section 2033 .420. Under that section, "If a party fails to admit ... the truth of any matter ... and if the party requesting that admission thereafter proves ... the truth of that matter ... [that party] may move the court

for an order requiring the [responding] party ... to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees." (*Id.* § 2033.420(a);) The court is required to order the payment of these fees and expenses, unless the court finds: (l) an objection to the request was sustained or a response to it was waived; (2) the admission sought was of no substantial importance; (3) the party failing to make the admission had reasonable ground to believe that it would prevail on the matter; or (4) there was other good reason for the failure to admit. (*Id.* § 2033.420(b).)

The trial court has broad discretion to award fees and expenses under section 2033.420. Section 2033.420 "clearly vests in the trial judge the authority to determine whether the party propounding the admission thereafter proved the truth of the matter which was denied." (*Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 735 (discussing former Code Civ. Proc. § 2033(0).) Once a finding has been made that the party propounding the admission proved the truth of the matter which was denied, the Court *must* award fees and expenses under section 2033.420. "The statute governing requests for admissions states a court "shall" award such fees unless "good reason" exists for the opposing party's denial of the request." (*Miller v. American Greetings Corp.* (2008) 161 Cal. App. 4th 1055, 1065.)

1. The Requests for Admission at Issue

Defendants propounded a series of Requests for Admission focused on the origin and cause determination and the white flag rock, and the deposition testimony of White and Reynolds regarding

these topics. Several of the requests asked Cal Fire to admit facts supporting the proposition that the investigators placed a white flag at the location they originally believed was the origin of the Moonlight Fire. For example, Defendants asked Cal Fire to admit that the "Point of Origin" in the sketch Reynolds prepared was the white flag. Cal Fire denied the request, although its own experts admitted this during their depositions.

Defendants asked Cal Fire to admit that the photographs that are perfectly triangulated on the white flag, and those that depict Reynolds taking a GPS reading at the same location, were taken to document the point of origin originally identified by the investigators. Cal Fire again denied the requests. In support of its denial, Cal Fire claimed that the investigators could not have made such a determination because "all of the photographs taken which depict the rock ... including those which show a white flag, were taken prior to the time that Chief Josh White and Dave Reynolds processed the specific origin area ... including the search for micro-scale indicators, indicating that the search for a 'point of origin' ... was still in progress after the photographs of the rock were taken and the white ... flag was placed." However, White testified to the opposite; he claimed that the investigators processed the origin before the white flag photographs were taken at 8:18 a.m. The testimony and the response cannot be reconciled.

Defendants also asked Cal Fire to admit that its attorneys had met and discussed the white flag with Reynolds prior to his deposition, thereby demonstrating the evasive and misleading nature of

his deposition testimony when he pretended the white flag was a chipped rock. Cal Fire admitted that its counsel had met with Reynolds, but claimed it was "unable to admit or deny" the "precise date of the meeting" because it had "insufficient time to review the vast information in the litigation record." The Court finds this response deeply troubling, especially since a straightforward answer would have revealed the duplicitous nature of the deposition testimony.

Defendants asked Cal Fire to admit that Josh White denied seeing the white flag when he was initially shown a photograph of it during his deposition. Cal Fire provided what it labeled a "qualified" response: "The propounding party's continual disregarding of the explanatory testimony by Chief White regarding his lack of recollection of the white flag indicates that the propounding party is not interested in discovering facts or understanding reality, rather defense counsel are interested in manufacturing arguments that are inconsistent with reality." The Court finds this argumentative response evasive and inappropriate.

Finally, Defendants asked Cal Fire to admit that White and Reynolds had provided false testimony about the white flag. Cal Fire responded "denied" and asserted under oath that their "deposition testimony on this topic and all topics was truthful." However, its testifying experts did not agree. The Court notes that Bernie Paul and Larry Dodds testified that they did not believe the investigators' testimony about the white flag. Bernie Paul was asked if the evidence and testimony surrounding the white flag was enough to cause him to "toss the whole report," to which he

responded "that one concerns me a bunch, yes." And Dodds testified that the "white flag raises a red flag" and creates a "shadow of deception" over the investigation, and caused him to conclude "it's more probable than not that there was some act of deception associated with testimony around the white flag."

2. Defendants Proved the Requests for Admission at Issue.

The Court finds that Defendants have proven the matters in the Requests for Admission. The record demonstrates that the investigators placed a white flag at the location they originally determined was the origin of the Moonlight Fire, photographed it, then provided evasive, misleading and false testimony about what they had done.

For example, the sketch Reynolds prepared shows a single "X" accompanied by the initials "P.O." The key at the bottom of this sketch confirms that this "X" marks the "Point of Origin." Also on that sketch are precise bearing and distance measurements from two reference rocks to this "Point of Origin." Experts for both the defense and Cal Fire confirmed that the coordinates on the sketch for the "Point of Origin" are, in fact, the *exact* location of the white flag. Additional documents supporting this conclusion are the series of five photographs White took from these reference points that perfectly center on the white flag. Moreover, the Official Report states that the white flag denotes the origin and/or evidence. From these documents, the conclusion necessarily follows that the investigators placed a white flag at the location where they had determined and documented their original "Point of Origin."

Cal Fire should have also admitted the Request for Admission that White provided false testimony about the white flag. When Defendants asked White about the white flag, White first questioned "what white flag?" then claimed that he never placed any white flags during the Moonlight Fire investigation. In light of the fact that White took five photographs centered on the white flag, the Court finds this testimony incredulous.

Cal Fire also should have also admitted the Request for Admission that Reynolds provided false testimony about the white flag. Early in discovery, and at that time unbeknownst to Defendants, Reynolds attended a meeting with White and the Cal Fire attorneys during which they looked at pictures of and specifically discussed the white flag. A few weeks after this meeting took place, Defendants deposed Reynolds and asked him about the white flag. In response, Reynolds feigned ignorance, denied seeing it, and stated it "looks like a chipped rock to me." Reynolds proceeded to testify that he also had not placed any white flags during the Moonlight Fire investigation. Defendants later uncovered the fact of the pre-deposition meeting and the discussion regarding the white flag. In light of this sequence of events, the Court finds that Reynolds did not testify honestly.

Cal Fire has argued that Defendants cannot recover cost-of-proof sanctions associated with their white flag Requests for Admission because these issues were not tried before a jury. However, Code of Civil Procedure section 2033.420(a) "does not on its face require that an issue be proved at trial, although it does require that the party requesting the admission

have proved the issue." (*Barnett v. Penske Truck Leasing* (2001) 90 Cal.App.4th 494,497,499 (interpreting former Code Civ. Proc. §2033(0).) "'Proof' is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact *or the court*. (*Ibid*. (citing Evid. Code, § 190) (emphasis added).) Here, Cal Fire forced Defendants to prove to the Court that the investigators placed the white flag at their initial "Point of Origin" and later lied about it.

Specifically, in its omnibus motion in limine, Cal Fire moved to exclude the white flag on the grounds that Defendants had "no credible evidence," or alternatively, that their evidence was "speculative," and could not overcome a presumption under Evidence Code section 644 that "White and Reynolds regularly performed their duties." (RJN Ex. G at 11: 17-21; see also *id*. at 13:22-24 ("None of defendants' 'evidence' ... can withstand scrutiny"); *id*. at 15:13-14 ("Defendants' conjecture cannot overcome that presumption"); *id.* at 15:15-16 (describing the white flag evidence as "unsubstantiated"). In response to this attack, Defendants had to marshal and submit the evidence—including deposition testimony in both written and video format, documents, and expert analysis—in order to demonstrate to the Court that the white flag was not some concocted "conspiracy theory" as Cal Fire claimed. In light of the voluminous submissions, the parties agreed that the motion could be resolved without hearing from the witnesses under oath, and stipulated that the submissions and rulings of the Court fulfilled the requirement of an Evidence Code section 402 hearing.

After carefully reviewing the extensive briefing and the hundreds of exhibits the parties submitted in support and opposition to this and other motions in limine, this Court denied Cal Fire's attempt to exclude evidence relating to the white flag. In so ruling, the Court necessarily rejected Cal Fire's arguments that the evidence regarding the white flag was "speculative," "conjectural" and/or "unsubstantiated." Although the Court did not articulate the precise basis for its decision, given Cal Fire's arguments, its ruling implies that the Court found the evidence sufficiently definite, certain and/or substantiated. (See Evid. Code§ 402(c) ("A ruling on the admissibility of evidence implies whatever finding of fact is a prerequisite to ….").)

The Court does not find the cases Cal Fire relies on persuasive. In *Wagy v. Brown* (1994) 24 Cal.App.4th 1, the defendants denied their negligence in response to the plaintiff's request for admission. (*Id.* at 4.) The case was then ordered to judicial arbitration where the defendants admitted, for purposes of the arbitration only, that they were negligent, "thus obviating the necessity for proof on that issue." (*Ibid.*) The court held that the plaintiff was not entitled to cost-of-proof expenses because the plaintiff never offered any evidence on defendants' negligence (it was unnecessary) and therefore could not prove the matter. (*Id.* at 6.) Similarly, in *Stull v. Sparrow* (2001) 92 Cal.App.4th 860, the defendants admitted liability on the eve of trial, "thus obviating the need for proof on that issue." (*Id.* at 864.) Not surprisingly, the Court denied the plaintiff's request for cost-of-proof expenses, reasoning that the plaintiff "did not put on any evidence." (*Id.* at 866.)

As this discussion reveals, in both *Wagy* and *Stull*, the responding party ultimately conceded negligence (the matter to be proven) and the requesting party therefore did not have the occasion to offer any evidence of negligence into the record. Thus, these cases would support Cal Fire's argument only if it had conceded the truth of the matters that Defendants requested they admit before filing its motions in limine. But Cal Fire never conceded that the investigators placed the white flag where they initially thought the fire originated or that the investigators later lied about it (although Cal Fire's experts Paul and Dodds effectively did). Instead, notwithstanding the testimony of Dodds and Paul, and the weight of evidence, Cal Fire unsuccessfully moved to exclude the white flag from trial on the grounds that the evidence was speculative and conjectural, forcing Defendants to prove that it was not. Therefore, *Wagy* and *Stull* are inopposite and offer Cal Fire no support.

To be clear, the Court does not hold that Defendants' mere act of filing their evidence establishing the significance of the white flag "proved" the requested matters for purposes of section 2033.420. It was the act of filing this evidence in response to a motion that characterized the white flag as "speculative" and "unsupported conjecture," and the act of the Court denying that motion based on the detailed evidentiary submissions. (See *Whicker v. Crescent Auto Co.* (1937) 20 Cal.App.2d 240, 243 (describing "proof' as the "effect of evidence").) Thus, while not every ruling on a motion in limine might satisfy the "proof' requirement of section 2033.420, Cal Fire's motion in limine was unique in that it was premised on the alleged non-existence, or speculative

nature of a fact. The Court's careful evaluation of and ruling on the evidence submitted in connection with such a motion is more than sufficient to deem the matters "proved" for purposes of section 2033.420.

2. The Requests for Admission Addressed Issues of Substantial Importance

The white flag concerns one of the most critical aspects of this case: the origin of the Moonlight Fire. The Court notes that the primary purpose of any wildland fire investigation is to find the origin and the cause. Under wildfire investigation standards, if the origin of a fire cannot be determined, the cause likely cannot be determined. The evidence regarding the white flag shows that the investigators on the Moonlight Fire determined a specific "Point of Origin" that they marked with a white flag, documented in a sketch, and thoroughly photographed, and that they subsequently changed their minds, selected different points of origin, and attempted to conceal the evidence regarding their initial origin determination.

Not only does this evidence go to one of the most central, substantive issues in this case—the location of the origin, and thus the cause of the fire—it also goes directly to the credibility of the investigators on the Moonlight Fire. While credibility is important in any case, the Court notes that it is even more critical when the witnesses at issue are law enforcement officers who have access to the scene, are charged with gathering and documenting the evidence, and are responsible for determining who is to blame. The Court finds that the credibility of the investigators is also an issue of substantial importance to this case.

3. Cal Fire Did Not Have a Good Reason for Its Failure to Admit

Cal Fire argues that an expenses award is not appropriate because it interposed "meritorious objections." In support of this argument, Cal Fire appears to rely on section 2033.420(b)(l), which provides that a court must award cost of proof sanctions unless an "objection to the request was sustained" or a response "waived."

This aspect of the statute is inapplicable because Cal Fire's objections were never "sustained" by the Court nor a response ever "waived." For example, in *Amer. Fed. of State, County and Mun. Employees v. Metro. Water Dist. of So. Cal.* (2005) 126 Cal.App.4th 247 ("*American Federation*"), the plaintiff responded to various requests for admission by first interposing various objections, and then "without waiving" these objections, unequivocally denying the entire request. (*Id.* at 266.) The plaintiff subsequently argued that the defendant could not recover its costs of proof under section 2033.420 because the defendant had not moved to compel plaintiff to provide further responses. (*Ibid.*) The court rejected this argument, noting that although plaintiff interposed objections, plaintiff proceed to unequivocally deny the requests in their entirety. (*Ibid.*) Under the Code of Civil Procedure, that unequivocal denial meant that the defendant could not move to compel a further response—after all, there was nothing to compel. (*Id.* at 268.) And, if the defendant could not move to compel, then the court could never rule upon—let alone sustain—any of the objections.

Similarly, here, after interposing boilerplate objections, Cal Fire unequivocally denied each of the Requests for Admission at issue. Defendants did not—and could not—move to compel further responses because a requesting party cannot compel a responding party to admit a fact.[19] The Court notes that Cal Fire could have chosen to stand on its objections, and put the burden on Defendants to bring a motion to compel. Having chosen not to do so, the Court never had the opportunity to weigh in on whether its objections should be sustained or overruled.

Even if Cal Fire could rely on its objections, the Court finds that those objections are without merit. Cal Fire's objection to the term "Point of Origin"—the term Reynolds employed on his sketch—in some (not all) of the Requests for Admission is disingenuous. Even if Cal Fire believed that the term "Point of Origin" could potentially encompass a larger area than a specific point of origin, that belief would only further support the unreasonableness of Cal Fire's denial that the investigators placed the white flag to mark this larger "Point of Origin." The record demonstrates that Cal Fire understood "Point of Origin" in the same way that Reynolds used it in his sketch. Cal Fire's objections are therefore unavailing.

The Court finds that Cal Fire had no reasonable ground to deny the white flag Requests for Admission, or to subsequently characterize the evidence as "speculative" and "conjectural," in light of the all the

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[19] Although a responding party cannot be forced to admit a fact that it knows to be true, section 2033.420 provides consequences for failing to do so.

documents and testimony in the record, including the Reynolds sketch, photographs, measurements, expert analysis and testimony, Official Report, Official Sketch, and the investigators' testimony. Accordingly, the Court awards Defendants cost of proof expenses pursuant to Code of Civil Procedure section 2033.420.

C. Defendants Are Entitled to Attorneys' Fees pursuant to California Code of Civil Procedure section 1021.5.

In assessing Defendants' argument for attorneys' fees under Section 1021.5, the Court begins by noting that it has considerable equitable discretion to award such fees. (*Vasquez v. State* (2008) 45 Cal.4th 243, 251.) Moreover, in applying the criteria for whether such fees are warranted, the Court must do so from a practical perspective. (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142.) Having reviewed thousands of pages of briefing and developed an understanding of the nature of this unfortunate matter, and what Defendants' successful defense of it accomplished not just for Defendants but for the public, the Court finds that Defendants are entitled to recover those fees associated with exposing the bad faith conduct of certain employees within Cal Fire regarding the Moonlight Fire investigation and with respect to uncovering the WiFITER fund, an effort which Defendants began almost immediately upon being sued.

With respect to Cal Fire's WiFITER fund, which the State Auditor found to be illegal in the audit it published on October 15, 2013, Cal Fire argues that any issues pertaining to the Defendants' discoveries regarding WiFITER are irrelevant to Defendants'

claim to fees under Section 1021.5 because the Court initially granted Cal Fire's motion in limine regarding WiFITER. Cal Fire is mistaken.

First, this Court's determination regarding Cal Fire's motion in limine was tentative and thus subject to change as the case developed. Additionally, this Court's initial determination regarding WiFITER was naturally based on the assumption that Cal Fire had disclosed all responsive evidence in its possession to the Defendants before this Court made its determination, as Cal Fire had earlier been ordered to do. But the State Auditor's report regarding WiFITER ultimately revealed that Cal Fire had not complied with its discovery obligations or with the Court's order of April 10, 2013, which commanded the production of all responsive and non-privileged WiFITER documents on or before April 30, 2013. Thereafter, Cal Fire belatedly produced thousands of documents. In the context of reviewing the Defendants' Motions for Fees, Expenses and/or Sanctions, the Court has considered a number of belatedly produced documents and finds that certain of these documents are contrary to Cal Fire's representations to this Court regarding the lack of any evidence that WiFITER was improper, as alleged in its WiFITER motion in limine. The Court further finds that many of the belatedly produced documents are supportive of Defendants' argument that WiFITER is relevant to the question of whether Moonlight Fire case manager Alan Carlson and Moonlight Fire investigator (and subsequent case manager) Josh White were biased towards affixing blame on affluent defendants who could pay for Cal Fire's suppression costs (and who therefore could, by extension, help fund WiFITER) in order to perpetuate

an illegal account for which Carlson, White and others were beneficiaries.

Thus, the Court finds that, had it been made aware of these belatedly produced documents before reaching its decision on Cal Fire's and Defendants' WiFITER motion in limine, it would have denied Cal Fire's motion and, had a trial been necessary, permitted Defendants to argue that the formation of WiFITER created bias with respect to the Moonlight Fire investigation and its case administration. Whether the Defendants would have succeeded in making this case to a jury is not for this Court to decide, but the belatedly produced documents sufficiently demonstrate that WiFITER may have created a bias within Cal Fire towards finding affluent defendants such that the Court would now reverse its decisions regarding the WiFITER motion in limine, thereby denying Cal Fire's WiFITER motion in limine and granting Defendants' WiFITER motion in limine in full.

Separately, it is also clear that the defense of this matter helped expose the WiFITER account, the existence of which, as confirmed by the State Auditor on October 15, 2013, and by a separate public audit issued by the Department of Finance on August 28, 2013, was allowing Cal Fire to illegally divert money from California's General Fund to the detriment of all Californians. Moreover, having reviewed the timing of Cal Fire's disclosure of the initial audit, Cal Fire's public pronouncements regarding its existence, and the timing of its closure, the Court easily finds that the Defendants' discovery efforts regarding WiFITER contributed to its ultimate closure, and Cal Fire's

claims to the contrary are not supported by the evidence before this Court. In particular, this Court finds the testimony of Claire Frank compelling on this point, as she testified in her deposition that the account was frozen due to this litigation. (Ex. 63 at 665:15-19, 667:20-668:12.).

Cal Fire cannot avoid this Court's consideration of the benefit afforded to the public by WiFITER's disclosure by arguing that the Court's dismissals of this matter were unrelated to WiFITER. The proper inquiry for this Court begins with a focus on what the prevailing party accomplished for the public through its defense of this matter, as opposed to precisely how it prevailed itself. Indeed, the Court is aware of no California case law holding that there must be a causal connection between the successful party's ultimate victory and the important right they enforced. Rather, it is the case that "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." (*Hensley v. Eckerhart* (l 983) 461 U.S. 424, 435 (fn. omitted).) "The process of litigation is often more a matter of flail than flair; if the criteria of section 1021.5 are met the prevailing flailer is entitled to an award of attorney fees." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1303.) Additionally, because Defendants are the prevailing party, Cal Fire's assertions regarding any catalyst theory of recovery has no relevance here. (See *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 560 (explaining that "attorney fees may be awarded even when litigation does not result in a judicial resolution

if the defendant changes its behavior substantially because of ... the litigation").) In sum, the Court finds that the Defendants precipitated an important public benefit by helping to expose the existence of an illegal account which Cal Fire was wrongly using to divert public funds for its own benefit.

In addition to the public benefit associated with the closure of WiFITER, the Court also finds that the Defendants advanced an important public interest by causing the trial court to confirm through cross-motions for summary adjudication that 14 C.C.R. § 938.8 did not create liability for land owners and others for fires caused by third parties, as had been suggested by the federal court in the context of a pretrial decision. The fact that the summary adjudication rulings are not binding precedent is irrelevant to this Court's analysis. (See *MBNA Am. Bank, N.A. v. Gorman* (2006) 147 Cal.App.4th Supp. 1, 10 ("[I]t is not necessary, as appellant contends, that the order denying appellant's petition be 'binding precedent' in order to confer a significant benefit to the general public").)

In assessing whether a right is sufficiently important for consideration under section 1021.5, this Court must not assess rights too narrowly or in a manner that is inappropriately limited to the litigants. The proper inquiry is whether Defendants enforced a public right that affected a wide class of people. (See e.g. *Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1769 (construing challenges to ballot language that were "minor, inconsequential, and a 'piffle'" as still important enough to award fees); *Choi v. Orange County Great Park Corp.* (2009) 175 Cal.App.4th 524,

530-32 (reversing trial court's refusal of fees on basis that action seeking documents for purposes of vetting public corporation CEO was the same as "any other discovery order" and explaining that the public benefit conferred "may be conceptual or doctrinal and need not be actual and concrete").)

With respect to the Defendants' Motion for Summary Judgment regarding section 938.8, the trial court eventually found that section 938.8 "can create no legal duty" and "[a]t most, [it] may establish a standard of care under Evidence Code § 669." Thus, the Court rejected Cal Fire's contention that section 938.8 created a right for Cal Fire to collect fire suppression damages from these Defendants for failing to discover a fire caused by a third party. Defendants argue that, "had Court's legal ruling mirrored the federal court's erroneous ruling, it would have prompted landowners throughout the State to prevent the public from recreating on private lands." In this regard, a contrary decision regarding section 938.8 would have run afoul of California's public policy to encourage private landowners to permit the public to use their lands, and this Court therefore finds that Defendants' work on this issue conferred an important public benefit. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1288-1289 (explaining that important rights under section 1021.5 can be enforced through "the effectuation of the fundamental public policies embodied in constitutional or statutory provisions").)

Finally, even accepting on some level Cal Fire's assertion that these Defendants were motivated by their own personal interests, that reality alone does not end the Court's inquiry. While every defendant

has a personal stake in successfully defending against a complaint, California law recognizes that defendants are entitled to recover their fees under the private attorney general statute. (See *County of San Diego v. Lamb* (1998) 63 Cal.App.4th 845 (fees awarded to defendant who successfully defeated county's attempt to seek reimbursement of welfare payments).) It follows that motivation due to some personal interest, which all defendants must undeniably have, is not fatal to an award of fees under section 1021.5.

The question this Court must answer is whether the broad public benefits conferred by the Moonlight Fire litigation were simply coincidental to the defense of the case. While the Court is aware that any successful defense benefits the defendant, it also finds that the benefits conferred upon the citizens of California went far beyond the stake these Defendants had in defending themselves and were not merely coincidental in nature. While Defendants eventually exposed and helped cause the closure of an illegal account which was being used to divert millions from the General Fund, and helped clarify and advance the public policy benefit of keeping private lands open to the public—which this Court finds would be an independent basis for an award of fees under section 1021.5—Defendants' defense of this matter conferred a substantial additional benefit upon the public.

When the defense of a matter exposes dishonesty, investigative corruption, and the pervasive violation of our discovery rules by a public entity, such exposure confers a benefit upon the public which far exceeds any benefit conferred upon the litigating defendants,

including those in this case. Defendants' success in this case, including its success with respect to the instant order, confirms that public entities, their employees, and the public lawyers who represent them are not immune from the imposition of fees and sanctions for misusing the legal system. In particular, it is this Court's view that the Defendants' efforts in this matter have greatly served the public by confirming that public entities and their lawyers must always adhere to the highest ethical standards when using the legal system to advance their claims against their named defendants. In finding a compelling basis for the award of "private attorney general" fees under Code of Civil Procedure §l021.5 for this and other reasons, it is the hope of this Court that substantial changes will be made by Cal Fire and the Office of the Attorney General to ensure that the multiple instances of investigative misconduct that were advanced into the realm of this Court and thereafter repeated through the misuse and violation of our discovery rules will not be repeated in the future. Public confidence in the integrity of the investigation and prosecution of governmental claims against its citizens must be scrupulously maintained. Moreover, and perhaps more importantly, the vital importance of our discovery rules along with the integrity of our judicial system must be protected for the benefit of everyone. Defendants' success here has substantially furthered those goals for the benefit of all.

D. Defendants Are Entitled to Attorneys' Fees pursuant to Civil Code Section 1717.

Defendants also seek an award of attorneys' fees pursuant to Civil Code section 1717. Section 1717

makes a one-sided attorney fee provision reciprocal in any action on a contract. (*Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 780.) No contract is required in order for section 1717 to apply. (*Manier v. Anaheim Business Center Co.* (1984) 161 Cal.App.3d 503, 505-06.) Instead, the inquiry is not whether a contract has been actually formed, but whether the action can be characterized as one "on a contract," a question which courts have liberally construed to extend to any action "as long as an action 'involves' a contract and one of the parties would be entitled to recover attorney fees under the contract if that party prevails in its lawsuit .... " (*Milman v. Shukhat* (1994) 22 Cal.App.4th 538, 544-545.)

Here, the Court finds that Cal Fire's action under Health and Safety Code sections 13009 and 13009.1 "involves" a contract because these statutes give rise to contractual obligations and are governed by the procedure applicable to actions on a contract, a fact which Cal Fire has itself confirmed in other matters. In particular, in *People v. Zegras* (1948) 29 Cal. 2d 67, 68, Cal Fire successfully argued that venue for its fire suppression action should be governed by statutes pertaining to claims for breach of contract since such a cost recovery action "is a suit upon a quasi-contractual obligation, or contract implied in law." (*Id.* at 68; see also RFJN Ex. B, *Grijalva* Petition for Writ (wherein Cal Fire pled a cause of action for breach of contract under section 13009 and then repeatedly characterized sections 13009 and 13009.1 as creating a "contract action" and the failure to reimburse Cal

Fire as "a breach of an implied-in-law contract.").)[20] The Court also finds that Cal Fire would have been entitled to recover its legal fees as an obligation under a contract, therefore giving rise to the mutuality of the remedy created by section 1717. Since Cal Fire would have recovered its reasonable legal fees as an obligation under a contract had it prevailed in this matter, Defendants are entitled to the entirety of their reasonable fees as a matter of law and equity.

Despite Cal Fire's assertion to the contrary, the decision in *Department of Forestry and Fire Protection v. LeBrock* (2002) 96 Cal.App.4th 1137 does not compel a different result. Section 1717 only gives rise to reciprocity regarding attorneys' fees where the contract includes a "one-sided attorney fee provision." (See e.g. *Topanga, supra*, 103 Cal.App.4th at 780.) When *LeBrock* was decided, no statute authorized an award of attorney's fees under section 13009 and 13009.l. (96 Cal.App.4th at 1140-1142 (stating "these sections do not mention attorneys' fees at all" and "there was "no contract between the parties that expressly, or even impliedly, provides for recovery of attorneys' fees.") Consequently, section 1717 had no relevance whatsoever to an action brought under section 13009 until a year after *LeBrock* was decided when the Legislature enacted Code of Civil Procedure section 1021.8. Thus, the decision in *LeBrock* has no

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[20] In motion practice in *Grijalva*, Cal Fire declared without equivocation: "Section 13009 creates a statutory obligation enforceable under a cause of action for breach of contract." Supp. RNJ Ex. B at 4:10-11 (emphasis added); see also *id.* at 5:20-22 ("All of the truly essential elements ... for a breach of contract action pursuant to California Health & Safety Code sections 13009 and 13009.1 are stated.").)

relevance to the issues presented with respect to section 1717 reciprocity here, other than perhaps to confirm that section 1717 creates no reciprocity when there is no "one-sided attorney fee provision" in the first place.

Moreover, notwithstanding *LeBrock*'s dicta that 13009 and 13009.1 do not "transform liability into a contract ," (*id*. at 1141), Civil Code section 1717 does not turn on the existence of an actual contract, but on whether the action "involves" a contract. (*Milman, supra*, 22 Cal.App.4th at 544-545.) Accordingly, this Court need not conclusively determine, as Cal Fire urges, whether these cost recovery statutes sound in contract or in tort,[21] just as the Supreme Court found

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[21] Contrary to Cal Fire's claim, the Court's determination within the *Cottle* hearing that Public Resources Code section 4422(b) required some negligence or culpability (and did not create strict liability) says nothing at all about whether Health and Safety Code sections 13009 and 13009.1 "sound in tort." Although the Legislature cannot impose statutory liability based an "accidental and unavoidable fire," the Legislature can make statutory obligations, including those created by Health and Safety Code sections 13009 and 13009.1, enforceable as contractual ones. (*Maxwell-Jolly v. Martin* (2011) 198 Cal.App.4th 347, 362 (stating "when the Legislature intends to make a statutory obligation enforceable as a contractual one it knows how to do so").) The two concepts are not contradictory, are easily harmonized, and in no way suggest that this Court determined that sections 13009 and 13009.1 "sound in tort."

If anything, the Court leaned in the opposite direction. In its Order granting the Motion for Judgment on the Pleadings, the Court recognized that Health and Safety Code sections 13009 and 13009. I give rise to contract or quasi-contract recovery. The Court did not did not reach the broader issue of whether the statutes "sound" in contract or tort, as the Court had no need to do so. (*Ibid*.) In fact, the Court still need not do so since an action

that it need not determine that same question as it pertains to venue. (*Zegras*, at 68-69, ("It is immaterial, therefore, whether the statutory obligation for the expense of extinguishing a fire is classified as one sounding in tort, or a quasi-contract" because "the Legislature has ... made applicable the procedure for suit upon a contract.") Despite Cal Fire's effort to suggest otherwise, *People v. Wilson* (1966) 240 Cal.App.2d 574 also does not compel a different result. In fact, after turning to *Zegras* for guidance, the court in *Wilson* also concluded that the language of section 13009 "indicates a legislative intent to impose a contractual liability." (*Id.* at 577.)[22] Thus, the issue for

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under sections 13009 and 13009.1 creates a contractual obligation and is governed by the procedure applicable to a contract action. Given the liberal definition of "involving" a contact, this is more than sufficient to invoke the equitable principles of Civil Code section 1717.

[22] Cal Fire's arguments in opposition to applying section 1717 here ignore or misread the holdings in *Zegras* and *Wilson* on other fronts as well. In particular, Cal Fire contends that "the contractual relationship does not arise unless and until there is a judgment that Defendants negligently or in violation of the law started the fire or allowed the fire to be set." But both *Zegras* and *Wilson* teach the opposite, finding that the contractual obligation created by sections 13009 and 13009.1 arises when the State incurs expenses extinguishing a fire, not years later once a lawsuit has been filed, litigated and judgment entered. (*See Zegras, supra*, 29 Cal.2d at 69 (explaining that because "the fire started in Napa County and the expense of extinguishing it was incurred there, that is the place where the obligation was entered into .... ").) Indeed, in both of these cases, the courts applied—at the very outset of the litigation—statutes that are applicable to actions on a contract. By doing so, these courts confirmed that the contractual obligation created by Health and Safety Code sections 13009 and 13009.1 arises long before judgment.

this Court is simply whether Section 13009 involves a contract, not whether it "sounds in contract." Having reviewed section 13009 and 13009.1's language, this Court finds (in accordance with what Cal Fire itself has argued in other matters), that section 13009 "involves a contract" for purposes of applying the law attorneys' fees reciprocity under Section 1717.

Finally, Cal Fire claims that the one-sided, non-reciprocal nature of the attorney fee provision in Civil Code section 1021.8 precludes an award of fees to the prevailing Defendants because, had the Legislature wanted to make section 1021.8 reciprocal, it would have expressly done so. But this Court cannot find that the Legislature was unaware of the existence of section 1717 when it adopted the language in Civil Code section 1021.8. As Cal Fire itself points out, the Legislature is presumed to know the law, and thus presumably knew that Civil Code section 1717 would provide mutuality of remedy—a natural operation of law that the Legislature could have easily disclaimed within the language of section 1021.8 if it so intended.[23] Because an action under section 13009 and 13009.1 is "on a contract," and because section 1021.8 creates a unilateral, one-sided fee provision, the Court concludes that section 1717, without a contrary

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[23] In this regard, the Court notes that, with respect to all of the statutes referenced in Civil Code section 1021.8, Health and Safety Code sections 13009 and 13009.1 are the only ones that contain language giving rise to a contractual obligation. The language is intentional and unique. As one court emphasized: "when the Legislature intends to make a statutory obligation enforceable as a contractual one it knows how to do so." (*Maxwell-Jolly v. Martin* (2011) 198 Cal.App.4th 347, 362 (referring to language in Gov. Code § 53154).)

expression of intent, makes the provision of attorneys' fees under sections 1021.8, 13009 and 13009.1 reciprocal. (*See generally Clinton v. County of Santa Cruz* (1981) 119 Cal.App.3d 927, 933 (noting the general canon of statutory construction that courts should interpret statutes "in harmony with other statutes relating to the general subject").)

In sum, since Cal Fire's action under Section 13009 and 13009.1 involves a contract and encompassed by statute a "one-sided" attorneys' fees provision, section 1717 creates reciprocity for Defendants as prevailing parties. Accordingly, this Court finds that Defendants are entitled to their reasonable attorneys' fees.

IV. REASONABLENESS OF DEFENDANTS' FEES AND EXPENSES

The Court has reviewed the parties' Phase II papers relating to the reasonableness of fees, expenses, and/or sanctions claimed by Defendants. Cal Fire argues at length that the papers are insufficient and that Defendants should be awarded nothing because they did not produce their billing records, but it is clear that in assessing fee and sanctions awards, attorney declarations will suffice. (See *Raining Data Corp. v. Barrenchea* (2009) 175 Cal.App.4th 1363, 1375 ("The law is clear ... an award of fees may be based on counsel's declarations, without production of detailed time records"); see also *Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285,293 ("[A]n attorney's testimony as to the number of hours worked is sufficient evidence to support an award of fees, even in the absence of detailed time records").) This is particularly true in

this case, where Defendants raise legitimate concerns about revealing privileged information in light of the ongoing appeal.[24] Cal Fire's objections based on Evidence Code § 412 are overruled.

The Declarations submitted by counsel for Sierra Pacific, W.M. Beaty and the Landowner Defendants, and the Howell Defendants provide the Court with enough detail to reach a lodestar figure comprised of the reasonable hourly rates of each attorney and the reasonable time they spent. Minimally, a declaration must at least attest to the number of hours billed, the hourly rates of each attorney, and a description of the tasks performed, such that the court may determine whether the hours were reasonably expended. (*Steiny & Co., supra*, 79 Cal.App.4th at 290.) The Declarations of Mr. Warne, Mr. Linkert, Mr. Ragland, and Mr. Bonotto all set forth in copious detail these basic items, as well as the various litigation projects that consumed their respective teams for the past four years. They provide monthly summaries and describe the tasks each attorney and paralegal was responsible for handling. Mr. Warne's Declaration also provides the Court with a monthly summary of the litigation events that were taking place on a month-by-month basis, including descriptions of pleadings that were being filed and hearings that were conducted with the Court. As such, the tasks described can be verified against events that are memorialized in the Court's file. (See *City of Colton v. Singletary, supra*, 200

[24] The Court notes that Cal Fire has asserted the same concerns in declining to produce documents to Defendants related to its own fees and costs.

Cal.App.4th at 785 ("[T]he reasonable worth of that work can be evaluated by looking at the record").)

Cal Fire raises certain accuracy concerns with Defendants' documentation, but Defendants have addressed these nuances, and the Court is confident that, as officers of the court, all defense counsel used their best judgment and efforts to include only that time which is relevant to the theories pied in their Phase I papers. The Court recognizes that this was a complex case, particularly for Defendants who were defending themselves in seven cases total. It is expected and not at all unusual that these circumstances may raise administrative difficulties unique to the way in which defense counsels' firms handled their billings. The Court is satisfied that counsel worked through these issues to the best of their abilities and provided conservative breakdowns for review by the Court. (See *Mardirossian & Associates v. Ersoff* (2007) 153 Cal.App.4th 257, 269 ("[P]recise calculations are not required," and "fair approximations based on personal knowledge will suffice.").)

Cal Fire is correct that Defendants' declarations all utilize a block billing approach, albeit a quite detailed one, but this is not a basis to deny fees outright. (See *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1010, n 6 (noting that relevant state court precedent clearly permits the court to retain discretion regarding the block billing practice); *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 830 (upholding an award of fees based on such generalized block-billed entries as "trial prep," and "T/C-client").) Some courts will adjust the

lodestar downward to account for any "padding" that may occur as a result of blockbilling. (*Heritage Pacific Financial, LLC v. Monroy, supra*, 215 Cal.App.4th at 1010 ("Trial courts retain discretion to penalize block billing when the practice prevents them from discerning which tasks are compensable and which are not").) The Court finds this is unnecessary here, however, because defense counsel represent that the amounts set forth in their documentation have already been decreased as a result of "write-offs" and/or discounts, and that they attempted to be conservative in deciding what to include. The Court also notes that the record evidence in the form of declarations from defense counsel indicates that counsel frequently did not bill for all the work they performed, and often times reduced their time entries to ensure that they were reasonable and appropriate, to the point of sometimes understating the amount of work performed.

Cal Fire is also correct that Defendants have included time in their documentation for work that was done in the federal case and, in some limited instances, in the private plaintiffs' cases. Defendants admit as much, but explain that the work described all pertained to or overlapped with issues relevant to Cal Fire's case. Cal Fire itself claimed to be proceeding under a Joint Prosecution Agreement with the United States, which necessarily acknowledges substantial overlap between the cases. The Court is not persuaded that this time should have been excluded by Defendants. Moreover, to the extent Cal Fire argues that Defendants have not adequately allocated their time, Defendants have been wholly successful in this litigation against unlikely odds, securing rulings on

two dispositive motions. Defendants have shown the issues to be inextricably intertwined, and no allocation is therefore necessary. (See *Hensley v. Eckerhart* (1983) 461 U.S. 424, 435 "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters."); *Abdallah v. United Savings Bank* (l 996) 43 Cal.App.4th 1101, 1111 (trial court is not required to apportion attorney fees between contract claims and noncontract claims if all claims are inextricably intertwined).) This is also a sufficient basis for the Court to award fees incurred by Defendants solely in connection with the federal case.[25]

Finally, Defendants have drawn attention to the fact that Cal Fire is silent with respect to defense counsels' hourly rates, and does not challenge the volume of work done or time spent by Defendants during discovery or any other stage of the litigation. The Court agrees that Cal Fire's arguments elevate form over substance and do not address the legal question of whether the time spent was reasonable. Furthermore, no matter how wanting Cal Fire may find defense counsels' declarations, nothing prevented Cal Fire from conducting an analysis of its own time and comparing that to all or a subset of Defendants' time.

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[25] Cal Fire is not a third-party beneficiary to the settlement agreement entered by Defendants in the federal case. Therefore, that document does nothing to prevent the award of Defendants' federal fees against Cal Fire.

Defendants on the other hand have provided the Court with sufficient evidence to conduct a comparative analysis between the hours spent/billed by Cal Fire's counsel (including the Office of the Attorney General, and two private law firms retained in 2013) and the hours billed by defense counsel. The Court finds that in 2013, and during the balance of the action, the fees billed on behalf of Cal Fire and those billed on behalf of Sierra Pacific were comparable, which further establishes the reasonableness of the defense fees and expenses incurred, particularly in view of the fact that Sierra Pacific was engaged in the simultaneous defense of the federal and state Moonlight Fire actions, while Cal Fire, on the other hand, litigated before only one tribunal.

Cal Fire also contends that Defendants are not entitled to an award of fees or costs because their motion for judgment on the pleadings could or should have been brought via demurrer, during the pleadings stage of the case. Thus, Cal Fire contends that Defendants could have avoided all fees had they only made the motion earlier. Initially, the Court observes that this argument is one pertaining to the entitlement to fees, and yet was not raised in Phase I briefing. Accordingly, Cal Fire waived it. The Court also observes that Cal Fire's contention appears irreconcilable with its concurrent assertion that the motion for judgment on the pleadings, which Cal Fire has appealed, was improvidently granted. Nevertheless, had it not been waived, this argument would not have persuaded the Court.

As the Court observed during the *Cottle* proceedings, there may be perfectly legitimate

reasons, particularly in a complex matter such as this one, for filing dispositive pleadings motions only after the record has been fully developed so that the theories of liability are fully understood. On the other hand, to the extent Defendants were not aware of the argument advanced on the motion until the record was fully developed, Cal Fire is not in position to complain, given that Cal Fire itself contends that it too did not, and does not, recognize the argument. In any event, there is no evidence in the record that Defendants purposefully delayed the filing of the motion for judgment on the pleadings.

Cal Fire's reliance on *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1303, is misplaced. As the court in Drew stated: "The process of litigation is often more a matter of flail than flair; if the criteria of section 1021.5 are met the prevailing flailer is entitled to an award of attorney fees." (*Ibid.*) The court further explained that "[a] litigant should not be penalized for failure to find the winning line at the outset" unless unsuccessful forays address unrelated claims, are pursued in bad faith, or are pursued incompetently." (*Ibid.*) Here, Cal Fire has not established that any of the litigation strategies or tactics employed by Defendants pertained to irrelevant matters, were pursued in bad faith, or were pursued incompetently. (*See id.* at 1303.)

For all these reasons, and based on its own expertise and familiarity with the litigation gained from reading the Court's extensive files, attending numerous and lengthy hearings with the parties, preparing for trial in this complex litigation, and closely reading the voluminous pleadings submitted

by the parties, the Court is satisfied with the documentation submitted by Defendants. The Court finds that the rates charged and the total hours set forth therein are reasonable.

In addition, the Court finds that an upward multiplier is appropriate, as the relevant factors all counsel in favor of one. (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623-24.) The record establishes that the case was exceedingly difficult, the amounts involved were extraordinary, the case required exceptional skill in its handling, defense counsel demonstrated a high level of skill, the attention given has been virtually all consuming for defense counsel, and defendants were extremely successful on multiple fronts. In addition to the above factors, there is every reason for such an adjustment here because, as lead defense counsel, Downey Brand's standard rates were well below those charged by the two law firms Cal Fire retained in 2013, as were the rates of co-defense counsel Matheny Sears Linkert and Jaime, and Rushford and Bonotto. In addition, Downey Brand reduced its already low standard rates by another ten percent, and then applied another layer of discounts by cutting time from each and every invoice. Accordingly, for the reasons stated, the Court finds that Defendant Sierra Pacific Industries is entitled to the awards described herein below. The awards pertaining to W.M. Beaty and Associates, the Landowner Defendants, and the Howell Defendants are addressed in separate orders.

V. AWARDS OF FEES, EXPENSES, AND SANCTIONS

In light of the foregoing and based on the record evidence presented, the Court imposes terminating sanctions for the reasons described in favor of all Defendants, and against plaintiff Cal Fire. The Court further finds that Sierra Pacific is entitled to an award of fees, expenses sanctions from Cal Fire, ~~and sanctions against its lead litigation counsel, Supervising Deputy Attorney General Tracy Winsor and Deputy Attorney General Daniel Fuchs,~~ as follows: [handwritten: LCN, Judge]

1. The total attorneys' fees incurred in defending itself in all the Moonlight Fire litigation, in the total amount of $14,240,628, plus the expert fees incurred in the amount of $3,010,326, plus the expert expenses incurred in the amount of $29,351, plus additional expert costs in the amount of $303,631, for a complete total of $17,583,936.

2. Separately, but not in addition to the amount set forth above, the total fees billed in connection with the state action, in the total amount of $9,969,265, plus the expert fees incurred in the amount of $3,010,326, plus the expert expenses incurred in the amount of $29,351, plus additional expert costs in the amount of $303,631, for a complete total of $13,312,573.

3. Separately, but not in addition to the amounts set forth above, the total fees billed since July 3, 2010, in connection with the state action, in the total amount of $9,559,948.

4. Separately, but not in addition to the amounts set forth above, the total fees billed since November

16, 2010, in connection with the state action, in the total amount of $8,737,422.

5. Separately, but not in addition to the amounts set forth above, the total attorney's fees, expert fees, and expert expenses billed in connection with metallurgy issues, in the total amount of $1,675,651.

6. Separately, but not in addition to the amounts set forth above, the total attorneys' fees billed in connection with WiFITER issues, in the total amount of $912,844.

7. Separately, but not in addition to the amounts set forth above, the total attorneys' fees billed in connection with 14 C.C.R. § 938.8 issues, in the total amount of $288,319.

8. In addition to the foregoing, Sierra Pacific also is entitled to the fees most recently incurred in connection with briefing on its Motion for Fees, Expenses, and/or Sanctions and related issues, which was not set forth in the December 13 Declaration of William Warne. Counsel has provided the Court with evidence substantiating fees in the amount of $650,634. This sum shall be awarded in addition to the amounts set forth above.

9. Finally, the Court finds that the circumstances of this case make it appropriate for a multiplier in the amount of 1.2, as requested by Sierra Pacific in its moving papers. Accordingly, all dollar amounts awarded hereinabove shall be adjusted upward by a 1.2~~5~~ multiplier.

IT IS SO ORDERED.

FEB 04 2014
Dated:_____, 2014

Leslie C. Nichols
Honorable Leslie C. Nichols
Judge of the Superior Court

Appendix G

SUPERIOR COURT OF CALIFORNIA
COUNTY OF PLUMAS
UNLIMITED JURISDICTION

Case No. GN CV09-00205

CALIFORNIA DEPARTMENT OF FORESTRY,
Plaintiff,
v.
HOWELL, EUNICE E., *et al.*,
Defendant.

AND CONSOLIDATED CASES
COMPLEX CIVIL LITIGATION

Endorsed February 4, 2014

ORDERS ON MOTIONS TO TAX COSTS AND FOR ATTORNEY FEES, EXPENSES, AND SANCTIONS, AND MOTIONS RE PRIVILEGE

PREFACE

"There are no small cases, only small judges." Judge Jon Tigar in passing along a tip from a judicial colleague. This is true. Every case before a judge is the most important case in the world to the parties, and the proper adjudication of that case is of paramount importance to the administration of justice. The undersigned favors early involvement in cases, so that ground rules might be established, good relations

between the Court and counsel can be fostered, and so that the case can be managed so as to maximize opportunities for voluntary resolution, or, if that is not possible, timely and cost effective adjudication through trial. In this matter, however, the undersigned was appointed as all purpose judge only shortly before trial, after all dates had been established and when the matter had been pending for almost four (4) years.

Despite the Court's best efforts, no agreement could be achieved, and big issues are now presented to the Court for hard decisions. The issues have been hard fought and very contentious. Counsel have cooperated with the Court in meeting suggestions and orders for timely submission and delivery of documents, and the Court appreciates that cooperation. For reasons that become apparent, the Court is required to speak clearly and forcefully to the issues in controversy, and the Court's obligations cannot be shirked or delegated. The Court has taken care to use language no more forceful that that employed by our appellate Courts. Even so, the Court reminds counsel that, in announcing its decisions and in making its orders, the Court deals only with the issues presented for decision. Courts are usually ill advised to make broad moral or existential pronouncements, and the Court declines to do so here.

THE BOTTOM LINE

Plaintiffs' motions to tax Defendants' memoranda of costs, motions related to claims of privilege, and Defendants' motions for attorney fees, expenses, and sanctions were heard, argued, and submitted this day. Prevailing party Defendants seek drastic remedies.

After full and careful consideration, the remedies will be granted. Full compensatory attorney fees and expenses and costs will be awarded to all Defendants against Plaintiff California Department of Forestry and Fire Protection, and prevailing party costs will be awarded against all Plaintiffs, jointly and severally. Terminating sanctions shall issue against Cal Fire. Sanctions sought against attorneys Tracy L. Winsor and Daniel Fuchs will be denied.

BACKGROUND

These consolidated cases, involving multiple parties, arises out of a wild fire, which occurred in Plumas County on September 3, 2007. The lead case was filed on or about August 3, 2009. The cases were noticed for an estimated three -month jury trial set to commence with jury selection on July 29, 2013.

The undersigned received the designation as all-purpose Judge in this complex litigation matter on May 2, 2013. The order from Plumas Superior Court Presiding Judge Hon. Janet A. Hilde confirmed the appointment order executed by Chief Justice Tani Cantil-Sakauye. When the order was received, two dates had been set, the trial date and a trial readiness date of July 1, 2013. The Court issued its notice to all counsel of record and order on May 2, 2013. The Court traveled to Plumas County and resided there from June 3 to 7, 2013. The Court met with all counsel on June 6, 2013 and filed and served on that day its trial Court perspectives and order —first meeting with counsel. Thereafter, on July 1, 2013, the Court heard and decided the motions *in limine* filed by the parties. The Court delivered its written order on all issues to counsel on that day.

At the July 1 hearing on motions *in limine*, the Court made clear that it would order a mandatory settlement conference unless counsel accepted the Court's strong request and direction that they make their clients available for mediation of up to two days. Mediation did occur before the Honorable Read Ambler, retired Superior Court Judge (JAMS). Judge Ambler determined after one day that further mediation would not then be effective. He made himself available for further consultation. The Court greatly appreciates and thanks Judge Ambler for making himself available and for familiarizing himself with the issues on such short notice.

The Court received trial briefs on July 15, 2013. Upon reviewing the briefs, the Court filed and served its notice to counsel concerning issues to be addressed during the three days set aside for hearings on July 24, 25, and 26, 2013. Those issues included, without limitation, a hearing on the motion for judgment on the pleadings, consideration of whether expert testimony evidence was required, and a hearing to determine whether Plaintiffs could establish a prima facie case before trial. Before commencing the hearing on July 24, 2013, the Court filed and served on counsel its further Trial Court perspectives—pre jury selection meeting with counsel. Upon completion of the three days hearings, the Court issued its written orders and judgment in favor of Defendants and against Plaintiffs.

The Court and counsel worked diligently through three full Court days, July 24 through 26, 2013. The parties brought able litigation teams to Portola, and the Court was favored with briefs on the issues

presented. Further briefs were filed as the issues were refined. In the Court's opinion, all issues were fully briefed and argued before submission.

This is the Court's recollection concerning the conduct of the *Cottle* hearing. Paul Gordon, of Gordon & Polland LLP, Cal Fire's litigation counsel, made the Cottle presentation throughout July 24 and 25. The Court invited counsel for Defendants to argue what it thought would be the deficiencies in Plaintiffs' cases. With that notice, Mr. Gordon made extensive offers. Briefing followed, and that briefing was submitted throughout the three- day hearing. The Court had hoped to have time on Friday, July 26, 2013, to discuss jury trial issues. However, sometime in the morning of Thursday, July 25, it is the Court's recollection that Mr. Gordon reported that he had much more to present. Accordingly, the Court invited him to continue his presentation. Mr. Gordon continued through Thursday afternoon. As the Court recalls, Mr. Gordon, toward the end of the day, said, "Judge, I'm just about done," or wards to that effect. The Court directed counsel for Defendants to prepare and email proposed orders to Plaintiffs. Counsel complied on the evening of July 25.

The Court's perspective is that something changed on the morning of Friday, July 26. After affording counsel for Cal Engels time to consult with his client, the Court resumed the hearing. The Court found that the advocacy torch had been passed from Paul Gordon to Robert Charles Ward, Cal Fire's second outside litigation counsel, at Shartsis Friese LLP. Mr. Gordon, with whom the Court and opposing counsel had engaged over the two previous days,

remained mute on July 26, 2013. The tenor of the presentation changed. Now Cal Fire argued procedure, due process, not enough time, not enough notice, etc.

Late in the morning of Friday, July 26, 2013, counsel for Cal Engels Mining Company, the party whom the Court understood had the biggest financial interest in the matters in issue, announced that his client had agreed with Defendants to dismiss its claims with prejudice in exchange for a waiver of costs. After a recess to allow counsel to confirm authority to bind his client with the settlement [a party representative was absent from Court, the Court conducted a *voir dire* of counsel and confirmed the settlement. Thereupon, the Court dismissed Cal Engels claims with prejudice.

Prior to trial, on July 18, the Court had issued its written directive that counsel of record appear at all sessions of the Court unless leave for good shown was granted by the Court in advance. The Court was surprised to learn on Friday, July 26, 2013, that counsel for Brandt Plaintiffs was not present. Counsel had not contacted the Court in advance. Upon inquiry by the Court, Tracy Winsor, supervising Deputy Attorney General, informed the Court that she had received a call from counsel and that, for some family related reason, he could not appear. She said she had agreed to appear specially for counsel. This was not permitted by the Court's July 18 notice, except as provided above. Counsel for Defendants moved to default the Brandt Plaintiffs. The Court declined to grant that harsh order, but the Court noted on the record that it had done all it could to assure

appearance of responsible counsel for each party. Accordingly, as requested by counsel for Brandt Plaintiffs, counsel for Cal Fire agreed to protect the interests of those parties.

SOME WORDS ABOUT THE TRIAL JUDGE

It is a continuing privilege to have served as a Superior Court Judge for thirty years, twenty-five years as a Judge of the Superior Court for Santa Clara County and five years in service of the Chief Justice as a member of the Assigned Judges Program. This experience has included every kind of case that comes before a general jurisdiction judge, including complex and coordinated litigation, now in Courts in twelve counties throughout California. Judicial experience was preceded by almost seventeen years of trial and appellate law practice, federal and state, including, civil, criminal, family and juvenile court representation, and including death penalty representation on appointment by the California Supreme Court.

Through representing clients and adjudicating matters across the range of human experience, some experiences cause disappointment, but not much causes shock. The Court has never been required to hold a lawyer in contempt of Court for litigation conduct, bang a gavel, or issue terminating sanctions based on trial misconduct by a party or counsel.

The Court's attitude toward this litigation has been to take each issue as presented. The Court's orders show attention to case management and the need to proceed in a diligent, thorough, and timely manner. The Court at all times and at each opportunity has encouraged the parties to use best

efforts to achieve a fair settlement. Counsel, at least, appear as polarized as ever. The Court recalls that, in one of many scheduled telephone conference calls, some subject of future proceedings came up. The Court commented (but, curbing enthusiasm, did not burst into song), ("Que sera, sera. The future's not ours to see. What will be will be. Que sera, sera.")

The Court evaluated the motions *in limine* and the matters embraced in the three day hearing leading up to the dismissal orders and entry of judgments on their own terms. Although it was clear that there could be post judgment proceedings, no thought was given to any such possible proceedings at those times.

The Court has now reviewed thousands of pages of documents. In addition, the Court has viewed all the video depositions presented by the parties. The Court observed at the first meeting of counsel that it had been over fifty years since the undersigned has worked for a number of summers during college as a member and foreman of a fire crew at Yosemite National Park. It is not difficult to imagine that all the parties in these cases feel some affinity for the women and men who work the fire lines and do all the hard and often dangerous work involved in fire suppression. Of course, the advocacy of counsel and the rulings of the Court in no way reflect on the work performed by those hard working individuals. Other issues have been called out for the Court's determination.

THE LEGAL FRAMEWORK

The law concerning Plaintiffs' motions to tax costs is set forth at great length and detail by the contending parties. The Court has carefully considered the authorities presented and the evidence.

No good purpose would be served by expounding on the law in this order. It is digested in many places, including in Witkin, California Procedure, and in California Judges Benchbook, Trial, chapter 16, sections 30-57.

As it relates to Defendants' motions for attorney fees, expenses, and sanctions, Cal Fire [the motions are pending only as against Cal Fire and cited attorneys] contends that the Court lacks jurisdiction to rule on the motions. It further argues that, even if the Court has jurisdiction to rule on the motions, it cannot make a money order, because that would in effect be a damages award. The claim is that Cal Fire and its attorneys are statutorily immune from any such award. Whether it involves a claimed cost of $100.00 to rent a refrigerator at lodging during trial proceedings to refrigerate insulin for counsel's type diabetes (which Cal Fire derides as merely convenient "to take a break from work to go get a cold drink.") to any claim for costs, expenses, fees, or sanctions (except for a $355.00 filing fees), Cal Fire says, "No." Even as to the $355.00 costs suggested by Cal Fire, other Plaintiffs seek apportionment.

The Court's task is to review the voluminous evidence, in light of the applicable law, and determine which view of the evidence has more convincing force than that opposed to it. Having considered everything the parties presented, and neither party having exercised their right to request the Court to consider oral testimony, case law puts the Court in the best position to evaluate the credibility and the weight of the evidence. As it relates to sanctions, the Court provided two full rounds of briefing to the parties so

that they could comprehensively put forth their positions on all sanctions, including the issue of terminating sanctions. Paul Gordon, counsel for Cal Fire requested that opportunity, and the Court granted it. After accommodating that request, another attorney for Cal Fire indicated its desire to make an emergency application to suspend that presentation. The Court indicated there was no emergency. All positions were to be fully laid out in accordance with the briefing schedule, and the matter would be heard on the date(s) long set, February 3, and, if necessary, February 4, 2014.

Case law instructs that, in considering a trial court's imposition of sanctions, the question is not whether the trial court should have imposed a lesser sanction; rather the question is whether the trial court abused its discretion by imposing the sanction it chose. No authority states that terminating sanctions may not be issued unless the court finds that the sanctioned party prejudiced an opponent's ability to go to trial. Sanction orders are reversed only for arbitrary, capricious, or whimsical action. In choosing among its various options for imposing sanctions, a trial court exercises its discretion, subject to reversal for manifest abuse exceeding the bounds of reason. See *Liberty Mutual Fire Insurance Company v. LcL Administrators, Inc.* (2408) 163 Cal.App. 4th 1093 (Opinion by Butz, J., with Hull, Acting P.J., and Cantil-Sakauye, J., concurring), cases cites, and many other cases.

In ruling on the motions before the Court, the Court in every instance resolves credibility and weight of evidence issues in favor of its rulings and any and

all findings, express or implied. Although the standard of evidence review is the civil standard of preponderance of the evidence, the Court has been fully satisfied even by the higher clear and convincing standard of review.

SOME WORDS ABOUT ADVOCACY

Persuasive advocacy requires some sense of perspective. Time and again, the Court found exaggeration and hyperbole in the papers submitted by Cal Fire. From the assertion that its case was a "clear liability" case, to the defense of Cal Fire employees by reference to their uniform (appeal to authority), to reference to the Defendants as backed by insurance (appeal to prejudice), to disparagement of counsel (*ad hominem*), false characterization of the Jason Dorris Air Attack video work (*reductio ad absurdum*), constantly and inaccurately characterizing Defendant's presentation as arguing a vast criminal conspiracy (*ad nauseam* argument by repetition), the presentations left the Court wondering to what audience Cal Fire was appealing. In characterizing the Dorris work as all about eighteen seconds, the Court was left to wonder, are the Higgs Boson and Albert Einstein accomplishments worth only a nickel, because one is invisible to the naked eye and the other can be expressed in such a short equation? The *ad nauseam* fallacy is well illustrated by the lyrics of Rogers and Hart's "Johnny One Note" (1937).

Counsel for Cal Fire appear utterly sanguine concerning the conduct of Cal Fire. They advance many arguments which do not persuade the Court. At one point in the papers, however, said counsel

launched the thermo nuclear device known in rhetoric as the, "Have you no sense of decency" assault. On the thirtieth day of the Army McCarthy hearings, on June 9, 1954, counsel Joseph N. Welch galvanized the audience and the nation by saying to Senator Joseph McCarthy, "Have you no sense of decency, sir? At long last, have you left no sense of decency?" This courageous action hastened the demise of Senator McCarthy and helped bring the nation to its senses. It did nothing to persuade this Court.

In constantly misstating Defendants' claim as being that Cal Fire is engaged in a massive criminal conspiracy, and that accusation made by delusional people at that, did Cal Fire seek to suggest to a gullible trial judge that proof must be forthcoming to a beyond a reasonable doubt standard? Some of the rhetoric reminds one of the Scottish poet Andrew Lang's reference to facts: "Some people use them as a drunk uses a lamppost, more for support than for illumination." This kind of argument is lamentable. It is distracting. It takes more time and effort far the Court to scrutinize Cal Fire's papers for any persuasive arguments and evidence that may be found. The Court has undertaken that extra effort. The rights and interests of the parties require no less.

OBJECTIONS, JUDICIAL NOTICE, AND EVIDENCE EVALUATION

All evidence objections except as noted in the companion order and in this order ruling on an attorney client privilege claim, are overruled and all requests for judicial notice are granted. The Court was presented with numerous briefs concerning admissibility of evidence. For example, Defendants

assert that post close of discovery, and post judgment declarations are submitted which violate court orders and impermissibly seek to offer opinions that are barred by rules of law. They argue that the declarations are irrelevant and are simply filed to jam into the record information to attack the judgments entered after the Court's ruling on the motion for judgment on the pleadings and the ruling following submission on the *Cottle* issues. The point is taken.

Such efforts would be gross and impermissible and would be entirely unprofessional. The Court assumes that such efforts, if made, would be quickly detected by the reviewing Court and would be subject to sanction. No motion was made to reopen the proceedings leading to the judgments in favor of Defendants. No motion attacking the judgment in the trial Court was brought. The matters now on appeal are on a fully developed record.

Many of the objected to declarations are subject to grave deficiencies. The Court must take all these matters into account in evaluating the credibility and the force of the evidence. Having reviewed the great volume of submissions, the final question is, "Does it persuade?"

Counsel argue the weight that should be given to the deposition testimony and the recently filed declarations of, among others, Joshua White, Larry Dodds, and Bernard Paul. During these depositions Cal Fire interposed repeated objections to the form of questions. The Court has in mind all the rules of evidence in considering these matters and need not recite those rules here. Whether, for example, Mr. Paul reportedly wept with emotion when presented

with hypothetical questions assuming predicate facts concerning Cal Fire's conduct before or during the during the pending litigation, or whether he was frustrated and angry, because he did not know the truth or falsity of those assumed predicate facts, is of no great moment. It is Court's opinion and conclusions on these matters, drawn from the whole record - before the Court, that matter[handwritten: s]. It is the Court's decision only which is subject to appellate review.

Some declarations are admissible as at least relevant to the credibility of the declarant. Evidence Cade section 210. Credibility is evaluated by considering factors set forth in Evidence Code section 780, including attitude toward the action in which testimony is given or toward the giving of testimony. That of course includes a consideration of those factors as they relate to the party proffering the testimony. The general rues are set out in the California Evidence Code and in CACI [Judicial Council of California Civil Jury Instructions], and we apply those rules daily. To the extent they are relevant, some of the declarations 'cut both ways.' It is the Court's obligation to determine the matter based on all the evidence, direct or indirect, and to draw those inferences which are supportable in the circumstances.

The Court can be expected to know the difference between valuable evidence which, on the one hand, properly assists in evaluating the truthfulness of testimony of witnesses and the credibility of other evidence and, on the other hand, after the fact evidence which in effect merely vouches for or justifies the testimony given by witnesses during discovery. It

cannot be forgotten that depositions provided each side the opportunity to ask questions of witnesses so that questions concerning credibility could be dealt with at the time testimony was provided.

In admitting the proffered evidence, subject to whatever limitations critical examination by an experienced trial judge may disclose, the Court hopes and expects that it will receive the deference provided by California Constitution Article VI section 13, Code of Civil Procedure section 475, and Evidence Code section 353.

The Court readily provides assurance that none of the evidence considered, in bulk or in particular, has overborne the Court's critical faculties. For all the great importance of the issues presented, and they are important, this is not a child abuse case; no one has submitted a gory photograph designed to inflame passion. Patience is a virtue, and the Court has tried at all times to display and exercise patience and be open to the presentation of each counsel.

To the extent zealous advocacy seemed to fan embers of appeal to sympathy, passion, or prejudice, it is the task of the Court to douse those embers with cool and logical analysis. Defendants provided evidence that invited the Court to doubt much of the evidence submitted by Plaintiffs. Trial lawyers argue the force and weight of evidence. It is an important part of advocacy. In this case, as distinct from so many cases over which the Court has presided, Cal Fire appears to argue that it is almost insulting to inquire about or argue the believability of evidence. Skilled advocates argue diametrically different positions, and it is well recognized that these issues must be decided. The

Attorney General when prosecuting cases against individuals and organizations in civil and criminal cases must often advance the kind of arguments addressing credibility advanced by Defendants here. The vehemence expressed in Cal Fire's arguments is perplexing.

In this case, counsel for Cal Fire writes in the last sentence of its opposition to Defendants' supplemental briefing requesting terminating sanctions, at page 23: 5-6, "Defendants' invitation to the Court to put its good name to these false accusations must be rejected." The Court is not sure what to make of that peroration. The Court assumes that nothing done by the Court in this hotly contested matter, including fulfilling its responsibility to rule on contested issues involving the evaluation of the force and weight of evidence, will imperil its good Warne, "the very jewel of one's soul." That would not enrich the robber, but would make the undersigned poor indeed. Shakespeare, Othello, Act III, scene 3. Nothing said by the author of the referenced brief has done anything to imperil him in his high standing before the Court, and the Court hopes and assumes that feeling is reciprocated.

SOME WORDS ABOUT THE FORM OF ORDERS

On occasions, appellate courts have questioned court orders that appeared to merely 'sign off' on the proposed orders submitted by counsel. Because this Court is doing just that, in part, a few words of explanation are in order. As has been made abundantly clear in previous orders of this Court, and as shown by the circumstances of this case, this is a complex litigation matter. The undersigned has undertaken to personally review each of thousands of

pages of written briefs, exhibits, submissions, deposition transcripts and video submissions of the same, motions, objections, and proposed orders. This list is not exhaustive. As was the case concerning the motion for judgment on the pleadings and the *Cottle* prima facie hearing and hearing on other issues which spanned the period July 24 through 26, 2013, the Court asked counsel to submit in advance proposed orders which set forth findings and orders. The Court informed counsel that these orders would be subject to critical Trial Court and perhaps Appellate Court review, so they should set forth those matters which could be fully supported by the record. Counsel had the proposed orders before them during oral argument, so there were no surprises. The same is true concerning the proposed orders submitted for these hearings.

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

any inconsistencies in those orders, the Court deems them immaterial.

SIERRA PACIFIC INDUSTRIES' MOTION FOR DETERMINATION OF ATTORNEY-CLIENT PRIVILEGE PURSUANT TO CCP SECTION 2031.285; TO COMPEL COMPLIANCE WITH COURT ORDER; AND REQUEST FOR SANCTIONS

Cal Fire seeks to withdraw a document which Senior Deputy Attorney General Tracy L. Winsor previously declared under of penalty of perjury had been produced. This document has been made public and was produced without objection pursuant to a Public Records Act request. To the extent Sierra Pacific industries has a burden of proving that the communication was not made in confidence, that burden has been carried. The record convincingly establishes that any claim of privilege has been waived. Sierra Pacific Industries' motion to determine that the communication is not protected by the attorney client privilege is granted. Cal Fire's counter motion is denied on the merits and as moot. The positions advanced by Cal Fire's motion and opposition to Sierra Pacific Industries' motion lack any substantial justification and are subject to sanction. The positions taken by Cal Fire are simply representative of and add to the mass of evidence relied upon by the Court in making its terminating and other sanction orders.

Even if this particular ruling were found to be in error, the Court is convinced in light of the whole record that it is harmless. The admission of the disputed document is merely corroborative of other evidence. Even in a criminal case, where life and

liberty are at risk, violation of the attorney client privilege does not necessarily result in reversal of a conviction. *People v. Corinthians Canfield* (1974) 12 CaL 3d 699 (McComb, J.), in which a unanimous Court determined that a clear violation of the attorney client privilege was harmless error.

There is no need for any other discovery disclosure orders. They have been made in the past and not complied with. The Court has no confidence that they will be complied with now: These are simply additional facts and conclusions that add to the Court's determination that great prejudice has been inflicted upon Defendants. They support the companion order which is part of this order.

MOTIONS TO TAX COSTS

Costs are determined as set forth in the companion orders signed and filed this day, which is part of this order. Those costs are established based upon a consideration of the law related to determination of costs as well as appropriate sanctions to make Defendants as whole as is possible in the context of this litigation.

A general comment concerning costs applies with equal force to matters related to consideration of attorney fees and expenses. "In for a dime, in for a dollar," is the American version of, "In for a penny, in for a pound." One of the meanings ascribed to that saying is "to venture into something a bit risky or hazardous without being able to weigh up the consequences." Another reported meaning is, "Nothing ventured, nothing gained." The practical consequences of this phrase are played out in courts of law all the time. If counsel will simply pull together a

small compendium of each order issued by the Court in this matter, they will note that the Court urged a careful and prudent approach to this litigation, and ongoing close communication between counsel and clients at all appropriate decision making levels. A further invitation in that regard was read into the record and handed to counsel on the morning of July 24, 2013. In response to the Court's direct question, and before the commencement of the three day hearing, Defendants made clear that, from their perspective, the grant of all the relief which it requested, would be case terminating. Thus, all counsel were abundantly clear concerning the potential risks and rewards of proceeding. As noted above, the Court had directed that all lead counsel be present at all sessions of the Court unless excused in advance by order of Court.

Counsel for Cal Engels and their client apparently kept in close touch, as suggested by the Court in its July 24, 2013, written and oral statement, considered all relevant factors, and entered into a settlement. This settlement was that, on the one hand, Cal Engels would dismiss all its claims, with prejudice. On the other hand, all Defendants would waive their claims for costs. All counsel were in a position to have discussed these matters, in mediation and at Court. The other Plaintiffs largely simply joined in all of Cal Fire's arguments and presentations. The Brandt Plaintiffs even entrusted their case to Cal Fire's counsel on July 26, 2013, when their lead counsel was absent from Court.

Plaintiffs now ask the Court to apportion costs. This would be unfair and inequitable to Defendants.

Plaintiffs, except for Cal Engels, which made an informed judgment, were content to take full advantage of Cal Fire's advocacy on liability issues. The potential damage to Defendants by virtue of the retention of all Plaintiffs in the case was enormous. Cal Fire's cost recoupment action was limited, but the claims of all Plaintiffs, pressed right up to trial, presented a great threat to all Defendants. The claim of Plaintiffs for equitable relief, in light of all the circumstances, including their willful continuance in the matter to judgment, continuance which required Defendant's resistance, comes too little too late.

MOTIONS FOR ATTORNEY FEES, EXPENSES, AND SANCTIONS

In this section of the order, the Court will comment on same of the law, which guides the Court in exercising its discretion in ruling on the motions for sanctions. The law is comprehensively argued in the papers, and the Court will not attempt an encyclopedic presentation of the applicable law.

As it relates to discovery sanctions, " "Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply ... and {2) the failure must be willful." " (*Villbona v. Springer* (1996) 43 Cal. App. 4th 1545, cited by *Liberty Mutual Fire Insurance Company. v. LcL Administrators* (2008) 163 Cal. App. 4th 1093.

As it relates to terminating sanctions, several important and recent cases from California appellate Courts have been briefed by the parties. The Court has jurisdiction to consider the matters in controversy. They involve matters collateral and ancillary to the judgments now on appeal. This is so even if the

determinations here make moot the matters now under consideration on appeal. Code of Civil Procedure section 916 (a). *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal. 4th 180, Witkin, California Procedure (5th Edition), Appeal, section 20. Terminating sanctions are upheld for discovery abuses. *Laguna Auto Body v. Farmers Ins. Exch.* (1991) 231 Cal. App. 3d 481, *Liberty Mutual Fire Insurance Co., supra*, 163 Cal. App. 4th 1093. Indeed, appellate courts have overturned decisions of trial courts not to issue terminating sanctions. *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal. App. 4th 967.

The Court need not rely on statutory authority alone is considering and ruling on the grave issues presented by the pending motions. When a Plaintiff's deliberate and egregious misconduct makes any sanction other than dismissal inadequate to ensure a fair trial, the trial Court has inherent power to impose a terminating sanction. This authority is consistent with the overwhelming weight of authority from federal Courts and Courts of other states. *Stephen Slesinger v The Walt Disney Company* (2007) 155 Cal.App. 4th 736.

Defendants seek sanctions against attorneys Tracy L. Winsor and Daniel M. Fuchs. These requests are denied, because the record does not clearly establish that said attorneys directed or advised the egregious and reprehensible conduct of California Department of Forestry and Fire Protection. Although there is plenty of evidence to support a strong suspicion, the evidence does not preponderate. This determination in no way speaks to issues of legal ethics or compliance with the requirements of the

State Bar Act, including Business and Professions Code 6068. It only addresses the statutory basis far sanctions. In that regard, the Court should and does exercise caution. Cited counsel did not submit declarations in defense of their actions. It is possible that they felt constrained by the requirement to preserve confidences of their client, to maintain the attorney client privilege, or to maintain attorney work product.

The sense of disappointment and distress conveyed by the Court is so palpable, because it recalls no instance in experience over forty seven years as an advocate and as a judge, in which the conduct of the Attorney General so thoroughly departed from the high standard it represents, and, in every other instance, has exemplified.

While declining to impose sanctions against cited counsel, the Court emphasizes that it relied on statements of counsel as officers of the court in considering a number of matters, including *in limine* motions and ex pane applications. On too many occasions, that reliance was misplaced, and that reliance directly impacted the Court's ruling on matters before the Court. For that reason, Cal Fire should not rely to its benefit on *in limine* rulings, always subject to modification, which dealt with arguments or presentations that would have been made to a jury. This lenity, prudence, and caution as it relates to sanctions against officers of the court should not in any way be seen as softening or mitigating the force of this Court's decision, findings, and orders as it relates to Cal Fire. It simply means that, whatever else might be said about the conduct

and advocacy of cited attorneys, it will not be sanctioned here.

Although it is most distasteful, the Court in discharging its duty finds it necessary, and accordingly, does bring the full weight of authority to bear in issuing terminating sanctions and full compensatory attorney fees and expenses against California Department of Forestry and Fire Protection. The Court finds that Cal Fire's actions initiating, maintaining, and prosecuting this action, to the present time, is corrupt and tainted. Cal Fire failed to comply with discovery obligations, and its repeated failure was willful. This Court makes the same finding as that made in *Liberty Mutual Fire Insurance Co. v. LcL Administrators, Inc, supra*, 163 Cal. App. 4th 1093. Cal Fire's conduct reeked of bad faith. Just as in *Doppes v. Bentley Motors, Inc*. (2009) 174 Cal. App. 4th 967, Cal Fire failed to comply with discovery orders and directives, destroyed critical evidence, failed to produce documents it should have produced months earlier, and engaged in a systematic campaign of misdirection with the purpose of recovering money from Defendants. As recently as November 2013, counsel for Cal Fire, in successfully resisting Defendants' request to alter a briefing schedule, strongly asserted that all discovery obligations had been fulfilled. The Court learned, not from Cal Fire, but from Defendants, that Cal Fire later dumped a huge new cache of documents on Defendants.

The Court relies on the authority provided by Code of Civil Procedure 2023.420 (a), 2023.030, along with the cases interpreting these statutes and others,

as augmented by the inherent powers of the Court, in issuing this most severe sanction. This Court finds that Cal Fire has engaged in misconduct during the course of the litigation that is deliberate, that is egregious, and that renders any remedy short of dismissal inadequate to preserve the fairness of the trial. Accordingly, the Court exercises its inherent and as well as statutory and case law authority to dismiss with prejudice. *Stephen Slesinger v. The Walt Disney Company* (2007) 155 Cal. App. 4th 736.

The misconduct in this case is so pervasive that it would serve no purpose for the Court to attempt to recite it all here. As noted in S*lesinger*, it is not necessary to attempt a catalogue of ail the types of misconduct necessary to justify an exercise of the inherent power to dismiss, because "corrupt intent knows no stylistic boundaries." The Court's review of the whole record confirms that Defendants' characterization of the misconduct is well established. Parties, interested persons, and reviewing Courts will find examples in the table of contents of Defendants' Supplemental Briefing Regarding Cal Fire's Dishonesty and Investigative Corruption executed by counsel for Defendants on December 13, 2013, and Defendant Landowners' and W. M. Beaty's Brief in Support of Reasonableness of Fees, Expenses and/or Sanctions (Phase 2 Briefing), pages 10 through 12, executed by counsel for those parties an December 12, 2013. These listing are not entire, but they are well supported.

Among so many acts of evasion, misdirection, and ofiher wrongful acts and omissions, one series of events stands out. It is all laid out in the papers and

need not be detailed here. It relates to Joshua White's `White Flag' testimony. The facts were problematic for Cal Fire. Cal Fire and the United States Government and their legal counsel, met with White to discuss it. At a later deposition in this action, White testified that the white flag "looked like a chipped rock." Counsel for Cal Fire remained mute. It was only later that Defendants found out about the meeting and, over objection, were permitted to inquire further. When they propounded questions to nail down the date of the earlier meeting, Cal Fire hedged, responding in effect that it didn't have time to go through the voluminous record to forthrightly respond. Of course, all it would have taken from Ms. Winsor was a telephone call to her U.S. Attorney counterpart in the federal litigation with an inquiry. "Can you please check your calendar to see if my calendar is correct on the date we all met to discuss the white flag problem?"

The Discovery Act was written to be largely self-executing. The Act was thrown out the window by counsel for Cal Fire. Cal Fire treats all this as entirely innocent and irrelevant. Cal Fire takes umbrage that anyone could draw inferences adverse to it from these facts. One hopes that this conduct is not explained in our law schools as what 'good lawyers do' to win their cases. Could Cal Fire's explanations be interpreted as disingenuous? Could reasonable inferences adverse to Cal Fire be drawn from these and the many other acts and omissions laid out in this record? The thing speaks for itself.

In making this order and in addressing the issues as set forth, it is always possible that a party that sees itself as aggrieved might point to some individual

point or points, and argue at length that the Court's determination is wrong. Because this Court's painstaking review considered the entire record of the proceedings, the Court views this exercise as pulling at a thread or threads in a huge tapestry or looking at a scuff or misplaced stroke in a mural. The big picture still stands out clearly.

The only change the Court makes, in incorporating these items by reference here, is that the Court substitutes the word ~~for~~ false for perjury. Credibility issues relating to the evidence are resolved in all instances against Cal Fire, but perjury is a word most commonly used in a criminal law context. Taking into account that the State's chief law office is representing Cal Fire, and continues to espouse the truth of many of the statements and actions of Cal Fire, investigations, other than in a civil context, would appear unlikely. The Court does not comment on those matters.

Terminating sanctions are cumulative to other sanctions authorized by law. In order to prevent injustice to Defendants, full compensatory fees and expenses will be awarded. Separate and apart from inherent authority, statutes and case law provide for full compensatory fees and expenses in cases of egregious misconduct such as this case.

In addition to the foregoing; Cal Fire is obligated to pay Defendants' full compensatory attorney fees, because, had it prevailed, it would have recovered its fees as an obligation under contract. This conclusion follows from Health and Safety Cade 13009, 13009.1, Civil Code 1717, and applicable case law. The Attorney General has advanced its entitlement to fees

when it benefited Cal Fire, and there is no reason in law or in equity to retreat from the fair and reasonable implications of that argument when it works to the benefit of Defendants.

Full compensatory attorney fees are justified by application of the Private Attorney General provisions of Code of Civil Procedure 1021.5. The robust and necessary defense mounted by Defendants, made necessary by the wrongful actions of Cal Fire, greatly benefited the public. The abuses of Cal Fire, especially as they relate to WiFiter Fund, which Cal Fire persistently attempted to cover up, shined light on abuses so that corrective action could be taken. That contribution to the public good greatly outweighed consideration that Defendants were attempting to stay alive financially by defending against Cal Fire's claims.

In making these awards, the Court has considered all relevant factors, including, without limitation, the multiplicity and complexity of the issues, the consequences fa Defendants of failure of their defense, the skill and experience of legal counsel, the bad conduct of Cal Fire which resulted in the Defendants having to employ experts and go to great lengths to uncover the governmental corruption, the reasonableness of the rates charged by counsel for the parties, including, in some instances, voluntary reduction in regular hourly rates, and the successful results which greatly benefited the public. This is a nonexclusive list of some of the factors considered. The Court had the benefit of experience over many years, both as a trial and appellate advocate and as a trial judge.

To the observation that the award of attorney fees and expenses is a big number, a question is presented. Compared to what? The Plaintiffs went 'all in', and in this case it meant all in to win at any cost. Defendants were forced to meet these challenges. The cost of Plaintiff Cal Fire's conduct is too much for the administration of justice to bear. The Court concludes that, although the awards are substantial, they are fair and reasonable in the circumstances.

A FINAL WORD

The conduct of Cal Fire does not inspire confidence that it will do anything other than press forward with litigation. 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 flask required countless hours of study and consideration. The conclusions arrived at, being of great consequence to the parties, were only arrived at after long and careful deliberation. The Court is aware that its rulings resulting from the hearings concluded on July 26, 2013 are already on review in the Court of Appeal. The Court is also aware, if its understanding of the law is correct, that the determinations here made, involving as they have, the issuance of terminating sanctions, may moot the appeal already under way. That is because the issuance of sanctions is said to be reviewed on an "abuse of discretion" standard of review.

One of the most helpful discussions of that standard of review which the Court has found is that set forth by Presiding Justice Conrad Bushing's concurring opinion in *Miyamoto v. Department of*

Motor Vehicles (2009) 176 Gal. App. 4th 1210. This Court is and always has been thankful that appellate Court exists to protect litigants and the public from errors committed by trial judges. Trial Courts and appellate Court each have their functions, and the final litmus test is whether, following applicable standards of review, the Trial Court got it right.

The Court, once again, encourages the parties in any effort to come to an agreeable settlement. In the Court's opinion, in order for this to occur, someone at Cal Fire must look at the facts of the matter, consider not just the advocates, but also the appraisal of the disinterested Trial Court, and assess whether it is fair, just, and appropriate to keep up the fight. The conclusion of this Court must be unpalatable to Plaintiffs, but it is the decision of the Court.

Of course, the appeal could fight over every issue, such as whether each of the claimed costs are fully justified. The Court is of the view that, if Cal Fire came to the table, the parties could agree amount of fees, expenses, and costs that would be paid to conclude the matter. However, if that is not possible, and if the matter comes back to the undersigned after affirmance, the Court will be required to consider Defendants' application for further fees and expenses in aid of enforcement of judgment. The Court wishes all parties success in their continuing efforts to resolve this matter.

Dated: FEB 04 2014

Leslie C. Nichols
Leslie C. Nichols
Judge of the Superior Court

Appendix H

28 U.S.C. §455(a)

Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Appendix I

Federal Rule of Civil Procedure 60(d)(3)

Other Powers to Grant Relief. This Rule does not limit a court's power to: … (3) set aside a judgment for fraud on the court.