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SIERRA PACIFIC INDUSTRIES

SUPERIOR COURT OF CALIFORNIA

COUNTY OF PLUMAS

UNLIMITED JURISDICTION

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.

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

~~[PROPOSED]~~ ORDER GRANTING SIERRA PACIFIC'S MOTION FOR FEES, EXPENSES AND MONETARY AND TERMINATING SANCTIONS

Date: February 3 & 4, 2014
Time: 9:00 a.m.
Dept: 4
Judge: Hon. Leslie C. Nichols

Action Filed: August 9, 2009

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 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, Kelly 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.

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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 by the United States, and resolved that action through settlement shortly before its scheduled trial in July of 2012.

[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.

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 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 July 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 July 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 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

[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.)

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-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

[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 13009.1 within 30 days of their receipt of the letter unless they wrote a check to the General 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.

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 parte 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 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 Pursuant to California Code of Civil Procedure Section 2023.030 .**

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

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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. † Counsel Paul Gordon's reading from the hearing in Court on February 4, 2014 2CM Judge

> 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 Cal.App.4th 967, 992.)

1. Cal Fire Has Engaged In Pervasive Discovery 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 discovery rules and to abide by the Court's

[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

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 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

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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 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.

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 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 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.

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[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) "Wildfire Origin & Cause Determination Handbook," and its companion and interagency wildland fire investigation training course and manual known as FI-210.

[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 fire's progression: blue designates a backing indicator, yellow designates a lateral indicator, and red designates an advancing indicator.

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 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

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

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 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]

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 Investigator Falsified J.W. Bush's Interview Statement, and Incorporated that Falsification Into Its Interogatory Responses.

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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. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64, 74 [internal quotations 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 as a consultant, denied in his deposition what he had conceded in Cal Fire's counsel's presence serveral weeks earlier.

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 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 I-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 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."

[14] Cal Fire's own expert Bernie Paul testified that he thought this discrepancy between the tape and the written statement was "either malicious and evil or it's incompetence." (Ex. 61 at 789:7-14.)

(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 closest federal lookout, known as the Red Rock lookout tower, was being manned by Caleb Lief. At roughly 2:00 p.m., Karen Juska, another federal employee, was in the process of responding to Lief's 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, USFS 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 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, 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

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[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 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.

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 lapse 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 Others 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~~ 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] 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.

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

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 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 signifcant 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 perfection of the appeal. Stated

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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; *Neff 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).)

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 clear-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 of WiFITER 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: (1) 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(o).)

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(o).) "'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)(1), 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 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

[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.

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* (1983) 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 on 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 §1021.5 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

[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

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 13009.1. (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 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

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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.").)

[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."

Court found 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 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

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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 13009.1 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 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 section1717 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.

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 expression of intent, makes the provision of attorneys' fees under sections1021.8, 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.

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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).)

[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.

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 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 pled 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* (1996) 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.

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

[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.

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. AWARD 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 and 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:

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 attorneys' 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 multiplier.

IT IS SO ORDERED.

Dated: FEB 04 2014, 2014

Leslie C. Nichols
Honorable Leslie C. Nichols
Judge of the Superior Court