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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)

DEFENDANTS' SUPPLEMENTAL BRIEFING REGARDING CAL FIRE'S DISHONESTY AND INVESTIGATIVE CORRUPTION

DATE: February 3 & 4, 2014
TIME: 9:00 a.m.
DEPT: 4
JUDGE: Hon. Leslie C. Nichols

Action Filed: August 9, 2009

DOWNEY BRAND LLP

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I. INTRODUCTION

The hallmark of all discovery obligations is telling the truth. If a party fails to do so, the very purpose of discovery is perverted and the essence our judicial process is destroyed. "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].)

Notwithstanding this clear imperative – and after four years of repeatedly doing violence to it – Cal Fire now attacks the entire judicial process by claiming that Government Code Section 821.6 creates absolute immunity if this Court were to find that Cal Fire had repeatedly breached its discovery obligations. After absorbing the shock of that argument, these Defendants now appreciate Cal Fire's disclosure of it, as it helps explain just why Cal Fire thought it could put these Defendants through the horror of this matter: among other things, written interrogatory responses that incorporate a fictional Official Report as "proof" of Cal Fire's claims against these Defendants; the destruction of Cal Fire's chief investigator's extensive field notes despite anticipated litigation; the failure by Cal Fire to produce thousands of responsive documents in violation of the Code, and then Cal Fire's brazen failure to produce those same documents in violation of two Court orders; the production of false metal fragment "evidence" that the investigators claimed to have recovered from one area, when their "evidence" actually came from another; and month after month of deposition testimony where Cal Fire's witnesses, some hiding behind blue uniforms and gold badges, were allowed to play an almost endless game of cat and mouse with the truth.

Using discovery in the manner as it was used by Cal Fire is not discovery; it is something else. And Cal Fire's attempt to obtain money damages through the violation of its discovery obligations deserves the most severe sanctions.[1] Prevailing against a party that is willing to

[1] "No legal system can long remain viable if lying under oath is treated as no more than a social solecism. Swearing to tell the truth is a solemn oath, the breach of which should have serious consequences, especially where the perjurer tells his lie in an attempt to obtain money damages." (See *U.S. v. Cornielle* (2d Cir. 1999) 171 F.3d 748, 753.)

engage in such discovery abuse is not guaranteed. Indeed, any satisfaction the Defendants had in uncovering some of Cal Fire's falsehoods was soon replaced by a deep concern over what they were not able to uncover, as the absence of honesty and the constant presence of investigative corruption converted a solemn process into a tragically expensive sham exercise. When a governmental actor uses discovery in order to abuse the truth, and when it does so while believing it is actually immune from the consequences of its actions, it is not only an affront to this Court and to our judicial process, it is also an affront to the public itself, calling into question our ability to trust the very people who are responsible for enforcing the law. No one is above the law, whether those laws pertain to the handling of public funds or to the presentation of evidence through our discovery rules. Not even Cal Fire.

II. EXAMPLES OF DISHONESTY AND INVESTIGATIVE CORRUPTION

A. False Testimony Regarding Scene Processing

The investigators violated their discovery obligations when answering questions about how they processed the specific area of origin. Under Cal Fire's FI-210 training regimen and the NWCG handbook, wildland fire investigators must carefully "grid" the specific origin area to identify the point of origin. (Ex. 33 at 418:6-12, 458:8-460:4, 482:7-484:3.)[2] Their testimony confirms here that neither did. White testified that he and co-investigator Dave Reynolds conducted a visual search of the specific area of origin on their hands and knees for an "hour, hour and a half" on September 5, 2007, and that he did so *before* taking his first photos at 8:18 a.m. from two reference points. (*Id.* at 318:15-319:12; 1367:12-21.)[3] However, co-investigator Reynolds testified that he did not arrive at the scene until about 8:00 a.m. to 8:15 a.m. on that day; he testified that the "first thing" he and White did that morning was take the reference point photos, and that the investigators conducted a continuous two hour search after doing so. (Ex. 36

[2] All exhibit references herein are to the Omnibus Declaration of William R. Warne In Support Of Defendants' Supplemental Briefing Regarding Cal Fire's Dishonesty and Investigative Corruption.

[3] In addition to the timing of Reynolds' arrival, the photographic evidence also disproves White's testimony. The photograph which Josh White took at 9:16:13 a.m. on September 5, 2007, when compared to the photograph his co-investigator Reynolds took at 6:05 p.m. the evening before, shows the soil and duff in the specific area of origin essentially undisturbed, with small branches and twigs still sitting on top of the soil in the same position both before and after the alleged grid search White claims that he and Reynolds did on their hands and knees first thing that morning.

at 614:5-615:22, 772:13-773:3.) Both investigators did neither, as their actual actions were chronicled that morning by their photos from 8:18 a.m. to 10:02 a.m. and which demonstrate that neither had time to conduct an hour, or for that matter, two hour, grid search.[4] (Ex. 7.) The investigators violated their training, and then attempted to cover-up those violations by violating their discovery obligations and oaths once discovery began here.

B. False Testimony Regarding the Foundation of the Investigation

Lead investigator Joshua White repeatedly abused his discovery obligations while testifying on issues relating to the essence of his investigation – the point of origin.[5] White testified that the only points of origin he and his co-investigator ever identified were two points on a spur trial, labeled E2 and E3; he testified that he found the metal fragment ignition source evidence adjacent to those two unmarked rocks; and he testified he never identified any other potential points of origin. (Ex. 33 at 582:23-583-11.) But White and Reynolds' choices and actions show their testimony to be untruthful. The investigators did absolutely nothing with or to their "claimed" points of origin E2 and E3 on either September 4, 2007, or September 5, 2007. At the same time, they did everything possible to their actual, and suppressed, point of origin.

White was forced to concede that he and Reynolds never marked their E2 and E3 points of origin with a white flag, the color that investigators use to denote the point of origin. (Ex. 33 at 599:22-600:14; see also Ex. 43 at 361:14-362:17.) Specifically, he testified that he and his co-investigator used blue, yellow, and red indicator flags as they processed the scene, but that they *never* placed a white flag for any purpose at all. (Ex. 33 at 309:21-310:17, 590:24-591:9.) In addition to conceding his failure to mark E2 and E3 with a white flag, the most important flag placed in an origin determination, White admitted that he and Reynolds never documented those

[4] The investigators' effort to concoct a grid search is belied by the photographs taken that morning, which demonstrate that both White and Reynolds were working on placing and photographing evidence placards from just after 8:18 a.m. through 9:35 a.m., and that they then packed up and hiked down to the landing below, setting up and taking the photos by 10:02 a.m. of the metal fragments they collected. (See Ex. 7.) The photographs prove that neither White nor Reynolds were down on their knees searching for anything. Neither spoke truthfully, as required by their discovery obligations.

[5] White conceded that one of the *primary* goals of a wildland fire investigation is to find a point of origin. (Ex. 33 at 730:20-25, 2418:12-2419:5.) White also testified that finding that point is necessary before determining a fire's cause because that is where any physical evidence of the actual ignition is likely to be located. (*Id.* at 2403:22-25.)

points. When he was asked why, White said, "I don't know." (*Id.* at 567:25-568:15, 2516:8-17.) White took no photos of the rocks he testified were his "points of origin." When asked "can you tell me why you didn't do that?" White responded, "no." (Ex. 33 at 569:15-22, 2516:8-17.) But this testimony was false. White simply did not want to reveal that he fabricated these points of origin and suppressed the evidence pointing to the truth.[6]

Although the investigators did nothing to document their E2 and E3 points of origin on September 4th and 5th, they did everything possible to document their actual, and suppressed, point of origin, by photographing it, measuring it, GPS'ing it, and sketching it. Defendants learned about this different point of origin through painstaking discovery, not from the Official Report. First, these Defendants discovered five photographs taken on September 5th that were not included in the Official Report. All of these photographs were focused on an area that White never revealed either in the Official Report or during his deposition testimony. White took each one of these five photographs from chosen reference points RP1 and RP2, and they are the only such photos he or Reynolds took during the entire investigation. (Ex. 6 at CDFM000339-CDFM000343.) Each one of these photographs depicts a white flag in the middle of the field of view, hanging from a metal stem placed into the soil next to a large rock. (*Id.*) The large white flag rock in these five September 5th photographs is the same rock White photographed Reynolds crouching over three times the evening before, as Reynolds was staring down to take the only GPS reading of the investigation. (Ex. 6 at CDFM000332.)

[6] White took critical photographs on September 5, 2007, at 9:16 a.m. and 9:25 a.m. which he referred to as "overview of the indicators." (Ex. 6 at CDFMO00359, Ex. 8 at CDFMO00364.) 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, as this Court can see, there is nothing whatsoever signifying any interest in their claimed points of origin E2 and E3. The absence of any flag or evidence placards at the official points of origin, of course, stands in stark contrast to (a) the investigators' significant effort to place numerous other colored flags and evidence placards within the area of origin to create a photographic record of numerous other, less primary points of interests, and (b) the presence of a white flag in the same "overview of the indicators" photo at the same spot as it is shown in the five photographs that White left out of the Official Report. Once the presence of this white flag was shown to the Moonlight investigators through the use of a computer screen and native photographs with magnification, each of them preposterously 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. There are many lies in this matter, but the investigators' stubborn refusal to simply admit the obvious reflects a profoundly disturbing cynicism towards the legal process in general, and the purpose of our discovery rules.

Reynolds wrote the GPS coordinates from the white flag rock on his Fire Origin Investigation Report ("Origin Report"), which White also failed to include in the Official Report. (Ex. 10, Ex. 37 at 1425:2-23.) The second page of this Origin Report contains a sketch, which reveals a single point of origin labeled with an "x" (as the key below defines "x" as "point of origin"). (Ex. 10.) The same "x" is also labeled with a "P.O." (*Id.*) The sketch also contains measurements between the reference points RP1 and RP2 and the white flag rock (with precision to a quarter of an inch) as well as the bearings from the same reference points to the white flag rock (with precision to a single degree). (*Id.*) Cal Fire experts Larry Dodds and Christopher Curtis confirm that these distance and bearing measurements intersect perfectly at the white flag rock. (Ex. 43 at 882:1-883:23; Ex. 56 at Depo. Ex. 5059.)[7]

Consistent with the investigators focusing on a singular point of origin, there is one plastic bag containing metal shavings, which the Official Report calls E1. (Ex. 5 at CDFMO000241.) White struggled to explain why, if he actually had two points of origin, he would have put what he claims are competent ignition sources in one bag, and eventually conceded that doing so would have been a violation of evidence collection protocols. (Ex. 34 at 1455:10-1457:18.)

Despite the significant and purposeful nature of this multi-faceted effort, White further frustrated discovery by simply denying any knowledge of his actions, even when Defendants confronted him with indisputable evidence of those actions. When initially provided with a copy of the first photograph he took on September 5, 2007, at 8:18 a.m., White denied that there was any white flag in its view since he had earlier testified that he and Reynolds placed no white flags during their investigation. (Ex. 33 at 597-600). When he was forced to admit its existence, White was not able to explain why there was a white flag in the center of five photos he carefully aligned and took from his chosen points of reference. (Ex. 33 at 598:22-599:21.) He testified that he and Reynolds never identified the point of origin as being in the vicinity of the rock marked with the white flag, and that he never identified the rock as a potential point of origin

[7] In another case, White had no trouble explaining the process and the purposes of that process. Specifically, on August 8, 2008, in *Cal Fire v. Dustin White*, White testified that, "aside from trying to get the absolute measurement to be able to go and recreate that point of origin so that I establish two reference points. Then I take those measurements. That's the very foundation of a origin and cause report." (Ex. 24 at 42-43.)

before finding a different spot, and that he never searched for metal fragments in its vicinity. (*Id.* at 2512:22-2513:23.) White testified that he does not know why Reynolds was crouched over the same rock with a GPS unit (despite the fact that he took not one, but three photos of Reynolds performing this act), does not know when the white flag was placed on that rock, when it was removed, or why there are a series of photographs of it. He denied that the white flag was ever even the focus of the photographs. (*Id.* at 629:2-630:20.) He even testified that he took the five photos which depict the same white flag in the center not to photograph a white flag, but to instead photograph the reference rocks themselves, so that others could "go back out to this exact location and have this angle line up and be able to say, okay, that's Reference Point 1." (Ex. 33 at 2510:17-2512:25.) White refused to acknowledge that the photographs were centered, like a gun sight, on the white flag, as doing so would reveal that he was initially focused on a different point of origin. (*Id.*)

Additionally, when confronted with other evidence demonstrating the falsity of his testimony, White persisted in abusing the discovery process. At some point, White was shown a copy of his ultimate co-investigator Welton's narrative, largely copied from the work of Reynolds. Therein, Welton unwittingly reveals the obvious, writing that White took photographs from two reference points to a single point of origin. (Ex. 11 at CDFMO000056.) When asked under oath if he knew why that was the case, White testified, "I don't."[8]

It is simple to conclude that White "forgetting" about these numerous acts or denying them outright – many of which White characterized under oath in a *different* Cal Fire matter as "the foundation of an origin and cause report" – is not a function of misplaced memory.[9] It is a

[8] In the same section of White's deposition, the following questions and answers were exchanged: "Q: And do you know why there is a white flag at that rock? A. I believe I have answered it. No, I don't. Q: Okay. And it's true that you guys changed your point of origin at some point in time after that morning of September 5th, correct? A: No." (Ex. 33 at 632:13-24.)

[9] It is also not the consequence of definitional differences either, as Cal Fire recently argued when it claimed the "point of origin" here must mean the specific area of origin, as opposed to an actual point, and that the flag must have been marking only that broader area. Cal Fire's excuses are baseless as a matter of common sense, as a matter of all that was done to record that "foundational" point down to a quarter of an inch in terms of accuracy, as a matter of how it was labeled and photographed, and as a matter of White's own testimony. In response to questions focused on Welton's own use of such terminology in her narrative on the investigation, White testified as follows: "Q: Well, there's a big difference between specific origin area and point of origin, right?" White responded, "there's a difference. . . . "Q: Right, and there's two separate things there. The point of origin is not the specific origin, correct? A: That's correct. They are two different things. Q: And you would expect the person that's a special agent with a

function of investigative corruption, transported into the province of this Court's jurisdiction for ill-intent and without regard for the solemn vow of honesty inherent in all discovery.[10]

In short, the investigators did not forget about these actions when they intentionally removed the evidence of each of them from the Official Report. And they did not forget about these actions when they attempted to remove them from their memories as they testified, much like a child who closes her eyes believing that in doing so she will disappear. Each act was purposeful, and the combination of those acts during discovery regarding the very foundation of an origin and cause investigation was a mockery of our judicial system, causing Defendants' fees and expenses to escalate immeasurably.

C. The Wasted Discovery Efforts to Analyze the Metal Fragments

White and Reynolds imported their false narrative about where they had collected the E1 metal fragments into the discovery process through interrogatory responses and deposition testimony. This in turn compelled Defendants to undertake the long and expensive assessment of the ignition capabilities, if any, of these metal fragments and the interaction of the bulldozer tracks with rocks E2 and E3. That effort was extremely expensive and time consuming.[11] And, in the end, all of the work was a wasted effort because, as Defendants eventually uncovered, the

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hundred investigations under her belt would know the difference, correct. A: I believe we have gone over it, but yes, I would expect." (Ex. 33 at 754:6-25) But Cal Fire's excuses are even more baseless since, before Defendants ever revealed to White that they had found photographic evidence of the white flag, they asked White if the investigators had planted any white flags for any reason, and he said "no." (*Id.* at 309:21-310:17). Reynolds repeatedly testified in the same manner until it became clear that the game might be up on denying the obvious, and during his last day of testimony in November of 2012, Reynolds attempted a different false narrative, saying that they may have initially thought it was important, but abandoned it that same morning. (Ex. 37 at 1365:16-1366:8.) But Reynolds effort to salvage their situation fell apart since their own photographs revealed no interest in E2 and/or E3 and a singular interest and focus on their suppressed point of origin.

[10] Testifying in this manner is akin to two law enforcement officers, while under oath, "forgetting" about the apprehension of a criminal suspect – even though the officers recorded his weight and height, even though they sketched his face, even though they photographed him not once, but numerous times, and even though his presence at the scene was recorded when the crime was committed – and then failing to weigh, sketch, measure or photograph their new suspect at all.

[11] The details regarding Defendants' work in this regard is certainly well documented in the various motions *in limine* regarding the metallurgy and geologic experts, but in summary, Defendants were forced to conduct days upon days of discovery inspections at leading metallurgical labs including Schafer labs in Livermore, CA, and U.C. Davis, along with a detailed engineering analysis of the metal fragments and their ignition potential, an assessment of the rocks and their characteristics, and the alleged bulldozer trajectory necessary to reach rocks E2 and E3, and to respond to similar experts from both state and federal governments. As set forth in the Declaration of William Warne regarding the reasonableness of Sierra Pacific's fees, the costs of this work was approximately $1,854,731.54.

investigators collected the metal at the white flag rock, not at rocks E2 and E3 as falsely claimed by White and Reynolds in the Official Report.[12] It would be no different than a scenario where ballistics experts are battling over whether there is a match between a gun and bullet recovered at a scene, only to learn that both the gun and the bullet had been planted by a corrupt investigator. Here, White and Reynolds collected metal at the white flag rock, and through their testimony and report, in essence *planted* that evidence at E2 and E3. Having done so, they should be held accountable for all of the wasted effort on the analysis of evidence that *they knew* had nothing to do with the ignition of the fire at their alleged E2 and E3 points of origin.

D. White Lied about Having Never Seen the Sketch Until the Litigation

White repeatedly testified that he knew nothing about Reynolds' single point of origin sketch until well after the investigation, and that he only discussed its existence with counsel. (Ex. 33 at 1825:23-1826:1, 3660:11-16, 3661:22-3662:9.) As was the case on numerous fronts, this testimony was again false. On September 5, 2007, after taking their last photographs on the hillside at 9:25 a.m., White and Reynolds pulled up their flags and evidence markers (including, of course, the white flag) and walked back down to the landing where they had parked their trucks. (Ex. 8.) At 10:02 a.m., they took two separate photographs of the metal they had collected that morning and which they had placed in the single plastic bag labeled E1. They took these photos by spilling the contents of the plastic bag onto some white paper before White snapped the shot. (Exs. 17, 19.) One of those photos reveals more than just the metal they had collected before releasing the scene at 10:15 a.m. – it shows that, despite their testimony to the contrary, Reynolds and White had the sketch with them at the time, a fact perfectly aligned with everything else these Defendants have uncovered on the investigators' deception regarding their

[12] Why else would White have placed metal fragments into a single bag collected from two locations some ten feet apart, in violation of the most basic investigation methods and his own training? Why else would White and Reynolds have lied about the white flag? Why else would the rocks E2 and E3 have no indicator flags, no evidence tents, no markings, nothing to suggest they were in any way relevant to Joshua White in the "overview of indicators" photographs intended to document all that they had accomplished at the scene, and taken shortly before he released the scene, and roughly 1/2 hour before Reynolds said they "were done." Why else would the only scene diagram on September 5 have distance and bearing measurements that perfectly triangulate to the white flag and not E2 or E3? Why else would White have waited until September 8, 2007, to collect rocks E2 and E3, long after he had released the scene three days before?

point of origin work. (See Exs. 18, 20.)

E. Cal Fire Gave Evasive Discovery Responses about White's White Flag Testimony

Unfortunately, Cal Fire's counsel participated in White's effort to deny the truth by passively allowing it to take place during his deposition, and by actively advancing the same narrative during written discovery. 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. (Ex. 65, RFA No. 325 at pg. 86-87.) 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." (*Ibid.* & Ex. 66, FR No. 17.1 at pg. 75.) The reality is that this was an "evasive" response and that White never provided any "explanatory testimony." White or Reynolds placed a white flag next to that rock, Reynolds took GPS readings from that rock, White took five photos triangulated on the white flag, Reynolds took distance and bearing measurements to the rock, Reynolds prepared a sketch that designated the rock as the "Point of Origin," yet both investigators supposedly had no recollection whatsoever about the white flag, and Cal Fire's counsel advanced their denial of the truth by allowing their testimony to occur and through written responses that did the same.

F. Reynolds Feigns Ignorance of the White Flag

Unbeknownst to Defendants, before his deposition, Reynolds attended a meeting with White, his replacement Diane Welton, and lawyers from the U.S. Attorney's Office and the Office of the Attorney General. During this meeting, they looked at pictures and discussed the white flag. (Ex. 36 at 1065:14-1067:21, 1071:04-1072:16, 1077:15-1078:11, 1491:21-1500:10.) A few weeks *after* this meeting, Defendants deposed Reynolds and asked him about this same topic. In response, Reynolds still feigned ignorance, responding "what white flag?" and suggesting it "looks like a chipped rock to me." (*Id.* at 534:5-535:10; Ex. 37 at 1362:5-1366:13.) Reynolds proceeded to testify that, like White, he had no idea where the white flag came from. (Ex. 36 at 535:6-10, Ex. 37 at 1364-1364:3-12.)

Months later, and only after Defendants prevailed on a motion to compel, Reynolds was forced to reveal to Defendants the facts associated with his pre-deposition meeting and the white flag discussion with Cal Fire's attorneys, including the fact that the white flag was placed at the same location where Reynolds took his GPS measurements. (Ex. 36 at 1065:14-1067:21, 1071:04-1072:16, 1077:15-1078:11, 1491:21-1500:10.) Defendants followed-up by asking Cal Fire to admit that its attorneys had met and discussed the white flag with Reynolds prior to his deposition, thereby demonstrating the perjurous nature of his testimony when he pretended the white flag did not exist. (Ex. 65, No. 346 at pgs. 101-102.) Cal Fire admitted that its counsel had met with Reynolds, but in order to avoid admitting to the critical timing component, 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." (Ex. 66, No. 17.1 at pg. 82.)

G. Cal Fire Provided Dishonest Responses to Written Discovery about the Sketch

Defendants asked Cal Fire to admit that the "Point of Origin" in the sketch Reynolds prepared is the white flag. (Ex. 65, No. 359 at pgs. 112-113.) Cal Fire denied the request (*ibid.*), even though its own experts admitted this fact during their depositions. (Ex. 43 at 882:1-883:23; Ex. 56 at Depo. Ex. 5059.) Defendants also 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. (Ex. 65, Nos. 250, 262-263, 266, 268 at pgs. 44-45, 50-55.) Cal Fire again denied the requests. (*Ibid.*) 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." (Ex. 66, No. 17.1 at pg. 48.) However, White testified to the exact opposite; he claimed that the investigators processed the origin before the white flag photographs were taken at 8:18 a.m. (Ex. 33 at 1365:6-18.)

H. The Investigators Lied about Not Searching for Metal Around the White Flag Rock

White testified that neither he nor Reynolds searched for metal fragments around the "white flag" rock at any point during their investigation – after all, they supposedly have no idea why the white flag was placed there, have no idea why they measured it, photographed it, or placed its location on a sketch. (Ex. 33 at 2512:22-2513.) However, a comparison of photographs taken on September 4, 2007, and September 12, 2007, shows that the area around the "white flag" rock has been significantly disturbed through searching and sifting, just as one would expect from the evidence demonstrating that the investigators were dishonest with respect to where they found their metal. (Ex. 26-28.) In essence, the investigators planted evidence – they claimed that the evidence came from a location from where it did not come. Defendants spent millions of dollars on the work of numerous metallurgists and fire science experts analyzing this metal, all of which was the consequence of Cal Fire's fraud upon these Defendants.

I. Cal Fire Refuses to Concede that Its Investigators Were Dishonest

Defendants asked Cal Fire to admit that White and/or Reynolds provided false testimony about the white flag. (Ex. 63, Nos. 338-350 at pg. 199-209.) Cal Fire responded "denied" and asserted under oath that their "deposition testimony on this topic and all topics was truthful." (*Ibid.* & Ex. 64, No. 17.1 at pg. 126-131.) Cal Fire's denial reflects a complete lack of regard for the truth, as even its own experts were not willing to avoid the obvious. Both Bernie Paul and Larry Dodds admitted 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." (Ex. 40 at 843:25-844:25; see also *id.* at 158:18-159:9.) And Dodds conceded: "it's more probable than not that there was some act of deception associated with testimony around the white flag." (Ex. 43 at 965:12-17, 1038:4-8.) Dodds also testified that a "shadow of deception" hung over the investigators' testimony regarding their work. (*Id.* at 965:12-17, 1038:4-8.)

J. The Falsified J.W. Bush Interview

The undisputed evidence establishes that Joshua White produced a witness interview summary for J.W. Bush falsely attributing to him admissions of liability. Reynolds prepared a

summary of his unrecorded September 3, 2007, interview with J.W. Bush, in which Reynolds claims that Bush said he "believes Cat [Caterpillar Bulldozer] tracks scraped rock to cause fire." (Ex. 5 at CDFMO000133.) On September 10, 2007, White asked Bush during a recorded interview whether he had ever said he believed that a Cat scraped a rock and started the fire, and Bush flatly denied having done so. (Ex. 29 at 30:17-25.) White then quickly terminated the interview, and misrepresented what Bush had said in the Official Report, writing that "Bush reiterated the same information he had provided to I-1 Reynolds."[13] (Ex. 5 at CDFMO000135.)

The recording of the September 10, 2007, interview obtained in discovery proves that Joshua White's summary of the interview is a fabrication. Cal Fire and its counsel then continued the same fabrication in this litigation by invoking Civil Code section 2030.230 in its interrogatory responses and incorporating by reference documents, including this falsified witness interview summary, in lieu of providing factual statements. (Ex. 57 at Nos. 42, 76, 82, 85.) Even after Defendants uncovered the true facts, Cal Fire never modified the witness summary or corrected its false interrogatory responses.

K. Cal Fire Falsified the Ryan Bauer Interview, Which Cal Fire Incorporated into Its Interrogatory Responses

Ryan Bauer was reportedly spotted by Sheriff Deputy Benny Wallace on the afternoon of September 3, 2007, leaving the area where the fire ignited, shortly after it was reported. Ryan Bauer's parents were also discovered looking for their son in the vicinity of the fire shortly after it started. During his interview with Cal Fire, Ryan Bauer blurted out, "I was with my girlfriend all day. She can verify that if I'm being blamed for the fire." (Ex. 31 at 17:5-6.) This was false. [14]

[13] During his February 2, 2011, deposition, White was asked if he knew why he had misreported what Mr. Bush had said, and he offered no justification, instead responding, "No. I don't know why." (Ex. 33 at 1908:3-1909:12.) Cal Fire's Bernie Paul confirmed this was "either malicious and evil or it's incompetence." (Ex. 40 at 789:7-14.)

[14] Defendants tracked down Ryan Bauer's girlfriend, Andrea Terry, who testified that Bauer was not with her all day, that he showed up mid-day, with a chainsaw in his pickup, and was dirty and had saw dust on his clothing. (Ex. 32 at 78-82, 89-92, 107, 209-211.) She also testified that Bauer, shortly after he arrived and in her presence, suddenly claimed to have spotted the smoke plume of the fire in its early stages from ten miles away. (*Ibid.*) Ms. Terry found it odd that Mr. Bauer saw a plume of smoke she could hardly see, and that he inexplicably "just knew right off the bat" that "[t]hat's where we [Howell's crew] are working." (*Ibid.*) To include in the witness interview a benign statement that Bauer "noticed the fire from his girlfriend's house" while omitting the suspicious circumstances of how he spotted the fire, and omitting a demonstrably false alibi, made the report of the Bauer interview, and interrogatories pertaining to it, that much more misleading and false, another component of Cal Fire's whatever-it-takes misuse of the discovery process.

Cal Fire's investigator Dieter Schmitt prepared a summary of Ryan Bauer's interview that omitted any reference to Bauer's false unsolicited alibi. (Ex. 5 at CDFMO000148.) Cal Fire and its counsel then injected this materially incomplete witness interview into the litigation by invoking section 2030.230 in its interrogatory responses and incorporating by reference documents, including this falsified witness interview summary, in lieu of providing factual statements.

L. Cal Fire Suppressed Information about What Happened at Red Rock, and Incorporated False Witness Interview Summaries into Its Interrogatory Responses

Cal Fire's chief investigator White and its own experts have consistently testified that the timing of the report of smoke from Red Rock Lookout 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. (Ex. 33 at 1679:2-8.) White cites to the timing of the call-in from Red Rock multiple times in the Official Report's narrative, and he references the interviews of the lookout and witness Karen Juska in his narrative. (Ex. 5 at CDFMO000035.) For this reason, the fact that Karen Juska found the lookout standing on the side of the cat-walk opposite from where the fire was burning, urinating on his feet, and the fact that Juska smelled the heavy odor of marijuana on his hand and his radio, were critical pieces of relevant information. (Ex. 72-73.)

But the Official Report reflects an active effort to suppress that information, as do the government's written and verbal discovery responses. The Official Report contains interview statements from Lief and Juska; both are written to create the impression that all was normal at Red Rock from the moment Juska arrived until they finally spotted the fire roughly 25 minutes later from the parking lot below. (Ex. 5 at CDFMO000162-174.) Although the interview summaries were drafted by Diane Welton, White reviewed the entire report before submitting it, and was responsible for its contents. (Ex. 33 at 733:4-735:1; 1675: 3-9.) According to White, he knew there was an issue associated with Red Rock and that there was a concern about the use of marijuana, but he did nothing to investigate it. (*Id.* at 1670:10-1676, 1679:2-16.)[15] Instead, he

[15] The fact that Welton spoke directly to White about marijuana use in the tower is about all that needs to be said regarding what he knew and what he didn't know. Certainly, there would have been no reason for Welton to discuss this with White unless it had some bearing on their joint investigation of the Moonlight Fire.

just summarized the false interview statements in the Official Report and remained completely silent with respect to what really happened at Red Rock. (Ex. 5 at CDFMO000035.)

Even assuming for the sake of argument that Cal Fire did not learn of the malfeasance at Red Rock until the litigation commenced, Cal Fire nevertheless abused the discovery process by relying on these statements in verified answers to interrogatories seeking "all facts" relating to the subject. (Ex. 57 at No. 79-81.)[16] Even after Defendants uncovered the true facts, Cal Fire never modified the witness interview summaries or corrected its false interrogatory responses. Sierra Pacific would urge this Court to watch the video montage Exhibit 77/Exhibit D to Motion to Seal to obtain a deeper understanding of just why the Red Rock story mirrors the larger story of Moonlight – whatever it takes.

M. White Destroyed Critical Evidence Even Though He Reasonably Anticipated the Moonlight Fire Litigation

According to Reynolds, White took copious notes during the scene processing of the alleged origin. (Ex. 37 at 1273-1277, 1301.)[17] At the time he took these notes during the investigation, he knew the Moonlight Fire was likely to result in litigation.[18] He nevertheless destroyed his notes (Ex. 33 at 3440:21-3446:16), thereby eliminating the contemporaneous record of what actually occurred, and effectively giving himself freedom to create whatever false narrative he desired.[19] By doing so, White was able to select and shape the evidence, and the

[16] On April 7, 2011, Sierra Pacific took the deposition of Larry Craggs, the USFS employee who verified the responses regarding Red Rock, and which essentially stated that September 3, 2007, was nothing but a routine day until the fire was timely spotted at 2:24 p.m. from the parking lot below. When his verified interrogatory response was put in front of him, Craggs was asked if it was truthful. He said it was not. (Ex. 77-78.)

[17] These notes relating to scene processing were of course critical, a contemporaneous reflection of what actually occurred, which would have likely included the investigators' careful steps with respect to the placement of the white flag, the collection of metal, and its documentation. Rather than carefully preserving this evidence, White destroyed it. He also deleted his computer files before the lawsuit was filed. (Ex. 33 at 350:2-352:16, 360:2-368:9.)

[18] On September 5, 2007, the day White and Reynolds processed the alleged origin scene, Reynolds listed Sierra Pacific Industries as the "Defendant" on a citation form. (Ex. 5 at CDFMO000051.) That same day, Cal Fire retained *litigation* consultant/metallurgist Lester Hendrickson, and Joshua White met with him five days later. (Ex. 44 at 309-313; Ex. 45.) By September 5, 2007, the Moonlight Fire had already grown to over 22,000 acres. (Ex. 13.) On September 7, 2007, Joshua White interviewed Bill Dietrich of Howell, and reported the following, "Dietrich said the [Safeco] policy was for $3 million liability insurance, as required by SPI. Dietrich said he would fax me a copy of their insurance policy." (Ex. 5 at CDFMO000143-144.) White testified that his investigation included assessing insurance policies of "potential defendants." (Ex. 33 at 1767:12-25.) White also admitted that he understood that fires of every variety can result in litigation. (Ex. 33 at 740:8-741:23.)

[19] White did the same regarding his interview with J.W. Bush, as White admits to destroying his notes of that interview. (See Ex. 33 at 1909:13-24, 3440:21-3441:4.)

Defendants' right to cross examine him on his field notes was lost. That Cal Fire has since attempted to institutionalize White's practice of destroying evidence is all the more reason why sanctions are necessary in order to compel Cal Fire's compliance with the discovery rules.[20]

N. White Changes His Opinions about the Direction the Fire Advanced

Mid-litigation – in fact, mid-deposition – White changed his opinions about the spread of the Moonlight Fire. In the narrative section of the Official Report, White opined that the fire advanced downhill with the wind.[21] (Ex. 5 at CDFMO000019.) The sketch White included in the Official Report indicates that the fire advanced from the alleged origin down the hill and toward the northeast. (Ex. 5 at CDFMO000058.) White has attested under oath that the opinions in the Official Report were "final" so that Cal Fire could avoid certain discovery obligations. (Ex. 35.)

What White apparently did not initially appreciate, but later learned during this litigation, was that his theory of fire spread was inconsistent with the Air Attack video of the Moonlight Fire. The video demonstrated that his alleged point of origin was downhill and away from the fire, a problem made even worse by the investigators' statement that the fire advanced northeast and downhill. In light of what the video reveals, they needed to say something close to the opposite – that the fire advanced toward the smoke, not away from it. For Cal Fire, however, the fix was easy, just change the facts as necessary and direct the fire in the required direction by simply changing the directional indicators by 90 degrees, from northeast to northwest. Thus, Josh White suddenly produced (mid-deposition) a new scene diagram showing the fire advancing to the northwest – a 90 degree shift from the Official Report.[22] (Ex. 23.) His new diagram came

[20] Cal Fire's effort to excuse such spoliation of evidence by arguing that White's "field notes were destroyed only after the information in them was transferred to his Report, which was and is the common practice" is without merit, and that he "transferred all of the case file information to his laptop computer, so all this electronic information is in fact preserved" is absurd. White has demonstrated a propensity to conceal and omit numerous things from the Official Report, including the only aspect of the scene processing that his co-investigator Reynolds felt was important enough to carefully document (the white flag rock diagram).

[21] Reynolds repeatedly testified that the Moonlight Fire burned toward the northeast out of the alleged origin, down the hill. (Ex. 36 at 304:8-305:23.)

[22] Curtis testified that "it causes me concern" that he was asked to prepare a document with "advancing spread indicators that are 90 degrees different than the official Moonlight diagram." (Ex. 56 at 767:23-768:7.) Curtis also agreed that by coupling the official/original sketch showing a fire advancing to the northeast with the aerial video, "you've got the fire spreading down the hill, according to the official sketch, into the green area that's not burning in the video" and in response to the question, "You see that? That's a big problem for them. Do you understand that?" he responded "I see your point, counsel." (*Id.* at 769:1-14.)

more than three years after his initial investigation. That White would change his opinion mid-deposition is itself an abusive discovery practice, but to have done so after swearing that his opinions were final so as to foreclose other discovery is clearly a misuse of the discovery process. Cal Fire's act of incorporating by reference the Official Report into its verified interrogatory responses, which it never amended, was another abuse. (Ex. 57.)

O. Cal Fire Included False Origin and Cause Reports for the Lyman Fire and Others In Its Interrogatory Responses

Cal Fire's effort to frame these Defendants included the creation of false origin and cause reports for three other fires, Greens, Lyman and Sheep, which Cal Fire then used to buttress its claim that Howell was prone to starting fires, and that the other Defendants knew or should have known as much. Cal Fire then moved this false narrative into the Moonlight litigation discovery process and into its interrogatory responses verified by Alan Carlson, where Cal Fire invoked Code of Civil Procedure 2030.230 and incorporated by reference the origin and cause reports for each of these fires in lieu of providing facts. (Ex. 57 at Nos. 7-12, 19-21, 157-159.)

The facts surrounding the Lyman fire are particularly egregious. The origin and cause report for that fire was authored by Cal Fire employee Les Anderson and states that the fire was caused by a Howell bulldozer. (Ex. 5 at CDFMO000269-272.) But this report was shown to be false when Anderson and another investigator, Greg Gutierrez, testified in their depositions that they never found the cause of the Lyman Fire, never concluded that Howell's equipment started the fire, and, in fact, were not able to rule out arson or other possibilities as the cause. (Ex. 84 at 199:9-201:17; Ex. 85 at 43:9-10, 44:9-13; Ex. 57 at Nos. 28-30.) Thus, Cal Fire simply created a conclusion that it wanted in order to get to Sierra Pacific, sacrificing an older woman whose only crime was running her own business, which went bankrupt shortly after Cal Fire forced her to pay $46,000 for a fire she did not cause. Even following the testimony of Anderson and Gutierrez, Cal Fire never withdrew its reliance on this false report in the context of its verified interrogatory responses.

P. Cal Fire and Its Counsel Enabled Chris Parker's Dishonest Testimony by Wrongfully Withholding Critical Emails Establishing Parker and Cal Fire's Scienter in Forming WiFITER

Cal Fire's Chris Parker was the founder of WiFITER. The State Auditor found, based on Mr. Parker's January 8, 2005, email (which Cal Fire failed to produce until its existence was disclosed by a third party), that his and Cal Fire's purpose in forming WiFITER was to circumvent state laws governing the expenditure of general fund dollars.[23] (Exs. 124-125.) By withholding that critical email in violation of the Court's order, Cal Fire and its attorneys made it possible for Mr. Parker to testify falsely on the subject. Specifically, Mr. Parker gave the following testimony:

> THE REPORTER: "Given that Cal Fire was already spending money out of its 02350 budget for purposes of providing some training to certain employees, why didn't Cal Fire simply use that budget rather than create the WiFITER Fund?"
>
> MR. FUCHS: Assumes facts. Lacks foundation. Calls for speculation.
>
> THE WITNESS: I have no idea why they didn't.

(Ex. 135 at 374:14-375:14.) Parker's testimony that he had "no idea" why "they" did not simply increase Cal Fire's authorized training budget is belied by his January 8, 2005, email, where, as found by the State Auditor, he explains that WiFITER was created to avoid state fund purchasing rules. (Ex. 143.) His reference to Cal Fire in the third person "they" is all the more dishonest, since *he* was the Cal Fire employee involved in the genesis of WiFITER.

Q. Cal Fire's Anthony Favro Testified Falsely in an Effort to Conceal Alan Carlson's Role in the WiFITER Scandal

In September 2009, Tony Favro, Cal Fire's chief auditor, internally circulated what he deemed to be a "final" WiFITER audit report. His report found that WiFITER violated SAM 8002. Favro thereafter deleted this finding from the audit report that Cal Fire publically released in November of 2009. Defendants first deposed Favro on October 26, 2012, and he gave

[23] Specifically, Parker wrote in his email that "I would (think I would) like to see an outside organization to receive the money so could be used in a more effective manner. If the State (CDF) receives the money there would be a lot of limiting factors on how, when, and where it could be used (limited to one budget year, purchase limits, locations, spending freezes, contracting with experts to provide training and program development, . . .)" (Ex. 143.)

testimony which covered-up Alan Carlson's role in the WiFITER scandal:

> Q. BY MR. THOMAS: What role did Alan Carlson play in administering WiFITER within Cal Fire?
>
> MR. FUCHS: Assumes facts. Lacks foundation. Calls for speculation.
>
> THE WITNESS: I don't know.
>
> * * *
>
> Q. Okay. Have you ever had any discussions with Alan Carlson concerning WiFITER?
>
> MR. FUCHS: Asked and answered.
>
> THE WITNESS: No.

(Ex. 129 at 166:17-20, 164:15-19.) At the time of this deposition, Cal Fire had not produced Favro's emails and work papers concerning the WiFITER audit, including his draft audits and the documents that revealed the earlier audit report containing the finding of WiFITER's illegality, or his emails with Alan Carlson regarding WiFITER. By denying that he had discussions with Alan Carlson about WiFITER, Favro concealed Carlson's role in causing Favro to delete the finding of illegality, and the existence of the first final audit.[24]

On December 6, 2012, Favro submitted a written change to his deposition transcript, and altered only one word, changing "No" to "Not that I recall", on the question of whether he had discussed WiFITER with Carlson. (Ex. 129.) On February 8, 2013, his deposition resumed, and by then Sierra Pacific had obtained at least some of the WiFITER documents, including the first final audit (and the finding of illegality). Favro then admitted Alan Carlson was one of two people who caused Favro to delete the finding of illegality, and now "recalled" his discussions with Carlson regarding WiFITER in some detail. (Ex. 129 at 111:1-7, 248:8-15.) Clearly, the

[24] After all, had Favro answered the question truthfully, the examination would have gone something like this: *Q: Have you ever had any discussions with Alan Carlson about WiFITER? A: Yes. Q: What did you discuss? A: He urged me to delete the finding of illegality. Q:What finding of illegality? A: The one in my first final audit. Q:What first final audit?" A: The one I circulated but never revealed publically that found WiFITER violated SAM 8002. Q: Have you produced it? A: No. Q. Why not? A: I have never been asked to produce anything. Q: Didn't you know the deadline to produce WiFITER documents was a week ago? A: No, no one ever told me that or asked me for anything. Q: But you were in charge of the audit, isn't it obvious that you and your email account would be a key repository of WiFITER documents? A: Yes I agree. Q: Can you think of any legitimate reason for Cal Fire not to have even asked you for documents? A: No.* This entire line of questioning would have likely avoided several hundred interrogatories, multiple motions, and multiple depositions including further depositions of Favro.

testimony Favro gave on the first day of his deposition was false, as were the corrections to his deposition, and given in an effort to minimize and conceal altogether Carlson's role in WiFITER.

R. Cal Fire and Its Counsel Enabled Kay Price's Dishonest Testimony by Wrongfully Withholding a Critical Email Establishing Her Knowledge of the WiFITER Scandal

Cal Fire apparently contends that since CDAA's name was on the WiFITER bank account, somehow the money belonged to CDAA (not Cal Fire) and was thus not state money, even though Cal Fire directed all of the money into the account, and had absolute control over how the money was spent. This is why Favro (and later DOF and the State Auditor) concluded it violated SAM 8002. To further discover this issue that Cal Fire refused to truthfully address in its interrogatory responses, Defendants deposed Kay Price, Cal Fire's administrator of WiFITER in 2011 and 2012. Price was asked about a December 5, 2011, email from her co-worker Candy Leffler, wherein Leffler wrote with regard to WiFITER, "It's my understanding that Cal Fire isn't supposed to have ownership of the funds . . . ." Price testified about this email as follows:

> Q. But did you understand what she meant by: "It's my understanding that Cal Fire isn't supposed to have ownership"? Supposed to according to what? Did she tell you?
>
> A. You'd have to ask her. I have no idea what she's meaning there.

(Ex. 133 at 235:6-12; see also *id.* at 235:28- 236:7.) At the time of this testimony, the Attorney General's office was withholding a November 30, 2011, email from Price to Leffler, wherein Leffler had raised the same issue with Price, and Price wrote in a responsive email the following:

> The intent of the fund is to show that we don't own, control, or handle the money. It will create issues if CAL FIRE owns it, which is why we have the fund, blah, blah, blah. My head hurts with all this stuff.

(Ex. 153.) In view of Price's November 30 email to Leffler, it is clear that Price had supplied the reasoning to Leffler in the first place, and that she feigned ignorance during her deposition. Ms. Winsor and Mr. Fuchs prepared Price for her deposition.

S. Cal Fire Continues to Abuse the Discovery Process and This Court's Orders By Proffering False Testimony from White, Dodds, and Paul

Cal Fire has continued to proffer false testimony through and including the pendency of the instant motion, through the sham affidavits of Joshua White, Larry Dodds, and Bernie Paul.

In their reply brief, and in their associated evidentiary objections, Defendants have analyzed in detail the reasons why these declarations are false, and why they should be rejected by this Court. But regardless of whether they are stricken, the Court should consider them as further evidence justifying the award of severe sanctions. As addressed in more detail in Defendants' evidentiary objections, each of these declarations is false and should be rejected. In summary:

- White claims in his Declaration that the white flag rock, the existence of which he initially denied, which he measured to the 1/4 inch, took bearing measurements to, photographed multiple times, and at which Reynolds took a GPS reading and labeled P.O. on a scene sketch that lay under the metal fragments while White photographed them on September 5, 2007 (a sketch White falsely denied seeing for the first time in 2010) meant nothing to him.
- White's declaration that it is his opinion that there is a 90% probability that a ground inspection for fire would have resulted in the early detection and suppression of the Moonlight Fire is both false and impermissible. It is false because it contradicts the opinion in the Official Report, which merely states that the fire "could" have been detected by such and inspection. White already swore the opinions in the Official Report were final. (Ex. 35.) It is also impermissible as violative of the Court's discovery orders, since White did not offer the opinion during his deposition.
- White also falsely states with respect to his new 90% probability opinion, "I would have so testified if given the opportunity." This statement is likewise false, because White and the AG know he was given the opportunity to offer the opinion during his deposition and in the Official Report. But knowing that he had *not* done so, Cal Fire's counsel nevertheless successfully foreclosed any further deposition of White, and the Court properly barred any new opinion. Cal Fire also never made any effort to make any offer of proof for this new opinion at the *Cottle* proceeding.
- Larry Dodds now falsely claims in his new declaration that he was duped into testifying that a "shadow of deception" (his words) hung over the investigation, and that it is more likely than not that White and Reynolds engaged in "acts of deception." The Court need only read carefully the testimony of Dodds to appreciate just how disingenuous his new declaration is, as well as how it is contradicted by other evidence.
- Bernie Paul now falsely claims in a new declaration that he was misled during his deposition, and that all he said about Cal Fire's investigation, including his views that White's conduct was "reprehensible", were uninformed speculation. The transcript clearly shows that Mr. Paul was given the testimony of the investigators, given all the relevant documents, and was not misled in any respect. To the extent it has not already found time in its busy schedule to do so, Defendants respectfully request that the Court review whatever it can of Mr. Paul's videotaped expert deposition.

T. **WIFITER Document Production**

Defendants have recently chronicled in detail[25] the circumstances of Cal Fire's violation of this Court's April 10, 2013 Order, when it failed to produce thousands of WiFITER documents on or before April 30, 2013. That violation of the Court's order is clearly a basis for both monetary and terminating sanctions, particularly since Cal Fire advanced arguments to the Court that were belied by the withheld documents. In addition, Defendants further note that Cal Fire also violated this Court's October 30, 2013, Order requiring that Cal Fire produce all documents on or before October 31. Cal Fire did not do so, but represented to the Court and Defendants in successfully opposing Defendants' ex parte application to adjust the briefing schedule, that it had and that there were no more documents to produce. On November 22, 2013, that misrepresentation was revealed when Cal Fire produced over 2,000 more pages of WiFITER documents, roughly five hours after Sierra Pacific's counsel sent an email demanding whatever else there was. There is no doubt that repeated violations of the Court's orders are ample reason for an award of stiff monetary and terminating sanctions.

III. ANALYSIS

Notwithstanding this Court's December 2, 2013, scheduling order giving Cal Fire every opportunity to respond to the issue of terminating and/or monetary sanctions for discovery abuses, Cal Fire recently attempted to side-step that order by giving notice of its intent to file emergency briefing on the issue. There certainly was no emergency, and there is no support for Cal Fire's suggestion that this Court lacks jurisdiction. Controlling Supreme Court authority makes clear that the trial court undoubtedly has jurisdiction to impose the full range of discovery sanctions under Code of Civil Procedure section 2023 (including terminating sanctions) notwithstanding the pendency of Cal Fire's notice of appeal.

Code of Civil Procedure section 916(a) generally stays trial proceedings during the pendency of an appeal. But, the filing of an appeal does not stay "any other matter embraced in the action and not affected by the judgment or order." Indeed, the fact that post-judgment or post-

[25] Defendants incorporate those prior arguments and evidence here.

order proceedings may render an appeal moot is not, by itself, enough to stay the proceedings. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180.) Rather, such proceedings are stayed only if "the possible outcomes on appeal and the actual or possible results of the proceeding are irreconcilable." (*Id.* at 190.) In other words, an appeal does not stay ancillary or collateral matters that do not affect the judgment or order on appeal. (*Id.* at 191; see also 9 Witkin, Cal Procedure (5th), Appeal § 20.)

A post-judgment or post-order proceeding is "ancillary or collateral" to the appeal if the proceeding could or would have occurred regardless of the outcome of the appeal. (*Id.*) A sanction proceeding constitutes a "collateral" or "ancillary" matter. (*See Day v. Collingwood* (2006) 144 Cal.App.4th 1116, 1125 ("[A] sanctions motion is a collateral proceeding that is not directly based on the merits of the underlying proceeding.").) That is because an award of sanctions is akin to an order awarding costs or attorney's fees, which are within the scope of the trial court's subject matter jurisdiction over collateral matters pending appeal. (*Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 368; see also *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 360 (court retains jurisdiction to award attorney's fees despite filing of notice of appeal); *In re Marriage of Sherman* (1984) 162 Cal.App.3d 1132, 1140 (an award of attorney's fees as costs is a collateral matter not affected by the order or judgment from which an appeal is taken).)

Here, the instant sanctions proceeding is clearly a collateral and/or ancillary matter that has no effect whatsoever on Cal Fire's pending appeal. In particular, the imposition of proper sanctions against Cal Fire, whether terminating or monetary, does not diminish or change the effectiveness of the Court's *Cottle* orders on causation and/or the judgment on the pleadings, which are the subject of appeal. In fact, Cal Fire's discovery abuses, while pervasive, do not serve as a predicate for the Courts' *Cottle* orders. And, any award of sanctions premised on Cal Fire's discovery abuses will not affect either dispositive order nor interfere in any way with the appellate court's ability to rule on the issues raised on appeal. Likewise, the affirmance or reversal of the Court's dismissal orders on appeal will not undermine or affect the Court's determination in the instant sanctions proceeding. (See *Varian, supra,* 35 Cal.4th at 191 (stating that the trial court retains jurisdiction where "the affirmance or reversal of [the appealed order]

does not and cannot eliminate the need for [the trial court's] additional proceedings"). Despite Cal Fire's effort to avoid the natural and necessary consequences of its actions under Section 2023, the trial court retains subject matter jurisdiction over this "collateral" proceeding. (*See id.* (trial court retains jurisdiction over a collateral matter "despite its potential effect on the appeal, if the proceeding could or would have occurred regardless of the outcome of the appeal").)

Moreover, Cal Fire is seriously mistaken if it believes that it is somehow immune from this Court's authority to impose sanctions for its flagrant discovery abuses. Contrary to Cal Fire's assertions, this Court has the power under Section 2023 to use whatever permutations of its authority to deter and punish inexcusable discovery conduct, whether through termination of the matter and/or imposition of monetary sanctions. Cal Fire's abuses here infected virtually every aspect of this action, from perjury, to pervasive false interrogatory responses, to spoliation of critical evidence, to willful violations of the Court's Orders requiring production of WIFITER documents. Given Cal Fire's pervasive discovery misconduct, this Court should, and can, impose all sanctions necessary, including both terminating and monetary sanctions, to remedy Defendants for Cal Fire's despicable conduct. (*Laguna Auto Body v. Farmers Ins. Exch.* (1991) 231 Cal.App.3d 481 (affirming dismissal sanction on the basis of multiple discovery abuses).) (Civ. Code § 3523 ("For every wrong there is a remedy.").)

Indeed, where a party's willful discovery abuses are so pervasive and atrocious, as Cal Fire's are here, discovery sanctions in the form of reimbursement of all attorney fees and costs are warranted. (*Qualcomm, Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008) (vacated in part on other grounds in *Qualcomm, Inc. v. Broadcom.*) As in *Qualcomm*, Cal Fire's failure to produce critical documents justifies the imposition of severe monetary sanctions against Cal Fire. But Cal Fire's misconduct is far more pervasive – its concealment of documents is a part of a pattern of discovery abuses exhibited in this action. For example, in addition to concealing documents, Cal Fire engaged in spoliation of evidence. It also falsified and modified witness statements and testimony. Cal Fire and its counsels' vast array of discovery abuses clearly illustrate their "above the law" attitude. These discovery abuses significantly increased the scope, complexity, and length of this litigation.

Terminating sanctions are clearly warranted under the facts presented here. Cal Fire's abuses here closely mirror (and are worse than) those in *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, in which a terminating sanction was imposed. In *Doppes*, plaintiff discovered during trial that defendant's further non-compliance with discovery orders had occurred. The trial court denied plaintiff's motion for terminating sanctions in favor of a lesser sanction. In its decision reversing the trial court, the court of appeal provided the following reasoning, which is instructive and applicable here:

> In this case, we make the extraordinary, yet justified, determination that the trial court abused its discretion by failing to impose terminating sanctions against defendant for misuse of the discovery process. The record demonstrates defendant engaged in repeated and egregious violations of the discovery laws that not only impaired plaintiff's rights, but threatened the integrity of the judicial process.
>
> ... Bentley persistently misused the discovery process, withheld documents, and violated four discovery orders or directives from the discovery referee.
>
> ...once it was learned during trial that Bentley still had failed miserably to comply with discovery orders and directives, we hold the trial court had to impose terminating sanctions.
>
> Each degree of sanctions had failed. The trial court and discovery referee had been remarkably moderate in dealing with Bentley, ultimately imposing only a form of issue sanction after repeated violations of discovery orders that would have justified terminating sanctions. Yet, during the middle of trial, it was learned that Bentley still had not complied with discovery orders and directives, had been irresponsible at best in preventing destruction of e-mails, had not fully permitted data mining of e-mails as previously ordered, and had failed to produce documents it should have produced months earlier. Bentley's discovery abuses were "willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules." (*Mileikowsky v. Tenet Healthsystem*, *supra*, 128 Cal.App.4th at pp. 279-280.) Terminating sanctions against Bentley were imperative.

(*Id.* at 971, 993-994.) Just as in *Doppes*, Cal Fire here has failed miserably to comply with discovery orders and directives, has destroyed critical evidence, has failed to produce documents it should have produced months earlier, and, unlike in *Doppes*, has engaged in a systematic and pervasive campaign of perjury with the singular purpose of recovering money from these Defendants.

Aside from the financial detriment imposed on these Defendants, Cal Fire's complete

disregard for the discovery process is an affront to this Court and the judicial process. Given the egregious nature of Cal Fire's misconduct, an imposition of terminating sanctions and/or significant monetary sanctions is certainly warranted. Accordingly, Defendants request that the Court issue an order awarding all of their defense fees and costs against Cal Fire as sanctions for bringing this corrupt and meritless action, as well as terminating this action.

IV. CONCLUSION

Cal Fire's discovery abuses are not prevarications around the margins of largely irrelevant issues. Instead, Cal Fire's investigative corruption and dishonesty go to the core of what it was attempting to accomplish in this matter: the use of our judicial process and discovery system in order to advance a reprehensible goal – the framing of these Defendants and the collection of damages from them regardless of the truth and without the regard to the Code of Civil Procedure. Because the joint origin and cause investigation of the Moonlight Fire was thoroughly corrupt, Cal Fire had a choice in this matter: either tell "the truth, the whole truth, and nothing but the truth," or continue the dishonesty of the investigation under oath. Unfortunately, it did the latter and made matters even worse by violating the discovery rules and court orders in an effort to prevail.

Today, the parties to this matter are still living with the consequences of that decision. Cal Fire and its counsel continue to make shameful excuses for their investigators and for themselves, and have most recently turned to claiming that they are all immune from any consequences of their choices in any event. The Defendants, on the other hand, are left with enormous legal fees and costs, and a deep concern over what Cal Fire was nearly able to accomplish in this matter by ignoring its obligations while setting fire to the truth and to the rules of discovery. Unfortunately, the point of origin for that fire is Cal Fire's sense of invulnerability as it stands before this Court.

DATED: December 13, 2013

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