SUPERIOR COURT OF CALIFORNIA
COUNTY OF PLUMAS

Date: **February 4, 2014**

California Department of Forestry
Plaintiff,
vs.
Howell, Eunice E et al
Defendant.

Case Number: **GN CV09-00205**

And Consolidated Cases
Complex Civil Litigation

ORDERS ON MOTIONS TO TAX COSTS AND FOR ATTORNEY FEES, EXPENSES, AND SANCTIONS, AND MOTIONS RE PRIVILEGE

PREFACE

"There are no small cases, only small judges." Judge Jon Tigar in passing along a tip from a judicial colleague. This is true. Every case before a judge is the most important case in the world to the parties, and the proper adjudication of that case is of paramount importance to the administration of justice. The undersigned favors early involvement in cases, so that ground rules might be established, good relations between the Court and counsel can be fostered, and so that the case can be managed so as to maximize opportunities for voluntary resolution, or, if that is not possible, timely and cost effective adjudication through trial. In this matter, however, the undersigned was appointed as all purpose judge only shortly before trial, after all dates had been established and when the matter had been pending for almost four (4) years.

Despite the Court's best efforts, no agreement could be achieved, and big issues are now presented to the Court for hard decisions. The issues have been hard fought and very contentious. Counsel have cooperated with the Court in meeting suggestions and

orders for timely submission and delivery of documents, and the Court appreciates that cooperation. For reasons that become apparent, the Court is required to speak clearly and forcefully to the issues in controversy, and the Court's obligations cannot be shirked or delegated. The Court has taken care to use language no more forceful that that employed by our appellate Courts. Even so, the Court reminds counsel that, in announcing its decisions and in making its orders, the Court deals only with the issues presented for decision. Courts are usually ill advised to make broad moral or existential pronouncements, and the Court declines to do so here.

THE BOTTOM LINE

Plaintiffs' motions to tax Defendants' memoranda of costs, motions related to claims of privilege, and Defendants' motions for attorney fees, expenses, and sanctions were heard, argued, and submitted this day. Prevailing party Defendants seek drastic remedies. After full and careful consideration, the remedies will be granted. Full compensatory attorney fees and expenses and costs will be awarded to all Defendants against Plaintiff California Department of Forestry and Fire Protection, and prevailing party costs will be awarded against all Plaintiffs, jointly and severally. Terminating sanctions shall issue against Cal Fire. Sanctions sought against attorneys Tracy L. Winsor and Daniel Fuchs will be denied.

BACKGROUND

These consolidated cases, involving multiple parties, arises out of a wild fire, which occurred in Plumas County on September 3, 2007. The lead case was filed on or about August 3, 2009. The cases were noticed for an estimated three -month jury trial set to commence with jury selection on July 29, 2013.

The undersigned received the designation as all- purpose Judge in this complex litigation matter on May 2, 2013. The order from Plumas Superior Court Presiding Judge Hon. Janet A. Hilde confirmed the appointment order executed by Chief Justice Tani Cantil-Sakauye. When the order was received, two dates had been set, the trial date and a trial readiness date of July 1, 2013. The Court issued its notice to all counsel of record and order on May 2, 2013. The Court traveled to Plumas County and resided there from June 3 to 7, 2013. The Court met with all counsel on June 6, 2013 and filed and served on that day its trial Court perspectives and orders – first meeting with counsel. Thereafter, on July 1, 2013, the Court heard and decided the motions *in limine* filed by the parties. The Court delivered its written order on all issues to counsel on that day.

At the July 1 hearing on motions *in limine*, the Court made clear that it would order a mandatory settlement conference unless counsel accepted the Court's strong request and direction that they make their clients available for mediation of up to two days. Mediation did occur before the Honorable Read Ambler, retired Superior Court Judge (JAMS). Judge Ambler determined after one day that further mediation would not then be effective. He made himself available for further consultation. The Court greatly appreciates and thanks Judge Ambler for making himself available and for familiarizing himself with the issues on such short notice.

The Court received trial briefs on July 15, 2013. Upon reviewing the briefs, the Court filed and served its notice to counsel concerning issues to be addressed during the three days set aside for hearings on July 24, 25, and 26, 2013. Those issues included, without limitation, a hearing on the motion for judgment on the pleadings, consideration of whether expert testimony evidence was required, and a hearing to determine whether

Plaintiffs could establish a prima facie case before trial. Before commencing the hearing on July 24, 2013, the Court filed and served on counsel its further Trial Court perspectives – pre jury selection meeting with counsel. Upon completion of the three days hearings, the Court issued its written orders and judgment in favor of Defendants and against Plaintiffs.

The Court and counsel worked diligently through three full Court days, July 24 through 26, 2013. The parties brought able litigation teams to Portola, and the Court was favored with briefs on the issues presented. Further briefs were filed as the issues were refined. In the Court's opinion, all issues were fully briefed and argued before submission.

This is the Court's recollection concerning the conduct of the *Cottle* hearing. Paul Gordon, of Gordon & Polland LLP, Cal Fire's litigation counsel, made the *Cottle* presentation throughout July 24 and 25. The Court invited counsel for Defendants to argue what it thought would be the deficiencies in Plaintiffs' cases. With that notice, Mr. Gordon made extensive offers. Briefing followed, and that briefing was submitted throughout the three- day hearing. The Court had hoped to have time on Friday, July 26, 2013, to discuss jury trial issues. However, sometime in the morning of Thursday, July 25, it is the Court's recollection that Mr. Gordon reported that he had much more to present. Accordingly, the Court invited him to continue his presentation. Mr. Gordon continued through Thursday afternoon. As the Court recalls, Mr. Gordon, toward the end of the day, said, "Judge, I'm just about done," or words to that effect. The Court directed counsel for Defendants to prepare and email proposed orders to Plaintiffs. Counsel complied on the evening of July 25.

The Court's perspective is that something changed on the morning of Friday, July 26. After affording counsel for Cal Engels time to consult with his client, the Court

resumed the hearing. The Court found that the advocacy torch had been passed from Paul Gordon to Robert Charles Ward, Cal Fire's second outside litigation counsel, at Shartsis Friese LLP. Mr. Gordon, with whom the Court and opposing counsel had engaged over the two previous days, remained mute on July 26, 2013. The tenor of the presentation changed. Now Cal Fire argued procedure, due process, not enough time, not enough notice, etc.

Late in the morning of Friday, July 26, 2013, counsel for Cal Engels Mining Company, the party whom the Court understood had the biggest financial interest in the matters in issue, announced that his client had agreed with Defendants to dismiss its claims with prejudice in exchange for a waiver of costs. After a recess to allow counsel to confirm authority to bind his client with the settlement [a party representative was absent from Court], the Court conducted a *voir dire* of counsel and confirmed the settlement. Thereupon, the Court dismissed Cal Engels claims with prejudice.

Prior to trial, on July 18, the Court had issued its written directive that counsel of record appear at all sessions of the Court unless leave for good shown was granted by the Court in advance. The Court was surprised to learn on Friday, July 26, 2013, that counsel for Brandt Plaintiffs was not present. Counsel had not contacted the Court in advance. Upon inquiry by the Court, Tracy Winsor, supervising Deputy Attorney General, informed the Court that she had received a call from counsel and that, for some family related reason, he could not appear. She said she had agreed to appear specially for counsel. This was not permitted by the Court's July 18 notice, except as provided above. Counsel for Defendants moved to default the Brandt Plaintiffs. The Court declined to grant that harsh order, but the Court noted on the record that it had done all it could to assure

appearance of responsible counsel for each party. Accordingly, as requested by counsel for Brandt Plaintiffs, counsel for Cal Fire agreed to protect the interests of those parties.

SOME WORDS ABOUT THE TRIAL JUDGE

It is a continuing privilege to have served as a Superior Court Judge for thirty years, twenty-five years as a Judge of the Superior Court for Santa Clara County and five years in service of the Chief Justice as a member of the Assigned Judges Program. This experience has included every kind of case that comes before a general jurisdiction judge, including complex and coordinated litigation, now in Courts in twelve counties throughout California. Judicial experience was preceded by almost seventeen years of trial and appellate law practice, federal and state, including, civil, criminal, family and juvenile court representation, and including death penalty representation on appointment by the California Supreme Court.

Through representing clients and adjudicating matters across the range of human experience, some experiences cause disappointment, but not much causes shock. The Court has never been required to hold a lawyer in contempt of Court for litigation conduct, bang a gavel, or issue terminating sanctions based on trial misconduct by a party or counsel.

The Court's attitude toward this litigation has been to take each issue as presented. The Court's orders show attention to case management and the need to proceed in a diligent, thorough, and timely manner. The Court at all times and at each opportunity has encouraged the parties to use best efforts to achieve a fair settlement. Counsel, at least, appear as polarized as ever. The Court recalls that, in one of many scheduled telephone conference calls, some subject of future proceedings came up. The Court commented

(but, curbing enthusiasm, did not burst into song), ("Que sera, sera. The future's not ours to see. What will be will be. Que sera, sera.")

The Court evaluated the motions *in limine* and the matters embraced in the three day hearing leading up to the dismissal orders and entry of judgments on their own terms. Although it was clear that there could be post judgment proceedings, no thought was given to any such possible proceedings at those times.

The Court has now reviewed thousands of pages of documents. In addition, the Court has viewed all the video depositions presented by the parties. The Court observed at the first meeting of counsel that it had been over fifty years since the undersigned has worked for a number of summers during college as a member and foreman of a fire crew at Yosemite National Park. It is not difficult to imagine that all the parties in these cases feel some affinity for the women and men who work the fire lines and do all the hard and often dangerous work involved in fire suppression. Of course, the advocacy of counsel and the rulings of the Court in no way reflect on the work performed by those hard working individuals. Other issues have been called out for the Court's determination.

THE LEGAL FRAMEWORK

The law concerning Plaintiffs' motions to tax costs is set forth at great length and detail by the contending parties. The Court has carefully considered the authorities presented and the evidence. No good purpose would be served by expounding on the law in this order. It is digested in many places, including in Witkin, California Procedure, and in California Judges Benchbook, Trial, chapter 16, sections 30 – 57.

As it relates to Defendants' motions for attorney fees, expenses, and sanctions, Cal Fire [the motions are pending only as against Cal Fire and cited attorneys] contends that

the Court lacks jurisdiction to rule on the motions. It further argues that, even if the Court has jurisdiction to rule on the motions, it cannot make a money order, because that would in effect be a damages award. The claim is that Cal Fire and its attorneys are statutorily immune from any such award. Whether it involves a claimed cost of $100.00 to rent a refrigerator at lodging during trial proceedings to refrigerate insulin for counsel's type I diabetes (which Cal Fire derides as merely convenient "to take a break from work to go get a cold drink.") to any claim for costs, expenses, fees, or sanctions (except for a $355.00 filing fees), Cal Fire says, "No." Even as to the $355.00 costs suggested by Cal Fire, other Plaintiffs seek apportionment.

The Court's task is to review the voluminous evidence, in light of the applicable law, and determine which view of the evidence has more convincing force than that opposed to it. Having considered everything the parties presented, and neither party having exercised their right to request the Court to consider oral testimony, case law puts the Court in the best position to evaluate the credibility and the weight of the evidence. As it relates to sanctions, the Court provided two full rounds of briefing to the parties so that they could comprehensively put forth their positions on all sanctions, including the issue of terminating sanctions. Paul Gordon, counsel for Cal Fire requested that opportunity, and the Court granted it. After accommodating that request, another attorney for Cal Fire indicated its desire to make an emergency application to suspend that presentation. The Court indicated there was no emergency. All positions were to be fully laid out in accordance with the briefing schedule, and the matter would be heard on the date(s) long set, February 3, and, if necessary, February 4, 2014.

Case law instructs that, in considering a trial court's imposition of sanctions, the question is not whether the trial court should have imposed a lesser sanction; rather the question is whether the trial court abused its discretion by imposing the sanction it chose. No authority states that terminating sanctions may not be issued unless the court finds that the sanctioned party prejudiced an opponent's ability to go to trial. Sanction orders are reversed only for arbitrary, capricious, or whimsical action. In choosing among its various options for imposing sanctions, a trial court exercises its discretion, subject to reversal for manifest abuse exceeding the bounds of reason. See *Liberty Mutual Fire Insurance Company v. LcL Administrators, Inc. (2008)* 163 Cal.App. 4th 1093 (Opinion by Butz, J., with Hull, Acting P.J., and Cantil-Sakauye, J., concurring), cases cites, and many other cases.

In ruling on the motions before the Court, the Court in every instance resolves credibility and weight of evidence issues in favor of its rulings and any and all findings, express or implied. Although the standard of evidence review is the civil standard of preponderance of the evidence, the Court has been fully satisfied even by the higher clear and convincing standard of review.

SOME WORDS ABOUT ADVOCACY

Persuasive advocacy requires some sense of perspective. Time and again, the Court found exaggeration and hyperbole in the papers submitted by Cal Fire. From the assertion that its case was a "clear liability" case, to the defense of Cal Fire employees by reference to their uniform (appeal to authority), to reference to the Defendants as backed by insurance (appeal to prejudice), to disparagement of counsel (*ad hominem*), false characterization of the Jason Dorris Air Attack video work (*reductio ad absurdum*),

constantly and inaccurately characterizing Defendant's presentation as arguing a vast criminal conspiracy (*ad nauseam* argument by repetition), the presentations left the Court wondering to what audience Cal Fire was appealing. In characterizing the Dorris work as all about eighteen seconds, the Court was left to wonder, are the Higgs Boson and Albert Einstein accomplishments worth only a nickel, because one is invisible to the naked eye and the other can be expressed in such a short equation? The *ad nauseam* fallacy is well illustrated by the lyrics of Rogers and Hart's "Johnny One Note" (1937).

Counsel for Cal Fire appear utterly sanguine concerning the conduct of Cal Fire. They advance many arguments which do not persuade the Court. At one point in the papers, however, said counsel launched the thermo nuclear device known in rhetoric as the, "Have you no sense of decency" assault. On the thirtieth day of the Army McCarthy hearings, on June 9, 1954, counsel Joseph N. Welch galvanized the audience and the nation by saying to Senator Joseph McCarthy, "Have you no sense of decency, sir? At long last, have you left no sense of decency?" This courageous action hastened the demise of Senator McCarthy and helped bring the nation to its senses. It did nothing to persuade this Court.

In constantly misstating Defendants' claim as being that Cal Fire is engaged in a massive criminal conspiracy, and that accusation made by delusional people at that, did Cal Fire seek to suggest to a gullible trial judge that proof must be forthcoming to a beyond a reasonable doubt standard? Some of the rhetoric reminds one of the Scottish poet Andrew Lang's reference to facts: "Some people use them as a drunk uses a lamppost, more for support than for illumination." This kind of argument is lamentable. It is distracting. It takes more time and effort for the Court to scrutinize Cal Fire's papers for

any persuasive arguments and evidence that may be found. The Court has undertaken that extra effort. The rights and interests of the parties require no less.

OBJECTIONS, JUDICIAL NOTICE, AND EVIDENCE EVALUATION

All evidence objections except as noted in the companion order and in this order ruling on an attorney client privilege claim, are overruled and all requests for judicial notice are granted. The Court was presented with numerous briefs concerning admissibility of evidence. For example, Defendants assert that post close of discovery, and post judgment declarations are submitted which violate court orders and impermissibly seek to offer opinions that are barred by rules of law. They argue that the declarations are irrelevant and are simply filed to jam into the record information to attack the judgments entered after the Court's ruling on the motion for judgment on the pleadings and the ruling following submission on the *Cottle* issues. The point is taken.

Such efforts would be gross and impermissible and would be entirely unprofessional. The Court assumes that such efforts, if made, would be quickly detected by the reviewing Court and would be subject to sanction. No motion was made to reopen the proceedings leading to the judgments in favor of Defendants. No motion attacking the judgment in the trial Court was brought. The matters now on appeal are on a fully developed record.

Many of the objected to declarations are subject to grave deficiencies. The Court must take all these matters into account in evaluating the credibility and the force of the evidence. Having reviewed the great volume of submissions, the final question is, "Does it persuade?"

Counsel argue the weight that should be given to the deposition testimony and the recently filed declarations of, among others, Joshua White, Larry Dodds, and Bernard Paul. During these depositions Cal Fire interposed repeated objections to the form of questions. The Court has in mind all the rules of evidence in considering these matters and need not recite those rules here. Whether, for example, Mr. Paul reportedly wept with emotion when presented with hypothetical questions assuming predicate facts concerning Cal Fire's conduct before or during the during the pending litigation, or whether he was frustrated and angry, because he did not know the truth or falsity of those assumed predicate facts, is of no great moment. It is Court's opinion and conclusions on these matters, drawn from the whole record before the Court, that matters. It is the Court's decision only which is subject to appellate review.

Some declarations are admissible as at least relevant to the credibility of the declarant. Evidence Code section 210. Credibility is evaluated by considering factors set forth in Evidence Code section 780, including attitude toward the action in which testimony is given or toward the giving of testimony. That of course includes a consideration of those factors as they relate to the party proffering the testimony. The general rules are set out in the California Evidence Code and in CACI [Judicial Council of California Civil Jury Instructions], and we apply those rules daily. To the extent they are relevant, some of the declarations 'cut both ways.' It is the Court's obligation to determine the matter based on all the evidence, direct or indirect, and to draw those inferences which are supportable in the circumstances.

The Court can be expected to know the difference between valuable evidence which, on the one hand, properly assists in evaluating the truthfulness of testimony of

witnesses and the credibility of other evidence and, on the other hand, after the fact evidence which in effect merely vouches for or justifies the testimony given by witnesses during discovery. It cannot be forgotten that depositions provided each side the opportunity to ask questions of witnesses so that questions concerning credibility could be dealt with at the time testimony was provided.

In admitting the proffered evidence, subject to whatever limitations critical examination by an experienced trial judge may disclose, the Court hopes and expects that it will receive the deference provided by California Constitution Article VI section 13, Code of Civil Procedure section 475, and Evidence Code section 353.

The Court readily provides assurance that none of the evidence considered, in bulk or in particular, has overborne the Court's critical faculties. For all the great importance of the issues presented, and they are important, this is not a child abuse case; no one has submitted a gory photograph designed to inflame passion. Patience is a virtue, and the Court has tried at all times to display and exercise patience and be open to the presentation of each counsel.

To the extent zealous advocacy seemed to fan embers of appeal to sympathy, passion, or prejudice, it is the task of the Court to douse those embers with cool and logical analysis. Defendants provided evidence that invited the Court to doubt much of the evidence submitted by Plaintiffs. Trial lawyers argue the force and weight of evidence. It is an important part of advocacy. In this case, as distinct from so many cases over which the Court has presided, Cal Fire appears to argue that it is almost insulting to inquire about or argue the believability of evidence. Skilled advocates argue diametrically different positions, and it is well recognized that these issues must be decided. The Attorney

General when prosecuting cases against individuals and organizations in civil and criminal cases must often advance the kind of arguments addressing credibility advanced by Defendants here. The vehemence expressed in Cal Fire's arguments is perplexing.

In this case, counsel for Cal Fire writes in the last sentence of its opposition to Defendants' supplemental briefing requesting terminating sanctions, at page 23: 5-6, "Defendants' invitation to the Court to put its good name to these false accusations must be rejected." The Court is not sure what to make of that peroration. The Court assumes that nothing done by the Court in this hotly contested matter, including fulfilling its responsibility to rule on contested issues involving the evaluation of the force and weight of evidence, will imperil its good name, " the very jewel of one's soul." That would not enrich the robber, but would make the undersigned poor indeed. Shakespeare, Othello, Act III, scene 3. Nothing said by the author of the referenced brief has done anything to imperil him in his high standing before the Court, and the Court hopes and assumes that feeling is reciprocated.

SOME WORDS ABOUT THE FORM OF ORDERS

On occasions, appellate courts have questioned court orders that appeared to merely 'sign off' on the proposed orders submitted by counsel. Because this Court is doing just that, in part, a few words of explanation are in order. As has been made abundantly clear in previous orders of this Court, and as shown by the circumstances of this case, this is a complex litigation matter. The undersigned has undertaken to personally review each of thousands of pages of written briefs, exhibits, submissions, deposition transcripts and video submissions of the same, motions, objections, and proposed orders. This list is not exhaustive. As was the case concerning the motion for

judgment on the pleadings and the *Cottle* prima facie hearing and hearing on other issues which spanned the period July 24 through 26, 2013, the Court asked counsel to submit in advance proposed orders which set forth findings and orders. The Court informed counsel that these orders would be subject to critical Trial Court and perhaps Appellate Court review, so they should set forth those matters which could be fully supported by the record. Counsel had the proposed orders before them during oral argument, so there were no surprises. The same is true concerning the proposed orders submitted for these hearings.

This portion of the order speaks in the Court's own voice. It is not practical for the Court to scour the voluminous record to set forth every finding that would support the orders made here, nor does the law require anything like that degree of specificity. In the Court's view, however, each party is entitled to submit detailed orders, which, if granted, can be defended on appeal. The good news is also the bad news. Every aspect of review, research, evidence evaluation, writing, and decision-making has been undertaken by the undersigned Trial Judge, and by no one else. The fact that the Court has signed Defendants' proposed orders with few changes reflects only the reality that those orders are supportable in all respects. This document, which speaks in the Court's own voice, and the other orders signed and filed today, are to be taken together as orders of the Court. To the extent there are any inconsistencies in those orders, the Court deems them immaterial.

SIERRA PACIFIC INDUSTRIES' MOTION FOR DETERMINATION OF ATTORNEY-CLIENT PRIVILEGE PURSUANT TO CCP SECTION 2031.285; TO COMPEL COMPLIANCE WITH COURT ORDER; AND REQUEST FOR SANCTIONS

Cal Fire seeks to withdraw a document which Senior Deputy Attorney General Tracy L. Winsor previously declared under of penalty of perjury had been produced. This

document has been made public and was produced without objection pursuant to a Public Records Act request. To the extent Sierra Pacific Industries has a burden of proving that the communication was not made in confidence, that burden has been carried. The record convincingly establishes that any claim of privilege has been waived. Sierra Pacific Industries' motion to determine that the communication is not protected by the attorney client privilege is granted. Cal Fire's counter motion is denied on the merits and as moot. The positions advanced by Cal Fire's motion and opposition to Sierra Pacific Industries' motion lack any substantial justification and are subject to sanction. The positions taken by Cal Fire are simply representative of and add to the mass of evidence relied upon by the Court in making its terminating and other sanction orders.

Even if this particular ruling were found to be in error, the Court is convinced in light of the whole record that it is harmless. The admission of the disputed document is merely corroborative of other evidence. Even in a criminal case, where life and liberty are at risk, violation of the attorney client privilege does not necessarily result in reversal of a conviction. *People v. Corinthians Canfield* (1974) 12 Cal. 3d 699 (McComb, J.), in which a unanimous Court determined that a clear violation of the attorney client privilege was harmless error.

There is no need for any other discovery disclosure orders. They have been made in the past and not complied with. The Court has no confidence that they will be complied with now. These are simply additional facts and conclusions that add to the Court's determination that great prejudice has been inflicted upon Defendants. They support the companion order which is part of this order.

MOTIONS TO TAX COSTS

Costs are determined as set forth in the companion orders signed and filed this day, which is part of this order. Those costs are established based upon a consideration of the law related to determination of costs as well as appropriate sanctions to make Defendants as whole as is possible in the context of this litigation.

A general comment concerning costs applies with equal force to matters related to consideration of attorney fees and expenses. "In for a dime, in for a dollar," is the American version of, "In for a penny, in for a pound." One of the meanings ascribed to that saying is "to venture into something a bit risky or hazardous without being able to weigh up the consequences." Another reported meaning is, "Nothing ventured, nothing gained." The practical consequences of this phrase are played out in courts of law all the time. If counsel will simply pull together a small compendium of each order issued by the Court in this matter, they will note that the Court urged a careful and prudent approach to this litigation, and ongoing close communication between counsel and clients at all appropriate decision making levels. A further invitation in that regard was read into the record and handed to counsel on the morning of July 24, 2013. In response to the Court's direct question, and before the commencement of the three day hearing, Defendants made clear that, from their perspective, the grant of all the relief which it requested, would be case terminating. Thus, all counsel were abundantly clear concerning the potential risks and rewards of proceeding. As noted above, the Court had directed that all lead counsel be present at all sessions of the Court unless excused in advance by order of Court.

Counsel for Cal Engels and their client apparently kept in close touch, as suggested by the Court in its July 24, 2013, written and oral statement, considered all relevant factors,

and entered into a settlement. This settlement was that, on the one hand, Cal Engels would dismiss all its claims, with prejudice. On the other hand, all Defendants would waive their claims for costs. All counsel were in a position to have discussed these matters, in mediation and at Court. The other Plaintiffs largely simply joined in all of Cal Fire's arguments and presentations. The Brandt Plaintiffs even entrusted their case to Cal Fire's counsel on July 26, 2013, when their lead counsel was absent from Court.

Plaintiffs now ask the Court to apportion costs. This would be unfair and inequitable to Defendants. Plaintiffs, except for Cal Engels, which made an informed judgment, were content to take full advantage of Cal Fire's advocacy on liability issues. The potential damage to Defendants by virtue of the retention of all Plaintiffs in the case was enormous. Cal Fire's cost recoupment action was limited, but the claims of all Plaintiffs, pressed right up to trial, presented a great threat to all Defendants. The claim of Plaintiffs for equitable relief, in light of all the circumstances, including their willful continuance in the matter to judgment, continuance which required Defendant's resistance, comes too little too late.

MOTIONS FOR ATTORNEY FEES, EXPENSES, AND SANCTIONS

In this section of the order, the Court will comment on some of the law, which guides the Court in exercising its discretion in ruling on the motions for sanctions. The law is comprehensively argued in the papers, and the Court will not attempt an encyclopedic presentation of the applicable law.

As it relates to discovery sanctions, " "Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply ... and (2) the failure must be willful." " (*Villbona v. Springer* (1996) 43 Cal. App. 4th 1545, cited by *Liberty Mutual Fire Insurance Company.* v. *LcL Administrato*rs (2008) 163 Cal. App. 4th 1093.

As it relates to terminating sanctions, several important and recent cases from California appellate Courts have been briefed by the parties. The Court has jurisdiction to consider the matters in controversy. They involve matters collateral and ancillary to the judgments now on appeal. This is so even if the determinations here make moot the matters now under consideration on appeal. Code of Civil Procedure section 916 (a). *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal. 4th 180, Witkin, California Procedure (5th Edition), Appeal, section 20. Terminating sanctions are upheld for discovery abuses. *Laguna Auto Body v. Farmers Ins. Exch.* (1991) 231 Cal. App. 3d 481, *Liberty Mutual Fire Insurance Co., supra,* 163 Cal. App. 4th 1093. Indeed, appellate courts have overturned decisions of trial courts *not* to issue terminating sanctions. *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal. App. 4th 967.

The Court need not rely on statutory authority alone is considering and ruling on the grave issues presented by the pending motions. When a Plaintiff's deliberate and egregious misconduct makes any sanction other than dismissal inadequate to ensure a fair trial, the trial Court has inherent power to impose a terminating sanction. This authority is consistent with the overwhelming weight of authority from federal Courts and Courts of other states. *Stephen Slesinger v The Walt Disney Company* (2007) 155 Cal.App. 4th 736.

Defendants seek sanctions against attorneys Tracy L. Winsor and Daniel M. Fuchs. These requests are denied, because the record does not clearly establish that said attorneys directed or advised the egregious and reprehensible conduct of California Department of Forestry and Fire Protection. Although there is plenty of evidence to support a strong suspicion, the evidence does not preponderate. This determination in no way speaks to issues of legal ethics or compliance with the requirements of the State Bar

Act, including Business and Professions Code 6068. It only addresses the statutory basis for sanctions. In that regard, the Court should and does exercise caution. Cited counsel did not submit declarations in defense of their actions. It is possible that they felt constrained by the requirement to preserve confidences of their client, to maintain the attorney client privilege, or to maintain attorney work product.

The sense of disappointment and distress conveyed by the Court is so palpable, because it recalls no instance in experience over forty seven years as an advocate and as a judge, in which the conduct of the Attorney General so thoroughly departed from the high standard it represents, and, in every other instance, has exemplified.

While declining to impose sanctions against cited counsel, the Court emphasizes that it relied on statements of counsel as officers of the court in considering a number of matters, including *in limine* motions and ex parte applications. On too many occasions, that reliance was misplaced, and that reliance directly impacted the Court's ruling on matters before the Court. For that reason, Cal Fire should not rely to its benefit on *in limine* rulings, always subject to modification, which dealt with arguments or presentations that would have been made to a jury. This lenity, prudence, and caution as it relates to sanctions against officers of the court should not in any way be seen as softening or mitigating the force of this Court's decision, findings, and orders as it relates to Cal Fire. It simply means that, whatever else might be said about the conduct and advocacy of cited attorneys, it will not be sanctioned here.

Although it is most distasteful, the Court in discharging its duty finds it necessary, and accordingly, does bring the full weight of authority to bear in issuing terminating sanctions and full compensatory attorney fees and expenses against California

Department of Forestry and Fire Protection. The Court finds that Cal Fire's actions initiating, maintaining, and prosecuting this action, to the present time, is corrupt and tainted. Cal Fire failed to comply with discovery obligations, and its repeated failure was willful. This Court makes the same finding as that made in *Liberty Mutual Fire Insurance Co. v. LcL Administrators, Inc, supra,* 163 Cal. App. 4th 1093. Cal Fire's conduct reeked of bad faith. Just as in *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal. App. 4th 967, Cal Fire failed to comply with discovery orders and directives, destroyed critical evidence, failed to produce documents it should have produced months earlier, and engaged in a systematic campaign of misdirection with the purpose of recovering money from Defendants. As recently as November 2013, counsel for Cal Fire, in successfully resisting Defendants' request to alter a briefing schedule, strongly asserted that all discovery obligations had been fulfilled. The Court learned, not from Cal Fire, but from Defendants, that Cal Fire later dumped a huge new cache of documents on Defendants.

The Court relies on the authority provided by Code of Civil Procedure 2023.420 (a), 2023.030, along with the cases interpreting these statutes and others, as augmented by the inherent powers of the Court, in issuing this most severe sanction. This Court finds that Cal Fire has engaged in misconduct during the course of the litigation that is deliberate, that is egregious, and that renders any remedy short of dismissal inadequate to preserve the fairness of the trial. Accordingly, the Court exercises its inherent and as well as statutory and case law authority to dismiss with prejudice. *Stephen Slesinger v. The Walt Disney Company* (2007) 155 Cal. App. 4th 736.

The misconduct in this case is so pervasive that it would serve no purpose for the Court to attempt to recite it all here. As noted in *Slesinger*, it is not necessary to attempt a

catalogue of all the types of misconduct necessary to justify an exercise of the inherent power to dismiss, because "corrupt intent knows no stylistic boundaries." The Court's review of the whole record confirms that Defendants' characterization of the misconduct is well established. Parties, interested persons, and reviewing Courts will find examples in the table of contents of Defendants' Supplemental Briefing Regarding Cal Fire's Dishonesty and Investigative Corruption executed by counsel for Defendants on December 13, 2013, and Defendant Landowners' and W. M. Beaty's Brief in Support of Reasonableness of Fees, Expenses and/or Sanctions (Phase 2 Briefing), pages 10 through 12, executed by counsel for those parties on December 12, 2013. These listing are not entire, but they are well supported.

Among so many acts of evasion, misdirection, and other wrongful acts and omissions, one series of events stands out. It is all laid out in the papers and need not be detailed here. It relates to Joshua White's 'White Flag' testimony. The facts were problematic for Cal Fire. Cal Fire and the United States Government and their legal counsel, met with White to discuss it. At a later deposition in this action, White testified that the white flag "looked like a chipped rock." Counsel for Cal Fire remained mute. It was only later that Defendants found out about the meeting and, over objection, were permitted to inquire further. When they propounded questions to nail down the date of the earlier meeting, Cal Fire hedged, responding in effect that it didn't have time to go through the voluminous record to forthrightly respond. Of course, all it would have taken from Ms. Winsor was a telephone call to her U.S. Attorney counterpart in the federal litigation with an inquiry. "Can you please check your calendar to see if my calendar is correct on the date we all met to discuss the white flag problem?"

The Discovery Act was written to be largely self-executing. The Act was thrown out the window by counsel for Cal Fire. Cal Fire treats all this as entirely innocent and irrelevant. Cal Fire takes umbrage that anyone could draw inferences adverse to it from these facts. One hopes that this conduct is not explained in our law schools as what 'good lawyers do' to win their cases. Could Cal Fire's explanations be interpreted as disingenuous? Could reasonable inferences adverse to Cal Fire be drawn from these and the many other acts and omissions laid out in this record? The thing speaks for itself.

In making this order and in addressing the issues as set forth, it is always possible that a party that sees itself as aggrieved might point to some individual point or points, and argue at length that the Court's determination is wrong. Because this Court's painstaking review considered the entire record of the proceedings, the Court views this exercise as pulling at a thread or threads in a huge tapestry or looking at a scuff or misplaced stroke in a mural. The big picture still stands out clearly.

The only change the Court makes, in incorporating these items by reference here, is that the Court substitutes the word ~~for~~ false for perjury. Credibility issues relating to the evidence are resolved in all instances against Cal Fire, but perjury is a word most commonly used in a criminal law context. Taking into account that the State's chief law office is representing Cal Fire, and continues to espouse the truth of many of the statements and actions of Cal Fire, investigations, other than in a civil context, would appear unlikely. The Court does not comment on those matters.

Terminating sanctions are cumulative to other sanctions authorized by law. In order to prevent injustice to Defendants, full compensatory fees and expenses will be awarded.

Separate and apart from inherent authority, statutes and case law provide for full compensatory fees and expenses in cases of egregious misconduct such as this case.

In addition to the foregoing, Cal Fire is obligated to pay Defendants' full compensatory attorney fees, because, had it prevailed, it would have recovered its fees as an obligation under contract. This conclusion follows from Health and Safety Code 13009, 13009.1, Civil Code 1717, and applicable case law. The Attorney General has advanced its entitlement to fees when it benefited Cal Fire, and there is no reason in law or in equity to retreat from the fair and reasonable implications of that argument when it works to the benefit of Defendants.

Full compensatory attorney fees are justified by application of the Private Attorney General provisions of Code of Civil Procedure 1021.5. The robust and necessary defense mounted by Defendants, made necessary by the wrongful actions of Cal Fire, greatly benefited the public. The abuses of Cal Fire, especially as they relate to WiFiter Fund, which Cal Fire persistently attempted to cover up, shined light on abuses so that corrective action could be taken. That contribution to the public good greatly outweighed consideration that Defendants were attempting to stay alive financially by defending against Cal Fire's claims.

In making these awards, the Court has considered all relevant factors, including, without limitation, the multiplicity and complexity of the issues, the consequences to Defendants of failure of their defense, the skill and experience of legal counsel, the bad conduct of Cal Fire which resulted in the Defendants having to employ experts and go to great lengths to uncover the governmental corruption, the reasonableness of the rates charged by counsel for the parties, including, in some instances, voluntary reduction in

regular hourly rates, and the successful results which greatly benefited the public. This is a nonexclusive list of some of the factors considered. The Court had the benefit of experience over many years, both as a trial and appellate advocate and as a trial judge.

To the observation that the award of attorney fees and expenses is a big number, a question is presented. Compared to what? The Plaintiffs went 'all in', and in this case it meant all in to win at any cost. Defendants were forced to meet these challenges. The cost of Plaintiff Cal Fire's conduct is too much for the administration of justice to bear. The Court concludes that, although the awards are substantial, they are fair and reasonable in the circumstances.

A FINAL WORD

The conduct of Cal Fire does not inspire confidence that it will do anything other than press forward with litigation. The Court does not wish on any appellate tribunal the task undertaken by the undersigned: the personal review of every document and video deposition submitted in the case. This task required countless hours of study and consideration. The conclusions arrived at, being of great consequence to the parties, were only arrived at after long and careful deliberation. The Court is aware that its rulings resulting from the hearings concluded on July 26, 2013 are already on review in the Court of Appeal. The Court is also aware, if its understanding of the law is correct, that the determinations here made, involving as they have, the issuance of terminating sanctions, may moot the appeal already under way. That is because the issuance of sanctions is said to be reviewed on an "abuse of discretion" standard of review.

One of the most helpful discussions of that standard of review which the Court has found is that set forth by Presiding Justice Conrad Rushing's concurring opinion in

Miyamoto v. Department of Motor Vehicles (2009) 176 Cal. App. 4th 1210. This Court is and always has been thankful that appellate Court exists to protect litigants and the public from errors committed by trial judges. Trial Courts and appellate Court each have their functions, and the final litmus test is whether, following applicable standards of review, the Trial Court got it right.

The Court, once again, encourages the parties in any effort to come to an agreeable settlement. In the Court's opinion, in order for this to occur, someone at Cal Fire must look at the facts of the matter, consider not just the advocates, but also the appraisal of the disinterested Trial Court, and assess whether it is fair, just, and appropriate to keep up the fight. The conclusion of this Court must be unpalatable to Plaintiffs, but it is the decision of the Court.

Of course, the appeal could fight over every issue, such as whether each of the claimed costs are fully justified. The Court is of the view that, if Cal Fire came to the table, the parties could agree amount of fees, expenses, and costs that would be paid to conclude the matter. However, if that is not possible, and if the matter comes back to the undersigned after affirmance, the Court will be required to consider Defendants' application for further fees and expenses in aid of enforcement of judgment. The Court wishes all parties success in their continuing efforts to resolve this matter.

Dated: FEB 04 2014

Leslie C. Nichols

Leslie C. Nichols
Judge of the Superior Court