No. C076008

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

DEPARTMENT OF FORESTRY AND FIRE PROTECTION, et al.,

Appellants,

v.

EUNICE E. HOWELL, et al.,

Respondents,

On Appeal from the Superior Court of Plumas County
(Case No. CV09-00205, Honorable Leslie C. Nichols, Judge)

APPLICATION TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* ATTORNEYS GENERAL FOR THE STATES OF ARIZONA, NEBRASKA, NEVADA, UTAH AND WISCONSIN IN SUPPORT OF DEFENDANTS-RESPONDENTS

SEAN D. REYES
Utah Attorney General

PARKER DOUGLAS
Chief Federal Deputy
AARON MURPHY (SBN 207517)
Assistant Solicitor General
**Counsel of Record*
Attorney General's Office
350 North State Street, Ste. 230
Salt Lake City, UT 84114
(801)538-9600
(801)366-0184
aaronmurphy@utah.gov
Counsel for State of Utah and Amici States Attorneys General

(continued)

Mark Brnovich
Arizona Attorney General
Attorney General's Office
1275 W. Washington Street
Phoenix, Arizona 85007
(602) 542-8986
Counsel for State of Arizona

Doug Peterson
Nebraska Attorney General
Attorney General's Office
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2683
Counsel for State of Nebraska

Adam Paul Laxalt
Nevada Attorney General
Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1150
Counsel for State of Nevada

Brad D. Schimel
Wisconsin Attorney General
Department of Justice
17 West Main Street
Madison, Wisconsin 53707
(608) 264-6365
Counsel for State of Wisconsin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Regulations

Other Authorities

APPLICATION TO FILE BRIEF *AMICI CURIAE*

Pursuant to California Rules of Court Rule 8.200(c) and for the reasons set forth in this application, the Attorneys General for the States of Utah, Arizona, Nebraska, Nevada and Wisconsin respectfully request permission to file the accompanying brief in support of Defendants-Respondents.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

Government investigations and prosecutions must be conducted with absolute integrity and a commitment to uncovering truth and doing justice. *Amici* are States Attorneys General (the "AGs") acting as the chief legal officers and governmental lawyers in several states. Having dedicated years of service to the justice system, the AGs have a continuing and overriding interest in preserving the fair and effective administration of justice in civil and criminal investigations, prosecutions, and enforcement actions. Their duties often include conducting parallel and joint investigations and enforcement actions with federal agencies, including, as in this case, the United States Forest Service ("USFS") and the United States Department of

[1] In accordance with California Rule of Court 8.200(c)(3), *Amici* Attorneys General for the states of Arizona, Nebraska, Nevada, Utah and Wisconsin affirm that no counsel for any party authored this brief in whole or in part, and no counsel made a monetary contribution to this brief's preparation or submission.

Justice ("DOJ"). To that end, the AGs have a significant interest in ensuring that those, and all other, investigations are carried out with the utmost integrity so that the public has unreserved confidence in both the findings of government investigations and the pursuit of resulting enforcement actions. In this case, the actions of certain investigators and government lawyers fell far short of these principles.

The AGs filed a similar amicus brief in the parallel federal appeal.[2] They undertook an independent review of the appellate record and came to most of the same conclusions as the superior court below. It is especially true in this age of growing public skepticism of government enforcement activity that all government legal offices must be extremely vigilant to ensure the integrity of their enforcement actions and investigations. To tolerate lapses in integrity is to undermine fundamental fairness and erode the People's trust. Where such lapses occur – and the actions of the state and federal lawyers and investigators in this case clearly constitute such a lapse – severe consequences must follow to restore public confidence in the fairness of law enforcement. For these reasons, the AGs urge this Court to affirm.

[2] *Sierra Pacific*, et al. *v. United States*, No. 15-15799 (9th Cir.), pending.

Government lawyers have a fundamental duty "to seek justice within the bounds of the law," not merely to win cases or obtain convictions. *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 3-1.2(c) (4th ed. 2015). This principle is as widely recognized as it is venerable. *See, e.g.*, *Freeport-McMoran Oil & Gas Co. v. FERC* (D.C. Cir. 1992) 962 F.2d 45, 47; *Hurd v. People* (1872) 25 Mich. 404, 416 ("The prosecuting officer represents the public interest * * *. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success."); *Foute v. State* (1816) 4 Tenn. (3 Hayw.) 98, 99 ("[The prosecutor] is * * * to * * * combine the public welfare and the [safety] of the citizens, preserving both, and not impairing either; he is to decline the use of individual passions, and individual malevolence, when he cannot use them for the advantage of the public; he is to lay hold of them where public justice * * * requires it.").

The AGs appreciate that seeking justice oftentimes creates challenging judgment calls for government lawyers, but whether to act honestly and ethically is never a judgment call. A government attorney's duty of candor – both to the court and the parties – is sacrosanct. This is a critical public trust issue in the current climate where misconduct by government lawyers is steadily in the news. *See, e.g.*, John Holloway,

"Reigning In Prosecutorial Misconduct: Criminalizing Financial Conduct, Not Disclosing Evidence—The Rulebreakers Need New and Clearer Rules," *The Wall Street Journal* (July 4, 2016). Indeed, myriad articles covering government lawyer misconduct have been written on this very case. *See, e.g.*, Editorial, "Prosecutors Burn Down the Law: How fire investigators distorted evidence to loot a company," *The Wall Street Journal* (January 2, 2015). Given this public perception, it is imperative that government lawyers receive a clear message – beyond the training and admonitions they already receive from their respective agencies – that they must represent the People with the highest ethical standards and scruples, or face substantial consequences.

This is true regardless of whether the investigation or enforcement action is civil or criminal. "[T]he duty [of government lawyers] to see to it that justice shall be done," *Berger v. United States* (1935) 295 U.S. 78, 88, requires fundamental fairness, candor, and integrity across the entire spectrum of government lawyering. *See, e.g.*, *Freeport–McMoran, supra*, 962 F.2d at p. 47 (stating that the duty to do justice applies "*with equal force to the government's civil lawyers*") (emphasis added). Indeed, the American Bar Association's Model Code of Professional Responsibility expressly holds a "government lawyer in a civil action or administrative proceeding"

to higher standards than private lawyers, stating that government lawyers have "the responsibility to seek justice," and "should refrain from instituting or continuing litigation that is obviously unfair." A.B.A. Model Code of Professional Responsibility EC 7–14 (1981); *cf.* Hon. Alex Kozinksi, *Preface: Criminal Law 2.0,* 44 Geo. L.J. Ann. Rev. Crim. Proc. (2015), viii (noting "prosecutor's duty is to do justice, not merely to obtain a conviction" but concerned that "[t]here is reason to doubt that prosecutors comply with these obligations fully").

The AGs have the highest respect for government investigators, enforcement lawyers and prosecutors – not just in their own organizations, but across the nation. The vast majority work tirelessly, ethically, and honestly for the public good, all too often with little recognition. But as the unfortunate facts of this case show, they sometimes lose their way and become unmoored from the moral and ethical standards required of them. The rare cases where this happens have an outsized effect on the reputations of enforcement agencies generally and impugn the integrity of government investigators, prosecutors and government enforcement lawyers everywhere. Because of the high reputational costs of such transgressions, sanctions are necessary, not only to incentivize ethical compliance but to restore public

trust in investigative processes and enforcement decisions. This is such a case.

The AGs' interest in the integrity of their offices—which is essential to serve the public and maintain its trust—compels them to submit this *amici* brief. The record below overwhelmingly supports the court's well-articulated decision regarding sanctions. *See generally Cal. Dep't of Forestry & Fire Prot. v. Howell* (Cal. Super. Ct. Feb. 4, 2014 No. CV09-00205) 2014 WL 7972097 [hereinafter "Howell"] (Order Granting Terminating Sanctions).

BRIEF OF *AMICI CURIAE* ATTORNEYS GENERAL FOR THE STATES OF ARIZONA, NEBRASKA, NEVADA, UTAH AND WISCONSIN

BACKGROUND

Amici are aware of the voluminous briefing before this Court but believe a short background will provide context for their interests and points.

On September 3, 2007, a fire ignited on private property near California national forests. That blaze came to be known as the Moonlight Fire. The next day USFS and Cal Fire initiated a joint investigation into its causes and that investigation ultimately led to both state and federal actions. Appellant's Opening Brief ("AOB") at p. 4; *Howell*, 2014 WL 7972097, at p. *1-2.

Cal Fire investigator Joshua White and USFS investigator David Reynolds (who was later replaced by USFS Special Agent Diane Welton) jointly conducted and oversaw the investigation. The two agencies ultimately issued a joint "Origin and Cause Investigation Report" ("OIR"). *Id*. at p. *8-9. The OIR concluded that the fire started when the front blade or grouser plate of a bulldozer operated by an employee of defendant Howell's Forest Harvesting struck a rock and issued a spark. *Id*. at p. *8.

Approximately two years later, Cal Fire filed the civil action below; the same month, the United States Attorney for the Eastern District of California filed a second civil action seeking approximately $1 billion in damages on behalf of the United States. *United States v. Sierra Pacific* et al., (*Sierra Pacific I*) (E.D. Cal. 2014) 100 F.Supp.3d 948, on appeal *Sierra Pacific* et al. *v. United States*, No. 15-15799 (9th Cir.). The AGs independently reviewed the record in that case and filed an amicus brief in that proceeding as well. Both suits relied heavily and almost exclusively on the integrity of the joint OIR. The two suits named as defendants Sierra Pacific Industries; Eunice E. Howell d/b/a Howell's Forest Harvesting; W.M. Beaty and Associates, and individual defendants, including landowners who owned interests in property where the fire purportedly began.

Defendants contended below, as they do before this Court, that government lawyers advanced a fraudulent origin-and-cause investigation report. They note with support the following consequential irregularities that Defendants contend in their totality support the sanctions imposed below, namely that government lawyers: (1) permitted their experts and investigators to testify falsely; (2) misrepresented the admission of one witness, J.W. Bush, that a bulldozer rock strike caused the fire; (3) proffered false testimony in opposition to the motion for summary judgment; (4) failed to take remedial action when it learned evidence—such as that derived from an air attack video—undermined their causation theory; (5) created a false diagram regarding the fires movements; (6) misrepresented and withheld evidence and covered up misconduct of prosecutors and investigators; and (7) failed to disclose a significant financial interest which constituted an undisclosed interest in the litigation, known as the Wildland Fire Investigation Training and Equipment Fund (WiFITER), and affirmatively misrepresented the nature of the fund to the district court. *Howell*, 2014 WL 7972069, at p. *7-15.[3]

WiFITER was an off-books fund set up by a small group within Cal Fire, for the benefit of Cal Fire fire investigators, to hold money recovered

[3] The AGs' review of the record on appeal in the Ninth Circuit proceedings led them to the same conclusions.

through settlements with parties allegedly responsible for reimbursing firefighting costs. The court below found that WiFITER also created an improper financial incentive for the government's investigator and disclosed expert, *id.* at p. *24-25; the fund has since been found unlawful by California's State Auditor, and has been dissolved. *Id.* In the face of these abuses, the court below could recall "no instance in experience over forty seven years as an advocate and as a judge, in which the Attorney General so thoroughly departed from the high standard it represents, and, in every other instance, has exemplified." *Id.* at p. *9.

Approximately three years after the United States filed the federal action, and after losing a handful of key pre-trial motions, defendants entered into a settlement agreement with the United States. *Sierra Pacific I*, *supra,* 100 F.Supp.3d. at p. 953. Under the terms of the settlement, Sierra Pacific Industries agreed to pay $47 million, Howell's Forest Harvesting agreed to pay $1 million, and the other defendants agreed to pay $7 million. Sierra Pacific also agreed to convey 22,500 acres of land to the United States. *Id.* After settlement between the parties, on July 18, 2012, the district court dismissed the case with prejudice. *Id.* Defendants subsequently moved for a hearing regarding fraud on the court under Rule 60(d) of the Federal Rules of Civil Procedure, and though that motion was

denied by the federal district court, *id*. at p. 981, that decision is now on review by the United States Court of Appeals for the Ninth Circuit, *Sierra Pacific* et al. *v. United States*, No. 15-15799 (9th Cir.) , and as noted the AGs have filed a similar amici brief supporting defendants in that appeal.

After settling the federal action, defendants continued to defend themselves in the instant action, where defendants were allowed discovery regarding misconduct by the state and federal investigators and prosecutors. After an in-depth three-day evidentiary hearing on evidence and possible sanctions, *Howell*, 2014 WL 7972097, at p. *2, the court below dismissed the action and entered judgment for defendants, and ultimately also imposed terminating sanctions and a $32.4 million monetary sanction against Cal Fire. *Id*. at p. *32-33.

Judge Nichols's decision traces a litany of investigatory and government lawyer abuse: "the Court finds that Cal Fire has, among other things, engaged in the pervasive and systematic abuse of California's discovery rules in a misguided effort to prevail against these Defendants, all of which is an affront to this Court and the judicial process." *Id*, at p. *1. The court below determined that: Cal Fire's conduct in initiating, maintaining, and prosecuting the action was corrupt and tainted; Cal Fire had engaged in unacceptable conduct for the purpose of recovering money

from defendants; and critical witnesses testified dishonestly, as well as compromised or fabricated reports. *Id*. at p. *1-2, 32-33

Judge Nichols's order recited sanctionable behavior in several areas. The first included WiFITER. Defendants learned that Cal Fire had failed to produce critical documents evidencing improper financial incentives on the part of the fire investigators after they happened on the discovery in a public audit. Many unproduced documents—which had already been ordered produced—related to WiFITER, a fund set up by a small group within Cal Fire, for Cal Fire investigators, that holds money recovered from settlements to reimburse firefighting costs and therefore creates a financial incentive for investigators to pursue parties with financial resources to provide cost recovery. Judge Nichols concluded that the late-discovered WiFITER documents "belie Cal Fire's own representations to this Court that there was no evidence whatsoever that the WiFITER fund was improper," and "would have caused [the] Court to rule differently" on past motions if they had been produced as required. *Id*. at p. *7-8. In short, the court found an undisclosed financial interest of investigators in the outcome of the case. It is and should be undisputed that Cal Fire, the government's joint enforcement partner and its attorneys, were in possession of and had concealed from Defendants these critical documents before and after the

settlement in federal court and during critical proceedings in the court below.

Judge Nichols also found that the lead Cal Fire investigator Mr. White failed to testify honestly and that government lawyers failed to disclose or correct Mr. White's dishonest deposition testimony. White was also an expert and witness in the federal action due to joint investigation agreements. The court specifically noted White contradicted testimony regarding the fire's origin, typically marked with a white flag, noting: "White testified that neither of [the investigators] ever placed any white flags to mark evidence of [the] points of origin ... Notwithstanding White's testimony, discovery revealed a number of photographs taken by White ... [and] White could not explain or was unwilling to explain the fact that there is a white flag in the center of each of these photos." *Id*. at p. *9 The court concluded that state counsel shared the blame for White's dishonesty: "Unfortunately, Cal Fire's lead counsel, officers of this Court, who should be 'operating under a heightened standard of neutrality,' greatly exacerbated the problem by failing to intercede and put a stop to what their witnesses were doing under oath." *Id*. at p. *10. From the totality of the record below, it appears that it is undisputed that both state and federal investigators also knew of White's false testimony, and in fact encouraged it, although

defendants did not discover this subornation of perjury until after settlement and entry of judgment in the federal action, as it was uncovered in the proceedings below and characterized as such by Judge Nichols. *Id*. at p. *13-14.

Further, Judge Nichols found evidence that the joint state and federal report saddling defendants with liability for the fire had misrepresented the testimony of key witnesses linking defendants to the fire's origin: "[D]espite the fact that Bush [a bulldozer operator a defendant] clearly stated during his September 10 interview that he never told anyone that a rock strike started the fire, White's written interview summary, advanced into the Official Report" asserts that Bush made such a statement." *Id*. at p. *11. Again, government lawyers and investigators advanced this false report of confession through the OIR, and presented it to the district court through a false declaration in opposition to Defendants' motion for summary adjudication.

All three of these highlighted incidents are attributable to both state investigators and government lawyers who did not disclose these facts. These incidents and others identified by Judge Nichols formed the basis of the wide-ranging sanctions he imposed, which under the findings seem entirely appropriate.

INTRODUCTION

The government lawyers and investigators involved in the investigation and civil litigation for California's Moonlight Fire entirely disregarded their duty to seek the truth and to do justice.

Amici AGs here do not repeat the comprehensive account of the factual background of both the federal and state proceedings that led Appellants to seek the relief at issue before this Court. Defendants and other *amicus curiae* have amply covered most of the significant facts and procedural background.

The salient point for this brief is that investigators and attorneys for the USFS and Cal Fire presented an extensive and ultimately fraudulent investigation as a basis for simultaneous enforcement actions in state and federal courts. They did so to pursue damages from the deepest pockets available, all the while concealing evidence they knew suggested a contrary fire source. The California Supreme Court appointed Judge Nichols to carefully consider the claims at issue. After a three day evidentiary hearing and careful consideration of the entire record, the superior court imposed $32 million in sanctions against the California Department of Forestry and Fire Protection for false testimony, fabricated evidence, and "pervasive and

systematic abuse . . . all of which is an affront to this Court and the judicial process." *See Howell, supra,* 2014 WL 7972097.

The irregularities the court found are of such magnitude that they demand affirmance of those sanctions by this Court to preserve the sanctity of and respect due to the justice system.

ARGUMENT

I. COURTS MUST CHECK CLEAR ABUSES OF DISCRETION BY GOVERNMENT LAWYERS

In *Berger v. United States, supra,* 295 U.S. 78, the Supreme Court explained the long recognized principle that lawyers for the public are "the representative not of an ordinary party to a controversy, but of a sovereignty . . . [whose] interest in a . . . prosecution is not that it shall win a case, but that justice shall be done." *Id.* at p. 88. This Court has recognized the same, *People v. Dehle* (2008) 166 Cal.App.4th 1380, 1388, as has the Supreme Court of California. *People v. McKinsie* (2012) 54 Cal.4th 1302, 1326; *accord Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, fn.1 (citing *People v. Eubanks* (1996) 14 Cal.4th 580, 589; *People v. Conner* (1983) 34 Cal.3d 141, 148; *People v. Superior Court* (Greer) (1977) 19 Cal.3d 255, 266; Corrigan, *On Prosecutorial Ethics* (1986) 13 HASTINGS CONST. L.Q. 537, 538–539). The Ninth Circuit Court of Appeals has also in kind observed that: "Prosecutors are subject to constraints and responsibilities

that don't apply to other lawyers . . . . The prosecutor's job isn't just to win but to win fairly, staying well within the rules." *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 (Kozinski, J.)

Other courts have agreed that in *both* criminal and civil cases, the "dominant purpose" of holding the government "to a high standard of conduct in civil litigation" is "to assist the court in arriving at a just and true resolution." *United States v. Moss-America, Inc.* (E.D. Wis. 1978) 78 F.R.D. 214 (civil case). This duty flows from the government attorney's special obligations. "The U.S. has a higher duty than an ordinary adversary. It is the representative of all of the people by the will of the people surviving on and expending the people's tax money and should be charged with a high standard of conduct in litigation, i.e., find the truth regardless of the consequences to the position of the U.S. as a party adversary." *United States v. Choctaw County Bd. of Educ.* (S.D. Ala. 1969) 310 F.Supp. 804, 810 (civil case).

The justifications for holding government lawyers to a heightened duty apply equally in civil cases. The sheer scope of government resources necessitates the government exercise caution in the way it wields its authority. *See Wardius v. Oregon* (1973) 412 U.S. 470, 475-76 fn. 9 (noting, in a criminal case, that the government possesses "greater financial

and staff resources with which to investigate and scientifically analyze evidence"). The government often also has superior investigatory tools. *See, e.g., id.* (observing that the government lawyer often "begins his investigation shortly after" a potential offense has taken place, "when physical evidence is more likely to be found and when witnesses are more apt to remember events") (citation omitted). These significant advantages apply in civil enforcement actions no less than in criminal prosecutions.

These heightened standards are reflected not only in case law but also in various sources outlining the professional and ethical obligations of government attorneys. For example, the A.B.A. Code of Professional Responsibility states that a "government lawyer in a civil action ... should not use his position to harass parties or to bring about unjust settlements or results." EC 7-14 (1980); *see also id*. (observing that a government lawyer "has an obligation to refrain from instituting or continuing litigation that is obviously unfair"); 5 C.F.R. § 2635.101(b)(5), (8), (14). Proper judicial review ought to also effectively check improper government overreach in civil or criminal enforcement. *See, e.g., Am. Power & Light Co. v. SEC* (1946) 329 U.S. 90, 105 ("Private rights are protected [from government power] by access to the courts"); Alt and Lessen, *Political and Judicial Checks on Corruption: Evidence from American State Governments*, 20 J.

Econ. & Pol. 33, 57 (2008) (judicial review can check government corruption).

Under the applicable standard of review, given its findings the court below was entirely correct in imposing sanctions, as public lawyers' duties do not disappear simply because the government demands civil, not criminal, relief. Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1047-48 (1984) ("it has always been clear that the clause applied to the conduct of criminal and civil trials") (citations omitted). The government's claim was against not only against Sierra Pacific and W.M. Beaty but also against individuals. The potential damages (demanded based on dishonest testimony) threatened each defendant with financial devastation.

Such consequences require the highest standards of conduct by the government with proper review and scrutiny by the court. This conclusion is especially cogent when the governmental remedy would be the same in the civil or criminal context, as it was here. In fact, as some commentators have argued:

> It is clear that certain proceedings, even though statutorily or judicially labeled 'civil,' in reality exact punishments at least as severe as those authorized by the criminal law. Arguably such proceedings should be treated as criminal proceedings for purposes of constitutional safeguards since, in the end, the punishment inflicted on the defendant is the functional

> equivalent of a criminal sanction. This idea is appealingly straightforward and, sometimes, equitably compelling. If a contractor who has filed false claims against the government can be assessed thousands of dollars in civil fines, why should the proceeding be any different from a criminal prosecution for the same misdeeds that carries the same monetary penalty.

Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Distinction*, 42 HASTINGS L.J. 1325, 1351 (1991).

Here, the government attempted to advance a fraudulent origin-and-cause investigation. Government lawyers also permitted experts and investigators to testify falsely; they misrepresented the admission of J.W. Bush that a bulldozer rock strike caused the fire; they proffered false testimony in opposition to the motion for summary judgment; they failed to take remedial action when they learned evidence such as that derived from the air attack video that undermined its causation theory; they sat passively while investigators lied under oath; they relied on a false diagram; and they ignored that the WiFITER account created an improper financial incentive. Under the findings made below, each of these egregious practices supports Judge Nichols's imposition of sanctions against the government.

II. GOVERNMENT LAWYERS SHOULD BE SANCTIONED

The government's duty of candor entails a duty to disclose adverse evidence when specifically asked for such material in a discovery request,

avoid reckless disregard for the truth, and prohibits financial conflicts of interest. The court properly imposed sanctions for government lawyers' disregard of each of these obligations. Judge Nichols also correctly recognized that the government lawyers' duties apply in civil cases, as the sanction was for significant civil discovery abuses.

A. Government Lawyers Should Act with Regard for the Truth.

The court below properly imposed sanctions that were well within its discretion. Courts have granted relief where prosecutors clearly acted recklessly or willfully. *E.g.*, *Demjanjuk v. Petrovsky* (6th Cir. 1993) 10 F.3d 338. In *Demjanjuk*, the Sixth Circuit found that the government's reckless disregard for the truth amounted to fraud on the court entitling the defendant to relief. *Id.* at p. 348–49 (reckless disregard of the truth by the government is sufficient to demonstrate fraud on the court). Citing *Demjanjuk* the Ninth Circuit has also found recklessness by government prosecutors to constitute misconduct sufficient to warrant judicial relief including sanctions of dismissal. *Wang v. Reno* (9th Cir. 1996) 81 F.3d 808, 819. This standard has been widely adopted by courts of the several states as well. *See, e.g.*, *NC-DSH, Inc. v. Garner* (Nev. 2009) 218 P.3d 853, 858; *State v. DiPrete* (R.I. 1998) 710 A.2d 1266, 1279 (affirming sanctions including dismissal); *State v. Quintal* (R.I.1984) 479 A.2d 117 (same).

Extremely reckless or willful disregard of the truth is inconsistent with a government attorney's duty to the court and to the judicial process. *Demjanjuk, supra,* 10 F.3d at p. 348–49; *Gen. Med., P.C. v. Horizon/CMS Health Care Corp.* (6th Cir. 2012) 475 Fed. App'x 65, 71–72 (allowing recklessness to suffice for fraud on the court); *Herring v. United States* (3d Cir. 2005) 424 F.3d 384, 386 fn.1 (acknowledging the Sixth Circuit's position that recklessness is sufficient but requiring proof of an "intentional fraud"). The facts found by the court below here show at least reckless and likely willful misrepresentations, warranting the relief sought. Courts expect that government lawyers will provide a "more candid picture of the facts and the legal principles governing the case." *Williams v. Sullivan* (W.D. Mo. 1991) 779 F.Supp. 471, 472 ("a special duty [is] imposed on government lawyer[]s to 'seek justice and develop a full and fair record'"); *see also* James E. Moliterno, *The Federal Government Lawyer's Duty to Breach of Confidentiality,* 14 Temp. Pol. & Civ. Rts. L. Rev. 633, 639 (2006). Because the record demonstrates government lawyers thwarting the development of a full and fair record in the interest of seeking justice, Judge Nichols properly imposed sanctions in proportion to those improprieties.

B. California's Financial Interest in the Outcome of the Investigation Tainted the Joint State-Federal Investigation Warranting Sanctions

Mr. White—a disclosed expert—had an improper financial incentive in the case as a result of WiFITER. As Judge Nichols found, the evidence disclosed demonstrated that Cal Fire was motivated to target affluent defendants to keep WiFITER from "running in the red," that they were looking for their next "high % recovery," and that Mr. White, the lead Moonlight Fire investigator, was a direct beneficiary of funds from that account and participated in managing it. *Howell, supra,* 2014 WL 7972097, *7-8. Put simply, Mr. White enriched himself and Cal Fire by ensuring a recovery. *Id*. Mr. White was the author of the origin-and-cause report relied upon by the United States in this case and his personal interest in WiFITER was never voluntarily disclosed by prosecutors. Again, this egregious omission also supports the sanctions Judge Nichols imposed.

"[I]njecting a personal interest, financial or otherwise into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raises serious constitutional questions" applicable to both civil and criminal actions. *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238; *cf. People ex. rel. Clancy v. Superior Court* (1987) 39 Cal. 3d 740, 746 (Noting under California ethical rules: "When a

government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function.").

It is of no legal relevance that Mr. White was an investigator because at a bare minimum, Cal Fire's lawyers knew about and were actively concealing key WiFITER documents evidencing Mr. White's direct financial interest and should have disclosed it; under the circumstances the legal principle is the same—a government lawyer's duty of impartiality applies likewise to government agents such as investigators. *See* California Rule of Professional Conduct, Rule 7-107(C) (testifying experts prohibited from having a contingent interest in the outcome of the action in which they are testifying). Mr. White stood to benefit directly and indirectly from any recovery in the state action. The evidence, support, and opinions for the government's and the state's cases were largely the same due to the joint investigation, and necessarily tainted all of Mr. White's reports and opinions. The government of necessity had to rely on these reports to maintain a case for Appellant's liability. In fact, in awarding sanctions against Cal Fire, the court below observed that Cal Fire falsely represented that there was "'zero' evidence WiFITER was a corrupt scheme or that it

had any impact on the investigations." *Id.* at p. *15. Additionally, the court found that there had been affirmative misrepresentations that affected the case and that the fund likely created a conflict of interest. *Id*. As such, Judge Nichols rationally found an omission constituting fraud on the court supported by substantial evidence, and the sanctions he imposed, unless this court concludes his findings to be erroneous, were appropriate given the egregiousness of the lawyers' actions.

CONCLUSION

Whatever else prosecutors' ethical duties are—or should be—they do not include apparent intentional misrepresentation to the Court. The court below properly sanctioned the lawyers involved for egregious behavior and lack of candor to the tribunal, and this Court should affirm that decision.

Respectfully submitted this 13th day of July 2016.

/s/ *Aaron Murphy*
Sean D. Reyes
Utah Attorney General
Parker Douglas
Chief Federal Deputy
Aaron Murphy, No. 207517
Assistant Solicitor General
**Counsel of Record*
Attorney General's Office
350 N. State Street, Suite 230
Salt Lake City, UT 84114
(801) 538-9600
(801)366-0184
aaronmurphy@utah.gov
Counsel for State of Utah

/s/Mark Brnovich
Mark Brnovich
Arizona Attorney General
Attorney General's Office
1275 W. Washington Street
Phoenix, Arizona 85007
(602) 542-8986
Counsel for State of Arizona

/s/Doug Peterson
Doug Peterson
Nebraska Attorney General
Attorney General's Office
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2683
Counsel for State of Nebraska

/s/Adam Paul Laxalt
Adam Paul Laxalt
Nevada Attorney General
Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1150
Counsel for State of Nevada

/s/Brad D. Schimel
Brad D. Schimel
Wisconsin Attorney General
Department of Justice
17 West Main Street
Madison, Wisconsin 53707
(608) 264-6365
Counsel for State of Wisconsin

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE OF ATTORNEYS GENERAL FOR THE STATES OF ARIZONA, NEBRASKA, NEVADA, UTAH AND WISCONSIN IN SUPPORT OF DEFENDANTS-RESPONDENTS is proportionately spaced, has a typeface of 13 points or more and contains (5,005) words.

/s/ *Aaron Murphy*
Aaron Murphy (SBN 207517)
Assistant Solicitor General
Counsel for Amici State Attorneys General

DECLARATION OF SERVICE

I, Cecilia Lesmes, declare as follows:

I am a resident of the State of Utah, residing or employed in Salt Lake City, Utah.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 350 North State Street, Ste. 230, Salt Lake City, Utah 84114-2320.

On July 13, 2016, a true copy of the APPLICATION TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE OF ATTORNEYS GENERAL FOR THE STATES OF ARIZONA, NEBRASKA, NEVADA, UTAH AND WISCONSIN IN SUPPORT OF DEFENDANTS-RESPONDENTS was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's filing system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

Kenneth Roye, Esq.
142 West 2nd Street, Suite B
Chico, CA 95928
Counsel for Plaintiffs James H. Brandt, et al.

G. Chris Anderson
Anderlini & McSweeney LLP
411 Borel Avenue, Suite 501
San Mateo, CA 94402
Counsel for Plaintiff Richard A. Guy and John and Christine Cosmez

Gary Garfinkle
Attorney at Law
1205 Via Gabarda
Lafayette, CA 94549
Counsel for Plaintiffs Grange Insurance Association and James H. Brandt, et al.

Gary E. Tevetian
Supervising Deputy General
300 S. Spring St., Suite 1702
Los Angeles, CA 90013
Counsel for Plaintiffs Department of Forestry and Fire Protection

Evan Eickmeyer
Tracy L. Winsor
Office of Attorney General
1300 I Street, Suite 125
Sacramento, CA 95814
Counsel for Plaintiff Cal Fire

William R. Warne
Michael J. Thomas
Annie S. Amaral
Meghan M. Baker
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95864
Counsel for Respondents Sierra Pacific Industries

Richard S. Linkert
Julia M. Reeves
Matheny Sears Linkert & Jaime LLP
3638 American River Drive
Sacramento, CA 95864
Counsel for W.M. Beaty & Associates, Inc., and Ann McKeever Hatch, Trustee of The Hatch 1987 Revocable Trust, et al.

Phillip R. Bonotto
Rushford & Bonotto, LLP
1010 Hurley Way, Suite 410
Sacramento, CA 95825
Counsel for Respondents Eunice E. Howell, dba Howell's Forest Harvesting, J.W. Bush, and Kelly Crimson

Deborah J. La Fetra
Lawrence G. Salzman
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Attorneys for Amicus Curiae Pacific Legal Foundation

Court Clerk
Plumas County Superior Court
520 Main Street, Room 104
Quincy, CA 95971

Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

I declare under penalty of perjury that the forgoing is true and correct and that this declaration was executed this 13th day of July, 2016, at Salt Lake City, Utah.

Cecilia Lesmes