

No. 15-15799

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

SIERRA PACIFIC INDUSTRIES, ET AL.,

Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO
No. 2:09-cv-02445-WBS-AC

**BRIEF OF AMICUS CURIAE MICHAEL COLE AND TOM HOFFMAN,
RETIREEES OF THE CALIFORNIA DEPARTMENT OF FORESTRY AND
FIRE PROTECTION, IN SUPPORT OF APPELLANTS AND IN SUPPORT
OF REVERSAL**

Julie A. Weis
Haglund Kelley LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
Phone: 503.225.0777
Fax: 503.225.1257
weis@hk-law.com

Attorneys for Amicus Curiae
Michael Cole and Tom Hoffman

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, amicus curiae Michael Cole and Tom Hoffman state that they are individuals to whom the Rule 26.1 disclosure requirement is inapplicable.

DATED this 17th day of September, 2015.

/s/Julie A. Weis
Julie A. Weis
Haglund Kelley LLP
Attorneys for Amicus Curiae
Michael Cole and Tom Hoffma

TABLE OF CONTENTS

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE
(CONSENT)..... 1

STATEMENT OF AUTHORSHIP AND FUNDING OF BRIEF 3

INTRODUCTION 4

SPECIFIC CONCERNS OF AMICI 8

 I. Fire Prevention and Protection on Public and Private Lands
 Depends on the Public Having Confidence that Wildfires are
 Investigated and Prosecuted with Honesty, Care, and
 Professionalism 8

 II. Because Appellants' Federal Settlement Rests on a Foundation
 of "Corrupt and Tainted" Conduct, it Continues to Harm the
 Interests of Amici and the Public 13

 III. The Illegal Use of the Wildland Fire Investigation Training and
 Equipment Fund Uncovered After Appellants' 2012 Federal
 Settlement Particularly Undermines Public Confidence in
 Honest and Professional Fire Investigations and Prosecutions..... 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

California Dep't of Forestry and Fire Prot. v. Howell,
 Case No. CV09-00205, Order Granting Sierra Pacific's Motion for
 Fees, Expenses and Monetary and Terminating Sanctions
 (Cal. Superior Court Feb. 4, 2014)passim

California Dep't of Forestry and Fire Prot. v. Howell,
 Case No. CV09-00205, Orders on Motions to Tax Costs and for
 Attorney Fees, Expenses, and Sanctions, and Motions Re Privilege
 (Cal. Superior Court Feb. 4, 2014) 9, 10, 13-14

County of Santa Clara v. Superior Court,
 50 Cal. 4th 35 (2010)9, 17

Rules and Other Authorities

Fed. R. App. P. 29(c)(4)..... 1

Fed. R. App. P. 29(c)(5).....3

Fed. R. App. P. 32(a)(5).....22

Fed. R. App. P. 32(a)(6).....22

Fed. R. App. P. 32(a)(7)(B)22

Ninth Circuit Rule 28-2.621

<http://www.amforest.org>3

<http://www.auditor.ca.gov/pdfs/reports/2013-107.pdf>18

http://cdfdata.fire.ca.gov/incidents/incidents_stats?year=20157

<http://www.ofic.com>3

<http://www.wfpa.org>3

**STATEMENT OF IDENTITY, INTEREST AND AUTHORITY
TO FILE (CONSENT)**

Pursuant to Rule 29(c)(4) of the Federal Rules of Appellate Procedure, Michael Cole and Tom Hoffman are retirees of the California Department of Forestry and Fire Protection (Cal Fire) who are referred to jointly herein as amici and otherwise identified as Mr. Cole or Mr. Hoffman. Mr. Cole's public service career included 37 years with Cal Fire before he retired as a fire prevention-law enforcement battalion chief in 2006. Mr. Hoffman's public service career included 23 years with Cal Fire, preceded by 10 years working as a forester and fire fighter for the U.S. Forest Service, before Mr. Hoffman retired from Cal Fire in 2009 as the Chief of Fire Prevention and Law Enforcement. Mr. Cole's area of practice and expertise centered around wildland fire investigation whereas Mr. Hoffman's area of practice and expertise centered around fire prevention and law enforcement. Both were sworn peace officers.

Amici have a strong interest in this case because of their long tenures as Cal Fire professionals working diligently as honorable public servants and sworn peace officers in the area of wildland fires, like California's 2007 Moonlight Fire. In the aftermath of the Moonlight Fire, which burned about 65,000 acres of private and federal forestland before its containment, both the federal and state (California) governments sued appellants in separate actions in an effort to recover damages associated with the Moonlight Fire. As was later revealed by the Honorable Leslie

C. Nichols, the state court judge appointed to preside over the state court trial, the joint state-federal investigation and subsequent prosecution of the Moonlight Fire case was shockingly corrupted, so much so that Judge Nichols ordered sanctions that included termination of the case. The crux of this appeal is appellants' desire to set aside their earlier settlement of the federal case, a decision made before the full extent of the corrupted investigation and case prosecution was discovered and laid bare by Judge Nichols.

As retired Cal Fire professionals, amici understand the critical importance of instilling and maintaining public confidence in the fire prevention, fire investigation and related law enforcement processes. Amici believe that denying appellants a full opportunity to set aside the settlement of the federal case severely undermines public confidence in the fire prevention, investigation and related law enforcement processes, sullies their own professional reputations and that of other honorable Cal Fire professionals, and does a disservice to citizens, including amici, who as taxpayers support these critical efforts with the reasonable expectation that fire investigations and cost recovery actions will be handled with the highest degree of professionalism and integrity, not with an eye towards seemingly targeting those viewed as having deep pockets. For those reasons, amici support appellants' request that this Court reverse the trial court's decision to not set aside

the judgment embodying their ill-informed settlement, which appellants allege was tainted by fraud on the district court.

Authority to file this brief is based on consent of all parties, none of whom oppose the filing of this brief.¹

STATEMENT OF AUTHORSHIP AND FUNDING OF BRIEF

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, no party's counsel authored any portion of this brief, and no party and no party's counsel has or is expected to contribute money intended to fund preparing or submitting this brief. Funding for preparation and submittal of this brief has been provided by the by the Oregon Forest Industries Council, an Oregon non-profit corporation (<http://ofic.com>), the Washington Forest Protection Association, a Washington non-profit corporation (<http://www.wfpa.org>), and the American Forest Resource Council, an Oregon non-profit corporation (<http://www.amforest.org>), none of whom authored any portion of this brief.

///

///

///

¹ The consent of federal appellee was premised on agreed upon conditions, i.e., amici agreeing to file this brief timely, within the standard page (word) limits, and with no breach of federal work product or other confidences by Mr. Cole (due to his short stint as a retained expert for the federal government at the outset of the Moonlight Fire case). See infra note 2.

INTRODUCTION

Amici are Cal Fire retirees who dedicated decades of their professional careers to wildland fire investigation and/or fire prevention while also serving as sworn law enforcement officers in that arena. As such, amici – particularly Mr. Cole – have played a role in joint wildfire investigations involving both Cal Fire and the U.S. Forest Service like the joint investigation at issue in the Moonlight Fire case currently before this Court.² While working in their capacity as Cal Fire employees, amici understood that the public depended on Cal Fire to conduct its wildland fire work carefully and honestly so as to promote fire prevention and protection goals while also being good stewards of taxpayer resources. Now that they are retired, amici look to Cal Fire with the same expectations, only from the vantage point of citizens who rightfully expect Cal Fire to safeguard public and private resources, including public and private lands, with the utmost of integrity.

When Cal Fire on August 9, 2009 brought suit against appellants in an effort to recover damages associated with California's 2007 Moonlight Fire, it was

² In the interests of full disclosure, Mr. Cole originally was a retained expert for the federal government at the outset of the Moonlight Fire case for a period of about a year (approximately September 2008 through January 2010). Mr. Cole's contract subsequently was not renewed, and Mr. Cole declined an invitation to again contract with the federal government on the Moonlight case a year or so later (in May 2011). The contents of this amicus brief are not based on federal work product or confidences learned by Mr. Cole in his short stint under contract with the federal government but rather are based on Judge Nichols' findings in the consolidated state court cases.

reasonably presumed that Cal Fire was proceeding in good faith and in furtherance of its public duties. Four and a half years later, however, it became painfully apparent that Cal Fire had acted very much to the contrary. On February 4, 2014, the Honorable Leslie C. Nichols, the California Superior Court Judge tasked with presiding over the state action brought by Cal Fire against appellants, issued an extraordinary Order Granting Sierra Pacific's Motion for Fees, Expenses and Monetary and Terminating Sanctions on the grounds 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." California Dep't of Forestry and Fire Prot. v. Howell, Case No. CV09-00205 (lead file), slip op. at 1 (Cal. Superior Court Feb. 4, 2014) (Order Granting Terminating Sanctions).³

Much to amici's dismay, the Order Granting Terminating Sanctions revealed that Cal Fire had engaged in such improper conduct as:

- "gross violations of the discovery rules . . . some of which . . . were purposeful and calculated to enhance [Cal Fire's] chance of success on the merits," Order Granting Terminating Sanctions at 12;
- abuse of "the legal process through the false testimony of its lead investigator on the Moonlight Fire, Joshua White," id. at 13;
- "obfuscation and bad faith denials of the truth," id. at 16;
- conduct on the part of both "Cal Fire and its counsel[]" suggest[ing] that they

³ The Order Granting Terminating Sanctions is attached at Exhibit 1.

perceive themselves as above the law. . . . from false testimony, to pervasive false interrogatory responses, to spoliation of critical evidence, to willful violations of the Court's Orders," id. at 22; and

- "evasive, misleading, contradictory and false deposition testimony on numerous topics, from the origin and cause investigation [of the Moonlight Fire], to the suppression of witness information, to WiFITER [Wildland Training and Equipment Fund]." Id.

These examples of improper conduct are not exhaustive but rather are offered to illustrate why the Court concluded:

Cal Fire's agents not only betrayed their oath "to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the constitutional rights of all men to liberty, equality and justice," but, as it pertains to this Court, they betrayed the primary purpose of judicial system – to reveal the truth.

Id. at 22-23 (citation omitted).

Not surprisingly, amici believe their professional reputations have been damaged and their interests as taxpaying members of the public harmed by the conduct of Cal Fire in connection with the Moonlight Fire's joint state-federal investigation. More fundamentally, amici fear that the dishonorable conduct of Cal Fire in connection with the Moonlight Fire undermines public faith in the conduct of Cal Fire employees working in the areas of fire prevention, fire investigation and related law enforcement. Even though Judge Nichols took the extraordinary action of terminating the state court action based on Cal Fire's egregious conduct, amici believe that appellants' ill-informed prior settlement of the high stakes

federal action against them, which settlement is alleged to have been tainted by fraud on the district court, should be set aside in the interests of justice and integrity of the judicial process.

The 2015 fire season is proving to be yet another destructive and frightening fire season for inhabitants of the western states, particularly drought-stricken California. According to statistics reported by Cal Fire, from January 1, 2015 through September 5, 2015, more than 217,827 acres in California have burned, compared with a five year average of 90,894 acres for the same time interval. See http://cdfdata.fire.ca.gov/incidents/incidents_stats?year=2015. The need for honest and diligent investigation of wildland fires, and public confidence in same, grows only more compelling as a result. Thus, for the following specific reasons, amici support appellants' request that this Court reverse the trial court's decision declining to set aside the federal judgment embodying appellants' settlement, which was entered into almost two years before Judge Nichols imposed terminating sanctions for the dishonorable conduct uncovered as a result of the state court proceedings.

///

///

///

SPECIFIC CONCERNS OF AMICI

I. Fire Prevention and Protection on Public and Private Lands Depends on the Public Having Confidence that Wildfires are Investigated and Prosecuted with Honesty, Care, and Professionalism.

Carefully and truthfully determining the origin and cause of fires plays a key role in fire prevention and the protection of lives and property. For decades, amici worked to further those important goals as public servants and sworn law enforcement officers employed by Cal Fire. Amici believe their efforts saved lives and livelihoods in California's timber country and were proud to serve Californians in that capacity.

Public confidence in the work performed by public servants like those employed by Cal Fire also is a key element to successful fire prevention and protection work. Likewise, "[p]ublic confidence in the integrity of the investigation and prosecution of governmental claims against its citizens must be scrupulously maintained." Order Granting Terminating Sanctions at 48. This is particularly true when "witnesses at issue are law enforcement officers who have access to the scene, are charged with gathering and documenting the evidence, and are responsible for determining who is to blame." Id. at 41. After all:

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

Id. at 8-9 (quoting County of Santa Clara v. Superior Court, 50 Cal. 4th 35, 57 (2010)).

Today, in retirement, amici are embarrassed and dismayed over Cal Fire's "corrupt and tainted" conduct surrounding the joint state-federal Moonlight Fire investigation and prosecution as described in Judge Nichols' Orders on Motions to Tax Costs and for Attorney Fees, Expenses, and Sanctions, and Motions Re Privilege. California Dep't of Forestry and Fire Prot. v. Howell, Case No. CV09-00205 (lead file), slip op. at 21 (Cal. Superior Court Feb. 4, 2014) (Order Granting Fees and Costs).⁴ In the Order Granting Fees and Costs, Judge Nichols concluded that "Cal Fire's actions initiating, maintaining, and prosecuting this action, to the present time, is corrupt and tainted." Id. Although the Court declined to hold that Cal Fire counsel had "directed or advised the egregious and reprehensible conduct of" Cal Fire, id. at 19, Judge Nichols conveyed "disappointment and distress" over "the conduct of the Attorney General [which] so thoroughly departed from the high standard it represents" Id. at 20.

The governmental corruption and taint described by Judge Nichols was at the heart of the joint state-federal Moonlight Fire investigation; the uncovered misconduct was "so pervasive that it would serve no purpose for the Court to recite it all," Judge Nichols concluded. Id. at 21. The governmental corruption and taint

⁴ The Order Granting Fees and Costs is attached at Exhibit 2.

only became fully evident in its manifold elements *after* settlement of the federal case brought against appellants, a settlement unknowingly built on the later-uncovered "corrupt and tainted" investigation. Yet the settlement remains in effect today.

Amici believe that officials involved in the Moonlight Fire investigation and prosecution compromised Cal Fire's reputation and ability to promote a culture of accountability and integrity at Cal Fire, the detrimental effects of which carry over to Cal Fire's federal partner the U.S. Forest Service. The "many acts of evasion, misdirection, and other wrongful acts and omissions" discussed by Judge Nichols, *id.* at 22, have besmirched the professional reputations of honest, hard-working Cal Fire law enforcement officers, current and retired. In doing so, the dishonorable conduct that tainted the joint state-federal investigation and prosecution have undercut the confidence of the general public, as well as landowners and those in the timber industry, that government officials can be trusted to pursue the real cause or culprit of a wildland fire instead of pursuing those individuals or entities best positioned to replenish government coffers.

After issuance of the Order Granting Terminating Sanctions and the Order Granting Fees and Costs, Mr. Cole sought to mitigate the harm to Cal Fire and to the public resulting from the Moonlight Fire case by filing a Citizen Complaint,⁵ "a

⁵ The Citizen Complaint filed with Cal Fire by Mr. Cole is attached as Exhibit 3.

well-defined procedure for assisting citizens who wish to voice a grievance against [Cal Fire's] operation, policies, or an employee's conduct." Citizen Complaint at 3. The Cal Fire Citizen Complaint process is based on the belief that Cal Fire "employees are among the most professional firefighting and resource management personnel available. They serve with pride and want the citizens of the State of California to share in this pride. However, as with any large organization, deviation from ideal performance may occur." Id.

Mr. Cole, believing in good faith that deviation from ideal performance had indeed occurred in connection with the Moonlight Fire, alleged in his Citizen Complaint that Cal Fire employee Joshua White, retired Cal Fire employee Alan Carlson, Cal Fire-funded consultant Dave Reynolds (also a former U.S. Forest Service investigator), and other unknown Cal Fire employees "were incompetent and dishonest in the performance of their duties on the Moonlight case." Id. at 5. The Citizen Complaint alleged, based on information and belief and as informed by Judge Nichols' rulings, that the named individuals involved in the Moonlight case had run afoul of numerous laws, including those concerned with false report by a peace officer, false documentary evidence, and dishonesty. Id. at 5-6 (identifying relevant laws). Amici have seen no positive action on the Citizen Complaint that might restore the public's confidence in the wildland fire prevention, investigation, and related law enforcement processes.

Judge Nichols' Order Granting Terminating Sanctions set forth specifics of the Cal Fire governmental corruption and taint that also infected the federal government's prosecution of appellants. Judge Nichols understood that the Moonlight Fire investigation and prosecution was, like so many of the wildfire cases amici have worked on, a joint state and federal effort from the first day of the fire when Cal Fire's Joshua White and the U.S. Forest Service's Dave Reynolds began their investigation. See, e.g., Order Granting Terminating Sanctions at 14 ("The Moonlight Fire origin and cause investigation was jointly conducted by agents from Cal Fire and the United States Forest Service. Cal Fire's Joshua White and the USFS's Reynolds were the primary scene investigators."). As a result of Cal Fire's "Joint Prosecution Agreement with the United States," there was necessarily an inherent and "substantial overlap between the [state and federal] cases." Id. at 53. That is why amici support appellants' request that this Court reverse the district court's decision, which declined to set aside the judgment embodying appellants' ill-informed settlement of the federal Moonlight case. That settlement was negotiated prior to the full daylighting of Cal Fire's "corrupt and tainted" conduct, which necessarily infected the federal government's case against appellants due to the joint state-federal nature of the Moonlight Fire investigation and prosecution.

After more than four years of state litigation, depositions and discovery,

Judge Nichols reached for these words in ruling against Cal Fire and dismissing the consolidated state cases: "The plaintiffs went 'all in,' and in this case it meant all in to win at any cost. . . . The cost of Plaintiff Cal Fire's conduct is too much for the administration of justice to bear." Order Granting Fees and Costs at 25. Likewise, amici respectfully suggest that the egregious misconduct that was too much for the administration of justice to bear warrants granting appellants another opportunity to set aside their ill-informed settlement of the federal Moonlight case, which appellants allege was tainted by fraud on the district court.

II. Because Appellants' Federal Settlement Rests on a Foundation of "Corrupt and Tainted" Conduct, it Continues to Harm the Interests of Amici and the Public.

As explained above, Cal Fire's "corrupt and tainted" conduct infected the federal government's case against appellants due to the joint state-federal nature of the Moonlight Fire investigation and prosecution. Cal Fire's "corrupt and tainted" conduct is why Mr. Cole joined other Cal Fire retirees in filing a formal complaint against Cal Fire representatives involved in the Moonlight Fire investigation and prosecution. See generally Citizens Complaint. Cal Fire's "corrupt and tainted" conduct also is why amici now support appellants in asking this Court to reverse the district court's decision to afford appellants a full and fair opportunity to set aside their ill-informed federal settlement based on fraud upon the court.

To be sure, Judge Nichols' Order Granting Terminating Sanctions and Order

Granting Fees and Costs provide some measure of justice to remedy the dishonorable conduct that infected the Moonlight Fire proceedings. Those rulings comprise a stiff rebuke to both government investigators and their counsel. But amici fear the continued existence of the federal settlement has two contrary effects which are detrimental to the rule of law in general and the dispensation of justice in this particular case. Those contrary effects also continue to compromise Cal Fire's reputation and that of its federal partner in wildland fire cases, the U.S. Forest Service, and to sully the professional reputation of honest, hard-working Cal Fire law enforcement officers, both past and present.

First, the continued existence of the federal settlement suggests to the public that appellants must have been responsible for the Moonlight Fire, as a result of which the federal prosecution presumably was just. Why else would appellants have settled the federal case and agreed to pay \$55 million plus transfer 22,500 acres of valuable timberland to the federal government? See generally District Court Doc. No. 592 (Settlement Agreement and Stipulation entered July 18, 2012). The public surely is unaware of the breathtakingly expansive damages sought by the federal government against appellants, which included "all damages to the National Forests as a result of the [Moonlight] fire," including at least \$22 million in fire suppression costs, resources damages in excess of \$118 million, \$1.5 million in emergency rehabilitation costs, unspecified tens of millions (if not more) in

interim environmental degradation costs, prejudgment interest, and a *doubling* of damages for all injuries to forest resources. District Court Doc. No. 561 (United States' Trial Brief entered June 25, 2012) at 9, 10-18. Nor does the public likely appreciate that when appellants reluctantly entered into the federal settlement as they faced crippling potential damages that posed existential threats to them, appellants were unaware of the full extent of the "corrupt and tainted" nature of the joint state-federal Moonlight Fire investigation and prosecution.

Second, to the extent the public does know about Judge Nichols' post-federal settlement findings of "corrupt and tainted" governmental conduct uncovered in the consolidated state cases, the public surely is left to wonder why the federal government "got away with" a tainted settlement that had the effect of transferring substantial assets from private parties to federal coffers. In an era of damaging public cynicism about our federal government and government employee conduct, the notion that appellants were forced into a settlement before the full extent of the "corrupt and tainted" Moonlight Fire investigation and prosecution was discovered only fuels such public cynicism. When "corrupt and tainted" government conduct leads to termination of state court proceedings without a similar outcome in the parallel federal court proceedings simply because the federal case settled prior to full discovery of the corruption and taint, public cynicism of our federal government rightfully *should* increase, with a concomitant decrease in confidence

in our public officials. The rule of law should not be viewed as a game of beat the clock, but amici fear that continued existence of the federal settlement has just that effect. And Amici know first-hand based on their many years with Cal Fire that public cynicism poses a clear danger when it comes to wildland fire investigation and related law enforcement efforts.

Judge Nichols' conclusion that governmental actors played an active role in delaying discovery of the "corrupt and tainted" conduct in connection with the Moonlight Fire adds additional force to the above concerns. Amici did not learn of the "corrupt and tainted" conduct until after Judge Nichols' February 2014 rulings. Similarly, appellants apparently only uncovered the full extent of the evidence leading up to those rulings after the July 2012 federal settlement as they prepared for trial in the combined state cases. And as Judge Nichols concluded, the investigators and prosecutors in the joint state-federal investigation and prosecution were far from hapless spectators to the ongoing drama that delayed discovery of the egregious conduct. See, e.g., Order Granting Terminating Sanctions at 13 ("[I]t is this Court's responsibility to review whether Cal Fire abused the legal process through the false testimony of its lead investigator on the Moonlight Fire, Joshua White. This Court finds that Cal Fire, through White, repeatedly did so."); id. at 17 ("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.") (quoting County of Santa Clara v. Superior Court, 50 Cal. 4th 35, 57 (2010)).

Because of the joint state-federal nature of the Moonlight Fire investigation and prosecution, Order Granting Terminating Sanctions at 14, 53, the federal government was not a mere bystander. Id. at 53 (concluding there was an inherent "substantial overlap between the [state and federal] cases"). Amici's desire to remediate the harm to their interests and those of the public resulting from the continued existence of the federal Moonlight settlement thus causes them to support appellants' request for reversal of the district court's decision, which declined to set aside appellants' federal settlement.

III. The Illegal Use of the Wildland Fire Investigation Training and Equipment Fund Uncovered After Appellants' 2012 Federal Settlement Particularly Undermines Public Confidence in Honest and Professional Fire Investigations and Prosecutions.

For amici, the matter of Cal Fire's use of the Wildland Fire Investigation Training and Equipment Fund (WiFITER) exemplifies in a special way the harm done to Cal Fire's reputation – and by association amici's reputations – as well as the fraud upon the district court in the federal case. Amici wondered why Cal Fire investigators were so intent on going after appellants. As it turned out, appellants were wondering the same thing and suspected it had something to do with WiFITER after lead Cal Fire investigator White sent a letter to each of the then-

defendants demanding that they pay a portion of the costs of fire suppression and investigation into the WiFITER fund rather the General Fund. Order Granting Terminating Sanctions at 4 n.5. But the prosecutors apparently had worked at every turn to keep defense counsel in the dark about WiFITER. See, e.g., id. at 10-11 (discussing Cal Fire's withholding of documents related to WiFITER in violation of court orders, which was ruled "akin to spoliation" and found to be "purposeful and calculated to enhance [Cal Fire's] chance of success on the merits").

Only in October 2013 – more than a year after appellants' federal settlement and quite by happenstance – did appellants learn some of the details regarding WiFITER due to the publication of the otherwise nondescript California Auditor's report 2013-107, titled "Accounts Outside the State's Centralized Treasury System." See <http://www.auditor.ca.gov/pdfs/reports/2013-107.pdf>. The report prominently featured Cal Fire's WiFITER and concluded it was being used "in violation of California law." Order Granting Terminating Sanctions at 4. Subsequently, documents that were belatedly produced by Cal Fire in the consolidated state cases, id. at 5-6, showed that Cal Fire officials had been intent on replenishing the WiFITER fund at the time of the Moonlight Fire and that they had worked to hide the true nature of the fund. Id. at 11-12 n.7 (discussing documents showing that Cal Fire was "fixated on the cash flowing in and out of the

illegal WIFITER account" and noting that Cal Fire's general counsel had cautioned Cal Fire "to keep a low profile" to avoid "look[ing] fishy") (quoting from produced documents).

Judge Nichols, noting the "pervasive nature of Cal Fire's discovery abuses," id. at 10, concluded that the belatedly-produced documents revealed "information that is inconsistent with the testimony of Cal Fire's witnesses and with Cal Fire's representations to this Court" Id. at 11. From amici's perspective, that egregious conduct not only interfered with the truth-finding goal of the judicial process, but it also called into substantial doubt whether Cal Fire investigators working on the joint state-federal Moonlight Fire investigation and prosecution could be trusted to fairly, honestly, and professionally administer their duties. The WIFITER debacle uncovered after the appellants' settlement is thus another reason that amici support reversal in this case.

CONCLUSION

In the conduct of their wildland fire work with Cal Fire, amici always were aware that their findings under color of law had the power to harm, even ruin, individuals and businesses. Livelihoods were at risk. So, often, was the very existence of companies, large and small. As such, amici took pains to perform their job duties with care, integrity and the utmost professionalism. Yet Judge Nichols' findings in the consolidated state cases make clear that "all in" officials in

the combined state-federal Moonlight Fire investigation and prosecution abused their authority as shown by their "corrupt and tainted" conduct. Allowing such egregious misconduct to stand to the extent it is embodied in appellants' federal settlement is an affront to all honest Cal Fire law enforcement officers, current and retired, and to the public. Amici thus support reversal.

Based on the foregoing, and for all of the reasons set forth by the other interested parties who have placed their concerns before this Court, amici respectfully urge the Court to reverse the trial court's decision to not set aside the judgment embodying appellants' ill-informed federal settlement, which appellants allege was tainted by fraud on the district court.

DATED this 17th day of September, 2015.

/s/Julie A. Weis
Julie A. Weis
Haglund Kelley LLP
Attorneys for Amicus Curiae
Michael Cole and Tom Hoffman

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, amici are not aware of any related cases pending before this Court.

DATED this 17th day of September, 2015.

/s/Julie A. Weis

Julie A. Weis

Haglund Kelley LLP

Attorneys for Amicus Curiae

Michael Cole and Tom Hoffman

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,633 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010, font size 14 and Times New Roman type style.

DATED this 17th day of September, 2015.

/s/Julie A. Weis
Julie A. Weis
Haglund Kelley LLP
Attorneys for Amicus Curiae
Michael Cole and Tom Hoffman

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2015, I electronically filed the foregoing **BRIEF OF AMICUS CURIAE MICHAEL COLE AND TOM HOFFMAN, RETIREES OF THE CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION, IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify all participants in the case are registered CM/ECF users.

/s/ Julie A. Weis
Julie A. Weis
Haglund Kelley LLP