

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

No. C076008

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 AMICUS CURIAE AND
BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION
IN SUPPORT OF DEFENDANTS-RESPONDENTS**

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TO BE FILED IN THE COURT OF APPEAL

APP-008

<p>COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION</p>	<p>Court of Appeal Case Number: C076008</p>
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<p>APPELLANT/PETITIONER: Department of Forestry and Fire Protection, et al. RESPONDENT/REAL PARTY IN INTEREST: Eunice E. Howell, et al.</p>	<p>FOR COURT USE ONLY</p>
<p>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE</p>	
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1. This form is being submitted on behalf of the following party (name): Amicus Curiae Pacific Legal Foundation

2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
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(2)
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Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: June 21, 2016

Lawrence G. Salzman
(TYPE OR PRINT NAME)

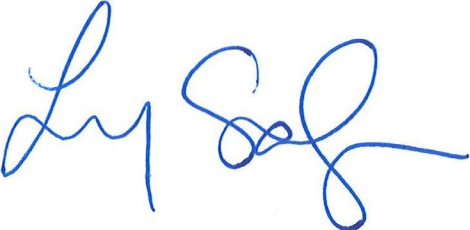
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**APPLICATION TO FILE
BRIEF AMICUS CURIAE**

Pursuant to California Rules of Court Rule 8.200(c) and for the reasons set forth in this application, Pacific Legal Foundation respectfully requests permission to file the accompanying brief in support of Defendants-Respondents.¹

IDENTITY AND INTEREST OF AMICUS

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under California law for the purpose of litigating matters affecting the public interest. PLF's work is supported by the contributions of donors who want to secure a rule of law protecting property rights, individual liberty, and the principles of just and limited government. During the past 40 years, PLF has often represented private parties against California governmental agencies. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000); *California Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435 (2015). In connection with its public interest cases, PLF has represented prevailing parties seeking attorneys' fees under Code of Civil Procedure

¹ In accordance with California Rule of Court 8.200(c)(3), Amicus Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

§ 1021.5, has received fees pursuant to that statute (and expects to seek and receive such fees in the future), and was a named party in a California Supreme Court case adjudicating the statute's meaning. *See Pacific Legal Foundation v. California Coastal Comm'n*, 33 Cal. 3d 158 (1982).

PLF's experience will provide the Court with a useful perspective on one of the issues in this case: whether the trial court abused its discretion by awarding attorney fees to Defendants-Respondents pursuant to Section 1021.5. As explained below, the trial court was warranted in awarding fees.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION

INTRODUCTION

In 2007, a fire began on private timber land in northern California (the "Moonlight Fire") that burned roughly 65,000 acres of forest before it was put out. *Cal. Dep't of Forestry & Fire Prot. v. Howell*, No. CV09-00205, 2014 WL 7972097, at *1 (Cal. Super. Ct. Feb. 4, 2014) (Order Granting Terminating Sanctions). A joint report by the California Department of Forestry and Fire Protection (Cal Fire) and the U.S. Forest Service on the origin of the fire deemed it to be started from by a spark from the blade of a bulldozer operated by an employee of Defendant-Respondent Howell's Forest Harvesting Company. Appellant's Opening Brief (AOB) at 4. The State of California sought a payment of \$8.1 million from Defendant-Respondents to offset the costs of extinguishing and investigating the fire. Respondents' Brief

(Resp. Br.) at 30. Defendant-Respondents resisted that demand, which led to Cal Fire bringing the instant case. Separately, the U.S. Forest Service brought its own civil action in federal court for recovery of costs and to impose fines. *See* Resp. Br. at 183-84. During limited early discovery, the defendants raised substantial questions about the fire investigation but chose to settle the federal case² while continuing to litigate this state action. *Id.* at 184.

After substantial discovery and a three-day evidentiary hearing, Plumas County Superior Court Judge Leslie C. Nichols (Ret.) terminated the state action, leading to this appeal. *Howell*, 2014 WL 7972097, at *2 (Order Granting Terminating Sanctions). The trial court further imposed more than \$32 million in monetary sanctions on Cal Fire, *id.* at *32-33, including attorney fees pursuant to Section 1021.5, finding 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 *1.

The trial court issued remarkable findings including: Cal Fire engaged in “gross violations of the discovery rules,” including those that were “purposeful and calculated to enhance its chance of success on the merits,” *id.* at *8; “false testimony of its lead investigator,” *id.*; “obfuscation and bad faith denials,” *id.* at *10; “spoliation of critical evidence [and] willful violations of

² Another federal lawsuit is ongoing, seeking to vitiate the terms of that settlement, on the basis of facts and misconduct subsequently discovered during the litigation of the instant case. *See* Resp. Br. at 184.

the Court's Orders," *id.* at *13. In the face these abuses, Judge Nichols could recall "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." *Cal. Dep't of Forestry & Fire Prot. v. Howell*, No. CV09-00205, 2014 WL 7972096, at *9 (Cal. Super. Ct. Feb. 4, 2014) (Trial Order). It is this extraordinary context in which this Court is called upon to review the trial court's decision impose the attorney fee award (and other sanctions) at issue in this appeal.

This Court should hold that an award under 1021.5 is due where, as here, a private litigant resists an economically efficient settlement and shoulders substantial financial risks over a period of years in order to vindicate its—and the broader public's—right to be free of "corrupt and tainted" investigations and prosecutions. *Id.* at *10. The courageous defense mounted by Defendants-Respondents in this case resulted in meaningful concrete benefits to large classes of persons, discussed below, and, fundamentally, "confirm[ed] that public entities, their employees, and the public lawyers who represent them are not immune from the imposition of fees and sanctions for misusing the legal system." *Howell*, 2014 WL 7972097 (Order Granting Terminating Sanctions), at *26. That counts as among the best purposes of the fee-shifting provision established by Section 1021.5.

ARGUMENT

I

THE STANDARD OF REVIEW FOR 1021.5 AWARDS IS ABUSE OF DISCRETION

Section 1021.5 provides a court discretion to award attorney fees to a successful party,

in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

Code Civ. Proc. § 1021.5. Where an action has produced no monetary recovery, as in this case, the third factor (c) does not apply. *Woodland Hills Residents Ass’n, Inc. v. City Council*, 23 Cal. 3d 917, 934-35 (1979).

The trial court determined that Defendants-Respondents were entitled to fees because they “expos[ed] bad faith conduct of certain employees within Cal Fire regarding the Moonlight Fire investigation and with respect to uncovering the WiFITER [Wildland Training and Equipment] fund, an effort which Defendants began almost immediately upon being sued.” *Howell*, 2014 WL 72972097 (Order Granting Terminating Sanctions), at *24. The court went on to state that “the defense of this matter helped exposed the WiFITER account, the existence of which . . . was allowing Cal Fire to illegally divert

money from California’s General Fund to the detriment of all Californians,” and which “contributed to [the fund’s] ultimate closure.” *Id.* at *25.

The Court also found that Defendants-Respondents “advanced an important public interest by” establishing that “14 C.C.R. § 938.8 did not create liability for land owners and others for fires caused by third parties.” *Id.* at *25. It made these findings based on its review of “thousands of pages of briefing,” having “developed an understanding of the nature of this unfortunate matter, and what [Defendants-Respondents’] successful defense of it accomplished not just for Defendants but for the public.” *Id.* at *24.

Appellants counter that Defendants-Respondents did not enforce an important right affecting the public interest or confer a significant public benefit, AOB at 63, and that their financial interest in the outcome of the case undermines the propriety of the 1021.5 award. AOB at 62. The thrust of their attack, however, is a challenge to the trial court’s factual conclusions, in which they argue that Defendants-Respondents defense of this matter did not truly expose nor contribute to the closure of the WiFITER fund. AOB at 65. This argument is misplaced as it effectively seeks de novo review of a matter that must be judged by an abuse of discretion standard. *See Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 578 (2004).

Under this standard, a trial court order—even one providing “little insight into its analysis”—“is presumed to be correct, and all . . . presumptions are indulged to support the order on matters as to which the record is silent.”

Gutierrez v. Autowest, Inc., 114 Cal. App. 4th 77, 88 (2003) (citing *Denham v. Superior Court*, 2 Cal. 3d 557, 564 (1970)). The order will be affirmed unless the appellant proves “a clear case of abuse” and “a miscarriage of justice.” *Blank v. Kirwan*, 39 Cal. 3d 311, 331 (1985) (quoting *Denham*, 2 Cal. 3d at 566).

An appellant cannot satisfy this deferential standard merely by arguing that a different decision would have been better or the facts might have supported an alternative. *Avant! Corp. v. Superior Court*, 79 Cal. App. 4th 876, 881-82 (2000) (“We could therefore disagree with the trial court’s conclusion, but if the trial court’s conclusion was a reasonable exercise of its discretion, we are not free to substitute our discretion for that of the trial court.”). Instead, the Appellants must persuade this Court that the lower court’s decision “exceeds the bounds of reason, all of the circumstances before it being considered.” *Denham v. Superior Court*, 2 Cal. 3d at 566. The Appellants’ attempt to re-litigate the trial court’s factual conclusions falls far short of that standard.

II

DEFENDANTS-RESPONDENTS’ LITIGATION CONFERRED A SIGNIFICANT BENEFIT TO THE GENERAL PUBLIC BY RESISTING AND PREVAILING OVER A “CORRUPT AND TAINTED” PROSECUTION

Defendants-Respondents’ three essential achievements warrant Section 1021.5 fees. First, they exposed (and contributed to the ultimate closure) of the

illegal WiFITER fund. Second, they established a change in the meaning of 14 Cal. Code Regs. § 938.8, which the trial court deemed to have widespread public benefits. Third, and most fundamentally, their defense guarded “the integrity of the investigation and prosecution of governmental claims against its citizens.” *Howell*, 2014 WL 72972097 (Order Granting Terminating Sanctions), at *26.

Appellants discount this vital third benefit because “[t]he court’s reasoning that its award might alter Cal Fire’s conduct in future litigation is irrelevant to section 1021.5.” AOB at 69 (citing *Ryan v. California Interscholastic Federation*, 94 Cal. App. 4th 1033, 1045 (2001)). But this statement goes too far. The Plaintiff in *Ryan* was a foreign high school student who was improperly deemed ineligible to participate in high school sports activities. 94 Cal. App. 4th at 1038-39. He won his right to engage in the activities through a mandamus challenge rescinding the ineligibility ruling and was granted attorney fees by the trial court under Section 1021.5. The court of appeal reversed, holding that the case turned on “unique factual circumstances,” *id.* at 1045, and conferred no significant benefit to “a large class of people.” *id.* at 1037. The Plaintiff argued that his victory “benefited all students and sent the message [to the high school sports administrating agency]: ‘be fair in your rulings and treat all applicants equally.’” *Id.* at 1045. But because the “case was simply a substantial evidence matter involving [the Plaintiff’s] personal interests,” the Court judged the message it sent

insufficient to sustain a Section 1021.5 award. *Id.* at 1045-46. This is similar to the holding in *Pacific Legal Found. v. Cal. Coastal Comm'n*, 33 Cal. 3d at 167, which denied Section 1021.5 fees because a substantial evidence administrative mandamus decision “vindicated only the rights of the owners of a single parcel of property.”

Often, however, successful litigation does “send a message” about an important right affecting large classes of persons, thereby warranting Section 1021.5 fees. In *Sokolow v. City of San Mateo*, for instance, female Plaintiffs alleged that a local sheriff office’s collaboration with an affiliated private law enforcement organization improperly harmed their chances to obtain professional positions because the private organization engaged in sex discrimination. 213 Cal. App. 3d 231, 235-36 (1989). The Plaintiffs prevailed, winning an injunction that caused the two organizations to sever their official ties. The trial court denied Section 1021.5 fees, but was reversed on appeal. *Id.* at 251. Although the immediate controversy was limited to the parties, the victory was premised on a broad right of equal protection that “necessarily confers a ‘significant benefit’ on society as a whole [And] it will deter other governmental entities from undertaking similar activities.” *Id.* at 246. The present case is more like *Sokolow* than *Ryan* or *Pacific Legal*, because it vindicated a broad and important right of all persons not to be subject to “corrupt and tainted” investigations and prosecutions by California governmental entities.

Had Defendants-Respondents simply given in to the government's initial demand to pay \$8.1 million in fire suppression and investigation costs, despite their skepticism of the faulty investigation, the illegal WiFITER fund may not have been exposed (or closed) and the public would still suffer under an interpretation of 14 C.C.R. § 938.8 that could close timber lands to public recreational use. However, by resisting and prevailing, Defendants-Respondents conferred those tangible public benefits plus exposed the government's "corrupt and tainted" process. Defendants-Respondents thereby affirmed "the vital importance of our discovery rules along with the integrity of our judicial system [which] must be protected for the benefit of everyone." The trial court correctly concluded that Defendants-Respondents' "success here has substantially furthered those goals for the benefit of all." *Howell*, 2014 WL 72972097 (Order Granting Terminating Sanctions), at *26.

III

DEFENDANTS-RESPONDENTS' FINANCIAL INTEREST IN THE CASE DOES NOT PRECLUDE AN AWARD UNDER 1021.5

Private parties often pursue litigation that involves both their own commercial interests and broader rights affecting large classes of people. When those parties refuse to accept financially advantageous settlements in order to vindicate more important principles, they have taken a risk beyond their pecuniary interests, and fees under Section 1021.5 are warranted. That is what happened here.

Appellants filed this case to pursue fire suppression and investigation costs from Defendants-Respondents arising out of the Moonlight Fire after the Defendant-Respondents declined to pay an approximately \$8.1 million demand. Defendants-Respondents did not believe they were liable for those costs, however, and had reason to distrust the investigatory process that established the liability—suspicions that were ultimately borne out through this litigation.

The government argues that Section 1021.5 fees are not due because Defendants-Respondents’ “aggressive defense was motivated by money, not altruism.” AOB at 62. But “the purpose of section 1021.5 is not to compensate with attorney fees only those litigants who have altruistic or lofty motives, but rather all litigants and attorneys who step forward to engage in public interest litigation when there are insufficient financial incentives to justify the litigation in economic terms.” *In re Conservatorship of Whitley*, 50 Cal. 4th 1206, 1211 (2010).

The government goes on to argue that the Defendants-Respondents’ “expenses were proportionate to the enormous risk posed by the litigation” and so “the court could not award them attorney’s fees as a matter of law.” AOB at 62. It is true that once litigation began, Cal Fire sought enormous penalties that could have done substantial harm to Defendants-Respondents’ economic position. However, a Section 1021.5 fee award is “appropriate when the cost of the claimant’s legal victory transcends his personal interest, that is, when

the necessity for pursuing the lawsuit placed a ‘burden on the plaintiff out of proportion to his individual stake in the matter.’” *Woodland Hills*, 23 Cal. 3d at 941 (quoting *County of Inyo v. City of Los Angeles*, 78 Cal. App. 3d 82, 89 (1978)).

Defendants-Respondents collectively expended tens of millions of dollars defending against a “tainted and corrupt” prosecution. They prevailed, thereby enforcing important rights and conferring “substantial . . . benefit upon the public.” *Howell*, 2014 WL 72972097 (Order Granting Terminating Sanctions), at *26. They might have walked away from that challenge by paying a fraction of those defense costs (at most, the government’s \$8.1 million initial demand). Instead, Defendants-Respondents put up a “robust and necessary defense” that “shined light on abuses so that corrective action could be taken” for the benefit of the public as well as themselves. *Howell*, 2014 WL 72972096 (Trial Order), at *11. This effort plainly transcended their narrow financial interests. In light of the totality of the circumstances, the trial court did not abuse its discretion in awarding fees under Section 1021.5.

CONCLUSION

Defendants-Respondents are due an attorney fee award under Section 1021.5 because their “success [in this case] has substantially furthered” important rights conferring significant benefits to the public, *Howell*, 2014 WL

72972097 (Order Granting Terminating Sanctions), at *26, and their defense imposed a financial burden that transcended their pecuniary interest.

DATED: June 21, 2016.

Respectfully submitted,

DEBORAH J. LA FETRA
LAWRENCE G. SALZMAN

By /s/ Lawrence G. Salzman
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-RESPONDENTS is proportionately spaced, has a typeface of 13 points or more, and contains 2,843 words.

DATED: June 21, 2016.

/s/ Lawrence G. Salzman
LAWRENCE G. SALZMAN

DECLARATION OF SERVICE

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

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

My business address is 930 G Street, Sacramento, California 95814.

On June 21, 2016, a true copy of APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION 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 efilings 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.

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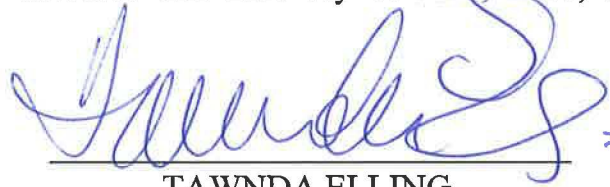
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I declare under penalty of perjury that the foregoing is true and correct
and that this declaration was executed this 21st day of June, 2016, at
Sacramento, California.



TAWNDA ELLING