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February 3, 2009

BY HAND DELIVERY

Honorable Patrick Marlette
Judge of the Superior Court
Sacramento County Superior Court
Department 19
720 Ninth Street
Sacramento, CA 95814

Re: *Professional Engineers in California Government and California Association of Professional Scientists v. Schwarzenegger, et al.*,
Case No. 34-2008-80000126
California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Schwarzenegger, et al.,
Case No. 34-2009-80000134
Service Employees International Union, Local 1000 v. Schwarzenegger, et al.,
Case No. 34-2009-80000135

Dear Judge Marlette:

I write in response to the improper ex parte communication sent to you by counsel for Controller John Chiang this morning. Respondents object to this communication to you and further object to the relief sought in it. In the event that this Court is inclined, however, to consider the matters raised in the various letters submitted to this Court, it is Respondents position that (1) the other constitutional officers of the State of California whose letters are attached to the Controller's letter must intervene in this action, at the very least for the limited purpose of obtaining the sought after clarification of this Court's ruling, and (2) this Court should establish a briefing schedule regarding the issues raised so that the Court has the benefit of a full discussion of the issues prior to making any ruling.

To begin with, the letter from the Controller's office amounts to an ex parte application seeking relief from this Court regarding the application of this Court's ruling last Thursday in the above-referenced actions. Ex parte applications for relief are governed by California Rules of Court, Rule 3.1200, *et seq.* Those rules require that a party seeking ex parte relief provide at least 24-hours notice of their request for such relief. (See Rule 3.1203.) No such notice was given here. Instead, I received an e-mail at 10:11 a.m. today forwarding a pdf

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file of the Controller's letter along with the other letters attached. This e-mail did not include a cover message from the Controller's counsel. Based on the above, the Controller's letter to you constitutes an improper ex parte communication and should be disregarded by the Court.

Second, the letter seeks relief on claims not presented to the Court by parties not before the Court. As a general proposition, courts do not, and should not, decide abstract questions of law based on claims not raised to the Court and certainly not on claims raised by parties who are not before the Court. (See *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 746.) The Controller's request for "clarification" of this Court's ruling of last week raises a number of new and novel legal issues, which were not raised by any of the pleadings filed by the Petitioners in the above-referenced action. Furthermore, these claims are raised by parties, *i.e.*, the constitutional officers of the State of California other than the Governor, who are not parties to this action. Based on this, Respondents again urge the Court to disregard the Controller's letter.

Third, *if* this Court is inclined to consider the matters raised in the letters submitted to it, then Respondents urge the Court to order the other constitutional officers to intervene in the action for the limited purpose of obtaining the clarification they seek. Respondents further request that this Court establish a briefing schedule regarding the issues raised in the letters submitted to the Court.

It is Respondents' position that pursuant to this Court's ruling of last week, the Governor, acting as the state employer, has the inherent executive authority to order furloughs for state employees, including the employees of other constitutional officers. No distinction was made in this Court's ruling between different types of state employees much less whether there may be some limitation on the Governor's authority to order furloughs for a particular class of state employee. Furthermore, the majority of state employees working in the offices of the other constitutional officers are represented by SEIU, while those in the Attorney General's office are represented by CASE, and thus on its face this Court's ruling applies to those employees.

As this Court's ruling last week recognized, the state employer has the authority to take action impacting state employees' hours of work including, but not limited to, the authority to order furloughs. The management of this authority is delegated to the Department of Personnel Administration ("DPA") for the purpose of "managing the nonmerit aspects of the state's personnel system." (Gov. Code § 19815.2) Toward that end, DPA "succeeds to and is vested with the duties, purposes, responsibilities, and jurisdiction exercised by the State Personnel Board with respect to the administration of salaries, hours, and other personnel-related matters, training, performance evaluations, and layoffs and grievances." As noted by the court in *Tirapelle v. Davis* (1993) 20 Cal. App. 4th 1317, 1322, "...in general, the DPA has jurisdiction over the State's financial relationship with its employees." In other words, the state employer has broad authority to take various actions regarding the employment of *all* state employees, including those of constitutional officers. This authority includes furloughing state employees when necessary to address a fiscal emergency.

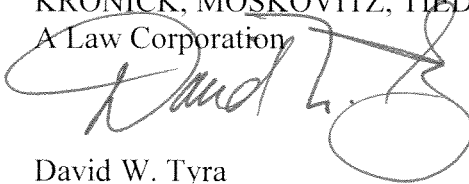
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It is Respondents' position that the request for clarification made to this Court by the Controller is improper and should be disregarded. However, if this Court is inclined to consider the request for clarification, then Respondents agree with the statement made by the Attorney General in his letter that "a full briefing regarding the Governor's authority to issue executive orders is beyond the limited scope of this letter." For this reason, and only if this Court is inclined to consider this request at all, Respondents reiterate their request that this Court order the other constitutional officer to intervene in this action for the limited purpose of considering the request for clarification and that this Court establish a briefing schedule on the questions presented by the other constitutional officers. With respect to any proposed briefing schedule, Respondents request that such a schedule be expedited in order to resolve this question at the earliest possible date.

Thank you for your consideration.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation



David W. Tyra

DWT

cc: See Proof of Service Attached

909470.1

PROOF OF SERVICE

I, May Marlowe, declare:

I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On February 3, 2009, I served a copy of the following document(s):

February 3, 2009 Letter to Court

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
- by causing to be transmitted via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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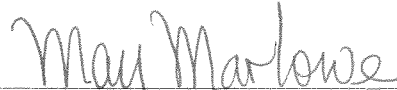
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1 I am readily familiar with the firm's practice of collection and processing correspondence
2 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
3 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
4 motion of the party served, service is presumed invalid if postal cancellation date or postage
5 meter date is more than one day after date of deposit for mailing in affidavit.

6 I declare under penalty of perjury under the laws of the State of California that the above
7 is true and correct.

8 Executed on February 3, 2009, at Sacramento, California.

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May Marlowe