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15 Administration; and DEPARTMENT OF PERSONNEL  
ADMINISTRATION

**Exempted from Fees  
(Gov. Code § 6103)**

17 SUPERIOR COURT OF CALIFORNIA

18 COUNTY OF SACRAMENTO

19  
20 ARNOLD SCHWARZENEGGER,  
Governor; DAVID A. GILB, Director of  
21 Department of Personnel Administration;  
DEPARTMENT OF PERSONNEL  
22 ADMINISTRATION,

23 Petitioners,

24 v.

25 STATE CONTROLLER JOHN CHIANG;  
and DOES 1 through 20, inclusive,

26 Respondents.  
27

CASE NO. 34-2009-80000158-CU-WM-GDS

**PETITIONERS' REPLY TO OPPOSITION  
OF RESPONDENT AND INTERVENORS  
ON THE MERITS**

Date: March 12, 2009

Time: 1:30 p.m.

Dept.: 19

The Honorable Patrick Marlette

**Action Filed: February 9, 2009**

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I.

INTRODUCTION

1  
2  
3 In an excess of hyperbole, Respondent State Controller John Chiang and  
4 Intervenors mischaracterize this case as involving an “unprecedented” intrusion by the Governor  
5 into the “core functions” of “elected constitutional officers by ordering them to furlough their  
6 employees.” (See Respondent’s and Intervenors’ Opposition Brief, 1:3-13.) Contrary to  
7 Respondent’s and Intervenors’ assertions, however, this case in no way involves an attempt by  
8 the Governor to interfere with the core functions of the civil executive officers of this State.  
9 Rather, by issuing Executive Order S-16-08 on December 19, 2008 directing twice monthly  
10 furloughs for all state employees, including the civil executive officers’ employees, the Governor  
11 was exercising the constitutional and statutory authority granted to him as the state employer to  
12 regulate the working hours of state employees. This authority extends to the employees of the  
13 other civil executive officers because, by definition, those employees are members of the state  
14 workforce subject to the Governor’s executive authority.

15 While Respondent’s and Intervenors’ opposition largely consists of their erroneous  
16 argument that the Executive Order impermissibly intrudes upon the civil executive officers’  
17 prerogatives, Respondent and Intervenors raise additional arguments that are equally unavailing.  
18 First, the Executive Order is not moot as a result of the Governor’s line item vetoes reducing the  
19 budgets of the civil executive officers. The issue of the Governor’s ability, as the state employer,  
20 to regulate the working hours of state employees through furloughs is an issue of public  
21 importance likely to recur and, therefore, is not moot. Furthermore, Petitioners’ evidence  
22 demonstrates that the revisions to the 2008-2009 and 2009-2010 budgets recently passed by the  
23 Legislature mandate certain cost savings in state employee compensation costs. The assumptions  
24 factored into the cost savings figures included in the recent legislation include twice monthly  
25 furloughs of state employees, including the employees of the civil executive officers. (See  
26 generally Declaration of Diana Ducay.)

27 Second, Petitioners are not estopped from applying the Executive Order to the  
28 employees of the civil executive officers. Respondent and Intervenors have failed to demonstrate

1 the essential elements for applying principles of equitable estoppel to comments made by  
2 Administration officials shortly following issuance of the Executive Order. Specifically,  
3 Respondent and Intervenors have failed to demonstrate that the statements made by  
4 Administration officials regarding the applicability of the Executive Order to the civil executive  
5 officers' employees were deliberately false and made for the purpose of causing Respondent  
6 and/or Intervenors to alter their position to their detriment.

7 Finally, this Court's prior ruling of January 30, 2009 establishes the applicability  
8 of the Executive Order to the civil executive officers' employees. The undisputed evidence  
9 submitted with Petitioners' opening brief shows that the vast majority of the employees working  
10 for the State's civil executive officers are represented by Service Employees International Union,  
11 Local 1000 ("SEIU"), California Attorneys, Administrative Law Judges and Hearing Officers in  
12 State Employment ("CASE"), or Professional Engineers in California Government ("PECG").  
13 Each of these employee organizations was subject to the final ruling and judgment of this Court  
14 rendered on January 30, 2009, as follows:

15 The Court accordingly rules that, with regard to the issues raised by  
16 *all petitioners* regarding the Governor's authority to make the  
17 challenged order, the petitions for writ of mandate are denied and  
18 judgment shall be entered for the defendants (respondents) on the  
19 complaints for declaratory relief. *This ruling applies to both state*  
20 *employees represented by all of the petitioners under the Dills Act*  
and to those state employees represented by petitioners PECG and  
CAPS who are excluded from the Dills Act by law, as the  
authorities on which the Court has relied in finding that the  
Governor has the authority to take the challenged action apply to  
both classes of employees.

21 Based on this Court's January 30, 2009 ruling, therefore, employees working for the civil  
22 executive officers are subject to the Executive Order because they are members of the employee  
23 organizations against whom that ruling was made.

24 For all of these reasons, as more fully discussed below, Petitioners submit that this  
25 Court should issue the requested writ of mandate compelling the Controller to reduce employee  
26 compensation for those employees working for the other civil executive officers commensurate  
27 with twice monthly furloughs and to issue the requested injunctive relief compelling the  
28

1 Controller to comply with the Executive Order and the implementation of it as directed by the  
2 Department of Personnel Administration (“DPA”).

3 **II.**

4 **LEGAL ANALYSIS**

5 **A. The Governor Has the Legal Authority to Furlough the Employees of the State Civil**  
6 **Executive Officers.**

7 As noted above, the dominant argument in Respondent’s and Intervenors’  
8 opposition is that the Executive Order interferes with their prerogatives as “independent  
9 constitutional officers” of the State. Respondent and Intervenors are statutorily defined as “civil  
10 executive officers.” Government Code section 1000 states, “Executive officers are either (a) civil  
11 or (b) military.” Section 1001 defines the civil executive officers of the State of California as  
12 including the Governor, Lieutenant Governor, the Secretary of State, the Treasurer, the Attorney  
13 General, the Controller, the Insurance Commissioner, the Superintendent of Public Instruction,  
14 and the members of the Board of Equalization. Maintaining this proper definition of Respondent  
15 and Intervenors as civil executive officers is not mere nomenclature because Government Code  
16 section 12010 provides: “The Governor shall supervise the official conduct of all executive and  
17 ministerial officers.” Thus, for all of the arguments raised by Respondent and Intervenors  
18 regarding their independence and notions of “divided executive authority” in California (see  
19 Opposition, 8:14, *et seq.*), the relevant statutory framework gives the Governor the authority and  
20 responsibility for supervising the official conduct of the civil executive officers. This, in fact, is  
21 consistent with the constitutional framework in the California Constitution, which grants to the  
22 Governor “[t]he supreme executive power of the State.” (Cal. Const., Art. V, sec. 1.)

23 This having been said, it is not the Governor’s authority over the civil executive  
24 officers themselves that is really at issue here. Rather, it is the Governor’s authority, in his role as  
25 the state employer, over the state workforce, including those state employees working for the  
26 other civil executive officers, that is at issue. Specifically, it is the Governor’s authority to  
27 regulate the working hours of those state employees by directing twice monthly furloughs that is  
28 being challenged by Respondent and Intervenors. It is undisputed that the Governor and DPA

1 possess “jurisdiction over the state’s financial relationship with its employees, including matters  
2 of salary, layoffs and nondisciplinary demotions.” (*Tirapelle v. Davis* (1993) 20 Cal.App.4th  
3 1317, 1322.) As this Court already has ruled, this jurisdiction includes the authority to regulate  
4 the working hours of state employees, including temporarily furloughing them during a time of  
5 fiscal crisis. (See Gov. Code §§ 19851 and 19849.) Despite this fact, Respondent and  
6 Intervenors argue that the Governor may not furlough employees working for them.

7           In making this argument, Respondent and Intervenors rely on a series of  
8 Government Code sections they contend provide them with “independent power and duties” with  
9 respect to state employees working for them. (See Opposition, pp. 13-14.) The statutes relied  
10 upon by Respondent and Intervenors do *not*, however, provide them with authority over state  
11 employees in their service that is independent of, or greater than, the Governor’s authority over  
12 them as the state employer. Rather, the statutes relied upon by Respondent and Intervenors  
13 provide that the civil executive officers may appoint certain key deputies and staff, who  
14 themselves are civil executive officers. (See e.g., Gov. Code, § 12101 re Lieutenant Governor,  
15 § 12152 re Secretary of State, § 12302 re Treasurer, § 12402 re Controller, § 12502 re Attorney  
16 General; see also, *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1225.)  
17 Those employees who are listed in the aforementioned statutes are thus subject to the Governor’s  
18 supervisory authority over the performance of all executive employees of the State. (Gov. Code  
19 § 12010.) All other employees working for the civil executive officers who are not specifically  
20 referenced in the aforementioned statutes are state employees in the civil service and thus subject  
21 to the Governor’s authority over them as the state employer.

22           This is clear from the holding in *Schabarum, supra*, which Respondent and  
23 Intervenors do not even cite, much less discuss, in their opposition. As noted in Petitioners’  
24 Opening Brief to this Court, the issue in *Schabarum* was whether the determination by the  
25 Legislature and the Governor that the budget for the Legislative Counsel may be excluded from  
26 the operating expenses and equipment for the Legislature was unconstitutional. In answering this  
27 question in the negative, the court noted that the chief of the Legislative Counsel’s office is one of  
28 the civil executive officers enumerated in Government Code section 1001. Thus, the chief, along

1 with two deputies, are exempt from civil service. However, as to the remainder of the staff  
2 working in the Legislative Counsel's office, the court noted as follows:

3 [B]ut other members of the Legislative Counsel's staff are subject  
4 to the civil service system of employment. (Cal. Const. art. VII, §§  
5 1, subd. (a), 4, subd. (m).) *They are thus subject to the jurisdiction*  
6 *of the State Personnel Board with respect to the merit aspects of*  
*their employment and to the Department of Personnel*  
*Administration with respect to the nonmerit aspects of*  
*employment.)*

7 (*Id.*, at p. 1225; emphasis added.) Later in its opinion, the *Schabarum* court reiterated this same  
8 point and contrasted employees working in the Legislative Counsel's office from those  
9 employees working directly for the Legislature:

10 The Legislative Counsel is not, in form, a part of the Legislature.  
11 Its chief is a civil executive officer who must be appointed on a  
12 nonpartisan basis. [Citations.] While the officers and employees of  
13 the Legislature are exempt from civil service and may be hired and  
14 fired freely by the house to which they are attached [citation],  
*employees of the Legislative Counsel are within the civil service*  
*and are under the jurisdiction of the State Personnel Board and the*  
*Department of Personnel Administration.*

15 (*Id.*, at p. 1227; emphasis added.)

16 Just like the employees of the Legislative Counsel who are within the civil service  
17 and, therefore, subject to the Governor's jurisdiction as the state employer, employees of the civil  
18 executive officers who also are members of the civil service are subject to that same jurisdiction.  
19 This conclusion is made abundantly clear by considering the fact that, except for exempt  
20 appointed positions, the employees of the civil executive officers are represented by various  
21 recognized employee organizations pursuant to the Dills Act. It is undisputed that the vast  
22 majority of the civil executive officers' employees belong to bargaining units represented by  
23 employee organizations that were petitioners in the cases decided by this Court on January 30,  
24 2009. For instance, in the State Controller's office there are approximately 920 employees in  
25 bargaining units represented by petitioners subject to this Court's Final Amended Ruling of  
26 January 30, 2009 (916 in SEIU, 4 in CASE); in the Attorney General's office, approximately  
27 3,151 employees in bargaining units represented by those petitioners (2,186 in SEIU, 954 in  
28 CASE, 2 in PECG, and 9 in CAPS); in the Secretary of State's office, approximately 391

1 employees in bargaining units represented by those petitioners (374 in SEIU and 15 in CASE); in  
2 the State Treasurer's office approximately 155 employees in bargaining units represented those  
3 petitioners (153 in SEIU and 2 in CASE); in the Superintendent of Public Instruction's,  
4 approximately 2,215 employees in bargaining units represented by those petitioners (2,199 in  
5 SEIU, 14 employees in CASE, and 2 employees in PECG); in the Insurance Commissioner's  
6 office, approximately 760 employees in bargaining units represented by those petitioners (685 in  
7 SEIU and 75 in CASE); and in the State Board of Equalization offices, approximately 3,506  
8 employees in bargaining units represented by those petitioners (3,440 in SEIU, 65 in CASE, and  
9 1 in PECG). (See Judd Decl., ¶¶ 7-13.)

10 Government Code section 3513(c) defines those state employees who are entitled  
11 to be represented by recognized employee organizations as "any civil service employee of the  
12 state." In other words, to be represented by a recognized employee organization under the Dills  
13 Act, a state employee must be a member of the civil service. The *Schabarum* decision, in turn,  
14 holds that employees in the civil service are subject to DPA's jurisdiction as to the nonmerit  
15 aspects of their employment. It follows *a fortiori* that the represented, civil service employees of  
16 the civil executive officers are subject to the Governor's authority to regulate the working hours  
17 of state employees and are, therefore, subject to the twice monthly furloughs established by the  
18 Executive Order. Respondent's and Intervenors' irrelevant arguments regarding their  
19 independent constitutional status fail to address, much less overcome, this clear and inescapable  
20 conclusion.

21 **B. The Issue of the Governor's Authority to Furlough the Civil Executive Officers'**  
22 **Employees Is Not Moot.**

23 Respondent and Intervenors argue that the furloughing of their employees to  
24 achieve certain cost savings has been rendered moot as a result of the Governor's recent line item  
25 vetoes of their budgets. (Opposition, p. 17, *et seq.*) This is untrue.

26 To begin with, the Governor's line item vetoes affect only the civil executive  
27 officers' budgets for the 2009-2010 fiscal year, which begins on July 1, 2009. (See Declaration  
28 of Diana Ducay, ¶ 6.) For the remainder of the 2008-2009 fiscal year, Section 3.90 of the Budget

1 Act of 2008, recently enacted by the Legislature, requires that overall budget appropriations for  
2 fiscal year 2008-2009 be reduced in the total amounts of \$385,762,000 from General Fund items  
3 and \$285,196,000 from items relating to other funds to reflect reductions in state employee  
4 compensation for that fiscal year. (See Declaration of Diana Ducay, ¶ 3.) Because the  
5 Governor's line item vetoes apply only to the civil executive officers' budgets in the next fiscal  
6 year, the primary mechanism for achieving the legislatively mandated cost savings in state  
7 employee compensation for this fiscal year is the furloughs directed by the Executive Order.

8 For the 2009-2010 fiscal year, the Legislature has mandated budget appropriations  
9 be reduced in the total amounts of \$1,024,326,000 from General Fund items and \$688,375,000  
10 from items relating to other funds to reflect reductions in state employee compensation for that  
11 fiscal year. (See Declaration of Diana Ducay, ¶4.) In calculating these budget reductions, there  
12 was an assumption that all state employees, including those who work in the offices of the civil  
13 executive officers of the State, *i.e.*, the Lieutenant Governor, the Secretary of State, the Treasurer,  
14 the Attorney General, the Controller, the Superintendent of Public Instruction, the Insurance  
15 Commissioner, and the Board of Equalization, would be furloughed two days a month from  
16 February 2009 to June 2010 as required by the Executive Order. Thus, the assumptions  
17 underlying the required budget savings specified for both fiscal years 2008-2009 and 2009-2010  
18 include two-day a month furloughs for the employees of the civil executive officers. (See  
19 Declaration of Diana Ducay, ¶ 5.) The furloughing of the civil executive officers' employees has  
20 not, therefore, been rendered moot by the Governor's line item vetoes of the civil executive  
21 officers' budgets for the 2009-2010 fiscal year.

22 While the furloughing of the civil executive officers' employees is certainly not  
23 moot, even if this were the case this Court should still issue the requested relief. Although  
24 subsequent events may render an issue technically moot, courts still have the discretion to decide  
25 the issues of public importance that are likely to recur, especially when, because of their limited  
26 duration, the issues are not easily susceptible of judicial review. (*Californians for Fair*  
27 *Representation – No on 77 v. Superior Court* (2006) 138 Cal.App.4th 15, 22-23; *State Bd. of*  
28 *Educ. v. Honig* (1993) 13 Cal.App.4th 720, 742.) Under these circumstances, the court may

1 exercise its inherent discretion to resolve issues raised in a proceeding even if the matter is moot  
2 as to the particular parties in the proceeding. (*Id.*) Here, the issue of the Governor's authority to  
3 temporarily furlough state employees during a fiscal crisis is an issue of public importance that is  
4 likely to recur and is of a limited duration. The issues raised in this proceeding are, therefore,  
5 significant enough that this Court should exercise its inherent discretion to resolve them even if  
6 finds that there is some aspect of this case that may have become technically moot.

7 **C. Petitioners Are Not Estopped from Seeking a Writ of Mandate and/or Injunctive**  
8 **Relief to Enforce the Executive Order.**

9 Respondent and Intervenors argue that Petitioners are equitably estopped from  
10 seeking enforcement of the Executive Order against them based on certain statements allegedly  
11 made by Administration officials in early January 2009 to the effect that the Executive Order did  
12 not apply to the civil executive officers. (Opposition, p. 22, *et seq.*) Yet, Respondent and  
13 Intervenors have failed to present any facts to this Court warranting the application of equitable  
14 estoppel principles to this case.

15 All parties agree that the State's fiscal crisis, and the adoption of state employee  
16 furloughs as one means of addressing that crisis, were unprecedented. Following issuance of the  
17 Executive Order on December 19, 2009, analyses of various aspects of state employee furloughs  
18 were being undertaken and information was being disseminated rapidly. As the accompanying  
19 declaration of Debbie Endsley makes clear, the conversation with the civil executive officers  
20 regarding furloughs that took place on January 9, 2009 concluded with an understanding that  
21 more legal analysis needed to occur to determine whether the Executive Order would apply to the  
22 civil executive officers' employees. (See Declaration of Debbie Endsley, ¶ 4.)

23 In order for the doctrine of equitable estoppel to apply, Respondent and  
24 Intervenors must show that Petitioners made statements, or engaged in conduct, that intentionally  
25 and deliberately misled Respondent and Intervenors to believe a particular thing true – in this case  
26 that the Executive Order did not apply to their employees – and to act upon such belief. (See  
27 Evid. Code § 623.) The essence of an estoppel, if it is applicable at all in these circumstances, is  
28 that Petitioners have by false language or conduct led Respondent and Intervenors to do that

1 which they would not otherwise have done and, as a result, they have suffered injury. (*El Rio*  
2 *Oils v. Pacific Coast Asphalt Co.* (1949) 95 Cal.App.2d 186, 194.) As stated by the court in  
3 *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 162,

4 Broadly speaking, ‘estoppel’ refers less to a doctrine than to a  
5 conceptual pattern, first articulated in the courts of equity, which  
6 has come to pervade our law. When it is successfully invoked, the  
7 court in effect closes its ears to a point – a fact, argument, claim, or  
8 defense – on the ground that to permit its assertion would be  
9 intolerably unfair.

10 In this case, Respondent and Intervenors have failed to produce any evidence  
11 showing that Petitioners acted in a deliberately false way to induce them to change position in  
12 reliance. In fact, the evidence presented to the Court is to the contrary, *i.e.*, the teleconference on  
13 January 9, 2009 ended with an understanding that more legal research was needed to determine  
14 whether the Executive Order applied to the civil executive officers’ employees. Respondent and  
15 Intervenors also have failed to produce any evidence that they have suffered any injury as a result  
16 of the statements allegedly made during this teleconference. Finally, there has been no showing  
17 that it would be “intolerably unfair” to apply the Executive Order to the civil executive officers’  
18 employees. In fact, what would be intolerably unfair would be for the civil executive officers’  
19 employees to avoid furloughs while their fellow state employees continue to experience them.  
20 Accordingly, Petitioners are not estopped from seeking enforcement of the Executive Order on  
21 the civil executive officers’ employees.

22 **D. This Court’s Prior Ruling Establishes that the Executive Order Applies to the Civil**  
23 **Executive Officers’ Employees.**

24 Following this Court’s ruling of January 30, 2009, State Controller Chiang wrote  
25 to this Court seeking clarification as to whether the Court’s ruling applied to the employees of the  
26 civil executive officers. In response, this Court stated in a Minute Order dated February 4, 2009,  
27 as follows:

28 The Court's ruling in the above-captioned matters addressed  
petitions for writ of mandate and complaints for declaratory relief  
brought by four recognized employee organizations, raising issues  
regarding the Governor's authority to order furloughs of their  
members, as employees of executive branch agencies. The

1 independently elected Constitutional Officers and other elected  
2 state-wide officials referenced above were not parties to these  
3 matters. The petitions and complaints upon which the Court ruled  
4 did not raise any issues regarding the Governor's authority to order  
5 furloughs for the employees of those officers and officials. The  
6 Court's ruling therefore did not address, or make any ruling  
7 regarding, the Governor's authority to order furloughs for the  
8 employees of those officers and officials. Accordingly, the Court  
9 expresses no views regarding that issue.

10 (See Respondent's and Intervenors' Request for Judicial Notice, Exhibit 12.) On the basis of this  
11 Minute Order, Respondent and Intervenors argue that the Court's January 30, 2009 ruling is  
12 inapplicable to their employees.

13 However, at the time this Court issued its Minute Order of February 4, 2009, it had  
14 not been presented with evidence that the vast majority of the civil executive officers' employees  
15 are members of the very employee organizations that were subject to the Court's ruling of  
16 January 30, 2009. As this Court stated in its February 4, 2009 Minute Order, "[t]he Court's ruling  
17 [of January 30, 2009] addressed petitions for writ of mandate and complaints for declaratory  
18 relief brought by four recognized employee organizations, *raising issues regarding the*  
19 *Governor's authority to order furloughs of their members*, as employees of executive branch  
20 agencies. (Emphasis added.) Petitioners now have presented this Court with evidence of the fact  
21 that the civil executive officers' workforce are made up of employees in the very employee  
22 organizations that were before the Court on January 29, 2009 and thus subject to this Court's  
23 January 30, 2009 ruling. (See Judd Declaration submitted with Petitioners' Opening Brief.)

24 In that ruling, this Court stated,

25 The Court accordingly rules that, with regard to the issues raised by  
26 *all petitioners* regarding the Governor's authority to make the  
27 challenged order, the petitions for writ of mandate are denied and  
28 judgment shall be entered for the defendants (respondents) on the  
complaints for declaratory relief. *This ruling applies to both state*  
*employees represented by all of the petitioners under the Dills Act*  
and to those state employees represented by petitioners PECG and  
CAPS who are excluded from the Dills Act by law, as the  
authorities on which the Court has relied in finding that the  
Governor has the authority to take the challenged action apply to  
both classes of employees.

There is no dispute here that the civil executive officers' employees are employees  
represented by the employee organizations that were before this Court on January 29, 2009 and

1 thus subject to the above order. Accordingly, this Court's prior ruling fully disposes of the issue  
2 as to whether the Executive Order applies to the civil executive offices' employees.

3  
4 **III.**

5 **CONCLUSION**

6 Governor Schwarzenegger, acting as the state employer, has the authority to  
7 furlough the civil executive officers' employees. These employees are part of the state workforce  
8 subject to the Governor's exercise of his executive authority. They also are members of the  
9 employee organizations against whom this Court ruled on January 30, 2009. Accordingly, this  
10 Court should issue the requested writ of mandate and injunctive relief compelling Respondent  
11 State Controller Chiang to comply with the Governor's Executive Order and refrain from actions  
12 interfering with the full implementation of state employee furloughs, including the furloughing of  
13 state employees working for the civil executive officers of the State.

14 Dated: March 9, 2009

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
A Law Corporation

15  
16  
17 By: 

18 David W. Tyra  
19 Attorneys for Petitioners  
20 ARNOLD SCHWARZENEGGER, Governor;  
21 DAVID A. GILB, Director of Department of  
22 Personnel Administration; and DEPARTMENT OF  
23 PERSONNEL ADMINISTRATION  
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I, May Marlowe, declare as follows:

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 March 9, 2009, I served a copy of the within document(s):

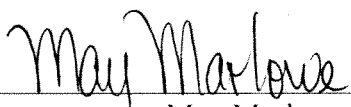
**PETITIONERS' REPLY TO OPPOSITION OF RESPONDENT AND INTERVENORS ON THE MERITS**

- 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 personal delivery by Messenger of the document(s) listed above to the person(s) at the address(es) set forth below.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Sacramento, California addressed as set forth below.
- 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.

Mark Beckington, Esq.  
DEPARTMENT OF JUSTICE  
300 S. Spring Street, #5312  
Los Angeles, CA 90013  
Email: [mark.beckington@doj.ca.gov](mailto:mark.beckington@doj.ca.gov)

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

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 9, 2009, at Sacramento, California.

  
\_\_\_\_\_  
May Marlowe

1 DAVID W. TYRA, State Bar No. 116218  
KRISTIANNE T. SEARGEANT, State Bar No. 245489  
2 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
A Law Corporation  
3 400 Capitol Mall, 27th Floor  
Sacramento, California 95814  
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5 E-mail: [dtyra@kmtg.com](mailto:dtyra@kmtg.com)

6 K. WILLIAM CURTIS  
Chief Counsel, State Bar No. 095753  
7 WARREN C. STRACENER  
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8 LINDA A. MAYHEW  
Assistant Chief Counsel, State Bar No. 155049  
9 WILL M. YAMADA  
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10 DEPARTMENT OF PERSONNEL ADMINISTRATION  
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11 Sacramento, California 95811-7258  
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12 Facsimile: (916) 323-4723  
E-mail: [WillYamada@dpa.ca.gov](mailto:WillYamada@dpa.ca.gov)

13 Attorneys for Petitioners  
14 ARNOLD SCHWARZENEGGER, Governor; DAVID A.  
GILB, Director of Department of Personnel  
15 Administration; and DEPARTMENT OF PERSONNEL  
ADMINISTRATION

**Exempted from Fees  
(Gov. Code § 6103)**

17 SUPERIOR COURT OF CALIFORNIA

18 COUNTY OF SACRAMENTO

19  
20 ARNOLD SCHWARZENEGGER,  
Governor; DAVID A. GILB, Director of  
21 Department of Personnel Administration;  
DEPARTMENT OF PERSONNEL  
22 ADMINISTRATION,

23 Petitioners,

24 v.

25 STATE CONTROLLER JOHN CHIANG;  
and DOES 1 through 20, inclusive,

26 Respondents.  
27

CASE NO. 34-2009-80000158-CU-WM-GDS

**DECLARATION OF DIANA L. DUCAY IN  
SUPPORT OF PETITIONERS' REPLY TO  
RESPONDENDT'S OPPOSITION ON THE  
MERITS**

Date: March 12, 2009

Time: 1:30 p.m.

Dept. 19

**Action Filed: February 9, 2009**

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911459.1

1 I, DIANA L. DUCAY, declare:

2 1. I am the Program Budget Manager for the Administration Unit of the California  
3 Department of Finance. The Administration Unit oversees the budgets for CalPERS, CalSTRS,  
4 Department of Personnel Administration, Public Employment Relations Board, and State  
5 Personnel Board. Specifically, the unit which I oversee has direct responsibility for the employee  
6 compensation and retirement benefit components of the State Budget. In addition, the unit is  
7 responsible for Local Mandates, Audits & Evaluations and the administrative support of the  
8 Department of Finance.

9 2. I have personal knowledge of all facts stated in this declaration and if called upon  
10 to do so, I could and would competently testify thereto.

11 3. Attached hereto and marked as Exhibit 1 is a true and correct copy of Section 3.90  
12 of the Budget Act of 2008, which was added to the Budget Act as a result of SBX 3 2, passed on  
13 or about February 19, 2009. Section 3.90 of the Budget Act of 2008 requires that overall budget  
14 appropriations for fiscal year 2008-2009 be reduced in the total amounts of \$385,762,000 from  
15 General Fund items and \$285,196,000 from items relating to other funds to reflect reductions in  
16 state employee compensation for that fiscal year.

17 4. Attached hereto and marked as Exhibit 2 is a true and correct copy of Section 3.90  
18 of SBX 3 1 establishing appropriations for the 2009-2010 fiscal year. This legislation mandates  
19 that budget appropriations for fiscal year 2009-2010 be reduced in the total amounts of  
20 \$1,024,326,000 from General Fund items and \$688,375,000 from items relating to other funds to  
21 reflect reductions in state employee compensation for that fiscal year.

22 5. These budget reduction figures legislatively mandated by both sections 3.90 for  
23 fiscal years 2008-2009 and 2009-2010 were calculated by the Administration Unit of the  
24 Department of Finance, which I manage, in cooperation with the Department of Personnel  
25 Administration, prior to those figures being included in the legislation. Our calculation of these  
26 figures was based, in part, on the assumption that all state employees, including those who work  
27 in the offices of the civil executive officers of the State, i.e., the Lieutenant Governor, the  
28 Secretary of State, the Treasurer, the Attorney General, the Controller, the Superintendent of

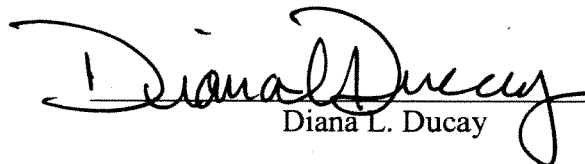
911459.1

- 1 -

1 Public Instruction, the Insurance Commissioner, and the Board of Equalization, would be  
2 furloughed two days a month from February 2009 to June 2010 as required by Governor  
3 Schwarzenegger's Executive Order S-16-08, dated December 19, 2009. Thus, the assumptions  
4 underlying the required budget savings specified in section 3.90 for fiscal years 2008-2009 and  
5 2009-2010 include two-day a month furloughs for the employees of the civil executive officers.

6 6. I generally am familiar with Governor Schwarzenegger's line item vetoes of the  
7 civil executive officers' budgets, included in separate legislation, reducing those budgets by  
8 approximately 10 percent. However, these line item vetoes relate only to the 2009-2010 State  
9 Budget, which takes effect on July 1, 2009. The savings in state employee compensation costs  
10 for the 2008-2009 fiscal year as reflected in section 3.90 of SBX3 2 was computed based on the  
11 assumption that state employees, including those employees working in the offices of the civil  
12 executive officers, would be furloughed twice a month. The savings in state employee  
13 compensation costs for the 2009-2010 fiscal year as reflected in section 3.90 of SBX3 1 also was  
14 computed based on the assumption that state employees, including those employees working in  
15 the offices of the civil executive officers, would be furloughed twice a month. The monthly  
16 savings to the State budget resulting from furloughing the employees of civil executive officers  
17 twice monthly is estimated to be nearly \$5.5 million.

18 I declare under penalty of perjury under the laws of the State of California that the  
19 foregoing is true and correct and was executed in Sacramento, California on March 6, 2009.

20   
21 Diana L. Ducay  
22  
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**EXHIBIT 1**

Sec. 3.90. (a) Notwithstanding any other provision of this act, each item of appropriation in this act, with the exception of those items for the California State University, the University of California, Hastings College of the Law, the Legislature (including the Legislative Counsel Bureau), and the judicial branch, shall be reduced, as appropriate, to reflect a reduction in employee compensation achieved through the collective bargaining process for represented employees or through existing administration authority and a proportionate reduction for nonrepresented employees (utilizing existing authority of the administration to adjust compensation for nonrepresented employees) in the total amounts of \$385,762,000 from General Fund items and \$285,196,000 from items relating to other funds. It is the intent of the Legislature that General Fund savings of \$1,024,326,000 and other fund savings of \$688,375,000 in the 2009-10 fiscal year shall be achieved in the same manner described above. The Director of Finance shall allocate the necessary reduction to each item of appropriation to accomplish the employee compensation reductions required by this section.

(b) The Department of Personnel Administration shall transmit proposed memoranda of understanding to the Legislature promptly and shall include with each such transmission estimated savings pursuant to this section of each agreement.

(c) Nothing in this section shall change or supersede the provisions of the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of the Government Code).

## **EXHIBIT 2**

SEC. 3.90. (a) Notwithstanding any other provision of this act, each item of appropriation in this act, with the exception of those items for the California State University, the University of California, Hastings College of the Law, the Legislature (including the Legislative Counsel Bureau), and the judicial branch, shall be reduced, as appropriate, to reflect a reduction in employee compensation achieved through the collective bargaining process for represented employees or through existing administration authority and a proportionate reduction for nonrepresented employees (utilizing existing authority of the administration to adjust compensation for nonrepresented employees) in the total amounts of \$1,024,326,000 from General Fund items and \$688,375,000 from items relating to other funds. The Director of Finance shall allocate the necessary reductions to each item of appropriation to accomplish the employee compensation reductions required by this section.

(b) The Department of Personnel Administration shall transmit proposed memoranda of understanding to the Legislature promptly and shall include with each such transmission estimated savings pursuant to this section of each agreement.

(c) Nothing in this section shall change or supersede the provisions of the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of the Government Code).

1 **PROOF OF SERVICE**

2 I, May Marlowe, declare:

3 I am a citizen of the United States and employed in Sacramento County, California. I am  
4 over the age of eighteen years and not a party to the within-entitled action. My business address  
5 is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On March 9, 2009, I served a  
6 copy of the within document(s):

7 **DECLARATION OF DIANA L. DUCAY IN SUPPORT OF OPENING BRIEF ON  
8 THE MERITS**

- 9  by causing it to be transmitted via electronically the document(s) listed above to  
10 the email addresses set forth below on this date.
- 11  by placing the document(s) listed above in a sealed \_\_\_\_\_ envelope and  
12 affixing a pre-paid air bill, and causing the envelope to be delivered to a  
13 \_\_\_\_\_ agent for delivery.
- 14  by causing personal delivery by Messenger of the document(s) listed above to the  
15 person(s) at the address(es) set forth below.
- 16  by placing the document(s) listed above in a sealed envelope with postage thereon  
17 fully prepaid, the United States mail at Sacramento, California addressed as set  
18 forth below.

16 Mark Beckington, Esq.  
17 DEPARTMENT OF JUSTICE  
18 300 S. Spring Street, #5312  
19 Los Angeles, CA 90013  
20 Email: [mark.beckington@doj.ca.gov](mailto:mark.beckington@doj.ca.gov)

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

26 I declare under penalty of perjury under the laws of the State of California that the above  
27 is true and correct. Executed on March 9, 2009, at Sacramento, California.

28   
\_\_\_\_\_  
May Marlowe

1 DAVID W. TYRA, State Bar No. 116218  
KRISTIANNE T. SEARGEANT, State Bar No. 245489  
2 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
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Facsimile: (916) 321-4555  
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6 K. WILLIAM CURTIS  
Chief Counsel, State Bar No. 095753  
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Deputy Chief Counsel, State Bar No. 127921  
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Labor Relations Counsel, State Bar No. 226669  
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E-mail: [WillYamada@dpa.ca.gov](mailto:WillYamada@dpa.ca.gov)

13 Attorneys for Petitioners  
14 ARNOLD SCHWARZENEGGER, Governor; DAVID A.  
GILB, Director of Department of Personnel  
15 Administration; and DEPARTMENT OF PERSONNEL  
ADMINISTRATION

**Exempted from Fees  
(Gov. Code § 6103)**

16  
17 SUPERIOR COURT OF CALIFORNIA

18 COUNTY OF SACRAMENTO

19  
20 ARNOLD SCHWARZENEGGER,  
Governor; DAVID A. GILB, Director of  
21 Department of Personnel Administration;  
DEPARTMENT OF PERSONNEL  
22 ADMINISTRATION,

23 Petitioners,

24 v.

25 STATE CONTROLLER JOHN CHIANG;  
and DOES 1 through 20, inclusive,

26 Respondents.  
27

CASE NO. 34-2009-80000158-CU-WM-GDS

**DECLARATION OF DEBBIE ENDSLEY  
IN SUPPORT OF PETITIONERS' REPLY  
TO RESPONDENT'S OPPOSITION ON  
THE MERITS**

Date: March 12, 2009

Time: 1:30 p.m.

Dept. 19

**Action Filed: February 9, 2009**

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I, DEBRA L. ENDSELY, declare:

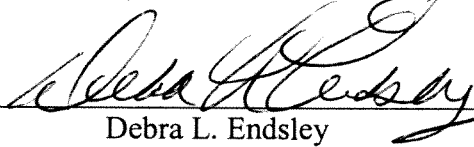
1. I am the Chief Deputy Director of the Department of Personnel Administration.

2. I have personal knowledge of all facts stated in this declaration and if called upon to do so, I could and would competently testify thereto.

3. On January 9, 2009, I participated in a conference call with Paul Feist, Deputy Cabinet Secretary for the Governor. The conference call included representatives from the various State of California civil executive officers. The topic of the call was furloughing of state employees, including the employees in the offices of the civil executive officers.

4. During the course of the telephone call, Mr. Feist explained that it was the Administration's understanding that the Governor could not legally furlough the employees of the other civil executive officers. One of the participants in the telephone call, a representative from the Insurance Commissioner's office, questioned the legal interpretation that the furloughs did not apply to the civil executive officers. Following this question, I told the group that the Department of Personnel Administration would have our legal office research the authority to furlough employees of constitutional offices and get this information to the Governor's Office. At the conclusion of the telephone call, the question of whether the furloughs applied to the employees of the civil executive officers, and the Governor's legal authority to furlough that group of employees, was definitely unresolved and the subject left open.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed in Sacramento, California on March 6, 2009.

  
Debra L. Endsley

1 **PROOF OF SERVICE**

2 I, May Marlowe, declare:

3 I am a citizen of the United States and employed in Sacramento County, California. I am  
4 over the age of eighteen years and not a party to the within-entitled action. My business address  
5 is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On March 9, 2009, I served a  
6 copy of the within document(s):

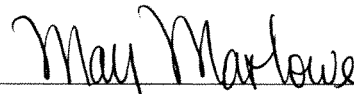
7 **DECLARATION OF DEBBIE ENDSLEY IN SUPPORT OF OPENING BRIEF ON  
8 THE MERITS**

- 9  by causing it to be transmitted via electronically the document(s) listed above to  
10 the email addresses set forth below on this date.
- 11  by placing the document(s) listed above in a sealed \_\_\_\_\_ envelope and  
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19 Mark Beckington, Esq.  
20 DEPARTMENT OF JUSTICE  
21 300 S. Spring Street, #5312  
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24 I am readily familiar with the firm's practice of collection and processing correspondence  
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27 motion of the party served, service is presumed invalid if postal cancellation date or postage  
28 meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above  
is true and correct. Executed on March 9, 2009, at Sacramento, California.

29   
30 \_\_\_\_\_  
31 May Marlowe