

No. _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FIRST APPELLATE DISTRICT
DIVISION 2

CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION,

Plaintiff/Respondent,

vs.

ARNOLD SCHWARZENEGGER, in his capacity as
Governor of the State of California, *et al.*,

Defendants/Appellants.

On Appeal from a Judgment of the
Alameda Superior Court, Case No. RG-09-441544
Honorable Frank Roesch

**MOTION TO DISMISS;
MEMORANDUM IN SUPPORT THEREOF**

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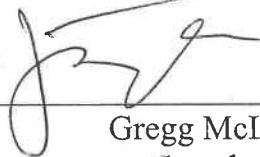
MOTION TO DISMISS

Plaintiff and Respondent California Correctional Peace Officers' Association ("CCPOA") brings this motion to dismiss the appeal filed by Defendants ARNOLD SCHWARZENEGGER, in his capacity as Governor of the State of California, STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF PERSONNEL ADMINISTRATION, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, CALIFORNIA DEPARTMENT OF MENTAL HEALTH, and CALIFORNIA DEPARTMENT OF JUVENILE JUSTICE (collectively "Defendants"), on the ground that these Defendants have appealed from non-appealable orders, and this Court therefore lacks jurisdiction to consider the appeal. This motion is based upon the attached memorandum of points and authorities, the request for judicial notice, and the accompanying declaration of counsel and exhibits thereto.

Dated: January 14, 2010

CARROLL, BURDICK & McDONOUGH LLP

By



Gregg McLean Adam

Jonathan Yank

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Attorneys for Plaintiff/Respondent California
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MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

Defendants purport to appeal from (1) a December 17, 2009 trial court order granting CCPOA's petition for a writ of mandate, and (2) the writ of mandate subsequently issued on December 30. These orders are not appealable, whether considered individually or together, because they do not dispose of all issues between the parties. In particular, the trial court has not yet resolved Plaintiff's damages claims in the form of back pay due to State Bargaining Unit 6 members under the Government and Labor Codes and liquidated damages for violations of the Labor Code. Our Supreme Court held in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 740-741, that a "judgment" ordering issuance of peremptory writ of mandate and the writ of mandate itself were not appealable because they did not resolve pending damages claims. Because this Court has no jurisdiction to hear Defendants' appeal, it must dismiss.

II

STATEMENT OF THE CASE

Plaintiff CCPOA filed its Second Amended Verified Petition for Writ of Mandate/Prohibition and Complaint for Injunctive and Declaratory Relief ("Petition") on September 22, 2009, challenging Defendants' implementation of a "furloughs" scheme with respect to CCPOA-

represented state employees.¹ (Ex. A; Declaration of Gregg M. Adam, filed herewith (“Yank Decl.”), ¶ 2.) The “furloughs scheme” was implemented pursuant to a series of Executive Orders issued by the Governor, but CCPOA’s Petition was an as-applied challenge that did not challenge the Executive Orders themselves. (See *ibid.*)

CCPOA’s Petition alleged four causes of action: violation of Government Code § 19826, Labor Code § 212 (payment of wages in negotiable form), Labor Code § 1171 (failure to pay California Minimum Wages), and Labor Code § 223 (failure to pay designated wage scale). (*Ibid.*; Yank Decl. ¶ 3.) CCPOA’s claims were premised upon the fact—admitted in Defendants’ evidence in the trial court—that its members were not paid for three “furlough” days each month *regardless of whether they were required by the State employer to work on the days in question.*

CCPOA prayed for a declaration of the parties’ legal rights and duties, an

¹ Plaintiff is the California Correctional Peace Officers’ Association (“CCPOA”), a labor organization representing correctional peace officer and related classifications employed by the State of California to work at correctional institutions run by the California Department of Corrections and Rehabilitation (“CDCR”), the California Department of Mental Health (“DMH”), and California Department of Juvenile Justice (“DJJ”). Some of these peace officer classifications constitute State Bargaining Unit 6 (“Unit 6”) under the Ralph C. Dills Act (Gov. Code section 3512, *et seq.*), a collective bargaining law; others, specifically approximately 2,500 correctional sergeants and lieutenants, are CCPOA members who do not enjoy collective bargaining rights. CCPOA sued on behalf of all its

injunction prohibiting Defendants from violating these statutes, a writ of mandate, damages in the form of unpaid wages due to Unit 6 members and liquidated damages for violation of Labor Code § 1171, *et seq.* (*Ibid.*)

At the final case management conference before the hearing on CCPOA's Petition, the trial court ordered that CCPOA proceed first on its claims remediable by a writ of mandate, effectively holding the damages claims in abeyance. (Ex. B; Yank Decl. ¶ 4.)

The trial court issued an order granting CCPOA's petition for writ of mandate on December 17, 2009 (the "Order"). (Ex. C; Yank Decl. ¶ 5.) The trial court found merit in CCPOA's claims that Defendants were violating mandatory ministerial duties arising under Government Code § 19826, Labor Code § 223, and Labor Code § 1171, but the court found Labor Code § 212 inapplicable. (*Ibid.*)

It ordered that a writ issue compelling Defendants, going forward, to pay CCPOA-represented employees for all hours worked for which "furlough" hours were not utilized—but the court did not calculate the damages due to any particular employee for past violations. (Order at p. 10; Yank Decl. ¶ 6.) That factual determination and the claim for liquidated damages were not addressed by the court's Order. The trial court

members adversely affected by the furloughs, including correctional sergeants and lieutenants. (See Ex. A.)

directed CCPOA to prepare a form of writ and—prematurely—a form of judgment. (*Ibid.*)

CCPOA submitted its form of writ to the trial court, but advised the trial court that it was not submitting a form of judgment because entry of final judgment would be premature given that the court's Order did not determine the actual backpay owed to any CCPOA member. (Ex. D; Yank Decl. ¶ 7.) Defendants objected to CCPOA's proposed form of writ on December 30, arguing that the court's Order determined all issues raised by the litigation, but failed to address CCPOA's position that damages claims had not yet been determined. (Ex. E; Yank Decl. ¶ 8.)

Notwithstanding Defendants' objections, the trial court did not enter final judgment. Instead it issued only the Writ of Mandate on December 30, commanding Defendants to "immediately and prospectively pay all employees in State Bargaining Unit 6, as well as correctional sergeants and lieutenants, their full salaries . . . for all hours worked" as required by the Government Code and Labor Code. (Ex. F; Yank Decl. ¶ 9.) The Writ of Mandate did not address CCPOA's claims for liquidated damages and back pay. (See *ibid.*) The trial court did not enter judgment. (*Ibid.*)

Defendants filed a Notice of Appeal on December 31, 2009, purporting to appeal from the Order granting the writ of mandate, and the Writ of Mandate itself. (Ex. G; Yank Decl. ¶ 10.) They acknowledged that

the trial court had not entered final judgment, but offered a number of reasons why its orders were appealable:

- “Taken together, these two documents [the Order and the Writ] constitute a final adjudication” and “resolved all issues between the parties”; or
- The December 17 Order alone “resolved all issues between the parties”; or
- “Despite the fact that final judgment has yet to be rendered or entered . . . an appeal may be taken . . . [because the Order and Writ] constitute a statement made by the trial court of its ruling in this matter” (*Ibid.*)

Defendants also asserted that their notice of appeal automatically stayed the trial court’s Order, the Writ of Mandate, and “any final judgment subsequently rendered and entered.” (*Ibid.*)

The State Controller, whom the Writ compelled to pay Unit 6 members their full wages for all hours worked, announced his intention to do exactly that, believing that no automatic stay resulted from the Notice of Appeal.² (See Ex. H; Yank Decl. ¶ 11.) That announcement led

² The Controller was a defendant in the underlying trial court action, but is not one of the appealing Defendants. (See Ex. G)

Defendants to petition this Court for a writ of supersedeas on January 13, 2010, which is separately pending. (*Ibid.*)

III

THE ONE FINAL JUDGMENT RULE BARS THIS APPEAL BECAUSE THE ORDERS APPEALED FROM DO NOT CONCLUSIVELY DETERMINE ALL THE ISSUES BETWEEN THE PARTIES

A. A Writ of Mandate Is Appealable Only When It Conclusively Disposes of All Issues Framed By the Pleadings

An appellant's right to appeal, and an appellate court's subject matter jurisdiction, is wholly statutory. (See *Griset v. Fair Political Practices Comm.* (2001) 25 Cal.4th 688, 696.) Appeal may taken from a final judgment or from orders made appealable by Code of Civil Procedure § 904.1, which codifies the common law "one final judgment rule." (*Id.* at p. 697; Code of Civ. Proc. § 904.1.)

The one final judgment rule is "a fundamental principle of appellate practice that prohibits review of intermediate rulings by appeal until final resolution of the case." (*Griset, supra*, 25 Cal.4th at p. 697.) "A judgment is final when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304, quotations and citations omitted; see also *Griset, supra*, 25 Cal.4th at p. 697 ["A judgment is the *final* determination of the rights of the parties"], citing Code Civ. Proc. § 577, italics added.)

But “where anything further *in the nature of judicial action* on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory” and not appealable. (*Griset, supra*, 25 Cal. 4th at p. 698, quotations and citations omitted.) That is, an appeal lies only from a judgment that terminates the trial court proceedings by completely disposing of all the matters in controversy. (*Id.* at p. 308 [“finality is so fundamental that it is essentially redundant to speak of a ‘final judgment’”], italics original.) “An appeal from a judgment [or order] that is not final violates the one final judgment rule and must therefore be dismissed” (*Sullivan, supra*, 15 Cal.4th at p. 308.)

Although generally a writ of mandate is a special proceeding that is considered immediately appealable (see, e.g., *Nerhan v. Stinson Beach County Water Dist.* (1994) 27 Cal.App.4th 536, 540; Code Civ. Proc. § 1064), a writ of mandate is *unappealable* when it does not dispose of all issues framed by the pleadings, i.e., when it is not a final determination of the parties’ rights. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725; *Nerhan, supra*, 27 Cal.App.4th at 540 [same].)

In *Morehart*, the California Supreme Court held that a writ of mandate is not an appealable order when the trial court expressly reserved judgment on plaintiffs’ damages claims. Plaintiffs’ complaint in that case—similar to CCPOA’s Petition here—pled for a writ of mandate, declaratory, and injunctive relief, as well for damages stemming from

enforcement of a local zoning ordinance. (*Morehart, supra*, 7 Cal.4th at p. 735).

The trial court in *Morehart* ordered that the damages claims would be tried separately and after the court ruled on the request for writ of mandate, and declaratory and injunctive relief claims. (*Ibid.*) The trial court found the local ordinances were preempted by state law and issued a peremptory writ of mandate. (*Id.* at p. 736.) Over plaintiffs' objections, the trial court also entered judgment in their favor even though the damages claims were pending, reasoning that "[i]t makes no sense to get involved in a protracted trial on various damages claims without obtaining a final resolution on the issue of the validity of the County's ordinance." (*Ibid.*) The county appealed from that judgment, and the court of appeal summarily disposed of the appealability issue in a footnote. (*Ibid.*)

The California Supreme Court rejected the court of appeal's appealability determination and found the trial court's orders were not appealable because they violated the one final judgment rule. (*Id.* at p. 734.) The high court explained that only judgments or orders "that leave *nothing to be decided* between . . . [the] parties . . . , or that can be amended to *encompass all controverted issues*, have the finality required by [Code of Civil Procedure] section 904.1." (*Id.* at p. 741, italics added.) By contrast, a judgment or order "that disposes of *fewer* than all of the causes of action

framed by the pleadings . . . is necessarily interlocutory and not yet final.”

(*Ibid.*, quotations and citations omitted, italics original.)

Defendants’ petition for supersedeas attempts to distinguish *Morehart* by asserting that it is limited to cases where judgment has been entered on fewer than all the pending causes of action. (See Ex. H, at pp. 20-21.) But the principles enunciated in *Morehart*, including the one final judgment rule and the importance of appellate courts limiting their review to orders conclusively determining all pending issues between the parties, equally apply here.

B. *Morehart* Requires Dismissal of Defendants’ Premature Appeal Because the Trial Court’s Orders Do Not Adjudicate the Damages Due To Unit 6 Members.

Morehart controls here and requires dismissal of Defendants’ premature appeal because there are unresolved damages claims pending in the trial court. This Court has previously applied *Morehart* to dismiss such premature appeals. (See, e.g., *Nerhan v. Stinson Beach County Water Dist.* (1st Dist. 1994) 27 Cal.App.4th 536, 538 [dismissing appeal from writ of mandate where petition included damages claim that was still pending before the trial court].)

Defendants concede that no final judgment has been entered in this case, but assert that the Order granting the writ of mandate and the Writ of Mandate itself purportedly resolve “all issues between the parties.” (See Ex. G.) Not so. Neither of these orders is appealable—whether read

together or separately—because they do not determine CCPOA’s damages claims with the requisite finality required under the one final judgment rule. That is, the trial court’s orders do not grant all the relief CCPOA prayed for in its Petition. (See *Public Defenders Organization v. County of Riverside* (2003) 106 Cal.App.4th 1403, 1410 [deeming writ of mandate appealable because it “granted the exact relief” petitioner requested and “the rights of the parties that had been put at issue by the pleadings [were] adjudicated”].)

The Writ of Mandate does not address CCPOA’s damages claims at all—nor was it intended to, since the trial court expressly decided to adjudicate only the writ of mandate, and declaratory and injunctive relief claims case first. (See Ex. F; Yank Decl. ¶ 4) That is, as in *Morehart*, the trial court expressly reserved determination of the damages claims. (*Morehart, supra*, 7 Cal.4th at p. 736; Ex. B.) Although the Order granting the writ of mandate generally recognizes Unit 6 members’ right to backpay damages (Ex. C, Order at p. 10 [“Respondents [are] to pay all employees . . . for all hours worked for which furlough credits have been utilized”]), it does not establish a formula to determine what damages—whether compensatory or liquidated—are due, let alone calculate any damage award for Unit 6 members as a whole or for any individual Unit 6 member. (See Order.)

Further judicial action in the trial court is necessary to determine Unit 6 members’ individual entitlement to damages and other make-whole

remedies because, among other reasons, several factual issues relating to CCPOA's backpay and liquidated damages claims for individual employees remain unresolved. For example, the "furloughs" scheme involved Defendants' unilateral and retroactive change to some Unit 6 members' hours (i.e., from paid "vacation hours" to unpaid "furloughs hours"). Additionally, Defendants created the fiction that if an employee works on a furlough day it does not count as time worked for determining when overtime wage rates are required. Because the trial court ordered the parties only proceed on the writ of mandate, and final judgment has not yet been entered in this case, these issues have not yet been presented to the trial court and are not part of the evidentiary record. (Yank Decl. ¶ 12) Unresolved factual issues such as these must be adjudicated before there can be a final judgment that resolves all legal and factual issues between the parties.

Simply stated, there is no final judgment or order in this case to be executed until the trial court adjudicates Unit 6 members' damages claims. (*Sullivan, supra*, 15 Cal.4th at p. 304 [a final appealable judgment or order "leaves nothing to be done but to enforce by execution what has been determined"].)

The authorities Defendants cited in their Notice of Appeal do not support appealability. In *Marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1341, the court of appeal, "for good cause," exercised its

discretion to deem appellants' premature notice of appeal as having been filed "immediately after entry of the judgment" in a child custody case. (See *ibid.*, n.1.) *Battenburg* appears to apply Rule of Court 8.104, subd. (e) which provides that an appellate court may treat a premature notice of appeal "filed after judgment is rendered but before it is entered" or "filed after the superior court has announced its intended ruling, but before it has rendered judgment" as having been "filed immediately after entry of judgment."

This does not help Defendants. Rule of Court 8.104, subd. (f) expressly provides that a "judgment" as used in subd. (e) means "an appealable order *if* the appeal is from an appealable order." (italics added.) That is, Rule 8.104, subd. (e) relied on by Defendants does not provide an independent basis for appealability if the order appealed from is unappealable and interlocutory—as it is here. Additionally, Defendants concede no final judgment has been rendered or entered in this case, and more importantly they do not argue make any showing of good cause why this Court should "validate" their premature appeal.

C. The One Final Judgment Rule's Policy Against Piecemeal Litigation and Multiple Appeals Also Requires Dismissal of This Case.

Defendants' appeal defeats the policies underpinning the one final judgment rule. *Morehart* recognized that "piecemeal disposition" and "multiple appeals" from the same case are "oppressive and costly" on

litigants and the courts. (*Morehart, supra*, 7 Cal.4th at p. 741 n.9, quotations and citations omitted.) Interlocutory appeals “burden the courts and impede the judicial process” in a number of other ways:

- They clog the appellate courts with multiple appeals.
- Early resort to the appellate courts produces uncertainty and delay in the trial court.
- Later actions by the trial court may provide a more complete record which dispels the appearance of error or establishes it was harmless.
- Having the benefit of a complete adjudication will assist the appellate court to remedy error (if any) by giving specific directions rather than remanding for “another round of open-ended proceeds.”

(See *ibid.*) For these reasons, the one final judgment rule “prohibits review of intermediate rulings by appeal until final resolution of the case” and review of intermediate rulings must “await the final disposition of the case.” (*Griset, supra*, at p. 697, quotations and citations omitted.)

All of these policy considerations are implicated here and require dismissal. Defendants will presumably appeal any damages award granted to Unit 6 employees, which means that Defendants will appeal twice in the same case, requiring CCPOA to defend the trial court’s orders each time. This premature appeal has already produced uncertainty and delay in the trial court regarding Unit 6 members’ right to prospective relief

(e.g., Ex. H), and whether the trial court may proceed with determining backpay due to Unit 6 members. (But see *Pazaderka v. Caballeros Dimas* (First App. Dist. 1998) 62 Cal.App.4th 658, 666 [trial court “retained jurisdiction” when invalid appeal filed with court of appeal].) Moreover, the appellate courts reviewing the trial court’s orders would benefit from having a complete record before them that includes final adjudication of backpay and damages due to Unit 6 members.

IV

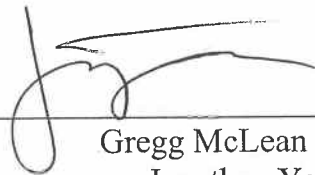
CONCLUSION

For all these reasons, Defendants’ appeal should be dismissed.

Dated: January 14, 2010

CARROLL, BURDICK & McDONOUGH LLP

By



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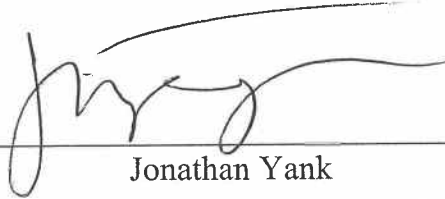
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WORD COUNT CERTIFICATION

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the attached brief contains 3,307 words, as determined by the computer program used to prepare the brief.

Dated: January 14, 2010



A handwritten signature in black ink, appearing to read 'Jonathan Yank', is written over a horizontal line. The signature is stylized and cursive.

Jonathan Yank

CBM-SF467332

California Correctional Peace Officers' Association v. Arnold Schwarzenegger, et al.,
California Court of Appeal, First Appellate District, Division 2, No. ~~A127292~~

PROOF OF SERVICE BY UNITED PARCEL SERVICE (UPS) – NEXT DAY

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On January 14, 2010, I served the enclosed:

**MOTION TO DISMISS;
MEMORANDUM IN SUPPORT THEREOF; AND**

**DECLARATION OF JONATHAN YANK IN SUPPORT OF RESPONDENT'S
MOTION TO DISMISS**

on the parties in said cause (listed below) by enclosing a true copy thereof in a prepaid sealed package, addressed with appropriate United Parcel Service shipment label and, following ordinary business practices, said package was placed for collection (in the offices of Carroll, Burdick & McDonough LLP) in the appropriate place for items to be collected and delivered to a facility regularly maintained by United Parcel Service. I am readily familiar with the Firm's practice for collection and processing of items for overnight delivery with United Parcel Service and that said package was delivered to United Parcel Service in the ordinary course of business on the same day.

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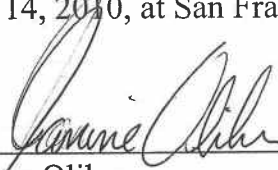
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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on January 14, 2010, at San Francisco, California.



Janine Oliker