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Docket No. C061020

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE THIRD APPELLATE DISTRICT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,

Plaintiff and Appellant,

v.

JOHN CHIANG, as State Controller, etc.,

Defendant and Appellant,

ARNOLD SCHWARZENEGGER, as Governor, etc., et al.

Defendants and Respondents.

APPELLANT'S REPLY BRIEF

FILED

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COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT
BY_____ Deputy

On Appeal of an Order and Judgment
by the Sacramento Superior Court
No. 34-2009-80000135-CU-WM-GDS
The Honorable Patrick Marlette

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I. INTRODUCTION

For violations of its constitutional and statutory rights, SEIU LOCAL 1000 (herein after "Local 1000") challenged the Executive Order dated December 19, 2008[1] which mandated two-day furloughs for all State employees effective February 1, 2009. Respondents offer in Opposition myriad excuses for the illegal action. However, under scrutiny, the brief filed on behalf of the Governor and State illuminates the scant legal support for the trial court's decision to uphold the executive fiat disputed in this case. Page after page, and cite after cite, disclose no real legal support for the Respondents' belief that the Governor's power is supreme because he wants it to be so. Erosion of the democratic principle of the separation of powers is unwarranted and unwise. Ample and legally permissible opportunities existed for the Governor to accomplish the goals of cutting the state's budget and/or reducing state employee pay.

However, simply making up power, based on convenience, is reminiscent of fairy tales and children's stories. The Governor's flawed effort to exercise the Legislature's power is nothing but an attempt at a set

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[1] In its Opening Brief on Appeal, SEIU Local 1000 inadvertently cited the date of this Executive Order as dated December 19, 2009. It is not disputed that the correct date is December 19, 2008.

of "new clothes."[2] In the fairy tale on this point, it took the unfiltered and unbiased observation of a child to be unafraid to state the obvious. Today, also like the children's story, such fearlessness is in short supply. Cloaking himself in bare assertions of fiscal catastrophe, the Governor claimed authority to replace Legislative actions. Nevertheless, the State Controller, the state workers and their representatives continue to maintain, for approaching 12 months of exhaustive debate, that Governor Schwarzenegger went too far with the attempted exercise of power by virtue of Executive Order. As set forth in the several opening briefs in the related appeals, under a correct reading of the separation of powers and applicable laws, one must conclude that no legal support existed for the Executive Order to accomplish the furloughs.

Only a tortured reading of the few applicable laws cited repeatedly by the State gives them faint hope for the conclusion that the Executive Order for furloughs was permissible. It is crystal clear that the feigned emergency is simply a different word for the new status quo. Misusing

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[2] **"The Emperor's New Clothes"**is a childhood short story by Hans Christian Andersen about two weavers (surely contractors, not civil service) who promise an Emperor a new suit of clothes invisible to the incompetent or those not fit for their positions. When the Emperor parades before his subjects in his "new clothes," a child cries out, "But he isn't wearing anything at all!"

power under a false claim both fails to address the political crisis and puts off reckoning for another day. One of the authors of the United State Constitution keenly observed "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the **very definition of tyranny**." (James Madison, Federalist #47, 1788.) (emphasis added). Ever since then, as previously argued, Courts have denounced excessive acts of Executive power as violative of the separation of powers doctrine. Now, substantiating tyranny should not be the role of this appellate court.

As set forth in these Replies and in the Opening Briefs in the related appeals, a proper interpretation of the applicable law compels the conclusion that the Governor had no authority to implement the furloughs through Executive Order in the manner which he did on December 19, 2008.

II. ARGUMENT

A. Respondents Incorrectly Claim That the Governor as the State Employer Has the Inherent Power to Issue the Executive Order Implementing Furloughs

What is clear from the Respondents' brief is that they can identify no other constitutional support for the Governor's order than the bare assertion

that Article IV, section 10(f) authorizes his action. However, this theory is unmasked as soon one reads that article. As is clear from all the prior opening briefs in the related appeals, although this section does state that the Governor has the authority to declare a fiscal emergency, by its specific language, it then removes him from decision-making and vests it in the Legislature. (Cal. Const., Art. IV, § 10(f)). Although the Governor does retain the authority to keep the Legislature in session, this power is precisely for the purpose that the Legislature may reach a decision on the policy-making course of action. This Constitutional authority to call back the Legislature and make them keep working, does not sound like the claimed ability to make grand orders impacting the entire state workforce.

In contrast, Respondents are surely aware of the Governor's concomitant duty listed in the constitution that: "The Governor shall see that the law is faithfully executed." (Cal. Const., Art. V, § 1). In ordering the furloughs, the Governor is far outside the constitutional boundaries and is violating the system of a separation of powers. While on the one hand, as Respondents state, it is undisputed that the Governor and the DPA are statutorily "vested with the duties, responsibilities, and jurisdiction...with respect to the administration of salaries, hours and other personnel related matters." (Gov. Code § 19816(a).) What is left out by the Respondents and

what the Governor has failed to remember is that authority is "vested" with limits. It is for the Legislature and the Legislature alone to create the legal boundaries of that authority when they grant any part of their power to the executive branch.

1. Government Code Sections 19849 and 19851 Do Not Authorize the Governor to Furlough State Employees.

Respondents inappropriately apply the well-established rules of statutory interpretation to achieve a result that is not in line with the Legislature's intent regarding Government Code section 19851. Analysis of any statute starts with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate the legislative intent. (*People v. Overstreet* (1986) 42 Cal. 3d 891, 895.) In determining intent, the court looks first to the words of the statute itself. (*Id.*) Interpretation of a word or phrase depends upon reading the whole statutory text and considering the purpose and context of the statute. (*Dolan v. U.S. Postal Service* (2006) 546 U.S. 481, 846.)

Respondents, rather than following the well-defined principles of statutory interpretation, look only to one sentence within section 19851 and attempt to read it in isolation. The first sentence of § 19851 reads

> it is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of state employees eight hours, except

> that workweeks and workdays of a different number of hours may be established in order to meet the varying needs of the different state agencies. (Gov. Code § 19851.)

Respondents fail to refer to the rest of the section, as is required by the general rules of statutory interpretation. The rest of the statute states that,

> it is the policy of the state to avoid the necessity for overtime work whenever possible. This policy does not restrict the extension of regular working-hour schedules on an overtime basis in those activities and agencies where it is necessary to carry on the state business properly during a manpower shortage. (*Id.*)

What is clear from a proper understanding of this section is that it was intended as a provision to limit **excessive** hours - i.e. greater than 40 hours per week - and not as a vehicle to permit a restructuring of the status quo to shorter workweeks and smaller paychecks. The great labor history of this country is defined by an effort of workers and unions to reduce excessively long work days - greater than 14 hours per day - to 12, then 10, then finally in modern history to 8 hours per day.[3] (Fair Labor Standards

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[3] The Adamson Act in 1916 established an eight-hour day, with additional pay for overtime, for railroad workers. As the first federal law regulating the hours of work in private companies, its constitutionality was immediately tested. However, the United States Supreme Court upheld the constitutionality of the Act in *Wilson v. New*, 243 U.S. 332 (1917). The Act, formerly codified at 45 U.S.C. §§ 65, 66, was repealed in 1996.

The eight-hour day was finally implemented for working people in

Act (29 U.S.C. Chapter 8, § 207).) This national history is reflected in the actual legislative history of section 19851.

Section 19851 was originally enacted as section 18020 in 1945. The statute was intended to establish guidelines for the structuring of **overtime** payments to employees. In the original enactment, the statute allowed for four different classes which would determine the eligibility for overtime payment, those classes were "(1) Classes with a normal work week of 40 hours; (2) Classes with a normal work week of 44 hours; (3) Classes with a normal work week of 48 hours; and (4) Classes which can not be included in any plan of payment for overtime because..." (Gov. Code § 18020.) The State Personnel Board ("SPB") eventually determined that only one class including 40 hours a week was necessary, the Legislature therefore amended the language to the current enacted language of § 19851. This was a change in the guidelines governing the payment of overtime, not a new grant of power to the Governor. (Stats. 1945, Chapter 123, p. 536, § 1.)

Respondents speciously claim that the statute allows leeway for the Governor to order the furlough days in his discretion; if this interpretation were accurate there would have been no need for the Legislature to describe

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the U.S. in 1938, when the Congress enacted the Fair Labor Standards Act (29 U.S. Code, Chapter 8) making it a legal day's work throughout the nation.

the four classes above. The Legislature intended the statute to govern the overtime for a work week of 40, 44 and 48 hours. Once it became the general policy of the state to adhere to only a 40-hour work week the other classifications became unnecessary. If as the Respondents claim, this statute gave the Governor the authority to modify the workweek there would have been no need for the original enactment and its numerous classifications.

After reading the entire statutory text, as instructed to do by the Supreme Court in determining the intent of the Legislature, it is clear that the statute does not stand for the proposition that the Respondents claim. It is a statute intended to govern the payment of overtime to employees after exceeding the maximum daily workday and not a grant by the Legislature of a sweeping power to the Governor to furlough any and all employees whenever he so chooses. To construe this as Respondents dictate undermines the entire purpose of the law - to ensure greater payment to workers for working longer days - and not as authority to unilaterally cut their pay regardless of hours worked. The Respondents focus on one sentence in order to achieve a spurious interpretation of the statute, and such an interpretation should not be allowed to stand.

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2. Section 19849 Grants Only the Authority to Make Legal Rules and Section 19851 Confers No Authority to Furlough.

Subscribing to additional nonexistent rights to contrive authority for the furloughs, Respondents also claim justification under Section 19849. section 19849 allows the state to adopt rules governing hours of work and overtime compensation. (Gov. Code § 19849.) But, as set forth in the Opening Brief, section 19849 cannot be read in isolation from section 19851. It does not operate in a vacuum and like all legislative mandates it is only authoritative in so far as the Legislature has allowed that Executive Branch to act. Here, the Governor is ultimately restrained by the provisions of section 19851. That section does not allow the Governor to unilaterally reduce hours of work and deprive workers of their pay. The Governor is attempting to grab more power than the Legislature has granted him. In doing so, he attempts to upset the balance in the separation of powers. While section 19849 does allow the state the authority to pass certain rules, it does not allow the seizing of legislative power and passing any rule especially when it conflicts with other laws.

B. Respondents Cannot Rely on Section 19851 Because it Is in Conflict with and Therefore Superseded by Section 19.1(a) of the MOU.

Respondents make no compelling case that section 19851 authorizes

the disputed order. This is especially true because 19851 conflicts with an MOU provision on the same point. It is clear that section 19851 is incorporated into the MOU, but it is equally clear that there is a conflict between section 19851 and section 19.1 of the MOU.[4] (MOU § 5.6) Section 5.6 of the MOU states that,

> "if any provision of this Contract alters or is in conflict with any of the Government Code sections enumerated below the Contract shall be controlling and supersede said Government Code sections or parts thereof any rule, regulation, standard, practice, or policy implementing such provisions."

(*Id.*)(Emphasis added.)

Respondents wrongly claim that because the MOU incorporates multiple sections of government code and some are quoted verbatim in the MOU, there is no conflict. This argument is not supported by the language in the MOU. (Respondents' Brief, pp. 27-28.)

In support of this flawed argument, Respondents' claim simply that because there are two components to section 19.1. Sections 19.1(a) and

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[4]State Bargaining Unit 1 (SEIU Joint Appendix ("JA"), Vol. II, Tab MM, JA000479); State Bargaining Unit 3 (*Id.*, Vol. III, Tab NN, JA000663); State Bargaining Unit 4 (*Id.*, Vol. IV, Tab OO, JA000894); State Bargaining Unit 11 (*Id.*, Vol. V, Tab PP, JA001060); State Bargaining Unit 14 (*Id.*, Vol. VI, Tab QQ, JA001208); State Bargaining Unit 15 (*Id.*, Vol. VII, Tab RR, JA001361), State Bargaining Unit 17 (*Id.*, Vol. VIII, Tab SS, JA001536); State Bargaining Unit 20 (*Id.*, Vol. IX, Tab TT, JA001745); and State Bargaining Unit 21 (*Id.*, Vol. X, Tab UU, JA001881.)

19.1(b), which bear similarity to the wording found in section 19851, and because 19.1(b) is nearly the same as section 19851, then *ergo* section 19.1(a) must also have the same meaning. However simplistic, this logic is flawed. When negotiating the contract, the parties presumably had the language of section 19851 available to them. The language of the MOU makes an important distinctions from 19851. Indeed, a review of the language changes discloses important differences. The language in section 19.1(a) requires something more than section 19851. Similarly the parties agreed that section 19.1(b) did not need to be altered and the language in section 19851 was sufficient. The Respondent proves through its own argument that the parties knew the language of section 19851 and chose to replace it in section 19.1(a) of the MOU.

All modern California decisions treat labor-management agreements in public employment as enforceable contracts (*see,* Labor Code § 1126) which should be interpreted to execute the mutual intent and purpose of the parties. (*Glendale City Employees Association* v. *City of Glendale* (1975) 15 Cal.3d 328, 339.) If labor and management intended section 19851's general provisions to control and not to be superseded, then there would be no need for the inclusion of the more specific section 19.1(a) in the MOU. Because this was a mutually bargained provision of the contract, the court

must enforce the more specific provision of the MOU as bargained and contracted for, rather than the general provisions of section 19851.

The court must "interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used." (*Lloyd's Underwriters* v. *Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197-1198.) Section 19851 states that "it is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of the state employee eight hours." (Gov. Code § 19851.) This general provision codifies the 40-hour week/8 hour day - as a reduction from historical excesses. However, to add greater clarity and force, the MOU solidifies the parties' position on this matter. Section 19.1(a) of the MOU states "unless otherwise specified *herein*, the regular workweek of full-time employees shall be forty (40) hours, Monday through Friday, and the regular work shift shall be eight (8) hours." (Emphasis added, MOU §19.1(a) (*supra,* Fn. 4).) Here, the union decided to replace the more general "policy" of the state language with a very specific statement - a mutually agreed upon and contracted-for standard - which guarantees the employee a 40-hour work week.

This MOU was bargained for in accordance with all governing statutes and is still binding on each party. (Gov. Code § 3517.8) As stated

in *East Bay Municipal Employees Union, Local 390, AFl-CIO v. County of Alameda*, "when a public employer engages in such meetings with the representatives of the public employee organization, any agreement that the public agency is authorized to make and, in fact, does enter into, should be held valid and binding as to all parties." ((1970) 3 Cal.App.3d 578, 584.) The Department of Personnel Administration ("DPA") has the authority to negotiate with the Union regarding such matters as the work week. (Gov. Code § 19849.) The DPA and the Union did in fact meet and negotiate the provision in the above referred to section of the MOU. The Court should enforce the bargained for provision of the MOU against the State and find the Governor's actions unlawful as a violation of the contract.

Section 19851 of the government code is in conflict with section 19.1(a) of the MOU. In the event of a conflict, the contract controls. (MOU § 5.6.) Respondents affirm that the parties intended something more than section 19851 when drafting the MOU, otherwise there would be no need to change the language of one, and leave the other unchanged. The codes listed in section 5.6 of the MOU are incorporated fully into the contract. However, the contract controls in cases of a conflict, and in this case that conflict mandates that section 19.1(a) supersedes section 19851. The Governor has no right to order the furloughs - unilaterally reducing work

hours - because the contract dictates a 40-hour week, and the specific contract language is controlling.

Respondents may endeavor to ignore the meaning of the supersession and incorporation provisions of MOU section 5.6, however, this court must rule consistent with both principles.

C. The "State's Rights" Clauses of the MOU Do Not Give the Governor the Authority to Furlough Employees Subject to Those MOUs

Respondents pin great hope on the State's Rights clause of the MOU to justify its action, though it is a clear example of the Respondents picking and choosing which provisions of the MOU they believe are really in effect. When it is convenient to do so, the Respondents downplay the MOU. When it is seemingly more favorable, the Respondents assert that the MOU trumps other state policy.

The State's Rights clause of the MOU found in section 4.1 begins with a limiting instruction stating "except for those rights which are **abridged or limited by this Contract**, all rights are reserved to the State." (MOU § 4.1(A))[5](Emphasis added.) This clause of the MOU, far from

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[5]State Bargaining Unit 1 (JA, Vol. II, Tab MM, JA000363); State Bargaining Unit 3 (*Id.*, Vol. III, Tab NN, JA000559); State Bargaining Unit 4 (*Id.*, Vol. IV, Tab OO, JA000798); State Bargaining Unit 11 (*Id.*, Vol. V, Tab PP, JA000943); State Bargaining Unit 14 (*Id.*, Vol. VI, Tab QQ, JA001110); State Bargaining Unit 15 (*Id.*, Vol. VII, Tab RR, JA001251);

granting the authority to furlough employees, limits the ability of the Governor to act only in accordance with law that is not contradictory or superseded by the MOU. First and foremost, the whole subject of a forty-hour week is defined and limited by the contractual agreement of the parties. Therefore, the parties cannot alter it. Moreover, the State can only claim "management rights" over those matters of the nature listed in Section 4.1 (B) and not otherwise defined by contract. Consistent with the arguments set forth above and in prior briefs, the Unions clearly maintain that a 40-hour week is signed, sealed and delivered by the contract.

Furthermore, this result is completely consistent with the operation of another provision of the MOU, specifically 24.1(A) which indicates that the State waived its right to make alterations to any term of the contract while the contract is in effect.[6] In labor relations, this prohibition against

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State Bargaining Unit 17 (*Id.*, Vol. VIII, Tab SS, JA001430); State Bargaining Unit 20 (*Id.*, Vol. IX, Tab TT, JA001635); and State Bargaining Unit 21 (*Id.*, Vol. X, Tab UU, JA001793-JA001749.)

[6]State Bargaining Unit 1 (JA, Vol. II, Tab MM, JA000504); State Bargaining Unit 3 (*Id.*, Vol. III, Tab NN, JA000688); State Bargaining Unit 4 (*Id.*, Vol. IV, Tab OO, JA000909); State Bargaining Unit 11 (*Id.*, Vol. V, Tab PP, JA001077); State Bargaining Unit 14 (*Id.*, Vol. VI, Tab QQ, JA001218); State Bargaining Unit 15 (*Id.*, Vol. VII, Tab RR, JA001399-JA001400); State Bargaining Unit 17 (*Id.*, Vol. VIII, Tab SS, JA001563); State Bargaining Unit 20 (*Id.*, Vol. IX, Tab TT, JA001763); and State Bargaining Unit 21 (*Id.*, Vol. X, Tab UU, JA001889.)

unilateral changes is well-defined and protects the fundamental purpose of negotiating an MOU in the first place.[7] (*Public Employment Relations Bd.* v. *Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900, following *NLRB v. Katz* (1962) 369 U.S. 736, 745; *San Joaquin County Employees Ass'n* v. *City of Stockton* (1984) 161 Cal.App. 3d 813, 818-189 (county government must refrain from unilateral changes in the status quo throughout the life of the contract and during every phase of the bargaining process.); *Campbell Municipal Employees Assn.* v. *City of Campbell* (1982) 131 Cal. App.3d 416, 422 (the prohibition against unilateral changes extends through completion of impasse procedures).)

Ignoring the language of section 4.1(A), Respondents claim that section 4.1(B) of the MOU grants the Governor the authority to furlough

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[7] Applying well-established labor law doctrine, the court in *NLRB v. McClatchy Newspapers* stated persuasively:

> A unilateral change not only violates the plain requirement that the parties bargain over "wages, hours, and other terms and conditions," but also injures the process of collective bargaining itself. "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent. (*NLRB v. McClatchy Newspapers* 964 F.2d 1153 (D.C. Cir. 1992).)

because it includes the passage that the state has the right to "take all necessary action to carry out its mission in emergencies." (*Id.*) The emergency imagined by the contract is nowhere near as broad as the Respondents claim, and they point to no authority that would demand a different conclusion.

Respondents attempt to draw a very broad interpretation of what is a so-called "emergency" by citing to many unrelated and inapplicable sections of Government Code. (Respondents' Brief, p. 29.) Incorrectly relying in part on section 8630, this section governs the actions by a "governing body of a city, county, or city and county" and grants no authority to the Governor. (Gov. Code § 8630.) Section 8558 specifically removes this type of an emergency power from the Governor when it states that "state of emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by such conditions as...other than conditions resulting from a labor controversy..." (Gov. Code § 8558) Finally, it is undisputed in this case, that the Governor chose not to issue an emergency proclamation - acting instead by Executive Order. Once again, Respondents piecemeal parts of the contract and the law - taking parts out of context - to justify its action.

Finally, the California Constitution section that Respondents cite sets forth a detailed procedure that the Governor must follow in the event of a fiscal impasse. As set forth in detail in the Opening Brief, the Constitution allows for the following actions:

> (f)(1) If, following the enactment of the budget bill for the 2004-05 fiscal year or any subsequent fiscal year, the determines that, for that fiscal year, General Fund revenues will decline substantially below the estimate of General Fund revenues upon which the budget bill for that fiscal year, as enacted, was based, or General Fund expenditures will increase substantially above that estimate of General Fund revenues, or both, the Governor may issue a proclamation declaring a fiscal emergency and shall thereupon cause the Legislature to assemble in special session for this purpose. The proclamation shall identify the nature of the fiscal emergency and shall be submitted by the Governor to the Legislature, accompanied by proposed legislation to address the fiscal emergency. (Cal. Const., Art. IV, §10(f).)

Far from giving the Governor authority to order furloughs, this section provides only the authority to call a special session of the Legislature to address the announced fiscal emergency.

For the purposes of argument, Respondents created a detailed timeline of what the Governor did to announce this fiscal emergency as is his right under Article IV section 10(f) of the constitution. However, this list serves only to confuse the ultimate issue. Article IV section 10(f) grants

NO authority to order furloughs. It only allows the Governor to call a special session of the Legislature. It is within the Legislature's province to review the Governor's suggestions, and it is within the Legislature's province to determine budget policy to raise revenue or cut spending. Finally, it is within the Legislature's province to resolve the announced fiscal emergency. The Governor has no authority to order furloughs. He has no power to seize funds from state employee paychecks, and any attempt to do so is an unconstitutional violation of the separation of powers.

Further, far from viewing these state's rights clauses from bestowing broad or independent authority, courts have viewed them as being limited by the bargained for provisions of the contract. In *General Precision Inc. v. International Association of Machinists*, the court was asked to resolve a managerial decision changing the agreed upon workweek of the employee. ((1966) 241 Cal.App.2d 744, 745.) Management claimed their right to alter terms was found in the management's rights clause of the contract which stated "the company shall have the exclusive right and power to manage the plant and direct the working forces, including the right to hire, promote, demote, and transfer subject to the provisions of this agreement." (*Id.* at 746.) Management argued that this clause was conferred an absolute right to specify working days and there was no other limiting provision in the

agreement. (*Id.*) The contract provision that the union relied on stated only "the normal workweek was Monday to Friday, and that overtime must be paid for work on Saturday." (*Id.* at 745.) The Arbiter in that case found, and the court affirmed, that the management's right clause did not give management the right to change the workweek and that the company had no basis to deviate from the contractually-defined workweek. (*Id.* at 745.)

Here, as in *General Precision*, the parties are governed by both a contractually defined workweek as well as a Management's (state's) right clause. In this dispute, as in *General Precision*, the employer attempted to rely on a management rights clause to unilaterally alter more specific language negotiated in the MOU. In our case, the language of section 19.1 in the MOU is very specific, "unless specified HEREIN the workweek shall be 40 hours." (Emphasis added, MOU § 19.1 (*supra,* at Fn. 4).) Just as in *General Precision,* the State is attempting to ignore its contractual obligation and asking the court for permission to disregard these contracted for obligations. And here as in *General Precision,* the court should look to the language of the contract and find that the State has no right to unilaterally alter the contract. Because neither the contract nor independent authority allows the Governor to issue the furloughs, the court should

reverse the trial court's holding and find the order of the furloughs unconstitutional.

D. Respondents' Theory that Furloughs are Not a Reduction in Salary and Salary Ranges is Fatally Flawed.

Respondents make a flawed argument that the furlough-generated salary reductions are not an illegal attempt to bypass Government Code section 19826(b). Respondents admit that furloughs are a reduction in hours but claim they are not a reduction in pay. Nothing could be further from the truth. It is not possible to dispute that state employees' wages are reduced regardless of the number of hours worked in a week. For example, under the "self-directed" furlough,[8] state worker wages (hourly and salary) are reduced even though they are working full-time hours and have never taken a furlough day. Under mandatory furloughs,[9] hourly state workers receive less hourly pay each hour of each day regardless of whether the week includes a furlough day or not. Likewise, salaried "FLSA exempt" workers receive less weekly pay (i.e. a reduced salary) each week of the month regardless of whether there was a furlough day during that week of work. In keeping with these facts, Respondents would have to admit that

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[8] For example, these involve departments - like state institutions and prisons - which do not close on a furlough day.

[9] For example, in state offices that close to the public intermittently.

pursuant to the furlough order, pay is reduced regardless of work hours.

State worker wages are paid monthly (Gov. Code section 19824), but this is a feature of the payroll system, and not earned hourly or salary wages. Consequently, Respondent's argument is fatally flawed. Moreover, once this flaw is exposed, Respondents have no excuse for the mandatory applicability of section 19826(b) and the cases cited in Local 1000's Opening Brief.

It is simply indisputable that the Legislature (not the executive) is tasked with setting compensation and work schedules for represented state workers. (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1325, fn. 10; *Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1151.) The Legislature specifically reserved the function of setting the salaries and work hours for represented state employees to itself.

That same Legislature enacted Government Code section 19826(b) which states:

> **Notwithstanding any other provision of law, the department shall not** establish, adjust, or recommend a salary range ***for any employees in an appropriate unit where an employee organization has been chosen as the exclusive representative*** pursuant to Section 3520.5.

(emphasis added.)

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When this statute specifically withholds from the Governor and DPA any authority to "establish, adjust, or recommend" changes in salaries for represented state employees and expressly "preclude[s] DPA from unilaterally adjusting represented employees' wages," it is difficult to reach any other conclusion. (*Dept. of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 178.) As previously stated by the Court, "the question of represented employees' wages . . . must ultimately be resolved by the Legislature itself." (*Ibid.*) The Legislature did so by adopting an MOU, and then reinforcing the existence of the MOU in the Budget Act itself which mandate collective bargaining as the process to achieve changes to wages.

Section 19826 is the law of the State which the Governor must faithfully execute. There is no section of the MOU that is in conflict with it. Indeed, what is in conflict with section 19826 is the conduct of the State in making its unilateral change in salaries through the furlough order.

E. Respondents Erroneously Contend That the Emergency Provision of the Dills Act Authorizes the Governor to Issue the Executive Order.

Respondents wrongly conclude that because of the now multi-year fiscal situation our state is experiencing - the new fiscal status quo - the Governor has the ability to furlough the state workforce without first

meeting and conferring with the recognized representatives of the state bargaining units as required by section 3516.5. Two problems with this argument lead to its undoing. First, even if this rule-making authority was held by the Governor, this is not the type of emergency that warrants bypassing of the meet and confer provisions of section 3516.5. This is explained extensively in the Union's Opening Brief. (Opening Brief, pp. 40-41.) Second, although in some situations the Governor may bypass the meet and confer provisions of section 3516.5, he may still only pass those rules and regulations for which he has statutory or constitutional authority.

Respondents misunderstand the type of emergency required to bypass the meet and confer requirement of section 3516.5. First of all, it is defined in section 3523 as "an act of God, natural disaster, or other emergency or calamity affecting the state, and which is beyond the control of the employer or recognized employee organization..." (Gov. Code section 3523.) Section 3523 offers the best description of the type of emergency contemplated within the confines of the Dills Act. When the Legislature enacted the Dills Act, they are presumed to have knowledge of all the provisions and to have used the terms consistently throughout the Act.

Respondents ignore an elementary rule of statutory construction that statutes must be interpreted *in pari materia* - that is, statutes relating to the same subject matter should be construed together. (*Medical Bd. of California* v. *Superior Court* (2001) 88 Cal.App.4th 1001, 1016.) This is especially true when such statutes are enacted at the same time, or during the same session of the Legislature, or when they become effective on the same date. (*Pierce* v. *Riley* (1937) 21 Cal.App.2d 513, 518.) When one statute deals generally with a particular subject and the other legislates specifically upon the same subject with greater detail and particularity, the two should be reconciled and construed so as to uphold them both. (*People* v. *Squier* (1993) 15 Cal.App.4th 235, 240-241, citing: *Natural Resource Defense Council* v. *Arcata National Corporation* (1976) 59 Cal.App.3d 959, 965.) To understand the intended meaning of a statutory phrase, the court may consider use of the same or similar language in other statutes, because similar words or phrases in statutes *in pari materia* ordinarily will be given the same interpretation. (*People* v. *Coker* (2004) 120 Cal.App.4th 581, 588.)

Sections 3516.5 and 3523 were both originally added by statute 1977, chapter 1159, § 4. (Gov.Code §§ 3516.5, 3523.) Sections 3516.5 and 3523 were both amended by statute 1978, Chapter 776. (*Id.*) These statutes

are *in pari materia*; they relate to the same subject matter and therefore they should be construed together. Section 3516.5 speaks of "emergency" generally and without definition. (Gov. Code § 3516.5.) Section 3523 gives a specific definition of what shall constitute an "emergency" in relation to this section. (Gov. Code § 3523.) When one statute deals generally and the other specifically the two should be reconciled. (*People* v. *Squier*, (1993) 15 Cal.App.4th 235, 240-241.) Because section 3523 gives a specific definition of what shall constitute an "emergency" and because sections 3516.5 and 3523 are *in pari materia*, the court should apply the long standing rules of statutory interpretation to apply the same meaning of "emergency" to both.

This conclusion is supported by other applicable labor-related decisions as well. In *Sonoma County Organization v. County of Sonoma*, the court described the type of emergency that would be required to alleviate the need to meet and confer. ((1991) 1 Cal.App.4th 267, 276-277.) An emergency may well be evidenced by an imminent and substantial threat to public health and safety. (*Id.*, citing: Gov. Code § 54956.5(a); *County Sanitation Dist. No. 2* v. *Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564, 586, 592.) This is perhaps the most important criterion if the emergency involves a public sector labor dispute. (*Id.*) Without question, an emergency must have "a substantial likelihood that serious harm will be

experienced" (*Id.*, citing: *Dow Chemical Co.* v. *Blum* (1979) 269 F.Supp. 862, 902) unless immediate action is taken. (*Id.*)

Moreover, Respondents' theory - that the public need regarding the state's fiscal issues automatically justifies the conclusion that it is an emergency - actually has no legal basis. Indeed, courts have specifically concluded that an emergency is not synonymous with expediency, convenience, or best interests. (*Id.*, citing: *Hunt* v. *Norton* (1948) 68 Ariz. 1[198 P.2d 124, 130, 5 A.L.R.2d 668]). In fact, it requires an import "more ... than merely a general public need." (*Id.*, citing: *Hutton Park Gardens* v. *Town Council* (1975) 68 N.J. 543 [350 A.2d 1, 13].) The term emergency comprehends a situation of "grave character and serious moment." (*Id.*, citing: *San Christina etc. Co.* v. *San Francisco* (1914) 167 Cal. 762, 773.)

This is not to say that the Legislature should not take seriously the significance of the fiscal situation in this state; however, it is the new fiscal status quo. One cannot have a "structural" budget problem - leading to budget impasses year after year - and then claim emergency power to address an annual problem.[10] It does not rise to the required level that

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[10] The courts in *White* v. *Davis* (2003) 30 Cal.4th 528, 537; *White* v. *Davis* (2002) 108 Cal.App.4th 197, 208-209; *Jarvis* v. *Cory* (1980) 28 Cal.3d 562, 574, have previously outlined the annual nature of the budget impasse problem.

would allow the Governor to create rules without needing to first meet and confer. The possibility of furloughs was raised as early as November 6, 2008. (JA, Vol. I, Tab J, JA000124-000125.) The furloughs were not implemented until three months later, in February 2009. In the intervening three months, the Governor convened a special session of the Legislature, issued an emergency proclamation, issued the subject executive order, and ultimately agreed upon and signed a budget that purported to resolve the fiscal crises. (Respondents' Brief, pp. 5-8.) That three month period of reflection, debate, deliberation and ultimate action reflects a situation that is the polar opposite of the type of emergency contemplated in section 3516.5.

Even assuming *arguendo* that there was a real general fund cash crisis, the Governor retains only the authority to implement those rules under proper rule-making procedure and as allowed by statute or by the constitution. As demonstrated earlier in this argument, the Governor has no statutory authority to pass rules or regulations implementing the furloughs. Sections 19849 and 19851 govern the ability of the executive to make overtime payments to the state workforce and not implement furloughs. (Gov. Code §§ 19849, 19851.) The Respondents' misunderstanding of those provisions led the trial court to the incorrect conclusion that these provisions give the Governor any authority to furlough the state workforce.

Further, the constitution specifically provides what the Governor's role is if he does in fact declare a fiscal emergency. California Constitution Art. IV section 10(f) tells the Governor that if the situation is as he claims, then he is to call a special session of the Legislature and present to them a proposal. (Cal. Const. Art. IV, § 10(f).) The Respondents' brief goes to great length to prove to the court that a fiscal emergency does in fact exist. If this is true then the Governor has a clear course of action that he is to pursue. This course does not involve passing ad hoc rules and regulations that he in fact has no authority to make. He is to call the Legislature to session.

F. Respondents' Argument That the Governor's Issuance of the Executive Order Was a Proper Method of Adopting the Rule Implementing Furloughs Is Fatally Flawed.

1. The Governor Could Not Validly Adopt a Rule Because He Has No Authority to Issue the Executive Order Implementing Furloughs.

There is no dispute that the Governor is vested with the authority to collectively bargain on behalf of the state employer with the state bargaining unit representatives, regarding to wages, hours, and terms of conditions of employment. (Gov. Code §§ 3512, 3517, 3513(j), 19815.4(g), 19816(a), 19816.4, 19816.8, 19816.17, 19819.5-19819.7.) Respondents' argument is that these well-established and long-standing statutory grants of

authority (to support the collective bargaining process) suddenly give him the new unilateral power to furlough state employees as long as he can cloak it in a fiscal emergency. However, the voters gave very clear directive regarding the course of action the Governor should take when a fiscal emergency is declared. The California Constitution states: "...the Governor may issue a proclamation declaring a fiscal emergency and shall thereupon cause the Legislature to assemble in special session for this purpose. The proclamation shall identify the nature of the fiscal emergency and shall be submitted by the Governor to the Legislature, accompanied by proposed legislation to address the fiscal emergency." (Cal. Const. Art. IV, § 3.) If the Governor holds the claimed power, why is it that our state constitution clearly and unequivocally grants the Governor the authority to **only** call the Legislature to session and present a proposal?

The Governor may not invade the province of the Legislature. (63 Ops.Cal.Atty.Gen. 583 (1980) WL 96881 (Cal.A.G.).) "The powers of state government are legislative, executive and judicial. Persons charged with exercise of one power may not exercise either of the others except as permitted by **this constitution**." (Emphasis added, Cal. Const. Art. III, § 3.) The executive branch, in expending public funds, may not disregard legislatively prescribed directives and limits pertaining to the use of such

funds. (*The Superior Court of Mendocino County* v. *County of Mendocino* (1996) 13 Cal.4th 45, 53; citing *Assembly* v. *Public Utilities Com.* (1995) 12 Cal.4th 87, 98-104.) In their effort to vest sweeping authority with the Governor, where none exists, Respondents undermine fundamental principles of American society. The concept of separation of powers is not something to be whittled away with arguments taken out of context.

Respondents incorrectly claim that certain authority stands for the proposition that the Governor may grant the furloughs without violation of the separation of powers. Respondents cite *Marine Forests Society* v. *California Coastal Com.* as alleged proof that the California courts have long recognized that, in reality, the separation of powers doctrine allows the three branches of government to affect each other significantly. ((2005) 36 Cal.4th 1, 24-25.) That very case then goes on to explain the meaning of this language,

> upon brief reflection, the substantial interrelatedness of the three branches' action is apparent and commonplace: the judiciary passes upon the constitutional validity of legislative and executive actions, the Legislature enacts statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings, and the Governor appoints judges and participates in the legislative process through the veto power. (*Id.*)

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However, the "affect" that court was describing was the ability of the Governor to appoint judges, affecting the judiciary, and the ability to veto legislation, affecting the Legislature. Far from being the extreme grant of authority the Respondents are claiming, this case actually affirms a checks and balances system of government. This system does not grant the Governor the claimed authority, rather, it expressly denies him the right to usurp authority that the constitution places squarely with the Legislature.

During a time of economic crisis and extreme hardship for many Americans, especially the state's workforce, the Governor, rather than taking the constitutionally-prescribed steps and assembling the Legislature, has delayed resolution by usurping the legislative power and unconstitutionally implementing the furloughs. Regardless of the time and the situation, the constitution shall not be violated, and the careful balance of the separation of powers that has been a cornerstone of our government is not to be removed. The Governor has the responsibility to safeguard our state; he has the duty to see that the laws are faithfully executed. Regardless of the reasons behind the Governor's orders, he may not usurp legislative authority in order to attempt to furlough the state's workforce.

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G. Respondents' Summary Disposition of the Remaining Arguments Set Forth on Appeal is Flawed.

1. The Court May Decide the Constitutional Issues Raised on Appeal.

Respondents claim that the remaining issues should not be considered by the appellate court because appellate courts generally do not consider issues that were not raised in the trial court. However, the Union did raise Constitutional impairment of contract in the case below. (Reporter's Transcript, pp. 26-27.) Moreover, the appellate court will and should hear the many substantive constitutional issues raised on appeal. Many cases explain similar situations and conclude that important constitutional issues can be decided at the appellate level. Here as in those cases, the issues are too important to be ignored. The Governor's order is affecting the entire state workforce; the Governor is unilaterally changing state employees' protected contractual rights and depriving them of their due process of law. Indeed, he is usurping the Legislature's authority to act in these areas.

It has been held that: "A fundamental public right, ... which involves the interest of the citizens at large cannot be disregarded, and a constitutional question in respect thereof may be raised at any time, and even upon the court's own motion." (*Bayside Timber Co.* v. *Board of*

Supervisors (1971) 20 Cal.App.3d 1, 5; citing *Craig* v. *Board of Education of City of New York*, 173 Misc. 969 [19 N.Y.S.2d 293, 302].) Appellate courts are more inclined to consider such tardily raised legal issues where the public interest or public policy is involved. (*Resolution Trust Corp.* v. *Winslow* (1992) 9 Cal.App.4th 1799, 1810.) Few situations can be understood to affect the public interest more greatly than the Governor's unconstitutional usurping of legislative authority regarding the state's work force. Not only is the public interest affected when the Governor illegally removes the state's workforce at a time when publicly-provided services are more important than ever; but more significantly, the public interest is affected any time one branch of the government attempts to contravene the constitutional provisions on which this country was founded. The appellate court has the authority to hear these constitutional issues. Indeed, the great public policy and interests affected by them compel this result.

Moreover, as set forth in the Opening Brief on Appeal (Opening Brief, pp. 41-50, more specifically p. 49) where the Court's order causes the impairment of the contractual protections - prohibited by the Constitution, the first opportunity to challenge the judicial impairment of contract is at the appellate level. Respondents raise no dispute to the cases on judicial impairment of contract.

2. Respondents Overstate the Ability of the State to Modify its Own Contracts.

Respondents overstate the principles found in *Sonoma County Organization of Public Employees v. County of Sonoma.* ((1979) 23 Cal.3d 296.) They argue that case stands for the proposition that the constitutionally-provided contracts clause does not prevent the Governor from implementing furloughs because it is not to be applied like a mathematical formula. While this may be true, this case certainly does not stand for the proposition that the contracts clause is not to be applied at all, as Respondents would have the court believe. Later, in that very case, the court quoted the Supreme Court, stating:

> If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the **Contract Clause would provide no protection at all** .... [A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good.... [A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well. (*Sonoma County Organization of Public Employees* v. County *of Sonoma* (1979) 23 Cal.3d 296, 308; citing *United States Trust Co.* v. *New Jersey* (1977) 431 U.S. 1, 26, 29, 30-31.) (Emphasis added.)

Sonoma County does not stand for the proposition that Government may always exercise a sweeping grant of authority; to hold this dismantles the

very protection of the contract clause. It only stands for the proposition that situations may arise when the impairment must be balanced in keeping with the *Blaisdell* factors.[11] Applying those factors in this case compels the conclusion that the impairment is far too great.

The Respondents also fail to acknowledge that nearly all cases dealing with this issue are examining legislative acts that impair contractual rights. These are situations in which a properly-enacted statute is examined to determine if it impairs state contractual obligations. By contrast, in this dispute, the action being analyzed is not a proper exercise of legislative authority, it is a seizure of rights by executive fiat. The only pertinent and legitimate legislation related to the Executive Order actually contradicts it. (Chapter 1, Statutes of 2009-10 Third Extraordinary Session. ("SB3X1").) The contradictory Executive Order specifically and flagrantly bypassed the Legislative process.

As a result, the four factor *Blaisdell* test stated by the Supreme Court was meant to determine when valid and legal legislation, passed by the constitutional methods, would be sufficient to alter an existing contractual duty. (*Supra,* Fn. 11.) The third factor in that test asks "whether the

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[11] *Homebuilding Loan Assn.* v. *Blaisdell* (1934) 29 U.S. 398, 428 [78 L.Ed. 413, 423, 54 S.Ct. 231.]

enactment was appropriate to the emergency and the conditions it imposed were reasonable." (*Sonoma, supra,*. at 305.) The Respondents offer nothing in support of this factor; they simply claim it was appropriate. The legislative process ensures that thought and reflection will be employed when ascertaining whether to pass any drastic measures, and what the ramification would be of those measures.

The Governor simply acted; there were no studies, no meetings, and no reports. How could the Governor determine that this was the appropriate and reasonable response, and how could he determine this so quickly? The answer is that without the use of a crystal ball, he could not. This power was originally vested and remains today with the Legislature for a distinct reason. The Legislature has the resources and the ability to meet in large groups to thoughtfully determine comprehensive plans that are best for our state. The Governor in this case had no such benefit, and when he unconstitutionally usurped legislative power in ordering these furloughs, he at the same time unconstitutionally impaired every state worker's contract.

3. The State Workers Are Being Denied the Due Process of Law.

The Respondents offer no new arguments to rebut the appeal regarding the due process violation but simply hang their hats on the hope that the appellate court will not see these issues as important enough of a

public interest to warrant attention. The Governor is unilaterally and unconstitutionally removing our state's workforce for two days a month. The Governor is unconstitutionally usurping legislative power. The Governor is denying state workers due process of law. These issues are of the utmost public interest and deserve the attention of the appellate court in order to protect the public interest. The appellate court should address the concerns the due process of law is being denied to the state workers.

4. Respondents Misunderstand the Arguments Concerning the Infringement of the Public Employment Relations Board's Exclusive Initial Jurisdiction.

Respondents fail to understand the argument relating to PERB's exclusive jurisdiction. While it is true that Local 1000 argued that the trial court had jurisdiction to resolve the constitutional and statutory issues regarding the Governor's usurpation of legislative power, the trial court erred when it took upon itself the role of interpreting the terms of the MOU. These are two entirely different arguments and each are under entirely different jurisdictions. While it was the jurisdiction of the trial court and this Court to decide constitutional issues and matters concerning the proper exercise of Executive power, it is exclusively within PERB's jurisdiction to determine conflicts within its scope. (Gov. Code section 3512.) PERB jurisdiction was actually the basis of Respondents arguing for dismissal

under the exclusive jurisdiction doctrine. (JA, Vol. I, tab O, JA000184-000185.) Consequently, if estoppel applies to any party, it should be to Respondents.

III. CONCLUSION

For all the foregoing reasons, the Governor's illegal seizure of state employee pay through the unconstitutional furlough program is fundamentally flawed. The trial court erred when it rejected the writ of mandate filed in this case and the related cases.

Respectfully submitted,

Dated: November 24, 2009

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,

By: _____

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1). I certify that Appellant's Reply Brief contains 9,738 words, as determined by the "word count" feature of the word count feature in the Word Perfect processing system used to prepare it.

Dated: November 24, 2009

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INTERNATIONAL UNION, LOCAL
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PROOF OF SERVICE

CASE NAME: *SEIU LOCAL 1000 v. ARNOLD SCHWARZENEGGER, et al.*
COURT NAME: Sacramento County Superior Court / Third District Court of Appeal
CASE NUMBER: 34-2009-80000135 / C061020

I am a citizen of the United States and a resident of the County of Yolo. I am over the age of eighteen (18) years and not a party to the above-entitled action. My business address is 1808 14th Street, Sacramento, California 95811.

I am familiar with SEIU Local 1000's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a United States mailbox after the close of each day's business.

On November 24, 2009, I served the following:

APPELLANT'S REPLY BRIEF

[ ] (BY PERSONAL DELIVERY) by delivering by hand and leaving a true and correct copy via messenger with the person at the address shown below:

[ ] (BY FACSIMILE) placing a true copy thereof into a facsimile machine addressed to the person and address shown below, which transmission receipt is attached hereto.

[ ] (BY OVERNIGHT DELIVERY) on the following party(ies) in said action, by placing a true copy thereof enclosed in a sealed envelope, with delivery fees paid or provided, and placed in the designated recepitcle for such overnight mail, addressed as set forth below. In the ordinary course of business, mail placed in that recepticle is picked up that same day for delivery the following business day.

[ ] (BY ELECTRONIC SERVICE) Via TRO mandating electronic service. The document was served electronically and the transmission was reported as complete and without error.

[X] (BY MAIL) by placing a true copy thereof enclosed in a sealed envelope addressed to the person(s) at the address as follows:

[ ] depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.

[X] placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the businesses' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, located in Sacramento, California, in a sealed envelope with postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on November 24, 2009, at Sacramento, California.

MARY A. MEDINA