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

PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT et al.,	Court of Appeal Case No. C061011
Plaintiffs and Appellants,	
v.	
JOHN CHIANG, as State Controller, etc.,	
Defendant and Appellant;	
ARNOLD SCHWARZENEGGER, as Governor, etc., et al.,	
Defendants and Respondents.	

On Appeal from the Superior Court, County of Sacramento
Honorable Patrick Marlette
Case No. 34-2008-80000126 CU-WM-GDS

PECG AND CAPS APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C061011
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APPELLANT/PETITIONER: Professional Engineers in California Govt., et al RESPONDENT/REAL PARTY IN INTEREST: Governor Schwarzenegger, et al	

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2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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Date: August 31, 2009

Gerald A. James
(TYPE OR PRINT NAME)

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(SIGNATURE OF PARTY OR ATTORNEY)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

MISCELLANEOUS

I.

STATEMENT OF APPEALABILITY

This is an appeal by the Professional Engineers in California Government (PECG) and the California Association of Professional Scientists (CAPS), from a judgment of the Superior Court of Sacramento County in a Petition for Writ of Mandate and Complaint for Declaratory Relief filed by PECG and CAPS against Governor Arnold Schwarzenegger, his Department of Personnel Administration (DPA), and State Controller John Chiang.

The action below was determined without a jury and culminated in a January 30, 2009 final ruling denying PECG and CAPS' Petition for Writ of Mandate and Complaint for Declaratory Relief and granting judgment in favor of Governor Schwarzenegger and his DPA. (Joint Appendix, Volume III, Exhibit VV, Page 650.) Notice of Entry of Judgment was entered on February 11, 2009. (J.A. IV, Ex. EEE, p. 733.) This appeal is taken from that judgment, which finally disposes of all issues between the parties Governor Schwarzenegger, the DPA, State Controller John Chiang, and PECG and CAPS. Notices of appeal were timely filed by PECG and CAPS on February 3, 2009. (J.A. III, Ex. YY, p. 673 and ZZ, p. 676.) Although State Controller Chiang was sued as a respondent and defendant in the trial

court, he has aligned his interests with PECG and CAPS. State Controller Chiang filed a Notice of Appeal on April 1, 2009 and an amended Notice of Appeal on April 9, 2009. (J.A. IV, Ex. JJJ, p. 786 and Ex. MMM, p. 796.)

II.

SUMMARY OF THE ARGUMENT

The present action stems from the Governor's issuance of Executive Order S-16-08 on December 19, 2008 calling for the two-day per month "furlough" of state employees, including the professional engineers and related professional employees represented by PECG and the professional scientists represented by CAPS, for 17 months beginning February 1, 2009.

PECG and CAPS here challenge that executive order contending that the Governor has no authority to cut pay and no authority to cut hours through an executive order. Such an act directly conflicts with existing statutes covering pay (Government Code section 19826) and hours of work (Government Code sections 19851) as those statutes have been interpreted and applied for decades.

Even if the statutes were construed in a manner to allow the Governor this unprecedented unilateral power (which formerly would lie with the Legislature in the absence of a collective bargaining agreement),

the Governor would be unable to utilize this furlough power as the action of cutting hours of work and salary directly conflicts with the binding collective bargaining agreements between the State and employees covering the Professional Engineer Unit, State Bargaining Unit 9 and the Professional Scientific Unit, State Bargaining Unit 10. Those agreements expressly call for 40 hour work weeks. The "fiscal emergency" is one which the Legislature and the Governor must resolve under the legislative and budget procedure established in the California Constitution. Neither the law, nor the collective bargaining agreements provide the Governor with the power to unilaterally cut pay and cut hours of work.

In November 2008, the Governor recognized that only the Legislature could cut the hours or the salaries of represented state employees, or cut the hours of employees excluded from collective bargaining. That is why he called a series of special sessions of the Legislature in which he proposed statutory language that would allow him to "furlough" employees by cutting their hours and cutting their pay. The Legislature did not pass those statutory changes. The Governor proceeded anyway and issued the challenged executive order.

The trial court ruled that the Governor has the authority to reduce the normal work hours of state employees for a temporary period due to the

state's fiscal crisis. This allowed the trial court to rule that the reduction in pay was not a "pay cut" rather it was a reduction in hours and a corresponding reduction in salary. In so ruling, the trial court relied upon provisions of the Government Code and the collective bargaining agreements of the unions challenging the executive order.[1] PECG and CAPS contend that their collective bargaining agreements expressly set the hours of work and directly set the salaries of covered employees. However, even if they did not, only the Legislature may make a change in the pay of represented state employees or the hours of state employees. The Governor may not invade the province of the Legislature and is not empowered, by executive order or otherwise, to amend the effect of, or to qualify the operation of existing legislation. (*Lukens v. Nye* (1909) 156 Cal. 498, 503-504.)

This Court previously considered the DPA's efforts to reduce compensation for represented employees during a serious budget deficit and found that DPA has no authority to impose salary reductions upon

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[1]The California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE) and the Service Employees International Union, Local 1000 (SEIU) each filed writs similar to the PECG and CAPS' writ in the Sacramento Superior Court. Those cases CASE (Sacramento Superior Court Case No. 34-2009-80000134) and SEIU (Sacramento Superior Court Case No. 34-2009-80000135) were deemed related cases and were heard and decided with the PECG and CAPS writ. CASE (C061099) and SEIU (C061020) have each filed Notices of Appeal and those cases are pending before this Court.

represented employees under the Ralph C. Dills Act. (*Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155.) In *Greene*, this Court found that in the absence of agreement between DPA and state unions regarding wages, the Legislature intended through Section 19826 subdivision (b) to retain authority over salaries. "Given that this statute denies DPA the power unilaterally to set salaries, the Legislature must have intended that unresolved wage disputes return to the Legislature for final determination." (*Id.* at 181 - 182.)

Similarly, existing law at Government Code section 19851 expressly establishes in statute that the workweek of state employees shall be 40 hours. Three Opinions of the California Attorney General interpreting nearly identical language regarding hours of state employees provide that "the length of the work week of state civil service employees is fixed by law to a certain extent" and that "it is within the prerogative of the head of the department to fix within reasonable bounds the workday hours of departmental employees, provided that the required forty-hour minimum workweek is observed." (39 Ops.Cal.Atty.Gen 264 (1962).) This work week established by statute may not be altered unilaterally by the Governor or his DPA. Given the statutory establishment of a 40 hour work week, and in the absence of a memorandum of understanding (MOU) which might

alter the work week, the Legislature clearly retains the authority to set the workweek of state employees.

In any event, the collective bargaining agreements covering the Professional Engineers in State Bargaining Unit 9 and the Professional Scientists in State Bargaining Unit 10 each expressly call for a 40 hour work week. The PECG MOU provides unequivocally, "Unless otherwise specified herein, the regular work week of full-time Unit 9 employees shall be forty (40) hours." (J.A. I, Ex. N, p. 172.) The CAPS MOU incorporates Section 19851 into the MOU by stating:

"12. Workweek

19851	Sets 40-hour work week and 8- hour day.
19843	Directs DPA to establish and adjust work week groups."

(J.A II, Ex. O, p. 305.)

Both of the statutes relied upon by the trial court to allow the cutting of hours and the cutting of pay, Government Code sections 19849 and 19851, are "supersedable" by the parties in a collective bargaining agreement. It is unquestioned that if a collective bargaining agreement conflicts with these two statutes, the collective bargaining agreement controls. (Government Code sections 3517.6, 19849 and 19851.) Here, the specific language of the MOUs call for 40 hour work weeks. That language controls and prevents the Governor from unilaterally altering hours of work

or pay for represented employees.

Both MOUs contain provisions on salaries. The PECG Unit 9 MOU language calls for employees to receive salaries no less than salaries received by their counterparts subject to a salary parity survey. (J.A. I, Ex. N, p. 123.) The CAPS MOU calls for various salary increases and contains an appendix listing classifications and the salary schedule for those classifications. (J.A. II, Ex. O, p. 230, 240-242, 331.) To comply with the MOU provisions on salaries, the salaries listed in the MOUs must actually be received.

Finally, the trial court ruled that in an "emergency" certain of the various MOUs expressly permit the State to either reduce hours in case of lack of funds or to take all necessary action to carry out its mission in emergencies. The Unit 9 PECG MOU covering the professional engineers does not contain any language regarding emergencies, or any language allowing the state to reduce hours in case of lack of funds. The trial court listed a number of provisions from the various MOUs, but did not list any provision from the Unit 9 MOU covering PECG.

The trial court cited the State Rights clause as a source of authority for the furlough for employees covered by the Unit 10 CAPS MOU. The trial court listed an excerpt from the Unit 10 MOU state rights clause,

including the phrase "...to take all necessary action to carry out its mission in emergencies, ...". (J.A. III, Ex. WW, p. 657.) But, the first part of the Unit 10 State Rights clause reads: "Except for those rights which are abridged or limited by this Agreement, all rights are reserved to the State." (J.A. II, Ex. O, p. 300.) The trial court ignored this provision of the State Rights clause which contains the limiting language of rights that are "abridged or limited by this Agreement." CAPS contends the statutory definition of "emergency" must apply or the contract could be ignored any time the Governor declares a fiscal crisis. Utilizing the trial court's rationale, the Governor as the state employer could unilaterally abrogate any provision of a valid and binding contract at any time during an emergency. Neither the Unit 9 PECG MOU nor the Unit 10 CAPS MOU contain an "emergency" provision which would allow the Governor to unilaterally cut hours and pay.

Whether the Governor lacks the authority under existing statutes, or whether the collective bargaining agreements conflict with those statutes and preclude the Governor's exercise of this power, it is clear that the Governor and the DPA lack the authority to reduce the hours and the salaries payable to PECG and CAPS represented and excluded state employees by executive order.

III.

STATEMENT OF THE CASE

Procedural History

On December 22, 2008, PECG and CAPS filed a verified Petition for Writ of Mandate and Complaint for Declaratory Relief. (J.A. I, Ex. A, p. 1.) The Petition/Complaint contained two causes of action. The first cause of action was for a writ of mandate seeking to set aside the portions of the Executive Order which call for a furlough and salary reduction of PECG and CAPS represented employees and a writ compelling State Controller Chiang to ensure that salaries not be reduced as a result of the illegal furlough. (J.A. I, Ex. A, p. 11.) The second cause of action sought a declaration that the furlough and salary reductions called for by the Executive Order were illegal and sought to enjoin the reduction of hours and pay of state engineers and scientists. (J.A. I, Ex. A, p. 11.)

Governor Schwarzenegger and the DPA filed a Demurrer to the Petition for Writ of Mandate and Complaint for Declaratory Relief. (J.A. I, Ex. K, p. 96.) PECG and CAPS filed an opposition to the Demurrer. (J.A. III, Ex. PP, p. 587.) State Controller Chiang filed an opposition to the Demurrer. (J.A. III, Ex. RR, p. 611.) Governor Schwarzenegger filed a reply to the opposition to the Demurrer. (J.A. III, Ex. TT, p. 633.) The

Demurrer was heard on the same day, prior to the petition on the merits.

Respondent Governor Schwarzenegger and the DPA filed an Opposition to the Petition for Writ of Mandate and Complaint for Declaratory Relief. (J.A. II, Ex. U, p. 426.) PECG and CAPS filed a reply to the Governor and DPA's opposition. (J.A. III, Ex. SS, p. 620.)

The parties appeared before the Honorable Patrick Marlette on January 29, 2009. The Demurrer was denied. (J.A. III, Ex. XX, p. 660.) The Petition for Writ of Mandate and Complaint for Declaratory Relief was denied and Judgment was entered for the Governor and DPA. (J.A. III, Ex. XX, p. 660 and J.A. IV, Ex. EEE, p. 733.) PECG and CAPS each filed timely notices of appeal, as did State Controller John Chiang. CAPS filed a petition for writ of supersedeas on February 5, 2009, which this Court denied on February 27, 2009.

IV.

STATEMENT OF FACTS

On November 6, 2008, the Governor sent a letter to all state workers regarding his plan to achieve budgetary cost savings. (J.A. I, Ex. D, p. 50.) Included in this letter was a proposal that "all state employees be furloughed for one day per month for the next year and a half, a total of 19 days. This will result in a pay cut of about 5 percent." The letter also

proposed elimination of two holidays, proposed amending the law to make it easier to allow employees to work four days a week/ten hours per day, and proposed changes to overtime provisions by not including sick and vacation time as time worked for overtime purposes. Significantly, the Governor's letter to state workers acknowledged "All the actions we're proposing must first be approved by the Legislature." (J.A. I, Ex. D, p. 50.)

Also on November 6, 2008, the Governor called a Fourth Extraordinary Session of the Legislature to address the budget shortfall. (J.A. I, Ex. E, p. 53.) In this special session of the Legislature, the Governor sought legislation to require state employees to take a one day furlough each month between February 1, 2009 and June 30, 2010 and seeking statutory authority to reduce salaries to accomplish the purposes of the furlough. (J.A. I, Ex. F, p. 55.)

The proposed legislation sought to set aside the bargaining law and any other provision of law and add statutory authority to "furlough" state employees. In the proposed legislation, furlough "means the placement of employees on temporary, nonduty status to reduce payroll costs. An employee subject to furlough shall not receive compensation for any furlough period." Also in the proposed legislation, the state would be given power to "reduce employees' salaries, as defined in paragraph (1) of

subdivision (c) of Section 19827.2, to accomplish the purposes of the furlough." (J.A. I, Ex. F, p. 55.)

The Legislature did not pass the Governor's proposed statutory changes during the fourth extraordinary session which ended in November 2008. (Declaration of Theodore Toppin paragraph 7, (J.A. I, Ex. C, p. 47.)

Following the expiration of the legislative session and the swearing in of two dozen new legislators, on December 1, 2008 the Governor issued two proclamations calling the new Legislature into a Proposition 58 Budget Special Session on the Budget and a Second Special Session to address the state's economy. (Declaration of Toppin, para. 8 (J.A. I, Ex. C, p. 47); and Governor's Proclamations (J.A. I, Ex. G, p. 70 and Ex. H, p. 72.)

In the Special Sessions which began on December 1, 2008, the Governor's proposed statutory changes were identical to those proposed in November 2008 for the 2007 - 2008 Fourth Extraordinary Session. (Declaration of Toppin, para. 9 (J.A. I, Ex. C, p. 48.); See Assembly Budget Committee's December 2, 2008 Summary of the Governor's Proposed December 2008-09 Budget Adjustments (J.A. I, Ex. I, p. 74.)

While the Legislature passed a series of bills as part of this Extraordinary Session, the Legislature did not pass a bill allowing or requiring state employees to be furloughed or a bill allowing salary

reductions or a reduction in the hours of state employees. (Declaration of Toppin, (J.A. I, Ex. C, p. 47.) Despite the Legislature not adopting the Governor's furlough plan, the Governor nevertheless proceeded to bypass the Legislature and implement a unilateral furlough and pay cut through his DPA.

On December 19, 2008, the Governor issued Executive Order S-16-08 (Executive Order). (J.A. I, Ex. A, p. 17.) In the Executive Order, among other items, the Governor orders the DPA to adopt a plan to implement a "furlough" of represented state employees and supervisors for two days per month beginning February 1, 2009 and ending June 31, 2010. Under the order, employees would have their hours reduced by two days per month. As implemented by the DPA, the reduction in hours would be accompanied by a cut in pay equal to approximately ten percent (10%) of each employee's salary.

PECG is the duly certified exclusive collective bargaining representative of employees in State Bargaining Unit 9, the Professional Engineers unit, pursuant to Government Code section 3520.5. (Declaration of Toppin (J.A. I, Ex. C, p. 46.) PECG also is a verified supervisory employee organization under Government Code section 3527 subdivision (c). PECG represents approximately 13,000 Unit 9 and supervisory state

employees covered by Executive Order S-16-08. (Declaration of Toppin (J.A. I, Ex. C, p. 46.)

CAPS is the duly certified exclusive collective bargaining representative of employees in State Bargaining Unit 10, the Professional Scientific unit, pursuant to Government Code section 3520.5. (Declaration of Toppin, (J.A. I, Ex. C, p. 47.) CAPS also is a verified supervisory employee organization under Government Code section 3527 subdivision (c). CAPS represents approximately 3,000 Unit 10 and supervisory state employees covered by Executive Order S-16-08. (Declaration of Toppin (J.A. I, Ex. C, p. 47.)

V.

STANDARD OF REVIEW

The interpretation and application of the MOU between the State of California and PECG, the MOU between the State of California and CAPS and the authority of the Governor to issue the contested Executive Order each present pure questions of law, not involving the resolution of disputed facts. Therefore, the Sacramento Superior Court's rulings in this case are subject to an independent, or de novo, review by this appellate court. (*City of El Cajon v. El Cajon Peace Officers' Assn.* (1996) 49 Cal.App.4th 64, 70-71; *Lockyer v. Shamrock Foods Co.* (2000) 23 Cal.4th 415, 432.)

Where as here the determination of the trial court as to the meaning of the MOUs and the statutes is one of law, the appellate court must make its own independent determination of the laws's construction and effect. (*Coate v. Life Insurance Co. Of California* (1979) 98 Cal.App.3d 982, 986.) Questions of law are determined by the appellate court without regard to the conclusion of the trial court. (*Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, *citing Eastern Columbia, Inc. v. Waldman* (1947) 30 Cal.2d 268, 273.)

VI.

ARGUMENT

A. THE SALARIES AND HOURS OF STATE ENGINEERS AND STATE SCIENTISTS ARE GOVERNED BY THE PARTIES' LABOR CONTRACTS WHICH REMAIN IN EFFECT

1. The Provisions of the Expired MOUs Remain in Effect and May Not be Impaired in Violation of the Contracts Clause of the California Constitution

It is not in dispute that the Memorandum of Understanding (MOU) between the State of California and PECG and the MOU between the State of California and CAPS each remain in effect as binding contracts.

Under Government Code section 3517.8 (a):

> If a memorandum of understanding has expired, and the Governor and the recognized employee organization have not agreed to a new memorandum of understanding and have not

> reached an impasse in negotiations, subject to subdivision (b), the parties to the agreement shall continue to give effect to the provisions of the expired memorandum of understanding, including, but not limited to, all provisions that supersede existing law, any arbitration provisions, any no strike provisions, any agreements regarding matters covered in the Fair Labor Standards Act of 1938 (29 U.S.C. Sec. 201 et seq.), and any provisions covering fair share fee deduction consistent with Section 3515.7.

The Governor and DPA, citing Section 3517.8, asserted before the trial court that all of the provisions of the MOU remain in effect, including all provisions which supersede existing law. (J.A. I, Ex. L, p. 104.) The trial court found that the MOUs remain in effect, although they are technically expired, pursuant to Government Code section 3517.8(a). (J.A. III, Ex. XX, p. 666.)

An MOU covering state employees becomes an "indubitably binding" contract on the parties once approved by the Legislature. (*California Association of Highway Patrolmen v. Department of Personnel Administration* (1986) 185 Cal.App.3d 352, 361 citing *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328.) Once approved by the Legislature, the 2003-2008 MOU between the State and PECG (J.A. I, Ex. N, p. 115) and the 2006-2008 MOU between the State and CAPS (J.A. II, Ex. O, p. 221) each became binding on the parties as "indubitably binding" contracts. Generally, neither the court nor the

legislature may impair the obligation of a valid contract. (Cal.Const., Art. I, § 9.)

A labor agreement that becomes valid and binding on approval by the public employer is definitive and permits no discretion. (*Glendale City Employees Assn, Inc.* 15 Cal.3d at 344.) As the California Supreme Court has noted, the terms of a binding MOU must be honored otherwise,

> "Why negotiate an agreement if either party can disregard its provisions? What point would there be in reducing it to writing, if the terms of the contract were of no legal consequence? Why submit the agreement to the governing body for determination, if its approval were without significance? What integrity would be left in government if government itself could attack the integrity of its own agreement?"

(*Glendale City Employees' Assn, Inc., v. City of Glendale, supra,* 15 Cal.3d at 336.)

While there is precedent for impairing contractual rights contained in an MOU, the standards are understandably extremely high before a public employer can invoke the "police power" to do so. Significantly, for the state employer, an act to impair a labor contract would require legislation. (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, holding that there are limited instances in which a statute can be passed lawfully impairing a labor contract.) No such legislation allowing the Governor to impair or abrogate provisions of

binding labor contracts has passed in connection with the Governor's declared fiscal emergency.

2. The MOUs Cover the Wages and Hours of Represented State Engineers and State Scientists

The PECG MOU contains an Article entitled "Recognition and Purpose." The stated purpose of the MOU is to "improve employer-employee relations between the parties by establishing the wages, hours, and other terms and conditions of employment, and other subjects contained herein." (J.A. I, Ex. N, p. 122.)

Similarly, the CAPS MOU contains a "Preamble." In that preamble, the MOU has as one of the listed purposes, "the establishment of rates of pay, hours of work, and other conditions of employment including health and safety." (J.A. II, Ex. O, p. 230.)

Clearly, in entering into these MOUs the parties were entering into binding contracts which establish the salaries and wages to be paid and establish the hours to be worked.

a. The MOUs Govern the Salaries of Unit 9 and Unit 10 Employees

The PECG Unit 9 MOU contains a provision on salaries. Specifically, the MOU language calls for employees in Unit 9 to receive salaries no less than salaries received by their counterparts subject to a

salary parity survey. (J.A. I, Ex. N, p. 123.) This language resulted in annual salary increases beginning in 2003 and continues to govern the salaries required to be paid to Unit 9 employees. The Unit 9 MOU also contains an appendix listing classifications and the salary schedule for those classifications. (J.A. I, Ex. N, p.205.) So to comply with the Unit 9 contractual provisions regarding salaries, the salaries bargained for must be actually received. There is no provision in the Unit 9 MOU which allows salaries to be reduced by the furlough program or for any other reason.

Similarly, the CAPS Unit 10 MOU contains a provision on salaries. The CAPS MOU calls for a salary increase to take effect on July 1, 2006, a second increase to take effect on July 1, 2007, and various labor market adjustments to take effect January 1, 2007 (J.A. II, Ex. O, p. 230, 240-242.) The Unit 10 MOU also contains an appendix listing classifications and the salary schedule for those classifications. (J.A. II, Ex. O, p.331.) So to comply with the Unit 10 contractual provisions regarding salaries, the salaries bargained for must be actually received. There is no provision in the Unit 10 MOU which allows salaries to be reduced by the furlough program or for any other reason.

b. The MOUs Govern the Hours of Work of Unit 9 and Unit 10 Employees

The PECG Unit 9 MOU provides unequivocally, "Unless otherwise

specified herein, the regular work week of full-time Unit 9 employees shall be forty (40) hours." (J.A. I, Ex. N, p. 172.) There is no exception to this mandatory statement of the 40 hour work week elsewhere in the PECG Unit 9 MOU. On that basis, the work week of Unit 9 employees shall be 40 hours. As the MOU controls, the Governor may not unilaterally reduce the hours of Unit 9 employees. Any supersedable statute, interpreted to the contrary, would be superseded by the MOUs. (Government Code § 3517.6.)

The CAPS Unit 10 MOU also contains the 40 hour work week. The CAPS MOU incorporates Section 19851 into the MOU by stating:

"12. Workweek

19851	Sets 40-hour work week and 8- hour day.
19843	Directs DPA to establish and adjust work week groups."

(J.A II, E. O, p. 305.)

Clearly, the agreement is for a 40 hour work week. There is no exception to the 40 hour work week in the CAPS Unit 10 MOU. As the MOU controls, the Governor may not unilaterally reduce the hours of Unit 10 employees.

The CAPS Unit 10 MOU also contains a "No Lockout" provision. Article 13.2 provides that "No lockout of employees shall be instituted by the State during the term of this agreement." (J.A. II, Ex. O., p. 301.) Merriam-Webster's Third New International dictionary defines "lockout" as

"an act of locking out or the condition of being locked out: as **a:** the withholding of employment by an employer and the whole or partial closing of his business establishment in order to gain concessions from or resist demands of employees. - compare STRIKE" The Governor's "partial closing" of state offices preventing state scientists from working their full 40 hour shifts is contrary to the Unit 10 MOU.

The trial court erred by failing to find that the salaries and hours of work of represented employees in State Bargaining Unit 9 (PECG) and State Bargaining Unit 10 (CAPS) are governed by the memoranda of understanding and cannot be unilaterally altered by the Governor and his DPA, the parties to the labor contract.

B. THE SETTING OF SALARIES AND HOURS OF WORK IS A LEGISLATIVE FUNCTION AND IS THEREFORE OUTSIDE OF THE GOVERNOR AND HIS DPA'S AUTHORITY TO CHANGE BY EXECUTIVE ORDER OR OTHERWISE

PECG and CAPS contend that the Governor lacks the authority to adopt the disputed Executive Order as it conflicts with current statute. The Governor may not invade the province of the Legislature and is not empowered, by executive order or otherwise, to amend the effect of, or to qualify the operation of existing legislation. (*Lukens v. Nye* (1909) 156 Cal. 498, 503-504.)

Here, not only does the Governor have no specific authority to adopt

this executive order, but the executive order is actually in direct conflict with existing statutes which expressly state that the Legislature will retain ultimate authority over salaries (Gov. Code § 19826) and other specified terms and conditions of employment, including hours of work (Gov. Code § 19851, 19852.). Even if these statutes did provide the power to cut hours, these statutes are each supersedable by the labor contracts. When the statutes conflict with the labor contracts, the labor contracts control. (Gov. Code § 3517.6.)

The trial court's ruling that the Governor has the authority to furlough under existing law is erroneous.

1. The Governor Has No Authority to Furlough State Employees by Cutting Pay and Hours

The Governor is authorized to issue directives, communicated verbally or by formal written order, to subordinate executive officers concerning the enforcement of law. An executive order is a formal written directive of the Governor by which interpretation, or the specification of detail, directs and guides subordinate officers in the enforcement of a particular law. (63 Ops.Cal.Atty.Gen. 583 (1980), 1980 WL 96881 (Cal.A.G.).)

Article III, section 3 of the Constitution of the State of California states: "The powers of state government are legislative, executive and

judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

Article V, section 1 of the Constitution of the State of California states: "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed." Government Code section 12010 states in relevant part, "[t]he Governor shall supervise the official conduct of all executive and ministerial officers."

There is simply no authority in law for the Governor to furlough employees. The statutes which the trial court utilized to justify the reduction in hours have been around for decades. Prior Governors and this Governor alike recognized that only the Legislature, or the people through the initiative process, could authorize the Governor to implement furloughs. The trial court did not address the Governor's very public written statement regarding the furlough he proposed on November 6, 2008 with the corresponding pay cut. In the Governor's letter, he stated "All the actions we're proposing must first be approved by the Legislature." (J.A. I, Ex. D., p. 50.)

The need for legislative approval is confirmed by the Governor's introduction of legislation to implement a furlough during the 2008 Special

Sessions. Governor Schwarzenegger specifically introduced legislation to giving him the power to "reduce employees' salaries, as defined in paragraph (1) of subdivision (c) of Section 19827.2, to accomplish the purposes of the furlough." (J.A. I, Ex. F, p. 55.)

In 1991, then Governor Pete Wilson sought to address a state budget deficit with various proposals including pay reductions, furloughs, deletion of one of two tiers of the retirement system, caps on employer contributions to health insurance, discontinuance of employee and retiree system trustees, and removal of funds from employee contributions to the retirement system. Governor Wilson proposed these items to the Legislature as statutory changes to be implemented by legislation in May and June of 1991. (*Public Employment Relations Board v. Superior Court* (1993) 13 Cal.App.4th 1816, 1819.) Governor Wilson also was the proponent of Proposition 165 a failed initiative measure which appeared on the ballot in 1992. Proposition 165 sought to constitutional and statutory changes and was titled the Government Accountability and Taxpayer Protection Act of 1992. It would authorize the Governor to declare a "state of fiscal emergency" and unilaterally reduce certain expenses. Among other things, Proposition 165 would have allowed the Governor during a fiscal emergency to reduce salaries of employees not covered by a collective bargaining agreement by

up to 5 percent or impose equivalent furloughs. (*League of Women Voters v. Eu* (1992) 7 Cal.App.4th 649, 653-654.)

Similarly when a "personal leave program" consisting of a salary reduction in exchange for leave credits was implemented in 1992, it was done so at the bargaining table and required legislation for employees excluded from collective bargaining. (Gov. Code § 19996.3.)

Notably, the Government Code specifically grants to state departments the power and authority to lay off employees "because of lack of work or funds, or whenever it is advisable in the interests of economy, to reduce the staff of any state agency..." (Gov. Code § 19997.) There is no such statutory authorization for furloughs.

Clearly, there is a long history confirming the need for legislative approval of statutory changes which would allow furlough or other reductions in pay of state employees. This history simply cannot be ignored - furloughs require legislative approval via a statutory authorization.

2. The Trial Court Erred by Allowing the Governor to Alter the Salaries of Represented State Engineers and Scientists as Such Action is Inconsistent with Government Code Section 19826

Setting compensation for state employees is a legislative function. (*Lowe v. Resources Agency* (1991) 1 Cal.App.4th 1140.) The Legislature has provided that salaries for rank-and-file state employees and other terms

and conditions of employment shall be set through collective bargaining. In Government Code section 19826, the Legislature has delegated a portion of the salary setting function to the DPA. Under Section 19826 subdivision (b), where an exclusive representative has been selected, the DPA has no authority to change the salary. Since the Legislature has chosen not to delegate this salary setting function to the DPA with respect to represented employees under the Dills Act, the Legislature necessarily retains that role for itself. Government Code section 19826 expressly and unambiguously precludes the reduction of represented employee wages. (*Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155.)

In the absence of conflicting provisions in an MOU, the statutory bar in Section 19826 (b) on DPA adjusting salaries remains in place. (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1325; Gov. Code § 19826 subd. (b).) As there is nothing in the parties' collective bargaining agreements which allows for the reduction of salaries, in the absence of the Legislature taking an action to reduce the salaries of Unit 9 employees or Unit 10 employees, the salaries of those employees may not be lawfully reduced.

The trial court allowed a reduction in salaries on the basis that Section 19826 applied to protect only "salary ranges", not the salaries paid

to employees. The Governor argued before the trial court that unlike *Greene*, here the Governor is not reducing salary ranges and employees will receive the same rate of pay. In doing so the Governor does not dispute that state employees monthly salaries will be reduced. If the Governor cannot change salary ranges, what gives him the authority to change pay within those ranges? By long standing practice, the salaries of state employees have been set as ranges, defined by a minimum and maximum. The power to establish and adjust salary ranges includes the authority to adjust salaries within those ranges. (*Tirappelle v. Davis* (1993) 20 Cal.App.4th 1317, 1342.) Section 19826 (b) covers both salary ranges and the adjustment of salaries within those ranges. Further, if an employee is currently at the bottom of the salary range, a nearly ten percent salary decrease in the month will place that employee well under the "salary range" for his or her classification. The trial court erred to the extent it concluded that Section 19826 (b) allows salary reductions of employees within a salary range.

3. The Trial Court Erred by Allowing the Governor to Alter the Hours of Work of State Engineers and Scientists as Such Action is in Conflict with Government Code Section 19851 and Not Authorized by 19849(a)

Existing statute sets the workweek of state employees. Government Code section 19851 provides 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." The plain reading of this section makes it clear the statute was never intended to be used as a justification to cut state employees' hours of work and cut state employees' pay.

In Government Code section 19852, the Legislature provides the Governor limited discretion in determining whether the 40 hour work week should be worked in four or five days. That section provides that when the Governor determines it is in the best interests of the state, "the Governor may require that the 40-hour workweek established as the state policy in Section 19851 shall be worked in four days in any state agency or part thereof."

Section 19851 was formerly Section 18020 added by Stats. 1945, c. 123, p. 536. In 1962, the Attorney General's Office drafted an opinion in which it commented on the 40-hour minimum work week. As part of the reviewed, the opinion repeats Government Code section 18020 as it read at the time:

> "It is the policy of the State that the workweek of the state employee shall be 40 hours, except that workweeks of a different number of hours may be established in order to meet the varying needs of the different state agencies. 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 such is necessary to carry on the state business properly during a manpower shortage."

The AG's Opinion stated:

> Thus, the length of the work week of state civil service employees is fixed by law to a certain extent, but the hours the individual employee shall work during each day is largely a matter of administrative determination in the discretion of the head of the employee's department or agency or other appointing power (2 Ops.Cal.Atty Gen. 184, 185-186.) Such head of the department or agency or other appointing power has authority to fix within reasonable bounds the daily working hours of department employees, provided the required 40-hour minimum work week is observed. "In so fixing the hours of employees consideration should be given to the needs of the department and insofar as possible the convenience of employees and the public." (35 Ops.Cal.Atty.Gen 239, 240.)

(39 Ops.Cal.Atty.Gen 261, 262 - 263.)

With the exception of current Section 19851's addition of "and the workday of state employees eight hours" the language is the same. For decades, the minimum workweek of 40 hours has been in statute. Departments can alter when the work is done, as long as they adhere to the 40-hour minimum workweek.

Under Government Code section 19849 (a), DPA can establish rules governing "hours of work and overtime compensation and the keeping of records related thereto..." The Governor argued before the trial court that this section gives him "implied" authority to reduce hours. (J.A. I, Ex. U, p.

448.) Any authority under this section must either comply with the statutorily established forty hour workweek or be agreed to in an MOU. A statute allowing the DPA to adopt rules to assist with keeping track of overtime cannot be used to justify a furlough.

To see what the statute means, one need look no further than the regulations adopted by the DPA concerning work weeks. Without exception, those rules discuss the "minimum work week of 40 hours."

Title 2, CCR § 599.703. Work Week Group 4 provides in part:

> Classes and positions required (sic) the establishment of special provisions governing hours of work and methods of compensation for overtime, shall be assigned to one of the following subgroups of Work Week Group 4, which are hereby established.
>
> 4A. Classes and positions with a minimum work week of 40 hours. Required work in excess of the minimum work week is compensable as overtime in accordance with the provisions of Section 599.704...
>
> 4B. Classes and positions with a five-day work week with a minimum average of 40 hours a week during any 12 consecutive pay periods, but no specified maximum number of hours per day. Overtime does not accrue for work performed on a normal work day except as provided by Section 599.710...
>
> 4C. Classes and positions with a minimum average work week of 40 hours. The regular rate of pay is full compensation for all time that is required for the employee to perform the duties of the position...

In sum, the only rule making the DPA has legitimately engaged in regarding work weeks confirms the 40-hour statutorily established work week.

The Legislature has specifically authorized reductions to the 40 hour work week by adopting the Reduced Worktime Act at Government Code section 19996.19 et seq. Specific legislative action was necessary to establish this program. Under the program, involuntary reduction of an employee's worktime is prohibited. (Gov. Code § 19996.22.)

4. To the Extent Sections 19826, 19851 or 19849(a) Conflict With the MOUs, the MOUs Control

Government Code section 3517.6 lists the statutes that the Legislature says can be superseded by the parties in an MOU without further legislative action. Among those statutes are Government Code sections 19826, 19849, and 19851.

The Unit 9 PECG MOU contains a provision entitled 19.2 Supersession which reads as follows:

> The following Government Code Sections and all DPA regulations and/or rules related thereto are hereby incorporated into this MOU. However, if any other provision of this MOU is in conflict with any of the Government Code Sections listed below or the regulations related thereto, such MOU provision shall be controlling. The Government Code Sections listed below are cited in Section 3517.6 of the Dills Act.

(J.A. I, Ex. N, p. 192.)

The Unit 10 CAPS MOU contains a similar Supersession provision

at 13.6 which reads as follows:

> The following enumerated Government Code Sections and Education Code Sections and all existing rules, regulations, standards, practices and policies which implement the enumerated Government Code Sections and Education Code Sections are hereby incorporated into this Agreement. However, if any other provision of this Agreement alters or is in conflict with any of the Government Code Sections or Education Code Sections enumerated below, the Agreement shall be controlling and supersede said Government Code Sections or Education Code Sections or parts thereof and any rule, regulation, standard, practice, or policy implementing such provisions. The Government Code Sections listed below are cited in Section 3517.6 of the Dills Act.
>
> (J.A. II, Ex. O, p. 301.)

At oral argument on the writ petition, counsel for PECG and CAPS argued that supersedable statutes do not control if they are in conflict with the MOU. The trial court stated, "But when the MOU expressly adopts a statute, I think that's the next step, I think, that perhaps you are not taking that I am." (RT p.16, ln. 27 - p. 17, ln. 1.) To the extent the trial court relied upon the notion that an incorporated statute prevailing over an MOU provision in ruling on the Petition, the trial court erred. Pursuant to the law and to the MOUs, if something in the MOU conflicts with one of the supersedable statutes, the MOU controls. (Gov. Code § 3517.6.)

Section 19826 is not incorporated into either the Unit 9 PECG MOU or Unit 10 CAPS MOU. In the absence of conflicting provisions in an

MOU, the statutory bar in Section 19826 (b) on DPA adjusting salaries remains in place. (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1325; Gov. Code § 19826 subd. (b).)

Just like section 19826, Sections 19851 and 19849 (a) are supersedable. This means the parties could agree to a provision in an MOU for represented employees which conflicts with the 40 hour work week statute. In the absence of such an agreement, the 40 hour work week can only be altered by the Legislature.

So assuming *arguendo* that Section 19851 and 19849 are construed to allow a reduction in the work week, the Governor still lacks the authority to reduce hours because 19851 and 19849 would conflict with the PECG Unit 9 MOU provision which states "Unless otherwise specified herein, the regular work week of full-time Unit 9 employees shall be forty (40) hours." (J.A. I, Ex. N, p. 172.) Similarly, the CAPS Unit 10 MOU which contains provisions confirming the 40 hour work week would control by superseding the conflicting provisions of Sections 19851 and 19849.

PECG and CAPS contend there is not an exception which allows a reduction in overall hours and only a restructuring of when the hours are worked. However, even if the Governor has the power to alter work hours, the Governor has failed to comply with the statutory basis for the

"exception" he claims allows him to alter work hours. There is no indication or evidence that the Governor's reduction in hours is designed to "meet the needs of the different state agencies." His action of cutting the hours of all employees is not consistent with this statute. For example, state employees are paid out of different funds. Cutting the hours of an employee paid out of special funds would not "meet the needs of the different state agencies" as there would not be an impact on the General Fund budget deficit, the purported purpose of the Executive Order. As neither Government Code section 19851 nor 19849(a) were cited as authority for the Executive Order, it is not surprising that there was no evidence put forth by the Governor to establish the reduction in hours was to "meet the needs of the different state agencies." Without even attempting to meet this burden and therefore giving employee organizations or the public a basis to challenge the connection between the hours and pay cut and the "needs of the different state agencies", the Governor should not be allowed to proceed under these Sections.

The trial court's interpretation that this section allows a wholesale reduction in hours must be wrong. If it did provide the Governor with such authority, presumably he could cut the hours of all state workers in half or even to zero. This interpretation ignores Section 19852 which limits the

Governor's authority to determine whether the 40 hour work week may be worked in four days. In other words - the Governor has limited authority over when the hours are worked, not how many hours are worked. A state employee's work week is 40 hours a week. Some state employees work that 40 hours in four 10-hour days per week. (*Peters v. State of California* (1987) 188 Cal.App.3d 1421, 1426, citing Gov. Code §§ 19851 and 19852.)

Any attempt by the DPA to reduce hours in a manner inconsistent with the forty hour workweek would be void. An attempt by an administrative agency to exercise control over matters which the Legislature has not seen fit to delegate to it is not authorized by law and in such case the agency's actions can have no force or effect. (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1335.)

As the proposed furlough and reduction in pay and reduction in hours are inconsistent with current statute, DPA lacks the authority to reduce pay or hours and its actions in doing so are unlawful. (*Association for Retarded Citizens-California v. Department of Departmental Services* (1985) 38 Cal.3d 384, 391 - 392.)

C. THE "FISCAL EMERGENCY" DECLARED BY THE GOVERNOR PROVIDES THE GOVERNOR ONLY LIMITED POWERS UNDER GOVERNMENT CODE SECTION 3516.5 and UNDER ARTICLE IV, SECTION 10(f) OF THE CALIFORNIA CONSTITUTION

1. Government Code Section 3516.5 is Not a Source of Power

The Governor claims in the Executive Order that he has the authority to issue the furlough because of the fiscal and cash crisis. (J.A. I, Ex. A, p. 17.) The sole legal authority cited for this broad and erroneous claim in the Executive Order was Government Code section 3516.5. On its face, that section merely relates to the procedural aspect of the state employer's obligation to provide notice and opportunity to meet and confer under the state collective bargaining law over the impact of a law, rule, resolution or regulation related to matters within the scope of representation. Section 3516.5 does not provide any authority to "furlough" state employees or otherwise implement a cut to their salaries or hours of work. The trial court agreed. At oral argument on the writ, counsel for PECG and CAPS asked for clarification regarding the court's tentative ruling and whether the trial court was utilizing Government Code section 3516.5 as the basis for the authority to implement the furlough plan, or whether the basis for the authority was Government Code sections 19851 and 19849(a). The Court responded that the Section has more to do with the meet and confer. (RT, p.

15, lines 1 - 8.) Without the authority of Government Code section 3516.5, the Executive Order is devoid of any purported authority or power for the furlough.

2. Article IV, Section 10(f) of the California Constitution Provides only Limited Powers During a Budget Emergency

The California Constitution outlines the actions that a Governor may take in a fiscal year when General Fund revenues will decline substantially below the estimate or expenditures will increase substantially above the estimate.

Article IV, Section 10(f) of the California Constitution provides as follows:

> (1) If, following the enactment of the budget bill for the 2004-05 fiscal year or any subsequent fiscal year, the Governor 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.
>
> (2) If the Legislature fails to pass and send to the Governor a bill or bills to address the fiscal emergency by the 45th day following the issuance of the proclamation, the Legislature may not act on any other bill, nor may the Legislature adjourn

for a joint recess, until that bill or those bills have been passed and sent to the Governor.

(3) A bill addressing the fiscal emergency declared pursuant to this section shall contain a statement to that effect.

As listed in the Constitution, the Governor may call a special session by issuing a proclamation, accompanied by proposed legislation to address the fiscal emergency. If the Legislature fails to pass and send the Governor a bill or bills to address the fiscal emergency by the 45th day, the Legislature may not act on any other bill , nor adjourn for a joint recess until the bill or bills have been sent to the Governor. This is consistent with the notion that the fiscal crisis is a legislative issue, not one the Governor may act on unilaterally. The California Constitution clearly lays out the power provided to the Governor in the exact fiscal emergency situation we faced in December 2008. Such power does not include the power to engage in unilateral action in violation of statute.

D. THE FISCAL EMERGENCY DECLARED BY THE GOVERNOR DOES NOT ALLOW UNILATERAL ACTION UNDER EITHER THE PECG UNIT 9 MOU OR THE CAPS UNIT 10 MOU

The trial court ruled that "the specific terms of certain of the petitioners' of MOUs expressly permit the State either to reduce hours in case of lack of funds or to take all necessary action to carry out its mission in emergencies." (J.A. III, Ex. XX, p. 667.) The Unit 9 MOU covering the

Professional Engineers does not contain any language regarding emergencies, or any language allowing the state to reduce hours in case of lack of funds. The trial court listed a number of provisions from the various MOUs, but did not list any provision from the Unit 9 MOU covering PECG. While PECG and CAPS each deny the MOUs provide such emergency authority, clearly, even if the trial court was correct that an emergency allowed such action under other MOUs, this portion of the trial court's justification supporting the legality of the Executive Order cannot apply to PECG.

The CAPS Unit 10 MOU contains a State Right clause which was relied upon by the trial court. In the listing of the state's rights, it includes "...to take all necessary action to carry out its mission in emergencies, ..." But, the first part of the State Right clause reads: "Except for those rights which are abridged or limited by this Agreement, all rights are reserved to the State." (J.A. II, Ex. O, p. 300.) The trial court ignored this provision of the State Right clause which contains the limiting language of rights that are "abridged or limited by this Agreement." Utilizing the trial court's rationale, the Governor as the state employer could unilaterally abrogate any provision of the a valid and binding contract at any time during an undefined emergency.

Emergency is not defined in the Unit 10 MOU, but is defined in statute. Under Government Code section 8625, the Governor may proclaim a state of emergency either during a state of war or when the conditions of subdivision (b) of Section 8558 exist. Subdivision (b) states:

> (b) "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 air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy or conditions causing a "state of war emergency," which, by reason of their magnitude, are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission.
>
> (Gov. Code § 8558(b).)

This statutory definition does not include, and does not describe, a fiscal crisis. The term "emergency" in the Unit 10 MOU should not be construed in a manner to allow the Governor to abrogate the provisions of the MOU.

VII.

CONCLUSION

For all the foregoing reasons, Plaintiffs and Appellants PECG and

CAPS respectfully request that the Court vacate the trial court's judgment and enter its own judgment reversing the lower court and ordering the trial court to grant the Petition for Writ of Mandate and Complaint for Declaratory Relief.

Date: August 31, 2009

Respectfully submitted,

GERALD JAMES
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CERTIFICATE OF WORD COUNT

I, Gerald James, am counsel for Appellants in the above referenced appeal. The foregoing brief consists of 9,023 words. I am relying on the computer program, Corel Word Perfect X4, used to prepare this brief for this word count.

Date: August 31, 2009

GERALD JAMES
Attorney for Appellants Professional Engineers in California Government and California Association of Professional Scientists

PROOF OF SERVICE BY OVERNIGHT DELIVERY

Court of Appeal Case No. CO61011

Case: Professional Engineers in California Government et al., Plaintiffs and Appellants, v. John Chiang, as State Controller, etc., Defendant and Appellant; Arnold Schwarzenegger, as Governor, etc., et al., Defendants and Respondents.

I declare that I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The address of my business is 455 Capitol Mall, Suite 501, Sacramento, CA 95814.

On August 31, 2009, I served the **PECG and CAPS APPELLANTS' OPENING BRIEF** on the parties listed below by placing true copies thereof in sealed envelopes with the fees paid and depositing said envelopes with Federal Express for guaranteed next day delivery:

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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.

Executed on August 31, 2009, at Sacramento, California.

Breanna Cabrera