

Chuck Alexander, *Executive Vice President*

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January 14, 2010

State Board;

Yesterday, the State filed another appeal in our furlough case. As things have developed thus far, we believe that an appeal is not appropriate in our case, as the order has not yet been made final. As has been reported by various media outlets, the State Controller concurs with our position and as such the State has now filed the "new" appeal in an effort to stop the Controller from complying with the Alameda Court decision. As part of their appeal, the State has requested a "temporary" stay to stop the Controller until such time as the Appeal can be heard. Upon being notified of any ruling regarding this case we will immediately forward said information to you.

Interesting to note, the State's appeal claims they will be "irreparably harmed" if the judgment is allowed to take effect pending appeal. The state claims that this order "would directly and immediately affect public safety," as it would create 85 vacant posts every day at every institution, thus harming the mission and function of CDCR institutions. Seems like a sound argument for exempting correctional peace officers from furloughs as essential public safety. However, this same Administration has previously decided that we aren't essential public safety.

The appeal will be posted on the CCPOA web page shortly.


Chuck

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT**

**CALIFORNIA CORRECTIONAL PEACE
OFFICERS ASSOCIATION**

Plaintiffs/Respondents,

vs.

**ARNOLD SCHWARZENEGGER, in his capacity
as Governor of the State of California;
CALIFORNIA DEPARTMENT OF PERSONNEL
ADMINISTRATION; CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION; CALIFORNIA
DEPARTMENT OF MENTAL HEALTH; and
CALIFORNIA DEPARTMENT OF JUVENILE
JUSTICE**

Defendants/Appellants.

**JOHN CHIANG, in his capacity as the Controller of
the State of California**

Defendant

Court of Appeal Case No.

(Superior Court Case No. RG-09-441544)

Appeal from the Superior Court, Alameda County
The Honorable Frank Roesch, Department 31, (510) 268-5105

**PETITION FOR WRIT OF SUPERSEDEAS AND REQUEST FOR
TEMPORARY STAY**

**STAY REQUESTED OF DECEMBER 17, 2009 FINAL ORDER
GRANTING WRIT OF MANDATE AND WRIT OF MANDATE
ENTERED DECEMBER 30, 2009**

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**ARNOLD SCHWARZENEGGER, as Governor of the
State of California; DEPARTMENT OF PERSONNEL
ADMINISTRATION; CALIFORNIA DEPARTMENT
OF CORRECTIONS AND REHABILITATION;
CALIFORNIA DEPARTMENT OF MENTAL
HEALTH; CALIFORNIA DEPARTMENT OF
JUVENILE JUSTICE**

**Court of Appeal
State of California
First Appellate District**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: _____

Division _____

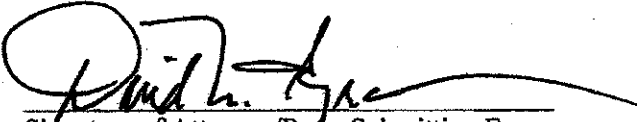
Case Name: Correctional Peace Officers Association v. Schwarzenegger et al.

Please check the applicable box:

- There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d)(3).
- Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1. See attached	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person information if necessary.


Signature of Attorney/Party Submitting Form

Printed Name: David W. Tyra

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State Bar No: 116218

Party Represented: Appellants

IF SUBMITTED AS A STAND-ALONE DOCUMENT, SUBMIT A SEPARATE PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE.

Attachment to Certificate of Interested Entities or Persons

Full Name of Interested Entity or Person	Nature of Interest
California Attorneys, Administrative Law Judges and Hearing Officers in State Employment	Petitioner in related case filed in Alameda County Superior Court
Carrie Lopez, Director of the Department of Consumer Affairs	Respondent in related case filed in Alameda County Superior Court
Cindy Ehnes, Director of the Department of Managed Health Care	Respondent in related case filed in Alameda County Superior Court
David Maxwell-Jolly, Director of the Department of Social Services	Respondent in related case filed in Alameda County Superior Court
Kimberly Belshe, Director of the Department of Public Health	Respondent in related case filed in Alameda County Superior Court
Service Employees International Union, Local 1000	Petitioner in related case filed in Alameda County Superior Court
Steve Poizner, Insurance Commissioner of the State of California	Respondent in related case filed in Alameda County Superior Court
Tony Sauer, Director of the Department of Rehabilitation	Respondent in related case filed in Alameda County Superior Court
Union of American Physicians and Dentists	Petitioner in related case filed in Alameda County Superior Court
Yvonne Walker	Petitioner in related case filed in Alameda County Superior Court

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INTRODUCTION

The present appeal is taken from a final ruling of the Alameda County Superior Court issued December 17, 2009 directing the issuance of a writ of mandate and judgment in this case, and from a writ of mandate entered by that same court on December 30, 2009, holding that the State of California may no longer utilize self-directed furloughs for employees in State Bargaining Unit 6 represented by the California Correctional Peace Officers Association ("CCPOA").

On December 31, 2009, Governor Arnold Schwarzenegger, the Department of Personnel Administration, the Department of Corrections and Rehabilitation, the Department of Mental Health, and the Department of Juvenile Justice – Defendants and Respondents in the trial court and Appellants and Petitioners before this Court – filed their timely notice of appeal with respect to the trial court's decisions. The timely appeal from the trial court's final ruling and writ of mandate affected an automatic stay of that ruling and writ. On January 12, 2009, the Office of the State Controller, a party to this action, indicated its intent to ignore that stay and to cease acknowledging self-directed furloughs of BU 6 employees in the payroll it issues for such employees, thereby effectively eliminating the self-directed furlough program for BU 6 employees altogether. As a result of the threatened violation of the automatic stay, this Court should grant supersedeas relief. This Court should grant the requested relief to preserve

the status quo pending appeal and in a "corrective capacity" to prevent the threatened violation of the automatic stay by the Controller. Because the appeal in this case resulted in an automatic stay, supersedeas relief can issue here without this Court undertaking an examination and balancing of the relative equities of the parties' positions.

Even if this Court determines that it should weigh those relative equities, however, the requested supersedeas relief should be granted. The petition submitted to this Court, along with the supporting evidence, demonstrates the State will suffer irreparable harm if the Controller is permitted to violate the automatic stay. Furthermore, there is a likelihood that the present appeal will be successful in that it raises substantial questions of probable error by the trial court. For all of these reasons, Governor Arnold Schwarzenegger, the Department of Personnel Administration, the Department of Corrections and Rehabilitation, the Department of Mental Health, and the Department of Juvenile Justice respectfully submit that the requested writ of supersedeas be granted.

PETITION

1. A Final Order Granting Writ of Mandate and directing the preparation and entry of final judgment in this action was issued by the Honorable Frank Roesch of the Alameda County Superior Court on December 17, 2009. (A copy of this Order is attached to this petition and incorporated herein as Exhibit A.)

2. A Writ of Mandate was entered by the Alameda County Superior Court on December 30, 2009. (A copy of the Writ of Mandate is attached to this petition and incorporated herein as Exhibit B.)

3. Governor Arnold Schwarzenegger, the California Department of Personnel Administration, the California Department of Corrections and Rehabilitation, the California Department of Mental Health, and the California Department of Juvenile Justice, Respondents in the trial court (hereinafter, referred to collectively as "the State parties"), filed a Notice of Appeal from the trial court's Final Order granting the Writ of Mandate and directing the preparation and entry of final judgment in this action on December 31, 2009. (A copy of the Notice of Appeal is attached to this petition and incorporated herein as Exhibit C.)

4. On December 1, 2008, Governor Arnold Schwarzenegger issued a Fiscal Emergency Proclamation pursuant to his authority under Cal. Const. Art. IV, § 10(f). In his Fiscal Emergency Proclamation, the Governor declared the nature of the fiscal emergency "to be the projected budget imbalance and insufficient cash reserves for Fiscal Year 2008-2009 and the projected insufficient cash reserves and potential budgetary and cash deficit in Fiscal Year 2009-2010 which are anticipated to result from the dramatically lower than estimated General Fund revenues in Fiscal Year 2008-2009." (A copy of the December 1, 2008 Fiscal Emergency Proclamation is attached to this petition and is incorporated herein as

Exhibit D.)

4. On December 19, 2008, Governor Arnold Schwarzenegger issued Executive Order S-16-08 which directed the implementation of a two-day a month furlough for all state employees commencing in February 2009 and ending in June 2010. (A copy of the December 19, 2008 Executive Order S-16-08 is attached to this petition and is incorporated herein as Exhibit E.)

5. On July 1, 2009, as a result of continued budgetary and cash shortfalls, the Governor issued Executive Order S-13-09, directing a third furlough day for state employees, "regardless of funding source." (A copy of the July 1, 2009 Executive Order S-13-09 is attached to this petition and is incorporated herein as Exhibit F.)

6. Also on July 1, 2009, the Governor issued a Fiscal Emergency Proclamation. (A copy of the July 1, 2009 Fiscal Emergency Proclamation is attached to this petition and incorporated herein as Exhibit G.) In the July 1, 2009 Fiscal Emergency Proclamation, the Governor noted that "the Legislative Analyst predicted that the Governor's May Revision revenue projections may prove overly optimistic, and instead, projected that the drop in revenues will be at least \$3 billion worse than projected putting the size of the state's shortfall at more than \$24 billion for fiscal years 2008-09 and 2009-10." (*Id.*)

7. On March 16, 2009, CCPOA commenced the present action and filed a verified petition of writ of mandate/prohibition and complaint for

injunctive and declaratory relief in Alameda County Superior Court challenging the manner in which the furloughs ordered by Governor Schwarzenegger were being applied to employees in State Bargaining Unit 6 ("BU 6"). CCPOA alleged in its Petition that its members were being subjected to self-directed furloughs by which employees who were unable to take furlough days during the pay period in which their compensation was reduced would be allowed to accumulate furlough credits that could be utilized to take days off work through June 30 2012. CCPOA alleged that self-directed furloughs constitute an illegal salary reduction under California Government Code section 19826(b). The Petition further alleged that the self-directed furlough program violates Labor Code sections 212, 223, and 1171.

8. Given that the Final Order from the Alameda County Superior Court was an order granting writ of mandate, the writ of mandate is automatically stayed upon perfection of the appeal.

9. Controller of the State of California, John Chiang, has announced his intention to violate the automatic stay and enforce the writ of mandate by ceasing to acknowledge self-directed furloughs of BU 6 employees in the payroll it issues for such employees, thereby effectively eliminating the self-directed furlough program for BU 6 employees altogether. (See Exhibit H. See also, Declaration of Julie Chapman, which is attached as Exhibit I.)

10. Issuance of the writ of supersedeas is necessary to enforce the automatic stay of the grant of writ of mandate pending appeal.

11. The appeal is based on the following grounds:

a. The self-directed furlough program does not constitute an illegal salary reduction under California Government Code section 19826(b.).

b. The self-directed furlough program does not violate any of the provisions of California Labor Code sections 212, 223, and 1171.

c. The writ of mandate interferes with the exercise of discretion on matters within the executive branch's core function and, as such, should not have issued.

d. CCPOA failed to present sufficient evidence in the trial court to establish a ministerial duty that would have allowed the trial court to issue a writ of mandate.

e. The trial court erred with respect to the relief it granted CCPOA.

12. Both California Department of Corrections and Rehabilitation ("CDCR") and the Department of Mental Health ("DMH") will suffer irreparable harm if the automatic stay is violated because both organizations have 24-hour institutions and therefore cannot close completely on "furlough Fridays." (See Declaration of Scott Kernan, which is attached as Exhibit J, and Declaration of Stanley Bajorin, which is

attached as Exhibit K.)

13. Both CDCR and DMH will suffer irreparable harm if the stay does not issue because both CDCR and DMH will be unable to provide enough staff for vital programs. (*Id.*)

14. If CDCR and DMH are prevented from using the self-directed furlough program during the pendency of the appeal, both organizations will suffer severe budget deficiencies that will cause irreparable harm. (See Declaration of David Lewis, Exhibit L.)

15. In addition, if CDCR and DMH are not permitted to continue using self-directed furloughs during the pendency of this appeal, the staff and inmates at correctional institutions throughout the State will be put at risk due to inadequate staffing. The inadequate staffing at these institutions also will create safety risks to the general public. (See Declaration of Scott Kernan, Exhibit J and Declaration of Stanley Bajorin, Exhibit K.)

**REQUEST FOR WRIT OF SUPERSEDEAS TO ENFORCE
AUTOMATIC STAY**

WHEREFORE, ARNOLD SCHWARZENEGGER, as Governor of the State of California; CALIFORNIA DEPARTMENT OF PERSONNEL ADMINISTRATION; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; CALIFORNIA DEPARTMENT OF MENTAL HEALTH; CALIFORNIA DEPARTMENT OF JUVENILE JUSTICE pray that this Court issue a writ

of supersedeas or other appropriate stay of the Final Order and Writ of Mandate, enforcing the automatic stay and barring further enforcement of the grant of writ of mandate, pending the determination of this appeal.

REQUEST FOR TEMPORARY STAY

ARNOLD SCHWARZENEGGER, as Governor of the State of California; CALIFORNIA DEPARTMENT OF PERSONNEL ADMINISTRATION; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; CALIFORNIA DEPARTMENT OF MENTAL HEALTH; and CALIFORNIA DEPARTMENT OF JUVENILE JUSTICE further pray that this Court grant a temporary stay of the Writ of Mandate pending determination of this petition.

Dated: January 13, 2010

KRONICK, MOSKOVITZ, TIEDEMANN &
GIRARD

A Professional Corporation

By 

David W. Tyra,

Attorneys for Defendants/Appellants

ARNOLD SCHWARZENEGGER, as

Governor of the State of California;

DEPARTMENT OF PERSONNEL

ADMINISTRATION; CALIFORNIA

DEPARTMENT OF CORRECTIONS AND

REHABILITATION; CALIFORNIA

DEPARTMENT OF MENTAL HEALTH;

CALIFORNIA DEPARTMENT OF

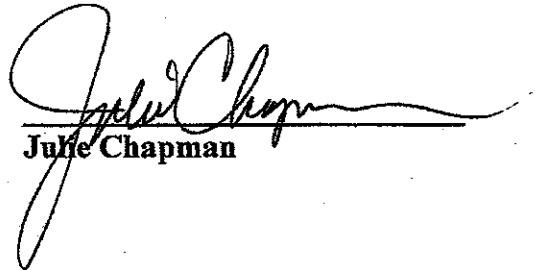
JUVENILE JUSTICE

VERIFICATION

I, Julie Chapman, declare as follows:

I am the Chief Deputy Director of the Department of Personnel Administration, one of the Respondents in this appeal. I have read the foregoing Petition for Writ of Supersedeas and Request for Temporary Stay and know its contents. The facts alleged in the Petition are within my own knowledge and I know those facts to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Verification was executed on January 12, 2009 at Sacramento, California.


Julie Chapman

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF PETITION FOR WRIT OF SUPERSEDEAS AND REQUEST
FOR TEMPORARY STAY**

L

STATEMENT OF THE CASE

A. Statement of Facts.

1. The Executive Orders Directing Furloughs of State Employees.

On December 19, 2008, Governor Schwarzenegger issued Executive Order S-16-08 directing the implementation of a two-day a month furlough plan for all state employees commencing in February 2009 and ending in June 2010. (Exhibit E.) The issuance of this Executive Order was preceded by a Fiscal Emergency Proclamation issued by the Governor on December 1, 2008 pursuant to his authority under Cal. Const. Art. IV, § 10(f). (Exhibit D.) In his Fiscal Emergency Proclamation, the Governor declared the nature of the fiscal emergency “to be the projected budget imbalance and insufficient cash reserves for Fiscal Year 2008-2009 and the projected insufficient cash reserves and potential budgetary and cash deficit in Fiscal Year 2009-2010 which are anticipated to result from the dramatically lower than estimated General Fund revenues in Fiscal Year 2008-2009.” (Exhibit D.) In Executive Order S-16-08, the Governor reiterated the fact that absent immediate action, the State would run out of cash in February of 2009 and would not be able to meet its mandatory obligations. (Exhibit E.)

On July 1, 2009, as a result of continued budgetary and cash shortfalls, the Governor issued Executive Order S-13-09, directing a third furlough day for state employees, "regardless of funding source." (Exhibit F.) On that same date, the Governor also issued a Fiscal Emergency Proclamation. (Exhibit G.) In the July 1, 2009 Fiscal Emergency Proclamation, the Governor noted that "the Legislative Analyst predicted that the Governor's May Revision revenue projections may prove overly optimistic, and instead, projected that the drop in revenues will be at least \$3 billion worse than projected putting the size of the state's shortfall at more than \$24 billion for fiscal years 2008-09 and 2009-10." (*Id.*) The Governor further noted that "the State Controller has determined that the State's \$2.8 billion cash shortage in July 2009 will grow to \$6.5 billion in September, and a double-digit freefall after September." (*Id.*)

B. Furlough Usage by Bargaining Unit 6 Members.

1. Furlough Usage by CDCR Employees.

The State of California Department of Corrections and Rehabilitation ("CDCR") employs approximately 35,000 employees who are represented by CCPOA in bargaining unit 6 ("BU6"). A large number of BU6 employees are employed at adult correctional facilities and juvenile detention centers throughout the State. (See Exhibit J, Declaration of Scott Kernan, at ¶ 3.) CDCR operates 33 adult correctional facilities and 7 juvenile detention centers. CDCR also employs BU6 members who do not

work primarily within correctional facilities. These BU6 members are employed within CDCR's Division of Adult Parole Operations or within CDCR's administration or headquarters. (*Id.*)

In response to the Governor's Executive Orders, CDCR implemented a furlough program which placed CDCR BU6 member staff on a "self-directed" furlough program. (Exhibit J, Kernan Declaration, ¶ 5.) CDCR BU6 staff who are in the current "self-directed" furlough program are encouraged to take their furlough hours off within the month. However, if certain individuals are unable to use their hours within the month, they are permitted to accumulate furlough leave credits to be used at a future date. (*Id.*)

2. Furlough Usage by Department of Mental Health Employees.

The State of California Department of Mental Health ("DMH") employs approximately 11,000 individuals, the majority of whom work in 24-hour institutions, and some of whom work in adult correctional institutions and are represented by CCPOA in BU6. (Exhibit K, Declaration of Stanley Bajorin, ¶¶ 2, 4.) DMH also instituted a self-directed furlough program for DMH BU6 employees who maintain necessary patient services, security and health and safety functions. (*Id.*, ¶ 4.)

C. Procedural History

On March 16, 2009, CCPOA filed a verified petition of writ of

mandate/prohibition and complaint for injunctive and declaratory relief in Alameda County Superior Court. CCPOA challenged the manner in which the furloughs ordered by Governor Schwarzenegger were being applied to employees in State Bargaining Unit 6 ("BU 6"). CCPOA alleged in its Petition that its members were being subjected to self-directed furloughs by which employees who were unable to take furlough days during the pay period in which their compensation was reduced would be allowed to accumulate furlough credits that could be utilized to take days off work through June 30 2012. CCPOA alleged that self-directed furloughs constituted an illegal salary reduction under California Government Code section 19826(b). The Petition further alleged that the self-directed furlough program violated Labor Code sections 212, 223, and 1171.

On November 16, 2009, the Alameda County Superior Court held a hearing on the merits on CCPOA's request for mandamus relief. On December 17, 2009, Judge Roesch issued a Final Order granting the CCPOA's petition for writ of mandate and directing the preparation of a final judgment in this action. (Exhibit A.) On December 30, 2009, the Alameda County Superior Court executed the writ of mandate prepared by CCPOA pursuant to the trial court's direction in its December 17, 2009 final order. (Exhibit B.) (CCPOA has yet to prepare the final judgment form it was directed by the trial court to prepare.) On December 31, 2009, Respondents filed a Notice of Appeal. (Exhibit C.) Appellants included in

their Notice of Appeal a notice that the writ of mandate was automatically stayed on appeal based on the final order from the Alameda County Superior Court granting the writ of mandate.

D. Controller John Chiang's Announcement of Intent to End Self-Directed Furloughs

On January 11, 2010, the Department of Personnel Administration was informed by the State Controller's Office that it intended to cease self-directed furloughs for CDCR employees in Bargaining Unit 6 and correctional sergeants and lieutenants by eliminating the negative pay differential associated with the furlough. (Exhibit I; Declaration of Julie Chapman [hereinafter "Chapman Declaration," at ¶ 4.) The Controller's Office stated that it believed that Judge Roesch's grant of writ of mandate was an interlocutory order, and as such, any appeal was premature. (Exhibit J, at ¶ 5.) On January 11, 2010, the Department of Personnel Administration sent the State Controller a letter advising the State Controller to cease and desist from any actions eliminating self-directed furloughs or the negative pay differential. (Exhibit I, at ¶ 6 and Exhibit A thereto.) On January 12, 2010, Richard Chivaro, counsel for the State Controller, wrote a letter to the Department of Personnel Administration stating that it was the belief of the State Controller's Office that the writ of mandate issued by the Alameda County Superior Court immediately eliminated the negative pay differential and the self-directed furloughs.

(Exhibit I, at ¶ 7 and Exhibit B thereto.) The State Controller's office reiterated its position that the writ of mandate issued by Judge Roesch is an interlocutory order and, as such, not appealable.

II.

ARGUMENT

A. Standard for Writ of Supersedeas.

The appellate court has the authority to stay a judgment during the pendency of appeal by issuing a writ of supersedeas. (Code of Civ. Proc. § 923; *In re Christy L.* (1986) 187 Cal.App.3d 753, 759.) A writ of supersedeas is an extraordinary writ used to "protect the appellate court's jurisdiction," during the pendency of the appeal. (*Nuckolls v. Bank of California, National Association* (1936) 7 Cal.2d 574, 578.) A petition for writ of supersedeas should be granted when "to deny a stay would deprive the appellant of the benefit of a reversal of the judgment against him." (*Deepwell Homeowner's Protective Association v. City Council of the City of Palm Springs* (1965) 239 Cal.App.2d 63, 66.)

Supersedeas "is the appropriate remedy when it appears that a party is refusing to acknowledge the applicability of statutory provisions 'automatically' staying a judgment while an appeal is being pursued." (*Gallardo v. Specialty Restaurants Corporation* (2000) 84 Cal.App.4th 463, 467, quoting *Nielsen v. Stumbos* (1990) 226 Cal.App.3d 301, 303.) "It is also established law that even where an appeal effects a statutory stay, the

writ of supersedeas will issue 'in a corrective capacity' in case of a violation or threatened violation of such stay." (*In re Dabney's Estate* (1951) 37 Cal.2d 402, 408.) Furthermore, the court in *In re Dabney's Estate, supra*, 37 Cal.2d at 408, quoting *Feinberg v. One Doe Co.* (1939) 14 Cal.2d 24, 29, stated that in a writ of supersedeas petition to enforce an automatic stay, "this court will not balance or weigh the arguments with reference to the possible irreparable injury to the appellants or respondents as would be necessary if the question of the issuance of the writ was solely a matter of our discretion." In this case, the appeal taken from the trial court's final order issuing a writ of mandate and directing preparation of a final judgment in this case results in an automatic stay of the trial court's final order and writ. (Code of Civ. Proc. § 916; *Hayworth v. City of Oakland* (1982) 129 Cal.App.3d 723, 727.) Thus, the writ of supersedeas should issue in this case to prevent the threatened violation of that automatic stay by the State Controller, who is a party to this action.

Even if this were not a case in which the perfecting of the appeal resulted in an automatic stay and, thus, the issuance of the requested writ of supersedeas was a matter of this Court's exercise of discretion, the writ of supersedeas should so issue. In order for a writ of supersedeas to be granted when the issuance of the writ is a matter within the Court of Appeal's *discretion*, the writ should issue when the petitioner (1) demonstrates a likelihood of success on appeal by raising substantial

questions of probable error by the trial court and (2) shows that the balance of the equities weighs in favor of granting the requested writ. (*Deepwell Homeowner's Protective Association, supra*, 239 Cal.App.2d at 65-67; *West Coast Home Improvement Company v. Contractor's State License Board of Department Professional and Vocational Standards* (1945) 68 Cal.App.2d 1, 6; *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861; *Nuckolls v. Bank of California, National Association, supra*, 7 Cal.2d 574, 578.) A writ of supersedeas may issue if the petitioner demonstrates it will suffer irreparable injury if the writ of supersedeas is not granted. (*Mills v. County of Trinity, supra*, 98 Cal.App.3d 859, 861; *Deepwell Homeowner's Protective Association v. City Council of the City of Palm Springs, supra*, 239 Cal.App.2d 63, 66.) Specifically, supersedeas writs avoid situations where the result of a judgment taking effect during the pendency of the appeal would result in a "denial of the appellant's right if his appeal were successful." (*Deepwell Homeowner's Protective Association, supra*, 239 Cal.App.2d at 66.)

B. The Court Should Issue a Temporary Stay Pending Determination of the Present Writ Because the Threat By the Controller to Violate the Automatic Stay is Imminent.

As discussed above, the threat by the State Controller to violate the stay is imminent and as such, this Court should issue a temporary stay, staying any enforcement of the final order by the Alameda County Superior Court pending the determination of the present petition for writ of

supersedeas. Under California Rules of Court 8.112(c) and 8.116, this Court is authorized to grant a temporary stay of any enforcement of the writ of mandate pending determination on the writ of supersedeas. State Controller Chiang intends to immediately enforce the writ of mandate, ignoring the automatic stay, and, as such, a temporary stay is necessary to preserve the State parties' rights on appeal. (Exhibit I, Declaration of Julie Chapman, ¶ 7 and Exhibit B thereto.)

C. **A Writ of Supersedeas Is the Proper Procedure to Enforce the Automatic Stay of the Writ of Mandate in this Case Because a Timely Appeal Has Been Perfected.**

As discussed above, supersedeas is an appropriate remedy to enforce an automatic stay when a party threatens to violate or violates the stay.

(*Gallardo v. Specialty Restaurants Corporation* (2000) 84 Cal.App.4th 463, 467; *In re Dabney's Estate* (1951) 37 Cal.2d 402, 408.) In this case, the State parties seek the requested writ of supersedeas to prevent the State Controller from violating the automatic stay created by the perfection of a timely appeal.

1. **The Appeal of the Writ of Mandate Was Timely.**

The Controller has taken the erroneous position that it is not obligated to abide by the automatic stay of the trial court's final ruling and the writ of mandate it issued because the present appeal is premature and not from a final judgment in this case. (See Exhibit H and I.) Contrary to the Controller's position, however, a writ of supersedeas is appropriate

because a timely appeal from the judgment in this case is pending. (*In re Christy L.* (1986) 187 Cal.App.3d 753, 759.)

The State parties filed a Notice of Appeal with the Alameda County Superior Court on December 31, 2009. The appeal was taken from the trial court's final order, which granted the writ of mandate and directed the preparation of a final judgment in the case, entered by the trial court on December 17, 2009, as well as the writ of mandate entered by the trial court on December 30, 2009. (Exhibit C.) As stated in the Notice of Appeal, these two documents, taken together, constitute a final adjudication of the rights and interests of the parties in this action. As such, Respondents and Defendants named above brought a timely appeal. Despite the fact that final judgment has yet to be rendered or entered in this action, an appeal may be taken from the aforementioned order and writ in that they constitute a statement made by the trial court of its ruling in this matter made prior to the rendition and entry of judgment. (See CRC 8.104(e)(2); *Marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1341.)

CRC 8.104(e)(2) provides as follows, "The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment." This case falls precisely within the situation addressed by this rule. The Alameda County Superior Court has articulated its final decision but there has been no entry of final judgment. This is

evidenced by the Alameda County Superior Court's direction in its order for CCPOA to prepare the judgment. (Exhibit A.) There is no reason for CCPOA to have failed to follow the explicit direction that the trial court gave it to prepare the judgment. Therefore, under the provision of 8.104(e)(2), this court should exercise its discretion and consider the present appeal to be timely given the significance of the issues of public policy intrinsic to this case.

The timely appeal of the trial court's final order and writ effectively rebuts any argument by the Controller that a writ of supersedeas is not appropriate because the appeal was premature. (Exhibit I; Chapman Declaration, at ¶ 7 and Exhibit B thereto.) In taking his position that the appeal in this case is premature and, thus, he may disregard the automatic stay, the Controller relies on *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743 – 744.) However, the Controller misinterprets the holding in *Morehart*. In *Morehart*, the court merely acknowledged "that an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately or may be characterized as 'separate and independent' from those remaining." (*Id.*, at 743.) In the *Morehart* case, a complaint was filed alleging five separate causes of action and the first, fourth and fifth causes of action were tried separately from the second and third causes of action. (*Id.*, at 735.)

The trial court filed a judgment on the first, fourth and fifth causes of action but not the second and third. (*Id.*) Therefore, the trial court judgment in *Morehart* expressly did *not* dispose of all causes of action between the parties. (*Id.*) Conversely, the order issued by the trial court in this action explicitly disposed of all of the causes of action between the parties. In fact, the order granting the writ of mandate issued by the trial court *specifically* directs CCPOA, as Petitioners, to prepare a form of final judgment. The trial court's direction to prepare a *final judgment* evidences its intent that its order dispose of all causes of action in this case. Therefore, because *Morehart* is entirely distinguishable, the Controller's reliance on *Morehart* is misplaced and irrelevant.

CCPOA has yet to explain why it has not complied with the trial court's direction to prepare a judgment form in this action. As of the date of the filing of the notice of appeal and the filing of this petition for writ of supersedas, CCPOA has not prepared or lodged with the trial court the form of judgment it was directed to prepare. The fact that CCPOA has not complied with the trial court's direction to prepare the final judgment, however, does not render this appeal untimely. As noted, an appeal may be taken from the aforementioned order and writ in that they constitute a statement made by the trial court of its ruling in this matter made prior to the rendition and entry of judgment. (See CRC 8.104(e)(2); *Marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1341.)

2. **A Writ of Supersedeas Should Issue to Prevent the State Controller's Threatened Violation of the Automatic Stay.**

The filing of the timely Notice of Appeal in this action automatically stayed enforcement of the writ of mandate during the pendency of the appeal. (Code of Civ. Proc. § 916; *Hayworth v. City of Oakland* (1982) 129 Cal.App.3d 723, 727.) As the appeal stayed the writ of mandate, any action by Controller Chiang to implement the writ of mandate is in direct violation of the stay perfected by the Notice of Appeal. As such, a writ of supersedeas should issue to enforce the stay against Controller Chiang.

As noted above, supersedeas "is the appropriate remedy when it appears that a party is refusing to acknowledge the applicability of statutory provisions 'automatically' staying a judgment while an appeal is being pursued." (*Gallardo v. Specialty Restaurants Corporation* (2000) 84 Cal.App.4th 463, 467, quoting *Nielsen v. Stumbos* (1990) 226 Cal.App.3d 301, 303.) In this action, by announcing his intention to cease recognizing self-directed furloughs in the manner in which payroll for BU 6 employees is processed, the Controller has indicated his intention to implement the provisions of the trial court's final order and writ of mandate. The Controller's position, therefore, constitutes a refusal to abide by the provisions of the automatic stay during the pendency of the appeal of this action. "It is established law that even where an appeal effects a statutory stay, the writ of supersedeas will issue 'in a corrective capacity' in case of a

violation or threatened violation of such stay.” (*In re Dabney's Estate* (1951) 37 Cal.2d 402, 408.) Controller Chiang’s announcement that he intends to cease self-directed furloughs for all BU6 employees is a threatened violation of the stay and as such, this court must issue a writ of supersedeas to “correct” this threatened violation.

Furthermore, since this writ of supersedeas will act to enforce an automatic stay, the court need not engage in the balancing of the harms between appellants and respondents as is required when the stay is within the discretion of the appellate court. (*In re Dabney's Estate* (1951) 37 Cal.2d 402, 408; *Feinberg v. One Doe Company* (1939) 14 Cal.2d 24, 29.) Therefore, the court need not engage in irreparable harm analysis and the writ of supersedeas should issue.

D. Respondents Will Suffer Irreparable Harm if the Writ of Supersedeas Does Not Issue.

However, even if this court determines that an irreparable harm analysis is necessary, a writ of supersedeas should issue in this case because Respondents will be irreparably harmed if the automatic stay is not enforced and Controller Chiang is permitted to cease self-directed furloughs for BU6 employees and eliminate the negative pay differential. First, Respondents will be irreparably harmed if the automatic stay is violated because if the writ of mandate is reversed they will be required to engage in costly and burdensome procedures and/or litigation to recoup any

overpayments made to employees during the pendency of the appeal, to the extent that they are able to recoup said overpayments at all. A writ of supersedeas should issue where the result of a judgment taking effect during the pendency of the appeal would result in a "denial of the appellant's rights if his appeal were successful." (*Deepwell Homeowner's Protective Association, supra*, 239 Cal.App.2d at 66.) If this Court determines that the trial court erred in issuing its ruling in this case, and thus reverses that ruling, the State will have lost the critical budget savings which led to the furloughing of state employees as the result of the Controller's refusal to abide by the automatic stay and the State will be left without any ability to recover those lost savings.

Furthermore, the day-to-day functions and missions of the State's correctional institutions will be irreparably harmed if the judgment is allowed to take effect during the pendency of the appeal. This harm would directly and immediately affect public safety. Consistent with the relevant Executive Orders, CDCR has been furloughing its employees two days per month as of February, 2009 and three days per month as of July, 2009. However, the mission and function of CDCR makes it impossible for CDCR to do regular Friday furloughs like many other agencies. The majority of CDCR facilities are twenty-four facilities and cannot shut down for three Fridays a month. (Exhibit J, Declaration of Scott Kernan, at ¶ 5.) Therefore, CDCR has been using the self-directed furlough program and

most employees are able to take their furlough days within the month. (*Id.*) Requiring CDCR to cease the use of the self-directed furlough program will pose a health and safety risk to CDCR staff, inmates of CDCR facilities and the general public. (*Id.*, at ¶ 6.)

If every institutional custody staff member of a CDCR institution is required to take three furlough days per month, 85 daily posts must be held vacant in every institution every day. (*Id.*, at ¶ 7.) These empty posts will harm the mission and function of CDCR institutions. CDCR has many constitutional and statutory obligations that must be staffed, which include constitutional levels of care for inmates, liberty interests and basic feeding and hygiene. (*Id.*, at ¶ 8.) Therefore, discretionary programs such as yard, dayroom, telephones, recreational library, visiting, self-help programming and hobby craft will have to be shut down. (*Id.*, at ¶ 8.) The decrease in programs will likely result in increased violence. Furthermore, the staff reductions may result in CDCR's inability to meet mental health care mandates for inmates. (*Id.*, at ¶ 9.) The lack of self-directed furloughs will also result in fewer staff members being able to respond to alarms and disturbances, fewer staff members to conduct security searches, and less training in institutional security for CDCR employees. (*Id.*, at ¶ 10-11.) In addition, reduced staffing will also have a significant adverse impact on CDCR's ability to meet court ordered time frames and mandates for the parole department. (*Id.*, at ¶ 12-15.)

The lack of self-directed furloughs may also interfere with the ability to complete investigations, hearings and case work which may result in the irreparable harm of an inmate's due process rights being violated. (*Id.*, at ¶15.) CDCR may also be prevented from meeting the requirements of several federal and state lawsuits imposing new requirements on CDCR. Compromised staffing of CDCR may also lead to significant public safety risks. (*Id.*, at ¶ 24-25.)

Based upon all of these potential circumstances, maintenance of self-directed furloughs during the pendency of this appeal is integral to maintaining CDCR's critical missions and the protection of public safety, the safety of CDCR staff, and the safety of inmates.

Finally, if CDCR is unable to continue the three-day a month furloughs and to meet its legal obligations and the mission of the institutions, the State will experience severe financial harm. At the beginning of 2009, due to the California budget deficit, CDCR's budget was reduced by \$400 million. (Exhibit L, Declaration of David Lewis, at ¶ 5.) CDCR's budget was further reduced to account for the reduction in total employee compensation due to the self-directed furloughs. (Exhibit L, at ¶ 6.) CDCR has estimated that if it is unable to furlough BU 6 employees due to institutional necessity, it will cost CDCR \$40 million a month or \$240 million over the next six months. (Exhibit L, at ¶ 7.) This would require CDCR to cut \$240 million from its already strapped budget,

which would require instituting significant cuts across the board that would impact the health and safety of staff and inmates and risk public safety. (Exhibit L, at ¶ 8.) The services that would be cut include substance abuse treatment, medical treatment and vocational rehabilitation. (Exhibit L, at ¶10.) Although savings to cover the loss of self-directed furloughs can be realized by program reduction or eliminations, said reductions and eliminations can only be achieved through essentially "locking down" all facilities. (Exhibit L, at ¶ 14.) Lock downs will likely lead to inmate unrest and violence. (Exhibit L, at ¶ 14.)

The same type of irreparable harm would result to the Department of Mental Health ("DMH"), as DMH also has twenty-four hour facilities with strict staffing levels and licensing standards. (Exhibit K, Declaration of Stanley A. Bajorin, at ¶ 2.) It is, therefore, impossible for these facilities to shut down three Fridays a month and self-directed furloughs are critical to complying with minimum legal standards and ensuring health and safety of patients. (Exhibit K, at ¶ 2.) As DMH cannot legally lower staffing ratios given current patient population levels, requiring DMH to cease using the self-directed furlough program will result in practically ceasing furloughing of employees. As a result of the loss of savings from furloughs, DMH's financial expenditures would immediately exceed the appropriated funds legally available to DMH. (Exhibit K, at ¶ 7 -8.) This added expenditure would require DMH to immediately seek a deficiency request from the

Legislature, which, if denied will immediately result in DMH having to reduce client population by closing facilities. (Exhibit K, at ¶ 10.) DMH is legally prohibited from discharging committed individuals, but even if it were ordered to do so, the release of committed individuals into the general populace would severely jeopardize the health and welfare of all Californians. (Exhibit K, at ¶ 10.) Therefore, irreparable harm will be suffered by DMH patients and the general public if the automatic stay is violated.

Therefore, for all of the reasons described above, and the further reasons provided in the declarations of Stanley A. Bajorin, David Lewis, and Scott Kernan, irreparable harm will result if the automatic stay is violated and the writ of mandate is enforced during the pendency of the appeal. Accordingly, a writ of supersedeas should issue to ensure compliance with the automatic stay during the pendency of the appeal.

E. There Is a Likelihood that this Appeal Will Succeed Because it Raises Substantial Questions of Probable Error by the Trial Court.

The ruling by the trial court constitutes an unwarranted intrusion into the inherent discretion of the Governor, as the Chief Executive of the State of California, to set the working hours and schedules of state employees. (See Gov. Code §§ 19851 and 19849.)

CCPOA bore the burden of proof in the trial court of establishing the prima facie elements for mandamus relief: (1) the absence of a plain,

speedy, and adequate remedy at law; (2) the violation of a clear, present, and ministerial duty to act in a particular way; and (3) a clear, present, and beneficial right to performance of that duty. (*County of San Diego v State of California* (2008) 164 Cal.App.4th 580, 593.) CCPOA failed to meet its burden of proof on the first two elements and the trial court erred in finding otherwise.

The gravamen of CCPOA's claim in this case is that self-directed furloughs result in its members not being paid for all hours worked during any pay period in which employees are granted furlough credits to be used at a later point in time. Even assuming that individual BU 6 members can establish this fact – something which was never proven in the trial court – this merely gives rise to a potential claim for unpaid wages which individual BU 6 members may pursue assuming they have the evidence to support such a claim and assuming such a claim has any merit. The existence of a plain, speedy, and adequate legal remedy to address what essentially was a wage claim raised by CCPOA, and which should have defeated CCPOA's claim for mandamus relief, is not even addressed by the trial court in its ruling.

In addition, CCPOA failed to establish the existence of a clear, present, and ministerial duty to act in a particular way that is violated by self-directed furloughs. The trial court's finding to the contrary is clear error. The error committed by the trial court in rendering its ruling in this

case is exemplified, among other ways, by the trial court's finding that self-directed furloughs violate an alleged ministerial duty imposed by Labor Code section 233 because self-directed furloughs result in BU 6 employees being paid a wage rate less than that which the State was contractually obligated to pay them. The trial court specifically found, "the wage scales for employees represented by [CCPOA] were set by a Memorandum of Understanding with the State which, by operation of Government Code section 3517.8, remains in effect until negotiation of a new agreement or until an impasse is reached and the state employer implements a last, best, and final offer approved by the Legislature." (Trial Court's Final Order, p. 8.)

This statement by the trial court ignores the undisputed evidence that the State has not had a Memorandum of Understanding with CCPOA since September 18, 2007, when the State implemented portions of its last, best, and final offer following a declaration by the Public Employment Relations Board in May 2007 that the State and CCPOA had reached a collective bargaining impasse. The trial court's statement is also legally erroneous in that the Legislature does not need to approve the state employer's last, best, and final offer unless that offer conflicts with existing statutes or requires the expenditure of funds not already approved by the Legislature. (See Gov. Code § 3517.8.) As a consequence of these clear errors, the trial court's ruling fails to identify a clear, present, and ministerial duty

allegedly violated by self-directed furloughs. Accordingly, this element for establishing the basis for granting the present writ for supersedeas has been met.

III.

CONCLUSION

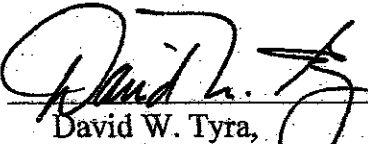
The timely appeal from the trial court's final order and writ of mandate effected an automatic stay of that order and writ. The Controller has threatened to ignore that stay and to cease acknowledging self-directed furloughs in the payroll it issues for such employees, thereby effectively eliminating the self-directed furlough program for BU 6 employees altogether. As a result of the threatened violation of the automatic stay, this Court should grant supersedes relief without the necessity of weighing the relative equities of the parties' positions in this case.

Even if this Court determines that it should weigh those relative equities, however, the requested supersedeas relief should be granted. The petition submitted to this Court, along with the supporting evidence, demonstrates the State will suffer irreparable harm if the Controller is permitted to violate the automatic stay. Furthermore, there is a likelihood the present appeal will be successful in that it raises substantial questions of probable error by the trial court. For all of these reasons, Governor Arnold Schwarzenegger, the Department of Personnel Administration, the Department of Corrections and Rehabilitation, the Department of Mental

Health, and the Department of Juvenile Justice respectfully submit that the requested writ of supersedeas be granted.

Dated: January 13, 2010

KRONICK, MOSKOVITZ, TIEDEMANN &
GIRARD
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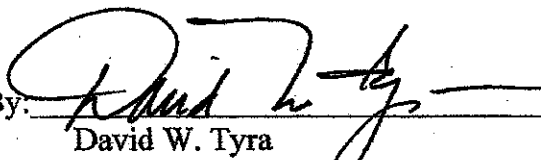
By  _____
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CERTIFICATE OF WORD COUNT

I, Meredith Packer, Attorney for Defendants/Appellants ARNOLD SCHWARZENEGGER, as Governor of the State of California; CALIFORNIA DEPARTMENT OF PERSONNEL ADMINISTRATION; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; CALIFORNIA DEPARTMENT OF MENTAL HEALTH; CALIFORNIA DEPARTMENT OF JUVENILE JUSTICE, hereby declare under penalty of perjury that the number of words in the Petition for Writ of Supersedeas and Request for Temporary Stay equals 7,115 words, as per the word count feature in Microsoft Word.

Dated: January 13, 2010

KRONICK, MOSKOVITZ, TIEDEMANN &
GIRARD
A Law Corporation

By:  _____

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JUSTICE

PROOF OF SERVICE

I, May Marlowe, declare:

I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On January 13, 2010, I served a copy of the within document(s):

- **Petition for Writ of Supersedeas and Request for Temporary Stay**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
- by causing personal delivery by Messenger of the document(s) listed above to the person(s) at the address(es) set forth below.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Sacramento, California addressed as set forth below.
- by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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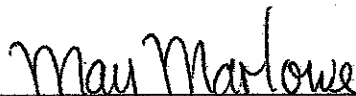
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 13, 2010, at Sacramento, California.



May Marlowe