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

SUPERIOR COURT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS IN STATE EMPLOYMENT, GLEN GROSSMAN, MARK HENDERSON, GEOFFREY SIMS, and DOES 1-500,

Petitioners/Plaintiffs,

v.

ARNOLD SCHWARZENEGGER as, Governor of the State of California; DAVID GILB as Director of the Department of Personnel Administration; JOHN CHIANG, Controller of the State of California; JAN FRANK, as President of STATE COMPENSATION INSURANCE FUND, and DOES 1-50,

Defendants/Respondents.

CASE NO. CPF-09-509205

**RESPONDENTS GOVERNOR ARNOLD SCHWARZENEGGER AND DAVID GILB'S OPPOSITION ON THE MERITS OF PETITIONERS' PETITION FOR WRIT OF MANDATE**

**Date: March 20, 2009**
**Time: 9:30 a.m.**
**Dept.: 301**

**Action Filed: February 10, 2009**

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## I.

## INTRODUCTION

This case represents the second attempt by Petitioners California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment ("CASE") to challenge Governor Arnold Schwarzenegger's Executive Order S-16-08, issued December 19, 2008, ordering temporary two-day a month furloughs for state employees from February 1, 2009, to June 30, 2010. On January 5, 2009, CASE filed a petition for writ of mandate and complaint for injunctive and declaratory relief in Sacramento County Superior Court, Case No. 2009-80000134 ("CASE I"), against the current Respondents as well as State Controller John Chiang. On January 29, 2009, the Sacramento Superior Court heard oral argument on the merits on CASE's action, as well as two related cases joined with it for the hearing, Case Nos. 2008-80000126, 2009-80000134 and 2009-80000135.[1] On January 30, 2009, the Sacramento County Superior Court issued an amended and final order denying all of Petitioners' writs and entering judgment for the Respondents. (See Declaration of David W. Tyra ["Tyra Decl."], **Exhibit A**.) The Sacramento County Superior Court's Final Order states in relevant part:

> The Court accordingly rules that, with regard to the issues raised by all petitioners regarding the Governor's authority to make the challenged order, the petitions for writ of mandate are denied and judgment shall be entered for the defendants (respondents) on the complaints for declaratory relief. This ruling applies to … state employees represented by all of the petitioners under the Dills Act …

(*Id.*) Petitioner CASE filed a notice of appeal from the judgment and order denying the Petition for Writ of Mandate and Complaint for Declaratory Relief on February 3, 2009. (See Tyra Decl., **Exhibit B**.)

The judgment of the Sacramento County Superior Court bars this action based on the doctrine of res judicata. The doctrine of res judicata bars CASE, as well as the individually named Petitioners who are members of CASE and thus in privity with it, from raising claims in this action that could have, and should have, been raised in the prior action and which seek to

[1] At a scheduling hearing on January 9, 2009, all parties stipulated to the joint hearing on January 29, 2009.

vindicate the same primary right as the claims raised in that prior action. Having lost its challenge to the Executive Order in the Sacramento County Superior Court, the filing of the action in this Court must be viewed with great suspicion. Furthermore, the Insurance Code section relied upon by Petitioners does not support the proposition that employees of the State Compensation Insurance Fund ("SCIF") are beyond the reach of the Governor's Executive Order furloughing state employees.

## II.

## STATEMENT OF FACTS

### A. Efforts to Address the State Budget Crisis Prior to Issuance of the Subject Executive Order.

On July 31, 2008, Governor Schwarzenegger issued Executive Order S-09-08 directing the State to take various emergency measures in light of the budget impasse. (7-31-08 Executive Order S-09-08, **Exhibit C** to Tyra Decl.) In the Executive Order, the Governor directed state agencies and departments "to cease and desist authorization of all overtime for employees effective July 31, 2008[.]" (*Id.*)

On September 23, 2008, the Governor signed into law a new budget for the 2008-2009 fiscal year. (9-23-08 Gov Press Release, **Exhibit D** to Tyra Decl.) Shortly after signing the budget, the national economy took a serious downturn resulting in an unanticipated and significant reduction in revenues forecast in the 2008-2009 budget. Besides the revenue shortfall, the State's Department of Finance also determined by the end of the 2008-2009 fiscal year the State would amass a budget deficit of $11.2 billion based on the shortfalls in the budget compromise. (Governor's Budget for Special Session 08-09, **Exhibit E** to Tyra Decl.) The Department of Finance also initially determined revenue for the 2009-2010 fiscal year would be $13 billion lower than projected. (*Id.*) Absent immediate action, the conclusion was the "state will run out of cash in February and be unable to meet all of its obligations for the rest of the year." (*Id.*)

In the Department of Finance's October 2008 Finance bulletin, the Department determined the "Preliminary General Fund agency cash for October was $923 million below the

2008-09 Budget Act forecast of $10.667 billion." September's revenues included the third estimated payments for personal income tax filers and calendar-year corporations. At that point, the Department concluded "year-to-date revenues are $1.06 billion below the $22.58 billion that was expected." (DOF, Oct. 2008 Finance Bulletin, **Exhibit F** to Tyra Decl.)

In response to the unanticipated budget deficit, the Governor, on November 6, 2008, issued a special session proclamation calling for an emergency session of the Legislature to immediately address this statewide crisis. (Governor's 11-06-08 Special Session Proclamation, **Exhibit G** to Tyra Decl.) On the same day, the Governor also issued a letter to all state workers informing them of some of the plans he was proposing in order to save state funds which would impact state workers. (Governor's 11-6-08 letter to state employees, **Exhibit H** to Tyra Decl.) In the letter, the Governor also informed state employees he would be convening the Legislature to attempt to seek a comprehensive solution to the entire budget crisis.

The Legislature convened in special session in or about early November of 2008 in an effort to resolve the pending budget crisis. No resolution was reached. On December 1, 2008, the Governor issued a proclamation addressing the deepening financial crisis and the likelihood that "this fiscal year's deficit will cause the State to miss payroll and school payments at the beginning of 2009." (Governor's 12-1-08 Proclamation, **Exhibit I** to Tyra Decl.) In this proclamation, the Governor also reconvened the Legislature for another special session to address the fiscal emergency. The Department of Finance also recalculated its estimates and found revenues for the 2008-2009 fiscal year were expected to be $14.8 billion below the estimate at the time the 2008-2009 budget was enacted. The deficit had increased by more than $3 billion in the span of approximately two months. The State Department of Finance also determined the State's inability to reach a solution on the State's deficit had caused the deficit to increase and the State would now have a $41.6 billion deficit by the end of the 2009-2010 fiscal year. As a result of the devastating budget deficit, the conclusion reached was that the State will run out of funds by February 2009.

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**B. The Subject Executive Order.**

Faced with a financial catastrophe of unprecedented proportions, and the fact that a solution acceptable to both the Governor and the Legislature was proving elusive, the Governor, by virtue of his constitutional and statutory authority, issued an Executive Order on December 19, 2008, directing the implementation of a two-day a month furlough plan for all state employees commencing in February 2009 and ending in June 2010. Based on the proclaimed fiscal emergency, the Governor issued the subject Executive Order without meeting and conferring in advance with public employee unions pursuant to Government Code section 3516.5. (12-19-08 Executive Order S-16-08, referred to hereafter as "the Executive Order", **Exhibit J** to Tyra Decl.") In the Executive Order, the Governor reiterated the fact that absent immediate action, the State will run out of cash in February of 2009 and will not be able to meet its obligations. (*Id.*)

**C. Confirmation of State Fiscal Crisis Since Issuance of the Executive Order.**

On December 19, 2008, the California State Controller, John Chiang, released a statement urging the Governor and Legislature to reach a resolution in order to prevent the State from running out of cash in late February. (12-19-08 Chiang Press Release, **Exhibit K** to Tyra Decl.) On December 22, 2008, the State Controller sent a letter to the Governor and the Legislature, reiterating the severity of the fiscal crisis the State was facing. (12-22-08 Letter from Chiang, **Exhibit L** to Tyra Decl.) In this letter, Controller Chiang stated,

> [I]f current projections hold true, the State is less than seventy days from running out of cash. Worse, my office's analyses indicate there will be no shelter from the storm as the State's cash position will remain negative throughout the remainder of the fiscal year. As I indicated during the recent Legislative Budget Session, the failure of the Governor and the Legislature to quickly arrive at an agreement to responsibly address the State's $41 billion budget crisis would begin a cascading series of regrettable actions necessary to conserve the State's dwindling case reserves. (*Id.*)

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On January 13, 2009, the Director of the Department of Finance. Michael Genest, issued a special report titled "California at the Brink of Financial Disaster" detailing the State's financial crisis and the immediate harm that will be caused when the State runs out of cash. ("California at the Brink of Disaster", **Exhibit M** to Tyra Decl.)[2]

**D. Litigation Challenges to the Executive Order and Rulings Thereon.**

Within less than one month following the Governor's issuance of the Executive Order, state employee organizations filed suit in Sacramento County Superior Court challenging the Governor's authority to furlough state employees.

On December 22, 2008, the first petition for writ of mandate and complaint for injunctive and declaratory relief ("petition") was filed in Sacramento County Superior Court by petitioners Professional Engineers in California Government ("PECG") and California Association of Professional Scientists ("CAPS"), Case No. 2008-80000126, against the same Respondents named here. PECG and CAPS represent, and filed their petitions on behalf of, all state employees in Bargaining Units 9 and 10.

On January 5, 2009, a second petition was filed in Sacramento County Superior Court by petitioner California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE"), Case No. 2009-80000134, against the Respondents. CASE represents, and filed its petition on behalf of, all state employees in Bargaining Unit 2.

On January 7, 2009, a third petition was filed in Sacramento County Superior Court by Service Employees International Union, Local 1000 ("SEIU"), Case No. 2009-80000135, against Respondents. SEIU represents, and filed its petition on behalf of, all state employees in Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21.

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[2] On February 19, 2009, the Legislature agreed on a new State budget which, in relevant part, includes a spending reduction of $1.4 billion in state employee payroll over the next 17 months. The budget agreement specifies that this reduction will be achieved through a combination of furloughs, layoffs, elimination of two state holidays, and overtime reform. Despite the budget agreement, state employees continue to be subject to the furloughs implemented per the Governor's Executive Order until and unless labor agreements are entered into between the State and employee organizations. For instance, SEIU has reached a tentative agreement with the State that, among other things, involves one-day a month furloughs. The State continues to meet and confer with the remaining state employee unions to achieve necessary spending reductions in the near future.

On January 12, 2009, a fourth petition was filed in Sacramento County Superior Court by California Correctional Peace Officers Association ("CCPOA"), Case No. 34-2009-80000137, against Respondents. CCPOA represents, and filed its petition on behalf of, all state employees in Bargaining Unit 6.

On January 23, 2009, a fifth petition was filed in Sacramento County Superior Court by CDF Firefighters ("CDFF"), Case No. 34-2009-00032732, against Respondents. CDFF represents, and filed its petition on behalf of, all state employees in Bargaining Unit 8.

On January 23, 2009, a sixth petition was filed in Sacramento County Superior Court by California Association of Psychiatric Technicians ("CAPT"), Case No. 34-2009-80000148, against Respondents. CAPT represents, and filed its petition on behalf of, all state employees in Bargaining Unit 18. The CAPT petition has not yet been served on Respondents.

On January 9, 2009, the parties in Case No. 2008-80000126 (PECG/CAPS), Case No. 2009-80000134 (CASE) and 2009-80000135 (SEIU) appeared and stipulated that a hearing on the merits in those cases would be heard by Judge Patrick Marlette on January 29, 2009. On January 29, 2009, the Court heard oral argument on Case Nos. 2008-80000126, 2009-80000134 and 2009-80000135. All parties were present and appeared at the hearing. On January 30, 2009, Judge Marlette issued an amended and final order denying all of Petitioners' writs and entering judgment for the Respondents. Judge Marlette's Final Order states in relevant part:

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

The court also found that the provisions of the Governor's Executive Order constitute "a rule in that they establish a standard of *general application to state employees*." (Judge Marlette's 1-30-09 Amended Final Ruling, **Exhibit A** to Tyra Decl.)

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## III.

## ANALYSIS

### A. This Action is Barred by the Sacramento County Superior Court's Ruling and Final Judgment of January 30, 2009 in CASE I.

The claims raised in this action are barred by this Court's January 30, 2009 ruling and final judgment rendered in CASE I. Petitioners have impermissibly "split" their causes of action in an effort to challenge the validity of the Executive Order on theories that could have been raised in the prior action. Furthermore, having lost their initial challenge to the Executive Order in the Sacramento County Superior Court, Petitioners have impermissibly filed the present action in a different court they hope will be a more favorable forum by filing the present action in this Court. However, under well established principles of res judicata, the ruling in the prior action bars the claims here.

To assert res judicata against Petitioners, Respondents must demonstrate: 1) the prior action resulted in a final judgment on the merits; 2) the causes of action adjudicated in the prior action are identical to the current issues; and 3) the party *against* whom res judicata is asserted was a party or was in privity with the party to a prior action. (*People v. Barragan* (2004) 32 Cal.4th 236, 253; *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association* (1998) 60 Cal.App.4th 1053, 1065; *Whittlesey v. Aiello* (2002) 104 Cal.Ap.4th 1221, 1226.) As the discussion below will demonstrate, all of these elements are present and, therefore, Petitioners claims in this case are barred by the Sacramento County Superior Court's January 30, 2009 ruling and final judgment in CASE I.

#### 1. The Prior Action Resulted in a Final Judgment on The Merits.

First, the prior action resulted in a final judgment on the merits. The pleading filed in CASE I was a petition for a writ of mandate and complaint for declaratory and injunctive relief. Final judgments in special proceedings for writs of mandate are final judgments for res judicata purposes, as a judgment in a special proceeding is a final determination of the rights of the parties involved. (Code Civ. Proc., § 1064; see, e.g., *Overstreet v. County of Butte* (1962) 57 Cal.2d 504, 506.) Furthermore, while an action that *solely* alleges a cause of action for

declaratory relief is not considered a final judgment for res judicata purposes (*Mycogen Corporation v. Monsanto Company* (2002) 28 Cal.4th 888, 901), as long as the prior action included causes of action for *both* declaratory and injunctive relief, as was the case in CASE I, a final determination in such a case is considered a final judgment on the merits for res judicata purposes. (*Mycogen Corporation v. Monsanto Company, supra,* (2002) 28 Cal.4th 888, 903-904; *see also Road Sprinkler Fitters Local Union, No. 669 v. G&G Fire Sprinklers* (2002) 102 Cal.App.4th 765, 772, fn. 6.) CASE I included causes of action for both declaratory and injunctive relief, as well as for writ of mandate.

Because this Court's ruling in CASE I disposed of all issues, it is a final determination. This Court's ruling in CASE I states in relevant part: "The following shall constitute the Court's final rulings on the … petitions for writ of mandate and complaints for declaratory relief in the above captioned matters." (**Exhibit A** to Tyra Decl.) Therefore, the judgment in the prior case is final, and the first requirement for asserting res judicata is satisfied.

**2. <u>The Causes of Action Adjudicated in The Prior Action Are Identical to Those Present in This Action for Res Judicata Purposes.</u>**

The second required element for asserting res judicata against Petitioners is that the causes of action adjudicated in the prior action must be identical to the issues to be adjudicated in the present action. (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association, supra,* (1998) 60 Cal.App.4th 1053, 1067.) The second suit is not barred unless the causes of action in the two actions are identical. (*Id.*) "To define a cause of action, California follows the primary right theory, which defines a cause of action as '(1) a primary right possessed by the plaintiff, (2) a corresponding primary duty devolving upon the defendant, and (3) a delict or wrong done by the defendant which consists in a breach of such primary right and duty. Thus two actions constitute a single cause of action if they both affect the same primary right.'" (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association, supra,* (1998) 60 Cal.App.4th 1053, 1067, quoting *Acuna v. Regents of University of California* (1997) 56 Cal.App.4th 639, 648.)

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A "primary right" has been defined as "the plaintiff's right to be free from the particular injury suffered." (*Mycogen v. Monsanto Company, supra,* 28 Cal.4th 888, 904, *quoting Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682.) "The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation omitted.] A pleading that states the violation of one primary right in two causes of action contravenes the rule against 'splitting' a cause of action. [Citation omitted.]" (*Le Parc Community Ass'n v. Workers' Compensation Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1169 quoting *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) "'[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant, then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery.'" (*Id.*, at p. 1170, quoting *Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154.)

In both CASE I and this case, the lawfulness of the Governor's Executive Order to furlough state employees was or is the issue presented by Petitioners for resolution. In the present petition, Petitioners seek a writ of mandate compelling Respondents to "set aside the portions of the Governor's Executive Order S-16-08 calling for a furlough and salary reduction for SCIF employees because the Executive Order is unlawful in that respect." (Petition, at p. 12:5-7.) In both CASE I and this case, the alleged injury to Petitioners is the furloughing of state employees pursuant to the Governor's Executive Order. The fact that the challenge to the Executive Order in CASE I was based on a dispute over the Governor's executive authority to issue the Executive Order, while the challenge here is based on the contention that the Executive Order violates provisions of the Insurance Code as applied to SCIF employees, does not save the claims in this case from the bar of res judicata. Regardless of whether Petitioners in CASE I articulated the same legal theories for recovery as in this case, the alleged violation of the Petitioners' primary right giving rise to the claims in both cases is identical – the validity of the Executive Order. This is made particularly so in light of the fact that the individually named petitioners in this action are all members of CASE and thus their interests were fully represented in the prior action in the Sacramento County Superior Court. There is no reason why the claims raised here could not have

been raised in that prior action. Not only was the opportunity available to CASE in the prior action, it was obligated as part of its overall challenge to the validity of the Executive Order, to raise the claim that the Executive Order was inapplicable to a subset of CASE, *i.e.,* SCIF employees. The adverse judgment against CASE in the prior action bars that claim from being raised here.

"Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. The primary right must also be distinguished from the *remedy* sought: 'The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.'" (*Mycogen v. Monsanto Company, supra,* (2002) 29 Cal.4th 888, 904, *quoting Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682.) Therefore, even though Petitioners in this action assert new theories, *i.e.,* that the Executive Order violates Insurance Code section 11873(c), and abandon others, *i.e.*, their F.L.S.A claims, in comparison to those claims raised in CASE I, res judicata still acts as a bar to the claims raised here because the two actions seek to vindicate the same primary right, i.e., relief from the Executive Order.

In its final order in CASE I, and the other related cases heard contemporaneously with it, the Sacramento County Superior Court ruled that "[t]he Governor has the statutory authority to reduce the hours of state employees pursuant to Government Code section 19851 and 19849." (**Exhibit A** to Tyra Decl., p. 5.) The Court further held that,

> This case, however, does not involve the establishment, adjustment or recommendation of a salary range for represented state employees. This case involves a temporary reduction in the hours worked by certain state employees, which will result in a loss of pay for the hours not worked. The order does not change established salary ranges at all: state employees will continue to receive their normal pay according to established ranges in weeks that do not include a furlough day. In essence, state employees are subject to a temporary deduction from their total pay under the established ranges, and not to being paid under a new or adjusted salary range. ...

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

(*Id.*, at p. 7; emphasis added.)

The primary right at issue in both cases is the same. The difference is that instead of challenging the validity of the Executive Order on the grounds that it is unconstitutional and not statutorily authorized, Petitioners now seek to attack it solely on the grounds that it allegedly violates the rights of a subset of employees represented by CASE, that is, SCIF employees. This is an impermissible attempt to split a single cause of action by alleging different theories of recovery for the same alleged injury. Petitioners may not split their causes of action in this fashion.

### 3. CASE Was A Party to the Prior Action and the Individually Named Petitioners in this Action Are In Privity With CASE.

The final element for establishing the bar of res judicata in this case is demonstrating that the Petitioners here were parties to the prior action or in privity with a party or parties in the prior action. It is indisputable that CASE was a party to the prior action. Furthermore, the individually named petitioners here are in privity with CASE and, therefore, the prior judgment is res judicata as to them as well.

"In the final analysis, the determination of privity depends upon the fairness of binding [a party] with the result obtained in earlier proceedings in which it did not participate." (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association, supra,* (1998) 60 Cal.App.4th 1053, 1070 *citing Miller v. Superior Court* (1985) 168 Cal.App.3d 376, 384-385.) The concept for privity requires "an identity or community of interest with, and adequate representation by, the … party in the first action [citations omitted]. The circumstances must also

have been such that the nonparty should reasonably have expected to be bound by the prior adjudication...." (*Id.*, quoting *Victa v. Merle Norman Cosmetics Inc.* (1993) 19 Cal.App.4th 454, 464; see also *Evans v. Celotex* (1987) 194 Cal.App.3d 745-746; *Helfand v. National Union Fire Insurance Company of Pittsburgh, PA* (1992) 10 Cal.App.4th 869, 902; *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 150). A party is "adequately represented" for the purposes of the privity rule if "his or her interests are so similar to a party's interests that the latter was the former's virtual representative in the earlier action." (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association, supra,* (1998) 60 Cal.App.4th 1053, 1070, quoting *Helfand v. National Union Fire Insurance Company of Pittsburgh, PA* (1992) 10 Cal.App.4th 869, 902.) "We measure the adequacy of 'representation by inference, examining whether the . . . party in the suit which is asserted to have a preclusive effect had the same interest as the party to be precluded, and whether that . . . party had a strong motive to assert that interest. If the interests of the parties in question are likely to have been divergent, one does not infer adequate representation and there is no privity.'" (*Id.,* at p. 1071, *quoting Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 864, 877.) To determine adequate representation, the court must examine whether the losing party in the prior suit had the same interest as the party to be precluded, and whether the same losing party had a "strong motive" to assert that interest. (*California Physicians' Service v. Aoki Diabetes Research Institute* (2008) 163 Cal.App.4th 1506, 1523.)

In CASE I, CASE brought its petition on behalf of its members alleging that "*[a]ll CASE members* would be directly impacted if the executive order were to be implemented." (Petition in CASE I, at. p. 2:18-19, **Exhibit 2** to Request for Judicial Notice (hereinafter referred to as "RJN".) In this case, petitioner CASE alleges that it brings this action on behalf of "[a]ll CASE members employed by SCIF," including the individually named petitioners. (Petition, at p. 2:23-24.) In language strikingly reminiscent of the allegations made in CASE I, Petitioners allege in this case that "*[a]ll CASE members employed by SCIF* would be directly impacted if the executive order were to be implemented. ..." (*Id.*)

The interests of the individually named petitioners were represented in CASE I and they had a beneficial interest in the outcome of that case as admitted by CASE in its

pleadings in the prior action. The facts here establish that the individually named petitioners were at all times in privity with CASE with respect to the claims raised in CASE I. Accordingly, the judgment in that action serves as a bar to their brining an action in their own names here.

In sum, all necessary elements are present for applying res judicata to bar the claims in this case based upon this Court's January 30, 2009 final ruling and subsequent entry of judgment in favor of Respondents in CASE I. The prior action (1) resulted in a final judgment, (2) on causes of action identical to those raised here (i.e., the assertion of the same primary right), (3) against the same parties or those in privity with the parties in this action. Accordingly, the claims raised here are barred and this Court should rule for Respondents and enter judgment in their favor and against Petitioners.

## B. Insurance Code Section 11873 Does Not Preclude the State Employer From Regulating the Hours of Work for State Employees, Including Those Who Work at the State Compensation Insurance Fund.

Even if this Court reaches the merits of the present petition, which Respondents submit it should not in light of the fact that Petitioners' claims are barred by the doctrine of res judicata, Petitioners have not presented any basis for obtaining the requested writ of mandate or declaratory or injunctive relief. The gravamen of Petitioners' claim is that Insurance Code section 11873(c) prohibits the Governor from imposing furloughs on SCIF employees. As the discussion to follow demonstrates, section 11873(c) does not serve as a limitation on the Governor's broad authority, acting as the state employer, to regulate the working hours of all state employees, including SCIF employees.

### 1. The Plain Language of Section 11873 Allows for the Implementation of Furloughs.

A court's inquiry regarding the meaning and application of a statute must first be guided by the plain meaning of the words used in the statute. If the words of a statute are clear and unambiguous, the plain meaning of the statute governs and there is no need for judicial construction. (See *Estate of Griswald* (2001) 25 Cal.4th 904; *People v. Howard* (2002) 100 Cal.App.4th 94.) A court is required to give effect to statutes according to the usual, ordinary import of the language employed in framing them, and may not, under the guise of statutory

construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used. (*Phelps v. Stostad* (1997) 16 Cal.4th 23; *City of Pasadena v. AT&T Communications of California, Inc.* (2002) 103 Cal.App.4th 981.) Thus, the initial step in the process of statutory construction is to examine the language of the statute, attributing to the words therein their usual, ordinary, and common-sense meaning. (*Smith v. Rhea* (1977) 72 Cal.App.3d 361; *Santa Ana Unified School Dist. v. Orange County Development Agency* (2001) 90 Cal.App.4th 404.) The words must be read in context, considering the nature and purpose of the statutory enactment. (*Phelps v. Stostad*, *supra*, 16 Cal.App.4th 23.) The plain meaning rule of statutory construction does not require, or allow, a court to read a single sentence of a statutory provision in isolation. (*Los Angeles Times v. Alameda Corridor Trans. Authority* (2001) 88 Cal.App.4th 1381.)

Insurance Code section 11873 reads as follows:

> (a) *Except as provided by subdivision (b), the fund shall not be subject to the provisions of the Government Code made applicable to state agencies generally or collectively*, unless the section specifically names the fund as an agency to which the provision applies.
>
> (b) *The fund shall be subject to the provisions of Chapter 10.3 (commencing with Section 3512)* of Division 4 of Title 1 of, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of, Chapter 6.5 (commencing with Section 8543) of Division 1 of Title 2 of, Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of, the Government Code, and Division 5 (commencing with Section 18000) of Title 2 of the Government Code, with the exception of all of the following provisions of that division:
>
> (1) Article 1 (commencing with Section 19820) and Article 2 (commencing with Section 19823) of Chapter 2 of Part 2.6 of Division 5.
>
> (2) Sections 19849.2, 19849.3, 19849.4, and 19849.5.
>
> (3) Chapter 4.5 (commencing with Section 19993.1) of Part 2.6 of Division 5.
>
> (c) Notwithstanding any provision of the Government Code or any other provision of law, *the positions funded by the State Compensation Insurance Fund are exempt from any hiring freezes and staff cutbacks otherwise required by law*. This subdivision is declaratory of existing law.

(Emphasis added.)

Neither the statute itself nor the case law defines the relevant phrases, "hiring freezes" and "staff cutbacks." However, the established rules of statutory construction requiring this Court to interpret the "plain meaning" of the statute , as well as common sense and reason, lead to the conclusion that the phrase, "hiring freeze" denotes a cap or ceiling on the ability to hire *additional* employees. Similarly, the common understanding of the phrase, "staff cutbacks" refers to the reduction of positions at SCIF. In any event, neither phrase indicates a limitation on the Governor's authority, acting as the state employer, to regulate working hours by way of implementing furloughs. Furloughs, ordered as a result of the State's fiscal crisis, and as implemented by the Department of Personnel Administration ("DPA") pursuant to the Governor's Executive Order, reduce the hours of work for all state employees for a limited term. Furloughs constitute neither a hiring freeze, nor staff cutbacks.

The conclusion that section 11873 does not preclude the State employer from regulating work hours is consistent with subdivision (b) of section 11873 which provides that the employees who work at SCIF are under the authority of the Dills Act. (See Government Code, § 3512, *et seq.*) One of the stated purposes of the Dills Act is to "provid[e] a reasonable method of resolving disputes regarding *wages, hours, and other terms and conditions of employment* between the state and public employee organizations." (Emphasis added; Government Code § 3512.) This Court must harmonize "the various parts of a statutory enactment ... by considering the particular clause or section in the context of the statutory framework as a whole." (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230; see also *Woods v. Young* (1991) 53 Cal.3d 315, 323; *Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 91; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) Subdivision (b)'s incorporation of the broad scope of the Dills Act is consistent with a narrow and literal interpretation of subdivision (c)'s preclusions. To interpret subdivision (c) broadly annihilates any application of the Dills Act with respect to the working conditions of state employees at SCIF.

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Under the auspices of the Dills Act, in cases of emergency, the Governor is granted the authority to alter the working conditions, including work hours, of state employees before meeting and conferring with employee organizations. (See Government Code, § 3516.5.) Contrary to Petitioners' claims, furloughs are a change in working hours and not a per se salary reduction. Employee positions will not be frozen or reduced as a result of the furloughs. A furlough only constitutes a reduction in total hours worked. A furlough reduces an employee's total number of hours worked in a particular pay period. The corresponding rate of pay is not affected and employees will be paid at their normal rate for a reduced number of hours resulting from the two furlough days per month. This was the clear holding of the Sacramento County Superior Court in its ruling of January 30, 2009 in CASE I. (**Exhibit A** to Tyra Decl.)

**2. Government Code Sections 19851 and 19849 Provide the State with the Authority to Establish the Work Hours of State Employees.**

Not only are furloughs of state employees outside the ambit of Insurance Code section 11873's limitations, other sections within the Government Code permit the Governor, acting as the state employer, to furlough state employees.

**a. Section 19851 provides the State with authority to establish work schedules to meet the varying needs of different state agencies.**

The state employer has the statutory authority to reduce the hours of state employees pursuant to Government Code sections 19851 and 19849. Government Code section 19851(a) states in relevant part as follows:

> It is the policy of the state that the workweek of the state employee shall be 40 hours and the workday of state employees shall be 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.

(Emphasis added.)

Section 19851 states that it is only the *policy* of the State that workweeks are 40 hours and workdays are 8 hours. The term "policy" is defined in Black's Law Dictionary, 4th Ed., as "[t]he *general principles* by which a government is *guided in its management* of public affairs, or the legislature in its measures. This term, as applied to a law, ordinance or rule of law,

*denotes its general purpose or tendency* considered as directed to the welfare or prosperity of the state or community." (Emphasis added.) Thus the term "policy" is not synonymous with "mandate" or "obligation" and does not impose on the State an absolute, unequivocal duty to establish 40-hour workweeks for state employees.

Furthermore, section 19851 grants the State the discretion to establish workdays and workweeks of a "different number of hours," *i.e.,* less than 40 hours a workweek, to meet the varying needs of different state agencies. The fact that section 19851 was intended to provide the State with flexibility to establish work schedules of differing hours depending on operational needs is well-established in the legislative history of the code section. (See legislative history of section 19851, **Exhibit 1** to RJN.)

As early as 1945, at the time of the statute's adoption, the Legislature demonstrated a clear intent to create a flexible policy surrounding the adoption of workday and workweek schedules for state employees and expressly provided for exceptions to the 40-hour workweek when the operational demands of the various state agencies required it. Government Code section 19851 has an extensive legislative history. (*Id.*) The predecessor code section to 19851, Government Code section 18020, was adopted in 1945. Section 18020 was amended several times from the time of its enactment until 1981 when section 19851 was adopted as a replacement statute.

Former section 18020's history evidences the Legislature's intent regarding flexibility in scheduling workweeks other than 40-hour workweeks. For instance, in 1955, the Legislature sought to amend former section 18020. This amendment focused on the abolition of the State Personnel Board's four-tiered employee classification system for determination of workweeks. The Office of Legislative Counsel summarized the applicable legislation, Assembly Bill 1464, in the following manner:

> Recasts existing sections and deletes provisions establishing four work week groups and requiring overtime compensation for first three groups. Provides it is state policy that work week shall be 40 hours, *but work weeks with different number of hours may be established to meet needs of state agencies.*

(Emphasis added.)

The Office of the Attorney General also summarized Assembly Bill 1464 as setting forth "a statement of State policy that State workers shall be employed forty hours a week, *except that to meet the varying needs of the different State agencies workweeks of a different number of hours may be established.*" (Emphasis added.) (See **Exhibit 1** to RJN.)

Finally, section 19851 was adopted by the Legislature in 1981. As noted above, the plain language of the code provides the State the discretion and flexibility to adopt work schedules other than traditional 40-hour weeks to meet the "varying needs" of differing state agencies. By 1981, the inclusion of this provision in section 19851 was consistent with a near 40-year legislative history of providing the state employer with this sort of discretion and flexibility. In this case, the reduction in the work hours of state employees is indisputably related to the "varying needs of the different state agencies."

**b. Section 19849(a) provides the State with authority to promulgate rules regarding work hours.**

Whereas section 19851 provides the State with the overall flexibility to establish work schedules of varying numbers of hours, Government Code section 19849(a) provides the State with authority to promulgate rules regarding work hours that must be enforced by the varying agencies of the State. That code section provides in relevant part:

> The department [DPA] shall adopt rules governing hours of work ... Each appointing power shall administer and enforce such rules.

Read together, sections 19851 and 19849 provide the state employer with the statutory authority to establish hours of work including workweeks of less than 40 hours to meet the varying needs of the State. These statutes also establish the Governor's authority, acting as the state employer, to issue the Executive Order furloughing state employees two days a month.

## IV.

## CONCLUSION

Respondents Governor Arnold Schwarzenegger and DPA Director David Gilb respectfully submit that this Court should deny the requested writ of mandate and enter judgment on behalf of Respondents and against Petitioners on all causes of action pled. Petitioners' claims

in this action are barred by the judgment entered against CASE by the Sacramento County Superior Court on January 30, 2009. Furthermore, the plain language of the code section on which Petitioners rely for challenging the Executive Order establishing temporary furloughs for state employees, Insurance Code section 11873(c) does not impose a limitation on the Governor's broad authority, acting as the state employer, to regulate the working hours of state employees, including those employed by SCIF. Accordingly, this Court should find in Respondents' favor on all claims alleged.

Dated: March 9, 2009

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