2d Civil No. B202085

COURT OF APPEAL FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

JOSEPHINE LARNER,

Plaintiff and Appellant,

vs.

PACIFIC HEALTH CORPORATION,

Defendant and Respondent.

Appeal from the Los Angeles Superior Court
Honorable Irving Feffer, Judge Presiding
Case No. BC322049

RESPONDENT'S BRIEF

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: B202085

Case Name: Josephine Larner v. Pacific Health Corporation

Please check the applicable box:

[ ] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 14.5(d)(3).

[X] Interested entities or parties are listed below:

Name of Interested Entity or Person	**Nature of Interest**
Los Angeles Doctors Hospital Associates, LP	Doing business as Los Angeles Metropolitan Medical Center
Los Angeles Doctors Hospital Associates, Inc.	General partner of Los Angeles Doctors Hospital Associates, LP
Pacific Health Corp.	Financial interest in Los Angeles Doctors Hospital Associates, Inc.
Non-exempt employees employed by Los Angeles Metropolitan Medical Center from September 24, 2000 to the present	Members of putative class as proposed by plaintiff/appellant Josephine Larner

_____
Signature of Attorney/Party Submitting Form

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INTRODUCTION

Plaintiff Josephine Larner seeks to assert a wage and hour class action against defendant Los Angeles Metropolitan Medical Center. The problem is that Ms. Larner is not a member of one of the classes that she claims to represent and her claims are not typical of either class. The classes are also ill-defined at best. To top it all off, she did not seek class certification until two months before a much continued trial date, with the motion heard only three weeks before trial. Given these circumstances, it is no wonder that the trial court denied class certification.

On appeal, Ms. Larner wants to reinstate her wide-ranging class claims on behalf of others, many of whom have little in common with her. She does so even though she has settled *all* of her claims and, thus, no longer has any personal interest in the purported class claims.

The merits of the suit also run squarely into this District's recent decision in *Singh v. Superior Court* (2006) 140 Cal.App.4th 387. Ms. Larner claims that some class members are entitled to time-and-a-half pay after 36 hours per week, not the usual 40 hours per week. Her counsel raised the identical argument in *Singh*, where it was expressly rejected. Ms. Larner concedes that *Singh* is directly on point and directly contrary to her position, but fails to provide any reason why it should not be followed. The omission would doom her appeal on the overtime issue even were she able to represent a class.

The bottom line is that the trial court properly summarily adjudicated Ms. Larner's overtime claim, that it was well within its discretion in refusing to certify ill-defined and exceedingly tardily presented classes on the remaining claims, and that Ms. Larner no longer has standing to pursue *any* claim on appeal having fully settled *all* of her claims.

The judgment should be affirmed.

STATEMENT OF THE CASE

A. Ms. Larner Works For Several Years At Los Angeles Metropolitan Medical Center.

The relevant facts are undisputed. Josephine Larner used to be a nurse at Los Angeles Metropolitan Medical Center ("LAMMC"). (1 AA 61.) As a nurse, she was regularly scheduled to work three 12-hour shifts per week (a "3/12" schedule). (1 AA 62.) She also worked some hours beyond the 3/12 schedule. (1 AA 63.)

Ms. Larner left LAMMC's employ in April 2003. (1 AA 61.)

B. Ms. Larner Sues LAMMC, Alleging A Putative Class Action For Wage And Hour Violations.

Ms. Larner sued LAMMC in September 2004. (1 AA 1.) Relevant to this appeal, she asserted that LAMMC violated overtime laws by failing to pay 3/12 employees premium overtime wages (i.e., 1.5 times the regular rate) for some hours worked beyond their regular schedules (hours 37 through 40 in a week). (1 AA 6-7.) She also asserted that LAMMC failed to accurately calculate employees' pay rates for purposes of determining overtime wages and that LAMMC failed to keep accurate and complete wage records. (1 AA 194-195.) She purported to represent a class of current and former non-exempt LAMMC employees. (1 AA 3-4.)

C. The Court Summary Adjudicates That There Is No Duty To Pay Time-And-A-Half To Employees Until They Work More Than 40 Hours In A Week.

An employer's duty to pay overtime wages is governed by Industrial Welfare Commission wage orders. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581; Cal. Const., art. XIV, § 1.) LAMMC sought summary adjudication as to which of two wage order provisions control its duty to pay overtime to 3/12 employees. (1 AA 14-34.) It argued that Wage Order 5-2001(3)(B)(8), which is specific to employees in the healthcare industry, governs overtime for its 3/12 employees. (1 AA 24-26.) Under that section, LAMMC would have to pay time-and-a-half to a 3/12 employee only after she has worked 40 hours in a week. (*Ibid.*)[1]

Ms. Larner opposed summary adjudication. She did not dispute any facts, but rather argued that a different wage order provision, 5-2001(3)(B)(1), governed LAMMC's duty to pay overtime. (1 AA 49-58.) That section, Ms. Larner argued, required LAMMC to pay premium overtime wages to a 3/12 employee for *any* hours beyond the regularly scheduled three 12-hour shifts – that is, for hours 37-40 in addition to hours in excess of 40. (*Ibid.*)

The trial court granted summary adjudication for LAMMC, finding that section 3(B)(8), not section 3(B)(1), governs overtime for 3/12 employees in the healthcare industry. (1 AA 141-142.)

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[1] The same wage order provision also requires an employer to pay a 3/12 healthcare employee double time for hours in excess of 12 per day. (Cal. Code Regs., tit. 8, § 11050, subd. (3)(B)(8)(a).) Ms. Larner does not dispute that LAMMC has complied with this requirement. (1 AA 52:14-15.)

D. Ms. Larner Delays Taking Class Certification-Related Discovery.

More than a year after she filed this suit, Ms. Larner noticed the deposition of LAMMC's person most knowledgeable, a deposition she described as necessary to her class certification motion. (3 AA 634, 640-644.) She noticed the deposition for only two months before the initial trial date. (3 AA 634.) The deposition did not go forward. Instead, the parties stipulated to continue the trial date to permit additional time to resolve a discovery dispute and to conduct discovery. (3 AA 646-647.)

After obtaining the continuance, Ms. Larner waited two months before serving an amended deposition notice. (3 AA 649-654.) Again, she set the deposition for only a few months before the now-rescheduled trial. (See 3 AA 647, 649-650.) Again, the parties stipulated to continue the trial date and the deposition did not go forward.[2] (3 AA 657, 664.) And again, Ms. Larner delayed re-noticing the deposition, this time allowing ten months to pass between deposition notices. (See 3 AA 649-654, 665-666.) She served the new deposition notice in December 2006, more than two years into the suit. (3 AA 666.)

LAMMC had to reschedule the deposition several times between December 2006 and April 2007. (3 AA 636-637.) The trial court accepted the parties' stipulation to continue the trial date yet again but specifically

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[2] Mistakenly citing a stipulation entered in a different case, the Opening Brief asserts that the second continuance was due to LAMMC's counsel's unavailability for trial. (AOB 9, citing 1 AA 183-185 [stipulation in Los Angeles Superior Court case number BC 318847].) In fact, the parties agreed to continue the trial date primarily because of the then-forthcoming decision in *Singh v. Superior Court*, which they recognized presented the "identical issue" as this case. (3 AA 655-656 [stipulation in this case, Los Angeles Superior Court case number BC322049].) As we discuss below, *Singh* expressly rejected the position that Ms. Larner advances in this case.

indicated that there would be no further continuances. (2 AA 296.) Ms. Larner eventually took the deposition in April 2007, three months before the final trial date. (2 AA 309.)

E. Ms. Larner Moves For Class Certification Less Than Two Months Before The Final Trial Date.

Ms. Larner moved for class certification on May 23, 2007, less than two months before the repeatedly continued July 10 trial date. (2 AA 297.) She set the motion for hearing for June 20, only three weeks before trial. (*Ibid.*)

The motion sought to certify two classes: an "Overtime Class" consisting of "[a]ll non-exempt employees employed by [LAMMC] from September 24, 2000 to the present" and a "Wage Statement Class" consisting of "[a]ll non-exempt employees employed by [LAMMC] from September 24, 2003 to the present." (2 AA 298, 306.)

LAMMC opposed certification. (3 AA 565-592.) It argued that Ms. Larner could not represent the proposed classes because her claims were not typical and that the class definitions were too broad. (3 AA 566-568, 584-590.) It also argued, among other things, that the motion was not brought as soon as practicable, thereby prejudicing it. (3 AA 566, 580-583, 634-638.) LAMMC noted that Ms. Larner offered no explanation for approximately two years worth of inaction in taking what she described as a critical deposition. (3 AA 581-582, 634.) LAMMC emphasized that if the certification motion were granted, it would have only three weeks to prepare for a class action trial despite the parties' prior stipulation that "in the event class certification is granted, the Parties would need considerable time to prepare for a class action trial." (3 AA 581, 637-638; see also 3 AA 647.)

F. The Trial Court Denies Certification Based On Atypicality And Inadequate Class Definitions, And On A Prejudicial Delay In Bringing The Motion.

The trial court denied class certification on the grounds that Ms. Larner failed to establish that her claims were typical of the class and that the class definitions were too broad. (RT 23:5-12; RA 87.)

The trial court also held the motion to certify unduly tardy. (RT 22:23-28; RA 87.) Although recognizing that Ms. Larner was entitled to conduct pre-certification discovery, it found that the timing of the motion – filed two-and-a-half years into the suit and heard only three weeks before trial – was "beyond the scope of all that might be considered reasonable . . . ." (RT 21:17-28.) The court rejected Ms. Larner's argument that she could not have sought certification earlier because LAMMC had rescheduled the person most knowledgeable deposition several times. (RT 22:3-10.) It noted that this explanation "ignore[d]" Ms. Larner's lack of diligence in noticing the deposition, which accounted for approximately two years worth of delay. (RT 22:6-22.) The court concluded that the delay was prejudicial both to it and to LAMMC because the trial would have to be continued again. (RT 23:1-3.)

G. Ms. Larner Settles All Disputes, Disagreements, Claims, And Causes Of Action Arising Out Of Her Employment With LAMMC And This Lawsuit.

Following the denial of class certification, the parties prepared for a trial on Ms. Larner's individual claims. (E.g., 6 AA 1294-1296, 1307-1308.) A few days before the trial was to begin, however, the parties settled all of the claims and stipulated to entry of final judgment. (6 AA 1355-1358.)

The parties stipulated that they were settling "all disputes, disagreements, claims, demands, defenses, and causes of action relating to or arising out of Ms. Larner's employment with LAMMC [and this] Action . . . ." (6 AA 1356.) At the same time, Ms. Larner "contend[ed] she possesse[d] certain rights of appeal" and "reserve[d] all rights to appellate review" of the summary adjudication and class certification rulings. (6 AA 1357.) LAMMC did not expressly agree that Ms. Larner was entitled to appeal. Instead, it reserved "all rights and defenses" with respect to any appeal. (*Ibid*.)

H. The Trial Court Enters Judgment For LAMMC; Ms. Larner Timely Appeals.

The trial court entered final judgment for LAMMC on July 10, 2007. (6 AA 1359-1360.) Ms. Larner filed a timely notice of appeal on September 7, 2007. (6 AA 1361-1362; Cal. Rules of Court, rule 8.104(a).)

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE MS. LARNER HAS SETTLED ALL HER CLAIMS.

A. No Actual Controversy Remains Between Ms. Larner And LAMMC As She Settled All Her Claims And Causes Of Action.

Appellate courts "as a rule will not render opinions on moot questions . . . ." (*Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1178.) That rule is based on the principle that "courts decide only 'actual controversies' which will result in a judgment that offers relief to the parties." (*Ibid.*; see also *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214 ["'(w)hen no effective relief can be granted, an appeal is moot and will be dismissed'"].)

Ms. Larner divested herself of any personal interest in the subject of this appeal when she settled all her claims against LAMMC in the trial court. (6 AA 1355-1358.) Specifically, the record reflects that following two adverse rulings, Ms. Larner offered, and LAMMC agreed, to settle "*all* disputes, disagreements, claims, demands, defenses, and causes of action relating to or arising out of [her] employment with LAMMC [and this] Action . . . ." (6 AA 1356-1357, emphasis added.) This broad description does not carve out Ms. Larner's claims based on the interpretation of Wage Order 5-2001, her desire to be a class representative, or the claims that she sought to bring on behalf of the class. She settled those claims along with everything else. That means that even if the challenged rulings could be reversed on appeal, Ms. Larner would have nothing left to pursue in the trial court. A reversal therefore would be without practical effect. For that

reason, the appeal should be dismissed. (*Ebensteiner Co., Inc. v. Chadmar Group, supra,* 143 Cal.App.4th at p. 1176 [dismissing appeal where reversal would require determination as to sufficiency of a claim that, by terms of settlement agreement, no longer existed]; *Salazar v. Eastin* (1995) 9 Cal.4th 836, 860 [“‘The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court.’”]; *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132 [court’s duty is “‘to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it’”].)

It makes no difference that Ms. Larner purported to reserve her right to appeal the adverse rulings. She settled *all* her disputes with and claims against LAMMC “for the purposes of avoiding the costs attendant to trial and further litigation.” (6 AA 1357.) This is not a case, then, of the plaintiff merely stipulating to the entry of judgment to facilitate the appeal; it is one in which the plaintiff affirmatively settled all of her claims.[3] (Compare *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 400-402

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[3] The record includes a stipulation summarizing the settlement agreement, but not the agreement itself. (6 AA 1355-1358.) Even were the agreement to evince a mutual intent to preserve appellate rights, this Court would have no jurisdiction to consider the appeal because its opinion would remain merely advisory. “Parties cannot create by stipulation appellate jurisdiction where none otherwise exists.” (*Don Jose’s Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115, 118-119 [parties could not create appellate jurisdiction over summary adjudication rulings by stipulating to dismiss remaining cause of action without prejudice to plaintiff’s right to reinstate it if he prevailed on appeal]; *Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466, 1468-1469 [same].) Ms. Larner has settled all claims in this action. (6 AA 1356-1357.) Whether framed in terms of mootness, standing, or jurisdiction, the simple fact is that she seeks an advisory opinion which this Court is not empowered to render. (*Salazar v. Eastin, supra,* 9 Cal.4th at p. 860.)

[permitting appeal from a consent judgment entered merely to hasten the appeal]; *Upland Police Officers Ass'n v. City of Upland* (2003) 111 Cal.App.4th 1294, 1299 [same].) The settlement ended any actual controversy between Ms. Larner and LAMMC. There is thus no basis for the appeal.

B. Having Settled Her Personal Claims, Ms. Larner Cannot Represent The Putative Class.

Ms. Larner sought to bring wage and hour claims against LAMMC on behalf of current and former LAMMC employees. (2 AA 297-329.) In light of the settlement, she no longer has any such personal claims. (6 AA 1356.) Without a personal claim, she cannot represent the class. (*Petherbridge v. Altadena Fed. Sav. & Loan Assn.* (1974) 37 Cal.App.3d 193, 200; *Payne v. United California Bank* (1972) 23 Cal.App.3d 850, 860; *Greater Westchester Homeowners Assn., Inc. v. City of Los Angeles* (1970) 13 Cal.App.3d 523, 526; 4 Witkin, Cal. Procedure (4th ed., 1996) Pleading, § 264, p. 338.) Because she cannot be a class representative, any appellate ruling would be advisory and without practical effect. The appeal should be dismissed.

II. ON POINT PRECEDENT PROPERLY REJECTS PLAINTIFF'S OVERTIME PAY INTERPRETATION.

Ms. Larner raises the issue of when a healthcare employer must begin paying time-and-a-half to employees regularly scheduled to work three, 12-hour shifts per week ("3/12" employees): after they work 36 hours in a week, or 40 hours in a week?

The trial court held that the governing wage order provision requires a healthcare employer to pay time-and-a-half only after an employee has worked more than 40 hours in a week. (1 AA 141-142.) Ms. Larner argues

that a different wage order provision, which she reads as requiring the employer to pay time-and-a-half for *any* hours beyond the regular 3/12 schedule, should govern. This District directly rejected an identical argument in *Singh v. Superior Court* (2006) 140 Cal.App.4th 387, 390 (*Singh*). The Opening Brief mentions *Singh* in passing, recognizing that it is on point and contrary to Ms. Larner's position, but then ignores it. *Singh* reached the right conclusion. This Court should follow *Singh* and affirm.

A. The Competing Regulatory Provisions At Issue, One Specific To Healthcare Employers And One Not.

The issue turns on which of two regulatory provisions controls a healthcare employer's duty to pay overtime to 3/12 employees. Both provisions are part of the Industrial Welfare Commission's Wage Order 5-2001, which governs wages, working hours, and working conditions in hospitals and other employers (e.g., rest homes, child nurseries, and child care institutions) in the "Public Housekeeping Industry." (Cal. Code Regs., tit. 8, § 11050, subd. 2(P)(4); see also *Morillion v. Royal Packing Co., supra,* 22 Cal.4th at p. 581 [Industrial Welfare Commission "'is the state agency empowered to formulate regulations (known as wage orders) governing employment in the State of California'"]; Cal. Const., art. XIV, § 1; Lab. Code, §§ 517, 1173, 1178.5, 1182.)

Section 3(B)(1) of the Wage Order applies generally to the public housekeeping industry. Under it, employees may be regularly scheduled to work up to 10 hours per day, so long as they are paid premium overtime for work beyond the regular schedule and for work beyond 40 hours in a week. (Cal. Code Regs., titl. 8, § 11050, subd. (3)(B)(1).)[4]

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[4] Section 3(B)(1) provides, "No employer shall be deemed to have (continued...)

Section 3(B)(8) is a more specific rule for the healthcare industry. It provides that, "notwithstanding" the preceding provisions, healthcare employees may be regularly scheduled to work up to 12 hours in a day so long as they are paid premium overtime for work beyond 12 hours in a day and "for all hours over 40 hours in the workweek . . . ." (Cal. Code Regs., tit. 8, § 11050, subd. 3(B)(8).)[5]

The trial court held that the more specific section 3(B)(8) displaces the general section 3(B)(1) for 3/12 healthcare employees, rendering section 3(B)(1)'s overtime requirements inapplicable to those employees.

As she did in the trial court, Ms. Larner contends on appeal that section 3(B)(8) modifies, rather than displaces, section 3(B)(1). Under her reading, section 3(B)(8) permits healthcare employers to adopt a 3/12 schedule but does not excuse them from any of section 3(B)(1)'s overtime

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[4] (...continued)
violated the daily overtime provisions by instituting . . . a regularly scheduled alternative workweek schedule of not more than ten (10) hours per day within a 40 hour workweek without the payment of an overtime rate of compensation. All work performed in any workday beyond the schedule established by agreement up to twelve (12) hours a day or beyond 40 hours per week shall be paid at one and one half (1 ½) times the employee's regular rate of pay . . . ." (Cal. Code Regs., titl. 8, § 11050, subd. (3)(B)(1).)

[5] Section 3(B)(8) provides, "*Notwithstanding the above provisions* regarding alternative workweek schedules, no employer of employees in the healthcare industry shall be deemed to have violated the daily overtime provisions by instituting . . . a regularly scheduled alternative workweek schedule that includes work days . . . [of] not more than 12 hours within a 40-hour workweek without the payment of overtime compensation, provided that: (a) An employee who works beyond 12 hours in a workday shall be compensated double the employee's regular rate of pay for all hours in excess of 12; [and] (b) An employee who works in excess of 40 hours in a workweek shall be compensated at one and one-half (1 ½) times the employee's regular rate of pay for all hours over 40 hours in the workweek . . . ." (Cal. Code Regs., tit. 8, § 11050, subd. 3(B)(8), emphasis added.)

provisions for hours beyond the regular 36-hour schedule. As a result, she asserts, section 3(B)(1) entitles 3/12 healthcare employees to premium overtime for any hours in excess of 36 per week.

B. As *Singh v. Superior Court* Holds, Section 3(B)(8) Alone Governs A Healthcare Employer's Duty To Pay Overtime To Its 3-Day/12-Hour Shift Employees.

Ms. Larner acknowledges that the recent *Singh* decision "took up the same question of statutory interpretation" presented here and rejected her position. (AOB 3, fn. 14, 24.) She then proceeds to ignore *Singh*. *Singh* is correctly decided. None of Ms. Larner's arguments (which do not directly address *Singh*) support a different outcome.

1. This District's *Singh* decision confirms that LAMMC has no duty to pay time-and-a-half to employees until they work more than 40 hours in a week.

Like this case, *Singh v. Superior Court* involved a 3/12 hospital employee's claim to be entitled under section 3(B)(1) to time-and-a-half for any hours beyond the regular 36-hour schedule. (*Singh, supra,* 140 Cal.App.4th at p. 390.) Indeed, *Singh* involved the same argument advanced by the same counsel. (*Id.* at pp. 389, 391.) Singh rejected that argument, holding that section 3(B)(8) controls premium overtime pay for 3/12 healthcare employees and requires such pay only after 40 hours. (*Id.* at p. 401.) *Singh* based its conclusion on both the plain language of the regulations and their legislative history. Its analysis is correct and persuasive.

a. *Singh*'s textual analysis supports LAMMC's reading.

Singh began by applying traditional principles of statutory construction. (*Singh, supra,* 140 Cal.App.4th at p. 392.) Both sections 3(B)(1) and 3(B)(8) provide for time-and-a-half pay under certain circumstances. (*Id.* at p. 398.) Section 3(B)(1) requires such pay both for work beyond the regular schedule *and* for work beyond 40 hours a week. (*Ibid.*) Section 3(B)(8), by contrast, "provides for such pay *only* where the employee works more than 40 hours in the work week." (*Id.* at p. 399, emphasis added.) In light of "the rule of construction that significant differences in language imply a difference in meaning, it is reasonable to conclude that the [Industrial Welfare Commission] intended a different result for [3-day,] 12-hour schedules." (*Ibid.*)[6]

This conclusion is consistent with "the cardinal rule of statutory interpretation that specific statutory regulations control over the general statutes." (*Singh, supra,* 140 Cal.App.4th at p. 399.) Because section 3(B)(8) specifically addresses 3/12 employees in the healthcare industry, it controls over section 3(B)(1)'s general provisions for 10-hour

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[6] *Singh* also acknowledged the rule that courts will attempt to "avoid making any language mere surplusage." (*Singh, supra,* 140 Cal.App.4th at p. 392; see also *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22 [courts do not "construe statutory provisions so as to render them superfluous"].) While *Singh* did not elaborate on the application of that rule, it further supports LAMMC's position. Section 3(B)(8) states that no healthcare employer "shall be deemed to have violated the daily overtime provisions" by instituting a 3/12 schedule without paying premium overtime, "provided that" the employer meets six requirements. (Cal. Code Regs., tit. 8, § 11050, subd. 3(B)(8).) One requirement is that the employer pay time-and-a-half for "all hours over 40 hours in the workweek." (*Id.* at subd. 3(B)(8)(b).) If 3/12 employees were entitled to time-and-a-half for *any* hours beyond their regular (36-hour) schedule under section 3(B)(1), this requirement of time-and-a-half after 40 hours would be entirely superfluous.

shifts in the public housekeeping industry. That is reinforced by section 3(B)(8)'s introductory clause: It applies "[n]otwithstanding the above provisions [i.e., section 3(B)(1)] . . . ." (Cal. Code Regs., tit. 8, § 11050, subd. 3(B)(8).) *Singh* accordingly held that the regulatory language is "clear and unambiguous" and entitles 3/12 healthcare employees to time-and-a-half pay only for work beyond 40 hours in a week. (*Singh*, *supra*, 140 Cal.App.4th at p. 400.)

b. *Singh*'s legislative history analysis supports LAMMC's reading.

Singh also examined section 3(B)(8)'s history. Between 1986 and 1993, the governing wage order entitled 3/12 employees to time-and-a-half for the first eight hours worked on an unscheduled day. (*Singh*, *supra*, 140 Cal.App.4th at pp. 394-395.)[7] The Industrial Welfare Commission repealed that entitlement in 1993, amending the wage order to provide that 3/12 healthcare employees "could receive time-and-a-half pay only when they had worked 40 hours in a workweek." (*Id.* at p. 395.)[8]

In 1999, the Legislature added to the Labor Code several new sections dealing with overtime pay. Section 511 permitted alternative work schedules of up to 10 hours per day in a 40-hour week and required employees on that schedule to be paid time-and-a-half for any work beyond the regularly scheduled hours. (*Singh*, *supra*, 140 Cal.App.4th at p. 395.) Section 517 instructed the Industrial Welfare Commission to issue new

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[7] See Former Cal. Code Regs., tit. 8, § 11050, subd. 3(K)(1)(a)-(b), Register 86, No. 12 (Mar. 22, 1986) p. 776 and Former Cal. Code Regs., tit. 8, § 11050, subd. 3(K)(1)(a)-(b), Register 89, No. 10 (Mar. 11, 1989) p. 777.

[8] See Former Cal. Code Regs., tit. 8, § 11050, subd. (3)(K)(1)-(2), Register 93, No. 32 (Aug. 6, 1993) p. 1305.

wage orders, including regulations on alternative work schedules for the healthcare industry. (*Ibid*.) The Commission responded by instituting the current section 3(B)(8) – not by returning to the pre-1993 policy entitling 3/12 employees to time-and-a-half for all work beyond the regular schedule. (*Id.* at pp. 395, 398.)

Notably, the Industrial Welfare Commission expressly rejected a version of section 3(B)(8) that would have "authorized premium pay for hours 37 to 40 in a 3/12 alternative workweek schedule." (*Singh, supra,* 140 Cal.App.4th at p. 397; see also *id.* at p. 401.) That language, part of a proposal by Commissioner Barry Broad, would have entitled 3/12 healthcare employees to time-and-a-half pay for "[a]ll hours worked in excess of 36 hours in a workweek . . . ." (*Id.* at p. 397.)[9] The Commission did *not* adopt the proposal. Instead, it promulgated section 3(B)(8) in its current form, "which plainly provides for overtime pay only beyond 40 hours worked in a 3/12 alternative workweek schedule." (*Id.* at p. 400.)

As *Singh* correctly concluded, this sequence of events unequivocally establishes that the Commission intended to mandate time-and-a-half only after a 3/12 healthcare employee has worked 40 hours in a week. (*Singh, supra*, 140 Cal.App.4th at p. 401.)

2. This Court should follow *Singh*.

The Opening Brief concedes that *Singh* addressed the exact legal issue presented in this case. (AOB 3, fn. 14.) Although one Court of Appeal is not bound by the decisions of other districts or divisions, courts normally follow such authority unless there is "'good reason to disagree.'" (*Fire Ins. Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1023; see also *Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d

[9] Ms. Larner submitted a copy of Commissioner Broad's proposal in opposition to summary adjudication. (See 1 AA 67, 71-76.)

480, 485; *McGlothlen v. Department of Motor Vehicles* (1977) 71 Cal.App.3d 1005, 1017; 9 Witkin, Cal. Procedure, *supra*, Appeal, § 935, p. 973.) Ms. Larner has provided no good reason for this Court to depart from the cogent, thorough opinion in *Singh*.

a. There is no defect in *Singh*'s analysis.

As just discussed, *Singh* is based on a detailed textual and historical analysis. The Opening Brief does not refute *Singh*'s reasoning. It offers no response at all to *Singh*'s textual analysis. For example, the Opening Brief does not explain why section 3(B)(8) would state that no healthcare employer violates the daily overtime provisions provided that it pays time-and-a-half after 40 hours, if section 3(B)(1) already required time-and-a-half after 36 hours.

The Opening Brief also fails to address most of the legislative history discussed above, save one point: that the proposal rejected by the Commission did not explicitly require time-and-a-half for *any* hours beyond the regular schedule. (AOB 24-26.) That may be true. The rejected proposal did, however, require time-and-a-half for "[a]ll hours worked in excess of 36 hours in a workweek . . . ." (RA 76; see also 1 AA 72.) Given that a 3/12 schedule has 36 hours in a workweek, requiring overtime for any hours beyond 36 is the same as requiring overtime for any hours beyond the regular schedule. The Commission therefore effectively rejected a proposal that would have required time-and-a-half for any hours beyond the 3/12 schedule. That decision strongly suggests that the Commission did not intend to require that 3/12 employees receive overtime for *any* hours beyond the regular schedule – just for hours in excess of 40, as section 3(B)(8) provides. (See *Singh*, 140 Cal.App.4th at p. 401.)

b. Ms. Larner's arguments do not support her construction of section 3(B)(8).

Just as there is no flaw in *Singh*'s analysis that would merit this Court reaching a different result, there is no other basis for adopting Ms. Larner's proposed interpretation of the wage order.

Her basic premise is that section 3(B)(1)'s overtime provisions govern, regardless of what section 3(B)(8) might say. But, if the Industrial Welfare Commission intended section 3(B)(8) to operate as Ms. Larner proposes – i.e., to modify section 3(B)(1) to permit a 3/12 schedule while leaving section 3(B)(1)'s overtime provisions in effect for healthcare employers – it could have said so. It didn't. Instead, it created a stand-alone provision with its own premium overtime requirements. Those requirements displace section 3(B)(1)'s overtime provisions for 3/12 employees in the healthcare industry.

Ms. Larner next asserts that section 3(B)(8) cannot operate independently of section 3(B)(1) for purposes of overtime pay because that arrangement would have other implications for 3/12 employees. (AOB 21-24.) Specifically, she argues that if section 3(B)(8) displaces, rather than modifies, section 3(B)(1), it must also displace all of the other provisions in section 3(B). If that were true, 3/12 employees might lose some protections available to other employees, such as the requirement that an employer try to accommodate the religious observance of an employee when it conflicts with an alternative workweek schedule. (Cal. Code Regs., tit. 8, § 11050, subd. (3)(B)(4).)

This argument is directed at a straw man. LAMMC does not contend that section 3(B)(8) displaces *every* provision in Section 3(B). It contends only that section 3(B)(8) displaces section 3(B)(1), the provision with which it directly conflicts. The application of section 3(B)'s other provisions to 3/12 healthcare employees is not at issue in this case.

Ms. Larner's reliance on *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal.App.4th 893 (*Huntington*) is equally unavailing. *Huntington* did not conclude that section 3(B)(1) applies to 3/12 healthcare employees. It did not deal with that issue at all. It addressed the entirely separate question of whether a healthcare employer might have attempted to evade overtime laws by using a pay arrangement regulated by another provision of section 3(B). (*Id.* at p. 910-911; see also Cal. Code Regs., tit. 8, § 11050, subd. 3(B)(2) [setting pay rate when an employee is required to work *fewer* hours than those regularly scheduled].) As *Singh* explained, *Huntington* has no application to the issue here. (*Singh, supra*, 140 Cal.App.4th at p. 401.)

Finally, Ms. Larner contends that the legislative history actually supports her position. She relies on a declaration by Commissioner Broad, author of the rejected proposal that would have required time-and-a-half pay after 36 hours of work. (AOB 25-26.) Commissioner Broad asserts that the Commission intended 3/12 employees to receive time-and-a-half pay for *all* hours beyond the regular schedule. (1 AA 67.) This is nothing but an after-the-fact declaration of intent by a single commissioner. Such attempts to rewrite history by individual legislators or regulators are irrelevant. (*El Dorado Palm Springs, Ltd. v. City of Palm Springs* (2002) 96 Cal.App.4th 1153, 1173-1174 [refusing to consider letter written for purposes of litigation five years after enactment of the relevant statute on the ground that "such post hoc materials are not evidence of legislative intent"]; cf. *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 700-701 [statement that reveals "only the author's personal opinion and understanding" is irrelevant to determining legislative intent].)

In any event, Commissioner Broad provides no elaboration or support for his claim to know the whole Commission's intent in enacting

section 3(B)(8). (See *California Teachers Assn. v. San Diego Community College Dist., supra,* 28 Cal.3d at p. 700 [statement of legislator's intent is relevant only where "it is a reiteration of legislative discussion and events leading to adoption of proposed amendments"].) Nor does he explain why, if the Commission intended to require time-and-a-half pay for any hours beyond a 3/12 schedule, it adopted a version of section 3(B)(8) that requires time-and-a-half pay only after 3/12 employees have worked *4 hours beyond the regular schedule* (i.e., after 40 hours in a week rather than 36). His declaration does not compel an interpretation of section 3(B)(8) that is contrary to its unambiguous language and to the circumstances surrounding its adoption. (*City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 793-794 [rejecting evidence of legislative intent contrary to the language of the statute].)

The trial court correctly held that section 3(B)(8) governs a healthcare employer's duty to pay premium overtime to its 3/12 employees. Section 3(B)(1) has no application in this context. The grant of summary adjudication for LAMMC should be affirmed.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING CLASS CERTIFICATION FOR BOTH SUBSTANTIVE SHORTCOMINGS AND PREJUDICIAL DELAY.

The attempt to certify a class here was both substantively and procedurally defective. Substantively, the individual plaintiff, Ms. Larner, was not a member of one of the classes she sought to represent and she did not establish that her claims were typical of either class. Procedurally, the eve-of-trial certification motion was unreasonably tardy. It is undisputed that Ms. Larner waited two-and-a-half years to seek class certification and then set her certification motion for hearing only three weeks before trial.

(2 AA 297-298.) LAMMC could not prepare for a class action trial in so little time. (See 3 AA 580-583.) The trial court denied certification based both on the substantive and prejudicial delay grounds. (RT 21:17-23:16; RA 87.) It acted well within its discretion in doing so.[10]

A. Standard Of Review: Abuse Of Discretion.

Trial courts have wide latitude in ruling on a motion for class certification. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*) [recognizing that "trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action"]; see also *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470 [trial courts have "great discretion" with regard to class certification].) This court reviews an order denying class certification for an abuse of discretion. (*Linder, supra,* 23 Cal.4th at p. 435.) An order that is supported by substantial evidence will not be reversed unless it relies on improper criteria or erroneous legal assumptions. (*Ibid.*) "'*Any* valid pertinent reason stated will be sufficient to uphold the order.'" (*Id.* at p. 436, emphasis added.)

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[10] The Opening Brief threatens that an affirmance may permanently deprive others of the opportunity to pursue overtime or wage statement claims as a class. (AOB 3 & fn. 15.) It notes that the same claims are pending in *Ellis v. Pacific Health Corp.*, Los Angeles Superior Court case number BC380230, another putative class action (filed by the same counsel) against the same defendant. (*Ibid.*) Such repetitive *class actions* by the same counsel pursuing the same claims may indeed be barred. (*Alvarez v. May Dept. Stores Co.* (2006) 143 Cal.App.4th 1223, 1236-1238.) No individual claim is barred, however. (*Id.* at p. 1238.) In any event, the effect of a decision in this case on the *Ellis* matter (which has been stayed pending this appeal) is a question for another day. It has no bearing on the issues presented here.

B. The Trial Court Acted Well Within Its Discretion In Declining To Certify The Atypically Represented And Inadequately Defined Class.

The trial court ruled that Ms. Larner "fail[ed] to provide evidence that her claims are typical to the putative class members," and that the class definitions were too broad. (RT 23:5-12.) The Opening Brief fails to demonstrate that these rulings were an abuse of discretion.

1. Ms. Larner has waived her challenge to the denial of certification on substantive grounds by failing to develop any pertinent argument on appeal.

The Opening Brief summarily asserts that the trial court's denial of class certification on substantive grounds was an abuse of discretion. (See AOB 37.) It does not explain why in any detail. Its arguments on typicality and overbreadth are so perfunctory that they should be treated as waived. "'An appellate brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citation.]'" (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368, quoting *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164.) It is not this Court's role "'to act as counsel for [plaintiff] or any appellant and furnish a legal argument as to how the trial court's rulings in this regard constituted an abuse of discretion' [citation], or a mistake of law." (*Ibid.*; accord *People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37.)[11]

[11] A reply brief is too late to develop these fact-based arguments for the first time. (*Pallco Enterprises, Inc. v. Beam* (2005) 132 Cal.App.4th 1482, 1502.)

2. The trial court adequately ruled that Ms. Larner failed to establish typicality and that the class definition was overbroad.

The Opening Brief also summarily complains that the trial court did not explain the basis for its findings of atypicality and overbreadth. (AOB 36-37.) But LAMMC set forth bases for these findings in detail in its opposition to class certification and at the class certification hearing. (3 AA 576-577, 583-590; RT 18:15-19:6.) The trial court noted and impliedly adopted this lengthy exposition in denying certification. (RT 18:4-8 [court acknowledging parties' "very lengthy briefs"], 23:5-12 [court concluding that "plaintiff fails to provide evidence that her claims are typical of the putative class members" and that the class definition "is too broad"].) The fact that it did not repeat the exposition in its order is not grounds for reversal. (*Walsh v. Ikon Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1452-1453 [affirming order denying certification despite lack of in-depth explanation of court's analysis, where briefing addressed the reason cited for denial]; *Grogan-Beall v. Ferdinand Roten Galleries, Inc.* (1982) 133 Cal.App.3d 969, 976 [affirming decertification order that did not include analysis, because basis for the ruling was clear from the defendants' moving papers].)

As we now discuss, the record supports the trial court's implied findings, which Ms. Larner has not addressed in any depth on appeal. The findings of atypicality and overbreadth are each sufficient, on their own, to justify the trial court's denial of certification.

3. Substantial evidence supports the trial court's finding that Ms. Larner failed to establish typicality.

a. Ms. Larner was not even nominally a member of the Wage Statement Class that she sought to represent.

Ms. Larner moved to certify a "Wage Statement Class" of individuals employed from *September 24, 2003* onward. (3 AA 584.) But she admittedly left LAMMC's employ in April 2003, some five months earlier. (2 AA 562.) In other words, she was by her own definition not a member of the class. (3 AA 576.) It is elementary that a plaintiff must be member of class she seeks to represent. (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 874; *Petherbridge v. Altadena Fed. Sav. & Loan Assn.*, *supra*, 37 Cal.App.3d at p. 200; *Payne v. United California Bank*, *supra*, 23 Cal.App.3d at p. 860.) Ms. Larner cites no contrary authority on appeal. The trial court, thus, was well within its discretion in finding her claims not typical of the Wage Statement Class.

b. Ms. Larner did not establish that her overtime claim was typical of the Overtime Class.

Ms. Larner's overtime claim involved materially different facts than the claims of other putative Overtime Class members. (See 3 AA 584-590.) Specifically, in seeking class certification, Ms. Larner contended that LAMMC erroneously excluded various non-discretionary employee bonuses when calculating overtime rates, thereby reducing overtime pay. (2 AA 311-313, 316.) Although she alleged that she received one such type of bonus, she never received several of the "[n]umerous other [types of]

bonuses paid to LAMMC employees [which allegedly] were also systematically excluded from the computation of overtime pay." (2 AA 312; 3 AA 586, 725-726.) Accordingly, she has no viable personal argument whether such other bonuses should have been factored into her overtime pay rate.

Her individual overtime claim therefore does not present all or even most of the issues that she purposes to raise on behalf of the class. It is, by definition, not representative. Again, the Opening Brief does not address this defect. It is a separate, sufficient reason for the trial court's denial of certification of the proposed Overtime Class.

c. Ms. Larner did not establish that her claims as a "twelve-hour employee" were typical of claims by "eight-hour employee" class members.

Ms. Larner sought to certify a class that included both employees regularly scheduled to work twelve-hour shifts ("twelve-hour employees") and employees regularly scheduled to work eight-hour shifts ("eight-hour employees"). (3 AA 589-590.) It is undisputed, though, that she had always been a twelve-hour employee. (1 AA 62.) She bore the burden of establishing that eight- and twelve-hour employees' claims were alike. (*Linder, supra*, 23 Cal.4th at p. 435; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 324.) She failed to do so. Her only evidence was from the deposition of an LAMMC executive who testified solely about the treatment of twelve-hour employees. (See 3 AA 725, 728, 734-738.) She identified *no* evidence on the treatment of eight-hour employees. She therefore could not establish that her claims as a twelve-hour employee were typical of the claims of an eight-hour employee. Again, the Opening

Brief does not address this defect. It is yet another sufficient basis for the trial court's certification denial.

4. Substantial evidence supports the trial court's finding that the class definitions were overbroad.

Ms. Larner's proposed classes were too broad because the class claims turned on overtime pay and the receipt of bonuses, but the class definition was not limited to employees who worked overtime and received the bonuses at issue. (3 AA 575-577, 588.) The trial court agreed. (RT 23:10-12 [class definition is "too broad," making it unascertainable].) Ms. Larner does not directly address the overbreadth finding on appeal. She argues instead that the class was ascertainable because she already had a list of prospective class members. (AOB 37.) That response misses the point.

Ms. Larner had a list of people who fit the overbroad class definition – that is, of all non-exempt LAMMC employees from a certain period. The list does not indicate which employees received non-discretionary bonuses and worked overtime. (See 5 AA 1148-1169.) Individuals who do not meet those criteria do not share the claims described in Ms. Larner's complaint and therefore are not properly part of the class. The record offers no way to identify them. As LAMMC argued at the class certification hearing, it was not even apparent from the record whether the class would be numerous once individuals who did not meet the criteria (i.e., those who did not *both* receive non-discretionary bonuses *and* work overtime) were removed. (See RT 18:15-25; Code Civ. Proc., § 382 [class action available "when the parties are numerous"].)

Where multiple members of the putative class do not share the claims alleged in the complaint, "no ascertainable class exists, and a class action may not be maintained." (*American Suzuki Motor Corp. v. Superior*

Court (1995) 37 Cal.App.4th 1291, 1294-1295; see also *Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th 1094, 1100-1101 [affirming denial of certification where class definition included individuals who did not share the class claims and there was no easy way to distinguish who had viable claims].) It is true that overinclusiveness does not *always* defeat class certification. (E.g., *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 743; *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 136.) But here, as we discuss below, the timing of the certification motion meant that the court and parties could not have redefined the class or sorted out

who actually had claims before the trial. Under these circumstances, the trial court did not abuse its discretion in denying certification based on overbreadth.

C. The Trial Court Acted Well Within Its Discretion In Declining To Certify A Class So Close To Trial As Such Certification Would Have Prejudiced LAMMC And The Court.

The trial court also denied certification as being sought unreasonably and prejudicially late, on the eve of a trial date that had already been continued multiple times. (RT 22:26-28.) The court emphasized that Ms. Larner had offered no explanation for much of the delay. (RT 22:3-22.) It found the unexplained delay was prejudicial to it and to LAMMC because if a class were certified, the trial would have to be postponed yet again (the fifth time) to allow the parties to prepare. (RT 23:1-3.) The trial court again was well within its discretion in denying class certification on that basis.

1. A trial court properly denies class certification for prejudicial delay.

Courts must decide whether a suit can proceed as a class action as early as practicable. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 453; *Carabini v. Superior Court* (1994) 26 Cal.App.4th 239, 242; see also Cal. Rules of Court, rule 3.764(b).) A prompt and early class certification decision is critical for a number of reasons. It shapes discovery and counsel's trial preparations. It affects case management plans and the court's busy trial calendar. Perhaps most important, a timely decision is "'essential . . .' in order to permit class members to elect whether to proceed as members of the class, to intervene with their own counsel, or to be

excluded from the class action." (*Massey v. Bank of America* (1976) 56 Cal.App.3d 29, 32, citation omitted.)

Given these interests, a trial court has discretion to deny class certification when it is not sought as soon as practicable and late certification would prejudice the defendant. *Massey v. Bank of America, supra,* 56 Cal.App.3d 29, is illustrative. There, the court affirmed dismissal of the class action aspect of a case that had been pending for four years and ten months with no determination on class certification. (*Id.* at pp. 31-32.) The court focused on the timing of the motion, emphasizing that the 34-day period before the case had to be tried "was grossly inadequate for the giving of notice" and would not "allow even a minimally reasonable period for exercise by the class members of their options." (*Id.* at p. 33; see also *Travelers Ins. Co. v. Superior Court* (1977) 65 Cal.App.3d 751, 762 [trial court handling a class action is not "deprived of the discretion which is vested in it regarding the diligent prosecution of civil cases generally"].)[12]

The cases cited in the Opening Brief are not to the contrary. According to the brief's own description, those cases deal only with a court's discretion to deny certification based on a *non-prejudicial* delay. (AOB 28-29.) That's not the case here. As we discuss below, substantial

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[12] Federal courts agree that class certification denial is appropriate based on a plaintiff's prejudicial delay in seeking it. (E.g., *McCarthy v. Kleindienst* (D.C. Cir. 1984) 741 F.2d 1406, 1411-1412 [affirming denial of class certification motion based on 3-year delay in bringing it, and noting that "(f)undamental fairness" and "the orderly administration of justice" require that defendants not remain uncertain as to who is suing them]; *Adise v. Mather* (D.Colo. 1972) 56 F.R.D. 492, 494-495 [denying certification motion filed 21 months into case as untimely]; *Walker v. Columbia University* (S.D.N.Y. 1973) 62 F.R.D. 63 [denying motion for class certification on the ground that delay in bringing it "imped[ed] the course and progress of the litigation"].) These federal decisions provide guidance on the disposition of a class certification motion under California law. (See *Apple Computer v. Superior Court* (2005) 126 Cal.App.4th 1253, 1264, fn. 4.)

evidence establishes that Ms. Larner's delay prejudiced LAMMC, the court, and putative class members.

2. Substantial evidence supports the trial court's finding that the delay in seeking certification until three weeks before a much-continued trial date was prejudicial.

Larner moved for class certification two years and eight months after filing this suit. (1 AA 1; 2 AA 297.) The motion was heard three weeks before the trial was scheduled to begin. (2 AA 297 [notice of motion showing June 20 hearing date and July 10 trial date].) The trial had already been continued four times. (3 AA 647, 657, 664; 2 AA 296.) Not surprisingly, the trial court found that the belated class certification motion prejudiced both it and LAMMC because certification would require the trial date to be continued yet again. (RT 23:1-3.) On appeal, Ms. Larner does not dispute that a continuance would have been prejudicial.[13] She argues instead that the trial could have gone forward without a continuance. (AOB 32.) The record belies her claim.

First, Ms. Larner stipulated earlier in the litigation that the parties would need "considerable time" to prepare for trial if a class were certified. (1 AA 39, 44.) Three weeks is not considerable time. Although she now argues that it would have been sufficient, the trial court was entitled to disagree with that assertion in light of her prior contrary representation.

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[13] Having failed to argue in the Opening Brief that the court should have granted a continuance, Ms. Larner may not do so for the first time in her reply brief. (*Pallco Enterprises, Inc. v. Beam, supra,* 132 Cal.App.4th at p. 1502.) In any event, Ms. Larner never requested a continuance in the trial court. She therefore would be in no position to assert that the trial court abused its discretion in failing to grant one.

Second, LAMMC submitted declarations establishing that it would need several months – not three weeks – to prepare for a class action trial. (See 3 AA 637-638, 725-727, 741-742.) The Opening Brief does not address this evidence. Instead, it repeats the trial court argument that LAMMC could have prepared for trial in three weeks because the class action trial would have been simple, an argument premised on the assumption that the defense would have been the same for a class action as for an individual suit. (AOB 31-32.) The trial court impliedly rejected this argument when it found that certification would require the trial to be continued. (RT 23:1-2; see also RT 28:13-29:4 [trial court denying certification after hearing Ms. Larner's argument that the parties could prepare for class action trial in three weeks].)

Ms. Larner emphasizes on appeal that LAMMC submitted its witness and exhibit lists relating to Ms. Larner's individual claims before the trial date. (AOB 31-32.) She contends that preparing to try the claims of 1500 class members would have been no more complicated, and so could have been accomplished in the same timeframe. (*Ibid.*) LAMMC submitted declarations directly refuting that contention. (3 AA 637-638, 725-727, 741-742.) The declarations are consistent with common sense. Preparing to defend against the claims of a large class is not the same as preparing to defend against the claims of an individual. A class action trial would require additional discovery regarding the members of the class, additional analysis, and additional witnesses and exhibits. Ms. Larner's unsupported contrary assertion does not establish that the trial court abused its discretion in rejecting her argument that LAMMC could prepare for trial in three weeks.

Third, Ms. Larner's own trial court submissions demonstrated that class notification could not realistically have been completed without a continuance. In response to LAMMC's argument that three weeks was

insufficient time to notify the class, Ms. Larner submitted a proposal for completing notification in three weeks. (3 AA 575; 6 AA 1284 [LAMMC's arguments]; 5 AA 1172 [Ms. Larner's proposal].) The proposal assumes that class notices could have been mailed on or around June 20, the day of the certification hearing. (5 AA 1172.) That means that even in a best case scenario, class members would have learned of the suit less than 20 days before the July 10 trial. In reality, they probably would have significantly less notice, given the vagaries of mail and the intervening Fourth of July holiday, when people are likely to be traveling rather than home checking their mail for class action notices.

Ms. Larner's proposal would have required class members wishing to opt out of the litigation to so inform the claims administrator by July 9, the day before the trial. (5 AA 1172.) That would have left class members with at most a few days to learn about the suit, find and meet with an attorney, assess their potential claims, decide whether to participate, and respond to the notice. That's not enough time to make an informed decision. Indeed, *Massey v. Bank of America, supra,* 56 Cal.App.3d at p.33, concluded that a 34-day period was "grossly inadequate" to notify a large class and "allow even a minimally reasonable period for exercise by the class members of their options." The shorter window contemplated here was certainly not long enough for any class member to hire a lawyer to intervene in the trial, one of the purposes of class notice. (*Home Sav. & Loan Assn. v. Superior Court* (1974) 42 Cal.App.3d 1006, 1010 [class members must be given "appropriate notice" and an opportunity to intervene through their own counsel].)

Moreover, even if class members could have made an informed decision in the short window proposed, LAMMC would not have known the class members' decisions until *the day of trial*. In other words, it would have had to get ready for trial without knowing who was asserting claims

against it, how many claims it was defending against, who would be bound by the judgment, and whether any class members planned to participate at trial. It could not have been adequately prepared for trial under these circumstances.

The trial court's prejudice finding is amply supported.

3. The trial court reasonably concluded that Ms. Larner's own inaction was largely responsible for the delay.

The trial court laid the blame for the prejudicial delay squarely at Ms. Larner's door. (RT 22:1-24.) It found the delay in seeking certification "beyond the scope of all that might be considered reasonable . . . ." (RT 21:21-27.) Again, the record fully supports that determination.

As the trial court noted, Ms. Larner "didn't even try to notice" a deposition that she said was critical until more than a year after the suit was filed and two months before the initial trial date. (RT 22:6-10.) After obtaining a continuance of the first trial date, she waited two months to serve an amended notice of deposition, this time for three months before the trial date. (RT 22:11-15.) As the trial date was continued twice more, she "dropped out of things for a ten-month period, didn't make any effort to take the deposition." (RT 22:18-20.) All told, Ms. Larner's own inaction resulted in approximately two years of delay.

In light of this timeline, the trial court rejected Ms. Larner's contention (renewed on appeal) that the late motion was attributable solely to LAMMC rescheduling the deposition several times. (RT 22:3-24.) That determination was entirely consistent with the record. (See, e.g., 3 AA 634-639 [declaration of LAMMC's trial counsel describing sequence of events], 640 [initial notice of deposition of person most knowledgeable dated

11/28/05], 649-653 [amended deposition notice dated 2/17/06], 665-671 [deposition notice dated 12/7/06].)

The Opening Brief offers no support for Ms. Larner's assertion that the delay was caused entirely by LAMMC's postponement of the deposition. It does not dispute that Ms. Larner waited more than a year to notice the deposition or two months to serve an amended notice of deposition. While it says that she tried to schedule the deposition during the ten months when the trial court found she had "dropped out of things," even this version of events accounts for only a few months of delay. (AOB 9-10.) She still would have been solely responsible for nearly two years of delays in taking the deposition and, by extension, in moving for class certification. On these facts, the trial court reasonably found that the motion was untimely.

"'Where a certification order turns on inferences to be drawn from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 328, citation omitted.) There is no basis for this court to revisit the trial court's delay ruling.

4. Ms. Larner was not denied necessary discovery.

Finally, in a backwards argument, the Opening Brief contends that the denial of class certification effectively deprived Ms. Larner of her right to depose LAMMC's person most knowledgeable before certification. (AOB 30.) The trial court found that Ms. Larner did not diligently pursue discovery despite obtaining multiple trial date continuances and, thus, was responsible for much of the delay in taking the deposition. (RT 22:3-22.) It concluded that while a plaintiff should have an opportunity to take pre-certification discovery, that opportunity is not limitless. (RT 21:18-22:17.) That conclusion was correct. Ms. Larner's delay was not the court's doing.

CONCLUSION

Plaintiff Josephine Larner personally has no remaining actual controversy with LAMMC. For that reason, she cannot pursue the present appeal. But even if Ms. Larner could overcome this obstacle, the appeal would fail on its merits. As *Singh v. Superior Court* correctly concluded, 3/12 healthcare employees are entitled to time-and-a-half pay only for hours in excess of 40 per week. The trial court also did not abuse its discretion in denying class certification for the remaining claims. *Any* valid stated reason suffices to sustain certification denial. Here, there were three such reasons: Ms. Larner failed to establish that her claims were typical, the classes were amorphously ill-defined, and certification was sought unreasonably and prejudicially late, on the eve of a repeatedly continued trial date. The judgment should be affirmed.

Dated: June __, 2008

Respectfully submitted,

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CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204(c), I certify that this **Respondent's Brief** contains 9,726 words, not including the tables of contents and authorities, the caption page, and this Certification page.

Dated: June ___, 2008

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Alana H. Rotter