

**2nd Civil No. B291170**

LASC No. BC517444

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT, DIVISION ONE

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CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM,

*Petitioner,*

v.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,

*Respondent.*

HOLLY WEDDING, RICHARD M. LODYGA AND EILEEN  
LODYGA, individually and on behalf of a class of persons  
similarly situated.

*Real Parties in Interest.*

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On Petition from the Superior Court of California  
County of Los Angeles  
The Honorable Ann I. Jones  
Judicial Council Coordination Proceeding No. 4936  
Super. Ct. No. BC517444

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**PRELIMINARY OPPOSITION TO PETITION FOR WRIT  
OF MANDATE, PROHIBITION OR OTHER  
APPROPRIATE RELIEF AND REQUEST FOR STAY OF  
ALL TRIAL COURT PROCEEDINGS**

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<b>COURT OF APPEAL</b> Second <b>APPELLATE DISTRICT, DIVISION ONE</b>	COURT OF APPEAL CASE NUMBER: B291170
ATTORNEY OR PARTY WITHOUT ATTORNEY:      STATE BAR NUMBER: 112566 NAME: Gretchen M. Nelson FIRM NAME: Nelson & Fraenkel LLP STREET ADDRESS: 707 Wilshire Blvd., Suite 3600 CITY: Los Angeles      STATE: CA      ZIP CODE: 90017 TELEPHONE NO.: 213-622-6469      FAX NO.: 2123-622-6019 E-MAIL ADDRESS: gnelson@nflawfirm.com ATTORNEY FOR (name):	SUPERIOR COURT CASE NUMBER: BC517444
APPELLANT/ California Public Employees' Retirement System PETITIONER: RESPONDENT/ Superior Court of County of Los Angeles REAL PARTY IN INTEREST: Holly Wedding, Richard M. Lodyga, Eileen Lodyga et al	
<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b>	
(Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
<b>Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.</b>	

1. This form is being submitted on behalf of the following party (name ): Holly Wedding, Richard M. Lodyga & Eileen Lodyga
2. a.  There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b.  Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
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- (1)
- (2)
- (3)
- (4)
- (5)

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 19, 2018

Gretchen M. Nelson \_\_\_\_\_  
 (TYPE OR PRINT NAME)

  
 (SIGNATURE OF APPELLANT OR ATTORNEY)

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## INTRODUCTION

Real parties in interest, Holly Wedding, Richard Lodyga and Eileen Lodyga (“Plaintiffs”) and the certified Class submit this preliminary opposition explaining why the writ petition and accompanying stay request should be summarily denied.

Petitioner California Public Employees’ Retirement System (“CalPERS”) seeks review of a decision denying its motion to decertify a Class that the trial court certified in 2016. CalPERS claims it will suffer irreparable injury if writ review is not granted because it will otherwise have to face a trial. But writ review of a motion to decertify will not obviate a trial. No matter whether the case is prosecuted as to the Class or only as to the individual Plaintiffs, this case will be tried. CalPERS will then have an available and adequate remedy at law. If a judgment should be entered against it, it can appeal that judgment and the trial court’s orders certifying the Class and denying the motion to decertify. Thus, CalPERS’ claim of irreparable harm absent writ review is nothing more than a claim of inconvenience that is insufficient to support writ review.

The writ should be summarily denied for another reason: neither of the two issues CalPERS raises in its writ require review because CalPERS failed to demonstrate when it sought decertification that either issue was based on new law or newly discovered evidence – both of which are critical to seeking decertification. (*Weinstat v. Dentsply Intern. Inc.* (2010) 180 Cal.App.4th 1213, 1226 [it is procedurally improper to decertify a class without new law or newly discovered evidence].) Further, one of the issues was raised and rejected by the trial court in 2016 when it certified the Class – yet, CalPERS never sought writ review then of the court’s decision. And, as to the other, CalPERS never raised it in opposing certification and in seeking decertification could not show any change in circumstance, new fact or new law that prevented it from raising the issue before.

CalPERS incorrectly claims the foregoing challenges to certification were based on new facts. And, it incorrectly argues that Plaintiffs altered the theory of the case after the trial court certified the Class. Not so! CalPERS presented no new facts in seeking decertification. And from the inception of this case, Plaintiffs’ legal theories have remained constant and CalPERS’

accusations of changing theories and belated “new” theories are inaccurate.

In the unlikely event the Court decides to reach the merits, real parties request an opportunity to submit a formal, comprehensive opposition. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180; *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1242-1243 [noting limited circumstances under which a suggestive *Palma* notice might issue: unusual urgency, clear error, or where entitlement to a writ is conceded].)

## LEGAL DISCUSSION

- I. **THE WRIT AND STAY REQUEST SHOULD BE DENIED BECAUSE (1) A TRIAL IN THIS CASE IS INEVITABLE, WHETHER WRIT REVIEW IS GRANTED OR NOT, (2) CALPERS HAS AN ADEQUATE REMEDY AT LAW BY APPEAL FROM ANY ADVERSE JUDGMENT, AND (3) THE PETITION PRESENTS NO NOVEL ISSUE.**

Having dragged this case out for nearly five years through a failed demurrer, a failed prior writ petition, a motion for summary judgment, and numerous discovery spats that prompted the retention of a discovery master and ensuing lengthy discovery hearings, CalPERS now claims it will suffer

irreparable harm as a result of incurring the financial cost of a trial. (Petition, p. 17.) Relying on the same perverse logic, CalPERS even has the audacity to argue that the Class will incur irreparable harm because CalPERS will incur attorneys' fees that it apparently will then charge the Class in the form of further higher premiums. (*Ibid.*)

The fatal flaw in CalPERS' argument is that this case will proceed to trial whether it is on behalf of the certified Class or not. Plaintiffs maintain both individual claims as well as the certified contract claim. Plaintiffs individually state a claim for declaratory and injunctive relief in which Plaintiffs seek a judgment that "it is unlawful for Defendants to increase premiums for the LTC Policies for Plaintiffs and the Class or to reduce or terminate benefits if Plaintiffs and the Class cannot pay the exorbitant increase in premiums." (Pet. Appx., Vol. 4, Tab G, p. 01056, ¶ 136.) Even though the declaratory and injunctive relief claim was not certified for class treatment, the practical outcome of any ruling at trial on that claim will affect the Class. Thus, granting review will not prevent any purported

irreparable harm to CalPERS or the Class, because the case will proceed to trial in any event.

Moreover, it is nearly a maxim of writ practice that a “trial does not generally meet the definition of ‘irreparable injury,’ being at most an irreparable inconvenience. Also, it is not fair to parties on appeal who have often waited years for the final resolution of their disputes to have litigants in the pretrial stage elbow their way into the line at our door.” (*Ordway v. Superior Court* (1988) 198 Cal.App.3d 98, 101, fn. 1, disapproved on other grounds *Knight v. Jewett* (1992) 3 Cal.4th 296; accord *Unnamed Physician v. Board of Trustees of St. Agnes Medical Center* (2001) 93 Cal.App.4th 607, 620 [“A remedy will not be deemed inadequate merely because additional time and effort would be consumed by its being pursued through the ordinary course of the law. [Citations.]’ Inconvenience does not equal irreparable injury”]; *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1269.)

CalPERS also fails to demonstrate the lack of an adequate remedy at law as is required to obtain extraordinary relief by writ. (Code Civ. Proc. §§ 1086, 1103 [relief by extraordinary writ

is not warranted when there is an adequate remedy in the ordinary course of law]; *Science Applications International Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1100.)

CalPERS gives no reason why an appeal is inadequate – it merely states that because a direct appeal from the order is not available it has “no adequate remedy in the ordinary course of law.” (Petition, p. 16.)<sup>1</sup>

But that is not the standard. The mere fact that a direct appeal from an order is not available does not equate to the absence of an adequate remedy at law. CalPERS retains its right, following the entry of an adverse judgment, to appeal the trial court’s order certifying the Class and its denial of CalPERS’ decertification motion. (*Shelley v. City of Los Angeles* (1995) 36 Cal.App.4th 692, 696 [“An order certifying a class is subject to modification at any time, and is appealable after final judgment”].)

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<sup>1</sup> A petitioner must explain why the appeal remedy is inadequate by reference to specific facts. (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370 [general allegations of “great and irreparable harm and injury” are insufficient to overcome adequacy defense].) Here, CalPERS also failed to meet this standard.

Moreover, an appeal is not “inadequate” simply because it involves greater effort and expense or because it is not as quick as writ review. (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370-371; *Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1221; *Science Applications Int’l Corp., supra*, 39 Cal.App.4th at 1101.)

CalPERS rounds out its perceived need for writ review by arguing that the petition “involves a novel legal question of widespread importance affecting the State of California and its taxpayers.” (Petition, p. 17.) The purported novel question is whether the objective expectations of a reasonable insured apply to the interpretation of the insurance contract at issue.

But there is nothing novel about this issue, and California courts have unanimously answered it in the affirmative. (*Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 270-71 [“the court interprets the form contract to mean what a reasonable buyer would expect it to mean . . .”]; *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mutual Ins. Co.* (1993) 5 Cal.4th 854, 875 [if a term in an insurance contract is ambiguous, the court proceeds “by looking to the expectations of a reasonable insured”]; *Haynes v. Farmers*

*Insurance Exchange* (2004) 32 Cal.4th 1198, 1214 [“it is not our role to speculate on the policyholder’s abstract expectations, but rather to consider reasonable expectations defined by the insurer’s policy language”]; *In re Insurance Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1409-1412 [interpreting a phrase regarding the timing of payments and noting that such interpretation is “within the objectively reasonable expectations of the insured”].)

CalPERS’ flawed attempt to escape the inescapable conclusion that the well-settled principle applies here is based on its unfounded argument that the reasonable expectation doctrine only applies to coverage disputes and should not be applied to interpret an insurance policy provision relating to premiums. It makes this argument relying on two cases from Pennsylvania. (Petition, pp. 35-36.) But CalPERS fails to inform this Court that in Pennsylvania, the insured’s subjective expectation can trump a policy’s clear and explicit language and is the “focal point of the insurance transaction” (*Diener v. Renfrew Centers, Inc.* (E.D. Pa. Feb. 10, 2015) 2015 WL 567339, at \*5), whereas in California, the objectively reasonable expectations doctrine applies in resolving

policy ambiguities. Thus, Pennsylvania law is inconsistent with California law and provides no support for CalPERS' argument.

In sum, there is no novel legal issue to be considered.

CalPERS can appeal from any adverse judgment following the trial that will occur no matter what. And, granting review will not avoid any perceived irreparable harm.

## **II. THE TRIAL COURT PROPERLY DENIED THE MOTION TO DECERTIFY THE CLASS**

The petition seeks to have this Court review the denial of CalPERS' motion to decertify the Class – a motion that is effectively a motion for reconsideration. Generally, a trial court's order granting or denying a motion seeking reconsideration may not be challenged by writ petition. (*International Ins. Co. v. Superior Court (Rhone-Poulenc Basic Chem. Co.)* (1998) 62 Cal.App.4th 784, 788, ["we see no reason why, absent other compelling facts, we ought to use the writ procedure to review orders that grant or deny reconsideration of a summary adjudication order based upon a 'change of law'"].)

Here, the foregoing principle applies with even greater force because in making the motion to decertify the Class, CalPERS failed to present any new law or new evidence to

support its request. And, the trial court expressly found that CalPERS' motion was deficient in failing to comply with this fundamental requirement. (Pet. Appx. Tab A, pp. 00001, 00004 [“CalPERS’ adequacy challenge is not based on ‘new law or newly discovered evidence showing changed circumstances’”].)

The trial court further found that CalPERS' claim that Plaintiffs had changed theories was inaccurate. (*Id.*, p. 00002 [“As Plaintiffs correctly respond, they did not introduce a ‘new theory’ as they have always claimed that CalPERS breached the EOC by prohibiting premium increases as a result of the Inflation Protection benefit. For example, in their motion for class certification, Plaintiffs contended that ‘the EOC expressly prohibits rate increases to the extent they are caused by inflation protection’”].)

Moreover, CalPERS coyly fails to inform this Court that in opposing class certification in 2016, CalPERS vigorously argued that the insured’s reasonable expectations doctrine should not apply and that certification was improper because CalPERS should be entitled to present individualized evidence as to each policyholder’s subjective expectation. The argument was rejected

by the trial court in 2016 when the court certified the Class and CalPERS never sought review from this Court of that supposed “novel legal issue” then. (See, e.g., Pet. Appx. Vol. 6, Tab Q, p. 01440-01442 [“In opposition, CalPERS contends that individual issues predominate regarding the interpretation of the ambiguous EOC. Specifically, CalPERS argues that extrinsic evidence regarding each class members’ (1) interpretations of the EOC, (2) course of performance, and (3) reasonable expectations, must be considered”].) At a minimum, CalPERS’ effort to seek review more than two years later should be considered untimely.

Similarly, in opposing certification in 2016, CalPERS never argued that Class counsel or Plaintiffs were inadequate or that there was any conflict existing between counsel and the Class. In fact, it conceded counsels’ adequacy and the absence of any conflict. (Pet. Appx. Vol. 6, Tab Q, p. 01450 [“Neither Defendant challenges the adequacy of class counsel” . . . CalPERS does not challenge the adequacy of the named Plaintiffs”].) Its unfounded attempt to seek review of an argument (lacking in any new evidence or new law) which runs counter to its prior admissions, should be summarily rejected.

## CONCLUSION

For all of the reasons stated, this Court should summarily deny CalPERS' petition without reaching the merits.

Dated: July 19, 2018

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

Under California Rule of Court 8.204(c)(1), counsel of record certifies that this PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF AND REQUEST FOR STAY OF ALL TRIAL COURT PROCEEDINGS is produced using 13-point Century Schoolbook type, including footnotes, and contains 2,088 words. Counsel relies on the word count provided by Microsoft Word word-processing software.

Dated: July 19, 2018



Gretchen M. Nelson

*Attorney for Amicus Curiae  
Consumer Attorneys of California*

## **DECLARATION OF SERVICE**

I, the undersigned, declare:

1. That declarant is, and was at the time of service, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to, or interested in, this legal action; and that declarant's business address is 707 Wilshire Blvd., Suite 3600, Los Angeles, CA 90017.

2. That on July 19, 2018, declarant served this

**PRELIMINARY OPPOSITION TO PETITION  
FOR WRIT OF MANDATE, PROHIBITION OR  
OTHER APPROPRIATE RELIEF AND REQUEST  
FOR STAY OF ALL TRIAL COURT  
PROCEEDINGS**

by depositing a true copy in the United States mail at Los Angeles, California in a sealed envelope with postage fully prepaid, addressed to the following interested parties and courts and by serving on the parties through the electronic service provider CaseAnywhere:

Presiding Judge, Superior Court of California – BY U.S. MAIL  
County of Los Angeles  
Hon. Daniel J. Buckley  
111 North Hill Street  
Los Angeles, CA 90023

Clerk, Superior Court of Los Angeles County – BY U.S. MAIL  
Hon. Ann I. Jones  
312 No. Spring Street, Department 11  
Los Angeles, CA 90012

Clerk - BY U.S. MAIL  
Supreme Court of California  
350 McAllister Street  
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3. That there is a regular communication by mail  
between the place of mailing and the places so addressed.

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

Executed on this 19th day of July, 2018, at Los Angeles,  
California.



Gretchen M. Nelson