S206874

IN THE CALIFORNIA SUPREME COURT

No. _____

MARIA AYALA et al.,

Plaintiffs and Appellants,

v.

ANTELOPE VALLEY NEWSPAPERS, INC.

Defendant and Respondent.

After a Decision by the California Court of Appeal,
Second Appellate District, Division Four
Case No. B235484

Appeal from the California Superior Court, Los Angeles County
Case No. BC403405 (Judge Carl J. West)

PETITION FOR REVIEW

Sue J. Stott, State Bar No. 91144 PERKINS COIE LLP Four Embarcadero Center, Suite 2400 San Francisco, CA 94111-4131 Telephone: 415-344-7000 Facsimile: 415-344-7050 SStott@perkinscoie.com	Eric D. Miller, State Bar No. 218416 PERKINS COIE LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101-3099 Telephone: 206-359-8000 Facsimile: 206-359-9000 EMiller@perkinscoie.com

Attorneys for Defendant-Respondent

IN THE CALIFORNIA SUPREME COURT

No. _____

MARIA AYALA et al.,

Plaintiffs and Appellants,

v.

ANTELOPE VALLEY NEWSPAPERS, INC.

Defendant and Respondent.

After a Decision by the California Court of Appeal,
Second Appellate District, Division Four
Case No. B235484

Appeal from the California Superior Court, Los Angeles County
Case No. BC403405 (Judge Carl J. West)

PETITION FOR REVIEW

Sue J. Stott, State Bar No. 91144 PERKINS COIE LLP Four Embarcadero Center, Suite 2400 San Francisco, CA 94111-4131 Telephone: 415-344-7000 Facsimile: 415-344-7050 SStott@perkinscoie.com	Eric D. Miller, State Bar No. 218416 PERKINS COIE LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101-3099 Telephone: 206-359-8000 Facsimile: 206-359-9000 EMiller@perkinscoie.com

Attorneys for Defendant-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

RULES OF COURT

I. ISSUES PRESENTED

1. Whether the Court below erred in holding, in conflict with *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639 (*Sotelo*), and *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333 (*Ali*), that a court may certify a class of individuals claiming to be employees rather than independent contractors even when it finds that the secondary factors in the independent contractor test of *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*), vary materially among the members of the putative class.

2. Whether the Court below erred in holding that the secondary factors in the *Borello* test pertain to the generic type of work being performed, rather than the specific features of the relationship between the individual performing the work and the putative employer.

II. INTRODUCTION AND STATEMENT OF THE CASE

A. Introduction

This Court's review is required to resolve a direct conflict between the published opinion of the Second Appellate District in this case and the decisions of the First Appellate District in *Sotelo*, *supra*, 207 Cal.App.4th 639, and the Fourth Appellate District in *Ali*, *supra*, 176 Cal.App.4th 1333. In all three cases, the plaintiffs were independent contractors who alleged that they were misclassified as contractors and were instead employees. They claimed to be entitled to damages for various alleged Labor Code violations. In each case, the trial court denied the plaintiffs' motion to certify a class, ruling that individual issues predominated because the multi-factor independent contractor analysis called for by this Court's opinion in *Borello*, *supra*, 48 Cal.3d 341, required examination of the characteristics of each individual worker's relationship with the putative employer.

In *Sotelo* and *Ali*, the Courts of Appeal affirmed the denial of class certification. They held that variability in the so-called "secondary"

independent contractor factors—that is, the factors, other than the principal's right to control the performance of the work, that determine whether a worker is an employee or an independent contractor—precluded class certification because "even if other factors were able to be determined on a class-wide basis, [the variant secondary] factors would still need to be weighed individually, along with the factors for which individual testimony would be required." (*Sotelo*, *supra*, 207 Cal.App.4th at p. 660; accord *Ali*, *supra*, 176 Cal.App.4th at pp. 1349-52.) This Court denied review in *Ali*, and, more recently, it denied review in *Sotelo*.

In this case, interpreting *Borello* the same way that *Sotelo* and *Ali* have, the trial court declined to certify a class. The Second Appellate District, however, reversed. The Court made no effort to explain how the trial court had abused its discretion. It also made no effort to distinguish *Sotelo* or *Ali* on their facts, nor could it plausibly have done so, as all three cases involve similar allegations and similar variations among the members of the putative classes—in the case of *Sotelo*, strikingly so, as both *Sotelo* and this case involve newspaper carriers who contract to deliver daily newspapers. The Court recognized that—as in *Sotelo* and *Ali*—the evidence bearing on the secondary factors varied across the proposed class. However, the Court viewed the variations as immaterial because, it said, "the focus of the secondary factors is mostly on the job itself, and whether it involves the kind of work that may be done by an independent contractor or generally is done by an employee." (Ct. App. opinion, dated Sept. 19, 2012 ("Opn.") at p. 19.) Reasoning that the nature of the job itself is a common question, the Court concluded that the entire independent contractor analysis therefore presented a "common question" sufficient to warrant class certification.

The Court below did not acknowledge the conflict with *Sotelo* and *Ali*, nor did it substantively address those cases. Indeed, it scarcely

acknowledged their existence, dismissing them in a footnote as involving "facts and positions unique to the parties." (Opn. at p. 18, fn. 9.) Nor did the Court cite any authority for its conclusion regarding the "focus of the secondary factors," which reflects a misinterpretation of *Borello* and is contrary to settled law establishing that the focus of those factors is on the nature of the specific service relationship, not the generic type of "work" at issue.

With the recent publication of the opinion below, California trial courts considering class certification motions in independent contractor cases—and many such cases are pending—are faced with irreconcilable published opinions: *Sotelo* and *Ali*, which say that variation in the secondary factors is critical to the analysis of independent contractor status and weighs against certification, and the decision below, which says that such variation is irrelevant because the real focus is on the nature of "the job" (whatever that may mean in any particular context), rather than the entirety of the relationship between the service provider and the service recipient. Indeed, the conflict affects not only putative class actions but also all cases involving a challenge to any independent contractor designation. In every such case, the court must now decide whether to charge the jury with examining the entire relationship between the parties (as *Borello* requires and *Sotelo* and *Ali* reiterate) or instead to instruct the jury to decide whether "the job . . . involves the kind of work that may be done by an independent contractor, or generally is done by an employee" (as the Court below held). (Opn. at p. 19.) The Court gave no guidance as to how a trier of fact would ascertain contractor versus employee "work" (for example, with the use of experts, by individualized fact analysis or some other means).

Worse still, the lower Court's misinterpretation of the *Borello* test will create grave uncertainty both for businesses seeking to structure their

relationships with individuals who provide services and for service providers seeking to establish independent businesses. The Court below did not explain how to determine whether a job "involves the kind of work that may be done by an independent contractor, or generally is done by an employee," nor did it say what kind of evidence could be introduced on that question, or whether expert testimony would be required. Because the Court's test is entirely novel, existing precedent provides no guidance. The uncertainty will have serious consequences because misclassification of an employee as an independent contractor can result in significant penalties under state and federal law. (See, e.g., Cal. Lab. Code § 226.8 [providing for penalties of up to $25,000 per violation].) Indeed, the vagueness of the lower Court's newly adopted test, coupled with the large penalties for those who are found to have misclassified employees, raises serious concerns of lack of fair notice.

The *Sotelo* and *Ali* holdings are correct; the holding of the Court below is wrong. The error made by the decision below would be important enough for this Court to correct even if it did not create a conflict in the law. In light of the conflict, review by this Court is even more important and should be granted.

B. Facts and Proceedings Below

1. Plaintiffs are former newspaper delivery contractors or "carriers" of the Antelope Valley Press ("AVP"), a daily newspaper in Palmdale, California. They filed this lawsuit on behalf of a putative class of carriers, alleging that they were misclassified as independent contractors and that, as a result of the misclassification, AVP violated various statutes. Plaintiffs moved for class certification. AVP opposed the motion.

2. The trial court denied class certification, finding that individual issues predominated with respect to the threshold misclassification question. (Los Angeles Super. Ct. Ruling and Order Re: Plaintiff's Motion

for Class Certification, dated Aug. 19, 2011, Appellants' Appendix ("AA") at volume ("vol.") 19, pp. 4381-91.) The court emphasized that "no commonality exists regarding the right to control, and heavily individualized inquiries are required to conduct the 'control test'" as part of the analysis of plaintiffs' status. (*Id.* at p. 7.) In particular, the trial court noted that individual issues predominated on, *inter alia*,

- "who performs the services at issue"—some of the carriers used helpers or substitutes from time to time, others on a regular basis, still others not at all (*ibid.*),
- "when carriers are to perform their services"—some of the carriers' contracts specified a time at which papers were to be picked up, while others did not (*ibid.*),
- "how the carriers perform their services"—some carriers received training from AVP, while others did not, and some were required to bag newspapers, while others were not (*id.* at vol. 19, pp. 4384-85), and
- "the contacts carriers had with AVP subscribers"—some carriers provided personal contact information to subscribers and had many contacts with subscribers, while others had few such contacts (*id.* at vol. 19, p. 4386),
- whether "carriers delivered other publications, including competing newspapers, when delivering for AVP"—some carriers did, others did not (*id.* at vol. 19, p. 4388), and
- whether carriers "created a business entity and/or bank accounts for their delivery work" (*id.* at vol. 19, p. 4389).

3. The Court of Appeal affirmed in part and reversed in part. The Court affirmed the trial court's order to the extent that it denied certification of claims based on overtime and meal and rest breaks. (Opn. at pp. 20-21.)

It reversed the trial court's determination that Plaintiffs had failed to meet their burden of proving that common issues predominated with respect to misclassification, and it remanded with instructions that the trial court certify a class unless it identified some other reason not to do so. (*Id.* at pp. 17-20, 22.)

The Court of Appeal acknowledged that, during the class period, AVP used basic forms of written contractor agreements with carriers that were broadly similar among carriers but that also contained some terms specific to each carrier; the record showed that those terms were sometimes subject to individual negotiation. (Opn. at p. 9.) The Court also discussed other documents that, Plaintiffs alleged, evinced AVP's right to control the carriers' work. As the trial court had noted, the record reflected divergent testimony on whether the documents represented mandates or were merely suggestions. (*Id.* at pp. 11-12.) The Court next discussed the evidence of AVP's conduct that, according to Plaintiffs, showed AVP's right to control their work. It noted that AVP's evidence showed that many of the alleged indicia of control varied from carrier to carrier. (Opn. at pp. 12-15.)

Turning to the "secondary factors" in the *Borello* test, the Court of Appeal noted that Plaintiffs had submitted purportedly "common" evidence related to the secondary factors, while AVP submitted evidence showing a lack of commonality as to those factors. The Court of Appeal described the evidence as follows:

> (1) some carriers delivered other publications (such as the Los Angeles Daily News or the Los Angeles Times) at the same time they delivered for AVP; (2) some carriers have set up formal business entities to conduct their delivery business, or consider their delivery work to be an independent business; (3) some carriers provide their contact information to subscribers and/or deal directly with subscribers regarding complaints or special requests; (4) some carriers have other jobs in addition to their delivery work; (5) some carriers choose to use AVP's facilities to assemble and fold their

> newspapers while others do not; (6) some carriers purchase supplies from AVP but others choose not to; (7) some carriers take advantage of opportunities to increase their compensation by generating new subscribers, taking on additional routes, using substitutes or helpers efficiently, or avoiding customer complaint charges by re-delivering; (8) some carriers delivered for as little as one day while others delivered for many years; and (9) many contractors, unlike the named plaintiffs, understood they were independent contractors and intended to be independent contractors.

(Opn. at p. 16.)

In reviewing that same evidence, the trial court had correctly concluded that individual issues predominated because of the variations in the carriers' work experiences and in their interactions with AVP. (AA at vol. 19, pp. 7381-91.) But the Court of Appeal concluded that the record instead reflected disputes as to the import of evidence common to all class members. (Opn. at pp. 17-19.) With regard to the right to control, for example, the Court stated that AVP's evidence that "the way that the carriers accomplished their work varied widely" constituted evidence of an overall lack of control, rather than evidence that the control question needed to be assessed on a carrier-by-carrier basis. (*Id.* at p. 19.) Similarly, the Court held that the "focus of the secondary factors is mostly on the job itself, and whether it involves the kind of work that may be done by an independent contractor, or generally is done by an employee," and that individual "choices" made by an employee with respect to the secondary factors did not affect the carrier's "employee status." (*Ibid.*) The Court therefore concluded that AVP's evidence of material variability in the secondary factors simply provided evidence that "the type of work involved often is done by independent contractors" but did not establish the predominance of individual issues. (*Ibid.*)

4. AVP filed a petition for rehearing, which the Court of Appeal denied.

III. THE COURT SHOULD GRANT REVIEW TO RESOLVE CONFLICTS IN PUBLISHED AUTHORITY AND TO CORRECT THE LOWER COURT'S ERRONEOUS INTERPRETATION OF THE *BORELLO* INDEPENDENT CONTRACTOR TEST

Left unresolved, the conflict between the published opinion below and *Sotelo* and *Ali*—as well as the lower Court's mischaracterization of the *Borello* secondary factors—will result in inconsistent application of law and confound trial courts and California businesses attempting to apply the independent contractor analysis that this Court prescribed in *Borello*. For two reasons, review is necessary "to secure uniformity of decision" and "to settle an important question of law." (See Cal. Rules of Court, rule 8.500(b)(1).)

First, the result reached by the Court below is directly contrary to the First Appellate District's opinion in *Sotelo* and the Fourth Appellate District's opinion in *Ali*, both of which correctly held that variations in facts relevant to even some of the secondary factors can render individual issues predominant, making class certification inappropriate. Review is necessary to resolve the conflict between the incorrect conclusion of the Court below and the opinions in *Sotelo* and *Ali*.

Second, the decision below is also inconsistent with this Court's decision in *Borello*. Based on an incorrect interpretation of *Borello*, the Court of Appeal stated that "the focus of the secondary factors" in the *Borello* test "is mostly on the job itself, and whether it involves the kind of work that may be done by an independent contractor or generally is done by an employee." (Opn. at p. 19.) Without citing any authority, the Court also held that variations among members of the putative class with respect to many of the secondary factors were irrelevant because individual service providers' "choices" do not affect the secondary factors analysis. (*Ibid.*) From those faulty premises, the Court reasoned that "[a]ll of the

[secondary] factors may be determined based upon common proof." (*Ibid.*) Under *Borello*, however the secondary factors explore the nature of the particular service relationship—not the generic "type of work" at issue—and each worker's "choices" are essential to that analysis. The lower Court's erroneous interpretation of *Borello* threatens to create great confusion in an area of the law that is of critical importance to businesses and service providers. This Court's review is warranted.

A. Review Is Required to Resolve the Conflict Between the Decision Below and the Decisions of the First Appellate District in *Sotelo* and the Fourth Appellate District in *Ali*

This case, *Sotelo*, and *Ali* all involve putative classes of allegedly misclassified independent contractors. In each case, the threshold question is whether—upon application of the *Borello* test to the record on class certification—plaintiffs met their burden of demonstrating that the classification question was amenable to common proof. Although the material facts in the cases are similar—*Sotelo*, like this case, involved newspaper delivery contractors—the Court below and the Courts in *Sotelo* and *Ali* nevertheless reached divergent results because of their fundamentally different holdings regarding the secondary factors. This Court's review is therefore necessary to "secure uniformity of decisions." (Cal. Rules of Court, rule 8.500(b)(1); see, e.g., *Toland v. Sunland Hous. Group., Inc.* (1998) 18 Cal.4th 253, 264; *Marvin v. Marvin* (1976) 18 Cal.3d 660, 664-65.)

1. The *Borello* independent contractor test requires balancing multiple intertwined factors

In *Borello*, this Court held that the determination of independent contractor status requires application of a multi-factor test that considers not only a service recipient's right to control the work performed by the putative employee but also a host of "secondary factors" designed to flesh

out the nature of the service relationship.[1] (See *Borello, supra*, 48 Cal.3d at p. 351, fn. 5 ["control of work details is not necessarily the decisive test for independent contractorship"] [internal quotation marks omitted].) As the Court explained, a multi-factor test is used because service relationships come in many forms, and consideration of the abstract "right to control" alone does not give the factfinder a complete view of the relationship. (*Id.* at p. 350.) The Court emphasized that the secondary factors "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." (*Id.* at p. 351 [internal quotation marks and citation omitted].) In other words, the *Borello* secondary factors require a factfinder to consider *all* relevant aspects of a service relationship in order to determine whether a worker is an independent contractor of an employee.

2. Class certification is appropriate only when common issues predominate

A plaintiff seeking class treatment of a claim must demonstrate the existence of "a well-defined community of interest," which requires showing predominant common questions of law or fact. (*Brinker Rest.*

---

[1] Those secondary factors include (1) whether there is a right to fire at will without cause; (2) whether the alleged employee is engaged in a distinct occupation or business; (3) the kind of occupation; (4) the skill required; (5) who supplies the instrumentalities, tools, and the place of work; (6) the duration of the relationship; (7) the method of payment; (8) whether the work is a regular and integral part of the business of the principal; (9) the parties' belief as to the nature of the relationship; (10) whether the classification of independent contractors is bona fide; (11) the contractor's degree of investment and whether he or she holds himself out as an independent business; (12) the contractor's use of helpers, employees, or replacements; (13) the contractor's opportunity for profit and loss depending upon managerial skill; and (14) whether the service rendered is an integral part of the alleged employer's business. (*Sotelo, supra*, 207 Cal. App.4th at pp. 656-57 [citation omitted]; see also *Borello, supra,* 48 Cal.3d at pp. 350-51.)

Corp. v. Super. Ct. (2012) 53 Cal.4th 1004, 1021 (*Brinker*).) Common questions do not predominate when their resolution depends upon answering individual questions, "even though there may be many common questions of law." (*Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 542 [internal quotation marks and citation omitted].) To obtain class certification, a plaintiff thus must raise common questions *and* show that those questions are answerable through common proof. (*Wash. Mut. Bank, FA v. Super. Ct.* (2001) 24 Cal.4th 906, 913-14; see also *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 933 [plaintiff showed existence of a common question that can be *answered* "on the basis of a single set of facts applicable to all [class] members."]; *City of San Jose v. Super. Ct.* (1974) 12 Cal.3d 447, 460.) Common issues also do not predominate where liability is contingent, at least in part, on facts particular to individual claimants, and "proof of . . . liability would have had to continue in an employee-by-employee fashion." (*Brinker*, *supra*, 53 Cal.4th at pp. 1051-52.)

"Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) A class certification order may be disturbed only if the trial court "exceeded the bounds of reason," and, under that standard, "[w]hen two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

3. The opinion below conflicts with the decisions in *Sotelo* and *Ali* regarding the nature and application of the *Borello* secondary factors

a. In *Sotelo*, the First Appellate District faithfully applied this Court's instruction that courts must consider both the right-to-control test and the secondary factors. The record in that case reflected variation as to at least four secondary factors: "(1) whether the one performing services is engaged in a distinct occupation or business; (2) the method of payment; (3) whether or not the parties believe they are creating an employer-employee relationship; [and] (4) the hiree's opportunity for profit or loss depending on his or her managerial skill." (*Sotelo, supra,* 207 Cal.App.4th at p. 657-58.) Based on that variation, the *Sotelo* court affirmed the trial court's ruling that the threshold classification question was not amenable to class treatment. As the Court explained, "[e]ven though the [trial] court found variability among the class in only a few of the factors," it correctly determined that "the multi-factor test 'requires that the factors be examined together.'" (*Id.* at p. 660.) Thus, "even if other factors were able to be determined on a class-wide basis, those factors would still need to be weighed individually, along with the factors for which individual testimony would be required." (*Ibid.*) Under *Sotelo*, a trial court does not abuse its discretion by denying certification if it concludes that variability among some of the secondary factors will require individual testimony at trial.

b. In *Ali*, the Fourth Appellate District similarly affirmed the denial of certification of a class of taxi drivers where, among other things, some (but not all) class members testified that they supplied their own tools, held themselves out as independent businesses, and understood themselves to be independent contractors. In light of those factual variations among the class, the *Ali* Court held that the trial court had "reasonably rejected the argument that a single set of facts predominate[d]"; instead, "the testimony

of putative class members would be required on the issues of employment." (*Ali, supra*, 176 Cal.App.4th 1333 at p. 1350.) Under the applicable abuse of discretion standard, nothing more was required to affirm the trial court's denial of class certification, even if "[p]erhaps another trial judge considering the matter in the first instance would have allowed class treatment." (*Id.* at p. 1351; see also *Narayan v. EGL, Inc.* (N.D. Cal. Sept. 7, 2012, Case No. C-05-04181 RMW) 2012 WL 4004621, *7 [applying California law and concluding that, given variation in "distinct occupation" secondary factor, individual issues predominated because "[t]o ignore the differences in defendants' operations and certify a class would be tantamount to making a substantive finding that this evidence cannot change the outcome" which would improperly constitute "prejudging the weight of the evidence."])

c. The Court below was confronted with precisely the same issue as in *Sotelo* and *Ali*—whether the trial court abused its discretion by refusing to certify a class because the need for individual inquiry into the secondary factors meant that common questions of law and fact do not predominate. As in *Sotelo*, the trial court here had identified variability among putative class members with respect to some secondary factors; indeed, even more factors than in *Sotelo*. (See, e.g., AA at vol. 19, p. 4393 ["The evidence also shows that some carriers have multiple clients and customers; some have distinct occupation or delivery businesses; there is no commonality in the instrumentalities, tools, and place of work; carriers may or may not take advantage of chances to generate profits; and the length of time to perform services varies."])

Nonetheless, and although it acknowledged that it could reverse the trial court only for a "manifest abuse of discretion," (Opn. at p. 6), the Court below reached the opposite result from *Sotelo* and *Ali*, concluding that those factual variations in the secondary factors did not matter for

purposes of the predominance inquiry. (*Id.* at p. 19.) In essence, the Court stated that variations among putative class members as to the secondary factors are immaterial because the factors bear on the nature of the work at issue and not the specific facts of particular service relationships. (*Ibid.*) In so holding, the Court not only mischaracterized the secondary factors analysis but also improperly substituted its own view of the evidence for that of the trial court: despite having noted the applicable abuse of discretion standard, the Court never explained precisely how the trial court had abused its discretion in determining that individual issues would predominate at trial. Whether intentional or not, the Court of Appeal's substitution of its judgment regarding the facts forced it to decide the class certification question without the benefit of the trial court's unique insight and understanding of whether the case could feasibly be tried as a class action.

Rather than distinguishing *Sotelo* and *Ali*, discussing their reasoning, or explaining why it analyzed the independent contractor test differently, the Court below dismissed those cases in a footnote as involving "facts and positions unique to the parties." (Opn. at p. 18, fn. 9.) The *Sotelo* Court's understanding of the relationship between class certification principles and the independent contractor test, however, was not specific to the newspaper context or to the specific factual variations present in the *Sotelo* record. What mattered was that there was variation in the secondary factors, not what the specific variations were. And again, the variations were largely the same in *Sotelo* as in the present case. Although *Sotelo* and this case differ in many ways, there is no way to distinguish the two cases *on this critical point*. The same is true of *Ali*.

The conflict between *Sotelo* and *Ali* and this case will present trial courts with a conundrum. Any trial court confronted with a putative class of misclassified newspaper carriers—or any other class of allegedly

misclassified employees—will need to choose between the approach to the secondary factors embodied in *Sotelo* and *Ali* or the novel approach set out in the opinion below, which requires them to determine, without any guidance from precedent, whether the contracted work or job "involves the kind of work that may be done by an independent contractor, or generally is done by an employee." That is not a theoretical problem. A number of such cases are pending at present.[2] And because the discussion of the secondary factors by the Court below is not limited to class cases, the confusion that it engenders will also not be limited to such cases but will arise in all applications of the *Borello* test. To maintain the uniformity of decisions, this Court should resolve the conflict between *Sotelo* and *Ali* and the present case.

B. Review Is Required to Correct the Court of Appeal's Misinterpretation of the *Borello* Secondary Factors

Review is also necessary to allow this Court to "settle an important question of law" by correcting the lower Court's mischaracterization of the *Borello* secondary factors. (See Cal. Rules of Court, rule 8.500(b)(1); see also *S. Cal. Chapter of Associated Builders & Contractors, Inc. v. Cal. Apprenticeship Council* (1992) 4 Cal.4th 422, 431, fn. 3; *Great W. Shows v. Cnty. of L.A.* (2002) 27 Cal.4th 853, 858-59.) In concluding that the secondary factors bear only on the "type of work" at issue and on the abstract question of "control" over the work performed, the lower Court misunderstood the purpose of the secondary factors and conflated the

---

[2] (See, e.g., *Becerra v. The McClatchy Co.* (Fresno Cnty. Sup. Ct., pending, No. 08 CECG 04411 AMS); *Sawin v. The McClatchy Co.* (Sacramento Cnty. Sup. Ct., pending, No. 34-2009-00033950-CU-OE-GDS [pending]); *Salgado v. The Daily Breeze, et al.* (Los Angeles Cnty. Sup. Ct., pending, No. BC458074)); *Espejo v. The Copley Press Inc.* (San Diego Cnty. Sup. Ct., pending, No. 37-2009-00082322-CU-OE-C TL).)

secondary factors with the right-to-control analysis. That result warrants correction by this Court.

1. The Court below incorrectly interpreted the secondary factors to focus on the whether the "type of work" at issue is typically done by an independent contractor or an employee

The Court below held that the Defendant's evidence that alleged class members did not share common secondary characteristics was simply "evidence that the type of work involved often is done by independent contractors." (Opn. at p. 19.) In the Court's view, "a carrier's employee status cannot be based upon the individual choices the carrier makes" because "the focus of the secondary factors is mostly on the job itself, and whether it involves the kind of work that may be done by an independent contractor, or generally is done by an employee." (*Ibid.*) That is incorrect. In fact, the secondary factors relate to the specifics of particular service relationships, not to whether the type of work at issue is generally performed by an employee.

The Court below overlooked that the "type of work" performed is *itself* one of the secondary factors. In *Borello*, this Court articulated that factor as "the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision." (See *Borello*, *supra,* 48 Cal.3d at p. 3514; see also *Sotelo*, *supra*, 207 Cal.App.4th at p. 657.) It would make little sense to identify the "type of work" as one of many secondary factors if the secondary-factor inquiry as a whole were directed at determining what "type of work" was performed.

Most of the remaining secondary factors concern matters other than the "type of work" being performed. Here, for example, the length of time for which a carrier has provided services varies by individual and has nothing to do with the intrinsic nature of newspaper-delivery services.

Likewise, whether a particular carrier used helpers or substitutes is a fact specific to that carrier. So, too, is whether a given carrier obtained supplies from AVP or provided them himself or herself. And whether the parties believed they were forming an employer-employee relationship turns on the state of mind of the contracting parties, not on the nature of the work to be performed. Indeed, other than *Borello*'s "kind of occupation" factor, only one secondary factor—the skill needed to perform the work—pertains directly to the generic type of work performed. In other words, "different legal standards [do not] apply in the context of different occupations" but, rather, "'[e]ach service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case.'" (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 87, quoting *Borello*, 48 Cal.3d at 354 [emphasis altered].)

For that reason, courts have observed that in any given case "a newspaper carrier can be an independent contractor as a matter of law; in others, an employee as a matter of law; and in still others, the status of the newspaper carrier to the newspaper is a factual issue." (*Larson v. Hometown Communications, Inc.*, (Neb.Ct.App 1995) 526 N.W.2d 691, 698, affd. (Neb. 1995) 540 N.W.2d 339; see also *Harper ex rel. Daley v. Toler* (Fla. Dist. Ct. App. 2004) 884 So.2d 1124, 1133, quoting *Keith v. News & Sun Sentinel Co.* (Fla. 1995) 667 So.2d 167, 170 [noting that "whether a particular newspaper carrier is an employee or an independent contractor depends on the particular relationship the carrier has with the newspaper" and "'the facts peculiar to each case govern the decision.'"]) Cases from California and elsewhere reflect those principles. Some find newspaper delivery persons properly classified as independent contractors based on the specific facts (and combinations of the right-to-control and

secondary factors) presented.[3] Other courts, presented with different facts and in different contexts, have concluded that newspaper delivery persons were instead properly classified as employees.[4] And cases involving other occupations confirm that workers doing relatively lower-skilled work can be independent contractors, even when the work in question could be and often is performed by an employee. (See, e.g., *Becker v. Industrial Accident Com.* (1931) 212 Cal. 526 [general messenger]; *Chin v. Namvar* (2008) 166 Cal.App.4th 994 (*Chin*) [painter]; *Torres v. Reardon* (1992) 3 Cal.App.4th 831 (*Torres*) [gardener]; *Millsap v. Fed. Express Corp.* (1991) 227 Cal.App.3d 425 [parcel delivery-person]; *Lara v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 393, 399-400 (*Lara*) [gardener].)

If the Court below were correct that the secondary factors bear only on whether a particular type of work is "independent contractor" work or not, then varied evidence regarding secondary factors would *always* be irrelevant on class certification because a well-defined class of putatively misclassified workers *always* performs the same "type" of work. There would be no cases denying certification of classes of putatively

---

[3] (See, e.g., *Fleming v. Foothill-Montrose Ledger* (1977) 71 Cal.App.3d 681, 685; *Taylor v. Industrial Accident Com.* (1963) 216 Cal.App.2d 466; *Hartford A. & I. Co. v. Industrial Accident Com.* (1932) 123 Cal.App. 151; see also *Venango Newspapers v. Unemployment Comp. Bd. of Review* (Pa.Commw.Ct. 1993) 631 A.2d 1384; *LaFleur v. LaFleur* (Iowa 1990) 452 N.W.2d 406; *Brown v. NLRB* (9th Cir. 1972) 462 F.2d 699; *Cable v. Perkins* (Ill.App.Ct. 1984) 459 N.E.2d 275; *Neve v. Austin Daily Herald* (Minn.Ct.App. 1996) 552 N.W.2d 45; *Lewiston Daily Sun v. Hanover Ins. Co.* (Me. 1979) 407 A.2d 288; *Ross v. Post Publ'g Co.* (Conn. 1943) 29 A.2d 768.)

[4] (See, e.g., *Grant v. Woods* (1977) 71 Cal.App.3d 647, 652; *Cal. Emp. Com. v. L.A. Downtown Shopping News Corp.* (1944) 24 Cal.2d 421.)

misclassified independent contractors on predominance grounds. In fact, however, there are such cases.[5]

Finally, the holding of the Court below that "a carrier's employee status cannot be based upon the individual choices the carrier makes, if other choices are available" (Opn. at p. 19) is not supportable as applied to the secondary factors. A carrier's abstract freedom of choice (whether exercised or not) might well bear on the question of which party had the "right" to control the manner and means of performing the work. Many of the secondary factors, however, depend on the choices made by both the worker and the service recipient, and they would make no sense if the rule were otherwise. For example, courts considering whether a given worker is "engaged in a distinct occupation or . . . business," do not ask simply whether a given worker has the *option* to engage in other work (whether exercised or not) but whether he or she *does* engage in other work.[6]

---

[5] (See, e.g., *Sotelo*, *supra*, 207 Cal.App.4th at pp. 657-59 [denying certification of class of putatively misclassified newspaper carriers given variability as to secondary factors]; *Ali*, *supra,* 176 Cal.App.4th at pp. 1349-52 [denying certification of class of putatively misclassified workers given variability between class members as to right to control and secondary factors]; *Walker v. Bankers Life & Cas. Co.* (N.D.Ill. July 28, 2008, Case No. 06-C-6906) 2008 WL 2883614, *11 [same, applying California law, where evidence bearing on "right to control" and secondary factors varied, meaning that "a liability determination will require an individualized evaluation of each [worker's] relationship with [the defendant]"]; *Rumpke v. Rumpke Container Serv., Inc.* (S.D.Ohio 2001) 205 F.R.D. 204, 208-09 [same, where evidence bearing on applicable 13-factor independent contractor test varied among members of the putative class].)

[6] (*Lara, supra,* 182 Cal.App.4th at pp. 399-400 [noting that worker performed work in question "as part of his own occupation as a gardener, which he had been doing independently for approximately 25 years" and that while he "does not advertise, he has several different clients"]; *Chin*, *supra,* 166 Cal.App.4th at pp. 1000, 1008 [given that painter had "other clients," he was "in fact engaged in an independently established painting business"]; *Torres*, *supra*, 3 Cal.App.4th at p. 838 [finding that gardener

Likewise, with regard to the length of time for which the services are to be performed and the degree of permanence of the relationship, a worker could always choose to enter into a service contract of a different length or terminate a service relationship at a particular time. These factors would be meaningless unless they considered the *actual* duration of the service relationship in question. In short, at least some of the secondary factors depend on the actual circumstances of individual contractors—the "choices" that they have made about their work lives.

2. The lower Court's holding regarding class certification warrants review

The lower Court's error regarding the secondary factors fatally undermines its conclusion that the independent contractor analysis is a "common question" in this case. There is no dispute that the secondary-factors evidence in this case varies from contractor to contractor; the Court below acknowledged as much. As *Sotelo* held, because each factor in the independent contractor test is relevant to the overall classification inquiry—even if any given factor is not necessarily dispositive—it still may be litigated at trial, requiring individual proof. Thus, where there is variation as to those factors among class members, individual issues predominate because individual testimony will be needed to determine liability in individual cases. That is the antithesis of a proper class. (*Brinker*, *supra*, 53 Cal.4th at p. 1052 [class treatment of a case is inappropriate if proof at trial would need to proceed "in an employee-by-employee fashion"].) The trial court was therefore correct to deny class certification, and it certainly was within its right and did not abuse its discretion in doing so.

The Court below erred in setting aside the trial court's decision. Its error is significant not only because of its effect on class actions and other

---

was independent contractor where he provided tree-trimming service in the course of his own business].)

litigation but also because it will create significant uncertainty for businesses that previously have been able to rely on the *Borello* factors in determining the status of persons providing services to them but that now must attempt to apply the novel test announced by the Court of Appeal. That uncertainty is especially harmful in light of the serious consequences that can result from misclassifying workers as independent contractors, including liability under federal and state tax laws, the Fair Labor Standards Act, and the California Labor Code, which provides large civil penalties for misclassification. (See, e.g., Cal. Lab. Code § 226.8 [providing for penalties of up to $25,000 per violation].) This Court recognized the importance of clarity in the test for determining independent contractor status when it granted review *sua sponte* in *Borello*. (See *Borello, supra,* 48 Cal.3d at p. 360, fn. 1 (dis. opn. of Kaufman, J.).) The decision below similarly warrants review and correction by this Court.

IV. CONCLUSION

The petition for review should be granted.

Respectfully submitted.

DATE:
November 26, 2012

PERKINS COIE LLP

By: _____
Sue J. Stott, State Bar No. 91144
Attorneys for Petitioner
ANTELOPE VALLEY NEWSPAPERS, INC.

71240-0001/LEGAL25033459

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 8.204(c)
OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 8.204(c) of the California Rules of Court, and in reliance on the word count feature of the software used to prepare this document, I certify that the attached Petition For Review contains 6,457 words, including footnotes and exclusive of those materials not required to be counted under Rule 8.204(c)(3); is proportionally spaced; and has a typeface of 13 points.

DATE:
November 26, 2012

PERKINS COIE LLP

By: _____
Sue J. Stott, State Bar No. 91144

Attorneys for Petitioner
ANTELOPE VALLEY NEWSPAPERS, INC.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARIA AYALA et al., Plaintiffs and Appellants, v. ANTELOPE VALLEY NEWSPAPERS, INC., Defendant and Respondent.	B235484 (Los Angeles County Super. Ct. No. BC403405)

APPEAL from an order of the Superior Court for Los Angeles County, Carl J. West, Judge. Reversed in part and affirmed in part.

Callahan & Blaine, Daniel J. Callahan, Jill A. Thomas, Michael J. Sachs, Kathleen L. Dunham and Scott D. Nelson for Plaintiffs and Appellants.

Perkins Coie, William C. Rava and Sue J. Scott for Defendant and Respondent.

Plaintiffs Maria Ayala, Rosa Duran, and Osman Nuñez appeal from an order denying their motion for class certification. Plaintiffs sought to certify a class of newspaper home delivery carriers in a lawsuit against defendant Antelope Valley Newspapers, Inc. (AVP), alleging that AVP improperly classified the carriers as independent contractors rather than employees and violated California labor laws. The trial court found there were numerous variations in how the carriers performed their jobs, and therefore common issues did not predominate. We conclude, however, that those variations do not present individual issues that preclude class certification. Instead, because all of the carriers perform the same job under virtually identical contracts, those variations simply constitute common evidence that tends to show AVP's lack of control over certain aspects of the carriers' work. Similarly, the so-called "secondary factors" that must be considered when determining the primary issue in this case -- whether AVP improperly classified the carriers as independent contractors rather than employees -- also may be established for the most part through common proof, since almost all of those factors relate to the type of work involved, which is common to the class. Therefore, we hold the trial court erred in finding that the independent contractor-employee issue is not amenable to class treatment.

Our holding that the independent contractor-employee issue may be determined on a class wide basis through common proof does not entirely resolve the class certification question as to all of the causes of action plaintiffs allege. The trial court also found that plaintiffs' claims of overtime and meal/rest period violations (Lab. Code, §§ 1194, 226.7, 512) were not amenable to class treatment because of wide variation in the amount of time each carrier spent performing the required work, and their varied use of helpers or substitutes. Therefore, the trial court found that individual inquiries would have to be made to determine AVP's liability as to each carrier (assuming, of course, the carriers were found to be

employees). We agree, and affirm the trial court's denial of class certification as to the first, second, and third causes of action. We reverse the order denying certification as to the remaining causes of action because the court's denial as to those claims was based solely upon its determination that the independent contractor-employee issue is not suitable for class treatment. Unless the trial court determines, on remand, that the remaining causes of action present predominately individual issues as to liability (as opposed to damages), the court shall certify the class for the fourth through eighth causes of action.

BACKGROUND

Plaintiffs, who are (or were) newspaper carriers for AVP, filed a lawsuit on behalf of themselves and a putative class of carriers who signed an "Independent Contractor Distribution Agreement" with AVP, alleging claims for (1) failure to pay overtime wages (Lab. Code, § 1194); (2) failure to provide meal periods or compensation in lieu thereof (Lab. Code, §§ 226.7, 512); (3) failure to provide rest periods or compensation in lieu thereof (Lab. Code, § 226.7); (4) failure to reimburse for reasonable business expenses (Lab. Code, § 2802); (5) unlawful deductions from wages (Lab. Code, §§ 221, 223); (6) failure to provide itemized wage statements (Lab. Code, §§ 226, 226.3); (7) failure to keep accurate payroll records (Lab. Code, § 1174); and (8) violation of Business and Professions Code section 17200 (based upon the alleged violations of the Labor Code).

The complaint alleges that AVP publishes the Antelope Valley Press, a general circulation newspaper that is distributed under the auspices of AVP. Most of AVP's customers receive home delivery of the newspaper on a daily basis. The members of the putative class are engaged by AVP to assemble inserts, sections, pre-prints, samples, bags, and supplements and deliver the newspapers as directed by AVP to AVP's customers. The complaint alleges that, even though class

members signed agreements that categorize them as independent contractors, AVP maintains the right to control the performance of their work, and therefore their relationship with AVP is that of employees rather than independent contractors. Thus, the complaint alleges, AVP violated various provisions of California labor laws by failing to pay overtime wages, failing to provide meal and/or rest breaks, failing to reimburse carriers for their reasonable business expenses (such as automobile expenses), making illegal deductions from their wages (for customer complaints or supplies, or by requiring carriers to pay the cost of workers' compensation insurance), failing to provide itemized wage statements, and failing to keep accurate payroll records showing the hours worked by the carriers.

Plaintiffs moved to certify the class. They argued that "[t]he central issue to liability is whether or not the putative class members . . . are 'independent contractors' or 'employees,'" and that this issue can be decided based upon common proof. Noting that the principal test to determine whether a worker is an employee or an independent contractor is whether the principal has the right to control the manner and means by which the worker accomplishes the work, plaintiffs contended they could establish this right to control through the standardized distribution agreements AVP uses, as well as other common evidence.

AVP opposed the motion to certify. Although AVP agreed that the independent contractor/employee issue was a threshold issue and that the primary factor in determining that issue is whether the principal has the right to control the manner and means of accomplishing the work, it argued that determination of that issue was not subject to common proof because the manner and means by which the carriers accomplish their work varies widely. AVP also argued that, even if the independent contractor/employee issue could be determined through common proof, plaintiffs failed to address whether common issues predominate as to each

of the causes of action; it contended that the other elements of those claims require individual proof and therefore class treatment was not appropriate.

In a lengthy and detailed ruling, the trial court denied the motion for certification, finding that "heavily individualized inquiries are required to conduct the 'control test'" to determine whether the carriers are independent contractors or employees, and that the overtime and meal/rest break claims require individualized inquiries due to the wide variation in hours and days worked by the carriers. Plaintiffs timely filed a notice of appeal from the order denying class certification.

DISCUSSION

A. *Standard of Review of a Class Certification Order*

Code of Civil Procedure section 382 authorizes class actions "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (Code Civ. Proc., § 382.) "The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.] 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."' [Citations.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).)

The only element of class certification at issue in this appeal is that of predominance. "The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the

maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.]" (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) "To assess predominance, a court 'must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.' [Citation.] It must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence." (*Id.* at p. 1024.)

Whether the claims plaintiffs seek to assert as a class action have merit is not ordinarily a concern at the class certification stage. (*Brinker*, *supra*, 53 Cal.4th at p. 1023 [""The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious""]."] The class action mechanism is simply a tool to resolve the asserted claims for all parties, including absent class members, in a single action. Thus, a class may be certified even if it is likely that the defendant will prevail on the merits. Certification in such a case would allow the defendant to obtain a judgment in its favor that would be binding on all members of the class (except those who elect to opt out of the class in a timely fashion). (See *id.* at p. 1034 ["It is far better from a fairness perspective to determine class certification independent of threshold questions disposing of the merits, and thus permit defendants who prevail on those merits, equally with those who lose on the merits, to obtain the preclusive benefits of such victories against an entire class and not just a named plaintiff"].)

"On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: '. . . A certification order

generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions.'" (*Brinker*, *supra*, 53 Cal.4th at p. 1022.)

B. *Law Governing the Independent Contractor/Employee Distinction*

All of plaintiffs' claims are based upon their allegation that AVP misclassified the carriers as independent contractors when they are, in fact, employees. In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*), the Supreme Court discussed the test courts have used to determine independent contractor or employee status. The Court explained: "Following common law tradition, California decisions . . . uniformly declare that '[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. . . .' [Citations.] [¶] However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*Id.* at p. 350.) Those secondary indicia include the right to discharge at will, without cause, as well as other factors "derived principally from the Restatement Second of Agency." (*Id.* at pp. 350-351.) Those factors include: "(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e)

the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (*Id.* at p. 351.)

In addition to the Restatement factors, the Supreme Court noted with approval a six-factor test developed by other jurisdictions. In that test, "[b]esides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business." (*Borello, supra*, 48 Cal.3d at pp. 354-355.) The Court cautioned that the individual factors – from the Restatement as well as the six-factor test – "'cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.'" (*Id.* at p. 351.)

C. *Evidence and Argument Related to Independent Contractor/Employee Issue*

In moving for class certification, plaintiffs argued that common proof of AVP's right to control the carriers' work can be found in the standard form agreements AVP requires all carriers to sign, as well as other AVP documents and testimony by AVP managers and plaintiffs' declarations. In opposition, AVP argued that, although it does specify in detail the results it demands of the carriers – the timely delivery of its newspapers in a dry, readable condition -- it does not have a right to and does not control the means and manner of accomplishing that delivery. It contended that many of the facts that plaintiffs pointed to as evidence of control were irrelevant to show control over the means and manner by which the

carriers accomplish the desired result, but it argued that, in any event, there were so many variations in the way in which the carriers did their work that the issue of control is not amenable to class treatment.[1]

1. *Form Agreements as Evidence of Right to Control*

In relying upon the form agreements -- the "Independent Contractor Distribution Agreement," which AVP stipulated were the standard contracts it used during the class period -- as common evidence of AVP's purported right to control, plaintiffs argued that only a "handful of terms" are not pre-printed, and even with respect to those terms, there is no "real negotiation."[2]

The agreements set forth the requirements for what is to be delivered. They require the carriers to deliver the newspapers (and other products that AVP provides),[3] in a safe and dry condition. They prohibit the carriers from delivering any part of the newspaper (such as advertising inserts or coupons) separately, or from inserting into, attaching to, or stamping upon the newspaper any additional matter. They also prohibit the carriers from inserting the newspapers into any imprinted wrapping, covering, or container that has not been approved by AVP, and require carriers to use certain types or colors of bags for certain products.

---

1 We note that AVP does not concede that *any* of the carriers are employees, and instead maintains they are all independent contractors.

2 Plaintiffs did acknowledge, however, that three or four carriers did negotiate at least one of the terms, and obtained different piece rates than other carriers obtained.

3 In addition to the daily newspaper AVP publishes, the agreements require carriers to deliver a weekly publication, the Antelope Valley Express. AVP also requires carriers to include certain items, such as advertising inserts or coupons, with the newspapers they deliver.

The agreements also set forth requirements related to when the newspapers are to be delivered. Some of them require the carrier to pick up their newspapers by a certain deadline each day, and all of them require the carrier to complete delivery by a certain time.

Under the agreements, the carrier is required to furnish the carrier's own vehicle and provide AVP with copies of the carrier's driver's license, social security number, and proof of automobile and workers' compensation insurance. The agreements also state that the carrier has no right, title, interest, or property right to subscriber information, may not disclose to third parties the subscriber list or route records, and must return all records to AVP upon termination of the contract. In addition, the carrier must give AVP an accurate updated subscriber delivery list when requested by AVP, and must cooperate with auditors for the Verified Audit of Circulations or the Audit Bureau of Circulation when requested.

According to plaintiffs, all of these terms evidence AVP's right to control. In its opposition to plaintiffs' motion, AVP did not dispute the existence of the terms (although it did dispute plaintiffs' assertion that there was no real negotiation), but instead argued that the terms are irrelevant to determining whether AVP has the right to control the manner and means of accomplishing the desired result. It contended that the terms setting forth the requirements of what is to be delivered and when it is to be delivered merely define the results for which AVP is contracting, and the remaining terms have no connection to how the delivery is to be accomplished. Moreover, AVP argued that, since the form agreements expressly disclaim any right to control the means and manner in which the carriers accomplish the result (i.e., timely delivery of newspapers in a dry, readable condition), the factfinder will have to look beyond the agreements, at the actual conduct of delivery operations, to determine AVP's control. To that end,

AVP submitted the declarations of 15 carriers[4] and its home delivery manager, as well as deposition testimony from plaintiffs and AVP's circulation operations manager, to show the variations among the carriers in the manner in which they do their work, and argued that because of these variations there is no commonality on the right to control issue.

2. *Other Documents Related to Right to Control*

In addition to relying upon the form agreements to establish AVP's alleged control, plaintiffs pointed to documents known as "bundle tops" or "carrier mail," which typically are prepared by AVP and provided to all carriers each day.[5] The bundle tops inform the carrier about customers' requests regarding the placement of their papers and whether to start or stop delivery to certain customers, and provide instructions about inserts to the newspaper and/or use of colored bags on that day. Similarly, plaintiffs contended that route lists that AVP provides to all carriers show the control AVP exercises, because the lists contain instructions about customer preferences or requests regarding how the newspapers are delivered.[6] Plaintiffs also asserted that "suggestion sheets" and "success sheets" that AVP provides to some (although not all) carriers constitute evidence of AVP's

---

[4] Although AVP collected declarations from more than 50 of its current and former carriers, the trial court limited its submission to 15 carrier declarations.

[5] Plaintiffs submitted several examples of bundle tops, which AVP stipulated were representative of the bundle tops it provided to carriers on a daily basis.

[6] Plaintiffs submitted examples of route lists, which AVP stipulated were representative of route lists it provided to all carriers.

right to control because they give step-by-step instructions about how to complete their jobs.[7]

Although AVP conceded that the bundle tops and route lists it provides to all the carriers include delivery instructions that include directions on how to drive to subscribers' addresses, it submitted testimony from carriers (including plaintiffs) that they are not required to, and many do not, follow those directions. Acknowledging that one of the named plaintiffs testified that she was required to comply with special customer requests, AVP noted that she was the only carrier who so testified, and it submitted testimony from other carriers that there was no such requirement.

3. *Evidence of Conduct Related to Right to Control*

In addition to documentary evidence, plaintiffs pointed to evidence of AVP's conduct to show AVP's control over the carriers.

First, they argued that AVP controls the carriers' performance through its use of customer complaints. Noting that the form agreements allow AVP to impose financial penalties for customer complaints (such as wet, damaged, or missing papers), plaintiffs submitted their declarations attesting to the fact that AVP made deductions from their pay for customer complaints. They also submitted invoices (which AVP stipulated were representative of invoices they provided to all carriers) that reflect those deductions. In addition, they submitted evidence showing that AVP keeps track of customer complaints against each

---

[7] Plaintiffs submitted examples of suggestion sheets and success sheets that AVP stipulated were representative of such sheets that it provided to some, although not all, carriers. We note that all three sheets in the record are virtually identical, all three state at the top "This is your business," and two out of the three also state "The following are merely suggestions."

carrier, informs the carriers of complaints from their customers, and that AVP's home delivery manager would talk to a carrier if he believed the number of complaints the carrier received was too high.

In its opposition, AVP noted that the way customer complaints are treated can weigh in favor of or against a finding of independent contractor status, and argued that commonality is lacking because, although the form agreements provide for a charge against the carrier for customer complaints (which would tend to indicate an independent contractor relationship), the practices have varied among carriers and over time. It presented evidence that some carriers have not always been charged for customer complaints while others have always been charged, that some carriers have negotiated with subscribers regarding their complaints (which would indicate an independent contractor relationship), and that under one of the two form agreements carriers have the option to re-deliver newspapers to resolve customer complaints (which also would indicate an independent contractor relationship).

Second, plaintiffs argued that AVP's monitoring of carriers' work evidenced its control. They submitted evidence that AVP conducts routine field inspections to verify deliveries of complementary newspapers and the weekly newspaper (the Antelope Valley Express), and occasionally conducts field inspections to see if advertisements were properly placed on newspapers that had been delivered. AVP did not dispute that it conducts field inspections. Instead, it contended that monitoring to ensure the desired result is being accomplished does not evidence control over the manner and means of delivery, but that if it does, it is not subject to common proof because the frequency and circumstances of inspections vary from carrier to carrier.

Third, plaintiffs submitted evidence that AVP provides training to some of the carriers, which it contends shows its control. AVP argued that this issue was

not subject to common proof, based upon evidence it provided showing that some carriers had a drive-along with AVP and some did not, and some carriers received training and/or documents on how to make deliveries while others did not. AVP provided evidence, however, that carriers were not required to follow any instructions that were given. Moreover, although two of the named plaintiffs testified that they were instructed on how to fold the newspapers and were required to fold them as instructed, AVP's home delivery manager testified that AVP does not require carriers to fold or throw the newspapers in any particular way.

Finally, plaintiffs argued that AVP's control is demonstrated by evidence that it requires carriers to pick up their newspapers for delivery by a certain deadline, and controls the order in which carriers pick up their newspapers by giving carriers numbers in the order of their arrival at the loading dock. AVP disputed plaintiffs' assertion that its specification is evidence of a right to control, but submitted evidence to show that, even if it could show control, not every carrier signed contracts that included a deadline and some carriers testified that they were free to decide when to pick up their newspapers and/or were not fined or disciplined if they picked them up after the stated deadline. In addition, some of the carriers testified that they could choose whether to arrive early to pick up their newspapers and receive a pick-up number, and that even if they did choose to do so, they were free to leave the area after receiving their pick-up numbers and could do whatever they wish while waiting for their number to be called.

In addition to addressing the evidence that plaintiffs asserted demonstrated AVP's control, AVP presented additional evidence that it contended was relevant to the control issue, but required individual inquiries. For example, AVP submitted evidence showing that carriers are allowed to use helpers or substitutes, that some of them do use helpers or substitutes, and that those carriers decide, in their sole discretion, whom they use, when and how they use them, and what they

pay them. It also contended that to the extent frequency of contact between carriers and AVP employees may evidence control, individual inquiries would be required because the evidence it presented showed that the frequency varied among carriers. It submitted evidence, however, that carriers were not required to check in with AVP or report on their delivery status or to attend meetings.

4. *Evidence Related to Secondary Factors*

Addressing the secondary factors used to determine independent contractor or employee status, plaintiffs contended that many of those factors are subject to common proof.

They submitted evidence that carriers get supplies such as rubber bands and plastic bags from AVP, as well as the newspapers and advertisements the carriers deliver. They also submitted evidence that carriers use AVP's facilities to pick up materials needed for their work, that AVP provides carts that carriers can use to carry the newspapers to their vehicles, and that AVP will, if requested, provide maps of the carriers' routes. They argued that this evidence shows that AVP supplies the instrumentalities, tools, and the place of work for the person doing the work.

Plaintiffs provided evidence that AVP controls the overall newspaper business operations, that delivery of the newspapers is an integral part of its business, and that it holds itself out to the public as the entity responsible for delivery of the newspapers. They also pointed to provisions of the common agreements to show that AVP has the right to terminate carriers at will (on 30 days notice), and that carriers are engaged in prolonged service to AVP. Finally, plaintiffs argued that the carriers' work did not require any specialized skill, relying upon a finding in a case, *Antelope Valley Press v. Poizner* (2008) 162 Cal.App.4th 839 (*Poizner*), in which Division Three of this District affirmed a

decision of an administrative law judge that carriers are employees for purposes of worker's compensation insurance.

In its opposition, AVP argued there was no commonality with regard to several of the factors, based upon evidence it submitted showing that: (1) some carriers delivered other publications (such as the Los Angeles Daily News or the Los Angeles Times) at the same time they delivered for AVP; (2) some carriers have set up formal business entities to conduct their delivery business, or consider their delivery work to be an independent business; (3) some carriers provide their contact information to subscribers and/or deal directly with subscribers regarding complaints or special requests; (4) some carriers have other jobs in addition to their delivery work; (5) some carriers choose to use AVP's facilities to assemble and fold their newspapers while others do not; (6) some carriers purchase supplies from AVP but others choose not to; (7) some carriers take advantage of opportunities to increase their compensation by generating new subscribers, taking on additional routes, using substitutes or helpers efficiently, or avoiding customer complaint charges by re-delivering; (8) some carriers delivered for as little as one day while others delivered for many years; and (9) many contractors, unlike the named plaintiffs, understood they were independent contractors and intended to be independent contractors.

5. *Evidence Related to Other Elements of Plaintiffs' Claims*

Plaintiffs in their moving papers did not address commonality with respect to any issue other than the independent contractor/employee issue, except to argue that once employee status is determined, individual damages may be determined through "efficient and easily managed procedures."

In its opposition, AVP noted that plaintiffs failed to address other elements of their causes of action, and argued that common issues do not predominate as to

some of those elements. It contended that plaintiffs' overtime and meal/rest period claims are not suitable for class treatment, based upon evidence it presented showing that the number of hours and days each carrier worked varied widely. Thus, it argued that individual inquiry would be required to determine if each carrier worked sufficient hours to be entitled to meal or rest breaks or overtime pay. Because this issue goes to AVP's liability in the first instance (i.e., whether there were damages at all) rather than the amount of damages, AVP contended class certification was not appropriate for those causes of action. In addition, AVP contended that plaintiffs' reimbursement claim was not suitable for class treatment because reimbursement is required (assuming employee status) only for expenses that are necessarily incurred, and individual inquiries must be made to determine whether each expenditure was "necessary."[8]

D. *Analysis of the Independent Contractor/Employee Issue*

In denying class certification, the trial court agreed with AVP that no commonality exists regarding AVP's right to control because individualized questions predominate as to who performs the services, when and where they perform the services, and how they perform the services. Many of the court's observations (and AVP's arguments), however, actually point to conflicts in the evidence regarding AVP's right to control rather than individualized questions. For example, the court noted that AVP's home delivery manager declared that AVP does not have a policy or practice to instruct or direct carriers on how to fold

---

[8] At the hearing on the certification motion, counsel for plaintiffs argued that at the very least class members would be entitled to expenses related to the use of their vehicles, which counsel represented constituted 80 percent of the damages related to the reimbursement claim, and which could be computed based upon maps of the routes and rates set under the Internal Revenue Service mileage formula.

and deliver their papers, and some carriers testified that they were never so instructed, but two of the plaintiffs testified that AVP had rules on folding the papers and how to deliver them. Similarly, the court noted that the home delivery manager and some carriers testified that AVP does not require carriers to bag or rubber band the newspapers, but one of the plaintiffs testified that carriers were required to bag them.

Simply put, much of AVP's evidence, upon which the trial court relied, merely contradicts plaintiffs' allegations that AVP had policies or requirements about how carriers must do their jobs. The parties do not argue that some carriers operating under the form agreements are employees while others are not. Both sides argue that AVP has policies that apply to *all* carriers. The difference between the parties is the content of those policies. Plaintiffs argue that the policies are ones that control the way in which the carriers accomplish their work; AVP argues the policies impose certain requirements about the result of the work but allow the carriers to determine manner and means used to accomplish that result. While there may be conflicts in the evidence regarding whether the policies plaintiffs assert exist, the issue itself is common to the class. Similarly, whether the policies that exist are ones that merely control the result, rather than control the manner and means used to accomplish that result, is an issue that is common to the class.[9]

---

[9] Both sides cite to published cases involving newspaper carriers or persons engaged in similar work in which classes were or were not certified. (See, e.g., *Soleto v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639; *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286; *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333; *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72; *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1; *Dalton v. Lee Publications, Inc.* (S.D.Cal. 2010) 270 F.R.D. 555.) Those cases, each of which involve facts and positions unique to the parties, are not of much assistance in this case.

Just as AVP's evidence that the way that the carriers accomplished their work varied widely is evidence of its lack of control over the carriers as a class, much of its evidence regarding the secondary factors -- e.g., that some carriers choose to operate as independent businesses, delivering papers for multiple publishers, that other carriers work at other jobs in addition to delivering for AVP, that some carriers choose to deal directly with subscribers, that some carriers choose to take advantage of opportunities to increase their compensation, and that some carriers choose not to use AVP's facilities to assemble their newspapers or choose not to purchase supplies from AVP -- is evidence that the type of work involved often is done by independent contractors. To be sure, some carriers choose *not* to deliver for multiple publishers, or work at other jobs, or deal directly with subscribers, or take advantage of opportunities to increase their compensation, or they choose to assemble the newspapers at AVP's facilities or to purchase supplies from AVP. But a carrier's employee status cannot be based upon the individual choices the carrier makes, if other choices are available. Rather, the focus of the secondary factors is mostly on the job itself, and whether it involves the kind of work that may be done by an independent contractor, or generally is done by an employee. All of the factors may be determined based upon common proof.

Before we leave this issue, we need to address the *Poizner* case, upon which plaintiffs heavily rely. In their reply brief on appeal, plaintiffs criticize the trial court for failing to address this case, arguing that all of the facts that led the court in *Poizner* to conclude that the carriers were employees are present in this case. *Poizner*, however, was not a class action. It was a review of a decision by the Insurance Commissioner, adopting the proposed decision of an administrative law judge, who concluded that AVP's carriers were employees for purposes of worker's compensation insurance. (*Poizner*, *supra*, 162 Cal.App.4th at p. 842.)

While it *might* be relevant to the merits of plaintiffs' case,[10] the decision has little relevance to whether, on the record before the trial court, plaintiffs' causes of action were amenable to class treatment.

E. *Plaintiffs' Causes of Action*

As noted, plaintiffs did not in their moving papers address commonality as to any issues related to their causes of action other than the independent contractor/employee issue applicable to all of their claims. AVP, on the other hand, submitted evidence showing that the number of hours and days each carrier worked varied significantly, with some of the carriers working fewer than four hours a day and/or seven days a week. The trial court found, based upon this evidence, that individual assessments would have to be made as to each carrier to determine whether, assuming they are found to be employees, they were entitled to meal or rest breaks or overtime pay. Therefore, the court found that those claims are not amenable to class treatment. We agree.

As the Supreme Court has instructed, in assessing whether common or individual issues predominate, the trial court "must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may

---

[10] Because the case involved an administrative mandamus proceeding, review by the trial and appellate courts of the Commissioner's decision was under the substantial evidence test. (*Poizner*, *supra*, 162 Cal.App.4th at pp. 849-850.) Under that test, "courts do not reweigh the evidence. They determine whether there is any evidence (or any reasonable inferences which can be deduced from the evidence), whether contradicted or uncontradicted, which, when viewed in the light most favorable to an administrative order or decision or a court's judgment, will support the administrative or judicial findings of fact." (*Id.* at p. 849, fn. 11.) In contrast, in this case, the trial court is not presented with an administrative decision that it must affirm if supported by substantial evidence. It must decide the issues in the first instance, based upon the record before it.

require individualized evidence." (*Brinker*, *supra*, 53 Cal.4th at p. 1024.) To establish liability for failure to provide meal or rest breaks or overtime pay, plaintiffs must establish that they worked sufficient hours or days to be entitled to such breaks or pay. (See, e.g., Cal. Code Regs., tit. 8, §§ 11010(11)(A) ["No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes"], 11010(12) ["a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours"]; 11010(3)(A)(1) [overtime pay required for "[e]mployment beyond eight (8) hours in any workday or more than six (6) days in any workweek"].) In light of AVP's evidence, it is clear that plaintiffs cannot establish that element of its meal/rest period and overtime claims through common proof.[11] Nor did plaintiffs show how proof of that element could be effectively managed to make class treatment superior to individual actions. Therefore, we conclude the trial court did not abuse its discretion by denying plaintiffs' motion to certify with respect to those claims.

With respect to the remaining claims, the trial court denied certification based solely upon its determination that the independent contractor/employee issue was not amendable to class treatment. In light of our conclusion that the trial court erred in that determination, we must reverse the court's order as to those claims. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436 [order denying class certification must be reversed if based upon improper criteria or incorrect legal assumptions even if there may be substantial evidence to support the court's

---

[11] This is not, as plaintiffs argue, a question of individual determinations of damages. While plaintiffs are correct that the need for individual determinations of damages does not preclude class certification (see, e.g., *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 332-333), the issue here is the need for individual determination of each carrier's *entitlement* to damages, which is a proper ground for denying class certification (see, e.g., *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 756).

order]; *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 829 ["In other words, we review only the reasons given by the trial court for denial of class certification, and ignore any other grounds that might support denial"].)

DISPOSITION

The order denying class certification is affirmed as to the first, second, and third causes of action, and reversed as to the remaining claims. On remand, the trial court shall certify the class as to the fourth through eighth causes of action unless it determines that individual issues predominate as to some or all of them, or that class treatment is not appropriate for other reasons. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARIA AYALA et al., Plaintiffs and Appellants, v. ANTELOPE VALLEY NEWSPAPERS, INC., Defendant and Respondent.	B235484 (Los Angeles County Super. Ct. No. BC403405) (Carl J. West, Judge) ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:*

The opinion in the above-entitled matter filed on September 19, 2012, was not certified for publication in the Official Reports. Good cause appearing, it is ordered that the opinion in the above entitled matter be published in the official reports.

*WILLHITE, Acting P.J. MANELLA, J. SUZUKAWA, J.

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to this action. My business address is 4 Embarcadero Center, Suite 2400, San Francisco, California 94111-4131.

On November 26, 2012, I caused to be served the following document:

PETITION FOR REVIEW

on the interested parties in this action by placing true copies of the document in sealed envelopes as set forth below, addressed as follows:

SEE ATTACHED SERVICE LIST

XXX **VIA FEDERAL EXPRESS**: I placed the document listed above in a sealed Federal Express envelope and affixed a pre-paid air bill, and caused the envelope to be delivered to a FEDERAL EXPRESS agent for delivery;

OR

XXX **VIA FIRST CLASS MAIL:** I caused each envelope with postage fully prepaid to be placed for collection and mailing following the ordinary business practices of Perkins Coie LLP.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed at San Francisco, California, on November 26, 2012.

James Otake

SERVICE LIST

Clerk of the Court California Court of Appeal Second Appellate District, Fourth Division Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	BY U.S. MAIL
Clerk of the Court California Superior Court County of Los Angeles 111 North Hill St. Los Angeles, CA 90012-3014	BY U.S. MAIL
Callahan & Blaine 3 Hutton Ctr. Dr., Ninth Flr. Santa Ana, CA 92707	ATTORNEYS FOR PLAINTIFFS BY FEDERAL EXPRESS
Attorney General of California Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	BY U.S. MAIL
Los Angeles County District Attorney's Office 210 West Temple Street, Suite 18000 Los Angeles, CA 90012-3210	BY U.S. MAIL