IN THE CALIFORNIA SUPREME COURT

No. S206874

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)

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The first issue in this Appeal, as framed by Defendant Antelope Valley Press, Inc. ("Defendant" or "AVP"), is whether "variability in the 'secondary' independent contractor factors preclude[s] class certification". (Reply Brief for the Petitioner ("Reply") at p. 3). In both its Petition for Review and Reply, Defendant repeatedly cited *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*") as allegedly supporting the proposition that variation in secondary factors precludes class certification. Now, however, Defendant barely mentions *Sotelo* and *Ali.* In its Opening Brief on the Merits ("OB"), *Sotelo* is discussed in only two paragraphs (OB at pp. 22, 28) and *Ali* is mentioned only once (OB at p. 22). Plaintiffs explained in detail in their Answer to Petition for Review that the facts of this case are distinguishable from the facts in *Sotelo* and *Ali*, but Defendant denied this in its Petition and Reply, and this Court granted Defendant's Petition for Review.

According to Defendant, there is "a direct conflict between" the Court of Appeal's Opinion in this case and the *Sotelo* and *Ali* cases (Petition for Review ("Pet.") at p. 1) regarding the effect of variation in secondary factors on class certification, and this "conflict affects not only putative

class actions but also all cases involving a challenge to any independent contractor designation". (*Id.* at p. 3). It is this issue, as framed by Defendant, that Plaintiffs address below.

The second issue raised by Defendant in this Appeal is that the Court of Appeal's Opinion "is inconsistent with this Court's decision in *Borello*". (Pet. at p. 8). As explained below, the Court of Appeal correctly followed *S.G. Borello & Sons Inc. v. Dept. of Indus. Rel.* (1989) 48 Cal.3d 341 ("*Borello*"), and Defendant's arguments to the contrary are without merit.

STATEMENT

Plaintiffs are newspaper carriers who filed their Class Action Complaint on December 5, 2008, on their own behalf and on behalf of all others similarly situated, against defendant Antelope Valley Newspapers, Inc. ("AVP") for violations of the California Labor Code and unfair business practices. Plaintiffs' Motion for Class Certification was denied by the Trial Court on August 19, 2011, but that ruling was based on erroneous legal assumptions and improper criteria, and it was reversed in part and affirmed in part by the Court of Appeal.

In reversing the Trial Court's Order, the Court of Appeal applied the correct law governing the independent contractor/employee determination, as stated in *Borello*, 48 Cal.3d at 350 ("whether the person to whom service

is rendered has the right to control the manner and means of accomplishing the result desired"). It carefully considered Plaintiffs' evidence regarding Defendant's right to control and also on the "secondary" indicia of the nature of the service relationship. (Opn. at pp. 8-17). It also correctly noted that these factors "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." (Opn. at p. 8).

The Trial Court committed multiple errors. It ignored Plaintiffs' substantial evidence on AVP's right to control and secondary factors and instead improperly focused on alleged variations in how some carriers did their work. This was improper. The law is clear that the Trial Court was required to focus on the general policies and practices of AVP, not on how some carriers may have responded to those policies and practices. The Court of Appeal corrected this error.

Another fundamental error made by the Trial Court was its reliance on the erroneous legal assumption that Plaintiffs must show actual "pervasive and significant control" by AVP. Based on that erroneous legal assumption, the Trial Court found that AVP's control was not pervasive and significant because of alleged variations in how some carriers performed their work. The Trial Court also applied improper criteria to secondary

factors and ignored the multiple secondary factors which Plaintiffs established. These errors were also corrected by the Court of Appeal.

SUMMARY OF ARGUMENT

Contrary to Defendant's assertions, the Court of Appeal correctly examined the *Borello* right to control factor and secondary factors and determined that substantial common evidence was submitted by the parties on those factors. The Court of Appeal also correctly applied the predominance test for class certification and focused on Plaintiffs' theory of recovery, which is: AVP has policies and practices about how carriers must do their job. Evidence submitted by the parties on AVP's policies and practices was examined by the Court of Appeal, and it concluded, based on that evidence, that those policies and practices constitute a common issue.

Defendant's criticism of the Court of Appeal's use of the term "type of work" is unjustified because that term was not based on some vague supposition, as asserted by Defendant, but rather was used only after the Court had considered the parties' substantial evidence on the right to control factor and the secondary factors. Defendant's objections to the Court's "choices" term is also unfounded because that term correctly reflects the law that alleged variations amongst class members with regard to how they individually respond to an alleged employer's general policies

and practices are not a proper basis for determining class certification.

Defendant seeks to replace the predominance test adopted by this Court for determining class certification – which test was correctly applied by the Court of Appeal – with a new "rule" that precludes class certification if there are variations in any secondary factors. Defendant bases its new proposed rule on *Sotelo* and on *Narayan v. EGL* (N.D. Cal. 2012) 285 F.R.D. 473.

If Defendant's new "rule" is endorsed, it will effectively guarantee that no independent contractor class actions will ever be certified. This would be a disastrous blow to misclassified workers, and it would undermine the policies of the State of California and the federal government which are aimed at combatting misclassification and its harmful effects, including unfair competition for law-abiding-businesses and the denial of rights and benefits to workers.

ARGUMENT

A. THE COURT OF APPEAL CORRECTLY APPLIED THE PREDOMINANCE TEST AND DETERMINED THAT COMMON ISSUES PREDOMINATE

1. There Is Substantial Common Evidence on the Principal Issue of Right to Control

Defendant complains that the Court of Appeal erred when it concluded that common issues predominate, but Defendant fails to address the evidence on common issues which the Court described at length in its Opinion and upon which it based its holding. That evidence was substantial, and it is summarized below.

The key common evidence on both the principal factor of right to control and some secondary factors are the standard contracts that AVP required the carriers to sign.[1] The Court of Appeal specifically pointed to the "form agreements – the 'Independent Contractor Distribution Agreement,' which AVP stipulated were the standard contracts used during the class period." (Opn. at p. 9) (Emphasis added). The Court below spelled out in detail the multiple terms in the standard contracts which evidence AVP's right to control the carriers. Specifically, the Court of

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[1] Defendant admits in its Opening Brief that "*each* of the carriers has signed a delivery agreement with AVP." (Opening Brief ("OB") at p. 2) (Emphasis added).

Appeal noted that the contracts: (1) "set forth the requirements of what is to be delivered"; (2) "require the carriers to deliver the newspapers (and other products that AVP provides) in a safe and dry condition"; (3) "prohibit the carriers from delivering any part of the newspaper (such as advertising inserts or coupons) separately"; (4) "prohibit the carriers ... from inserting into, attaching to, or stamping upon the newspaper any additional matter"; (5) "prohibit the carriers from inserting the newspapers into any imprinted wrapping, covering, or container that has not been approved by AVP"; (6) "require carriers to use certain types or colors of bags for certain products"; (7) "set forth requirements related to when the newspapers are to be delivered ... all of them require the carrier to complete delivery by a certain time"; (8) "required [the carriers] 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 worker's compensation insurance"; (9) "state that the carrier has no right, title, interest, or property right to subscriber information"; (10) "state that the carrier ... must return all records to AVP upon termination of the contract"; (11) "state that ... the carrier must give AVP an accurate updated subscriber delivery list when requested by AVP"; and (12) "state that the carrier ... must cooperate with auditors for the Verified Audit of Circulations or the Audit Bureau of

Circulation when requested." (Opn. at pp. 9-10). The Court of Appeal noted that Defendant does not dispute these common terms in the standard contracts (Opn. at p. 10), and the Court determined that "all of the carriers perform the same job under virtually identical contracts." (Opn. at p. 2).

Defendant does not refute the Court of Appeal's finding that the above contractual terms are common evidence of the most important factor in the employee versus independent contractor determination – the right to control. "The 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." (*Borello,* 48 Cal.3d at 350). That right to control does not have to be complete, rather Plaintiffs only need to show that the alleged employer has "retain[ed] all *necessary* control" over how the workers accomplish their work. (*Id.* at 357) (Emphasis in original).

Defendant states in its Opening Brief that "AVP does not have a uniform approach to negotiating delivery agreements." (OB at p. 2). However, common evidence submitted by Plaintiffs shows that the contract terms, including fees, were not negotiated. One hundred percent of 190 "Check Lists" produced by AVP show that the piece rates either stayed the same or had nothing marked, i.e., there was no increase in the piece rate

paid compared to the amount paid for the same route during the previous contracting period. (Resp. to Special Interrogatory Nos. 63, 8 AA 1582-1772; 2 AA 435:24-436:7). The lack of negotiation regarding piece rates is further demonstrated by AVP's "File Maintenance" forms which AVP stipulated were "typically used by AVP with all Independent Contractor Distribution Agreements during the class period." (4 AA 847-851 and 840:11-14). AVP stipulated that four examples of this form were "representative," and on the line for "New rate: Yes __ No __," the "No" line is checked in each instance. (*Id.*) AVP's employees and representatives and the named plaintiffs confirmed that there was no real negotiation of the terms of the Agreements. Home Delivery Manager Lynn Long, who worked for the Antelope Valley Press for over eight years (9 AA 1779:19-21) was a district manager from the time he began with AVP until August 2008 when he was elevated to Home Delivery Manager. (9 AA 1789:7-12). Mr. Long could not recall any negotiated rates with the carriers except for a limited three or four carriers as to a single item on the 14-page Agreement. (9 AA 1837:5-1838:25, Tab 14).

Additional substantial common evidence of AVP's right to control the carriers was noted by the Court of Appeal, namely, (1) "bundle tops"; (2) "route lists"; and (3) "suggestion sheets" and "success sheets". (Opn. at

p. 11). The Court of Appeal pointed out that "AVP conceded that the bundle tops and route lists it provides to ***all*** the carriers include delivery instructions and directions on how to drive to subscribers' addresses ...". (Opn. at p. 12) (Emphasis added). AVP stipulated that it provided an "Independent Contractor Suggestion Sheet" and an "Independent Contractor Success Sheet" to home delivery carriers (although not to all carriers) during the class period. (Stipulation, ¶ 1; 4 AA 840, 843-846). These documents provide the carriers with step-by-step instructions regarding how to properly do their work from beginning to end, including: "find a parking place," then "get a cart," then "get Bundle Top," "update your route list by your Bundle Top," and "fold efficiently." Under the heading "On The Route," AVP tells carriers to "use Route List," "Check up, not down, after you've delivered," "remove distractions (radio, etc.)" and "update route list and give info to DM." (*Id.*) Defendant does not dispute any of this evidence in its Opening Brief.

The Court of Appeal also considered additional "evidence of AVP's conduct to show AVP's control over the carriers." (Opn. at p. 12). The Court below noted that "the form agreements allow AVP to impose financial penalties for customer complaints (such as wet, damaged or missing papers)" and further noted that "Plaintiffs submitted their

declarations attesting to the fact that AVP made deductions from their pay for customer complaints." (Opn. at p. 12). Plaintiffs submitted exemplars of carrier invoices showing these deductions, and the Court noted that "AVP stipulated [the exemplars] were representative of invoices they provided to ***all*** carriers". (Opn. at p. 12) (Emphasis added). Plaintiffs also submitted evidence of "AVP's monitoring of carriers' work", and the Court noted that "AVP did not dispute that it conducts field inspections." (Opn. at p. 13).

The Court below also considered, as further proof that common issues predominate, the fact "that AVP does not concede that *any* of the carriers are employees, and instead maintains they are all independent contractors." (Opn. at p. 9, fn. 1) (Emphasis in original). This is important common proof, and this Court has held that such uniform company-wide policies constitute proof that common issues predominate:

> The court specifically noted [as the basis for its finding that common issues predominate] plaintiffs' evidence that defendant classified its [assistant managers] and [operating managers] exempt without any exception... The predominance of the defendant's class-wide exemption is evidenced by the fact that ... no single class member has ever received overtime compensation. The class-wide policy does not vary from store to store, or employee to employee.

(*Sav-On Drug Stores, Inc. v. Sup. Ct.* (2004) 34 Cal.4th 319, 322) (Emphasis added).

In addition to the foregoing, Plaintiff submitted the following common evidence showing that AVP controls the manner and means of how the carriers accomplish their work, as follows:

(1) AVP set the exact time by which the carriers are required to deliver the newspapers. (1 AA 82 and 2 AA 361, 375, 379; 8 AA 1774; 9 AA 1829:12-25, 1830:14-20, 1966:10-13).

(2) AVP required carriers to arrive at AVP's loading dock by a certain deadline to pick up the newspapers. (1 AA 83-84 and 2 AA 375, 360; 7 AA 1429-1572; 4 AA 820:2-14; 3 AA 471, 582-706; 2 AA 441:6-14, 305:6-306:4, 9 AA 2002:11-19, 2007, 2004:14-19, 2005:11-23; 2 AA 441; 9 AA 1991:4-6, 1997:7-24, 2003:1-19).

(3) AVP required carriers to use certain types and colors of bags for home delivery of newspapers. (1 AA 96:14-27; 84:1-13 and 7 AA 1576, 2 AA 455:4-456:8, 9 AA 1841:11-1842:22, 1843:17-25, 1844:1-6, 1871, 2 AA 374, 7 AA 1578, 9 AA 1845:12-1846:25, and 1872).

(4) AVP controlled the order in which carriers pick up newspapers at the loading dock by giving numbers to the carriers in the order of their arrival at the dock. (1 AA 86:1-

10 and 2 AA 280:24-26; 2 AA 222:26-28, and 1 AA 102:13-17; 9 AA 1863:20-24, 2000:10-2001:22).

(5) AVP trained the carriers. (1 AA 94:1-25 and 9 AA 1823:12-1828:8, and 1866).

Thus, it is clear the Court of Appeal found that there was substantial common evidence relating to the key issue in this case – Defendant's right to control how the carriers accomplish their work.

2. The Court of Appeal Correctly Analyzed Common Issues in the Context of Plaintiffs' Theory of Recovery

In addition to considering common evidence on the principal factor of right to control, the Court of Appeal also correctly examined Plaintiffs' theory of recovery in deciding whether common or individual issues predominate, in compliance with this Court's directive in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1025:

> Presented with a class certification motion, a trial court must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. (Emphasis added).

The Court of Appeal correctly focused on Plaintiffs' theory of recovery, pointing to "plaintiffs' allegations that AVP had policies or requirements about how carriers must do their jobs." (Opn. at p. 18). The Court of Appeal then properly analyzed whether there was evidence of

those policies:

> 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. (Opn. at p. 18) (Emphasis in original).

The above analysis by the Court of Appeal is consistent with this Court's statements that courts should properly "consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Sav-On,* 34 Cal.4th at 327).

Defendant does not attack the Court of Appeal's finding that AVP's policies constitute a common issue, and, in fact, Defendant does not even mention the word "policies" in its Opening Brief despite their importance in Plaintiffs' allegations and in the Court of Appeal's Opinion. The Court of Appeal's focus on AVP's policies was correct and is consistent with *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, where the plaintiff's theory of recovery also involved defendant's uniform policies applicable to the workers. The *Jaimez* court stated:

> Although individual testimony may be relevant to determine whether these policies unduly restrict the ... drivers as a whole ..., the legal question to be resolved is not an individual one. To the contrary, the common legal question remains the overall impact of [respondent's] policies on its drivers ...

(*Id.* at 1299) (quoting from *Ghazaryn v. Diva Limousine Ltd.* (2008) 169 Cal.App.4th 1529, 1531).

As in *Jaimez*, the Court below found that a common legal and factual issue was whether AVP's policies "control the way in which the carriers accomplish their work" (as Plaintiffs assert) (Opn. at p. 18), or whether instead they "impose certain requirements about the result of the work but allow the carriers to determine manner and means used to accomplish that result" (as Defendant asserts). (*Id.*) The Court of Appeal further found that there was common evidence, as described above, on this issue.

In sum, the Court of Appeal correctly applied the predominance test, correctly focused on Plaintiffs' theory of recovery, and correctly reviewed the common evidence of AVP's policies and practices. After applying the correct tests and considering the evidence, the Court of Appeal found that common issues predominated and that they were supported by substantial common evidence.

B. THE COURT OF APPEAL ALSO CORRECTLY FOUND THAT SUBSTANTIAL COMMON EVIDENCE EXISTED REGARDING THE *BORELLO* SECONDARY FACTORS

1. The Court of Appeal's Use of the Phrases "Type of Work" And "Choices" Reflect its Careful Consideration of the Evidence on Many Secondary Factors, And Was Not a Restriction on the Analysis of Secondary Factors, as Erroneously Suggested by Defendant

a. Defendant Mischaracterizes the Court's "Type of Work" Language

Defendant incorrectly argues that the Court of Appeal dispensed with all secondary factors based solely on an unsupported assumption about "type of work." In fact, the Court correctly analyzed the secondary factors based on evidence submitted by both parties. Indeed, the Court of Appeal provided a separate heading devoted to this very issue, namely: "4. Evidence Related to Secondary Factors" (Opn., p. 15), and expressly noted he evidence submitted by Plaintiffs on the following six secondary factors: (1) "AVP supplies the instrumentalities, tools, and the place of work for the person doing the work"; (2) "AVP controls the overall newspaper business operations"; (3) "delivery of the newspapers is an integral part of [AVP's] business"; (4) "AVP has the right to terminate carriers at will (on 30 days' notice)"; (5) "the carriers are engaged in prolonged service to AVP"; and (6) "the carriers' work did not require any specialized skill". (Opn. at p. 15). Plaintiffs' evidence supporting these secondary factors was substantial

and included:

(1) AVP provided supplies and tools to carriers to use in their delivery work. (1 AA:84:14-85:27 and 9 AA 1987:1-8, 1987:10-16, 2002:11-25, 1994:9-15; 1 AA 101:1-3; 2 AA 221:26-28; 2 AA 279:26-28; 9 AA 1859:1-1862:13; 9 AA 1984:12-19; 4 AA 840 and 843-845; 2 AA 360 and 373; 4 AA 840; 4 AA 919, 926, 936).

(2) AVP supplied the facilities for carriers to pick up materials needed for their work, including newspapers, advertisements, bags and Bundle Tops. (1 AA 93:1-25 and 2 AA 360, 375; 9 AA 1928:13-21, 1859:14-21, and 1985:13-20).

(3) Newspaper delivery is an integral part of AVP's business. (1 AA 90:1-91:19 and 9 AA 1918:6-22; 1919:20-22; 1920:10-12; 1923:21- 1924:19, 1903:15- 1904:6, 1907:21-23 and 1908:12-20; 1908:25- 1909:23, 1909:15-18; 1925:14-17, 1926:25 - 1927:24, 1928:13-22).

(4) AVP controls the overall newspaper business operations. (1 AA 88:1-89:20 and 2 AA 456:10-28, 9 AA 1864:10-24).

(5) AVP had the right to terminate the carriers at will. (1 AA 88-89 and 2 AA 365, 382, 9 AA 2016:14-2017:17-25, and 2018:12-15).

(6) Delivery of newspapers does not require specialized knowledge or skill. *AVP v. Poizner* (2008) 162 Cal.App.4th 839, 855 ("Delivering papers requires no particular skill.") (1 AA 92:23-27).

(7) The carriers were engaged in prolonged service to AVP. (1 AA 95:1-14; 2 AA 366, and 381).

Defendant completely ignores the Court of Appeal's express findings that there was common evidence on numerous secondary factors and instead argues that "[t]he key premise of the decision below is 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.'" (OB at p. 13) (Emphasis added). This "key premise" argument is clearly erroneous given the Court of Appeal's reliance on common evidence on at least six of *Borello's* secondary factors in holding that common issues predominated.

Defendant devotes four pages of its Opening Brief (pp. 15-18) erroneously arguing that the only evidence considered by the Court of Appeal on secondary factors was "the type of work" and that it failed to make any findings as to whether common evidence existed as to those factors. (OB at p. 15). For example, with regard to the secondary factor of "right to discharge at will, without cause," Defendant claims it was

dispensed with by the Court of Appeal based solely on "type of work", but the Court pointed to the standard contract terms which gave AVP the right to discharge the carriers at will. (Opn. at p. 15). With regard to the "supplier of tools and place of work" secondary factor, Defendant does not deny that AVP supplied tools and the place of work for the carriers, and it ignores the evidence submitted on this secondary factor and the fact that the Court below pointed to that evidence in the Opinion. (Opn. at p. 15). With regard to the "length of relationship" and "method of payment" secondary factors, Defendant ignores the fact that the standard contract terms show that the contracts are typically for one year and that the method of payment is uniform, i.e. carriers are paid by piece rate.[2] (OB at p. 17).

Defendant also omits to mention that the Court of Appeal discussed its "type of work" finding in the context of evidence submitted by Defendant:

> 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

[2] 1AA 95:1-14; 2AA 366 and 381 (length of relationship); 2AA 360, ¶ C, 367, 374 (method of payment).

> their compensation, and that some carriers choose not to use AVP's facilities to assemble their newspapers or 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. (Opn. at p. 19) (Emphasis added).

Further, as described above, the Court of Appeal had before it standard contracts that spelled out the details of the carriers' job duties, and those contracts constitute further evidence of the type of work done by the carriers. As the Court said, "all of the carriers perform the same job under virtually identical contracts.[3] (Opn. at p. 2).

Defendant's assertion that "there is no *inherent reason* why any particular type of work can only be performed by employees or independent

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[3] Many cases have treated a defendant's standard contracts as common evidence of the rights and obligations of class members. In *Dalton v. Lee Publications* (S.D. Cal. 2010) 270 F.R.D. 555 affirmed (9th Cir. Cal. 2010) 625 F.3d 1220, newspaper carriers brought a class action alleging that they were employees and not independent contractors and that they were entitled to Labor Code benefits. The court granted class certification, explaining that "**the rights and obligations of the class members and defendants are set forth in two sets of substantially identical contracts**" and "**the contracts set forth the contours of defendant's control over the class.**" (*Id.* at 563) (Emphasis added). Also, in *Bradley v. Networks Int'l LLC* (2012) 211 Cal.App.4th 1129, workers claimed in a class action that they were misclassified as independent contractors. Class certification was deemed appropriate where the workers were required "to sign a standard contract." (*Id.* at 1135). The court found that **the standard contract "had specific time and place job requirements that all workers were required to follow" and "these common facts . . . would constitute the focus of the proof of the independent contractor/employee issue.**" (*Id.* at 1147). (Emphasis added).

contractors" again misconstrues the Opinion. (OB at p. 27) (Emphasis added). Neither Plaintiffs nor the Court below ever suggested that class certification in this case can be based upon "inherent reasons." This argument is, again, based on Defendant's erroneous interpretation of the Opinion. Rather, the Court of Appeal considered Plaintiffs' evidence on six secondary factors, and also Defendant's evidence on secondary factors, and only after that review of the evidence did the Court make its "type of work" statement. In fact, the Court of Appeal clearly stated that it had before it "evidence" regarding "the type of work involved." (Opn. at p. 19).

In sum, there was no derogation of duty to consider all evidence relevant to secondary factors, and the Court of Appeal did not simply arrive at its findings and conclusions based solely on "the type of work performed".

b. Defendant Also Misconstrues the Court's "Choices" Language

In a further strained reading of the Opinion, Defendant misconstrues the following single sentence in the Court of Appeal's Opinion: "But a carrier's employee status cannot based upon the individual choices the carriers makes if other choices are available." (Opn. at p. 19). Defendant incorrectly asserts that by using this "choices" language, the "Court of Appeal attempted to justify its narrow focus on the type of work performed

– and its failure to acknowledge the significance of the other secondary factors." (OB at pp. 22-23). Defendant's interpretation of the Court's "choices" language is wrong because, as explained above, the Court of Appeal did not "narrowly focus on the type of work performed." The Court below fully considered all evidence on secondary factors, both pro and con regarding employee vs. independent contractor status, in compliance with *Borello* (the right to control and other secondary factors are the proper test of an employment relationship). (*Borello*, 48 Cal.3d at 350). As shown above, the Court of Appeal did not whittle down the secondary factors to a mere consideration of "type of work".

Defendant argues that the nature of a service relationship "necessarily depends on the 'choices' made by the parties to that relationship." (OB at p. 23). However, case law is clear that alleged variations amongst some class members with regard to how they individually respond to an alleged employer's general policies and practices are not a proper basis for determining class certification. As explained in Jaimez,181 Cal App.4th 1286, 1300:

> [Defendant] submitted 25 declarations to support its contention that [Plaintiff's] claims actually "require extensive factual inquiry into each [worker's] practices and daily activities." The trial court focused on the *merits* of the declarations, evaluating the contradictions in the parties' responses to the company's uniform policies and practices, not the policies and practices themselves. The determination

> of whether to certify a class does not contemplate an evaluation of the merits.... (Emphasis added in part).

The Court of Appeal properly focused on AVP's policies and practices, and not alleged variations or individual choices in how some carriers responded to those policies and practices. There can be no doubt that in every company there are always individual responses to uniform, classwide company policies and practices. Thus, an improper focus on those individual responses, as Defendant proposes, would effectively defeat all class actions.

The Trial Court incorrectly focused on variations in how some carriers responded to AVP's policies and practices, stating that "[a] class action would force the Court to investigate how each carrier performed his or her job, and as a result, the class action mechanism would not promote judicial economy." (Trial Court Order, AA 4397:16-18). This was based on an erroneous legal assumption which the Court of Appeal corrected when it properly focused on Plaintiffs' theory of recovery and on AVP's policies. The Court of Appeal also properly considered the substantial common evidence of those policies as well as evidence on the principal right to control factor and the secondary factors. Based on that analysis and evidence, the Court of Appeal concluded that "the trial court shall certify the class ... unless it determines that individual issues predominate as to

some or all of them, or that class treatment is not appropriate for other reasons." (Opn. at p: 22).

C. DEFENDANT SEEKS TO REPLACE THE PREDOMINANCE TEST WITH A NEW "RULE" THAT PRECLUDES CLASS CERTIFICATION IF THERE ARE VARIATIONS IN ANY SECONDARY FACTORS

The real crux of Defendant's argument is that, notwithstanding its consideration of substantial common evidence on the principal right to control factor and at least six secondary factors, the Court of Appeal should have denied class certification because there were allegedly some variations in a few of *Borello's* secondary factors.

Defendant believes that the evidence it submitted of alleged variations in some secondary factors should have – alone – established the predominance of individual issues and required denial of class certification. Defendant's argument is based on *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639, which Defendant described in its Petition for Review as follows:

> [*Sotelo*] 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.)
(Petition at pp. 1-2) (Emphasis added).[4]

Defendant seeks to replace the predominance test, which requires a comparison and weighing of common and individual issues, with the *Sotelo* approach it described in the above quote, which does not compare and weigh common and individual issues, but instead requires denial of class certification if any individual issues are present. Defendant's new proposed test should be rejected because the *Sotelo* court's reasoning regarding secondary factors and class certification – as interpreted by Defendant – is erroneous.

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[4] Defendant stated in its Petition for Review and in the "Issues Presented" section of its Opening Brief that the Court of Appeal's decision also conflicts with *Ali v. U.S.A. Cab, Ltd.* (2009) 176 Cal.App.4th 1333 regarding secondary factors, but in fact the *Ali* decision does not center on secondary factors, and Defendant does not argue in its Opening Brief that it does. Defendant offers only a short one-paragraph description of the *Ali* case on page 22 of its Opening Brief and nothing more. The basis for denial of class certification in *Ali* was "common questions pertaining to the *fact* of damages do not predominate.... There can be no cognizable class unless it is first determined that members who make up the class have sustained the same or similar damage." (*Id.* at 1349, 1350). (Emphasis in original). Defendant does not claim that there is any issue in this case regarding the fact of damages. The *Ali* court made no finding that any particular secondary factor was variable or that variable secondary factors precluded class certification. The *Ali* court, however, improperly applied a "pervasive and significant control test" instead of the correct "right to control" test in denying class certification, but that is not one of the issues presented in this appeal.

D. THE ERRONEOUS HOLDINGS OF *SOTELO* AND *NARAYAN*

1. *Sotelo* Failed to Properly Apply the Predominance Test

On page one of its Opening Brief, Defendant describes the *Sotelo* court's decision to deny class certification as being based on a finding "that the secondary factors in *Borello* ... vary materially among members of the class." (OB at p. 1). Defendant, however, does not mention a critical aspect of that decision until page 22 of its Brief, which is *Sotelo* affirmed the denial of class certification on the basis of alleged variation in only a few secondary factors. Defendant fails altogether to mention that the *Sotelo* court actually found there was commonality on the principal factor of right to control and on other secondary factors, but nonetheless affirmed denial of class certification based upon variation in only a few secondary factors. *Sotelo's* holding conflicts with the firmly established test for predominance which was recently reaffirmed in *Brinker,* 53 Cal.4th 1004, 1021:

> 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." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238 [102 Cal.Rptr. 1, 497 P.2d 225]; accord, *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 [17 Cal.Rptr. 3d 906, 96 P.3d 194].) (*Id.* 1021) (Emphasis added).

The *Sotelo* court departed from the well-established predominance

test in several ways. First, it did not properly determine if the common issues were numerous or substantial. It is firmly settled that the principal factor for determining employee status is the right to control the manner and means of how the worker accomplishes his or her work,[5] and the *Sotelo* court expressly found that the evidence submitted by the parties "demonstrated little variance as to the issue of Respondent's control." *Sotelo,* 207 Cal.App.4th at 657.[6] Thus, the most important factor indisputably constituted a common issue, and yet the *Sotelo* court gave it no weight in deciding class certification because it concluded that "these aspects are not likely to be the focus of this litigation." (*Id.* at 657). This conclusion was wrong because it is "black letter" law that a putative employer's right to control is the principal factor in independent contractor vs. employee cases, and thus, that factor would certainly be the focus of litigation.

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[5] *Borello*, 48 Cal.3d at 350.

[6] The parties' evidence in *Sotelo* was described as "portions of deposition transcripts, various documents produced during discovery, and attorney declarations", and also declarations of carriers and employees. (*Sotelo*, 207 Cal.App.4th at 646).

The *Sotelo* court further erred by improperly adding a new requirement to the predominance test in independent contractor (IC) cases, namely, "the degree to which the factor [is] likely to be an issue of actual controversy at trial." (*Id.* at 657). Under this new requirement, the *Sotelo* court concluded that the "degree" of "actual controversy" of the principal factor of right to control would be low – because it was a common issue with little variation – and so assigned it no weight in determining class certification. The *Sotelo* court's "actual controversy" requirement is wrong, and the correct test, as stated in *Brinker*, is to compare "the issues which may be jointly tried" against "those requiring separate adjudication", and then determine if the common issues "are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants". (*Brinker*, 53 Cal.4th at 1021). The predominance test does not provide for diminishing the weight of common issues that might be lightly contested at trial. The predominance test does not provide that, the stronger a common issue is, the less importance it will have in deciding class certification. *Sotelo's* "actual controversy" requirement is erroneous because it is not in line with the predominance test, and because it creates the following perverse result: The more convincing the evidentiary showing is on the principal right to control factor, the less weight that factor will be given in deciding if class

certification is appropriate.

With regard to the secondary factors, the *Sotelo* court admitted that "some of them appear to be common across the proposed class," but then ignored them and focused only on variations in just four secondary factors: "(1) Whether the one performing services is engaged in a distinct occupation of 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,* 207 Cal.App.4th at 657-658). Under the predominance test, the *Sotelo* court was required to identify the common issues (right to control and some secondary factors), then compare them to the individual issues (the four variable secondary factors), and then determine if those common issues are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the parties. The *Sotelo* court failed to engage in this analysis. Instead, it simply pointed to alleged variability in "only a few of the factors" and decided that class certification was precluded on that basis. (*Id.* at 660). This was error because the predominance test does not require an absence of individual issues, to the contrary, it assumes there will be some issues "requiring separate adjudication" and that those individual issues must be compared to the common issues. "[T]he established legal standard

for commonality ... is comparative ... comparing the 'issues which may be jointly tried' with 'those requiring separate adjudication' ... and we consistently have adhered to that approach." (*Sav-On,* 34 Cal.4th at 339) (Emphasis added). The *Sotelo* court erroneously failed to do this comparison and did not determine if the common issues were relatively numerous or substantial in comparison to the alleged individual issues.

Further, this Court has unequivocally stated that "individual issues do not render class certification inappropriate so long as such issues may effectively be managed." (*Id.* at 334). The *Sotelo* court also erroneously failed to meet this requirement and did not analyze whether individual issues might be effectively managed.

In sum, Defendant's reliance on *Sotelo* is mistaken as that court failed to abide by basic and firmly established law regarding the predominance test and regarding management of individual issues in class actions.

2. *Narayan* Also Failed to Correctly Apply the Predominance Test

In addition to *Sotelo*, Defendant cites *Narayan v. EGL, Inc.* (N.D. Cal. Sept. 7, 2012) 285 F.R.D. 473 ("*Narayan*") three times in its Opening Brief.[7] (OB at pp. 16, 21, 29). Like *Sotelo*, *Narayan* failed to correctly

[7] Defendant also cited to and quoted *Narayan* in its Petition for Review at pp. 13-14.

apply the predominance test and denied class certification in an IC class action based on variation in a single secondary factor. As in *Sotelo*, the *Narayan* court acknowledged that there was substantial common evidence on the principal factor of right to control:

> Plaintiffs and the putative class members each entered a form contract titled "Agreement for Leased Equipment and Independent Contractor Services" .... Drivers were also bound by the "Safety & Compliance Policy Manual for Independent Contractors" ... Defendants' policies required drivers to purchase and wear a uniform with the company logo and required that all vehicles be painted white, bear the company logo in specified places, and be no older than five (later, seven) years old. Drivers were required to follow certain instructions in performing assignments, including, in some instances, standard operating procedures that incorporated contractual commitments to customers. In addition, drivers carried out their assignments using company-provided packing and shipping supplies, recorded pick-ups and deliveries using company-standardized documentation procedures, and used specific electronic tracking systems. [Defendant] also specified other aspects of the drivers' operations, such as types of insurance carried and minimum coverage levels and accident reporting protocols.

Id. at 475.

The *Narayan* court expressly found "that [the defendant company] has standardized *many if not all* aspects of its relationship with [the workers]." (*Id.* at 480) (Emphasis added). However, like *Sotelo*, the *Narayan* court gave no weight to this important common issue in deciding whether class certification was appropriate. It reduced this principal factor to a footnote (*Id.* at 478), and then, without any authority, went on to

pronounce that "one of the core issues" and "the central question" in an IC case is "whether a given [worker] can be said to be engaged in a distinct business". (*Id.* at 479). That was an incorrect statement of law.

Fifteen secondary factors in IC cases were identified by this Court in *Borello*,[8] and their importance was described as less significant than the principal factor of right to control: "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 350. *Borello* did not say that the secondary factor of "whether the one performing services is engaged in a

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[8] The fifteen secondary factors are: (1) The right to discharge at will, without cause; (2) whether the one performing services is engaged in a distinct occupation or business; (3) 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; (4) the skill required in the particular occupation; (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the services are to be performed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is a part of the regular business of the principal; (9) whether or not the parties believe they are creating the relationship of employer-employee; (10) the alleged employee's opportunity for profit or loss depending on his managerial skill; (11) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (12) whether the service rendered requires a special skill; (13) the degree of permanence of the working relationship; (14) whether the service rendered is an integral part of the alleged employer's business; and (15) whether the alleged employer "exercises pervasive control over the operation as a whole." (*Borello,* 48 Cal.3d at 350, 351, 355, 356.)

distinct occupation or business" is "one of the core issues" or that it constitutes the "central question" in IC cases. Rather, *Borello* held that it is only one of fifteen "secondary" factors. Only one secondary factor was singled out in *Borello* as more significant than the others, this was the "right to discharge at will" factor. The remaining secondary factors – including the "distinct occupation" factor – were referred to as only "[a]dditional factors." *Id.* at 350-351. Thus, it was error for the *Narayan* court to conclude that the "distinct occupation" secondary factor is the "central question" in IC cases.[9]

As in *Sotelo*, the *Narayan* court failed to compare the common issues with the individual issues and failed to make a finding based on that

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[9] Another danger of *Sotelo* and *Narayan* is that they open the door to the courts inventing or adopting new secondary factors, then finding they are variable and denying class certification. Defendant's Opening Brief illustrates this danger in the following statement: "The trial court denied a motion to certify a class, noting variations among the members of the putative class in numerous secondary factors, including whether the carriers use substitutes to perform their service, when they perform their services, how they perform their services, whether they do other work, and whether they have established separate business entities." (OB at pp. 1-2). Three of these items are not secondary factors identified in *Borello* ("when [the carriers] perform their services;" "how [the carriers] perform their services"; and "whether [the carriers] do other work"). Another item - "whether the carriers use substitutes" – is also not mentioned in *Borello* as one of the secondary factors. The *Sotelo* case further illustrates this problem because it erroneously identified "whether the classification of independent contractor is bona fide" as a secondary factor; but that is not one of the secondary factors mentioned in *Borello*. (*Sotelo,* 207 Cal.App.4th at 657).

comparison as to whether or not the common issues were numerous or substantial. The *Sotelo* and *Narayan* courts were required to engage in that comparison and predominance analysis, but they did not, and instead they adopted a "sudden death" rule for IC cases. Under that rule, class certification in IC cases is precluded if variance is found in a few secondary factors (or even one secondary factor) – even if numerous or substantial common issues are present, including the principal factor of right to control.

The *Narayan* court relied heavily on *Spencer v. Beavex, Inc.* (S.D. Cal., Dec. 15, 2006) 2006 U.S. Dist. LEXIS 98565, which likewise denied class certification in an IC case based on variation as to only one of *Borello's* secondary factors. The *Spencer* court found that at least eight of the *Borello* secondary factors "may be capable of resolution on a class basis." *Id.* at 45.[10] But it then focused on variations in only one of those secondary factors – "whether drivers are engaged in an occupation or business distinct from that of Defendant" (*Id.* at 45-46) – and lept to the

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[10] Those eight secondary factors were: "These include, *inter alia*, whether the work of drivers is part of the regular business of Defendant; whether drivers or defendant supply the instrumentalities, tools, and place for doing the work; the driver's investment in the equipment; whether the services rendered require special skill; 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; what opportunity drivers have for profit or loss depending on their managerial skills; the degree of permanence of the working relationship; and the method of payment, whether by time or by the job." *Id.* at 45.

erroneous conclusion that this single secondary factor constituted "the core dispute in this case" and the "central question in this case". *Id.* at 46. The *Spencer* court did not even mention the principal factor of right to control. In spite of finding that at least eight of the secondary factors constituted common issues, the *Spencer* court did not, as required by the predominance test, compare these multiple common issues to the single individual issue and determine if the common issues were substantial or numerous. Just like the *Sotelo* and *Narayan* courts, the *Spencer* court failed to properly apply the predominance test and instead applied a test which precludes class certification when there is variation in even just one of *Borello's* secondary factors, and regardless if the principal factor of right to control is a common issue supported by substantial common evidence, or if some secondary factors also constitute common issues supported by common evidence.

3. Defendant Proposes A New Test for Certification of IC Class Actions, Where Common Issues "Do Not Matter" And A Single Individual Issue Precludes Certification

Under *Sotelo/Narayan*, as interpreted by Defendant, if variances are found in a few secondary factors (or even one), this will automatically render individual issues predominant, and class certification will be precluded in IC cases. This is exactly the interpretation Defendant asks this Court to adopt in its attempt to overturn the Court of Appeal's decision: "*Sotelo* ... affirmed the denial of class certification, holding that variability

in the 'secondary' independent contractor factors **precluded class certification**". (Reply Brief at p. 3) (Emphasis added). Defendant's counsel is presently advancing this same argument in other trial courts:

> [T]he *Sotelo* court held that, because each factor in the independent contractor test is relevant to the overall classification inquiry, "**[e]ven if the factor is not dispositive, it is a factor which might be litigated**, requiring individual testimony at trial." 207 Cal.App.4th at 658. Thus, **variability as to several of the "secondary factors" rendered individual issues predominant, precluding class certification**. (Emphasis added).[11]

Thus, under *Sotelo/Narayan,* if there is a variable non-dispositive secondary factor that might be litigated in an IC case, then individual issues are "rendered predominant" and class certification is "precluded". Defendant made this same argument in its Petition for Review stating: "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." (Petition, at p. 20) (Emphasis added).

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[11] Memorandum of P's&A's in Support of Defendants The McClatchy Company and McClatchy Newspaper, Inc.'s Motion for Decertification, filed 1/7/13 in Sacramento County Superior Court Case No. 34-2009-00033950-CU-OE-GDS. MJN, Ex. 2, at p. 44:15-6:7.

Further, under *Sotelo/Narayan*, class certification will be denied even where common issues are found to exist (including the principal issue of right to control) because little or no weight will be ascribed to common issues. Defendant's counsel is also advancing this exact argument in other trial courts:

> In *Sotelo*, the trial court found little variation regarding control; **this was no obstacle to denial of certification**. *Sotelo*, 207 Cal.App.4th at 656-58. Many of [the common proofs on the control factor] are not disputed; as such, **they weigh but lightly in the predominance analysis**. *Id.* at 657 (trial court assessing predominance correctly considered "the degree to which the factor was likely to be an issue of actual controversy at trial."). (Emphasis added.)[12]
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> * * * * * *
>
> Because differences in a few factors can be dispositive, **it does not matter that some common evidence might exist** regarding some of the other factors. The court in *Sotelo*, for example, held that a proposed class of independent contractor newspaper carriers was correctly not certified where the evidence varied as to four of the fourteen secondary factors. (Emphasis added.)[13]

Thus, Defendant asks this Court to adopt the *Sotelo/Narayan* decisions, which hold (as interpreted by Defendant) that the presence of common evidence on some factors "does not matter," and commonality on the principal factor of right to control is "no obstacle to denial of

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[12] *Id.*, Ex. 2 at p. 51:7-11.

[13] Memo. of P's&A's in Support of Motion by Defendants to Strike Plaintiffs' Class Allegations, filed on 11/9/12 in Fresno County Sup. Ct. Case No. 08CECG04411KCK, *Becerra, et al. v. The McClatchy Co., et al.* (MJN, Ex. 14 at p. 527:16-19).

certification." Moreover, Defendant asks the Court to hold that if variation exists as to just one of *Borello's* secondary factors, class certification must be denied. Such an argument flies in the face of this Court's well-established predominance test. Adoption by this Court of the erroneous analysis and holding of the *Sotelo/Narayan* courts would be a devastating blow not only to Plaintiffs in this IC class action, but also to all plaintiffs in class actions involving multi-factor tests. Plaintiffs urge this Court to not strike such a death-knell to independent contractor class actions.

E. *SOTELO/NARAYAN* ALSO ERRED BY FAILING TO FOCUS ON THE PLAINTIFFS' THEORY OF RECOVERY AND ON DEFENDANT'S POLICIES AND PRACTICES

The *Sotelo/Narayan* courts also erred by failing to focus on the plaintiffs' theory of recovery in deciding class certification and by instead focusing on the individual conflicting facts in the defendant's declarations. In *Jaimez*, the Court of Appeal criticized the trial court for "focusing on the potential conflicting issues of fact or law on an individual basis, rather than evaluating 'whether the *theory of recovery* advanced by the Plaintiffs is likely to prove amenable to class treatment.'" (*Jaimez,* 181 Cal.App.4th at 1299, quoting *Ghazaryn*, 169 Cal.App.4th at 1531).[14] (Emphasis in original).

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[14] *Jaimez* was cited with approval by this Court in *Brinker Rest. v. Sup. Ct.* (2012) 53 Cal.4th 1004 at 1024, 1033, and 1040.

The *Sotelo/Narayan* courts also erred by not focusing on the defendant's policies and by failing to assign significant weight to those policies in deciding whether to grant class certification. This Court has made clear that class certification is proper and suitable where there are allegations of (and evidence of) a uniform policy that applies to all class members:

> Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment. (See, e.g., *Jaimez v. Daiohs USA, Inc., supra,* 181 Cal.App.4th at pp. 1299-1305; *Ghazaryan v. Diva Limousine, Ltd., supra*, 169 Cal.App.4th at pp. 1533-1538; *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1205-1208 [76 Cal.Rptr. 3d 804].)

Brinker, 53 Cal.4th at 1033.

In *Sotelo/Narayan* and also in *Spencer* (all wage and hour cases), the plaintiffs alleged a uniform policy that was applicable to all workers and submitted common evidence in support of same, yet those courts erroneously did not focus on those policies in deciding whether to grant class certification.[15] Instead, as explained in previous sections, the courts improperly focused on alleged variations of a few (and even just one) secondary factors.

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[15] In *Narayan*, the court actually found "that [the defendant company] has standardized many if not all aspects of its relationship with [the workers]," yet denied class certification. (*Narayan,* 285 F.R.D. at 480) (Emphasis added).

F. DEFENDANT'S CONCERNS ABOUT THE HANDLING OF EVIDENCE CAN BE MANAGED BY THE TRIAL COURT

Defendant worries that "there would come a time" when AVP would be precluded from presenting "specific facts" or from "cross-examining the members who participated in [a survey]" and that this would violate their due process rights. First, these imagined future evidentiary issues are speculative, and Plaintiffs did not submit any survey in support of their class certification motion. Second, the handling of evidence is a case management issue, and there are many possible ways in which the parties' evidence can be managed. As explained by this Court in *Sav-On,* 34 Cal.4th at 339-340:

> Courts seeking to preserve efficiency and other benefits of class actions routinely fashion methods to manage individual questions. For decades "[t]his court has urged trial courts to be procedurally innovative" (*San Jose, supra*, 12 Cal.3d at p. 453) in managing class actions, and "the trial court has an obligation to consider the use of ... innovative procedural tools proposed by a party to certify a manageable class." [Citations omitted.] Such devices permit defendants to "present their opposition, and to raise certain affirmative defenses."

This Court listed a number of management tools used by various courts: "Common fund ... bifurcation/subclasses ... administrative processing ... questionnaire ... single-issue hearings ... separate judicial or administrative miniproceedings on individualized issues.... individualized hearings [for] ... special matters." (*Id.* at 340). These and other tools could

be used by the trial court in this case to manage the parties' evidence and to protect their due process rights.

G. IF *SOTELO/NARAYAN* ARE ENDORSED, THEN CLASS CERTIFICATION WILL NEVER BE GRANTED IN IC CASES

Defendant admits that, under *Sotelo/Narayan*, there are only two scenarios in which an IC class action can be certified. The first is where "there is no record evidence of material variation as to the putative employer's right to control or as to the relevant secondary factors". (OB, p. 29). Such a scenario is based on the erroneous *Sotelo/Narayan* reasoning that there can be no class certification in IC cases if any individual issues are present. As explained above, that reasoning is contrary to the predominance test. Moreover, encountering an IC case where there are no variations in the principal control factor or any of the *Borello* secondary factors is tantamount to encountering Halley's Comet. Defendants in IC cases will almost certainly be able to produce some evidence of variation as to one of *Borello's* fifteen secondary factors. For example, a few carriers out of thousands who bought rubber bands from someone other than the newspapers. Of course, this is why Defendant and the business community embrace *Sotelo/Narayan* – those cases, if endorsed, will effectively guarantee that no IC class action will ever be certified.

Defendant's second proposed scenario is an IC case where "many of

the secondary factors are susceptible to common proof, and those factors are sufficient to allow the Court to determine the independent contractor status as a matter of law." (OB, p. 29) (Emphasis added). This second scenario is also contrary to well-established California law. Defendant is proposing that courts engage in a summary adjudication determination at the class certification stage on the ultimate fact of employee status. This flies in the face of the long-settled rule that the merits of the putative class's claims (including the claim that class members are employees) are not to be considered at the class certification stage: "The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious." (*Sav-On,* 34 Cal.4th at 326). This Court also stated in *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438:

> The procedures governing federal class actions under *Rule 23* do not permit inquiries into the merits of class claims for relief.... In *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156 [94 S. Ct. 2140, 40 L.Ed 2d 732] (*Eisen*), the United States Supreme Court explained that "nothing in either the language or history of *Rule 23* ... gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

Contrary to the above authorities, Defendant asks the Court to hold that plaintiffs in IC class actions must make a showing at the class certification stage sufficient to establish that they are employees as a matter of law. Such a draconian burden has never been contemplated at the class

certification stage and, in fact, has been soundly rejected. Thus, Defendant's two proposed scenarios for class certification under *Sotelo/Narayan* are contrary to established law, and they further reveal why *Sotelo/Narayan* should be rejected.

In sum, the *Sotelo/Narayan* decisions virtually guarantee that class certification will be denied in any independent contractor class action. No longer will trial courts be required to follow the predominance test and compare the common issues to the individual issues and determine if the common issues are so substantial or numerous that a class action would be advantageous to the judicial process and to the litigants. No longer will trial courts be required to focus on the plaintiff's theory of recovery or on the defendant's uniform policies and practices applicable to the workers. Instead, under *Sotelo/Narayan*, the analysis will be reduced to a single question: Are there any variations in a few secondary factors (or even one)? If the answer to that question is yes, then class certification is precluded.[16] This *Sotelo/Narayan* approach is clearly unjust – it prejudices plaintiffs, it

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[16] This is exactly the argument defense counsel are making at the trial court level. For example, see Defendant's Motion to Decertify the Class, filed on 12/6/12, in San Diego Superior Court Case No. 37-2009-00082322-CU-CE-CTL, *Espejo, et al. v. The Copley Press, Inc., et al.*: "A federal district court recently decided that class certification would be improper where the evidence varied among class members as to even a single IC factor. *Narayan v. EGI, Inc.*, 2012 WL 4004621 (N.D. Cal. Sept. 7, 2012), at *7." (MJN, , Ex. 1, at p. 17:1-4) (Emphasis added).

improperly reduces the importance of common issues, and it results in improper denial of class certification.

H. CLASS ACTIONS ARE CRITICAL AND NECESSARY ENFORCEMENT TOOLS IN COMBATING MISCLASSIFICATION OF WORKERS AS INDEPENDENT CONTRACTORS

1. This Court's Decision Will Have A Significant Impact on The Treatment of Workers in Numerous Industries

Class action litigation is one of the most effective, if not the most effective, tool for ferreting out companies who misclassify workers and prevent them from obtaining benefits under federal and state labor laws. Plaintiffs raised this issue with the Trial Court in their Motion for Class Certification:

> The Antelope Valley Press's mislabeling of the carriers as independent contractors (which mislabeling continued even after issuance of the *AVP v. Poizner* decision) has resulted in systemic non-compliance with California labor laws, making these class claims ideally suited for class treatment. This sort of systemic avoidance of the law by mislabeling employees as independent contractors has been the target of state and federal government legislative and enforcement efforts. (See New York Times 2/8/10 article "U.S. Cracks Down on 'Contractors' as a Tax Dodge.") The State of California has officially called such mislabeling part of the "underground economy" and has blamed the mislabeling practice for creating an uneven playing field for companies that abide by the law and pay payroll taxes and Labor Code benefits. (See California EDD's Information Sheet "Employment Development Department Underground Economy Operations" (12-08) (Internet) and EDD's "Annual Report, Fraud Deterrence and Detection Activities" June 2007 at p. 19.)

(1AA 53:6-9, 24-28).

The *Sotelo* decision, if endorsed, would impact businesses beyond the newspaper industry, and Defendant confirmed that *Sotelo* is far-reaching in its Petition for Review:

> The *Sotelo* Court's understanding of the relationship between class certification principals 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 a variation in the secondary factors, not what the specific variations were. (Petition at p. 14) (Emphasis added).

Defendant further admitted in its Petition for Review that "the conflict [between *Sotelo* and the lower court's decision] affects not only putative class actions but also all cases involving a challenge to any independent contractor designation." (Pet. at p. 3) (Emphasis added).

Misclassification of workers as independent contractors is a serious problem in numerous industries. The State of California and the federal government have identified the following industries as being particularly prone to misclassifying employees: (1) health care, high tech, trucking (2000 Study commissioned by the U.S. Department of Labor, MJN, Ex. 3 at p. 74); (2) construction, janitorial, home health care, child care, transportation and warehousing, meat and poultry processing (February 2010 Annual Report of the White House Task Force on the Middle Class, MJN, Ex. 6 at p. 343); and (3) agriculture, car wash, construction, garment manufacturing, auto body repair, pallet manufacturing, and restaurant (EDD

Annual Report to the California Legislature Re: Fraud Deterrence and Detection Activities, June 2011, MJN, Ex. 8 at p. 419).

If the *Sotelo/Narayan* cases are endorsed, misclassified workers in the above-described wide range of industries, as well as other industries, will find it difficult, and likely impossible, to obtain remedies under the Labor Code through class actions. Because class actions are the only viable means by which misclassified workers can obtain meaningful remedies, it is vital that this Court reject Defendant's interpretation of *Sotelo/Narayan*.

2. The Misclassification of Workers Has A Negative Impact On Workers And On Society At Large

As Plaintiffs argued in their Motion for Class Certification quoted above, both the State of California and the federal government have sounded the alarm about misclassification of workers as independent contractors and have made serious efforts to combat that fraudulent practice.

California's Employment Development Department ("EDD") has been condemning and combating misclassification of employees as independent contractors for more than a decade, and it has identified misclassification as part of the State's "underground economy." In its June 2007 Annual Report to the California Legislature on Fraud Deterrence and Detection Activities, the EDD examined the courier industry and stated that

"a common practice in this industry is misclassification of employees as independent contractors." (MJN, Ex. 7 at p. 385). In an effort to crack down on this and other fraudulent business practices, the EDD created the Underground Economy Operations (UEO), and its express mission "is to reduce unfair business competition and protect the rights of workers." (EDD website, MJN, Ex. 10 at p. 442). The EDD's *Information Sheet* points out that "when businesses operate in the underground economy, they gain an unfair competitive advantage over businesses that comply with the law. This causes unfair competition in the marketplace and forces law-abiding businesses to pay higher taxes." (MJN, Ex. 11 at p. 444).

In its June 2011 Annual Report to the California Legislature, the EDD reiterated its serious concerns regarding the underground economy. That Report describes the State's Joint Enforcement Strike Force which "combats the underground economy by pooling resources and sharing data among the State agencies that enforce licensing, labor, and tax laws." (MJN, Ex. 8 at p. 418).

The federal government has been equally concerned about the negative impact of the misclassification of workers. A February 2000 study commissioned by the U.S. Department of Labor found that misclassification over a nine year period resulted in a loss in revenue, due to under-reporting of unemployment insurance taxes, of approximately $198 million.

Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs, February 2000, by Planmatics, Inc., commissioned by the USDOL ("Study"). (MJN, Ex. 3 at p. 75). The Study also found that "a more significant item of concern is that annually there are estimated to be some 80,000 workers who are entitled to UI [unemployment insurance] benefits and are not receiving them." (*Id.*) The Study warned about serious problems caused by the growing wave of misclassification of workers:

> A new breed of accountants and attorneys has emerged to counsel employers on how to convert employees into ICs [independent contractors] to reduce payroll costs and avoid complying with labor and workplace legislation. (*Id.*)

The study noted that "a substantial portion of the work force, including ICs, lives without job security and workplace protections." (*Id.* at p. 79). "When employees are misclassified as independent contractors, Social Security, worker's compensation, unemployment insurance revenues and their social protections are significantly reduced, and compliance with other labor and employment laws are avoided to their detriment." (*Id.*) The Study concluded:

> Misclassification imposes real hardships on workers, both in the near term and in the future. In the near term it deprives the worker of the social protections that have long been commonplace in the workplace. Chief among these is unemployment insurance and workers' compensation.
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> **********
>
> One of the major issues of concern to federal and state policymakers at the labor department, as well as many

> employers, is the misclassification of employees as ICs. This particular practice is not only denying many workers protections and benefits they are entitled to, but it also has important implications for the financial viability of UI trust funds. (*Id.* at pp. 163, 166).

A July 2006 U.S. Government Accountability Office Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate, entitled *Employment Arrangements* ("2006 GAO Report") described how misclassification can negatively affect workers' health and government health programs:

> To the extent that contingent workers neither receive health or pension benefits nor qualify for unemployment or workers' compensation, they may have to turn to needs-based programs, such as Medicaid, to make ends meet. To the extent that this occurs, costs formerly borne by employers may be shifted to federal and state public assistance budgets. (MJN, Ex. 4 at p. 214.)

The U.S. Government Accountability Office also addressed the problem of misclassification in a separate August 2009 Report to Congressional Requesters, entitled *Employee Misclassification* ("2009 GAO Report"). This Report reiterated the negative impact of misclassification on federal and state tax revenues, and it described the many rights and privileges that are lost to workers who are misclassified:

- FLSA [Fair Labor Standards Act], which establishes minimum wage, overtime, and child labor standards for employees;
- the Americans with Disabilities Act of 1990 and the Age Discrimination in Employment Act of 1967,

which protect employees from discrimination based on disability or age;

- the Family and Medical Leave Act of 1993, which provides various protections for employees who need time off from their jobs because of medical problems or the birth or adoption of a child; and
- the National Labor Relations Act, which guarantees the right of employees to organize and bargain collectively. (MJN, Ex. 5 at pp. 249-250).

In February 2010, the *Annual Report of the White House Task Force on the Middle Class* ("2010 Task Force Report") concluded that misclassification of workers constitutes a threat to good jobs for the middle class, and that it is therefore vitally important that the misclassification of workers be combated:

> **Strong enforcement of employment and labor laws is critical** to ensuring that, as the economy begins to recover, the jobs we create are good jobs that can support a middle-class family. **If labor standards are not enforced**, too many workers will be poorly positioned to improve their economic status. Working men and women in many low-wage jobs will never earn enough to support themselves and their families. Noncompliant employers will be able to avoid responsibility for providing fair wages and safe workplaces by improperly relegating many employees to independent contractor status, which also unfairly puts the vast majority of employers – those who play by the rules – at a competitive disadvantage. (MJN, Ex. 6 at p. 342) (Emphasis added).

In December, 2011, the U.S. Department of Labor's Wage and Hour Division and California's Secretary of Labor entered into an agreement to share information and coordinate efforts to fight against the improper classification of employees as independent contractors. The deputy

administrator of USDOL's Wage and Hour Division, Nancy J. Leppink, stated in a press release: "This memorandum of understanding helps us send a message: We are standing together with the state of California to end the practice of misclassifying employees." (MJN, Ex. 12 at p. 446).

The above discussion shows that both the State of California and the federal government are very concerned about the negative impact on workers and on society at large that is caused by the misclassification of workers as independent contractors. They both have adopted the policy of taking serious action to combat this damaging practice. As stressed in the above 2010 Task Force Report, "strong enforcement of employment and labor laws is critical." California and federal government agencies, however, have only limited resources to combat misclassification, and thus, court cases - especially class actions - are key enforcement tools.

3. The Courts Are an Important, And Often the Only Means, by Which to Combat Misclassification

The 2009 GAO Report explained how federal agencies have limited ability to combat misclassification because of resource limitations: "IRS faces challenges with these compliance efforts because of resource constraints ..." (MJN, Ex. 5 at p. 242); and "WHD [Wage and Hour Division of D.O.L.] officials told us that their ability to conduct targeted investigations in recent years has been limited by reductions in agency

resources combined with consistently high levels of workers' complaints about possible labor law violations." (*Id.* at pp. 259-260).[17] This limited enforcement ability of the government heightens the importance of class actions to remedy the misclassification of workers.

The importance of court actions in the battle against misclassification is made clear in California Labor Code § 226.8 which provides that if "a court issues a determination that a person or employer has engaged" in willful misclassification of workers, that person or employer "shall be subject to a civil penalty" of between $5,000-$15,000 "for each violation." (Emphasis added). Class actions in particular have been recognized by this Court as important enforcement tools: "[Class] actions often produce 'several salutary by-products, including ... aid to legitimate business enterprises by curtailing illegitimate competition...." (*Linder,* 23 Cal.4th at 445.) "Trial courts remain under the obligation to consider 'the role of the class action in deterring and redressing wrongdoing." (*Id.* at pp. 445-446.)

The 2006 GAO Report also pointed out the importance of court cases in the fight against misclassification of workers: "When employers

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[17] An April 11, 2013 NPR report investigated the problem of misclassification of workers in the construction industry; one construction contractor who classifies his workers as independent contractors stated that "nobody seriously worries about enforcement. There aren't enough IRS agents in the world to make a dent." (MJN, Ex. 9 at p. 440).

have misclassified workers as independent contractors, workers may need to go to court to establish their employee status and their eligibility for protection under the laws." (MJN, Ex. 4 at p. 200) (Emphasis added). As explained above, the decision of the Court below – which correctly applied the predominance test – will enable workers to seek remedies under the Labor Code and to combat misclassification through class actions, while the *Sotelo/Narayan* cases, if endorsed, would effectively foreclose misclassified workers from pursuing their rights in class actions.

I. INDIVIDUAL ACTIONS ARE NOT A VIABLE ALTERNATIVE TO CLASS ACTIONS

Businesses that engage in misclassification often argue that workers who claim to be misclassified are free to pursue their claims individually in administrative proceedings or in individual civil actions. Defendant makes this same argument in its Opening Brief (OB at pp. 32-33). This Court has observed that individual actions are typically not a viable substitute for class actions:

> While the mere denial of certification does not, as a legal matter, terminate the right of any plaintiff to pursue claims on an individual basis, it is likely to have that net effect when there has been injury of insufficient size to warrant individual action. (Emphasis added.)
>
> *Linder,* 23 Cal.4th at p. 441 (Emphasis added).

Further, history shows that individual actions are ultimately of no

value in combatting and remedying the misclassification of workers. Newspaper companies in California have thumbed their noses at the government agencies and courts which have ruled that their carriers are employees and not independent contractors, and these companies have continued to misclassify workers with impunity. During the past twenty-seven years, California courts have routinely found that newspaper carriers are employees and not independent contractors, but the newspaper industry has defied these decisions and continued unabated their misclassification of carriers.[18] The six cases described below all involved similar circumstances, and they all found that the newspaper carriers were employees.

In *Brose v. Union-Tribune Publishing Co.* (1986) 183 Cal.App.3d 1079, the court pointed to the following factors that established employee status: the carriers signed an agreement that gave either party the right to terminate with 30 days' notice and entitled the carriers to use substitutes;

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[18] Class actions brought by misclassified newspaper carriers are currently pending against The Sacramento Bee (*Sawin v. The McClatchy Company*, SCSC Case No. 34-2009-00033950-CU-OE-GDS); The Fresno Bee (*Becerra v. The McClatchy Company*, FCSC Case No. 08 CE CB 04411 AMS); The San Diego Union Tribune (*Espejo v. The Copely Press, Inc.*, SDSC Case No. 37-2009-00082322-CU-OE-CTL [Consolidated with Case No. 37-2010-00085012-CU-OE-CTL]); and The North County Times (*Dalton v. Lee Publications*, 270 F.R.D. 555 (2010, S.D. Cal.). Also *see* Defendant's Petition for Review for a list of pending misclassification class actions brought by newspaper carriers, at p. 15, fn. 2.

the company gave information to the carriers about where to deliver the papers; and carriers bought poly bags and rubber bands from the company.

In *Freedom Newspapers, Inc., dba The Register Newspaper v. Workers' Compensation Appeals Board of the State of California* (1985) 50 Cal. Comp. Cas. 328, the newspaper carrier was also found to be an employee, and the court noted the following factors: the carrier signed an agreement labeling him an independent contractor; the customers paid the newspaper directly; company representatives verified the carriers' deliveries; the carrier did not have a substantial investment in the business; and the carriers' work did not require a particular skill or license.

Likewise, in *Los Angeles Herald Examiner v. WCAB* (1993) 58 Cal. Comp. Cas. 224, the carrier was found to be an employee where the carrier worked under a contract labeling him as an independent contractor; each morning the company gave the carriers special instructions on route changes; the carriers had little investment in equipment; and the carriers' work required no special skills.

In 1996, in *Gonzalez v. WCAB*, 46 Cal.App.4th 1584, the California Court of Appeal also found the carriers to be employees and noted the following factors: the form contract labeled carriers as independent contractors; either party could terminate the contract at any time by giving two weeks' written notice; the carriers made no capital investment aside

from their vehicles; the company provided bags and rubber bands; and no special skills were required to deliver newspapers.

In *The Press-Enterprise v. WCAB* (1997) 62 Cal. Comp. Cas. 214, the Court of Appeal affirmed the employee status of the carriers "despite [the] existence of an 'independent contractor' agreement." (*Id.* at *1.) The Court found that the carriers had no special skills; every morning the company would provide the carriers with a report notifying of route changes; the carriers did not have a capital investment aside from their vehicles; rubber bands and plastic bags were supplied by the company; and the carriers could use substitutes.

Most recently, in 2008, the California Court of Appeal in *Antelope Valley Press v. Poizner,* 162 Cal. App. 4th 839 ("*Poizner*"), found Defendant's carriers to be employees under the following facts (among others): the carriers all sign the same basic form contract labeling them as independent contractors; either party can terminate the contract without cause with 30 days' notice; the carriers do not have a substantial investment in their delivery duties other than their time and the vehicles they use; the carriers have the right to use substitutes; AVP's employees verify the carrier's deliveries; AVP sets the delivery deadlines; subscribers pay their fees to AVP not to the carriers; the carriers are charged a fine for customer

complaints; and AVP provides daily delivery instructions to the carriers.[19]

In spite of twenty-seven years of individual cases deciding that newspaper carriers are employees and not independent contractors, the newspaper industry continues to misclassify the carriers.[20] This demonstrates that individual court actions by misclassified employees do nothing to combat the practice of misclassifying workers. Businesses brush these individual cases off and continue to misclassify their workers. Class actions, on the other hand, are something businesses cannot brush off as they provide both injunctive relief and significant statutory penalties.

That class actions are the only effective enforcement tools for misclassified workers is amply demonstrated here. As described above, in *Poizner*, the court – applying all of the *Borello* factors – found that AVP carriers are employees and not independent contractors. The multiple

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[19] Defendant states that "some [cases] find newspaper delivery persons properly classified as independent contractors." (OB at p. 21). Defendant lists seven such cases, but only two of them are California cases, and they were decided in 1932 and 1963. There is one 9th Circuit case cited, but it was decided in 1972. The remaining four cases are from Illinois (1984), Minnesota (1996), Maine (1979), and Connecticut (1943). (*Id.*)

[20] In a pending class action, *Sawin, et al. v. The McClatchy Co., et al.*, Sacramento County Case No. 34-2009-00033950-CU-OE-GDS, the newspaper defendant described this common practice: "As to distribution, The [Sacramento] Bee follows a longstanding national newspaper practice – contracting with independent contractors and carriers and Large Distributors – for newspaper delivery." (MJN, Ex. 13 at p. 465, 4:11-13). Also see fn. 18, *supra*.

factors relied upon in *Poizner* are the same factors that exist today in the relationship between AVP and its carriers. Those factors were spelled out in Plaintiffs' Motion for Class Certification and Plaintiffs' Appendix of Additional Facts and Evidence in Support of Motion for Class Certification.[21] Defendant, after the Court of Appeal found that it is the carriers' employer, did nothing in response. It continued business as usual at the expense of its carriers who continue to not be provided the protections they are entitled to under the law. The only mechanism to ensure that Defendant's carriers are provided the rights they are entitled to is through a class action. Only the hammer of reimbursement, statutory penalties, and injunctive relief can serve as the necessary catalyst to force compliance. Without class actions, companies such as AVP will continue to misclassify workers so long as they can save money by doing so.

Incredibly, Defendant does not even acknowledge the existence of *Poizner*, and this silence constitutes further proof that individual cases have no impact and companies ignore them. As far as AVP is concerned (as reflected in its Opening Brief), *Poizner* does not even exist. In light of AVP's own conduct in ignoring a 2008 individual action which found that its carriers are employees, Defendant's argument that "class treatment is not necessary" should be given no credence whatsoever. (OB at p. 32). Class

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[21] 1 AA 49-68, 81-96.

actions are indeed necessary – they cannot be ignored by Defendant or other companies, and they will allow misclassified workers to have their day in court to obtain remedies they are entitled to under the Labor Code and to combat misclassification.

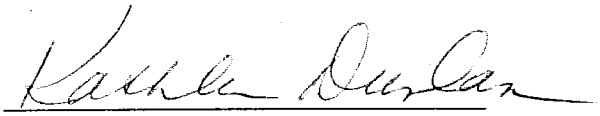
CONCLUSION

The judgment of the Court of Appeal should be affirmed.

DATED: April 29, 2013

Respectfully Submitted,

CALLAHAN & BLAINE, APLC

By: 

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CERTIFICATE OF WORD COUNT

CALIFORNIA RULES OF COURT, RULE 14 (c)(1)

The text of Appellants' Opening Brief consists of 13,843 words as counted by the WordPerfect for Windows, Version 13, word processing program used to generate the brief, exclusive of the cover, title page, table of contents, table of authorities, and this certificate of word count.

DATED: April 29, 2013

Respectfully Submitted,

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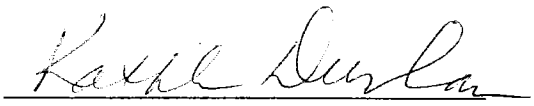
By: 

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PROOF OF SERVICE

Ayala, et al., v. Antelope Valley Newspapers, et al.
Court of Appeal Case No. B235484
Supreme Court Case No. S206874

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 3 Hutton Centre Drive, Ninth Floor, Santa Ana, California 92707.

On **April 29, 2013,** I served the foregoing document(s) entitled:

ANSWER BRIEF ON THE MERITS

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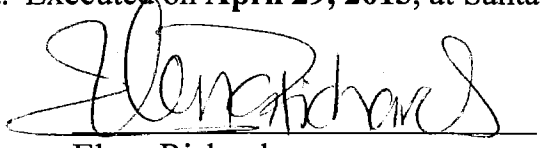
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **April 29, 2013**, at Santa Ana, California.



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