

IN THE CALIFORNIA SUPREME COURT

No. S206874

MARIA AYALA, et al.,
Plaintiffs and Appellants,

v.

ANTELOPE VALLEY NEWSPAPERS, INC.,
Defendant and Respondent.

SUPREME COURT
FILED

APR 30 2013

Frank A. McGuire Clerk

Deputy

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)

MOTION FOR JUDICIAL NOTICE; [PROPOSED] ORDER

CALLAHAN & BLAINE, APLC
Daniel J. Callahan (State Bar No. 91490)
Michael J. Sachs (Bar No. 134468)
Kathleen L. Dunham (Bar No. 98653)
Michael J. Wright (Bar No. 231789)
3 Hutton Centre Drive, Ninth Floor
Santa Ana, California 92707
(714) 241-4444; Fax (714) 241-4445
kdunham@callahan-law.com
mwright@callahan-law.com

Counsel for Appellants,
MARIA AYALA, ROSA DURAN, and OSMAN NUÑEZ,
on their own behalf and on behalf of all others similarly situated

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Santa Ana, California 92707

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kdunham@callahan-law.com

mwright@callahan-law.com

Counsel for Appellants,
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REQUEST FOR JUDICIAL NOTICE

TO ALL PARTIES AND TO THEIR ATTORNEYS OF

RECORD:

NOTICE IS HEREBY GIVEN that pursuant to California Rules of Court, rules 8.520(g) and 8.252(a) and Evidence Code sections 452, 453, and 459, Plaintiffs and Appellants Maria Ayala, Rosa Duran, and Osman Nuñez (“Appellants”) hereby move and request that the Court take judicial notice of the following documents, attached as Exhibits 1 through 13 to the concurrently filed Declaration of Michael J. Wright:

- Exhibit 1. Notice of Motion and Motion to Decertify the Class; Memorandum of Points and Authorities in Support filed in San Diego Superior Court case *Espejo et al., v. The Copley Press, et al* SDSC case number 37-2009-00082322-CU-OE0CTL on December 6, 2012.
- Exhibit 2. Memorandum of Points and Authorities in Support of Defendants The McClatchy Company and McClatchy Newspapers, Inc.’s Motion for Decertification filed in Sacramento Superior Court case *Sawin, et al., v. The McClatchy Company, et al.*, SCSC case number 34-2009-00033950-CU-OE-GDS on January 7, 2013.

Exhibit 3. *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, (February 2000) Planmatics, Inc.'s report commissioned by the US Department of Labor, available, as of April 19, 2013, at the Department of Labor, Employment and Training Administration website: www.doleta.gov.

Exhibit 4. U.S. Government Accountability Office Report to the Ranking Minority Member, Committee on Health, Education, Labor, and Pensions, U.S. Senate (July 2006) *Employee Misclassification: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-09-717, available, as of April 19, 2013, at U.S. Government Accountability Office website: www.gao.gov.

Exhibit 5. U.S. Government Accountability Office Report to Congressional Requesters (August 2009) *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention*, GAO-09-717, available, as of April 19, 2013, at the U.S. Government Accountability Office

website: www.gao.gov.

- Exhibit 6. Annual Report of the White House Task Force on the Middle Class (February 2010), available, as of April 19, 2013, at The White House website:

www.whitehouse.gov.

- Exhibit 7. California Employment Development Department Annual Report *Fraud Deterrence and Detection Activities* (June 2007) available, as of April 19, 2013, at the Employment Development Department website:

www.edd.ca.gov.

- Exhibit 8. California Employment Development Department Annual Report *Fraud Deterrence and Detection Activities* (June 2011) available, as of April 19, 2013, at the Employment Development Department website:

www.edd.ca.gov.

- Exhibit 9. The transcript of radio broadcast *Texas Contractors Say Playing By The Rules Doesn't Pay* by Wade Goodwyn first broadcast on NPR on April 11, 2013 and available, as of April 19, 2013, at the National Public Radio website: www.npr.org.

- Exhibit 10. California Employment Development Department (“EDD”) website regarding Underground Economy Operations (2010) available, as of April 25, 2013 at the EDD’s website: www.edd.ca.gov.
- Exhibit 11. EDD *Information Sheet* regarding Employment Enforcement Task Force (November 2009) available, as of April 25, 2013 at the EDD’s website: www.edd.ca.gov.
- Exhibit 12. News Release Number 12-0257-SAN (February 9, 2012) from the U.S. Department of Labor’s Wage and Hour Division and a true and correct copy of the Memorandum of Understanding to which it refers, available, as of April 25, 2013 at the U.S. Department of Labor’s website: www.dol.gov/whd.
- Exhibit 13. Defendants’ Memorandum of Points and Authorities in Support of Motion to Strike Class Allegations filed in Sacramento Superior Court case *Sawin, et al., v. The McClatchy Company, et al.*, SCSC case number 34-2009-00033950-CU-OE-GDS on February 15, 2011.
- Exhibit 14. Memorandum of Points and Authorities in Support of

Motion by Defendants to Strike Plaintiffs' Class
Allegations filed in *Becerra, et al., v. The McClatchy
Company, et al.*, FCSC case number 08-CECG-04411-
KCK on November 9, 2012.

This request is made on the following grounds:

- (1) The documents are described, under penalty of perjury, to be true and correct copies of the originals in the Declaration of Michael J. Wright, attached hereto.
- (2) The materials offered by Appellants are relevant to the issues raised in Appellants' Answer Brief On The Merits.

This request is based on this Notice, the accompanying Memorandum of Points and Authorities, the supporting Declaration of Michael J. Wright, Exhibits 1 through 14 attached to the Declaration, and such other matters as may properly come before the Court. The materials submitted with this Motion were not presented to the trial court.

April 29, 2013

Respectfully Submitted,

MICHAEL J. WRIGHT
Counsel for Plaintiffs and Appellants,
MARIA AYALA, ROSA DURAN, and
OSMAN NUÑEZ

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Appellants hereby request that this court take judicial notice of materials relied upon in drafting the Answer Brief on the Merits.

The materials include:

1. Notice of Motion and Motion to Decertify the Class;
Memorandum of Points and Authorities in Support filed in San Diego Superior Court case *Espejo et al., v. The Copley Press, et al* case number 37-2009-00082322-CU-OE0CTL on December 6, 2012.
2. Memorandum of Points and Authorities in Support of Defendants The McClatchy Company and McClatchy Newspapers, Inc.'s Motion for Decertification filed in Sacramento Superior Court case *Sawin, et al., v. The McClatchy Company, et al.*, case number 34-2009-00033950-CU-OE-GDS on January 7, 2013.
3. *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, (February 2000)
Planmatics, Inc.'s report for the US Department of Labor.

4. U.S. Government Accountability Office Report to the Ranking Minority Member, Committee on Health, Education, Labor, and Pensions, U.S. Senate (July 2006) *Employee Misclassification: Improved Outreach Could Help Ensure Proper Worker Classification.*
5. U.S. Government Accountability Office Report to Congressional Requesters (August 2009) *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention.*
6. Annual Report of the White House Task Force on the Middle Class (February 2010).
7. California Employment Development Department Annual Report *Fraud Deterrence and Detection Activities* (June 2007).
8. California Employment Development Department Annual Report *Fraud Deterrence and Detection Activities* (June 2011).
9. The transcript of the National Public Radio broadcast *Texas Contractors Say Playing By The Rules Doesn't Pay* by Wade Goodwyn first broadcast on April 11, 2013.

10. EDD website regarding Underground Economy Operations (2010).
11. EDD *Information Sheet* regarding Employment Enforcement Task Force (November 2009).
12. News Release (February 9, 2012) from the U.S. Department of Labor's Wage and Hour Division.
13. Defendants' Memorandum of Points and Authorities in Support of Motion to Strike Class Allegations filed in Sacramento Superior Court case *Sawin, et al., v. The McClatchy Company, et al.*, SCSC case number 34-2009-00033950-CU-OE-GDS on February 15, 2011.
14. Memorandum of Points and Authorities in Support of Motion by Defendants to Strike Plaintiffs' Class Allegations filed in *Becerra, et al., v. The McClatchy Company, et al.*, FCSC case number 08-CECG-04411-KCK on November 9, 2012.

II. THE EVIDENCE CODE, RULES OF COURT AND RELEVANT DECISIONAL AUTHORITY PERMIT THIS COURT TO TAKE JUDICIAL NOTICE OF THE DOCUMENTS REQUESTED BY RESPONDENT

Judicial notice may be taken under Evidence Code section 452(d) of the “[r]ecords of [] any court of this state.” Under Evidence Code section

452(h) the court may take judicial notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” Evidence Code section 459 grants appellate courts the same right and power to take judicial notice as the trial court. Rule 8.252, California Rules of Court provides that “[t]o obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order.”

California courts have also held that it is appropriate to take judicial notice of factual information found on the internet. *See, Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 821, fn. 1 [court took judicial notice of the manner in which eBay described its operations on its website under Evidence Code 459]; *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1573 [documents published on Internet and excluded by trial court were deemed amenable to judicial notice to the extent the records were "... not reasonably subject to dispute and [were] capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy"]; *Smiley v. Citibank* (1995) 11 Cal.4th 138, 145, fn. 2 [proper to take judicial notice of documents from federal administrative agencies]; *Salvaty v. Falcon Cable Television* (1985) 165 Cal.App.3d 798, 800, fn. I [proper to

take judicial notice of documents filed with state governmental entity, copies of which were attached to the complaint]; *Moehring v. Thomas* (2005) 126 Cal.App.4th 1515, 1523 [judicial notice granted of the decennial census found on the United States Census Bureau's web site (<http://factfinder.census.gov> [as of Feb. 23, 2005], [citing] Evid.Code, § 452, subds.(c) & (h), and *People v. Howard* (1992) 1 Cal.4th 1132,1160, fn. 6.)].)

The declaration of a party's attorney to the effect that the copies provided are true and correct copies of the originals is sufficient to authenticate the materials. (*People v. Connor* (2004) 115 Cal.App.4th 669, 681; *Whaley v. Sony Computer America, Inc.* (2004) 121 Cal.App.4th 479, 487.)¹

¹ Federal courts in California and elsewhere have also consistently permitted judicial notice of web-based documents under the federal standard found at Rule 201 of the Federal Rules of Evidence as long as they are not subject to reasonable dispute. *See, O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) [proof of earnings for the U.S. Equity Fund from Northrop Grumman's website]; *In re Agribiotech Sec. Litig.*, No. CV-S990144 PMP (LRL), 2000 U.S. Dist. LEXIS 5643, *4-5, 2000 WL 35595963, *2 (D. Nev. Mar. 2, 2000) ["In this new technological age, official government or company documents may be judicially noticed insofar as they are available via the worldwide web"]; *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) [taking judicial notice of approval by the National Mediation Board published on the agency's website]; *Currey v. Homecomings Financial, LLC* 2009 WL 1227010 (N.D. Cal.) [factual information on Fannie Mae's website]; *Hernandez v. Wagner* 2010 WL 2464830 (E.D. Cal.) [Federal Bureau of Prisons website]; *Alvara v. Aurora Loan Services* 2009 WL 1689640 (N.D. Cal.) [chart posted on website of the Federal

At issue in this case is whether the predominance test for class certification shall be altered as proposed by Defendant, so that, pursuant to *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639 (“*Sotelo*”) and *Narayan v. EGL, Inc.* (N.D. Cal. Sept. 7, 2012) 285 F.R.D. 473 (“*Narayan*”), variations in a few (or even one) secondary factors would - alone - preclude class certification. Appellants intend to provide this Court with legal, factual and public policy bases for adhering to the established predominance test and refuting Defendant’s position.

Exhibits 1 and 2 are pleadings filed in newspaper carrier class actions currently pending in the San Diego and Sacramento Superior Courts. Under Evidence Code section 452(d) they constitute records of any court of this state. As discussed in Appellants’ Answer Brief on the Merits, these pleadings provide insight into how Defendant’s counsel and other defense counsel are presently advancing the holdings in the *Sotelo* and *Narayan* cases to alter the predominance test in order to defeat certification of independent contractor class actions.

Exhibits 3 through 6 are reports produced by or for the United States Government, and are available from government web sites, making them capable of immediate and accurate verification by resort to sources of

National Mortgage Association].)

reasonably indisputable accuracy as required by Evidence Code 452(h).

These reports address the issue of employee misclassification and are relevant to determination of the instant matter as they provide insight into government policy considerations and developments at a federal level.

Exhibit 7 and 8 are reports from the California Employment Development Department and are available from government websites, making them capable of immediate and accurate verification by resort to sources of reasonably indisputable accuracy, as required by Evidence Code 452(h). These reports address the issue of employee misclassification and are relevant to determination of the instant matter as they provide insight into government policy considerations and developments at the state level.

Exhibit 9 is the transcript of a nationally syndicated radio program (National Public Radio) that is relevant because it addresses and is illustrative of the widespread nature of employee misclassification, both geographically and by industry, and illustrative of misclassification enforcement problems. The transcript is available on National Public Radio's website, making it capable of an immediate and accurate verification by resort to sources of reasonably indisputable accuracy, as required by Evidence Code 452(h).

Exhibits 10 and 11 are printouts from the California Employment Development Department's web site regarding the Underground Economy Operations and the Employment Task Force. They are available from the state government's web site, making them capable of immediate and accurate verification by resort to sources of reasonably indisputable accuracy as required by Evidence Code 452(h). These reports address the issue of employee misclassification and are relevant to determination of the instant matter as they provide insight into government policy considerations and developments at the state level.

Exhibit 12 is a copy of a news release issued by the U.S. Department of Labor's Wage and Hour Division regarding a Memorandum of Understanding signed between the federal government and the state of California addressing the issue of employee misclassification. Both documents are available from the federal government's web site, making them capable of immediate and accurate verification by resort to sources of reasonably indisputable accuracy as required by Evidence Code 452(h). These reports address the issue of employee misclassification and are relevant to determination of the instant matter as they provide insight into government policy considerations and developments at the federal and state level.

Exhibits 13 and 14 are pleadings filed in newspaper carrier class actions currently pending in Sacramento and Fresno Superior Courts. Under Evidence Code section 452(d) they constitute records of any court of this state. As discussed in Appellants' Answer Brief on the Merits, these pleadings provide insight into how Defendant's counsel and other defense counsel are presently advancing the holdings in the *Sotelo* and *Narayan* cases to alter the predominance test in order to defeat certification of independent contractor class actions.

III. CONCLUSION

For the foregoing reasons, appellants respectfully move that this Court take judicial notice of exhibits herein, pursuant to Evidence Code sections 450, 452, 453 and 459 and California Rules of Court, rules 8.250(g) and 8.252(a), as well as all relevant decisional authority.

April 29, 2013

Respectfully Submitted,



MICHAEL J. WRIGHT
Counsel for Plaintiffs and Appellants,
MARIA AYALA, ROSA DURAN, and
OSMAN NUÑEZ

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:

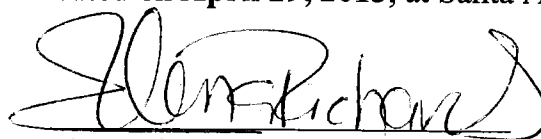
MOTION FOR JUDICIAL NOTICE; [PROPOSED] ORDER

on the interested parties in this action by placing [] the original [X] a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

- [X] **BY FEDEX:** I deposited such envelope at Santa Ana, California for collection and delivery by Federal Express with delivery fees paid or provided for in accordance with ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing packages for overnight delivery by Federal Express. They are deposited with a facility regularly maintained by Federal Express for receipt on the same day in the ordinary course of business.
- [X] **BY MAIL:** I deposited such envelope in the mail at Santa Ana, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

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.



Elena Richards

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

SERVICE LIST

Sue J. Stott
PERKINS COIE
4 Embarcadero Center, Suite 2400
San Francisco, CA 94111
(415) 344-7000
(415) 344-7050 Fax
sstott@perkinscoie.com

Attorneys for Defendant-Respondent
ANTELOPE VALLEY
NEWSPAPERS, INC.
By FedEx

Eric D. Miller
PERKINS COIE
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8000
(206) 359-7338 Fax
emiller@perkinscoie.com

Attorneys for Defendant-Respondent
ANTELOPE VALLEY
NEWSPAPERS, INC.
By FedEx

California Court of Appeal
Second Appellate District, Division 4
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

By U.S. Mail