**IN THE CALIFORNIA SUPREME COURT**

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**No. S206874**

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MARIA AYALA et al.,

Plaintiffs and Appellants,

v.

ANTELOPE VALLEY NEWSPAPERS, INC.

Defendant and Respondent.

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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)

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# ANTELOPE VALLEY NEWSPAPERS, INC.'S OPPOSITION TO APPELLANTS' MOTION FOR JUDICIAL NOTICE

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| *Sue J. Stott, Bar No. 91144<br>Jenica D. Mariani, Bar No. 266982<br>PERKINS COIE LLP<br>Four Embarcadero Center, Suite 2400<br>San Francisco, CA 94111-4131<br>Telephone: 415-344-7000<br>Facsimile: 415-344-7050<br>SStott@perkinscoie.com<br>JMariani@perkinscoie.com | Eric D. Miller, Bar No. 218416<br>PERKINS COIE LLP<br>1201 Third Avenue, Suite 4900<br>Seattle, WA 98101-3099<br>Telephone: 206-359-8000<br>Facsimile: 206-359-9000<br>EMiller@perkinscoie.com |

Attorneys for Defendant-Respondent

## INTRODUCTION

Plaintiffs have asked the Court to take judicial notice of trial court filings from unrelated class actions brought against other California newspapers, government-issued reports and documents, and a news article. The motion for judicial notice should be denied for two independent reasons. First, none of the documents are relevant to the issues on which this Court granted review. Second, although the existence of the documents may be properly subject to judicial notice, the factual assertions that they contain are not.

## ARGUMENT

### A. The Documents Submitted by Plaintiffs Are Not Relevant to the Issues on Which the Court Granted Review

This Court has granted review in this case to consider two issues: first, "[w]hether the Court below erred in holding, in conflict with *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639 (*Sotelo*), and *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333 (*Ali*), that a court may certify a class of individuals claiming to be employees rather than independent contractors even when it finds that the secondary factors in the independent contractor test of *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*), vary materially among the members of the putative class," and second, "[w]hether the Court below erred in holding that the secondary factors in the *Borello* test pertain to the generic type of work being performed, rather than the specific features of the relationship between the individual performing the work and the putative employer." (Petition for Review, filed November 26, 2012, at p. 1.) Judicial notice is appropriate only to the extent that the matters noticed will assist the Court in resolving those issues. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 ["Although a court may judicially notice a variety of matters, only *relevant* material may be noticed."] [emphasis in original,

citation omitted], overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.)

According to plaintiffs, trial court pleadings filed by *other* newspaper defendants in *other* putative class actions (Exhibits 1, 2, 13 and 14) "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." (Plaintiffs' Motion for Judicial Notice, filed April 30, 2013 ("MJN"), at pp. 12, 15.) But the validity of the arguments made by Defendant's counsel—or other defense counsel representing newspapers—in other cases is for the courts hearing those cases to consider. Plaintiffs' effort to rely on those pleadings is a distraction from the issues in this case. While true that the cited briefs were filed in independent contractor class actions brought by newspaper carriers, the similarities with this appeal stop there. (*Johnson & Johnson v. Sup. Ct.* (2011) 192 Cal.App.4th 757, 768 [declining to take judicial notice of other unrelated lawsuits involving "purportedly similar matters" because the cases were "not relevant or helpful" to the court's review].) As such, Exhibits 1, 2, 13 and 14 are irrelevant and should not be judicially noticed.

The remainder of the motion seeks judicial notice of government reports (Exs. 3-8, 12); information about state enforcement agencies that investigate worker misclassification (Exs. 10-11); and a news article (Ex. 9). According to plaintiffs, the government reports and information about state enforcement agencies are relevant because the materials "address the issue of employee misclassification" and "provide insight into government policy considerations and developments" at both levels of government. (MJN, at pp. 12-14.) Plaintiffs similarly suggest that the news article 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." (MJN, at p. 13, referring to Ex. 9.)

Contrary to plaintiffs' argument, however, the fact that certain industries, beyond the newspaper delivery industry, may allegedly be "particularly prone to misclassifying employees" has no bearing on whether these plaintiffs were misclassified, much less on whether that issue is suitable for class treatment. (Plaintiffs' Answer Brief on the Merits, filed April 30, 2013, ("Pltfs. Br."), at pp. 45-46.) The materials are only even plausibly relevant to the extent the Court accepts plaintiffs' suggestion that reversal of the lower court's decision would be a "death-knell" to independent contractor class litigation in California — a "fact" that is certainly not in the record. (*Id.*, at p. 38.) Instead, government reports about burdens imposed on public resources and the anecdote regarding lack of enforcement by the Internal Revenue Service against Texas employers in the construction industry only serve to dramatize the parties' dispute and distract from the actual legal issues at hand. (*Id.*, at pp. 46-53.) Even if the materials were arguably relevant, any probative value would be outweighed by risk of their prejudicial effect. (Evid. Code § 352; *Raines v. Belshe* (1995) 32 Cal.App.4th 157, 183 fn. 6 [denying judicial notice of newspaper articles that were irrelevant to the statutory interpretation issue on appeal and were only offered for a "sensational" effect and to support an argument that a "parade of horribles" would result if a writ petition were denied].)

**B. Even If Relevant, the Materials Are Not Judicially Noticeable**

Even if the materials submitted by plaintiffs were relevant, judicial notice would be inappropriate. Plaintiffs do not seek to rely merely on the *existence* of the documents they have submitted (which is not subject to reasonable dispute), but on the *truth* of the factual statements that they contain (which is subject to dispute). While the Evidence Code permits judicial notice to be taken as to the existence of documents, that does not

mean that the information contained within those documents can be relied upon. (*Marriage of Forrest & Eaddy* (2006) 144 Cal.App.4th 1202, 1209-10 [court records]; *Beckley v. Reclamation Bd.* (1962) 205 Cal.App.2d 734, 741-42 [government reports]; *Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1235 fn.1 [press clippings].)

For example, plaintiffs make the following representations in reliance on facts contained in Exhibits 3 through 9 and 13:

- In support of the contention that worker misclassification is a "serious problem in numerous industries," plaintiffs list specific industries that, according to state and federal authorities, are purportedly "prone" to misclassification. (Pltfs. Br., at pp. 45 - 46, citing MJN, Exs. 3, 6, 8.)
- Plaintiffs say that various negative consequences result from worker misclassification, including unfair competition (Pltfs. Br., at p. 47, citing MJN, Ex. 11; *id.* at p. 50, citing MJN, Ex. 6); depletion of public welfare resources, unemployment insurance, and decreased tax revenues (*id.* at pp. 47-49, citing MJN, Exs. 3-4); loss of employees' legal rights (*id.* at pp. 49-50, citing MJN, Ex. 5); and the overburdening of government enforcement agencies (*id.* at pp. 51-53, citing MJN, Exs. 4-5, 9).
- To support the assertion that "the newspaper industry continues to misclassify [c]arriers," plaintiffs quote the following language from the defendant's motion to strike class allegations in *Sawin v. The McClatchy Co.*: "As to distribution, The [Sacramento] Bee follows a longstanding national newspaper practice—contracting with independent contractors and carriers and Large Distributors—for

newspaper delivery." (Pltfs. Br., at p. 57 fn.20, citing MJN, Ex. 13.)

- Plaintiffs also quote language from an EDD report that purportedly "examined the courier industry" and determined that misclassification was a "common" industry practice. (Pltfs. Br., at pp. 46-47, citing MJN, Ex. 7.)

Plaintiffs propose that the Court may take judicial notice of these matters, as well as the news article they cite, because they are available on the Internet and therefore are "capable of immediate and accurate verification by resort to sources of reasonably indisputable accuracy as required by Evidence Code 452(h)." (MJN, at pp. 12-14.) While the Internet provides a method for verification, "[s]imply because information is on the Internet does not mean that it is not reasonably subject to dispute." (*Huitt v. So. Calif. Gas Co.* (2010) 188 Cal.App.4th 1586, 1605 fn. 10.) Further, the fact that information is in a government report does not necessarily mean that such information is beyond dispute. (*Beckley, supra,* 205 Cal.App.2d at p. 742 (holding judicial notice could not be taken of the facts contained in commission reports because the reports were influenced by the "opinions and conclusions drawn" by the engineers who prepared them and who "are not infallible"); *Leibert v. Transworld Sys., Inc.* (1995) 32 Cal.App.4th 1693, 1700.) It is not, for instance, widely accepted and undisputed that the industries identified in plaintiffs' answer brief are "prone" to worker misclassification. (Pltfs. Br., at pp. 45-46.)

Accordingly, the Court should also deny the motion on the ground that plaintiffs have not met their burden to establish that such materials are qualified under Evidence Code section 452, subsection (h).

## CONCLUSION

The motion for judicial notice should be denied.

DATED: May 15, 2013

**PERKINS COIE LLP**

By: _____

Sue J. Stott
Eric D. Miller
Jenica D. Mariani

Attorneys for Defendant/Respondent
Antelope Valley Newspapers, Inc.

LEGAL26731787.1

**PROOF OF SERVICE**
*Ayala, et al. v. Antelope Valley Newspapers, et al.*
Los Angeles County Superior Court Case No. BC403405
Court of Appeal Case No. B235484

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

On May 15, 2013, I served the foregoing document(s) entitled:

**ANTELOPE VALLEY NEWSPAPERS, INC.'S OPPOSITION TO APPELLANTS' MOTION FOR JUDICIAL NOTICE**

on the interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

☒ By causing to be personally delivered the document(s) listed above to the person(s) at the address(es) set forth below.

Daniel J. Callahan
Michael J. Sachs
Kathleen L. Dunham
CALLAHAN & BLAINE, APLC
3 Hutton Center Drive, Suite 900
Santa Ana, CA 92707

Attorneys for Plaintiffs and Appellants MARIA AYALA, ROSA DURAN and OSMAN NUNEZ

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Elizabeth Carmichael

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Second Appellate District, 4th Division
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300 S. Spring Street
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