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)

REPLY BRIEF ON THE MERITS

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INTRODUCTION

This Court has held that determining whether a worker is an employee or an independent contractor requires examining not only the service recipient's right to control the manner and means by which the work is performed but also a set of "secondary" factors designed to illuminate "the nature of [the] service relationship." (*S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations* (1989) 48 Cal.3d 341, 350 (*Borello*).) The plaintiffs in this case are newspaper carriers for the Antelope Valley Press (AVP) who allege that they have been improperly classified as independent contractors. The trial court denied a motion to certify a class, finding that material variations among the members of the putative class with respect to numerous secondary factors made individual issues predominant and a class action unmanageable. The Court of Appeal reversed, reasoning that those variations are irrelevant to the class action inquiry because the "focus of the secondary factors is mostly on the job itself, and whether it involves the kind of work that may be done by an independent contractor, or generally is done by an employee." (Opn. at p. 19.) As explained in the opening brief, that holding rests on a fundamental misunderstanding of *Borello*.

In this Court, plaintiffs make little effort to defend the Court of Appeal's misreading of *Borello*. Indeed, they acknowledge that *Borello* requires examining all of the evidence bearing on the secondary factors, and that no single factor is dispositive. That concession, combined with the trial court's findings, is sufficient to compel reversal. If all of the secondary factors must be weighed against each other in determining independent contractor status (as *Borello* says they must), and if there is material variation in those factors among the members of the class (as the trial court found that there is), then AVP's liability to the plaintiffs cannot

be determined on a classwide basis, and common issues do not predominate. Class certification is not appropriate.

Plaintiffs attempt to resist that conclusion, but their efforts are unavailing. They argue that commonality on the right to control, by itself, is sufficient for class certification. But class certification requires that common questions predominate among the questions that will actually be disputed, so that liability can be determined on a classwide basis. Employee status cannot be determined without considering and weighing the secondary factors along with the right to control, so where there is material variation in those factors, that type of commonality is lacking.

Plaintiffs also argue that, on the facts of this case, there is sufficient commonality in the secondary factors to permit certification. But they ignore the highly deferential standard of review that applies to the trial court's certification decision, and they have not come close to showing that the trial court abused its discretion.

Even if common issues did predominate, the individual issues would still require separate resolution at trial, making a class action unmanageable. There is no dispute that many of the secondary factors cannot be resolved on the basis of common evidence. Plaintiffs offer no explanation of how this case could actually be tried as a class action, providing nothing but the vaguest of assurances that somehow, some way, the trial court would devise a "creative" trial plan that would efficiently resolve hundreds of claims requiring testimony from hundreds of individuals while protecting AVP's due process rights. The trial court did not abuse its discretion by concluding that those assurances fell well short of meeting plaintiffs' burden.

Finally, plaintiffs argue that if this case is not permitted to proceed as a class action, no case involving allegedly misclassified employees will be able to be certified. That is incorrect—not all cases exhibit the kind of

variation that is present here. In any event, plaintiffs' policy arguments provide no reason to depart from settled class certification principles, which protect a defendant's due process right to present individualized defenses to the claims that are brought against it.

ARGUMENT

A. *Borello* requires courts to balance multiple intertwined factors in determining independent contractor status.

This Court's decision in *Borello* establishes that a court deciding whether a worker is an employee or an independent contractor must apply a multi-factor test that considers not only "whether the person to whom service is rendered has a right to control the manner and means of accomplishing the result desired" but also a set of "secondary" factors designed to illuminate "the nature of [the] service relationship." (*Borello*, *supra*, 48 Cal.3d at p. 350 [internal quotation marks and citation omitted]; see *id.* at p. 351, fn. 5 ["control of work details is not necessarily the decisive test for independent contractorship"] [internal quotation marks omitted].) Under that test, all of the factors must be weighed against each other, "and the dispositive circumstances may vary from case to case." (*Id.* at p. 354.)

Plaintiffs correctly acknowledge that the secondary factors "cannot be applied mechanically as separate tests" because "they are intertwined and their weight depends often on particular combinations." (Plaintiffs/Appellants' Answer Brief on the Merits, filed Apr. 30, 2013, ("Br.") at p. 3 [quoting Opn. at p. 8].) Instead, plaintiffs agree, a court evaluating independent contractor status must "consider[] *all* evidence on secondary factors, both pro and con." (Br. at p. 22.)

Those concessions demolish the key premise of the decision below, which 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." (Opn. at p. 19; see also *id.* at p. 2.) According to the Court of Appeal, a court determining the independent contractor status of a group of workers need not examine the individual characteristics of each worker as long as they are all engaged in the same "kind of work." While plaintiffs attempt (Br. at p. 18) to minimize the significance of that language in the Court of Appeal's opinion, it was critical to the Court's holding. The trial court found that "numerous individual inquiries" would be necessary to apply the secondary factors to the members of the putative class in this case. (Appellants' Appendix ("AA") at vol. 19 at p. 4391, Court Ruling and Order Re: Plaintiff's Motion for Class Certification, dated Aug. 19, 2011 ("Trial Ct. Opn.") at p. 16.) The Court of Appeal did not fault that conclusion as a factual matter; to the contrary, the Court acknowledged that the record reflected variation among class members with respect to multiple secondary factors. (Opn. at p. 19.) The Court of Appeal was able to reverse the trial court's decision only because the Court of Appeal incorrectly applied *Borello* and concluded that the variations among members of the putative class with respect to the secondary factors were irrelevant.

The Court of Appeal attempted to justify its interpretation of *Borello* by reasoning that "a carrier's employee status cannot be based upon the individual choices the carrier makes, if other choices are available." (Opn. at p. 19.) Plaintiffs endorse that proposition, arguing 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." (Br. at p. 22) That argument is refuted by this Court's decision in *Brinker Restaurant Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, in which the Court rejected an effort to certify a class of employees who claimed that they had been

required to work "off the clock." It was undisputed that the employer had a uniform policy that "disavow[ed] such work," but some employees had nevertheless engaged in off-the-clock work. (*Id.* at p. 1051.) Because "proof of off-the-clock liability would have had to continue in an employee-by-employee fashion," this Court concluded that certification was improper. (*Id.* at p. 1052.) In so holding, it expressly relied on what plaintiffs would describe as "variations amongst some class members with regard to how they individually respond to an alleged employer's general policies."

Moreover, plaintiffs' reasoning reflects a confusion between the analysis of the right to control and the analysis of the secondary factors. The *right* to control can exist whether or not it is exercised, and therefore the scope of a worker's freedom to make choices about the manner and means of performing the work is relevant to an assessment of the right to control, whether or not the worker exercises that freedom. The secondary factors are different. As explained in the opening brief (at pp. 22-24), many of the factors would be meaningless if they did not turn on the actual choices made by the worker and the service recipient. Thus, courts considering whether a given worker is engaged in a distinct occupation or business do not ask if a worker *could* engage in other work, but rather whether he *does* engage in other work. So too, courts examine which party actually provides the tools, equipment, and place of work, not who theoretically could do so. To say that individual choices are irrelevant would be to say that all that matters is the abstract right to control. *Borello* expressly rejected that view. (*Borello*, *supra*, 48 Cal.3d at p. 350 [explaining that the right to control, considered "in isolation," is of "little use in evaluating the infinite variety of service arrangements"].)

B. A class of allegedly misclassified employees cannot be certified when there is material variation in the secondary factors among the members of the class.

Plaintiffs do not appear to dispute the basic principle that a class cannot be certified when the trier of fact is unable to determine liability on the basis of facts that are common to the class but instead must examine facts specific to each class member. (*Brinker*, *supra*, 53 Cal.4th at pp. 1051-52 [explaining that common issues do not predominate, and certification is improper, where "liability is contingent," at least in part, on facts specific to individual plaintiffs, so that "proof of . . . liability would have . . . to continue in an employee-by-employee fashion"].) Because, as plaintiffs concede, *Borello* requires all of the secondary factors to be weighed against each other in assessing independent contractor status, it follows that a class of allegedly improperly classified contractors should not be certified when there is material variation in the *Borello* secondary factors among the members of the class. As the Court in *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639 (*Sotelo*)) correctly observed, even if *some* of the secondary factors "were able to be determined on a class-wide basis, those factors would still need to be weighed individually, along with the factors for which individual testimony would be required." (*Id.* at p. 660.)

In resisting that conclusion, plaintiffs advance three arguments. First, they suggest that the secondary factors are less important than the right to control, so that variation in the secondary factors is irrelevant as long as there is strong common evidence of right to control. Second, they contend that common issues will predominate as long as some of the secondary factors are susceptible to common proof, even if others are not. And third, they argue that if material variation in the secondary factors precludes class certification, then cases involving claims that employees

have been misclassified as independent contractors will never be able to proceed as class actions. Those arguments lack merit.

1. According to plaintiffs (Br. at p. 24), so long as there is "substantial common evidence on the principal right to control factor," a court necessarily abuses its discretion by concluding that variation as to some secondary factors makes individual issues predominant. That argument reflects a misunderstanding of both the *Borello* test and the nature of the class certification inquiry.

It is well established that in making an ultimate determination as to whether a given worker is an employee or an independent contractor, "[t]he principal test . . . is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." (*Borello*, *supra*, 48 Cal.3d at p. 350 [quoting *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946] [brackets in original].) But it is equally well established that, standing alone, the right to control test is not dispositive. (*Id.* at p. 351, fn. 5 ["control of work details is not necessarily the decisive test for independent contractorship"] [internal quotation marks omitted]; see also *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 303 [holding that courts must consider the secondary factors, and that it was reversible error to instruct a "jury that the right of control, *by itself*, gave rise to an employer-employee relationship"] [emphasis in original].) The trier of fact must therefore consider both the right to control and the secondary factors. Accordingly, unless the court is able to hold as a matter of law that evidence pertaining to a particular set of secondary factors could not possibly change the outcome—in other words, that those factors are not material—then evidence bearing on those secondary factors must be presented at trial.

When the secondary factors vary materially among the members of the class, the trier of fact will necessarily have to evaluate individualized

evidence pertaining to each class member. Faced with the need to consider such evidence, a court exercising its discretion in ruling on a motion for certification could reasonably determine that individual issues predominate, as the trial court did here. In other words, even if the right to control inquiry is common, it does not follow that class certification is appropriate.

2. For similar reasons, plaintiffs err in suggesting that common issues necessarily predominate as long as some of the secondary factors are susceptible to common proof, even if others are not. The secondary factors are not viewed in isolation, and no single secondary factor, standing alone, is likely to be dispositive. (*Borello*, *supra*, 48 Cal.3d at p. 351 [secondary factors "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations"] [internal quotation marks and citation omitted]; *Narayan v. EGL, Inc.* (N.D. Cal. 2012) 285 F.R.D. 473, 479 [courts must "proceed 'with the understanding that no one factor is decisive, and it is the rare case where the various factors will point with unanimity in one direction or the other'"] [quoting *Narayan v. EGL, Inc.* (9th Cir. 2010) 616 F.3d 895, 901].) Instead, a factfinder makes the ultimate determination of employee or independent contractor status by considering all of the secondary factor evidence together and making a qualitative judgment about the nature of the relationship between the service provider and service recipient.

To determine whether common issues predominate, the court must identify and consider both the common and the individual issues. An "issue," in the sense relevant here, must be a question for which the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." (*Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, 2551 (*Wal-Mart*); see also *Frieman v. San Rafael Rock Quarry, Inc.* (2004) 116 Cal.App.4th 29, 42 [individual issues predominated in nuisance claim premised on effect of a quarry's

operations on the surrounding community notwithstanding common evidence, because "[w]hether each resident even heard or felt the impact of Quarry's operations is subject to separate and differing matters of proof"]; *Hancock v. Chicago Title Ins. Co.* (N.D. Tex. 2009) 263 F.R.D. 383, 390 ["The mere fact that each plaintiff's claim involves the same list of questions does not transform those questions into common substantive issues that predominate. . . . For a question to be a common substantive issue that predominates, it must be definitively answered for all class members using a generalized set of facts and producing one unified conclusion."].)

In this case, for example, the threshold question that must be answered with regard to each of plaintiffs' claims is whether a given carrier is an employee or an independent contractor. Under *Borello*, answering that question requires a qualitative assessment of evidence bearing on the right to control inquiry and related secondary factors. Because the factors have meaning only when considered together, none of them is truly a separate "issue"—resolving any of the elements of the *Borello* test alone will not generate an "answer" that applies to all carriers alike because each class member will present a unique combination of facts relevant to those elements. Where some subelements of an aspect of a multipart claim can be established through common proof but others cannot, common issues do not predominate. (See, e.g., *Morris v. Wachovia Sec., Inc.* (E.D. Va. 2004) 223 F.R.D. 284, 301-02 [no common proof possible as to "reliance" element of a fraud claim where some subelements of "reliance" element required individualized proof]; *Cooper v. So. Co.* (11th Cir. 2004) 390 F.3d 695, 722 (disapproved on another ground in *Ash v. Tyson Foods, Inc.* (2006) 546 U.S. 454, 457-58. ["Common issues will not predominate over individual questions if, 'as a practical matter, the resolution of . . . [an] overarching common issue breaks down into an unmanageable variety of

individual legal and factual issues.'"] [quoting *Andrews v. AT&T Co.* (11th Cir. 1996) 95 F.3d 1014, 1023].)

In any event, even if the individual secondary factors were viewed as separate "issues," the availability of common proof as to a few factors still would not establish that a trial court would abuse its discretion by finding that common issues do not predominate. As the Court explained in *Sotelo*, a court weighing common issues against issues requiring individual proof must evaluate "the degree to which [each] factor [is] likely to be an issue of actual controversy at trial." (*Sotelo*, *supra*, 207 Cal.App.4th at p. 308.) Thus, if the trial is likely to focus on those factors as to which there is individual variation, common issues would not predominate. Plaintiffs dispute that principle (Br. at p. 28), but it follows directly from this Court's statement in *Brinker* that a court evaluating a class certification motion "must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes *likely to be presented*," and only then "decide whether individual or common issues predominate." (*Brinker*, *supra*, 53 Cal.4th at p. 1025 [emphasis added].)

Indeed, it is difficult to see how else a court could assess predominance. "Predominance is a comparative concept," but the comparison is not a mathematical exercise in which the court tallies up common issues on one side of a ledger and individual issues on another to see which side has the most entries. (*Sav-On Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 334.) The point is not for the parties to compete to define a claim as broadly or narrowly as possible to generate individual or common questions as may suit their litigation position. After all, "[a]ny competently crafted class complaint literally raises common 'questions.'" (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2551 [internal quotation marks and citation omitted] [brackets in original].) For example, considered purely in the abstract, every putative class action presents many common issues: Is

venue proper? Is the defendant subject to personal jurisdiction? Is the statute that creates the cause of action constitutional? In most cases, however, those issues will not be contested at trial, and it would make little sense to weigh them in deciding whether common issues predominate. Instead, the question is whether the issues to 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." (*Brinker*, *supra*, 53 Cal.4th at p. 1021 [quoting *Collins v. Rocha* (1972) 7 Cal.3d 232, 238].) And where secondary factors vary materially—where, that is, they vary in ways that may affect the independent contractor status of the members of the class—the answer to that question is no. Any common issues would quickly be swamped by the need to proceed on an employee-by-employee basis to hear granular and detailed testimony from individual class members about their own work experiences.

3. Plaintiffs repeatedly suggest (Br. at pp. 24-26, 35-38, 41-44) that if material variation in the secondary factors precludes class certification, then no independent contractor misclassification cases will ever be able to proceed as class actions. Even if that were true, it would not be a reason to alter the substantive law governing independent contractor status. This Court long ago established that the substantive law should not be altered to accommodate trying a case as a class action. (*City of San Jose Super. Ct.*, 12 Cal.3d 447 ["Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going."].) Moreover, as explained below (at pp. 21-22), plaintiffs greatly exaggerate the adverse policy consequences that would result from limiting class actions in this context, and in any event, plaintiffs' concerns are not well-founded, as illustrated by *Bradley v. Networkers Internat., LLC* (2012)

211 Cal.App.4th 1129, in which the Court correctly applied *Borello* but nevertheless held that certification was proper because "the evidence likely to be relied upon by the parties would be largely uniform throughout the class." (*Id.* at p. 1147.)

As noted in the opening brief (at p. 29), it is easy to imagine a case in which the secondary factors vary only in immaterial ways and thus are sufficiently susceptible to common proof to allow certification. Indeed, such cases are particularly likely to arise when the workers are in fact employees. Where the service recipient's policies and practices are highly regimented and employment-like—and thus the workers are more likely to be employees—the class members will display less diversity, and class certification is more likely to be appropriate. Conversely, when the class members display the variation that one would expect from a group of entrepreneurs whose only "job" is to deliver results, then class certification is less likely to be appropriate.

Moreover, there could also cases in which the secondary factors vary, but the variations could be managed in a fair and efficient way at trial. For example, suppose that all of the factors were the same except for the duration of the relationship, and suppose further that the service recipient used two form contracts—one an open-ended agreement with no term, and one a contract with a fixed four-week term. That case would exhibit variation in a secondary factor, but it could easily be managed by dividing the class into subclasses depending on which contract the plaintiff had signed. Within each subclass, common issues would predominate.

In short, there is no basis for plaintiffs' suggestion that the proper application of class certification principles in this context will eliminate class actions alleging misclassification of employees.

C. The trial court did not abuse its discretion in determining that class certification is inappropriate in this case.

1. The trial court's decision whether to certify a class is entitled to great deference.

Throughout their brief, plaintiffs ignore the applicable standard of review. For example, they erroneously describe AVP's position as one based on an argument that "the Court of Appeal should have denied class certification." (Br. at p. 24; see also *id.* at pp. 8, 18 [discussing the Court of Appeal's "findings"].) It is not the Court of Appeal, however, that grants or denies class certification; it is the trial court. In this case, the trial court denied certification, and the question for the Court of Appeal was whether the trial court abused its discretion in doing so. This Court has held that "[b]ecause trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification"—certification decisions are thus entitled to "great deference on appeal" and will be reversed "only for a manifest abuse of discretion." (*Brinker*, *supra*, 53 Cal.4th at p. 1022 [internal quotation marks omitted].) The premise of plaintiffs' arguments is that common issues predominate in this case and that a trial on a classwide basis would be manageable. The trial court expressly found to the contrary, however, and, as explained below, plaintiffs have not come close to showing that it abused its discretion in doing so.

2. The variation in the secondary factors in this case means that individual issues predominate.

In this case, the trial court concluded that variations in the secondary factors meant that "numerous individual inquiries" would be "required to determine whether carriers are members of the class," and that individual issues therefore predominate. (Trial Ct. Opn., at p. 16) The Court of Appeal did not seriously take issue with that finding but reversed the trial court only because it erroneously construed the *Borello* test to focus on the

kind of work involved, making the variations in the individual secondary factors irrelevant. Plaintiffs, however, do attempt to challenge the trial court's finding that individual issues predominate. They assert that "there is substantial common evidence on the principal issue of right to control" (Br. at p. 6 [capitalization omitted]), that AVP's common treatment of the carriers as independent contractors establishes commonality for class certification purposes (*id.* at p. 11), and that common evidence exists to prove several of the secondary factors (*id.* at p. 16-18). Plaintiffs have not established an abuse of discretion.

a. Plaintiffs devote much of their brief to a presentation of purportedly common evidence of the right to control. Ultimately, that evidence is beside the point because the unquestionable variation in the secondary factors creates a predominance of individual issues. In any event, plaintiffs mischaracterize the evidence in several respects. For example, plaintiffs allege that AVP's "Suggestion Sheet" and "Success Sheet" are common indicia of "control." But as plaintiffs admit (Br. at p. 10), some carriers received copies of the "Suggestion Sheet" and "Success Sheet," while others did not. To the extent that either document is relevant to the right to control analysis, it presents individual, not common, questions: whether a carrier received the "Suggestion Sheet" and "Success Sheet"—and, if he or she did, whether he or she read and acted on them. Similarly, with regard to "route lists" and "bundle tops," the record reflects widespread variations among carriers in the meaning and significance of those documents. Some testified that they were required to follow delivery instructions, (AA, at vol. 10, at pp. 2090-91, ¶120), whereas others testified that they were not, (*Id.* at pp. 2083-84, 2090-91, ¶¶81-83, 86, 118, 121). (See also Trial Ct. Opn. at p. 9 ["AVP does not have a policy or practice of instructing or directing carriers on how to deliver newspapers."].) Those documents therefore are not common proof of control.

More fundamentally, much of the purportedly common evidence that plaintiffs cite does not establish control over the manner and means of performing the work (which is evidence of employment), but rather control over the results to be provided (which is not). (See, e.g., Br. at p. 7 ["requirements of what is to be delivered," requirements that "the carriers deliver the newspapers . . . in a safe and dry condition," "requirements related to when the newspapers are to be delivered"]; *Borello*, *supra*, 48 Cal.3d at p. 350 [control test looks to "right to control the manner and means of accomplishing the result desired"] [internal quotation marks and citation omitted]; 22 Cal. Code. Regs. § 4304-6 subd. (c)(4) ["The fact that a principal and carrier agree that the carrier shall deliver a newspaper to each customer on his or her route in a timely manner and in a readable condition shall not be evidence of an employment relationship as long as other factors indicate the absence of control by the principal of the manner and means of such delivery."].) And in any event, as explained above, even if there were common evidence on the right to control, the variation in the secondary factors means that common issues still would not predominate. (See *Sotelo*, *supra*, 207 Cal.App.4th at pp. 657 [noting "little variance as to the issue of respondents' control over the details of putative class members' work," but nevertheless affirming the denial of certification because of variability in the secondary factors].)

b. Plaintiffs similarly err in relying on AVP's policy of treating all of its carriers as independent contractors. A policy that applies in the same way to all putative class members can support certification if the policy is—on its face—illegal as to *everyone* to whom it applies, such as the rest period policy that was at issue in *Brinker*. (See *Brinker*, *supra*, 53 Cal.4th at 1033-34, 1051.) By contrast, a uniform classification of individuals that might simultaneously be legal as to some individuals but illegal as to others is not a basis for class certification. (See *Wang v. Chinese Daily News, Inc.*

(9th Cir. 2013) 709 F.3d 829, 835 [criticizing "a presumption that class certification is proper when an employer's internal exemption policies are applied uniformly to the employees," and observing that "such a presumption disregards the existence of other potential individual issues that may make class treatment difficult if not impossible"] [internal quotation marks and citation omitted].) Put another way, proof of the legality or illegality of a "uniform policy" must also resolve liability for the entire class without having to look to individual factors; if it does not, then class certification is inappropriate. (See *Wal-Mart*, *supra*, 131 S.Ct. at p. 2551 [allegedly common contention must "resolve an issue that is central to the validity of each of the claims in one stroke"]; accord *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, 1369 [in order to certify a class, there must be common, classwide evidence to prove plaintiffs' theory of liability], review denied (Jan. 23, 2013).).

A simple example illustrates the point. An employer might classify all of its employees—from the executive suite to the reception desk—as exempt from overtime. That would be a uniform classification policy, but because the policy could well be lawful as to the CEO but unlawful as to the receptionists, it would be absurd to propose a class action on behalf of everyone to whom the classification policy applied. In the language of *Wal-Mart*, the legality of the exempt classification could not be resolved "in one stroke" because the exemption test would apply differently to different employees. (See, e.g., *Dunbar v. Albertson's Inc.* (2006) 141 Cal.App.4th 1422, 1427 [affirming denial of class certification where decision to classify employees as exempt "may be improper as to some putative class members but proper as to others" [internal quotation marks and citation omitted]]; *In re Wells Fargo Home Mortg. Overtime Pay Litig.* (9th Cir. 2009) 571 F.3d 953 [policy of uniform classification, without

more, does not show predominance].) The same principle applies to independent contractor class actions such as this one.

Plaintiffs cite *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, for the proposition that "uniform policies" are sufficient for class certification, but their reliance on that case is misplaced. (Br. at p. 14). In *Jaimez*, the Court held that class certification was appropriate, but it did not rely solely on the existence of common policies. To the contrary, it examined declarations describing the circumstances of individual workers, and it concluded that the "individual effects of [the defendant's] policies and practices . . . may well call for individual *damages* determinations" but "nevertheless confirm the predominance of common legal and factual issues." (*Jaimez*, *supra*, 181 Cal.App.4th at p. 1300 [emphasis added].) Here, by contrast, the individual characteristics of the members of the putative class do not merely affect damages; they make classwide determination of liability impossible.

c. Finally, plaintiffs assert (Br. at p. 18) that there was "common evidence on numerous secondary factors." Plaintiffs overstate the degree of commonality in the evidence of secondary factors. For example, plaintiffs contend (*id.* at p. 19) that "AVP supplied tools and the place of work for the carriers," presumably because AVP made certain items such as bags and rubber bands available to carriers for purchase on an optional basis, and because it made space available for folding newspapers, also on an optional basis. Significantly, AVP did not sell items or provide space to all of the carriers: the trial court found that although "some carriers did buy bags and/or rubber bands from AVP, others bought bags and/or rubber bands elsewhere," and that "[c]arriers fold[ed] newspapers at various locations of their choosing." (Trial Ct. Opn., at pp. 8-10; accord Opn. at p. 19 [acknowledging that only "some carriers . . . choose to assemble the newspapers at AVP's facilities or to purchase supplies from AVP"].)

Likewise, plaintiffs identify the "length of the relationship" as a factor that exhibits uniformity, even though, as noted in the opening brief (at pp. 30-31), there was considerable variation in that factor among the members of the plaintiff class. Similarly, plaintiffs claim (Br. at p. 8) that "common evidence submitted by Plaintiffs shows that the contract terms, including fees, were not negotiated," but that is not what the record reflects. To the contrary, the record before the trial court reflected variation as to whether individual carriers negotiated with AVP. Some carriers, including named plaintiff Maria Ayala, testified that they successfully negotiated higher rates. (AA, at vol. 10 at pp. 2075-75 ¶38; accord AA, at vol. 10 at pp. 2104-058, ¶7) [confirming that piece rates are not pre-printed in carrier contracts and are the subject of individual discussion].) Others did not negotiate their rates. (AA. at vol. 10 at p. 2076, ¶39.) The evidence on the point was not common.

More importantly, while there may be uniformity in some of the secondary factors, there were many other factors that varied among the members of the class and thus would not be susceptible to common proof. (Trial Ct. Opn., at pp. 7-15.) Even the Court of Appeal acknowledged that some—but not all—carriers "deliver for multiple publishers, or work at other jobs, or deal directly with subscribers, or take advantage of opportunities to increase their compensation." (Opn. at p. 19.) For example, the opening brief (at pp. 30-31) identified two members of the putative class who are situated very differently with respect to the secondary factors. Plaintiffs have made no effort to explain how a single proceeding could fairly determine AVP's liability to both of those class members. Under a correct understanding of *Borello*, those variations preclude certification.

3. This case would not be manageable if tried as a class action.

As explained in the opening brief (at pp. 31-32), given the need for a trier of fact to consider individualized evidence as to many of the secondary factors, there is no viable means of managing this case as a class action. The trial court would need to permit an endless series of mini-trials or else place arbitrary limits on the presentation of the evidence. As the court observed, a "class action would force the Court to investigate how each carrier performed his or her job," and while in some cases, "sampling and statistical models may suffice to establish the viability of the class claims, in the context of this case, . . . the Court is satisfied that such an approach would raise serious questions of Defendant's right to confront those who make claims against it." (Trial Ct. Opn., at p. 22.) Those are not "imagined future evidentiary issues," as plaintiffs would have it. (Br. at p. 40.) Rather, they are issues that go to the core of whether plaintiffs' proposed class action would be manageable, and they provide another basis for the trial court's denial of certification.

It is plaintiffs' burden to establish that their proposed class action is manageable. (*Washington Mutual Bank, FA v. Super. Ct.* (2001) 24 Cal.4th 906, 922-23 (*Washington Mutual).*) Here, plaintiffs have done nothing to meet that burden except to assert (Br. at p. 40) that "there are many possible ways in which the parties' evidence can be managed." But it is not enough simply to hope that somehow, someone will think of a way of conducting a workable trial. To the contrary, this Court has held that "a district court considering certification of a nationwide class cannot simply rely on counsel's assurances of manageability." (*Washington Mutual, supra*, 24 Cal.4th at p. 924.)

In their brief, plaintiffs do not offer any trial plan, or, indeed, any hint of how this case could be tried. They list a series of generic

"management tools used by various courts" in other cases and assert, without explanation or analysis, that "[t]hese 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." (Br. at pp. 40-41.) That is inadequate by a wide margin. "It is not sufficient . . . to mention a procedural tool; the party seeking class certification must explain how the procedure will effectively manage the issues in question." (*Dunbar*, *supra*, 141 Cal.App.4th at p. 1432; see also *Morgan*, *supra*, 210 Cal.App.4th at p. 1369 ["In the present case, appellants do not explain how their list of procedural tools can be used to effectively manage a class action in this case."].) The lack of manageability of this case is therefore an additional reason why class certification would have been improper. At a minimum, the trial court did not abuse its discretion in so holding.

D. Plaintiffs' policy arguments lack merit.

Plaintiffs devote much of their brief to arguing that class certification is appropriate in this case because, they say, the misclassification of employees as independent contractors is a serious problem, and class actions are the only way to address it. (Br. at pp. 44-59) That argument is flawed in at least three respects.

First, plaintiffs' argument fails because it asks the Court initially to conclude on the merits that "[m]isclassification of workers as independent contractors is a serious problem" (Br. at p. 44) and then to hold that the existence of that "problem" is a basis for class certification in this case. This Court has never held, however, that courts can alter or ignore the class certification requirements based on speculation about which party will ultimately prevail on the merits. Nor are courts authorized to correct perceived social problems by certifying class actions that contravene section 382 of the Code of Civil Procedure. The class action mechanism is a tool to be employed in appropriate circumstances as defined by the court

rules and as limited by the Due Process Clause. The fairness and even constitutionality of the class action device requires that courts *not* employ it in *inappropriate* cases in the hope of forcing a settlement or facilitating a particular outcome on the merits of an important issue.

Second, plaintiffs' argument rests on the erroneous premise that, if class certification is not permitted here, it will never be permitted in cases in which independent contractors allege that they have been misclassified. As explained above (at pp. 11-12), however, that is not correct. In this case, there is no manageable way to try plaintiffs' claims on a classwide basis; in other cases, such as *Networkers*, there will be.

Third, plaintiffs err in arguing that class actions are the only effective method of remedying misclassification. As plaintiffs themselves acknowledge (Br. at pp. 47-50), both the state and federal governments can take enforcement action in cases of misclassification. Moreover, recent amendments to the Labor Code permit the imposition of penalties of up to $15,000 for willful misclassification. (Lab. Code § 226.8(b).) In addition, as explained in the opening brief, individuals who believe that they have been misclassified may seek a hearing before the Labor Commissioner under Labor Code 98, a proceeding that provides a "speedy, informal, and affordable method of resolving wage claims." (*Post v. Palo/Haklar & Assocs.* (2000) 23 Cal.4th 942, 947.)

Private litigation can also supplement governmental enforcement. Plaintiffs argue that the denial of class certification will "terminate the right of any plaintiff to pursue claims on an individual basis . . . when there has been injury of insufficient size to warrant individual action." (Br. at p. 53 [quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 441].) As explained in the opening brief (at pp. 32-33), however, the available damages in a misclassification case are large enough to make such cases worth pursuing on an individual basis. (See *Soderstedt v. CBIZ So. Cal.,*

LLC (2011) 197 Cal.App.4th 133, 157 [employees seeking sufficiently large damages have a financial incentive to bring individual cases].) More importantly, several statutes permit prevailing plaintiffs in such cases to recover attorney's fees. (See Lab. Code, § 218.5 [non-payment of wages]; Lab. Code, § 226, subd. (e)(1) [failure to provide itemized wage statements]; Lab. Code, § 1194 [unpaid overtime]; Lab. Code, § 2802, subd. (c) [failure to reimburse for reasonable business expenses].) There is therefore no need to permit class treatment in order to allow such claims to be litigated. That plaintiffs have been able to identify six cases of alleged misclassification in the newspaper industry (Br. at pp. 54-56)—over a period of nearly 30 years—hardly demonstrates the existence of a problem so severe as to warrant departing from normal procedural rules and disregarding the due process right of defendants to present individual defenses to the claims against them.

CONCLUSION

For the foregoing reasons and those stated in the opening brief on the merits, the judgment of the Court of Appeal should be reversed.

Dated: May 20, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 8.204(C)
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Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned certifies that Respondent's brief is proportionately spaced, has type face of 13 points or more, and contains 6,918 words as calculated using the word count of the computer program used to prepare the brief, not including the cover, title page, table of contents, or table of authorities.

DATED: May 20, 2013

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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.

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Elizabeth Carmichael

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