

**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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**DECLARATION OF MICHAEL J. WRIGHT  
IN SUPPORT OF MOTION FOR JUDICIAL NOTICE  
EXHIBIT 14**

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on their own behalf and on behalf of all others similarly situated

**SUPREME COURT  
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on their own behalf and on behalf of all others similarly situated

## DECLARATION OF MICHAEL J. WRIGHT

1. I am an attorney duly admitted to practice law before the Courts of this state, and am an attorney at Callahan and Blaine, attorneys of record for Plaintiffs and Appellants. I have personal knowledge of the facts set forth in this declaration and, if called as a witness, would competently testify to their truth.

2. Attached hereto as Exhibit 14 is a true and correct copy of 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.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 29<sup>th</sup> day of April, 2013, at Santa Ana, California.

  
MICHAEL J. WRIGHT



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14 McClatchy Newspapers, Inc. dba The Fresno Bee

15  
16 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
17 COUNTY OF FRESNO

18 VERONICA BECERRA, an individual;  
WILLIAMS HERRERA LUIS, an individual;  
19 VANESSA CASTRO, an individual; ALMA  
LANDEROS, an individual; RANDY  
20 LEYVA, an individual; and ROGER  
CARPENTER, an individual, on their own  
21 behalf and on behalf of all others similarly  
situated,

22 Plaintiffs,

23 v.

24 THE MCCLATCHY COMPANY, a Delaware  
Corporation, d/b/a The Fresno Bee;  
25 McCLATCHY NEWSPAPERS, INC., a  
Delaware Corporation, d/b/a The Fresno Bee,  
26 and DOES 1 - 50, inclusive,

27 Defendants.  
28

CASE NO.: 08 CECG 04411 KCK

Assigned for all purposes to the  
Hon. Kristi Culver-Kapetan Dept. 403

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION BY DEFENDANTS TO STRIKE  
PLAINTIFFS' CLASS ALLEGATIONS**

Date: March 5, 2013  
Time: 3:30 p.m.  
Dept.: 403

Complaint filed: December 19, 2008  
Trial date: None set

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## I. INTRODUCTION

Defendants The McClatchy Company and McClatchy Newspapers, Inc. d/b/a The Fresno Bee (collectively "McClatchy" or "The Bee") respectfully move the Court to strike the "class" allegations of Plaintiffs' Second Amended Complaint. California Rule of Court 3.767 authorizes courts to strike class allegations where the evidence establishes that the proponents of class certification cannot carry their burden of proving that all class certification requirements are met. *In re BCBG Overtime Cases*, 163 Cal. App. 4th 1293, 1297-98 (2008). One requirement for certification is that common questions of law or fact predominate over individual questions. Common questions do not predominate in this case.

Plaintiffs are individuals who formerly held independent contractor agreements for delivery of *The Fresno Bee* newspaper. They assert overtime, meal and rest period, expense reimbursement and various other California Labor Code claims and a derivative unfair competition claim—all premised on allegations that Plaintiffs were The Bee's employees, not independent contractors. The potentially dispositive threshold issue in this case, therefore, is whether The Bee permissibly classified and treated the carriers as independent contractors rather than employees.

The independent contractor inquiry in this case can only be made on an individual-by-individual basis because the contractors differ in numerous and material ways. For example, contractor Brad Haven (Sunrise News Service), has a business license, business cards, a business bank account, a lease on a warehouse, four subcontractors who do the delivery work, and delivery contracts with multiple newspaper companies. In stark contrast, contractor Connie Trejo walks her routes most days and only rarely uses substitutes or helpers. Haven and Trejo believe themselves to be independent contractors. The Bee also believes them to be independent contractors. A jury could easily find them both to be bona fide contractors. A jury would not be *compelled*, however, to reach the same conclusion about Haven—with his business license, warehouse, ongoing subcontractor relationships, etc.—and Trejo, who shares none of these attributes. Further, a decision about Haven or Trejo would not compel the jury to make the same

1 decision as to other contractors, whose varied circumstances render them unlike both Haven *and*  
2 Trejo. Class treatment is inappropriate in these circumstances.

3 Plaintiffs' class allegations should also be stricken because their underlying substantive  
4 claims are not amenable to collective and joint resolution. For example, their overtime claim  
5 requires an individualized assessment just to determine whether an individual worked *any* time  
6 that would qualify an employee for overtime pay. Determining the amount of time worked  
7 would be even more individualized. Plaintiffs' meal and rest period claims would similarly  
8 require individualized inquiries into whether contractors worked sufficient hours to qualify for a  
9 break; if they did, whether they took the break; and if they did not take the break, why not.  
10 Plaintiffs' expense reimbursement claims are a tangled mess of individual questions about who  
11 delivered on a given route, whose vehicle was used (if anyone's), and other determinative issues.  
12 Common questions of law or fact do not predominate and the class allegations should be  
13 stricken.

## 14 II. RELEVANT FACTS

15 The Bee publishes *The Fresno Bee* newspaper, a daily newspaper serving a six-county  
16 area in the central San Joaquin Valley. McDowell Decl. ¶ 4. The Bee outsources distribution of  
17 its product to third-party service providers. In The Bee's case, a variety of individuals and  
18 business entities provide delivery services to residential newspaper subscribers pursuant to  
19 independent contractor agreements. With certain inadequately defined exceptions, Plaintiffs  
20 propose to agglomerate all of these third-party service providers into a single class. Second Am.  
21 Complaint ¶¶ 20-21. Plaintiffs presumably contend that the limitations period (the "class period")  
22 begins on December 19, 2004, four years before they filed their Complaint.

### 23 A. The Metro/Regional Distinction

24 Contractors deliver *The Fresno Bee* within either the "metro" area (essentially, the cities  
25 of Fresno and Clovis) or the "regional" area (outside of "metro"). McDowell Decl. ¶ 5.  
26 Circulation management differs between the two areas as does geography and population density.  
27 Subscribers, contractors and Bee employees are all more prevalent per square mile in the metro  
28 area than in the regional area. *Id.* ¶ 6. As a result, in the regional area, most contractors pick up

1 newspapers from one of 25-30 distant "drop sites" (e.g., a gas station). *Id.* ¶ 7. In contrast, in the  
2 metro area, newspapers have generally been available for pick up at one of four or five  
3 distribution centers staffed (prior to December 2009 or January 2010) by Bee employees.  
4 Cullinan Dep. at 37:18-38:4, 132:6-10.<sup>1</sup> A further variable, a contractor may have had newspaper  
5 bundles delivered to his or her home. *See* Holguin Dep. at 145:13-146:1.

6 **B. The Carrier/Distributor Distinction**

7 Through late 2009, The Bee contracted with newspaper contractors in both the metro and  
8 the regional areas. Cullinan Dep. at 15:13-21. Regional newspaper contractors continue to  
9 contract with The Bee. McDowell Decl. ¶ 14. In the metro area, however, The Bee awarded four  
10 distributor contracts in late 2009 and early 2010. Each of the distributors agreed in an  
11 independent contractor agreement to provide residential newspaper delivery services within a  
12 defined geography. McDowell Decl. ¶¶ 10-11. The creation of a distributor-based circulation  
13 model impacted the number of metro contracts that The Bee had to manage. The total number of  
14 contracts dropped from approximately 305 down to four. McDowell Decl. ¶ 12. These metro  
15 distributors are not part of the putative class, but some or all of their subcontractors and helpers  
16 appear to be. Second Am. Complaint ¶ 21-22.

17 **C. The Contractor/Helper/Substitute Distinction**

18 Although many contractors choose to deliver newspapers personally, The Bee's contractor  
19 agreements do not require their personal services. The agreements allow utilization of  
20 subcontractors, employees, or others as "helpers" (who assist the contractor) or "substitutes"  
21 (who perform some or all of the contractor's responsibilities). *See, e.g.,* McDowell 11/9/10 Dep.  
22 at 14:8-15:1, 17:21-23, 18:24-20:3, 39:9-42:8, Ex. 108 at ¶¶ 16-17; Ex. 109 at ¶¶ 16-17, Ex. 112  
23 at ¶¶ 16-17. Contractors exercise this contractual right in different ways. Some rarely, if ever,  
24 use substitutes to deliver; others rarely, if ever, deliver personally; others share responsibilities  
25 with other contractors or friends and family members. *Compare, e.g.,* Haven Decl. ¶ 7 with Trejo  
26 Decl. ¶¶ 20-21. Many of these arrangements are ad hoc and informal. *E.g.,* Kodur Decl. ¶¶ 14-

27  
28 <sup>1</sup> Deposition testimony cited herein is attached to the Stott Declaration filed herewith.

1 15, 21, 27-35; Leyva Dep. at 113:16-22, 115:2-11, 125:19-126:11, 128:17-129:4, 295:2-21,  
2 296:7-9, 532:19-23. Thus, some and possibly many people have delivered *The Fresno Bee*  
3 without a formal or written contract, or any relationship directly with The Bee.

4 **D. The Many Forms of Independent Contractor Agreements**

5 A putative class member who entered into a written contract between December 2004 and  
6 the present, might have executed any of a number of different forms of independent contractor  
7 agreement or amendments, depending on when the agreement was made and with whom.  
8 Especially in the earlier part of the class period, a contractor who contracted with The Bee would  
9 most likely have executed some form of a "buy-sell" agreement, pursuant to which the contractor  
10 purchased newspapers from The Bee, effected delivery, and collected subscription payments from  
11 subscribers. Later in the class period, some contractors executed "per piece" independent  
12 contractor agreements with The Bee. These contracts entitled the contractors to payment for each  
13 newspaper that was delivered within a geographic area, and did not involve them buying  
14 newspapers or collecting from subscribers. *See, e.g.*, McDowell 11/9/2010 Dep. at 14:8-15:1,  
15 17:21-23; 18:24-20:3, 24:12-33:25, 34:15-36:4, 40:24-48:8, 53:9-57:1 & Exs. 108-118.

16 Since February 2010 at the latest, metro contractors have contracted with independent  
17 distributors to perform contracted delivery services in the metro area. McDowell Decl. ¶ 13.  
18 Each of the distributors has chosen to subcontract in writing with newspaper carriers. Their  
19 contracts (which The Bee did not provide to them) seem similar but are not identical, and they  
20 differ from The Bee's various contracts. *See* Kolehmainen Decl. ¶ 17, Ex. 1; Swarts Decl. ¶ 26;  
21 Fleming Decl. ¶ 16, Ex. 1, Farmer Decl. ¶ 21, Ex. 1.

22 **E. The Named Plaintiffs and the Putative Class Members**

23 The putative class includes contractors in a wide variety of circumstances. Every  
24 contractor has his or her own unique way of doing business. Some examples follow.

25 **1. Brad Haven (Sunrise News Service)**

26 Brad Haven has owned and operated Sunrise News Service since 1982. Haven has  
27 business cards, and Sunrise has a business license, a business bank account, and a lease on a  
28

1 warehouse. In addition to The Bee, Sunrise contracts with others to deliver publications such as  
2 the *New York Times* and the *San Francisco Chronicle*. Haven Decl. ¶¶ 3-5.

3 Sunrise has divided its single Fresno Bee route into four sections, each of which is  
4 covered by a Sunrise subcontractor who also delivers the other publications that Sunrise has  
5 contracted to deliver. *Id.* ¶ 7. Sunrise receives Fresno Bee newspapers at Sunrise's leased  
6 warehouse. *Id.* ¶ 9. Sunrise does not require that its contractors bag or band newspapers, and  
7 does not instruct them or monitor their work. *Id.* ¶¶ 9-10, 13-14. Sunrise has refused requests  
8 from The Bee and from Bee subscribers, without consequence. *Id.* ¶¶ 11-12. Sunrise gives  
9 subscribers a telephone number to call so that Sunrise can address missed deliveries and avoid  
10 complaint charges. *Id.* ¶ 15.

11 Haven spends approximately 1.5 hours a day running his business. He receives written  
12 start and stop information, but he rarely in contact with Bee employees. Three Sunrise  
13 contractors routinely take less than three hours to finish their routes. Only one routinely takes  
14 four or more hours per day. *Id.* ¶ 17.

## 15 2. Yolanda Kodur and Elizabeth Aguilera

16 Yolanda Kodur has delivery contracts with both *The Fresno Bee* and the *Visalia Times-*  
17 *Delta* (a Gannett publication). So does Elizabeth Aguilar. Kodur picks up both contractors'  
18 Times-Delta newspapers, while Aguilar picks up The Bee for both routes. Each throws parts of  
19 the other's routes. In the middle, they trade off papers. Neither newspaper was consulted about  
20 the arrangement. Kodur Decl. ¶¶ 14-15. Kodur also uses a variety of substitutes and helpers  
21 from time to time to accomplish her deliveries, including her husband, who drives; her sons, who  
22 ride along; her son's girlfriend who is sometimes a helper and other times substitutes for Kodur  
23 using Kodur's car; and a Times-Delta employee who substitutes for Kodur using his own car.  
24 *Id.* ¶¶ 21, 27-35. Not surprisingly, Kodur recognizes that she is an independent contractor.  
25 *Id.* ¶ 7.

26 Kodur had a buy-sell arrangement with The Bee from 2006 until 2009. Since then she has  
27 been paid by the delivery. *Id.* ¶¶ 4, 11. The buy-sell agreement included a route allowance  
28 because of the distance Kodur drove daily. The per piece contract did not originally include a

1 route allowance, but Kodur negotiated one after evaluating her profits under the new contract.  
2 *Id.* ¶ 12. Kodur created her own color-coded “turn” list that she updates daily. *Id.* ¶ 9. Kodur’s  
3 routes take her about three hours daily. *Id.* ¶ 17. Sometimes she takes a ten-minute “power nap”  
4 break during delivery. *Id.* ¶ 46.

### 5           3.     **Roger Carpenter**

6           Named Plaintiff Roger Carpenter provided newspaper home delivery services from 1999  
7 until January 2006. Carpenter Dep. at 55:7-10; 75:5-8; 176:19-22. He had a buy-sell  
8 arrangement for delivering *The Fresno Bee* and a per piece arrangement for other publications.  
9 McDowell Decl. ¶ 17 & Ex. A. He was also a full-time employee of Putnam Hitch Products.  
10 Carpenter Dep. at 23:13-21; 26:6-14. Between 2002 and 2006 he also operated a carpet cleaning  
11 business. The business had both commercial and residential customers, and Carpenter had help  
12 from a subcontractor. *Id.* at 27:20-31:15; 34:1-37:7.

13           Carpenter understood that as a delivery contractor he similarly had the right and ability to  
14 provide delivery services simultaneously to multiple companies, *Id.* at 216:11-14, and he  
15 sometimes used substitutes and helpers for delivery. *Id.* at 81:1-90:6. He also helped others fold.  
16 *Id.* at 136:12-137:24. Carpenter modified his vehicle for delivery purposes and on Sundays used  
17 a trailer that he bought for use in his delivery business. *Id.* at 71:6-73:2; 122:13-123:11; 124:9-  
18 23; 125:17-126:8; 126:9-19 (trailer). (He had a different trailer that he used in the cleaning  
19 business. *Id.* at 33:12-25.) He created a customized route map and changed his delivery  
20 sequence regularly. *Id.* at 196:19-198:6; 201:9-13; 247:9-19. He purchased some supplies from  
21 The Bee and some through the Internet, combining with other carriers to buy better-quality  
22 supplies in bulk. *Id.* at 57:23-59:4, 61:24-62:2. Carpenter anticipated population growth in the  
23 Clovis area and obtained a route in that area, which grew along with the population. *Id.* at  
24 181:15-184:9.

### 25           4.     **Randy Leyva and Roger Moody**

26           Named Plaintiff Randy Leyva entered into a two-year buy-sell agreement with The Bee in  
27 October 2006. Leyva Dep. at Ex. 27. In July 2008, Leyva started a second route, which nearly  
28 doubled the number of newspapers he delivered. *Id.* at 209:15-210:23. In December 2009, he

1. entered into an independent contractor agreement with a distributor, 365 Media Distributing LLC.  
2. *Id.* at 39:11-13.

3. After Leyva obtained a second route in mid-2008, he used helpers to deliver almost every  
4. day, most often his roommate, Roger Moody, whose rent Leyva paid. *Id.* at 125:19-128:23,  
5. 532:19-23. Moody helped by folding and bagging papers and/or driving. *Id.* at 128:24-129:4,  
6. 295:2-4. Moody also helped Leyva a few times with collection activities. *Id.* at 296:7-9. In  
7. addition, Moody had a contract with The Bee for a number of months and Leyva helped Moody  
8. deliver that route. *Id.* at 295:10-21. Leyva also had helpers from time to time, including Moody,  
9. during his contract with 365 Media. *Id.* at 121:21-123:2, 124:14-18, 125:1-3, 408:14-24, 409:18-  
10. 410:2. Leyva used paid substitutes to deliver his routes when his car was not working. *Id.* at  
11. 113:16-22, 115:2-11.

12. Leyva bought a Chevy Beretta solely for purposes of delivering *The Fresno Bee*. He  
13. never drove it for any other purpose. *Id.* at 85:23-86:25, 87:1-9. When the Beretta broke down in  
14. 2007, he and Moody bought a Pathfinder. *Id.* at 89:3-19, 110:9-22. Leyva stopped using the  
15. Pathfinder for deliveries because it used too much gas. *Id.* at 111:6-17. He then bought a Honda  
16. to decrease his expenses in connection with newspaper distribution, but it cost him more because  
17. the car was a "lemon." *Id.* at 109:11-15, 111:9-112:23. Leyva had a Nissan Stanza in 2009. *Id.*  
18. at 120:22-25. In 2010, he was using a Ford Taurus. *Id.* at 119:21-25.

19. Leyva chose the sequence in which he delivered, in part based on fuel consumption. *Id.* at  
20. 308:16-309:6, 314:9-15, 315:15-316:8, 316:20-317:2. He sought route allowances to cover his  
21. high fuel costs; sometimes he obtained an allowance, other times he did not. *Id.* at 155:8-156:24,  
22. 596:13-597:10. Sometimes, when he had car problems, he delivered on foot. *Id.* 303:13-18.

### 23. 5. Vanessa Castro

24. Named Plaintiff Vanessa Castro considered herself an employee of The Bee because  
25. circulation managers allegedly were always telling her how she was "messing up." Castro Dep.  
26. at 68:15-69:9. Castro had a buy-sell agreement to deliver *The Fresno Bee* and a per piece  
27. arrangement for other publications and any down routes she elected to throw. *Id.* at 340:13-  
28. 341:15. When she delivered a "down" route she was paid per piece. *Id.* at 405:17-407:5.

1 Castro's domestic partner, Marissa, originally contracted for their route, but Castro always  
2 intended to deliver the newspapers herself. After consulting with The Bee, Castro substituted  
3 herself in as the contractor. *Id.* at 328:5-329:15. Marissa, however, helped with deliveries on  
4 occasion, and with folding two or three times a week. *Id.* at 111:24-112:11; 121:4-122:13; 123:3-  
5 5; 123:16-19. Others sometimes rode with Castro or helped her fold, including an uncle, cousin,  
6 brother and friends. *Id.* at 112:13-115:25; 122:14-123:2. Castro helped her aunt on occasion by  
7 delivering the last few papers on her aunt's route. *Id.* at 158:3-23.

8 Castro testified that a Bee employee gave her a route list and told her that it reflected how  
9 he wanted her to deliver the route. *Id.* at 87:15-22. Castro usually delivered the route as it was  
10 shown to her but made changes if there were "weirdoes" to avoid. *Id.* at 83:2-11. She rarely  
11 received complaints directly from customers; The Bee would pass along complaints. *Id.* at 54:21-  
12 24. She communicated with Bee employees frequently about complaints, usually by phone, a  
13 note in her box or bundle labels, but sometimes in person. *Id.* at 102:19-103:2; 105:5-8. Castro  
14 knew she could ask for another or different route but did not because she wasn't prepared to take  
15 one on. *Id.* at 397:13-398:1; 398:22-23.

16 **6. Connie Trejo**

17 Connie Trejo walked most of the route that she had with The Bee between 2002 and  
18 January 2012. Trejo Decl. ¶¶ 4, 12. Since then, she has contracted to do delivery work with  
19 Central California Home Distribution Agency, LLC. *Id.* ¶ 4. Trejo's route usually takes her two  
20 to two-and-a-half hours on weekdays and four hours on Sundays. Trejo has a small, fuel-efficient  
21 car for the parts of her route that she drives, and she bought a sealing machine so she would not  
22 have to tie bagged newspapers. *Id.* ¶¶ 16-17. She buys some of her supplies from The Bee and  
23 some from another contractor. *Id.* ¶ 18.

24 By choice, Trejo has rarely used substitutes or helpers. *Id.* ¶¶ 20-21. She hand makes  
25 Christmas calendars for the subscribers on her route, and has them contact her directly with  
26 complaints. *Id.* ¶¶ 22-23. She rarely had trouble collecting under the buy-sell contract that she  
27 had until approximately May 2009. *Id.* ¶ 25. She has always known that she was an independent  
28 contractor. *Id.* ¶ 29.



1 to control” the manner and means of accomplishing the desired result, along with as many as  
2 fourteen “secondary” factors designed to explore the nature of the parties’ actual business  
3 relationship.<sup>2</sup> “These factors ‘cannot be applied mechanically as separate tests; they are  
4 intertwined and their weight depends often on particular combinations.’” *Sotelo*, 207 Cal. App.  
5 4th at 656-57 (quoting *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 48 Cal. 3d 341, 351  
6 (1989)).

7 No single factor is dispositive—including the right to control. *Sotelo*, 207 Cal. App. 4th  
8 at 656-57. Because the test depends on a qualitative, individual assessment and weighing of  
9 interlocking factors, *all* of the relevant factors must be considered *jointly* to determine whether a  
10 given person is an independent contractor. *Id.* at 660 (affirming trial court: “the multi-factor test  
11 ‘requires that the factors be examined together’”). Formal agreements and any policies are  
12 relevant, but the parties’ actual practices trump formalities. *See, e.g., Ali v. U.S.A. Cab Ltd.*, 176  
13 Cal. App. 4th 1333, 1349-50 (2009).

14 Until relatively recently, it was often (though incorrectly) asserted that predominance  
15 could be established by reference to broadly “common” questions such as “were the carriers  
16 correctly classified as independent contractors?” *See, e.g.,* Second Amended Complaint ¶ 25(a)  
17 (“Common questions of law that exist include . . . [w]hether or not the Class Members are  
18 properly categorized as independent contractors.”). Every level of the California and federal  
19 judiciaries has now rejected that contention.

20 In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the United States Supreme  
21 Court held that a plaintiff seeking class certification must demonstrate the capacity of common  
22

23 <sup>2</sup> According to *Sotelo*, these secondary factors would include, in that case: (1) whether there is a  
24 right to terminate “at will” without cause; (2) whether the alleged employee is engaged in a  
25 distinct occupation or business; (3) the kind of occupation; (4) the skill required; (5) who  
26 supplies the instrumentalities, tools, and the place of work; (6) the duration of the relationship;  
27 (7) the method of payment; (8) whether the work is a regular and integral part of the business of  
28 the principal; (9) the parties’ belief as to the nature of the relationship; (10) whether the  
classification of independent contractors is bona fide; (11) the contractor’s degree of investment  
and whether he or she holds himself out as an independent business; (12) the contractor’s use of  
helpers, employees, or replacements; (13) the contractor’s opportunity for profit and loss  
depending upon managerial skill; and (14) whether the service rendered is an “integral” part of  
the alleged employer’s business. 207 Cal. App. 4th at 656-57.

1 proof to resolve liability as to the entire class. *Id.* at 2556-57. That is, broad common questions  
2 like “were carriers misclassified as contractors?” do not support class certification if they cannot  
3 be answered based on evidence common to the proposed class. *Id.* at 2551.<sup>3</sup>

4 In *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), the California  
5 Supreme Court held that class certification is not appropriate if the plaintiffs’ claim implicates  
6 “neither a common policy nor a common method of proof” and liability depends in material part  
7 on facts particular to individual claimants. *Id.* at 1051. Consistent with the principle, in *Marlo v.*  
8 *United Parcel Serv., Inc.*, 639 F.3d 942, 948 (9th Cir. 2011), the Ninth Circuit held that  
9 classifying an entire group of workers does not create a “common” issue if the classification may  
10 be accurate and lawful as to some class members but not to others. The court found that “the  
11 existence of a policy classifying [supervisors] as exempt from overtime-pay requirements does  
12 not necessarily establish that [the supervisors] were misclassified, because the policy may have  
13 accurately classified some employees and misclassified others.” *Id.* at 948. This is precisely the  
14 factual dynamic in the case at hand.<sup>4</sup>

15  
16 <sup>3</sup> Several courts in California have since applied this principle and denied or revoked class  
17 certification in cases where the plaintiffs claimed that the defendants misclassified workers and  
18 thereby violated the Labor Code. See, e.g., *Cruz v. Dollar Tree Stores, Inc.*, Nos. 07–2050 SC,  
19 07–4012 SC, 2011 WL 2682967, at \*5, \*7-8 (N.D. Cal. July 8, 2011) (decertification granted:  
20 plaintiffs’ failure to demonstrate “reliable means of extrapolating from the testimony of a few  
21 exemplar class members to the class as a whole” was “fatal to continued certification”);  
22 *Velazquez v. Costco Wholesale Corp.*, No. SACV 11–00508–JVS (RNBx), 2011 WL 4891027, at  
23 \*5, \*8 (C.D. Cal. Oct. 11, 2011) (certification denied despite common proof regarding workers’  
24 generic duties because common proof was lacking as to key liability issue of what tasks  
25 individual workers actually performed from week to week); *Gales v. WinCo Foods*, No. C 09–  
26 05813 CRB, 2011 WL 3794887, at \*6-10 (N.D. Cal. Aug. 26, 2011) (certification denied: no  
27 common proof of how class members actually spent their working time); *Aburto v. Verizon Cal.,*  
28 *Inc.*, No. CV 11–03683–ODW (VBKx), 2012 WL 10381, at \*5 (C.D. Cal. Jan. 3, 2012)  
(certification denied: question whether all class members were “improperly classified as exempt  
will depend on answers unique to each potential plaintiff”). See also *Wackenhut Wage and Hour*  
*Cases*, Nos. 4545, BC326 996, BC373415, 00180014, CGC11 551748, 2012 WL 3218518, at 5  
(L.A. County Super. Ct. Aug. 1, 2012) (decertification granted because plaintiffs’ claims did “not  
involve the kinds of common questions that can support class certification under *Wal-Mart*”).  
This is not an exhaustive list.

<sup>4</sup> See also *Novak v. Boeing Co.*, No. SACV09–01011–CJC(ANx), 2011 WL 7627789, at \*5 (C.D.  
Cal. Dec. 19, 2011) (quoting *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 948 (9th Cir.  
2011)); *Sotelo*, 207 Cal. App. 4th at 655 (noting that appellants had not alleged “uniform  
practices or policies, beyond the issue of employee misclassification, that would establish liability  
for overtime or rest/meal break violations”) (emphasis added); *Dunbar v. Albertson’s, Inc.*, 141  
Cal. App. 4th 1422, 1427 (2006) (decision to classify employees as exempt “may be improper as

1 In *Sotelo*, the California Court of Appeal affirmed denial of certification of a class of  
2 newspaper distributors and carriers who claimed, as Plaintiffs do here, that they were  
3 misclassified as independent contractors and that various Labor Code violations followed from  
4 that misclassification. Most importantly for the present motion, the *Sotelo* court held that,  
5 because each factor in the independent contractor test is relevant to the overall classification  
6 inquiry, “[e]ven if the factor is not dispositive, it is a factor which might be litigated, requiring  
7 individual testimony at trial.” 207 Cal. App. 4th at 658. The *Sotelo* court thus affirmed the trial  
8 court’s conclusion that variability as to several of the so-called “secondary factors” (discussed  
9 below) rendered individual issues predominant. *Id.* at 657-60.

## 10 2. The Right to Control Cannot Be Evaluated on a Class Basis

11 The most important factor in determining whether an individual is an “employee” or an  
12 “independent contractor” is whether the person to whom service is rendered has the “right to  
13 control” the manner and means of accomplishing the desired result. *Borello*, 48 Cal. 3d. at 350.  
14 In the newspaper context, timely delivery of a newspaper in a dry, readable condition to  
15 subscribers within a particular geographic area is the contracted-for result.<sup>5</sup> Thus, the question is  
16

17 to some putative class members but proper as to others”); *Walsh v. Ikon Office Solutions, Inc.*,  
18 148 Cal. App. 4th 1440, 1461 (2007); *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571  
19 F.3d 953, 958 (9th Cir. 2009); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th  
20 Cir. 2009) (“a district court abuses its discretion in relying on an internal uniform exemption  
21 policy to the near exclusion of other factors relevant to the predominance inquiry”); *Sepulveda v.*  
*Wal-Mart Stores, Inc.*, 237 F.R.D. 229, 248 (C.D. Cal. 2006) (“no benefit is derived from  
proceeding as a class action because class membership is not founded upon any [employer] policy  
or other generalized proof, but rather on the fact-specific determination of each individual  
plaintiff’s day-to-day tasks”) (citation omitted).

22 <sup>5</sup> “[T]he requirements that a specified number of deliveries be made 365 days a year during  
23 specified times to specified locations, merely reflect—in an entirely appropriate and  
24 understandable way—the intended results of the PCF-deliverer relationship. It is undisputed that  
25 they are the requirements imposed upon PCF by its clients. As these requirements concern the  
26 results to be achieved, not the means to accomplish those results, and as PCF may properly  
27 dictate its desired results to both employees and independent contractors, they do not affect the  
28 deliverers’ employment classification.” *Edwards v. Publishers Circulation Fulfillment, Inc.*, 268  
F.R.D. 181, 186 (S.D.N.Y. 2010); accord 22 Cal. Code Regs. § 4304-6(c)(4). If the rule were  
otherwise, then newspaper carriers could never be independent contractors, for all carriers of  
daily newspapers must deliver them timely to subscribers in a readable condition. Courts and  
agencies have repeatedly found carriers to be independent contractors. See, e.g., *St. Joseph News-*  
*Press & Teamsters Union Local 460*, 345 N.L.R.B. No. 31, 2005 WL 2115874 (Aug. 27, 2005);  
*Fleming v. Foothill-Montrose Ledger*, 71 Cal. App. 3d 681 (1977).

1 which party controls *how* the newspapers are to be timely delivered to subscribers in a dry,  
2 readable condition. The Bee's agreements expressly disclaim any right to control those matters.  
3 McDowell 11/9/2010 Dep. at 14:8-15:1, 17:21-23; 18:24-20:3, 24:12-29:21, 30:9-33:25, 34:15-  
4 36:4, 40:24-48:8, 53:9-57:1 & Ex. 108-118. Thus, to understand the parties' rights and whether a  
5 right to control exists in fact, the factfinder in this case will have to look beyond the contracts to  
6 how the parties actually conduct themselves in practice. *Ali*, 176 Cal. App. 4th at 1349; *see also*  
7 22 Cal. Code Regs. § 4304-6(c)(1) ("A written agreement . . . not complied with in practice . . .  
8 shall not determine the intent or the relationship of the parties."). The evidence in this case shows  
9 wide variation on this subject.

10 First, the ability to obtain a substitute on one's own authority is evidence of independence.  
11 *See* 22 Cal. Code Regs. § 4304-6(c)(7). The Bee's independent contractor agreements expressly  
12 permit contractors to utilize substitutes and helpers of the contractors' own choosing. *See, e.g.,*  
13 McDowell 11/9/10 Dep. at 14:8-15:1, 17:21-23, 18:24-20:3, 39:9-42:8, Ex. 108 at ¶¶ 16-17; Ex.  
14 109 at ¶¶ 16-17; Ex. 112 at ¶¶ 16-17; Haven Decl. ¶¶ 6, 18 (The Bee has no control over who he  
15 contracts with to deliver the newspapers); Kodur Decl. ¶¶ 31, 35 (was not required to ask The Bee  
16 for permission to have helpers or substitutes on the route). In contrast, distributors' agreements  
17 for use with their subcontractors contain "personal supervision" provisions. *E.g.,* Farmer Decl.  
18 Ex. 1 ¶ 7. Putative class members' *actual* use of helpers and/or substitutes varies from (a) always  
19 or almost always to (b) rarely, and possibly never. Haven has subcontractors delivering daily.  
20 Haven Decl. ¶ 7. Kodur and another carrier split their routes with one another. Kodur Decl.  
21 ¶¶ 14-15. Leyva and his roommate (and others) assisted each other in a variety of ways. Leyva  
22 Dep. at 113:16-115:11, 121:21-129:4, 295:2-296:9, 408:14-410:2, 532:19-23. Carpenter has  
23 sometimes used substitutes and helpers. Carpenter Dep. at 81:1-90:6. Castro sometimes shared  
24 her work with her then-domestic partner. Castro Dep. at 111:24-115:25, 121:4-123:19, 328:5-  
25 329:15. Trejo rarely uses substitutes or helpers. Trejo Decl. ¶¶ 20-21. Contractor Josh Bowman  
26 knew that he could have used a substitute, but he had no occasion to do so. Bowman Decl. ¶ 13.

27 Second, the evidence varies regarding when contractors collected their newspapers and  
28 when they finished their deliveries. Contractors picked up papers at different times. Carpenter

1 Dep. at 135:2-8. Carpenter's and Leyva's arrival times varied from day to day. *Id.* at 100:11-  
2 102:2, 135:9-16; Leyva Dep. at 273:3-274:24, 276:9-277:5. Kodur, however, alleges that she had  
3 to be at her drop site by 3:30 a.m. Kodur Decl. ¶ 16.<sup>6</sup>

4 Third, contractors worked in various locations. Some received their newspapers at  
5 distribution centers, e.g., Leyva Dep. at 98:7-9 (Lamona); Carpenter Dep. at 100:1-10 (Clovis);  
6 Trejo Decl. ¶ 5 (Fallbrook); some at drop sites, e.g., Kodur Decl. ¶¶ 18, 20 (Reedley and Dinuba  
7 drop sites); some, at times, at their homes, Holguin Dep. at 145:13-146:1; some at the contractor's  
8 own warehouse, Haven Decl. ¶ 9. Contractors also folded the newspapers in various locations,  
9 including distribution center, home or car, for example. Trejo sealed newspapers in bags at a  
10 distribution center. Trejo Decl. ¶¶ 7-8, 16. Kodur assembled and bagged papers as she drove, to  
11 save time. Kodur Decl. ¶¶ 23, 27. Carpenter observed some contractors folding in their cars  
12 every day. Carpenter Dep. at 135:17-23. Castro found it easier to fold and bag in the warehouse,  
13 but she sometimes bagged newspapers in her car. Castro Dep. at 141:8-13; 143:15-19; 192:2-4.  
14 Leyva folded in the warehouse or his car depending on circumstances. Leyva Dep. at 119:16-  
15 122:1, 130:4-131:23, 301:9-13, 338:20-22.

16 Other delivery practices—all part of the “how” of delivery—likewise varied among the  
17 contractors. Carpenter created his own customized map and then memorized it. Carpenter Dep.  
18 at 196:19-197:13. He changed his route frequently because subscribers were added or lost or  
19 because of new construction. *Id.* at 201:9-13; see also *id.* at 247:9-19 (no one at The Bee knew  
20 the order on his delivery route or asked him to change it). Leyva received color-coded maps from  
21 The Bee. Leyva Dep. at 310:9-312:23. He has changed his delivery sequence to conserve gas  
22 and when he added a second route. *Id.* at 314:9-317:2. Castro, in contrast, was allegedly given a  
23 route list and told by her district manager that he wanted her to follow it. Castro Dep. at 83:2-85:

24  
25 <sup>6</sup> There is, of course, a contractual delivery *deadline*, but that does not show control over the  
26 means and manner of delivery. Indeed, it would be remarkable if merely informing a delivery  
27 service provider that work must be done by a particular time somehow transformed the service  
28 provider into an employee. Every home renovation contractor, for example, commits to deadlines  
and milestones—often with penalties for late performance. *See also Edwards*, 268 F.R.D. at 186  
 (“a promise to make the publications available within a specified period of time does not direct a  
deliverer's attendance at a particular time, except to the extent that the deliverer must obtain the  
publication at some point prior to delivering them”).

1 18, 87:15-22, 96:1-97:14, 106:18-25, 108:1-17, 162:5-165:5; *but see id.* at 111:3-10 (The Bee did  
2 not know in advance if contractor changed the delivery order and never told her she could not  
3 change it; but did ask her why); *compare* Leyva Dep. at 308:16-309:6 (two contractors combined  
4 and arranged routes to economize on fuel); Haven Decl. ¶ 14 (contractor could create any route  
5 sequence without The Bee's approval or consent); Kodur Decl. ¶¶ 5, 9, 22-23 (free to assemble  
6 papers in any manner; The Bee did not provide contractor a delivery sequence); Trejo Decl. ¶¶ 2,  
7 14 ("delivered the route in whatever sequence I wanted"). This highly varied evidence regarding  
8 the right to control precludes class certification.

9 **3. Variation Regarding Secondary Factors Precludes Class Certification**

10 Although the control element of the independent contractor test does not present a  
11 common question, even if the evidence was common as to "control," individual issues would still  
12 predominate in the independent contractor inquiry as a whole. This is because all of the factors—  
13 right to control and each of the secondary factors—must be considered *together* when evaluating  
14 an alleged contractor's proper classification. *Sotelo*, 207 Cal. App. 4th at 659 ("Even if the factor  
15 is not dispositive, it is a factor which might be litigated, requiring individual testimony at trial.").  
16 Because differences in a few factors can be dispositive, it does not matter that some common  
17 evidence might exist regarding some of the other factors. The court in *Sotelo*, for example, held  
18 that a proposed class of independent contractor newspaper carriers was correctly not certified  
19 where the evidence varied as to four of the fourteen secondary factors.<sup>7</sup> Here, the secondary  
20 factors evidence is similarly varied:

21 **a. Independent Business**

22 Putative class members vary with respect to whether they held themselves out as  
23 independent businesses and, if so, how. Haven has operated Sunrise News Service for 30 years.  
24 Sunrise leases a warehouse, has a business license and bank account, has multiple clients, and  
25

26 <sup>7</sup> *Sotelo*, 207 Cal. App. 4th at 657-58 (discussing variability as to the following factors: "(1)  
27 whether the one performing services is engaged in a distinct occupation or business; (2) the  
28 method of payment; (3) whether or not the parties believe they are creating an employer-  
employee relationship; (4) the hiree's opportunity for profit or loss depending on his or her  
managerial skill").

1 works with four delivery contractors. Haven Decl. ¶¶ 3-5, 7. Trejo “would tape a handmade  
2 Christmas calendar to the newspapers” around the December holidays and distribute the calendars  
3 to subscribers as she walked her route. Trejo Decl. ¶¶ 12, 23. Trejo had subscribers contact her  
4 directly with complaints, and described her newspaper delivery operation as “my own business.”  
5 *Id.* ¶ 22-23, 28; *but cf. id.* ¶19 (could have deducted delivery expenses but chose not to because of  
6 income level); *compare* Carpenter Dep. at 55:14-24; 234:12-16 (gave tax preparer estimated  
7 mileage and business expenses in connection with distributing newspapers); *see also* Kodur Decl.  
8 ¶ 38 (deducted expenses such as vehicle, mileage, insurance, bags, and bands); *but see* Castro  
9 Dep. at 76:19-77:14; 81:19-82:2; 83:12-18 (did not claim expenses on her tax returns because she  
10 lacked proper documentation).

11 **b. Investment, Tools and Supplies**

12 The contractors’ practices with regard to purchasing tools and supplies were similarly  
13 wide-ranging. Leyva bought a Chevy Beretta solely for purposes of delivering *The Fresno Bee*,  
14 and he cycled through a variety of delivery vehicles after the Beretta broke down. Leyva Dep. at  
15 85:23-86:25, 87:1-9, 89:3-19, 110:9-112:23, 119:21-25, 120:22-25. Carpenter modified his  
16 vehicle for delivery purposes and sometimes used a trailer that he bought for use in his delivery  
17 business (a different trailer than the one he used for his other business). Carpenter Dep. at 33:12-  
18 25, 71:6-73:2, 122:13-123:11, 124:9-23, 125:17-126:8, 126:9-19.

19 Many contractors chose to purchase supplies from The Bee (or a distributor) because they  
20 are high quality, reasonably priced, and readily available in small quantities. Castro Dep. at  
21 151:1-24; Leyva Dep. at 81:12-82:4; Kodur Decl. ¶ 37. Other contractors shopped around to  
22 identify cheaper supplies to minimize their own costs and maximize their profits. *E.g.*, Carpenter  
23 Dep. at 57:23-59:4, 61:24-62:2 (bought rubber bands both from The Bee and from a company  
24 over the internet; several contractors went together on bulk purchase of bands). Trejo chose to  
25 buy a sealing machine from another contractor to seal bags so they did not need to be tied. Trejo  
26 Decl. ¶¶ 16, 18.

1                   c.       **Location of Work**

2           As described in the previous section, contractors have received their newspapers at their  
3 homes, their own warehouses, Bee-operate distribution centers, distributor-operated distribution  
4 centers and remote drop sites. They fold or assemble wherever they choose.

5                   d.       **Method of Payment**

6           Contractors have had buy-sell arrangements and per piece arrangements—sometimes in  
7 the same contract. McDowell Decl. ¶¶ 8, 17 & Ex. A. Some contractors negotiated route  
8 allowances to cover fuel costs; others did not succeed in obtaining route allowances. Kodur Decl.  
9 ¶ 12 (did); Leyva Dep. at 155:8-156:24, 596:13-597:10 (sometimes did, sometimes not). Kodur  
10 and Aguilar had essentially a barter arrangement in which each did part of the other's work.  
11 Kodur Decl. ¶¶ 14-15. Helper Moody had his rent paid by contractor Leyva. Leyva Dep. at  
12 125:19-128:23, 532:19-23. Leyva paid another helper in the form of a meal. *Id.* at 409:18-410:2.  
13 Carpenter paid helpers cash. Carpenter Dep. at 81:1-9, 87:6-90:6.

14                   e.       **Profit and Loss**

15           The ability to generate profits or incur losses has been described as the ability “to be an  
16 entrepreneur . . . to take economic risk and reap a corresponding opportunity to profit from  
17 working smarter, not just harder.” *St. Joseph News-Press*, 345 N.L.R.B. at 479 (citation omitted).  
18 In *St. Joseph News-Press*, holding that newspaper carriers were independent contractors, the  
19 National Labor Relations Board found it relevant that “the carriers can hire full-time substitutes  
20 and hold contracts on multiple routes . . . have complete control over their substitutes’ terms and  
21 conditions of employment . . . are also permitted to deliver other products, including competing  
22 newspapers . . . [and] can solicit new customers and thereby increase the profitability of their  
23 routes.” *Id.* In this case, depending on each individual contractor, the evidence varies on all of  
24 these material points.

- 25           • As described above, many contractors (but not all of them) regularly utilized  
26           helpers and substitutes.
- 27           • Many contractors had multiple routes. Leyva nearly doubled the number of  
28           newspapers he delivered when he took a second route. Leyva Dep. at 209:15-

1 210:23. Carpenter correctly anticipated population growth in the Clovis area and  
2 obtained a growing route in that area. Carpenter Dep. at 181:15-184:9.

- 3 • Haven contracted to deliver (simultaneously) the *San Francisco Chronicle*. Haven  
4 Decl. ¶ 4. Kodur contracted to deliver (simultaneously) the *Visalia Times Delta*.  
5 Kodur Decl. ¶¶ 14-15.
- 6 • Buy-sell agreements offered opportunities for greater profit through persistence  
7 and ingenuity in collections, but exposed the contractor to a risk of loss from  
8 subscribers' non-payment.
- 9 • Leyva delivered sample papers to try to generate new subscriptions on his route,  
10 and sought to convince former subscribers to restart their lapsed subscriptions.  
11 Leyva Dep. at 387:24-388:24; 449:15-450:16. In contrast, Castro and Carpenter  
12 did not pursue additional customers because they had all they could handle.  
13 Carpenter Dep. at 271:4-11; Castro Dep. at 397:13-398:1, 398:22-23.

14 **f. Length of Relationship**

15 Contractors contracted with The Bee for widely varying lengths of time. For example,  
16 2,350 newspaper carriers contracted with The Bee for less than six months. Stott Decl. ¶ 9 & Ex.  
17 H. On the other hand, 1,550 carriers contracted with The Bee for six months or *longer* and  
18 approximately 980 did so for a period of twelve months or longer. *Id.*

19 **g. Intent**

20 The parties' intent is not dispositive, but it *is* relevant. *Ali*, 176 Cal. App. at 1352 ("it is  
21 well established that a worker's belief is one of several secondary indicia of his or her status");  
22 *see also* 22 Cal. Code Regs. § 4304-6(c)(1) ("A written agreement signed by both parties shall be  
23 evidence of intent."). "[I]t is a factor which might be litigated, requiring individual testimony at  
24 trial." *Sotelo*, 207 Cal. App. 4th at 659. Here, some contractors understood that they would be  
25 and were independent contractors. *E.g.*, Carpenter Dep. at 220:20-221:8; Haven Decl. ¶¶ 2, 22;  
26 Kodur Decl. ¶¶ 7-8. Others claim that they had a different understanding. Castro Dep. at 68:15-  
27 69:9 (testifying that she considered herself an "employee" of The Bee).

1 This case is rendered completely unsuitable for class treatment by the many and varied  
2 combinations of secondary factors that might apply to any given contractor.

3 **4. The Contrary Interpretation in *Ayala v. Antelope Valley Newspapers* Conflicts**  
4 **with Existing Authority, and Should Be Rejected**

5 *Ayala v. Antelope Valley Newspapers*<sup>8</sup> is a recent decision in which the Second Appellate  
6 District Court of Appeal reversed in part an order denying class certification in a newspaper  
7 independent contractor case. The *Ayala* opinion is an outlier which does not acknowledge the  
8 dramatic conflicts that it creates with prior authority, including *Sotelo*, which the First Appellate  
9 District published only a few weeks before *Ayala* was decided, and *Ali v. U.S.A. Cab*. Indeed, no  
10 authority whatsoever is cited in support of the *Ayala* analysis. Nevertheless, when faced with a  
11 conflict in published authority, this Court must follow the most persuasive precedent. *McCallum*  
12 *v. McCallum*, 190 Cal. App. 3d 308, 315 n.4 (1987). *Ayala*'s faulty analysis compels discussion  
13 here.

14 Although the trial court denied class certification in *Ayala* because the evidence varied  
15 across the putative class, the appellate court held that variation was not fatal to class certification  
16 because all of the evidence went to which party (the newspaper or the newspaper carriers) had the  
17 right to control the means and manner of accomplishing delivery. The appellate court's opinion,  
18 however, relies heavily on the fact that all of the contractors provided services pursuant to nearly  
19 identical contract forms. Here, in contrast, the independent contractor agreements are many and  
20 varied. The evidence also differs here as between buy-sell and per piece contracts, regional and  
21 metro contracts, Bee contractors, distributors' subcontractors, and helpers and substitutes. The  
22 right to control is not a common question on this record.

23 *Ayala* also erred in holding that variation among carriers with respect to the secondary  
24 factors was "evidence that the type of work involved often is done by independent contractors"  
25 and that "the focus of the secondary factors is mostly on the job itself, and whether it involves the  
26

27  
28 <sup>8</sup> *Ayala v. Antelope Valley Newspapers, Inc.*, \_\_ Cal. Rptr. 3d \_\_, 2012 WL 4098995, 12 Cal.  
Daily Op. Serv. 11,809, 2012 Daily Journal D.A.R. 14,449 (Cal. App. Sept. 19, 2012).

1 kind of work that may be done by an independent contractor, or generally is done by an  
2 employee.” *Ayala*, 2012 WL 4098995 at \*10. This holding flies in the face of decades of case  
3 law recognizing “type of work” as one of more than a dozen secondary factors—not as the focus  
4 of the entire secondary factors inquiry. *See, e.g., Borello*, 48 Cal. 3d at 351 (referring to “kind of  
5 occupation” as a secondary factor). California courts have also long held that “different legal  
6 standards [do not] apply in the context of different occupations” but, rather, “[e]ach service  
7 arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case  
8 to case.” *Cristler v. Express Messenger Sys., Inc.*, 171 Cal. App. 4th 72, 87 (2009) (quoting  
9 *Borello*, 48 Cal. 3d at 354) (emphasis omitted).

10 Understanding that the “type of work” is but one of many secondary factors in the  
11 independent contractor analysis explains why some courts in this state and elsewhere have found  
12 newspaper delivery persons properly classified as independent contractors,<sup>9</sup> while other courts,  
13 given different facts and in different contexts, have concluded that newspaper delivery persons  
14 were instead properly classified as employees.<sup>10</sup> It also explains how courts have found that  
15 workers doing many kinds of relatively lower-skilled work can be independent contractors, even  
16 when the work in question could be and often is performed by an employee.<sup>11</sup> In short, in some  
17 cases “a newspaper carrier can be an independent contractor as a matter of law; in others, an  
18 employee as a matter of law; and in still others, the status of the newspaper carrier to the  
19 newspaper is a factual issue.” *Larson v. Hometown Commc’ns, Inc.*, 526 N.W.2d 691, 698 (Neb.  
20

21 <sup>9</sup> *E.g., Fleming v. Foothill-Montrose Ledger*, 71 Cal. App. 3d 681, 685 (1977); *Taylor v. Indus.*  
22 *Accident Comm’n*, 216 Cal. App. 2d 466 (1963); *Hartford A. & I. Co. v. Indus. Accident*  
23 *Comm’n*, 123 Cal. App. 151 (1932); *see also Venango Newspapers v. Unemployment Comp. Bd.*  
24 *of Review*, 631 A.2d 1384 (Pa. Commw. Ct. 1993); *LaFleur v. LaFleur*, 452 N.W.2d 406 (Iowa  
25 1990); *Brown v. NLRB*, 462 F.2d 699 (9th Cir. 1972); *Cable v. Perkins*, 459 N.E.2d 275 (Ill. App.  
26 Ct. 1984); *Neve v. Austin Daily Herald*, 552 N.W.2d 45 (Minn. Ct. App. 1996); *Lewiston Daily*  
27 *Sun v. Hanover Ins. Co.*, 407 A.2d 288 (Maine 1979); *Ross v. Post Publ’g Co.*, 29 A.2d 768  
28 (Conn. 1943).

29 <sup>10</sup> *See, e.g., Grant v. Woods*, 71 Cal. App. 3d 647, 652 (1977); *Cal. Emp. Comm’n. v. L.A. Down*  
30 *Town Shopping News Corp.*, 24 Cal. 2d 421 (1944).

31 <sup>11</sup> *E.g., Becker v. Indus. Accident Comm’n*, 212 Cal. 526 (1931) (general messenger); *Chin v.*  
32 *Namvar*, 166 Cal. App. 4th 994 (2008) (painter); *Torres v. Reardon*, 3 Cal. App. 4th 831 (1992)  
33 (gardener); *Millsap v. Fed. Express Corp.*, 227 Cal. App. 3d 425 (1991) (parcel delivery-person).

1 Ct. App), *aff'd*, 540 N.W.2d 339 (Neb. 1995); *see also Harper ex rel. Daley v. Toler*, 884 So. 2d  
2 1124, 1133 (Fla. Dist. Ct. App. 2004) (noting that “whether a particular newspaper carrier is an  
3 employee or an independent contractor depends on the particular relationship the carrier has with  
4 the newspaper” and “the facts peculiar to each case govern the decision”) (quoting *Keith v.*  
5 *News & Sun Sentinel Co.*, 667 So. 2d 167, 170 (Fla. 1995)).

6 The Bee and each individual contractor alike have a right to a decision based on *all* of the  
7 factors that the Supreme Court in *Borello* deemed important—not just the right of control plus the  
8 couple of secondary factors that relate to what sort of work is being done. The Court should  
9 disregard altogether *Ayala*’s faulty analysis. *Sotelo* sets forth the analysis that this Court should  
10 apply here. *See also Ali*, 176 Cal. App. 4th at 1349, 1352 (affirming denial of certification based  
11 in part on varied evidence regarding secondary factors). Under *Sotelo*, Plaintiffs’ claims fail  
12 because individual questions predominate in the independent contractor determination.

13 **B. Individual Issues Predominate Regarding Plaintiffs’ Substantive Labor Code Claims**

14 The predominance of individual issues in the independent contractor analysis means that  
15 the jury would have to evaluate every class member’s individual circumstances even to consider  
16 reaching the substantive causes of action that Plaintiffs assert. This is the antithesis of a class  
17 action. *Brinker*, 53 Cal. 4th at 1052 (class should not require proof “in an employee-by-employee  
18 fashion”). Moreover, contrary to the suggestion in Plaintiffs’ Second Amended Complaint (*see*  
19 ¶ 19), resolution of the independent contractor issue would *not* be the end of the individual  
20 inquires. In *Brinker*, for example, although the plaintiffs were undisputedly employees, the  
21 Supreme Court affirmed denial of class certification as to the plaintiffs’ “off-the-clock” claims.  
22 *Id.* at 1051.

23 **1. Meal and Rest Periods**

24 *Sotelo* and *Ayala* affirmed trial court decisions *not* to certify the meal and rest period  
25 claims of alleged classes of newspaper carriers. *Sotelo*, 207 Cal. App. 4th at 653-54; *Ayala* at  
26 \*11. The evidence here displays all of the variation that precluded certification in those cases.  
27 First, The Bee has no common policy or practice of denying meal or rest breaks to contractors  
28 who wish to take them. Second, time worked in a day governs entitlement to breaks for

1 employees, but a given contractor may spend more or less time working on a given day.<sup>12</sup>  
2 Further, for some contractors, time spent on their Fresno Bee contracts was commingled with  
3 deliveries of other products or with other activities. *E.g.* Haven Decl. ¶ 7 (subcontractors  
4 delivered multiple publications); Kodur Decl. ¶¶ 17-18 (*Fresno Bee* and *Visalia Times-Delta*  
5 routes usually took three hours to deliver both papers except three and a half hours on Sunday);  
6 Leyva Dep. at 405:18-407:15 (while collecting from subscribers under buy-sell agreement, was  
7 also checking up on his mother and an individual for whom he was a paid caretaker). As the  
8 above variation makes clear, some contractors are not even *potentially* entitled to the relief sought  
9 in Plaintiffs' meal and rest period claims because they did not work sufficient hours. It is well-  
10 established that a plaintiff cannot obtain class certification where plaintiffs' proposed class  
11 "includes both injured and uninjured parties."<sup>13</sup>

12 Even setting aside this threshold deficiency, certification of Plaintiffs' meal and rest  
13 period claims is inappropriate because it is not possible to determine whether a given contractor  
14 took a break on a given day (or if not, *why* not) without asking each individual contractor. For  
15 example, Castro testified that she did not take breaks during deliveries. Castro Dep. at 590:15-18;  
16 590:22-591:2. Kodur, in contrast, sometimes took a ten-minute "power nap" in the rural portion  
17 of her route. Kodur Decl. ¶ 46. Leyva took breaks during collecting to check up on his mother,  
18 Leyva Dep. at 405:18-407:15, but also claims that he did not know he could take breaks. *Id.* at  
19 594:16-23. Contractors Steven Carter and Robert Lopez knew that they could take breaks but  
20 usually or always chose not to take them. Carter Decl. ¶ 25; Lopez Decl. ¶ 16. In short,

21  
22 <sup>12</sup> *Brinker*, 53 Cal. 4th at 1029 ("Employees are entitled to 10 minutes rest for shifts from three  
23 and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30  
24 minutes for shifts of more than 10 hours up to 14 hours, and so on."). Testimony shows that only  
25 some contractors regularly exceeded 3.5 hours. *E.g.*, Haven Decl. ¶ 17 (about 1.5 hours a day  
26 coordinating with subcontractors); Vermette Decl. ¶¶ 13, 15 (Monday to Saturday and his portion  
of Sunday route took 1.5 hours to complete); Leyva Dep. 529:9-530:1 (three to four hours on  
weekdays); Holguin Dep. 153:10-156:2; 164:7-21 (maximum three hours to assemble and deliver  
newspapers on Sunday); *see also* Castro Dep. at 385:12-23 (alleging she spent about 21 hours per  
week collecting); Carpenter Dep. 160:24-162:15 (spent about 10 hours per month collecting).

27 <sup>13</sup> *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 268 F.R.D. 604, 612 (N.D. Cal. 2010)  
28 (citing *In re Neurontin Mktg. and Sale Practices Litig.*, 244 F.R.D. 89, 114 (D. Mass. 2007))  
(finding that a plaintiff's inability to propose a method for separating the injured from the  
uninjured precluded class certification).

1 determining whether a meal or rest break was missed or waived, and whether Defendants failed to  
2 provide a missed rest or meal break, are individual issues of fact incapable of class-wide proof.  
3 *See, e.g., Brown v. Fed. Express Corp.*, 249 F.R.D. 580 (C.D. Cal. 2008) (individual issues  
4 predominate where various route sizes, conditions, number and weight of packages etc. affected  
5 whether an employee had time for breaks).

## 6           2.       Overtime and Minimum Wage Claims

7           The same deficiencies plague Plaintiffs' overtime claim. Labor Code Section 510  
8 provides for overtime pay after eight hours in a work day, forty hours in one workweek or the  
9 first eight hours worked on the seventh day in any workweek. Obviously, liability under Section  
10 510 depends on whether, when and how much a person worked. As just discussed, these issues  
11 cannot be determined on a class basis in this case because contractors work widely varying hours  
12 on both a contractor-to-contractor basis *and* a day-to-day basis. The *Sotelo* court affirmed that an  
13 overtime claim was properly denied certification based on exactly this kind of variation. The  
14 court noted that individual issues predominated because "routes and helper arrangements varied  
15 such that not all routes would take more than 8 hours per day to fold and throw" and "[s]everal  
16 class members hired helpers so they could end their workday early." *Sotelo*, 207 Cal. App. 4th at  
17 653. *See also, e.g., Ayala* at \*11 (affirming denial of certification as to overtime claims of  
18 newspaper carriers); *Pablo v. ServiceMaster Global Holdings, Inc.*, No. C-08-03894 SI, 2009 WL  
19 2524478, at \*4-5 (N.D. Cal. Aug. 17, 2009) (denying class certification where putative class  
20 members' hours varied each week "because the Court would have to examine the work schedules  
21 of every inspector.").

22           Plaintiffs' minimum wage claims would similarly require analysis of hours and the  
23 individual's effective compensation in order to calculate the individual's "hourly rate of pay."  
24 The impossibility of generalizing about hours is addressed above. The effective compensation  
25 issue is also individualized. Different contracts provide for different payment rates. McDowell  
26 Decl. ¶9. Moreover, under a buy-sell agreement an individual's effective compensation would  
27 vary depending on how effective and efficient the individual was at collecting subscription  
28 payments. And, complicating things further, a buy-sell agreement might also have a per piece

1 component for delivering publications other than *The Fresno Bee*. There is no common proof on  
2 these highly individualized claims. See *Brinker*, 53 Cal. 4th at 1052 (off-the-clock claims  
3 correctly not certified because “liability would have had to continue in an employee-by-employee  
4 fashion, demonstrating who worked off the clock, how long they worked, and whether [the  
5 employer] knew or should have known of their work”).

### 6 3. Expense Reimbursement/Deductions

7 Plaintiffs may argue The Bee failed to reimburse contractors for the following: gasoline,  
8 maintenance, and insurance for, and wear and tear on the vehicle driven for delivery services,  
9 supplies used to assemble newspapers, for example, rubber bands, plastic bags, and insurance to  
10 cover accidental injury. Second Am. Complaint ¶ 41. The inquiry at the class certification stage  
11 is whether Plaintiffs can come forward with common evidence to show that expenses incurred by  
12 contractors were “reasonable and necessary” and that the negotiated rates and allowances paid to  
13 contractors pursuant to the contracts were insufficient to cover the expenses. Plaintiffs cannot  
14 present such common evidence.

15 Labor Code Section 2802 imposes liability only for failing to reimburse business  
16 expenses that were “reasonably and necessarily incurred.” *Gattuso v. Harte-Hanks Shoppers,*  
17 *Inc.*, 42 Cal. 4th 554, 576 (2007). Whether a business expense is “necessary” is a question of  
18 fact, *Takacs v. A.G. Edwards and Sons, Inc.*, 444 F. Supp. 2d 1100, 1125 (S.D. Cal. 2006), which  
19 turns on the employee’s chosen expenses:

20 For example, an employee’s choice of automobile will  
21 significantly affect the costs incurred. An employee who chooses  
22 an expensive model and replaces it frequently will incur  
23 substantially greater depreciation costs than an employee who  
24 chooses a lower priced model and replaces it less frequently.  
25 Similarly, some vehicles use substantially more fuel or require  
26 more frequent or more costly maintenance and repairs than others.  
27 The choice of vehicle will also affect insurance costs. Other  
28 employee choices, such as the brand and grade of gasoline or tires  
and the shop performing maintenance and repairs, will also affect  
the actual costs. Thus, calculation of automobile expense  
reimbursement using the actual expenses method  
requires . . . detailed record keeping by the employee and complex  
allocation calculations, [and] also the exercise of judgment (by the  
employer, the employee, and officials charged with enforcement of  
section 2802) to determine whether the expenses incurred were  
reasonable and therefore necessary.

1 *Gattuso*, 42 Cal. 4th at 568.

2 Here, The Bee negotiated multiple per piece and buy-sell rates with contractors. Cullinan  
3 Dep. at 530:7-18; McDowell Dep. at 354:7-15. Some contractors knew that their payments were  
4 meant to cover their expenses. Carpenter Dep. at 193:3-8. Some contractors negotiated route  
5 allowances specifically to cover some of their fuel costs. Kodur Decl. ¶ 12 (negotiated route  
6 allowances at least twice); *but see* Leyva Dep. at 155:8-156:24; 596:13-597:10 (only sometimes  
7 succeeded in negotiating allowance). Some contractors devised maximally efficient routes, while  
8 others did not. *E.g.*, Leyva Dep. at 308:16-309:6 (Moody and Leyva arranged deliveries to  
9 conserve fuel). Contractors used a wide variety of vehicles for delivery. Leyva Dep. at 85:23-  
10 86:25; 87:1-9; 89:3-19; 109:11-15; 111:9-112:23; 119:21-25; 120:22-25 (Chevy Beretta,  
11 Pathfinder (used too much gas), Honda (“a lemon”), Nissan Stanza, Ford Taurus). Contractors  
12 differ as to whether and how they maintained records of expenses. Luis Dep. at 243:14-244:22  
13 (did not keep records so cannot estimate how much he spent on gas while delivering); Holguin  
14 Dep. at 130:1-6 (no record of any expenses); Vermette Decl. ¶ 28 (maintained seven years of  
15 mileage records for tax purposes).

16 None of the data that The Bee can provide to Plaintiffs addresses how to calculate the  
17 alleged expenses using the actual damage or mileage reimbursement methods or how to address  
18 individualized issues related to such calculations as “information about the automobile’s  
19 purchase price and resale value (or lease costs),” what days, if ever, the class member used the  
20 automobile for the delivery of newspapers, and the costs associated with “fuel, maintenance,  
21 repairs, insurance, registration, and depreciation.” *Gattuso*, 42 Cal. 4th at 568.

22 Specifically regarding so-called “mileage,” The Bee has information about subscribers,  
23 but such information cannot be used to establish the “mileage” for a route. Indeed, the concept  
24 of associating “mileage” to “routes” breaks down upon rigorous examination. For example,  
25 Plaintiffs apparently assume that they can start their “mileage” calculation from a distribution  
26 center, but not all contractors picked up newspapers from a distribution center. Kodur Decl.  
27 ¶¶ 16-18 (picked up from drop site). Further, some contractors made a single trip to pick up  
28 newspapers for multiple routes—tacking on “distribution center mileage” to *each* of their routes

1 would over compensate them. Some contractors simultaneously delivered multiple publisher's  
2 products, such that their fuel costs would have to be apportioned between the contractors'  
3 various customers. E.g., Kodur Decl. ¶¶ 14-15; cf. Leyva Dep. at 295:10-21 (contractors  
4 delivered their routes together).

5 Moreover, determining whether a particular expense such as mileage was in fact incurred  
6 also presents a complicated, highly individualized liability question. The Bee is entitled to  
7 litigate whether a given class member incurred an expense and, if so, whether it was reasonable  
8 and necessary. *Dukes*, 131 S. Ct. at 2561 (“[A] class cannot be certified on the premise that  
9 [Defendants] will not be entitled to litigate [their] statutory defenses to individual claims.”).  
10 *Brinker* re-confirms that class certification is inappropriate where a parade of witnesses and  
11 individualized proof would be required to try a case. 53 Cal. 4th at 1052. Courts in California  
12 have repeatedly recognized the difficulties inherent in trying expense reimbursement claims as  
13 class actions.<sup>14</sup> Most evident of this difficulty is the fact that some contractors incurred no  
14 automobile expenses on a route because they had substitutes drive the route or they did some or  
15 all of the route on foot. E.g., Haven Decl. ¶ 7 (subcontractors performed deliveries); Trejo Decl.  
16 ¶¶ 4, 12 (walked most of the route); Leyva Dep. at 303:13-18 (sometimes, if car problems,  
17 delivered on foot). Demonstrating that a contractor actually incurred an expense is thus an  
18 individualized inquiry. Simply associating a “mileage” figure with a particular route does not  
19 establish liability to the contractor who had responsibility for that route.

20  
21 <sup>14</sup> See, e.g., *Chavez v. Lumber Liquidators, Inc.*, No. CV-09-4812 SC, 2012 WL 1004850, at \*10  
22 (N.D. Cal. Mar. 26, 2012) (denying certification of reimbursement claim where the court “would  
23 need to make individualized factual determinations concerning: (1) whether the claimed expenses  
24 were ‘necessary’ and incurred in direct consequence of the discharge of the employee’s duties;  
25 (2) whether the employee actually sought reimbursement from [the employer] for the expenses;  
26 and (3) whether [the employer] reimbursed the employee for the expense”); *Harris v. Vector*  
27 *Mktg. Corp.*, 753 F. Supp. 2d 996, 1022 (N.D. Cal. 2010) (denying certification of reimbursement  
28 class where the record reflected variety as to (1) whether expenses were incurred; (2) the  
necessity of some expenses was “likely to be challenged” at trial; and (3) the plaintiff had “not  
demonstrated that evaluation under § 2802 of the ‘necessity’ of various expenses incurred in a  
variety of contexts may be done on a relatively uniform basis”); *Ruiz v. Affinity Logistics Corp.*,  
No. 05CV2125JLS, 2009 WL 648973, at \*7-8 (S.D. Cal. Jan. 29, 2009) (quoting *Grissom v. Vons*  
*Cos., Inc.*, 1 Cal. App. 4th 52, 58 (1991) (“Whether expenditures were ‘necessary’ is a fact-  
intensive ‘inquiry into what was reasonable under the circumstances’” and thus require a “case-  
by-case analysis” that renders individual issues predominate.).

1 Finally, determining whether the amount already received by each contractor is sufficient  
2 to cover the expenses is also a complex and individual inquiry. Defendants do not pay the  
3 contractors a uniform rate or allowance amount. *See, e.g.,* McDowell Decl. ¶ 18 & Ex. B. Rates  
4 vary and depend on a multitude of factors, including not least of all a contractor's skill or effort  
5 at negotiating delivery rates with The Bee and subscribers. *See, e.g.,* McDowell Decl. ¶ 9;  
6 McDowell 8/31/2012 Dep. at 491:5-492:7 (describing a negotiation with a carrier). Other  
7 variables include draw, miles, type of delivery, cost of gas, maintenance, supplies and insurance.  
8 *See, e.g.,* McDowell Decl. ¶ 18 & Ex. B (blank justification forms used during the class period).  
9 Plaintiffs can offer no evidence that the amount of expenses allegedly owed to contractors is  
10 uniform class-wide. The question of whether the rates cover *reasonable* business expenses  
11 necessarily demands individual analysis.<sup>15</sup>

#### 12 4. Training and Meetings

13 Plaintiffs' fifth cause of action for unpaid time spent in "training" and "meetings" fails  
14 because there is no evidence of a common policy (or any policy) requiring meetings or training  
15 (mandatory, regular, or other) and no evidence based on which one could conclude that every  
16 class member, or even the majority of class members, ever attended "meetings" or "training."  
17 Carpenter, for example, testified that he received no training from The Bee, but a prior contractor  
18 showed him the route and explained handling subscriber requests. Carpenter Dep. at 197:14-  
19 198:6; 204:16-205:20; 235:4-6. Castro, in contrast, had not seen the delivery area before entering  
20 her independent contractor agreement. Castro Dep. at 338:18-339:2. As a further complication,  
21 some contractors may have been paid for a "meeting" or "training" (and "training" could mean  
22 very different things in different circumstances). Kodur, for example, asserts that she was paid  
23 for riding along on a delivery route before she contracted for a route of her own. Kodur Decl.  
24 ¶ 5. "[A]necdotal evidence of a handful of individual instances in which employees worked off  
25 the clock" does not suffice for a class to be certified because proof would be required "in an  
26 employee-by-employee fashion, demonstrating who worked off the clock, how long they worked,

27  
28 <sup>15</sup> Plaintiffs also repackage their reimbursement claim as a "deduction" claim, which lacks  
commonality for the same reasons set out above.

1 and whether [the employer] knew or should have known of their work.” *Brinker*, 53 Cal. 4th at  
2 1052.

### 3 5. Itemized Wage Statements

4 Technical omissions in wage statements are not actionable in and of themselves; rather, an  
5 employee must show an actual injury from the omission. Labor Code § 226(e); *Price v.*  
6 *Starbucks Corp.*, 192 Cal. App. 4th 1136, 1142-43 (2011). The Complaint alleges as an “injury”  
7 that it was “impossible” for Plaintiffs to understand what they were being paid or how much they  
8 were working. Second Am. Complaint ¶ 53. A need to perform simple calculations, however, is  
9 not a cognizable “injury” and speculative injuries do not qualify. *Price*, 192 Cal. App. 4th at  
10 1143. Only through individual evidence could a contractor establish an *actual* injury relating to  
11 his or her statements. This claim cannot be certified. *Id.*; *Tien v. Tenet Healthcare Corp.*, 209  
12 Cal. App. 4th 1077 (2012) (affirming denial of class certification on Section 226 claim, because  
13 “[t]he Court would have to determine *whether* each individual class member actually suffered  
14 injury or damages as a result of the pay stubs lacking the information required under the Labor  
15 Code”) (internal quotation marks omitted).

### 16 6. Other Claims

17 The Plaintiffs also join three other causes of action—wage deductions, failure to keep  
18 payroll records and a Business and Professions Code Section 17200. These claims suffer from  
19 the same deficiencies (as well as others) as the other claims in the case. First, The Section 17200  
20 claim is entirely derivative of the other claims. Second, each of the causes of action is dependent  
21 in the first instance on a determination that each class member is an employee and not an  
22 independent contractor. All of the prior arguments, including the lack of predominance, apply  
23 equally to these causes of action.

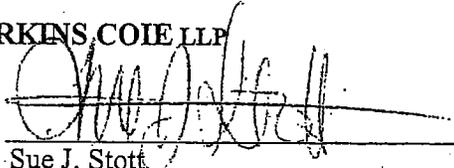
## 24 IV. CONCLUSION

25 Plaintiffs’ class certification motion will demonstrate that their proposed class action fails  
26 on many levels. McClatchy reserves the right to oppose certification on any other grounds that  
27 Plaintiffs address (or do not address) in their motion. Even prior to Plaintiffs’ motion for  
28 certification, however, it is already abundantly clear that common questions do not predominate

1 in this case and class certification is not appropriate. The Court should strike Plaintiffs' class  
2 allegations.

3 DATED: November 9, 2012

PERKINS COIE LLP

4  
5 By: 

Sue J. Stott

6 Attorneys for Defendants The McClatchy  
7 Company and McClatchy Newspapers, Inc.  
8 d/b/a The Fresno Bee

9 78388-0002/LEGAL25079233.8

**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:

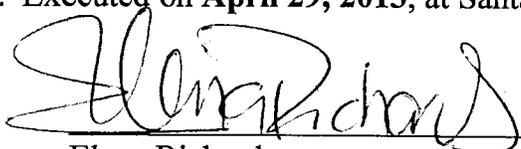
**DECLARATION OF MICHAEL J. WRIGHT IN SUPPORT OF  
MOTION FOR JUDICIAL NOTICE  
EXHIBIT 14**

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

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