SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE/TIME	**: SEPTEMBER 22, 2014**	**DEPT. NO**	**: 36**
JUDGE	**: GERRIT W. WOOD**	**CLERK**	**: C. CLAUSEN**
REPORTER	**: N/A**	**BAILIFF**	**: N/A**

LORIANNE SAWIN, an individual; et al.,
Plaintiff,

VS. Case No.: 34-2009-00033950

THE McCLATCHY COMPANY, a Delaware Corporation, dba The Sacramento Bee; et al.,
Defendant.

Nature of Proceedings: Tenative Decision

This matter came on regularly for court trial commencing February 3, 2014, in Department 36 of the above-entitled court, before the Honorable Gerrit W. Wood. Plaintiffs, LORAINNE SAWIN et. al., ("Plaintiffs"), appeared and were represented by their attorneys of record, the law firm of Callahan & Blaine, a Professional Law Corporation. Defendants, THE McCLATCHY COMPANY, a Delaware Corporation, d/b/a The Sacramento Bee; and McCLATCHY NEWSPAPERS INC., a Delaware Corporation, d/b/a The Sacramento Bee ("Defendants" or "the Bee"), appeared by their attorneys of record, the law firms of Lewis Brisbois Bisgaard & Smith LLP, and Perkins Coie LLP.

Oral and documentary evidence was introduced on behalf of the respective parties as duly noted in the Court's minutes. The Court, having considered the evidence and heard the arguments of counsel, and being fully advised, issues the following tentative statement of decision on the Phase One Trial as set forth below.

Pursuant to California Rules of Court, rule 3.1590(c)(4), this tentative decision will become the Court's statement of decision on the Phase I Trial unless, within 10 days after service of the tentative decision, a party specifies those principal controverted issues to which the party is requesting a statement of decision or makes proposals not included in the tentative decision.

PROCEDURAL BACKGROUND

CASE NUMBER: 34-2009-00033950 **DEPARTMENT: 36**
CASE TITLE: SAWIN V McCLATCHY COMPANY
PROCEEDINGS: Proposed Statement of Decision

The putative class action complaint was filed on February 5, 2009. The original complaint consisted of eight causes of action, including claimed violations of Labor Code Section 2802 and Business and Professions Code Section 17200, et seq.

On June 15, 2011, the court certified a class as follows: "All individuals currently or formerly engaged by defendants as home delivery carriers of the Sacramento Bee newspaper, and who signed contracts directly with Defendants, in the State of California, between February 2005 and July 2009."

Class certification applied only to the fourth, eighth, and ninth causes of action. On March 23, 2013, the plaintiffs filed a fourth amended complaint, which is now the operative pleading.

On September 5, 2013 the plaintiffs moved the court to dismiss all causes of action except the fourth and eight causes of action, Labor Code Section 2802 and Business and Professions Code Section 17200. More specifically, the action is now limited to reimbursement for reasonably incurred mileage expenses. Any and all individual claims were also dismissed.

On February 2, 2014, Phase One of this trial commenced. The sole issue to be decided in Phase One is the plaintiffs' claim that they were misclassified as independent contractors, and were instead employees of the Bee.

Presentation of evidence concluded on April 7, 2014. Neither side offered representative testimony. Neither side called expert witnesses.

On August 22, 2014, the court denied the defendants' post-trial motion to decertify the class.

APPLICABLE LAW

Resolution of the Phase One issue requires application of the common law test for employment, discussed in depth by the California Supreme Court in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350 (Borello), and most recently in a case of analogous facts to that presented here, *Ayala v. Antelope Valley Newspapers, Inc.*, (2014) 59 Cal. 4th 522, 531-536 (Ayala).

Recitation at length of the California Supreme Court's primary description of the test's components and operation is of particular value here to give structure and focus to this court's analysis while applying the test to the evidence received.

"Under the common law, ""[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired...."" (*Ayala*, at p. 531, citing *Borello*, at p. 350.) "What matters is whether the hirer 'retains all necessary control' over its operations." (*Ayala*, at p. 531 citing *Borello*, at p. 357.) """[T]he fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it."" (*Ayala*, at p. 531.) "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.'" (*Ayala*, at p. 531; see *Borello*, at p. 350.) "The worker's corresponding right to leave is similarly relevant: "'An employee may quit, but an independent

contractor is legally obligated to complete his contract."'" (*Ayala*, at p. 531, fn. 2 citing *Perguica v. Ind. Acc. Com.* (1947) 29 Cal.2d 857, 860 [179 P.2d 812].)

"Significantly, what matters under the common law is not how much control a hirer exercises, but how much control the hirer retains **the right to exercise**." (*Ayala*, at p. 533, emphasis added, citing *Perguica v. Ind. Acc. Com., supra*, 29 Cal.2d at pp. 859–860 ["The existence of such right of control, and not the extent of its exercise, gives rise to the employer-employee relationship."]; *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal.2d 33, 43 ["If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists."]; *Industrial Ind. Exch. v. Ind. Acc. Com.* (1945) 26 Cal.2d 130, 135 ["The right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not, gives rise to the employment relationship."]; *S.A. Gerrard Co. v. Industrial Acc. Com.* (1941) 17 Cal.2d 411, 414 ["the right to control, rather than the amount of control which was exercised, is the determinative factor"]; *Hillen v. Industrial Acc. Com.* (1926) 199 Cal. 577, 581-582 ["It is not a question of interference, or non-interference, not a question of whether there have been suggestions, or even orders, as to the conduct of the work; but a question of the right to act, as distinguished from the act itself or the failure to act."].) Whether a right of control exists may be measured by asking "'"whether or not, if instructions were given, they would have to be obeyed"'" on pain of at-will "'"discharge[] for disobedience."'" (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 875.)

"While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.'" (*Ayala*, at p. 532, citing *Borello*, at p. 351.)

Plaintiffs contend that in their role as newspaper carriers they were the Bee's employees under the common law test for employment. To that end, they argue the evidence establishes the Bee had the right to control the manner and means of their work during the class period, and exercised that right. They further assert that the secondary indicia of employee status also weigh in favor of their contention.

Plaintiffs point to the fact that delivery of the paper was an integral part of the Bee's business, and as a result the Bee developed its own distribution department. The deliveries were made to the Bee's customers. The Bee billed its customers for the paper and its delivery. The Bee instructed its customers to contact the Bee with any complaints. The Bee kept track of these complaints as part of a statistical complaint system CPT (complaints per thousand). The Bee would conduct audits to be sure that carriers were delivering their product properly. Sometimes Bee employees would deliver the routes

if a carrier failed to show up. Bee employees would orient or train new carriers in how to successfully do the job.

The Bee distribution department employed the following positions: Senior Vice President of Circulation, Director of Home Delivery, Regional Managers, Distribution Center Managers, District Managers, Quality Service Representatives, Distribution Center Coordinators, and Service Runners. The Distribution Center Managers and all the job descriptions beneath them worked out of warehouses, operated by the Bee. The newspaper carriers picked up their newspapers at these warehouses. Bee employees would identify by route how many papers to give to each carrier. Each bundle of papers would include carrier mail that would identify for the carrier any changes in the route, vacation stops and anything else that affected what delivery service specific customers would receive each morning. These carriers might also receive notices of complaints from customers who would notify the Bee if their paper was not delivered, or not delivered properly.

All Bee carriers signed the same contract. Plaintiffs rely upon the general fact that the standard contract was not subject to negotiation, at least not by the Bee's representative dealing with the carrier. The Bee had a right to terminate the contract for any reason with 30 days' notice, or immediately for a "material breach". The carrier could terminate the contract as well.

Delivering papers did not involve any specialized skill or training. The only job requirement was a California Driver's License, and proof of insurance. The ability to speak English was not required. Simplicity of the work made detailed supervision or control unnecessary. (*Air Couriers Internat. v. Employment Development Dept.* (2007) 150 Cal. App. 4th 923, 934.)

Contrary to the foregoing, Defendants maintain that historically newspaper carriers have been independent contractors. Defendants rely upon the following general facts to support their argument that the class members were independent contractors. The contract each carrier signs identifies them as independent contractors. And, many carriers wanted to be classified as independent contractors. The carriers had discretion as to the manner and means of work. They could pick up their papers from the warehouse at any time, so long as they were delivered on or before a certain time. They could deliver the papers in any order they wanted. They could wear whatever they wanted when doing so. They could use helpers and substitutes. Although the Bee offered to sell them rubber bands and plastic bags, they were not required to buy them from the Bee. They could fold their papers anywhere they wanted. They used their own vehicles. The Bee also claims that EDD has found the independent contractor relationship to be bona fide.

The defendants maintain that the plaintiffs' cannot meet their burden of proof. The fact that at some times, in some warehouses, certain practices may have blurred the distinction between independent contractors and employees, the plaintiffs cannot put forth the necessary common proof to establish that the certified class can be classified as employees.

ANALYSIS

For the reasons articulated below, the court finds that the carriers who make up the class during the class period were the Bee's employees, and were misclassified as independent contractors. Under the prevailing law and common law test of employment, those who delivered the Bee should have been classified as employees. Whether or not universally exercised, the evidence established that the Bee

had the right to exercise pervasive control of the manner and means of the class members' work on the Bee's behalf.

As recited above, ""[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired...."" (*Ayala*, at p. 531, citing *Borello*, at p. 350.)

The Defendants argue that *Borello* and its progeny are authorities limited to the subject of the Workers Compensation scheme, and should not control issues outside that context. But the California Supreme Court does not read *Borello* to apply only in the context of workers compensation claims. In fact, in *Borello* itself, the Court states that its ruling had implications beyond workers compensation laws. (*Borello*, at p. 400.) And, in Ayala, the California Supreme Court recognized the necessity of Borello's "all necessary control" test in a determination of employment status in a suit for wage and hour protections. (*Ayala*, at p. 531.)

In *Antelope Valley Press v. Poizner* (2008) 162 Cal.App.4th 839 (AVP), the court affirmed the Insurance Commissioner's determination that for purposes of calculating the newspaper publisher Antelope Valley Press' (AVP) workers' compensation insurance requirements, persons who made deliveries of newspapers for AVP were not properly classified as independent contractors, but were instead employees. The relationship of AVP to its carriers, and the factual nature of the carrier's employment circumstances as described in the opinion, are very similar to the relationship between plaintiffs and the Bee. In finding AVP's carriers to be employees, the court employed the common law employment test as described in *Borello* and *Ayala*. Specifically, the court found substantial evidence supporting the Insurance Commissioner's determination of an employment relationship in both AVP's right to control the manner and means by which the carriers were to accomplish their tasks, and that the preponderance of *Borello's* secondary indicia indicated an employer-employee relationship.

Notably, AVP's right to control its carriers was found despite the fact that all carriers executed a form contract with AVP expressly declaring that each carrier "has the right to control the manner and means of delivery" of AVP's publications and "has the right to determine the equipment and supplies needed to perform delivery services." Further, the court considered the fact that AVP had the right to discharge carriers at will without cause, subject only to a 30-day written notice to the carrier. The court found that the evidence did not show that in making deliveries for AVP, the carriers were engaged in a distinct occupation or business of their own, or that the carriers held themselves out as being an independent delivery service that happened to have AVP as one of its customers. Further, the evidence did not demonstrate that the carriers had a substantial investment in their AVP delivery duties other than their time and the vehicles they use; and their vehicles were not shown to be other than the vehicles they used for their own personal activities. Under the secondary indicia, the court further determined that delivering newspapers requires no particular skill, and that a carrier's payment was substantially dependent on non-negotiated financial terms in the contract rather than on the carrier's initiative, judgment or managerial abilities. AVP supplied many of the materials used by the carriers (the newspapers, the mandatory orange and red plastic bags, the subscriber lists), as well as facilities the carriers used. The length of the carrier's service was at least 12 months by contract, and evidence showed that many of the carriers had been working for AVP for many years, which the court found contrary to common concept that an independent contractor is someone hired to achieve a specific result that is attainable within a finite period of time.

Ayala most recently confirms that the common law employment test under *Borello*, is properly applied to determine whether a common employer-employee relationship exists between a newspaper publisher and its carriers, in an action where the carriers claim misclassification as independent contractors and resultant unpaid overtime, unlawful deductions, failure to provide breaks, and failure to reimburse for business expenses, and other acts, all in violation of Labor Code §§ 221, 223, 226, 226.3, 226.7, 512, 1174, 1194, and 2802; and unfair competition based on these violations pursuant to Bus. & Prof. Code, § 17200.

In applying *Borello*, this court did not find or apply any presumption in favor of employee status. The burden of proof was always with the plaintiffs. (See December 30, 2013 ruling)

The evidence presented demonstrates that the carriers who make up the class during the class period were the Bee's employees, and were misclassified as independent contractors. The facts that compel the court's conclusion in this respect are as found and set forth below.

As the primary factor, the court finds that the Bee had the right to exercise control over the means and manner of the plaintiffs' performance of their work tasks, and that the Bee exercised that control.

The carriers were required to sign standard contracts. The carriers had little or no right to negotiate terms. The carriers received daily carrier mail that set forth how they were to deliver the Bee's papers each day. The method of payment and deductions are inconsistent with an independent contractor relationship. The Bee managed, trained, and supervised the carriers. The Bee circulation administration created Best practices that were designed to be used in all the warehouses.

The defendants maintain that the carriers still retained the manner and means of completing their job. While the carriers did have discretion as to what they wore, the order of delivery, and where they folded their papers, the right-to-control test does not require absolute control. Employee status may still be found where "a certain amount of freedom is allowed or is inherent in the nature of the work involved" and such freedom "does not change the character of the relationship, particularly where the employer has general supervision." (*Air Couriers Int'l v. Emp't Dev. Dep't*, supra, 150 CalApp.4th 923, 934.)

The court also finds that the relevant secondary indicia of employment under Borella also weigh heavily in favor of plaintiffs' position.

Right of Bee to end service - In this case the contract allowed each party to terminate the contract with 30-days' notice. It also gave the Bee the right to terminate the contract immediately for a "material breach." "Material Breach" term was not defined in the contract. The agreement set up an at-will relationship. The 30-days' notice requirement gave the Bee the right of discharge at-will without cause as was the case under the form contract in AVP.

Basic Level of Skill - Delivering newspapers does not involve any specific skill. Job qualifications included a driver's license, proof of insurance, and a social security number. Speaking English was not required. Inability to read did not necessarily disqualify an applicant. Some managers would draw pictures of porches etc., to explain the job expectations.

The defense contends that the job has become more complicated since being performed by 12 year olds. While that may be true, it is still not complicated. No professional skills, education or training is required. This is especially true if one considers all the skills for which one might otherwise retain the finite services of a specialized independent contractor.

In *Borello*, the court found an employment relationship despite the fact that the employer there did not exercise significant control over the details of the work. The minimal degree of control that the employer exercised over the details of the work was not considered dispositive because the work did not require a high degree of skill and it was an integral part of the employer's business. (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal. App. 4th 1046, 1064, citing *Borello* at pp. 355-360.)

Duration of Relationship - A traditional independent contractor relationship would involve a specific project for a specific finite time. Newspaper delivery relationship may go on indefinitely. The carriers sign one-year renewable contracts. Many carriers have worked for the Bee over a decade. This open ended relationship is inconsistent with the general concept that an independent contractor is retained for a finite project and duration.

Service as part of regular business - Newspaper delivery is an integral part of the defendant's business. Most of the Bee's subscription revenue came from home deliveries. During the class period, the Bee employed multiple levels of managers and supervisors to insure that the Bee's customers received their papers. The Bee operated multiple warehouses as places to distribute the paper to the carriers. The customers belonged to the Bee, not the carriers. Complaints were directed to the Bee, not the carriers. Bee employees sometimes substituted for the carriers. Bee employees audited the carriers' job performance. A business entity may not avoid its statutory obligations by carving up its production process into minute steps then asserting that it lacks "control" over the exact means by which one step is performed by the responsible workers. (*Borello*, at p. 356.)

Parties' objective belief about nature of relationship -The contract's declaration of an independent contractor relationship is not dispositive of the actual legal character of that relationship. (*Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal. App. 4th 1, 10-11.) Simply, "[t]he parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship." (Id. citing *Borello* at p. 349; *Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra*, 220 Cal.App.3d at pp. 877–878; see also *Antelope Valley Press v. Poizner, supra*, 162 Cal.App.4th at pp. 854, fn. 14, 856.) The carriers called as witnesses, for the most part, testified that they knew and understood the nature of the contract. Still, there is no real evidence of contract negotiation. The paychecks received by the carriers would include deductions for rubber bands, CPT penalties, Wilson Gregory premiums, and bond contributions. Independent contractors get paid for a service, and independently handle payment for items of overhead needed to perform the service. In short, the parties' conduct here belies the contrary pronouncement in the form contracts of an independent contractor relationship.

Carriers' use of helpers or substitutes - The carriers could use helpers and substitutes as the carriers desired. This flexibility might lean in favor of an independent contractor relationship. Usually, helpers were most often friends or family. Some were compensated by the carrier. Some were not. If a carrier used a helper, Wilson Gregory wanted their name, so that premiums could be charged.

Wilson Gregory provided for insurance coverage for carriers intended to function as a form of workers compensation system. Should a carrier become injured on the job, the benefits offered through Wilson Gregory were designed to reduce the likelihood that a carrier would try to claim employee status to be entitled to workers compensation coverage. Once again, this requirement and its attendant oversight are inconsistent with a true independent contractor relationship.

Carriers' opportunity for profit and loss - The Bee delivery routes were owned by the Bee. The Bee would occasionally set up mandatory sales contests to encourage carriers to sell subscriptions. Such a sale might incrementally increase the route size and potential income to a carrier. Managerial skill was not required. And, any new subscriptions added to the Bee's customer list. Avoiding CPT penalties might earn the carriers more money than selling an additional subscription.

Carriers' degree of investment - The carriers needed to have a car and a driver's licese to deliver the papers. Although there were some exceptions, most carriers used their own general use vehicle, which did not represent any degree of capital investment. No other tools were required. One did not need to go to school, obtain a degree, or in any way invest time or money to be a carrier. The Bee provided a place for work. The Bee provided carts and tables. Although not required to be purchased from the Bee, the Bee also provided bags and rubber bands for sale.

DECISION

For the foregoing reasons, and upon these conclusions, the court finds that the carriers who make up the class during the class period were the Bee's employees, and were misclassified as independent contractors.

This tentative decision constitutes the court's proposed statement of decision on the Phase One Trial unless within 10 days after announcement or service of the tentative decision, a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision (Cal.Rules Ct., Rule 3.1590(c).)

Dated: _____

_____
Gerrit W. Wood
Judge of the Superior Court

Certificate of Service by Mailing attached.

CASE NUMBER: 34-2009-00033950 **DEPARTMENT: 36**
CASE TITLE: SAWIN V McCLATCHY COMPANY
PROCEEDINGS: Proposed Statement of Decision

CERTIFICATE OF SERVICE BY MAILING
C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled notice in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

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Dated: 09/22/14

Superior Court of California,
County of Sacramento

By: C. CLAUSEN,
Deputy Clerk