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8   **UNITED STATES DISTRICT COURT**

9   **SOUTHERN DISTRICT OF CALIFORNIA**

10 DANIEL LUDLOW, an individual,   Case No.   **'18CV1190 JAH BLM**

11   Plaintiff,   **CLASS AND COLLECTIVE ACTION**
                                      COMPLAINT FOR:
12   vs.

13 FLOWERS FOODS, INC., a   **(1)   FAILURE TO PAY OVERTIME**
   Georgia corporation; FLOWERS   **UNDER THE FAIR LABOR**
13 BAKERIES, LLC, a Georgia   **STANDARDS ACT (FLSA);**
14 limited liability company;
                                      (2)   INJUNCTIVE RELIEF AND
15   **RESTITUTION UNDER**
                       Defendants.   **CALIFORNIA'S UCL;**
16
                                      (3)   FRAUD;
17
                                      (4)   FAILURE TO PAY OVERTIME
18   **UNDER CALIFORNIA LAW;**

19   **(5)   UNLAWFUL DEDUCTIONS**
                                          FROM WAGES;
20
                                      (6)   FAILURE TO INDEMNIFY FOR
21   **NECESSARY EXPENDITURES;**
                                          AND
22
                                      (7)   FAILURE TO PROVIDE
23   **PROPER WAGE STATEMENTS.**

24   **DEMAND FOR JURY TRIAL**

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28

1   Plaintiff Daniel Ludlow ("Ludlow" or "Plaintiff") alleges, on information

2   and belief, as follows:

3   ## I.   INTRODUCTION

4   1.   Flowers Foods, Inc., through its regional subsidiaries, deploys an

5   elaborate fraud to cheat its employees, its competition, and the state and federal

6   governments.   Flowers[1] does so, primarily, by willfully and systematically

7   misclassifying its hundreds of driver/Delivery Employees as "Independent

8   Contractors."   In doing so, Flowers denies these employees, including the named

9   Plaintiff, access to critical benefits and protections they are entitled to by law, such

10   as minimum wage, overtime compensation, indemnification for business expenses,

11   family and medical leave, unemployment insurance, and safe workplaces.

12   Through its willful misclassification, Flowers also robs the federal and state

13   governments of tax revenues and generates losses to state unemployment insurance

14   and workers' compensation funds and gets an undue advantage over its law-

15   abiding competition.[2]

16   2.   Flowers sells billions of dollars of baked goods to retailers throughout

17   the United States.   To help sustain its profits, Flowers has concocted a model

18   where it advertises "independent contractor" distributor opportunities (for

19   "Delivery Employees," such as Plaintiff).   As part of the model, Flowers makes

20   employees purchase a specific sales territory in which the Delivery Employee is

21   supposedly going to purchase, take title to, re-sell, and distribute Flowers' bakery

22   products to the Delivery Employees' prearranged (by Flowers) customers. The

23   Delivery Employees often pay in excess of $100,000 for the right to the

24

25   [1] As used here, "Flowers" refers to all Defendants—who carry out the acts described herein jointly.

26   [2] *See* U.S. Dept. of Labor, Wage and Hour Division, "Misclassification of
27   Employees   as   Independent   Contractors,"   available   at
    https://www.dol.gov/whd/workers/Misclassification/   (describing   the
28   repercussions of misclassification) (last accessed June 1, 2018).

1   "independent business opportunity" outlined in Flowers' advertisements and its

2   uniform Distributor Agreement ("DA"). Delivery Employees also have to cover

3   business operational costs like paying for the vehicles used to carry out their

4   distribution work, gas/mileage, and insurance costs.

5   3.   In short, Flowers sells the notion that these "independent contractors"

6   will run and control their own sales-based business with their own customers for

7   their own profit and gain. But Flowers never *actually* operates its business under

8   these terms, despite Delivery Employees' heavy investment and reliance on the

9   promises Flowers makes.

10   4.   In reality, the distributor role is far from "independent." For example,

11 for the vast majority of product sales, Flowers itself contracts directly with its own

12 large retailer customers (like Wal-Mart and Costco) and maintains title over the

13 baking products until the retailers take possession. But in no case do Delivery

14 Employees ever actually receive title to products that go into Flowers' retail

15 locations. Instead, Delivery Employees merely deliver the product and stock

16 Flowers' customers' shelves for a non-negotiable commission that Flowers

17 unilaterally establishes.

18   5.   Flowers also dictates the set route or territory that the Delivery

19 Employees sell within. Flowers maintains control over that territory or route with

20 respect to things like which Flowers' products will be available, price, shelf space,

21 displays, and promotions. Flowers also unilaterally dictates when unsold bakery

22 products must be reclaimed from retail locations (a.k.a. "stales" or stale product) as

23 dictated by its retail customers and passed down to Delivery Employees.

24 Curiously, even though Flowers purports to pass "title" to the bakery products to

25 the "independent distributors," Flowers mandates that stale products must be

26 returned to Flowers warehouse and not used for any other purpose by the Delivery

27 Employees, even where they are forced to pay market price for them.

28

6.   Flowers also dictates which products and brands of goods will be sold within each territory. Notably, if Flowers elects to change which retailers it serves or which brands it will carry, the Delivery Employee does not receive a corresponding change in the valuation of the route that he was forced to buy. This is true even where Flowers drastically devalues the Delivery Employee's route because Flowers unilaterally chose to discontinue a certain brand or stop selling to a particular retailer within that route.

7.   Flowers also hires management and sales employees at each of its local, regional subsidiaries to carry out sales and to directly supervise and instruct the so-called "independent distributors" in performance of their distribution and merchandizing responsibilities within their routes.

8.   Flowers also controls the Delivery Employees' appearance as well as the appearance of their vehicle. For example, Flowers can make Delivery Employees paint their vehicles to Flowers' specifications or remove advertising that the Delivery Employee has chosen for his/her vehicle. Delivery Employees must also abide by "Good Industry Practices" as defined by Flowers. Failure to abide by any of these requirements risks termination by Flowers and often results in "breach notices" by Flowers where it insists on specific performance obligations with the threat of fines or termination.

9.   As such, rather than operating the sales-oriented independent business promised to them, Delivery Employees primarily carry out a vital portion of Flowers' direct-store-delivery ("DSD") business operations—delivering and merchandizing bakery products to Flowers retail customers for a set commission.

10.   The discrepancy between the business model set forth in Flowers' DA and the one actually put in place by Flowers is not accidental. Flowers sees its DSD model and specifically the use of "independent distributors" as a significant competitive advantage. It wants, and legally it *needs*, the appearance of separate, independent businesses to avoid having to treat "distributors" as employees. Yet, at

the same time Flowers must be able to ensure delivery to its blue-chip retail customers and control the timely and effective distribution of its products pursuant to the terms of its contracts with those retailers. Attempting to walk this invisible line or to simply capture the best of both worlds, Flowers presents the illusion of independence in its DA and related advertisements with no intention of actually operating its business as necessitated by its retail customers and its personal preference.

11.   Plaintiff is a present Delivery Employee who entered into the DA with Flowers. Plaintiff brings this action on behalf of himself and other similarly situated Delivery Employees. This hybrid action is brought as a "collective" action under the Federal Labor Standards Act ("FLSA") as well as a Federal Rules of Civil Procedure, Rule 23 class action based on numerous violations of California state law. Plaintiff seeks recovery for fraud, lost wages (including overtime), unfair competition, as well as an injunction putting an end to Flowers' bait-and-switch "independent distributor" business model. He also seeks reimbursement for business expenses and illegal deductions.

II.   JURISDICTION AND VENUE

12.   This Court has subject matter jurisdiction over Plaintiff's federal law FLSA claims pursuant to Title 28 of the United States Code, Sections 1331 and 1343(a)(4), because these claims seek redress for violations of Plaintiff's federal civil and statutory rights. There is also diversity among the parties as Plaintiff is a California citizen who brings claims against out-of-state Defendants. The value of these claims readily exceeds the jurisdictional minimum.

III.   THE PARTIES

13.   Plaintiff Daniel Ludlow is, and at all times mentioned was, an individual residing in the County of San Diego, California. Daniel Ludlow is employed by and works for Defendants as a distributor in the State of California,

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