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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DANIEL LUDLOW, individually and on behalf of others similarly situated; and WILLIAM LANCASTER, individually and on behalf of others similarly situated,
Plaintiffs,

v.

FLOWERS FOODS, INC., a Georgia corporation; FLOWERS BAKERIES, LLC, a Georgia limited liability company; and FLOWERS FINANCE, LLC, a limited liability company,
Defendants.

Case No.: 18cv1190-JO-JLB

**ORDER GRANTING PLAINTIFFS’
MOTION FOR CLASS
CERTIFICATION**

Plaintiffs are current and former delivery drivers alleging they were misclassified by Defendants as independent contractors instead of employees. Plaintiffs bring a wage and hour action arising from the alleged misclassification, asserting claims under the California Labor Code and related wage orders for failure to pay overtime, unlawful deductions from wages, failure to indemnify for necessary expenditures, and failure to provide proper wage

1 statements. Dkt. 56 (FAC).¹ Plaintiffs have filed a motion for class certification of these
2 claims. Dkt. 213. The Court held oral argument on March 30, 2022. For the reasons
3 discussed below, Plaintiffs' motion is GRANTED.

4 I. BACKGROUND

5 A. Defendants' Business

6 Defendant Flowers Foods, Inc. ("Flowers Foods") is a national bakery company
7 behind popular brands such as Wonder Bread, Nature's Own, and Dave's Killer Bread.
8 FAC ¶ 21. Flowers Foods operates as the sole parent company of Defendant Flowers
9 Bakeries, LLC ("Flowers Bakeries"),² which in turn operates as the sole parent company
10 of multiple operating subsidiaries located throughout California and the United States. *Id.*
11 ¶¶ 17, 18. According to Flowers Foods' investor materials, Flowers Foods is "America's
12 premier baker" that "produces and markets bakery products" in the "retail and food
13 service" market. Dkt. 213-5 (Declaration of Alex Tomasevic in support of Plaintiffs'
14 Motion for Class Certification, "Tomasevic Decl."), Ex. 1. Flowers Foods claims in its
15 SEC filings that it is the "second largest producer and marketer of packaged bakery foods
16 in the US" and "operate[s] in the highly competitive fresh bakery market." *Id.*, Ex. 2 at 11.
17 Flowers Foods' customers are retail and foodservice locations such as Walmart and Costco.
18 FAC ¶ 29. With sales of \$3.9 billion in 2017, Flowers Foods generates revenue from sales
19 of the bakery products to its retail and foodservice customers. Tomasevic Decl., Ex. 1 at
20 4; Ex. 2 at 5–6.

21 According to Flowers Foods, its key business functions include distribution and
22 delivery of these packaged bakery goods to its customers. Tomasevic Decl., Ex. 1. Flowers
23

24 ¹ This Court also presides over two other misclassification lawsuits filed against Defendants and
25 its subsidiaries: (1) *Goro et al v. Flowers Foods, Inc. et al*, 3:17-cv-2580-JO-JLB, which is a related case
26 brought by individual plaintiffs; and (2) *Maciel et al. v. Flowers Foods, Inc. et al*, 3:20-cv-02059-JO-JLB,
27 a class action that was transferred from the Northern District of California and consolidated with this
28 action.

² Flowers Bakeries, jointly referred to with Flowers Foods as "Flowers" in the parties' briefing, is
in charge of "sales related activities," such as negotiations with the customers on price, shelf space, and
distributor service requirements that are then communicated to the operating subsidiaries. FAC ¶ 17.

1 Foods’ business model relies on a system of delivery drivers such as Plaintiffs to deliver
2 the bakery products to the retail and foodservice locations. Tomasevic Decl., Ex. 19.
3 Flowers Foods refers to these delivery drivers as “distributors.” Each distributor enters
4 into a standard and substantially identical distributor agreement with a local operating
5 subsidiary of Flowers Foods and Flowers Bakeries that governs the distributor relationship.
6 *Id.*, Ex. 6.

7 **B. Plaintiffs’ Role and Responsibilities**

8 The Distributor Agreement (“DA”) signed by the delivery drivers sets forth the
9 working relationship between the distributor and Defendants. Tomasevic Decl., Ex. 6. The
10 DA labels the delivery drivers as “independent contractors.” *Id.* at § 16.1. As a prospective
11 distributor, the delivery driver purchases the “right” to deliver Flowers Foods’ bakery
12 products in a specific geographic territory.³ *Id.* at § 2.4. The territory dictates which
13 specific bakery products are delivered to the customer locations in the given territory. *Id.*
14 at §§ 2.2–2.3. The distributor can purchase and own more than one territory or resell his
15 or her territory to another person for a profit. *Id.* § 15.1. Distributors may hire helpers to
16 service their territory while they hold other full-time jobs (so-called “absentee”
17 distributors). *Id.* § 16.2.

18 The DA also describes how the distributor purportedly earns money with these
19 territory rights. Under the DA, the distributor “purchases” bakery products from Flowers
20 Foods and then “re-sells” those products to the retail and foodservice customers within
21 their given territory. Tomasevic Decl., Ex. 6 at §§ 4.1, 8.6. The distributor earns money
22 based on the standard margin—that is, the difference between the purchase price and the
23 sale price—which is set by Flowers Foods based on its negotiations with the customers on
24 the product price. The DA prohibits the distributor from selling stale products to the
25 customers, and so Flowers Foods will “repurchase” a percentage of the distributor’s stale
26 products. *Id.* at §§ 12.2, 12.3. Flowers Foods “repurchases” the stale products by charging

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28 ³ Financing for this purchase is offered to distributors by Defendant Flowers Finance, LLC, another
subsidiary of Flowers Foods. FAC ¶ 19.

1 the distributors a fee. FAC ¶ 102. Flowers Foods also provides the distributors with
2 advertising and branded material to increase sales. Tomasevic Decl., Ex. 6 at §§ 13.1, 13.2.
3 Some distributors use the marketing materials and displays to promote their sales, while
4 others do not. Dkt. 237-1 (Declaration of Frank L. Tobin in support of Defendants’
5 Opposition to Plaintiffs’ Motion for Class Certification, “Tobin Decl.”), Ex. 21.

6 The DA further describes the quality standards that distributors must meet as part of
7 their job requirements. For example, the DA requires the distributor to perform his or her
8 services in accordance with “the standards that have developed and are generally accepted
9 and followed in the baking industry,” including maintaining an adequate and fresh supply
10 of products in the stores, actively soliciting stores not being serviced, properly rotating the
11 products, promptly removing stale products, maintaining proper service per the store’s
12 requirements, and maintaining equipment in sanitary and safe conditions. Tomasevic
13 Decl., Ex. 6 at § 2.6. The DA also requires the distributor to obtain his or her own delivery
14 vehicle and insurance, and to keep the delivery vehicle clean, professional, and safe. *Id.* at
15 § 9.1. The DA further requires the distributor to use Flowers Foods’ “proprietary
16 administrative services” to collect sales data or prepare sales tickets. *Id.* at § 10.1. Flowers
17 Foods charges the distributor a fee unilaterally established by Flowers Foods to use these
18 services. *Id.* at § 10.2. The DA does not require a standard outfit or uniform, but some
19 distributors wear a polo shirt or branded shirt based on the recommendation of Defendants.
20 Tobin Decl., Ex. 23.

21 As set forth in the DA, the relationship between the distributor and Defendants is
22 one of indefinite duration. Under the DA’s terms, the distributor relationship continues
23 unless the distributor sells the territory, Flowers Foods ceases to use distributors in a
24 territory for “business reasons,” or Flowers Foods terminates as a result of the distributor
25 engaging in certain enumerated activities deemed non-curable or repeated curable
26 breaches. Tomasevic Decl., Ex. 6 at §§ 3.1, 17.1.

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II. CLASS CERTIFICATION STANDARDS

Class certification is governed by Federal Rule of Civil Procedure 23 (“Rule 23”). To obtain certification, a plaintiff bears the burden of proving that the class meets all four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Rule 23(a) sets out four prerequisites: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979–80 (9th Cir. 2011). If these four prerequisites are met under Rule 23(a), the court must then decide whether the class action is maintainable under Rule 23(b). Under Rule 23(b)(3), a class may be certified if the court finds that “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (quoting Fed. R. Civ. P. 23(b)(3)).

At the class certification stage, the court must take the substantive allegations of the complaint as true, but it “also is required to consider the nature and range of proof necessary to establish those allegations.” *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982). The court must engage in a “rigorous analysis” of each Rule 23(a) factor, which often “will entail some overlap with the merits of the plaintiff’s underlying claim.” *Dukes*, 564 U.S. at 351. If the court concludes that the moving party has carried its burden, then the court is afforded “broad discretion” to certify the class. *Zinser*, 253 F.3d at 1186.

III. STANDARDS FOR MISCLASSIFICATION CLAIMS

Prior to considering whether Plaintiffs’ claims satisfy Rule 23, the Court first addresses Defendants’ argument regarding the applicable legal framework to evaluate the putative class members’ central claim that they were misclassified as independent contractors instead of employees. Plaintiffs argue that the ABC Test articulated in

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