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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF SAN MATEO**

15 JOSE MACIEL, and individual, on behalf of
16 The State of California and all similarly-
17 aggrieved employees,

18 Plaintiff,
19 vs.

20 FLOWERS FOODS, INC., a Georgia
21 corporation; FLOWERS BAKERIES, LLC, a
22 Georgia limited liability company;
23 FLOWERS BAKING COMPANY OF
24 MODESTO, LLC, a California limited
25 liability company; FLOWERS BAKING
26 COMPANY OF HENDERSON, LLC, a
27 Nevada limited liability company,

28 Defendants.

Case No. 20-CIV-02959

**REPRESENTATIVE ACTION
COMPLAINT FOR:**

**(1) CIVIL PENALTIES UNDER THE
PRIVATE ATTORNEYS GENERAL
ACT, LABOR CODE SECTIONS
2699, ET SEQ.**

DEMAND FOR JURY TRIAL

I. INTRODUCTION

1. Flowers Foods, Inc., itself and through its affiliates, deploys an elaborate fraud to cheat its employees, its competition, and the state and federal governments. Flowers¹ does so, primarily, by willfully and systematically misclassifying its hundreds of delivery drivers as “Independent Contractors.” (Sometimes referred to as “Delivery Employees.”) Flowers did so and continues to do so in direct violation of, among other jurisprudence, California’s recently-enacted Labor Code Section 2750.3 (commonly referred to by its original Bill number – “AB5”), confirming that such workers are indeed employees, not contractors.

2. Flowers thus denies these Delivery Employees, including Plaintiff Jose Maciel, access to critical benefits and protections they are entitled to by law, such as minimum wage, overtime compensation, indemnification for business expenses, family and medical leave, unemployment insurance, and safe workplaces. Through its willful misclassification, Flowers also robs the federal and state governments of tax revenues and generates losses to state unemployment insurance and workers’ compensation funds and gets an undue advantage over its law-abiding competition.²

3. Flowers sells billions of dollars of baked goods to retailers throughout the United States. To help sustain its profits, Flowers has concocted a model where it advertises “independent contractor” distributor opportunities. As part of the model, Flowers makes Delivery Employees purchase a specific sales territory in which the Delivery Employee is supposedly going to purchase, take title to, re-sell, and distribute Flowers’ bakery products to customers prearranged by Flowers. The Delivery Employees often pay in excess of \$100,000 for the right to the “independent business opportunity” outlined in Flowers’ advertisements and its uniform Distributor Agreement (“DA”). Flowers even offers to finance the loans for these routes itself, or through subsidiaries, at illegal (usurious) rates – increasing the money it unjustly reaps from these workers.

¹ As used here, “Flowers” refers to all of Flowers Foods, Inc., Flowers Bakeries, LLC, Flowers Baking Co. of Henderson, LLC, and Flowers Baking Co. of Modesto, LLC—who carry out the acts described herein jointly and as a single enterprise. Flowers Foods, Inc. is the publicly-traded “head” of the organization.

² See U.S. Dept. of Labor, Wage and Hour Division, “Misclassification of Employees as Independent Contractors,” available at <https://www.dol.gov/whd/workers/Misclassification/> (describing the repercussions of misclassification) (last accessed April 14, 2020).

1 4. In short, Flowers sells the notion that these “independent contractors” will run and
2 control their own sales-based business for their own profit and gain. But Flowers never *actually*
3 operates its business under these terms, despite Delivery Employees’ heavy investment and
4 reliance on the promises Flowers makes.

5 5. In reality, the distributor role is far from “independent.” For example, for most
6 product sales, Flowers itself contracts directly with its own large retailer customers (like Wal-Mart
7 and Costco) and maintains title over the baking products until the retailers take possession. But in
8 no case do Delivery Employees ever actually receive title to products that go into Flowers’ retail
9 locations. Instead, Delivery Employees merely deliver the product and stock Flowers’ customers’
10 shelves for a non-negotiable commission that Flowers unilaterally establishes.

11 6. Flowers also dictates the set route or territory that the Delivery Employees sell
12 within. Flowers maintains control over that territory or route with respect to things like which
13 Flowers’ products will be available, price, shelf space, displays, and promotions. Flowers also
14 unilaterally dictates when unsold bakery products must be reclaimed from retail locations (a.k.a.
15 “stales” or stale product) as dictated by its retail customers and passed down to Delivery
16 Employees. Curiously, even though Flowers purports to “sell” the bakery products to the
17 “independent distributors,” Flowers mandates that stale products must be returned *to Flowers* and
18 not used for any other purpose by the Delivery Employees, even where they were forced to pay
19 market price for them.

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

26 8. Flowers also hires management and sales employees at each of its local warehouses
27 to carry out sales and to directly supervise and instruct the so-called “independent distributors” in
28 performance of their distribution and merchandizing responsibilities within their routes.

1 9. Flowers also controls the Delivery Employees’ appearance as well as the
2 appearance of their vehicle. For example, Flowers can make Delivery Employees paint their
3 vehicles to Flowers’ specifications or remove advertising that the Delivery Employee has chosen
4 for his/her vehicle.

5 10. Delivery Employees must also abide by “Good Industry Practices” as defined
6 unilaterally by Flowers. Failure to abide by any of these requirements risks termination by Flowers
7 and often results in “breach notices” by Flowers where it insists on specific performance
8 obligations with the threat of fines or termination.

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

13 12. The discrepancy between the business model set forth in Flowers’ DA and the one
14 actually put in place by Flowers is not accidental. Flowers sees its DSD model, and specifically
15 the use of “independent distributors,” as a significant competitive advantage. It wants, and legally
16 it *needs*, the appearance of separate, independent businesses to avoid having to treat “independent”
17 distributors as employees. Yet, at the same time Flowers must be able to ensure delivery to its
18 blue-chip retail customers and control the timely and effective distribution of its products pursuant
19 to the terms of its contracts with those retailers. Attempting to walk this invisible line or to simply
20 capture the best of both worlds, Flowers presents the illusion of independence in its DA and related
21 advertisements with no intention of actually operating its business as necessitated by its retail
22 customers and its personal preference.

23 13. Plaintiff Jose Maciel is a current Delivery Employee who entered into the DA with
24 Flowers. Plaintiff brings this action on behalf of the State of California and all similarly-aggrieved
25 Delivery Employees. This action is brought as a representative action for civil penalties under
26 California’s Private Attorneys General Act (“PAGA”).

27
28

II. JURISDICTION AND VENUE

14. The amount in controversy arising from the actions and statutory violations as further described below is sufficient to implicate the general jurisdiction of the Superior Court.

15. Venue is proper in this judicial district, pursuant to Code of Civil Procedure section 395, as Defendants conduct business within San Mateo County and many of the acts complained of were carried out in, and/or their effects were felt in, San Mateo County.

16. On June 16, 2020, aggrieved employee and Mr. Maciel's co-worker, Harold Wilson, electronically submitted a letter to the Labor and Workforce Development Agency ("LWDA"), pursuant to the California Private Attorney General Act ("PAGA"), codified at Labor Code §§ 2698, *et seq.* The letter notified the LWDA of numerous and continuing Labor Code violations committed by Defendants, including for violations of Labor Code § 226.8 (independent contractor misclassification). Mr. Maciel then also electronically submitted a substantially identical letter to the LWDA on or around June 10, 2020, utilizing the same LWDA case number, and notifying the LWDA that he would be stepping in or substituting for Mr. Wilson as the PAGA representative.

17. The required 60 day period passed without any notice from the LWDA stating an intention to investigate the claims provided in the original notice.

III. THE PARTIES

18. Plaintiff Jose Maciel is, and at all times mentioned was, an individual residing in San Mateo County, California. He is employed by and works for Defendants, and each of them, as a distributor in the State of California. He has been working for Defendants since at least 2013.

19. Defendant Flowers Foods, Inc. (“Flowers Foods”), is a publicly traded Georgia corporation with its principal place of business in Thomasville, Georgia (NYSE:FLO). It is a leading manufacturer and seller of bakery goods in the United States with gross profits of over \$1.9 billion in 2017 (and of over \$581 Million in the first quarter alone of 2018). It does business in this County by establishing subsidiaries with the intent of carrying out operations in this region. This entity establishes layers of national and regional affiliates or subsidiaries to carry out its sham “independent distributor” business model that in fact just secures workers to carry out the delivery and merchandizing of Flowers’ customers’ retail locations. Flowers Foods ultimately takes

1 responsibility for and recognizes all revenue generated from its sale of bakery goods through its
2 local subsidiaries and its Delivery Employees. It also guarantees and assumes responsibility for
3 the performance of its subsidiaries that execute the DA with Delivery Employees (sometimes
4 called “local subsidiaries”) throughout California. Specifically, “Flowers Foods, Inc. will
5 absolutely and unconditionally guarantee the performance by [its local subsidiary] of [the
6 subsidiary’s] obligations under the Distributor Agreement.” As a result, Flowers Foods, along with
7 Flowers Bakeries, LLC, are ultimately, and jointly, responsible for these claims.

8 20. Flowers Bakeries, LLC, is a Georgia limited liability corporation with its principle
9 place of business in Thomasville, Georgia. This entity is the Flowers Foods affiliate or subsidiary
10 that is charged with sales related activities. It negotiates with retailers on things such as price, shelf
11 space, and service requirements that are then carried out by the Delivery Employees at Flowers’
12 direction. Results of these high-level deals make their way down through the local subsidiaries to
13 the Delivery Employees.

14 21. One step further down the Flowers’ enterprise is the local DSD subsidiaries such
15 Defendants Flowers Baking Co. of Modesto, LLC and Flowers Baking Co. of Henderson, LLC.³
16 They are California and Nevada LLCs respectively. These entities’ only member is Flowers
17 Bakeries, LLC (who in turn is entirely owned by Flowers Foods). These local subsidiaries are set
18 up to help execute the policies and instructions passed down from the higher up Flowers entities
19 (the Defendants). They also act as a go-between for Delivery Employees and the other Flowers
20 entities.

21 22. All of these Defendants are part of the Flowers enterprise that jointly and
22 collectively manufacture, advertise, sell, and distribute bakery products throughout California and
23 the United States. They operate jointly, as co-employers, as alter egos, as joint venturers, and as a
24 single enterprise in carrying out the common fraud and misclassification against their Delivery
25 Employees and the state of California.

26 ³ Flowers Foods initially established a California-wide local subsidiary called Flowers Baking Co.
27 of California which later split and transferred its Northern California operations to Flowers Baking
28 Co. of Modesto and its Southern California operations to Flowers Baking Co. of Henderson around
February 2014. With the transfers, Flowers assigned some responsibility for management of its
Distributor Agreements to these new entities.

IV. GENERAL ALLEGATIONS

A. Overview of Flowers' Business

23. Flowers is a leading national packaged bakery foods company. It bakes, sells, and distributes breads, buns, rolls, snack cakes, and tortillas, among other items throughout the country under well-known brand names like "Wonder Bread," "Sunbeam," "Tasty Cake," "Nature's Own," and "Dave's Killer Bread." It has two business segments—a direct-store-delivery segment ("DSD Segment") and a warehouse delivery segment. The DSD Segment is at issue here. It produces a wide variety of fresh bakery foods that are sold through a DSD route delivery system to Flowers' retail and foodservice customers in California and other locations.

24. Within the DSD segment, Flowers establishes a web of affiliates or wholly-owned subsidiary companies to enter into agreements with the "Delivery Employees," such as Plaintiff, who are charged with delivering the bakery products from the warehouse to the retail locations and keeping the shelves stocked. According to Flowers' website, it "sells its products *through* a network of independent distributors [*i.e.*, Delivery Employees] to retail and foodservice customers." (<https://www.flowersfoods.com/investors/flo-overview/at-a-glance> [emphasis added].) These Delivery Employees are, thus, integral to Flowers' normal business operations—and they are selling *for Flowers*, not themselves.

B. How Flowers Sells Its So-Called "Independent Distributor Opportunity" to Delivery Employees.

25. Flowers classifies Delivery Employees as "independent contractors" and advertises routes as independent business opportunities for Delivery Employees where the Delivery Employees supposedly buy product from Flowers and re-sell it for a profit. Specifically, in disclosure documents, Flowers represents that the independent contractor Delivery Employee will "pay [Flowers] for the bakery products [distributor] purchase[s] for resale to [distributor's] outlets." It reiterates that Flowers "will sell [bakery products] to [distributor] at terms and prices established by [Flowers], and [Flowers] will derive income from these sales. Upon delivery, these products will belong to [the distributor]."

1 26. Flowers makes the same representations in the form DA presented to every
2 Delivery Employee. Flowers states that, under its system, it seeks to divide its bakery goods market
3 into territories operated by “independent contractor distributors.” Flowers claims to grant the right
4 both to sell and distribute authorized Flowers products within the territory. Under this model, as
5 described in the DA, the Delivery Employee will purchase from Flowers, take ownership of the
6 product, and then resell the products to retail outlets within their territories at a profit.

7 27. By claiming that the Delivery Employee is “purchasing” the products from
8 Flowers, Flowers feels it can pass certain business risks to the Delivery Employee. So Flowers
9 makes the Delivery Employees, like Jose Maciel, assume the risk of loss for non-payment by
10 Flowers’ retail customers, loss resulting from missing or otherwise unaccounted for inventory, and
11 loss resulting from excess stale products.

12 28. In short, and in no uncertain terms, the disclosure documents and the DA claim
13 that: (1) Flowers sells bakery products to Delivery Employee; (2) Delivery Employee takes title;
14 and (3) Delivery Employee re-sells to retailers at a profit. In the scenario described by Flowers,
15 Flowers makes a profit by selling to the distributor and passing off title at that time. The Delivery
16 Employee then executes its own independent sale to the retailer. Furthermore, Flowers describes
17 itself, in the DA, as merely the agent of the Delivery Employee in reaching agreements for
18 purchases with retail chain accounts that the Delivery Employee then executes. In its description
19 of this tripartite relationship, Flowers states that it will merely carry accounts receivable for these
20 retail accounts and credit the retail sales price to Delivery Employees.

21 29. Flowers uses its described business model to both (1) justify the “independent”
22 nature of Delivery Employees in an effort to support its misclassification of them as independent
23 contractors, and to (2) justify passing business losses and risks to the Delivery Employees who
24 supposedly “take title” to the products.

25 **C. Flowers’ Actual Business Model**

26 30. Flowers’ representations are false as evidenced by its own statements and
27 accounting policies. To summarize, Flowers represents to Delivery Employees that they own the
28 product and control their destinies. It does that to justify its misclassification of the Delivery

1 Employees as “independent contractors,” and to thus avoid the wages, employer-side taxes, and
2 other protections and burdens that would normally come with properly categorizing these workers
3 as “employees.” It also does this to justify passing certain risks and losses to the Delivery
4 Employees. But on the other hand, and as proven by its actions as well as what Flowers tells
5 accountants and the Securities and Exchange Commission (“SEC”), Flowers is the one that
6 controls the entire enterprise and actually owns the product. Upon information and belief, this
7 allows Flowers to claim higher revenues and present a healthier business to potential customers
8 and its investors. In short, Flowers is having its cake and eating it too. And it is *knowingly*
9 misclassifying workers.

10 31. More specifically, rather than selling to and vesting rights in the distributors to
11 make retail sales, Flowers itself negotiates, carries out, and receives gross proceeds from the vast
12 majority of bakery sales which are in turn merely delivered by its “distributors” who receive a
13 commission based on Flowers’ sales. The reality of selling products to national retailers like Wal-
14 Mart and Costco is that deals are negotiated on a national, or at least regional level and then simply
15 carried out by the local subsidiaries that make up Flowers’ DSD Segment. Sales to these retailers
16 accounts for over 75% of Flowers’ business in the increasingly corporate “big retail” market that
17 exists in the United States and California.

18 32. Flowers’ own website and SEC filings confirm that the distributors merely have
19 “the right to distribute,” and that sales are actually made and controlled by Flowers (*i.e.*, Flowers
20 sells products “*through*” distributors). It is Flowers who enters contracts for retail purchase and
21 negotiates all relevant retail terms like pricing. Individual distributors do not, for example, have a
22 contract with the local Wal-Mart within their territory and have no control over the price Wal-Mart
23 agrees to pay Flowers for products that distributors put on Wal-Mart’s shelves. Price, product
24 selection, and even product placement within these retail locations are all controlled by Flowers
25 well above the Delivery Employees’ level of operation.

26 33. Under Flowers’ actual business model, Delivery Employees do not, in-fact, take
27 title and then resell the products. Instead, Flowers executes sales with retail locations and
28 “distributors receive a percentage of the wholesale price of product sold to retailers and other

1 customers.” In doing so, and as a matter of accounting, Flowers then actually recognizes the sale
2 to the retail customer as revenue “at the time of delivery when title and risk of loss pass to the
3 [retail] customer.” See Flowers’ SEC Form 10-K for fiscal year ended January 1, 2011 (“2011
4 SEC Filing”) at p. F-7.⁴ Flowers does *not* recognize the revenue when it supposedly “sells” the
5 products to the Delivery Employees because no sale to these individuals actually occurs. Indeed,
6 in its SEC filings, Flowers explicitly admits that it bears risk of loss and owns title to the products
7 until the retailer or end consumer (like Wal-Mart) actually takes possession. This directly
8 contradicts the representations that Flowers makes to the State of California as well as its
9 “distributors,” including in the DA, where Flowers claims the Delivery Employees “buy” the
10 product from Flowers and own it upon taking possession.⁵

11 34. Flowers’ recent quarterly SEC filings remove any doubt that the DA and its related
12 disclosures are a sham. In its filings, Flowers explicitly admits that, for purposes of sales to its
13 retail chain customers (the vast majority of Flowers products sold), Flowers is the principal, and
14 the employee distributor is the “agent.” See, e.g., Flowers’ Form 10-Q for the quarterly period
15 ended April 21, 2018 (“2018 SEC Filing”), at p. 9.⁶ This directly contradicts what Flowers told
16 the employee distributors, including Jose Maciel, in the franchise disclosure and the DA.

17 35. In that recent filing, Flowers also admits again that revenue is recognized based on
18 the retail sales price (as opposed to the wholesale price it supposedly “sells” products to the
19 Delivery Employee for) only once product is delivered to the end customer. Additionally, “[t]he
20 company retains inventory risk, establishes . . . pricing, and fulfills the contractual obligations for
21 [retail] sales.” See 2018 SEC Filing at p. 9-10. Again, Flowers wants to save money on wages and
22 taxes by claiming that employees are “independent distributors,” but it needs to maintain control
23
24
25

26 ⁴ https://otp.tools.investis.com/clients/us/flowers_foods/SEC/sec-show.aspx?Type=html&FilingId=7747320&CIK=0001128928&Index=10000.

27 ⁵ A “sale” consists of passing of title from the seller to the buyer. See U.C.C. 2-106.

28 ⁶ https://otp.tools.investis.com/clients/us/flowers_foods/SEC/sec-show.aspx?Type=html&FilingId=12761070&CIK=0001128928&Index=10000.

1 over the enterprise, the products, and the distribution networks to satisfy its other financial and
2 accounting goals.⁷

3 36. Additional facts proving Flowers' control over the relationship with its Delivery
4 Employees (and thus the falsity of the "independent contractor" classification) are as follows:

5 a. Delivery Employees are forced to incorporate and retain a majority
6 ownership in their corporation. *I.e.*, they cannot choose their own business form. This forced
7 corporation then enters into the DA with the Flowers Foods, Inc. subsidiary to show the appearance
8 of a business-to-business relationship.

9 b. Despite the forced incorporation, the Delivery Employee himself or herself
10 must personally guarantee the contract. The personal guarantee makes the individual Delivery
11 Employee liable for performance under and compliance with the DA. This gives Flowers its
12 desired individual employee.

13 c. Flowers assigns each Delivery Employee a set route and set brands of
14 Flowers' bakery products to sell within that route to Flowers' retail customers. Delivery
15 Employees pay for the rights to the route. The price is usually \$100,000 or more. Moreover,
16 Flowers usually finances the purchase of the route at exorbitant interest rates. Flowers then
17 automatically deducts the principal and interest from the commissions otherwise owed to the
18 Delivery Employees.

19 d. Flowers also controls: (i) which retailers will receive which Flowers'
20 products within the territory; (ii) the price its retailers pay for products; and (iii) which products
21 and brands of goods will remain available to the retailers and, in turn, to the Delivery Employees.

22 e. Flowers maintains the right to change which retailers it and its Delivery
23 Employees serve and which brands will be sold to those retailers or otherwise available within a
24 Delivery Employee's territory.

25 ⁷ Notably, prevailing accounting standards dictate that in order for Flowers to claim, as it
26 repeatedly does, that it is the principal and the distributor is the "agent" in the arrangement, Flowers
27 must be the one that has control over the "right to a service to be performed by [the distributor],
28 which gives [Flowers] the ability to direct [the distributor] to provide the [distribution] service to
[retail] customer. . . ." See Accounting Financial Standards Board (FASB), Topic 606. This, of
course, is directly at odds with Flowers' characterization of the distributors as "independent
contractors" that make their own sales and over whom they allegedly lack control.

1 f. When Flowers makes changes to the products offered and/or the retailers it
2 offers them to, it does not re-value the route the Delivery Employee originally bargained for or
3 otherwise re-evaluate the money the individual owes to Flowers for that route. This is true even
4 where Flowers has drastically reduced the value of a given route by unilaterally choosing to
5 discontinue a product or stop selling to a retailer in that territory.

6 g. Flowers deploys a management structure within each local subsidiary
7 including branch and/or sales managers who manage relationships with retail customers, carry out
8 sales, and directly supervise and instruct the Delivery
9 Employees in performance of their responsibilities. Again, the distributors are not “independent.”
10 They have bosses at Flowers.

11 h. Flowers also dictates when unsold bakery products must be reclaimed from
12 retail locations (a.k.a. “stales” or stale product). Flowers demands that such products, despite
13 supposedly being the “property” of the Delivery Employee, be returned to a Flowers warehouse
14 for Flowers’ further benefit or re-sale, not the Delivery Employees. For example, if there is stale
15 product within a Delivery Employee’s territory above the threshold level unilaterally established
16 by Flowers, Flowers charges the Delivery Employee retail price for the products but maintains
17 possession of these products itself and, on information and belief, sells these products to its thrift
18 customers.

19 i. Delivery Employees must also agree to maintain a certain physical
20 appearance for both themselves and their vehicles. Flowers retains and exercises the right to force
21 Delivery Employees to paint their vehicles to Flowers’ specifications or remove advertising that
22 the Delivery Employees have chosen for their vehicle.

23 j. Delivery Employees must abide by “Good Industry Practices” as defined by
24 Flowers. Failure to abide by any of these requirements risks termination by Flowers.

25 k. The DA often has no end date and Delivery Employees often work for
26 Flowers for long periods of time. Per Flowers, these are “long-term financing arrangements.”

27 l. Flowers sets a calendar or schedule of days that Delivery Employees must
28 work and what tasks are to be completed on those dates (*i.e.*, managing inventory vs. dropping

1 new product). Flowers also requires that work be performed on the route each day of the week as
2 its customers require and expect under their contracts with Flowers. Flowers describes its
3 frequency of deliveries and shelf-stocking as “an increasingly important competitive factor” over
4 its competition and it needs to control Delivery Employees to perform accordingly.

5 m. Finally, When Flowers cannot find a Delivery Employee to service a
6 particular route or territory, it uses its own employees to perform the same distribution and
7 merchandizing work. Also, when Flowers is starting up in a new area, it uses a temp agency (that
8 classifies drivers as employees) to conduct this very same work. In short, Flowers and other
9 companies routinely treat individuals performing the same work as Delivery Employees as
10 employees and not independent contractors. The choice to make Delivery Employees
11 “independent contractors” is simple cost avoidance. *See, e.g.*, Flowers’ 2018 SEC Filings at p. 47
12 (“In the current quarter, a larger portion of our sales were made through independent distributors
13 resulting in increased distributor distribution fees as a percent of sales and decreased workforce-
14 related costs as a percent of sales . . . [which, among other things] resulted in a decline in workforce
15 related costs.”); *and see e.g.* Flowers’ SEC Form 10-K for fiscal year ended December 28, 2013
16 (“2014 SEC Filing”) at p. 39 (“The increase in workforce-related costs was primarily attributable
17 to the Lepage and Sara Lee California acquisitions as they generally did not use independent
18 distributors to deliver product for the majority of 2013. We transitioned the Sara Lee California
19 and are transitioning the Lepage operations to the independent distributor model which will, over
20 time, decrease the workforce-related costs and increase the distributor distribution fees.”)⁸

21 **D. Flowers Does Not Reimburse for Ordinary Business Expenses, and Also**
22 **Charges Illegal Fees to its Employees.**

23 37. Flowers does not reimburse Delivery Employees for ordinary business expenses.
24 These include payments Delivery Employees make in the ordinary course
25 of their work for Flowers such as expenses relating to use of their personal cars and delivery trucks,
26 business licenses, insurance, and tax.

27 ⁸
28 https://otp.tools.investis.com/clients/us/flowers_foods/SEC/sec-show.aspx?Type=html&FilingId=9795456&CIK=0001128928&Index=10000.

1 38. Moreover, Flowers actually charges Delivery Employees, as it charged Jose
2 Maciel, for the pleasure of delivering for Flowers. For instance, Flowers not only charges for the
3 privilege of working for it to begin with, but also charges recurring, non-negotiable fees as part of
4 their operation. This includes, but is not limited to a warehouse fee, an administrative fee, and a
5 technology fee (for use of Flowers required handheld computer equipment).

6 39. Flowers also charges Delivery Employees for (excess) stale, lost, stolen, or
7 otherwise unaccounted retail inventory. As such, distributors illegally serve as insurers of the
8 Flowers' merchandise. *See, e.g., Quillian v. Lion Oil Company*, 96 Cal. App. 3d 156, 161 (1979);
9 *Kerr's Catering Service v. Department of Indus. Relations*, 57 Cal. 2d 319, 327 (1962) ("The
10 employees, through this device, are in effect made insurers of the employer's merchandise, and the
11 commissions earned by the employees which are subject to the deduction serve the same purpose
12 as an employee's 'bond' exacted by the employer to cover shortages.").

13 **E. Flowers Cannot Meet its Burden to Show that Its Classification is Lawful**

14 40. Labor Code Section 2750.3 is clear that all persons "providing labor or services for
15 remuneration" shall be considered an employee, not an independent contractor, by default, unless
16 *the hirer* proves all three of the following:

- 17 a. That the person is free from the control and direction of the company;
18 b. that the person performs work that is outside the usual course of the hiring entity's
19 business; and
20 c. the person is customarily engaged in an independently established trade,
21 occupation, or business of the same nature as that involved in the work performed.

22 41. Flowers cannot meet any of these elements, let alone all three of them.

23 42. As outlined in detail above, Flowers exercises significant control over the workers
24 for all things that matter. And it would be ludicrous for Flowers – the bread company – to say that
25 these workers – the bread distributors – work outside of the "usual course" of Flowers' business.
26 Finally, Flowers cannot prove, as it must, that these workers were customarily engaged in an
27 independently established trade. The only reason they carry the title of "independent" contractor
28 is because Flowers writes it into their hiring contract.

43. Moreover, Labor Code Section 2750.3 was enacted with great publicity and discussion starting with its original title: “AB5.” Flowers cannot claim to have been unaware of its enactment or its importance, even if we allowed ignorance of the law to be a possible defense. Stated simply, Flowers knows and has known for some time that its classification of its delivery employees as “independent” is unlawful.

V. FIRST CAUSE OF ACTION

Civil Penalties Under The PAGA

44. Plaintiff Jose Maciel incorporates each and every allegation contained above.

45. PAGA permits aggrieved employees, like Plaintiff, to recover civil penalties for violations of numerous Labor Code sections on behalf of the State of California. (See Lab. Code, § 2699.5.) Defendants' conduct, as alleged above, violates numerous sections of the California Labor Code, including, but not limited to, the following:

- a. Labor Code sections 201, 202, 203, and 204, for failure to timely pay Plaintiffs and other aggrieved employees all earned wages;
- b. Labor Code section 226.8 for willful misclassification of Drivers and Helpers as “independent contractors;”
- c. Labor Code sections 1194 and 1197, for failure to pay Plaintiffs and other aggrieved employees all earned wages;
- d. Labor Code sections 510 and 1198, for failure to compensate Plaintiffs and other aggrieved employees with all required overtime pay;
- e. Labor Code sections 226.7 and 512, for failure to provide all required meal and rest breaks to Plaintiffs and other aggrieved employees;
- f. Labor Code sections 221 and 224, for deducting wages from Plaintiffs and other aggrieved employees without their express written consent or other legal authority for doing so;
- g. Labor Code section 2802, for failing to reimburse or indemnify expenses or losses incurred as a result of Plaintiffs and other aggrieved employees performing work duties;

1 h. Labor Code section 226, for failure to provide accurate wage statements to
2 Plaintiffs and other aggrieved employees; and

3 i. Labor Code sections 226, 226.2, 1174, 1174.5, and 1174, for failure to
4 maintain accurate employment records related to Plaintiffs and other aggrieved employees'
5 work.

6 46. Plaintiff has complied with all administrative requirements and pre-conditions
7 contained within Labor Code section 2699.3. Plaintiff's counsel electronically submitted the
8 Initial PAGA Notice on June 16, 2020 to the Labor and Workforce Development Agency
9 ("LWDA"). A copy of the notice was also provided to Defendants. The required 60 day period
10 passed without any notice from the LWDA stating an intention to investigate the claims provided
11 in the notice.

12 47. Pursuant to PAGA, and, in particular, California Labor Code sections 2699, 2699.3,
13 and 2699.5, Plaintiff is entitled to and hereby seeks to recover civil penalties against Defendants,
14 in addition to reasonable attorney fees and costs, on behalf of himself, the State, and all other
15 similarly-aggrieved current and former aggrieved employees for violation of the Labor Code
16 sections referenced in this Complaint.

17 **VI. REQUEST FOR JURY TRIAL**

18 Plaintiff hereby requests a trial by jury.

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20 *[Rest of page intentionally left blank.]*
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1 **VII. PRAYER FOR RELIEF**

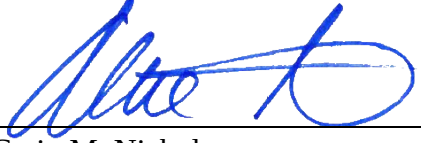
2 Plaintiff prays for judgment against Defendants, as follows:

- 3 1. For civil penalties according to proof;
4 2. For costs of suit;
5 3. For reasonable attorneys' fees; and
6 4. For such other and further relief as this Court may deem just and proper.

7 Respectfully submitted:

NICHOLAS & TOMASEVIC, LLP

8
9 DATED: July 16, 2020

By: 

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