AMERICAN BAKERS ASSOCIATION

By Electronic Submission October 26, 2020

The Honorable Cheryl M. Stanton
Administrator
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue N.W., Rm S-3502
Washington, DC 20210

Re: Notice of Proposed Rulemaking - Independent Contractor Status under the Fair Labor Standards Act (RIN 1235-AA34)

Dear Administrator Stanton:

The American Bakers Association ("ABA") welcomes the opportunity to submit these comments to the U.S. Department of Labor ("DOL" or "the Department") with respect to the above-referenced notice of proposed rulemaking ("NPRM" or "proposed rule").

By way of background, ABA is the voice of the baking industry. Serving Members from global wholesale baking companies and suppliers to baking industry entrepreneurs, ABA is the only bakery-specific national and state trade association, delivering results on priorities affecting the companies that feed the world. Since 1897, ABA has worked to increase protection from costly government actions, build the talent pool of skilled workers with specialized training programs, and forge industry alignment by establishing a more receptive environment to grow the baking industry. ABA's Membership has grown to represent more than 300 companies with a combined 1000+ facilities.

I. ABA Supports the Proposed Rule's Focus on Two "Core" Factors.

At the outset, ABA commends the Department for undertaking the effort to adopt through notice-and-comment rulemaking its interpretation of how independent contractor status is determined under the Fair Labor Standards Act ("FLSA"). The proposed rule retains the long-standing "economic reality" test applied under the FLSA, while clarifying and sharpening application of the test in a way that will foster clarity and certainty for employers, employees, contractors, and other stakeholders.

Fundamentally, ABA supports the Department's position that the two most probative "core" factors for determining independent contractor status under the FLSA are the degree and nature of an individual's control over their work, and the opportunity for

601 Pennsylvania Ave. NW, Ste. 230
Washington, DC 20004
info@AmericanBakers.org
www.AmericanBakers.org
(202) 789-0300
(202) 898-1164

profit (or loss) and the extent of a worker's investment in his or her business. As discussed below, ABA believes that under the Department's proposed analysis, independent owner-operators (sometimes called Independent Distributors) who distribute baked goods under a business model common throughout the industry for decades, will be (and, insofar as has already been recognized by courts, continue to be) properly classified as independent contractors.

II. The Independent Contractor Distribution Model Is Commonly Used In the Baking Industry.

For over seven decades, companies in the baking industry, and other manufacturers of food products, have contracted with independent contractors to sell, distribute, and/or merchandise the manufacturers' products.

In a typical distribution agreement, a baking company will grant an independent owner-operator the right to distribute the company's products within a sales area or territory and to market and sell them to retailers and other accounts within that area. The Independent Distributor operates an independent business which he or she can grow by maximizing sales to existing customers and gaining distribution with new customers. These distributorships have significant potential economic upside that can, with a good sales strategy and sound business decisions, yield significant sales and profits and build equity in their distributorships for resale.

Irrespective of whether distribution rights are purchased or whether they are obtained in consideration of the distributor's agreement to market and sell the manufacturer's products, a distributorship business requires substantial investments and involves ongoing expenses which the Independent Distributor must manage. The Independent Distributor invests in a sales vehicle and computer and billing systems, and may invest in additional vehicles and computer systems for the personnel the Independent Distributor engages in order to increase sales in the territory. In fact, the independent distributor need not even service the territory itself; it can engage helpers or employees to do that work while still reaping the profits. The Independent Distributor may also invest large amounts (often several hundreds of thousands of dollars a year) in inventory purchased from the manufacturer. Independent Distributors pay and must carefully manage their own business expenses, including motor vehicle and liability insurance expenses, vehicle fuel and maintenance expenses, accounting fees, charges for mobile phones and tablets, and amounts paid to personnel who work for or assist them. Just as important, the

decisions the Independent Distributor makes regarding his or her investments and expenses directly impact the opportunity for profit and risk of loss.

With that substantial investment comes the opportunity to keep the profit (or suffer a loss) from every sale. The amount of profit depends, again, upon an Independent Distributor's sales strategy, initiative, business plan, and engagement of support personnel, among other factors. A distributor's interaction and relationship with its customers, ability to grow its customer base, success in negotiating additional space and displays in its customers' stores and in their displays, strategic use of employees, agents, and equipment, and good customer service – all factors within the Independent Distributor's control and dependent upon their business savvy – dictate the ultimate success of his or her business.

As a reward for their entrepreneurship, Independent Distributors experience flexibility and independence, including control over the duration of the working relationship. Typically, the Independent Distributor has the option to terminate his or her relationship with the manufacturer, and may have the ability to sell the distribution rights, if he or she so chooses. Indeed, the value of these distribution rights has led to the development of a robust marketplace wherein owner-operators can make significant sums of money buying, selling, and trading distribution rights.

The widespread use of the independent owner-operator model of distribution in the baking and other industries has given countless individuals the opportunity to buy and own their own businesses, be their own boss, and use their entrepreneurial skills and talents to secure financial security. The use of the independent contractor model brings unique economic benefit not only to those who use them in the distribution context, but also to a range of other independent businesses and the economy writ large.

III. The NPRM's Focus on "Core" Factors of Control and Economic Opportunity Appropriately Stresses the "Factors" Most Probative of Independent Contractor Status.

At the heart of the proposed rule, the Department proposes two "control factors" which are the "most probative as to whether or not an individual is an economically dependent employee" and thus "afforded greater weight in the analysis than is any other factor." NPRM, 85 Fed. Reg. at 60639. The first "core factor" is the "nature and degree of the

individual's control over the work" as its first economic reality factors. As explained in the NPRM:

> ***This factor weighs towards the individual being an independent contractor to the extent the individual, as opposed to the potential employer, exercises substantial control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors.*** In contrast, this factor weighs in favor of the individual being an employee under the Act to the extent the potential employer, as opposed to the individual, exercises substantial control over key aspects of the performance of the work, such as by controlling the individual's schedule or workload and/or by directly or indirectly requiring the individual to work exclusively for the potential employer.

Id. at 60612 (emphasis added). ABA supports this articulation of the factor, but would request that the Final Rule contain one clarification. The NRPM notes that "an individual's theoretical abilities to negotiate prices or to work for competing businesses are less meaningful if, as a practical matter, the individual is prevented from exercising such rights." ABA notes that some Independent Distributors, as a practical matter, ***choose*** not to exercise some of the rights and abilities that they possess, e.g., negotiating prices or working for other companies. That ***choice*** is still indicative of the Independent Distributors' actual control over their own work. Thus, ABA requests that the Final Rule make explicitly clear that what matters for the control factor is not whether the individual ***exercises*** certain rights, but whether in practice he/she had the ***ability*** to exercise those rights (i.e., whether the potential employer ***prevented*** the individual, as a matter of contract or fact, from exercising the rights).

The second "core factor" is "the individual's opportunity for profit or loss." As the Department explains, this factor generally includes an analysis of "whether such opportunities are based on personal initiative, managerial skill, or business acumen." *Id*. at 60613. ABA supports this approach, insofar as the Department has correctly returned to the "ultimate inquiry" under the economic reality test: "whether, as a matter of economic reality, the worker is dependent on a particular individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor)." *Id*. at 60600.

ABA is highly supportive of this approach, and the setting of these two "core" factors above others in an independent contractor analysis. It is ABA's understanding that in almost all instances, where both of these "core" factors are aligned identically (whether both supporting an independent contractor status, or both supporting classification as an employee), that will generally be the end of the inquiry and dispositive. ABA supports this approach, and believes that in its application, it is made clear that within the industry's model of independent owner-operator distribution, Independent Distributors would properly be classified as independent contractors under the proposed rule.

A. Independent Distributors in the Baking Industry Are Independent Contractors Under the "Control" Core Factor.

With respect to the first control factor, under the agreements commonly entered into within the baking industry, Independent Distributors run their businesses as they see fit. They are free to hire (and fire) their own personnel to fulfill their obligations under the agreements, and the supervision and management of these workers rests solely with the Independent Distributors. The ability to hire and fire their own workers has long been a strong indication of independent contractor status. *See, e.g., United States v. Silk*, 331 U.S. 704, 719 (1947) (fact that independent contractor driver/owners "hire their own helpers" is probative of independent contractor status); *Saleem v. Corporate Trans. Grp, Ltd.,* 854 F.3d 131, 143 (2d Cir. 2017) (that plaintiffs "permitted other individuals to drive for them" is indicative of independent contractor status). Indeed, as one commentator aptly noted, "the most likely sign that a worker is not an employee is that he is in fact an employer." Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and Why It Ought to Stop Trying*, 22 Berk. J. Emp. & Lab. Law 295, 352 (2001).

Similarly, Independent Distributors are free to set their own schedules, subject only to the requirements of their purchasing customers, i.e., retailers (and not the bakers themselves) and the availability of product for pick-up. They are free to choose whether and when to work, whether and when to take rest or meal breaks, and when to take vacation or other time off (subject only to their own clients' needs). *See, e.g., Kirsch v. Fleet Street, Ltd.,* 148 F.3d 149, 171 (2d Cir. 1998) (that worker was "free to set his own schedule and take vacation when he wished" strongly supported finding of independent contractor status).

Finally, consistent with their ability to gain profit or suffer a loss, discussed further below, Independent Distributors determine whether and which products to purchase, whether and when to participate in product promotions authorized by retailers to whom they sell, and how to best to develop business with other retailers. These are the "key aspects of the performance of the work" contemplated under the NPRM's analysis of the control factor. NPRM at 60612. In short, there can be no serious dispute that under the baking industry's distribution model (common across many sectors, in the food industry and otherwise), Independent Distributors exercise substantial control over their work, and would be concluded to be independent contractors rather than employees under the first core factor.

B. Likewise, Independent Distributors Are Independent Contractors Under the "Profit and Loss" Factor.

With respect to profit and loss, the analysis (and outcome) is similar. Independent Distributors make significant capital investment in their businesses, which courts have recognized "are highly relevant to determining whether an individual is an independent contractor or an employee." *See, e.g., Saleem*, 854 F.3d at 144 (quoting *Dole v. Snell*, 875 F.2d 802, 810 (8th Cir. 1989)). This investment often includes a substantial initial investment in obtaining distribution rights, themselves a valuable commodity: the value of these distribution rights has led to the development of a vibrant marketplace wherein Independent Distributors can make significant sums of money buying, trading, and selling distribution rights.[1]

Even where an Independent Distributor's investment does not include that upfront capital (such as where distribution rights are obtained in consideration of the distributor's agreement to market and sell the manufacturer's products), an Independent Distributor must invest in sales vehicles, computer and billing systems, and, where relevant, the inventory they purchase from manufacturers and re-sell to their own customers within their territories. They incur and manage vehicle, liability and other insurance expenses, accounting fees, costs for necessary equipment, and of course the amounts paid to personnel who may work for or assist them.

[1] *See, e.g.,* http://routesforsale.net/route-listings.html (last accessed October 21, 2020); http://therouteguy.net (same); https://therouteexchange.com/routes-for-sale/ (same).

With that substantial investment comes the opportunity to keep the profit (or suffer a loss) from every sale. The ability of an Independent Distributor to obtain profit depends directly on their sales strategy, initiative, business plan, as well as their relationship with their customers, strategic use of employees, agents, and equipment. Likewise it turns on their ability to grow their customer base, and negotiate with new and existing clients. All of these factors are wholly dependent on the Independent Distributor's business acumen, their initiative, and their judgment, all of which go directly to their ability to earn substantial profit (or conversely, suffer a loss), a key indicator of independent contractor status. Within the industry's model, the "profit or loss" factor will almost always point to the classification of Independent Distributors as independent contractors. Having established that both "core" factors weigh in this same direction, this will generally end the analysis, with the final outcome being an independent contractor status classification.

IV. The Proposed Rule is Consistent with the Analysis of Courts Which Have Determined That Independent Distributors Under the Industry Standard Model Are Independent Contractors.

Finally, ABA supports the proposed rule insofar as it is consistent with the analysis of courts which have determined that the industry model's Independent Distributors are properly considered independent contractors. In that light, we would take this opportunity to bring to the attention of the Department a recent summary order of the U.S. Court of Appeals for the Second Circuit, which affirmed the ruling of the U.S. District Court for the Southern District of New York holding that independent owner-operators who sell and distribute baked goods under the model described above were, undoubtedly, properly classified as independent contractors under the FLSA. A copy of the Second Circuit's order in *Franze v. Bimbo Bakeries et al.*, No. 1902275-cv, 2020 WL CITE (2d Cir. Sept. 15, 2020) (summary order, slip opinion) is attached as Exhibit A.

In its order, the Second Circuit applied the five-factor test articulated under *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988), which includes analysis of both the "core factors" and "guidepost factors" set forth in the proposed rules. It engaged in the multi-factor analysis so as to "shed light on the underlying economic reality of the relationship." Slip. Op. at 3 (citing *Saleem*, 854 F.3d at 131).

With respect to the control factor, the Second Circuit concluded that the subject Independent Distributors' "control over their distribution territories, ability to hire

others, schedule flexibility, and lack of day-to-day oversight" lead to the conclusion that as a matter of "economic reality," a manufacturer of baked goods "did not exercise significant control" over its distributors' businesses. Slip Op. at 6.

Similarly, with respect to the "profit or loss" factor, the Second Circuit readily concluded that this factor pointed to independent contractor status:

> Here, there is no question that [Independent Distributors] made significant investments in, and had ample opportunity to profit from or lose money on their businesses. To purchase their delivery routes, [the Independent Distributor appellants] paid $148,000 and $98,034, respectively, without any financial assistance from Bimbo. Investment costs of this sort "constitute a substantial financial outlay that weighs in favor of independent contractor status. ***Appellants bore significant risk when they made these up-front investments, and they had ample opportunity for profit or loss when they ultimately sold those distribution rights.... Taken together, Appellants' substantial investments in their businesses, coupled with their ability to solicit new (albeit smaller) customers and modify their territories to increase profits, weigh in favor of finding that they were independent contractors.***
>
> Slip Op. at 6-7 (emphasis added; citation omitted).

The Second Circuit's analysis is consistent with that of the proposed rule.[2] Indeed, it makes a persuasive argument for the simplicity and clarity of the proposed rule's "core factor" analysis, insofar as it evidences how the current multifactor balancing test is cumbersome, and often repetitive or duplicative (for example, evidence of the distributors' opportunity for "profit or loss" likewise supported elements of the "skill required" factor insofar as "business management skills" were essential to the ability to make a profit or suffer a loss). Put more simply, the case evidences that under the proposed rule, courts will likely come to conclusions similar to the multi-factor balancing test, but in a more direct and straightforward fashion, relying on the evidence most probative of the question.

* * *

[2] The Court of Appeals likewise determined that the "degree of skill factor" and "permanence of relationship" factors also pointed to independent contractor status. In the absence of a record evidence cited by the district court, the appeals court concluded that even assuming arguendo that the "integral" factor weighed in favor of employee classification, it did not materially change the equation and the Independent Distributors were properly classified as independent contractors.

ABA appreciates the opportunity to provide these comments, and again commends the Department for its balanced and thoughtful approach to these complicated issues.

Respectfully Submitted,

Lee Sanders
SVP, Government Relations & Public Affairs / Corporate Secretary

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of September, two thousand twenty.

PRESENT: ROBERT D. SACK,
RICHARD C. WESLEY,
RICHARD J. SULLIVAN,
Circuit Judges.

Nicholas Franze, on behalf of themselves, and of all similarly situated individuals;
George Schrufer, Jr., on behalf of themselves, and of all similarly situated individuals,

Plaintiffs-Counter-Defendants-Appellants,

v. No. 19-2275-cv

Bimbo Bakeries USA, Inc.;
Bimbo Foods Bakeries Distribution, LLC,
FKA Bimbo Foods Bakeries Distribution, Inc.,
FKA George Weston Bakeries Distribution, Inc.,

Defendants-Counter-Claimants-Appellees.[*]

FOR PLAINTIFFS-COUNTER-DEFENDANTS-APPELLANTS:	RANDY J. PERLMUTTER, Kantrowitz, Goldhamer & Graifman P.C., Chestnut Ridge, NY (Orin Kurtz, Gardy & Notis, LLP, New York, NY, Sam B. Smith, Kantrowitz, Goldhamer & Graifman P.C., Chestnut Ridge, NY, *on the brief*).
FOR DEFENDANTS-COUNTER-CLAIMANTS-APPELLEES:	DAVID B. SALMONS, Morgan, Lewis & Bockius, Washington, DC (Michael J. Puma, Morgan, Lewis & Bockius, Philadelphia, PA, *on the brief*).

Appeal from a judgment of the United States District Court for the Southern District of New York (Nelson S. Román, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiffs-Counter-Defendants-Appellants Nicholas Franze and George Schrufer, Jr., on behalf of a class of similarly situated individuals ("Appellants"),

[*] The Clerk of Court is directed to amend the caption as set forth above.

appeal from a July 10, 2019 opinion and order of the United States District Court for the Southern District of New York (Román, *J.*) granting summary judgment in favor of Defendants-Counter-Claimants-Appellees Bimbo Bakeries USA, Inc. ("BBUSA") and Bimbo Foods Bakeries Distribution, LLC ("BFBD") (collectively, "Bimbo") on Appellants' Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") claims. In essence, Appellants – who were (and may still be) delivery drivers of baked goods for Bimbo – contend that the district court erred in concluding that they were independent contractors and not Bimbo employees. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I. Appellants' FLSA Claims Against BFBD

The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). "In light of the definition's circularity, courts have endeavored to distinguish between employees and independent contractors based on factors crafted to shed light on the underlying economic reality of the relationship." *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 139 (2d Cir. 2017). Accordingly, in *Brock v. Superior Care, Inc.*, we enumerated five factors that bear on whether workers are employees or independent contractors: "(1) the degree of

control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business." 840 F.2d 1054, 1058–59 (2d Cir. 1988). The "ultimate concern" behind these factors "is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves." *Id.* at 1059.

In analyzing the first *Superior Care* factor, the district court concluded that Bimbo "did not control [Appellants] directly and closely enough to render their relationship an employer-employee relationship." 2019 WL 2866168, at *8. We agree, and several key facts support the district court's conclusion. First, Appellants controlled the overall scope of their delivery operations. They could purchase additional territories, sell their territories to other Independent Operators ("IOs"), or even enter into arrangements whereby one IO keeps the proceeds from selling to a customer in an area, but another IO retains the distribution rights to that area. Schrufer took advantage of all of these options, modifying his territory and sales proceeds several times while he was an IO.

Second, Appellants were not required to deliver Bimbo products personally, and they could hire employees to substitute for them as needed. Both Franze and Schrufer hired assistants without any oversight from Bimbo, and in some cases, IOs hired others to run their businesses entirely. As we explained in *Saleem*, the ability to hire others to run the business is evidence of the type of "considerable independence and discretion" that supports a finding of independent contractor status. 854 F.3d at 143. Third, BFBD imposed no minimum-hour requirements on Appellants, who were free to set their weekly schedules, subject only to designated pickup and delivery times based on BFBD's warehouse hours and customer requirements. In *Saleem*, we also singled out schedule flexibility as a factor weighing in favor of independent contractor status because setting one's own hours demonstrates a lack of control by the putative employer and initiative on behalf of the worker. *See id.* at 146–48.

In response to these facts indicating Bimbo's lack of control, Appellants argue that the non-compete provision in their distribution agreements prevented them from driving routes and carrying products for competing companies. In *Saleem*, we specifically pointed to the fact that the black-car drivers in that case drove for other car services as a fact indicating the defendants' minimal control

over the plaintiffs. *See* 854 F.3d at 141. If there were fewer facts demonstrating Bimbo's lack of influence over Appellants' businesses, the non-compete clause – combined with the fact that Appellants solely carried Bimbo's products – might be of more consequence. But Appellants' control over their distribution territories, ability to hire others, schedule flexibility, and lack of day-to-day oversight ultimately lead us to conclude that the economic reality was that Bimbo did not exercise significant control over Appellants' businesses.

In assessing the second *Superior Care* factor – which focuses on "the workers' opportunity for profit or loss and their investment in the business," *Superior Care*, 840 F.2d at 1058 – we consider whether workers have "control over essential determinants of profits in the business," *Saleem*, 854 F.3d at 145 (internal quotation marks and brackets omitted). Moreover, a worker's "large capital expenditures – as opposed to negligible items, or labor itself – are highly relevant to determining whether an individual is an employee or an independent contractor." *Id.* at 144 (internal quotation marks omitted).

Here, there is no question that Appellants made significant investments in, and had ample opportunity to profit from or lose money on, their businesses. To purchase their delivery routes, Franze and Schrufer paid $148,000 and $98,034,

respectively, without any financial assistance from Bimbo. Investment costs of this sort "constitute a substantial financial outlay" that weighs in favor of independent contractor status. *Id.* at 144–45. Appellants bore significant risk when they made these up-front investments, and they had ample opportunity for profit or loss when they ultimately sold those distribution rights.

Appellants respond that they lacked control over their opportunities for profit or loss because of Bimbo's direct sales efforts to chain stores and institutional customers. But as the district court observed, even if Bimbo "had the bargaining power with larger customers," Appellants "could have grown their sales with smaller customers," with whom they could exercise greater freedom in negotiating prices. 2019 WL 2866168, at *7. And even with relatively fixed prices for larger clients, the overall value of Appellants' businesses primarily depended "on their own business judgment and foresight" in modifying their territories and managing day-to-day costs, "which suggests that they bore the risks of their decisions." *Id.* at *8. Taken together, Appellants' substantial investments in their businesses, coupled with their ability to solicit new (albeit smaller) customers and modify their territories to increase profits, weigh in favor of finding that they were independent contractors.

For many of the same reasons discussed in relation to Appellants' opportunities for profit or loss, the third *Superior Care* factor – "the degree of skill and independent initiative required to perform the work" – favors independent contractor status because Appellants' distribution businesses required substantial independent initiative and business management skills not provided by Bimbo. Appellants are correct that courts in this Circuit have generally found that the ability to drive vehicles and make deliveries is not the sort of "specialized skill" that favors a finding of independent contractor status. *See Saleem v. Corp. Transp. Grp., Ltd.*, 52 F. Supp. 3d 526, 541–42 (S.D.N.Y. 2014) (collecting cases). But as Appellants testified, operating their businesses required more than the ability to drive; their success depended on their ability to increase sales, build customer relationships, effectively identify the popularity of different products, hire and train employees, and manage profits and losses. So by modifying the scope of their businesses and "by deciding how best to obtain business from . . . clients, [Appellants'] profits increased through their initiative, judgment, or foresight – all attributes of the typical independent contractor." *Saleem*, 854 F.3d at 144 (internal quotation marks and alterations omitted).

The fourth *Superior Care* factor, "the permanence or duration of the working

relationship," also favors a finding that Appellants are independent contractors. Although Appellants point to the length of their relationships with Bimbo, like the black-car drivers in *Saleem*, this was "entirely of [Appellants'] choosing." *Saleem*, 854 F.3d at 147. As in *Saleem*, the economic reality of Appellants' freedom to buy and sell their distribution rights therefore weighs in favor of finding that they were independent contractors.

The final *Superior Care* factor addresses "the extent to which the [putative employees'] work is an integral part of the employer's business. *Superior Care*, 840 F.2d at 1059. Without citing to any evidence in the record, the district court found that Appellants were not integral to Bimbo's business because "Bimbo's primary business model was based on bakery product *manufacturing* and sales to end-market consumers." 2019 WL 2866168, at *10. But even if that were Bimbo's business model, we do not see how a model involving "sales to end-market consumers" could function without distributors that carry a company's product to those consumers. In addition, the district court made no attempt to distinguish between BFBD and BBUSA in making this determination.

Nevertheless, even assuming that Appellants were integral to BFBD's business, this conclusion does not affect the overall balance of the *Superior Care*

factors. BFBD's lack of control over Appellants, Appellants' substantial opportunity for profit and loss in their businesses, and the entrepreneurial skills required to keep those businesses afloat all support the district court's conclusion that Appellants were not BFBD's employees under the FLSA.

II. Appellants' NYLL Claims Against BFBD

After granting summary judgment in favor of Bimbo on Appellants' FLSA claims, the district court also granted summary judgment on Appellants' state-law NYLL claims. The record is silent regarding whether diversity jurisdiction would support Appellants' NYLL claims. But even if supplemental jurisdiction is the only basis for supporting Appellants' NYLL claims, the district court did not abuse its discretion in refusing to dismiss those claims after deciding Appellants' federal claims on the merits. *See Kroshnyi v. U.S. Pack Courier Servs., Inc.*, 771 F.3d 93, 102 (2d Cir. 2014) (holding that the district court did not abuse its discretion in exercising supplemental jurisdiction over state labor law claims after dismissing FLSA claims, where "discovery had been completed, dispositive motions had been submitted, and the case would soon be ready for trial").

In determining whether a worker is an employee or an independent contractor under the NYLL, courts consider the factors outlined in *Bynog v. Cipriani*

Grp., Inc., namely: "whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule." 1 N.Y.3d 193, 198 (2003). Although these factors are similar to those considered under the FLSA inquiry, the focus of the *Bynog* test is slightly different: "the critical inquiry in determining whether an employment relationship exists [under the NYLL] pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results." *Id.*

We have already discussed all factors relevant to the NYLL inquiry except whether Appellants received fringe benefits or were on Bimbo's payroll. Appellants concede that Bimbo "did not provide [Appellants] with benefits or put them on their payroll," but they argue that these factors should not weigh against them because it is precisely Bimbo's failure to pay benefits or characterize them as employees that is being challenged. While this argument has some merit, Appellants *themselves* "claimed expenses and took deductions from their taxes for tens of thousands of dollars in business expenses for their distributorships." 2019 WL 2866168, at *3. Under New York law, "the manner in which the relationship is treated for income tax purposes is certainly a significant consideration,"

although "it is generally not singularly dispositive." *Gagen v. Kipany Prods., Ltd.*, 812 N.Y.S.2d 689, 691 (3d Dep't 2006). Thus, while Appellants can hardly be faulted for claiming tax benefits associated with independent contractor status, as that was how Bimbo labeled their relationship, the third and fourth *Bynog* factors do still weigh against them.

As IOs, Appellants set their own schedules (Factor 5) and worked at their own convenience (Factor 1). And although Appellants did not generally work for any companies other than Bimbo or carry other companies' products, the distribution agreements made clear that they were free to engage in other employment (Factor 2). Most importantly, Bimbo exercised a minimal "degree of control" over Appellants' day-to-day operations and the ultimate success of their distributorships. *Bynog*, 1 N.Y.3d at 198. All five *Bynog* factors therefore weigh in favor of concluding that Appellants were independent contractors, not BFBD's employees, under the NYLL.

III. Appellants' FLSA and NYLL Claims Against BBUSA

Although it is not entirely clear from its opinion, the district court also appears to have held that Appellants were not BBUSA's employees under the FLSA or NYLL. The district court refers to BFBD and BBUSA, collectively, as

"Bimbo" throughout its opinion, and it held that "the economic reality of the relationship between [Appellants] and Bimbo is that [Appellants] were independent contractors" under the FLSA. 2019 WL 2866168, at *11. The district court nevertheless went on to hold that, because BBUSA was not a "joint employer with BFBD[,] . . . all claims against BBUSA [were dismissed] as a matter of law." *Id.*

The district court's opinion appears to confuse two issues related to employer status. As we explained in *Zheng v. Liberty Apparel Co.*, we apply "two different tests to determine whether an employment relationship exists" under the FLSA. 355 F.3d 61, 66 (2d Cir. 2003). One test examines whether an entity is an employee's "joint employer," and it applies when it is undisputed that the worker is already employed by one entity, but there is a question over whether that worker is also employed by the putative employer. *See id.* at 67 & n.2. The other test – the *Superior Care* test – has "been used primarily to distinguish independent contractors from employees" because it "help[s] courts determine if particular workers are independent of *all* employers." *Id.* at 67–68. This case involves only that second question – whether Appellants were independent of both BFBD and BBUSA – so whether BBUSA is a "joint employer" is ultimately irrelevant.

Nevertheless, Appellants do not point to any facts that meaningfully distinguish their relationship with BBUSA from their relationship with BFBD. Thus, for the same reasons that BFBD was not Appellants' employer under either the FLSA or the NYLL, BBUSA was also not their employer.

* * *

We have considered the remainder of Appellants' arguments and find them to be without merit. Accordingly, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court