19-2275-cv

United States Court of Appeals

for the

Second Circuit

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. –

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,

BIMBO FOODS BAKERIES DISTRIBUTION, INC., FKA George Weston Bakeries Distribution, Inc.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* ON BEHALF OF AMERICAN BAKERS ASSOCIATION, INDEPENDENT BAKERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FRAP 29(A)(4)

The **American Bakers Association** is a non-profit corporation that offers no stock; there is no parent corporation that owns 10 percent or more of this entity's stock.

The **Independent Bakers Association** is a non-profit corporation that offers no stock; there is no parent corporation that owns 10 percent or more of this entity's stock.

The **Chamber of Commerce of the United States of America** is a non-profit corporation that offers no stock; there is no parent corporation that owns 10 percent or more of this entity's stock.

The **National Association of Manufacturers** is a non-profit corporation that offers no stock; there is no parent corporation that owns 10 percent or more of this entity's stock.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

The American Bakers Association ("ABA") is the Washington DC-based voice of the wholesale baking industry. Since 1897, the ABA has represented the interests of bakers before the U.S. Congress, federal agencies, and international regulatory authorities. ABA advocates on behalf of more than 1,000 baking facilities and baking company suppliers. ABA members produce bread, rolls, cookies, crackers, bagels, sweet goods, tortillas, and many other wholesome, nutritious, baked products for America's families. The baking industry generates more than $153 billion in economic activity annually, engaging the services of more than 799,500 highly-skilled individuals in manufacturing and selling its products.

The Independent Bakers Association ("IBA") is a Washington, DC-based national trade association of over 200 family-owned bakeries and allied industry trades. The association was founded in 1968 to protect the interests of independent manufacturers of baked goods. IBA supports market-oriented agricultural commodity programs and advocates for reducing the burden on manufacturers to foster growth and entrepreneurship.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct

[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases involving labor and employment matters.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact on any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The ABA, IBA, Chamber, and NAM (collectively, "*amici*") have a significant interest in this Court's interpretation of laws that implicate the distinction between employees and independent contractors. A significant number of *amici*'s members contract with independent contractors. Those members—and by extension, *amici*—

have an interest in developing a workforce in a manner that is both lawful and conducive to growth and prosperity for businesses and workers alike.

Amici have moved for leave of the Court to file this brief.

SUMMARY OF ARGUMENT

This case does not simply present a question of whether Appellants were "misclassified" as independent contractors. Rather, it is an attempt to undermine the independent contractor business model that is common across a diverse range of industries and that offers significant benefits to businesses and contractors alike. Such hostility toward independent contractor relationships is unjustified as a matter of law as well as policy.

As Appellees have demonstrated, and the District Court determined below, there can be but one conclusion in this case based upon the undisputed evidence: Appellants are independent contractors. Appellants are independent owner-operators who sell and distribute bakery products to retailers and other customers that they have grown and developed, using their own skill, judgment, and entrepreneurial spirit.

Appellants' distribution agreements with Bimbo Bakeries USA, Inc. ("BBUSA") and Bimbo Foods Bakeries Distribution, LLC ("BFBD") make clear that independent owner-operators are not employees for purposes of federal or state wage and hour law. The facts in the record overwhelmingly demonstrate that these

owner-operators are independent businesspeople and entrepreneurs, both under their contracts and in fact. Indeed, it is only after years of reaping the benefits of contractual arrangements that are intended to give owner-operators the ability to start, manage, grow, and control their own businesses that Appellants now claim that they were simply employees delivering baked goods under the thumb of large companies dictating all elements of their activities and businesses. This Court should reject this legal and factual misrepresentation and affirm the District Court's grant of summary judgement in Defendants' favor.

ARGUMENT

A. For Decades, the Baking Industry Has Used Independent Contractors to Distribute Goods

For over seven decades, companies in the baking industry, and other manufacturers of food products, have contracted with independent contractors to sell the manufacturers' products.[2]

[2] *See, e.g., FlowerFoods Partners: Independent Distributors Model* (available at https://www.flowersfoods.com/partners/independent-distributors, last accessed February 10, 2020); *Frequently Asked Questions About Pepperidge Farm Independent Distributorships* (available at https://www.pfroutes.com/, last accessed February 10, 2020); *SL Distribution Company, LLC Frequently Asked Questions* (available at https://www.snyderslanceibo.com/frequently-asked-questions/, last accessed February 10, 2020). *See generally also What Are Independent Delivery Routes?* (available at https://www.therouteexchange.com/independent-distribution-routes/, last accessed February 10, 2020).

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 in exchange for the operator's agreement to purchase the company's baked goods, and to market and sell them to retailers and other accounts that the owner-operator develops. The owner-operator 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.

Some distribution rights can be costly for an individual to purchase, and the Appellants in this case paid $148,000 (Franze) and $98,000 (Schrufer) for their territories. SPA11; SPA13. Regardless 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 owner-operator must manage. The independent owner-operator invests in a sales vehicle and computer and billing systems, and may invest in additional vehicles and computer systems for the personnel the owner-operator engages in order to increase sales in the territory. The owner-operator also invests large amounts (often several hundreds of thousands of dollars a year) in inventory purchased from the manufacturer.

Independent owner-operators 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 owner-operator 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 owner-operator's sales strategy, initiative, business plan, and engagement of support personnel, among other factors. An owner-operator'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 owner-operator's control and dependent upon their business savvy—dictate the ultimate success of his or her business.

As a reward for their entrepreneurship, independent owner-operators experience flexibility and independence, including control over the duration of the working relationship. Typically, the owner-operator has the option to terminate his or her relationship with the manufacturer, and the owner-operator may have the ability to sell the distribution rights (as Appellants did here, *see, e.g.*, SPA 12; A432-

34), 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.[3]

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, typified here, 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.

B. Independent Contracting Offers Substantial Benefits to Businesses and Contractors Alike

For businesses and individuals in a range of industries, independent contracting can offer distinct advantages over employment. When parties voluntarily structure their working relationships in this fashion because those advantages are mutually appealing, courts should hesitate to set aside their choice—and should be mindful of the benefits that will be lost if independent contracting arrangements are invalidated.

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[3] *See, e.g.*, http://routesforsale.net/route-listings.html (last accessed February 10, 2020); http://therouteguy.net (last accessed February 10, 2020); https://www.therouteexchange.com/routes-for-sale/ (last accessed February 10, 2020).

Many workers are drawn to independent contracting primarily because it offers flexibility and autonomy. An independent contractor, unlike an employee, enjoys "the ability to choose his or her own hours, clients and manner in which the work is completed." Steven Cohen and William B. Eimicke, *Independent Contracting Policy and Management Analysis*, Columbia School of International Affairs, at 16 (August 2013) (hereinafter *Independent Contracting*).[4] Because independent contractors can decide when, how, and with whom to do business, "the quantity and quality of work is better correlated with the amount of money they make." *Id.* Workers with time and energy to devote to their craft thus stand to benefit greatly from independent contracting. *See id.* ("[O]ften highly motivated contractors are more likely to earn more money than regular employees."). Independent contracting gives individuals "more control over their economic destiny." *Id.* These and other advantages generate greater worker happiness: self-employed individuals report greater satisfaction with their careers than other workers. *See id.* at 17; *see also* Matthias Benz & Bruno S. Frey, *Being Independent Raises Happiness at Work*, 11 Swedish Economic Policy Review 95, 98 (2004).[5]

[4] *Available at* http://www.columbia.edu/~sc32/documents/IC_Study_Published.pdf (last accessed February 10, 2020).
[5] *Available at* https://www.brunofrey.com/articles.php#2 (last accessed February 10, 2020).

It therefore makes sense that, for most workers, independent contracting is a choice rather than a necessity. *See Independent Contracting* at 11 (studies "debunk the popular misconception that workers are forced into independence due to job loss or lack of alternatives"). Indeed, it is telling that, during a time when the country is at "full employment," with ample opportunities for individuals to work as employees, many people still elect to go into business for themselves as independent contractors. *See* Christopher Thornberg *et al.*, *Understanding California's Dynamex Decisions*, Beacon Economics (2018), at 6 ("The argument that alternative work arrangements area a sub-optimal form of employment for workers is harder to make at a time when the national unemployment rate stands at multi-decade lows."). "[I]n a growing economy, workers should be much more able to find the types of employment they seek, subject to their qualifications." *Id.*

If Appellants' position prevails, the flexibility and independence that many independent contractors currently enjoy would almost invariably end, and the economy would suffer as a result. *See, e.g.*, Jeffrey Eisenach, *The Role of Independent Contractors in the U.S. Economy*, Navigant Economics, at ii (Dec. 2010) (concluding that "policy changes that curtail independent contracting . . .

would result in higher unemployment, slower economic growth and reduced economic welfare").[6]

Of course, independent contracting may not make sense for every business or every worker. But, in some circumstances, independent contracting offers advantages not available in employment relationships, and millions of Americans in many industries have ordered their working lives accordingly. In the instant case, a decision to reverse the District Court may threaten longstanding contractual relationships upon which parties have relied in good faith in structuring their business affairs for many years. Given these facts, *amici* respectfully submit that the Court should reject Appellants' attempt to undermine a business model commonly used in a range of industries for decades.

C. The Court Should Affirm the District Court's Conclusion that Independent Owner-Operators Are Not Employees

If businesses and workers are to secure the benefits of independent contracting, they must be able to predict with confidence that a court will respect that choice later on. Employees may be entitled to certain legal benefits unavailable to independent contractors (and they generally receive different tax treatment as well). As a result, when a court reclassifies independent contractors as employees

[6] *Available at* https://www.aei.org/articles/the-role-of-independent-contractors-in-the-us-economy/ (last accessed February 10, 2020).

long after the start of the working relationship, the cost to businesses can be enormous.

The District Court correctly applied the law in determining that Appellants are independent contractors. Appellants have not raised any question of disputed material fact sufficient to prove that they were employees, and have given this Court no legitimate basis to invalidate a well-established business model that has been successfully and consensually used for decades by manufacturers in the baking and other industries and the independent seller/distributors with whom they contract.

Appellants control their business expenses, hours worked, and customers served, and thus have both the opportunity for profit and the risk of loss in their business ventures. To suddenly transform Appellees' contractual relationships with these independent owner-operators into a traditional employment arrangement would disregard the choice that numerous individuals have made to be their own boss and work flexible hours without a putative employer telling them when and how to manage and operate their businesses. Put simply, to overturn the District Court's decision is to tell these entrepreneurs that their choice to be in charge of their own career, invest (and risk) their own capital, supply their own labor, and make a physical, financial, and emotional investment in the success of their business in pursuit of financial security will be taken away.

Under the Fair Labor Standards Act ("FLSA"), the Court considers the economic reality of the parties' relationship to determine whether an individual is an "employee" or independent contractor. *See Saleem v. Corporate Trans. Grp., Ltd.*, 854 F.3d 131, 140 (2d Cir. 2017). The relevant factors of this economic reality test include:

> (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.

Id. at 139 n.19 (quoting *United States v. Silk*, 331 U.S. 704, 716 (1947)). No one factor is determinative, and courts typically focus on the "totality of the circumstances" because the "'ultimate concern . . . [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 139 (quoting *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) (emphasis added)).[7]

[7] With regard to Appellants' state law claims, the relevant question "in determining whether an employment relationship exists [under the NYLL] pertains to the degree of control exercised by the purported employer," which includes an analysis of 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." *Bynog v. Cipriani Group*, 802 N.E.2d 1090, 1093 (2003). As the District Court here correctly concluded, given the congruity of the factors analyzed under the FLSA and NYLL in determining whether an individual

The District Court properly granted summary judgment to Appellees in this case because the material facts are undisputed, and the legal status of workers is a *legal* question. *See Meyer v. U.S. Tennis Ass'n*, 607 Fed. App'x 121, 1231 (2d Cir. 2015) (affirming summary judgment, concluding that "the District Court correctly determined that plaintiffs were independent contractors, not employees, for purposes of the FLSA and the NYLL, substantially for the reasons stated in its through and well-reasoned . . . opinion"); *Schwind v. EW & Assocs., Inc.*, 357 F. Supp. 2d 691, 701 (S.D.N.Y. 2005) ("Finally, '[t]he existence and degree of each factor is a question of fact while the legal conclusion to be drawn from those facts—whether workers are employees or independent contractors—is a question of law.'" (quoting *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988)).

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is an employee under each statute, it is not necessary to conduct a separate analysis under state law. *See, e.g., Saleem*, 52 F. Supp. 3d at 536 (S.D.N.Y. 2014), *aff'd*, 854 F.3d 131 (2d Cir. 2017) (analyzing FLSA and NYLL factors together); *Hart v. Rick's Cabaret Int'l., Inc.*, 967 F. Supp. 2d 901, 924 (S.D.N.Y. 2013) (recognizing that while New York Court of Appeals has not directly answered question of whether FLSA and NYLL analyses are identical, "[T]here appears to never have been a case in which a worker was held to be an employee for purposes of the FLSA but not the NYLL (or vice versa)."). Appellants have offered no legal authority to the contrary. Even assuming *arguendo* that the minor differences in the wording or emphases of the two tests counsel a separate analysis, Appellees have persuasively demonstrated that the outcome under the NYLL analysis is identical to that under the FLSA. *See* Appellees' Brief 55-59.

1. Owner-Operators Exercise Substantial Control Over Their Sales and Distribution Business

To begin, an individual starting his or her business as an owner-operator does so voluntarily and seeks out the opportunity to acquire rights for any given territory. When doing so, the prospective operator is clear-eyed about the fact that obtaining a distributorship is not standard employment, but rather, the opportunity to be his or her own boss. Thus, "[f]rom the start," any individual electing to become a distributor is making "significant decisions regarding the operation of their small business," starting with the decision to enter into a distribution agreement. *Saleem*, 854 F.3d at 140. The undisputed facts in the record demonstrate that this was true of Appellants.

In their owner-operator agreements, Appellants affirmatively and consensually acknowledged that they were not employees. On their face, the agreements they signed explicitly state that Appellants are independent contractors. *See* A95 § 2.4; A536-37 § 2.4; A563 § 2.3. Appellants used their status as independent contractors to avail themselves of the tax advantages of this classification, holding themselves out as business owners to claim thousands of dollars in expenses and deductions in their tax filings. SPA12-13; *see also* A335.

Under independent owner-operator agreements commonly used in the industry, IOs run their business as they see fit. Consistent with that model, in the

instant case, each Appellant was granted "the right to operate [his] business as [he] chooses." A95 § 2.4; A536-37 § 2.4; A563 § 2.3.

Of course, the relevant inquiry goes beyond the terms of the agreement, and the record in the instant case shows that as a factual matter Appellants operated independently of Appellees. The record is replete with evidence demonstrating that Appellants exercised full control of the day to day activities of their businesses. *See, e.g.*, *Browning v. Ceva Freight, LLC*, 885 F. Supp. 2d 590, 600 (E.D.N.Y. 2012) (analyzing various ways in which contractors exerted day-to-day control over their own businesses and operations).

Appellants controlled the size and scope of their businesses, with a right to acquire additional available distribution rights in other territories and sell their rights under their contracts. A224-26; *see also* SPA23. Appellants were allowed to hire (and fire) their own personnel to fulfill their obligations under their contracts. The subject agreements state specifically that independent owner-operators were not required to "personally perform any of the services called for by this Agreement" and that each owner-operator was "free to retain such persons as [] deem[ed] appropriate to assist in discharging [] responsibilities hereunder." A99-100 § 4.2; A540-41 § 4.2; A567 § 4.3; *see also* A286-88. Appellees had no role in Appellants' decisions regarding whether or when to hire their own personnel, nor did Appellees play any role in the management of Appellants' hires. A288; A365-66; A456-57;

see also A95-86 § 2.4; A99 §4.2; A536-37 § 2.4; A540-41 § 4.2; A567 § 4.3. Courts have recognized that these are hallmarks of independent contractor status. *See Silk*, 331 U.S. at 719 (independent contractor "driver-owners . . . hire their own helpers"); *Saleem*, 854 F.3d at 143 ("some Plaintiffs . . . permitted other individuals to drive for them" indicating independent contractor status). As aptly noted by one commentator, "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 How It Ought to Stop Trying*, 22 Berk. J. Emp. & Lab. Law 295, 352 (2001).

Appellants were free to set their schedules, consistent only with the requirements of their purchasing customers. A468-71; A308-09. Even in those limited instances (*e.g.*, chain stores) where Appellees passed along to Appellants certain retailer scheduling requirements, there is no dispute that these requirements were set by the stores themselves (and often communicated by these stores to the owner-operators). A222-24; A388-90; A451-52. This is common across many distribution sectors, in the food industry and otherwise. That owner-operators were able to set their own work schedule, subject only to customer requirements, strongly supports the conclusion that they were independent contractors. *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 vacations when he wished" strongly supports finding of independent contractor status).

Finally, consistent with their ability to gain profit or suffer a loss, Appellants determined whether and which products to purchase, and then sold and distributed those products to their customers. A281-82; A288; A443-44; *see also* A191-92; A311-12; SPA24. Appellants alone were responsible for loss or damage to the products they purchased. A282; A371-72. In instances where the retailer (the owner-operator's customer) may have made decisions to authorize product promotions, the decision of whether and to what extent to participate in these promotions rested with the owner-operator, as did the concomitant opportunity for profit or loss. *See, e.g.*, A98 § 3.6; A539 § 3.6; A565 § 3.6; *see also* SPA23.

Ultimately, Appellants argue that because BFBD employed some number of individuals as employees to sell some of their products, they too should be considered employees. This argument only underscores the extent to which independent owner-operators enjoyed far greater control over their work and business than any BFBD employee. In contrast to delivery employees, whose schedules were set by Appellants, owner-operators set their own schedules, including when and whether to work, when and whether to take meal or rest breaks, and when to take vacation or other time off (subject only to their own clients' demands). *See* SPA22; *see also* A272-73; A469-73. In stark contrast to owner-

operators, employee drivers do not own the products they sell, would be terminated if they kept the profits from those sales, make no business investment, and have no risk of loss. Similarly, Appellants had unlimited discretion to delegate their work to others whom they hired; no employee enjoys such freedom. These facts, which are consistent with common practices in the industry, weigh heavily in support of the District Court's correct conclusion that Appellants were independent contractors.[8]

These are but a few examples demonstrating that Appellants had immeasurably greater control over their businesses, their work schedule, their day-to-day operations, and the management of their workforce than an employee could have. They underscore why the District Court's decision should be affirmed.

2. Independent Owner-Operators' Opportunity for Profit or Loss Goes to the Heart of Independent Contractor Status

When the relevant inquiry in the economic realities test is whether the worker is in business for himself or herself, it is no surprise that significant capital expenditures "are highly relevant to determining whether an individual is an employee or an independent contractor." *Saleem*, 854 F.3d at 144 (quoting *Dole v.*

[8] *See Sellers v. Royal Bank of Canada*, 2014 WL 104682, at *3 (S.D.N.Y. Jan. 8, 2014) (independent contractor status where plaintiff "took vacation and personal days at his own convenience" and was "not required to arrive or depart the office at any particular time"), *aff'd* 592 F. App'x 45 (2d Cir. 2015) (affirming summary judgment "for substantially the [same] reasons"); *Velu v. Velocity Express, Inc.*, 666 F. Supp. 2d 300, 303 (E.D.N.Y. 2009) (noting putative employer's communication that "certain clients have time requirements for their deliveries" did not detract from independent contractor status).

Snell, 875 F.2d 802, 810 (10th Cir. 1989)). In this regard, courts have found that purchasing vehicles, tools, supplies, insurance, maintenance, and repair are "substantial investments in" one's business. *Browning*, 885 F. Supp. 2d at 608; *Saleem*, 854 F.3d at 145-46; *see also Velu*, 666 F. Supp. 2d at 307 (E.D.N.Y. 2009) (plaintiff was an independent contractor when, *inter alia*, he owned, insured, maintained, and serviced his own vehicle without contribution from putative employer).

Moreover, although Appellants argue that a high percentage of their sales volume was with chain accounts with which Appellees had relationships, independent owner-operators can decide and determine to what extent they aim to develop business with smaller, non-chain accounts, which itself constitutes an important strategic decision for a business owner. For example, single-serve products sold to smaller accounts typically have higher profit margins, and the owner-operator may have more flexibility in pricing the products sold to those accounts. The owner-operator's decisions on all these points—customers to whom to sell, products to sell, and the pricing of these products—directly impact the independent owner-operator's profits and how the operator focuses his or her own sales efforts, requests shelf space and displays, and seeks to optimize promotions.

These factors support finding that Appellants are independent contractors. Appellants decide whether and how to invest capital into their businesses, and

purchased their own sales vehicles and insurance. As the U.S. District Court for the Southern District of New York noted in examining the "profit or loss" factor with respect to a ride service, where a worker has control over his or her income based on how much he or she works, as well as decisions that directly go to profitability (such as investing in equipment or hiring others to work for them), the factor weighs in favor of independent contractor status:

> There is no question that drivers had an opportunity for profit and loss in their businesses. As in *Browning*, the franchise agreements "did not guarantee a certain amount of work to the Plaintiffs." 885 F.Supp.2d at 608. Instead, drivers principally "controlled . . . how much overall money [they] earned as a result of the number of [jobs they] took." *Delux Transp.*, 3 F. Supp.3d at 12. *In addition, drivers made numerous decisions that would affect their overall profitability, such as whether to rent or buy a franchise, whether to hire other drivers, whether to work for other car service companies, and whether to solicit private clients. Drivers also made substantial investments in their businesses*. Not only did most drivers either buy or rent franchises, which they could in turn sell or lease, but they also spent money buying or renting their cars, maintaining their cars, buying gasoline, paying the costs associated with their TLC licenses, and procuring insurance. Such investments totaled thousands or tens of thousands of dollars per year, as documented in Plaintiffs' tax returns.

Saleem, 52 F. Supp. 3d at 539-40 (concluding on above facts that profit and loss factor weighed in favor of independent contractor finding) (emphasis added).

3. The Skill and Independent Initiative Necessary to Be a Successful Independent Owner-Operator Weighs in Favor of Independent Contractor Status

Where personal profits depend on the individual's initiative, judgment, and foresight, this factor also favors independent contractor status. *Saleem*, 854 F.3d at

143-44. Owner-operators exercise this skill and initiative when they choose which customers to pursue, and whether to work more or less and/or for other companies. *Id.* Owner-operators also demonstrate initiative and judgment in making important decisions regarding the purchase or lease of sales vehicles, computers systems, tools, and equipment, as well as in choosing how much wholesale inventory to purchase based on potential for sales with existing and future customers. *See, e.g.*, *Chao v. Mid-Atlantic Installation Services, Inc.*, 16 F. App'x 104, 107 (4th Cir. 2001) ("[Plaintiff's] net profit or loss depends on his skill in meeting technical specifications . . . ; on the business acumen with which [plaintiff] makes his required capital investments . . . ; and on [plaintiff's] decision whether to hire his own employees or to work alone.").

All of these factors are present here. Appellants used their business acumen in dealing directly with their customers and accounts, and in determining which products and quantities to order and sell to them based on their reasoned business judgment and external market factors. *See* SPA27; A428-29; A442-43. As independent business owners, Appellants were responsible for developing, growing, and maintaining strong commercial relationships with their customers to maximize profit and exposure. SPA27; A385-86. Indeed, both Appellants testified to using their experience and business sense in structuring their orders to maximize price and to merchandize the products they sold to their customers. *See* A312, A386-87.

4. Independent Owner-Operators Control the Permanency and Duration of Their Relationship with Manufacturers

As the District Court correctly concluded, Appellants controlled the permanency and duration of their relationships with Appellees, which is indicative of independent contractor status. Appellants had the ability to sell their distribution rights, whereas Appellees were limited in their ability to terminate owner-operator agreements.

In concluding that a delivery driver for a delivery company was an independent contractor and not an employee, the court in *Velu* observed that "[I]f either party were to terminate the Agreement today, Plaintiff could go out the next day with the same van, clothes, equipment, computer, printer, and other supplies, and immediately work for another [employer]." 666 F. Supp. 2d at 307. Such was exactly the case here. Under the owner-operator agreement governing their relationship, the independent owner-operator owns distribution rights and may sell them at any time, thus ending his or her relationship with Appellees. A102 § 6.1; A543 § 6.1; A569-70 § 6.1. *See Saleem*, 854 F.3d at 147 (both the length of appellants' affiliation with defendants and regularity of work "was entirely of Appellants' choosing" thus favoring independent contractor status). In that event, the owner-operator would be free the next day to use his or her sales vehicle, equipment, and supplies, as well as their existing personnel and relationships with

customers (and their customers' store personnel) to begin selling the products of any other manufacturer (even a competitor).

Even during the course of the contractual relationship, an owner-operator is free to use his or her truck, equipment, and personnel to sell the products of another (or several other) manufacturers (subject only to the requirement that the goods sold are not directly competitive with those of Appellees), a fact highly probative of an independent contractor relationship. *See, e.g., Herman v. Express Sixty-Minutes Delivery Serv., Inc.,* 161 F.3d 299, 305 (5th Cir. 1998) (observing fact that "[drivers] are able to work for other . . . delivery companies" was indicative of independent contractor status).

5. Appellants' Sale of Products Manufactured by BBUSA Was Not an "Integral Part" of the Company's Business

Within the baking industry, manufacturing is key; the product is the *sine qua non* of existence. In this case, BBUSA is in the business of baking a wide range of food and snack products. BFBD is in the business of establishing wholesale and franchise relationships with independent seller-distributors. As the District Court properly concluded, Appellants were not an "integral" part of Appellees' business: Appellants are independent sellers and distributors which do not manufacture products and have no involvement in Appellees' manufacturing operations.

Appellants' argument that they are integral to BFBD's business because they distributed the product that they themselves purchased from BFBD is unavailing.

Taken to its logical extreme, Appellants' argument would turn any contractor who distributes goods of any company that produces them into an employee of that manufacturer. Under their conception of "integrality," a free-standing independent courier business that exists solely to deliver products for numerous manufacturers and other clients on an as-needed spot-basis, invoicing per the job, would be an "employee" of every company which engaged it for so much as a single job, on the theory that the courier was "integral" to any company whose product it delivered. Conversely, a small, free-standing mail-order or internet-based business that relies upon a variety of couriers to deliver its products would be deemed to be the employer not only of a single courier working as his own small business, but also, conceivably, the employer of every UPS, FedEx, and USPS parcel carrier who picked up a package and ensured that the company's product was delivered to its intended customer. Neither the law nor the facts of this case can support so absurd a conclusion, and this Court should reject Appellants' attempt to do so.

The District Court correctly concluded that this factor favored independent contractor status because Appellees are in the business of *manufacturing*, whereas the Appellants are engaged in distribution. The distinction between and separate market functions of manufacturing and distribution—evident in the structure and day-to-day operations of the parties—is critical to recognize in this setting, and should be affirmed.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the District Court's grant of summary judgment in favor of Appellees-Defendants.

Respectfully submitted,

Dated: February 10, 2020

/s/ Joshua B. Waxman.

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(*application for admission pending*)
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitation, typeface requirements, and type-style requirements.

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because the brief contains 5,621 words, excluding exempt portions.

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New Roman font in text and footnotes.

Dated: February 10, 2020 */s/ Joshua B. Waxman*
Joshua B. Waxman

CERTIFICATE OF SERVICE

I certify that on the 10th day of February 2020, the foregoing brief was filed using this Court's Appellate CM/ECF system, which effected service on all parties.

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