IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RHEA LANA, INC. and RHEA LANA'S FRANCHISE SYSTEMS, INC., Plaintiffs, v. U.S. DEPARTMENT OF LABOR, Defendant.	)	Case No.: 14-cv-00017 Hon. Christopher R. Cooper **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT PURSUANT TO RULES 12(b)(1) AND 12(b)(6)

INTRODUCTION

This is a case where an agency inappropriately seeks to evade Article III review. Defendant U.S. Department of Labor ("DOL") claims that its determination Plaintiffs Rhea Lana, Inc.'s ("Rhea Lana's") and Rhea Lana's Franchise Systems, Inc.'s ("Rhea Lana's Franchise Systems") consignor-volunteers are Fair Labor Standards Act ("FLSA") "employees," and its threat to levy civil money penalties ("Determination Letter," Compl., Ex. 3, ECF No. 1) are not 5 U.S.C. § 704 "final agency action." Def.'s Mot. Dismiss ("Mot.") 7, ECF No. 11 at 16. Yet, DOL's Determination Letter was "final enough" for the agency to write Plaintiffs' consignor-volunteers and tell them to sue for FLSA back wages. *See* "Consignor Letters" Compl., Ex. 2.[1]

[1] DOL's effort to trigger collateral private FLSA litigation against Plaintiffs failed completely. Not *one* of Rhea Lana's consignor-volunteers has sued.

DOL aims to immunize its adjudicatory enforcement from judicial review. Thus, it tries to minimize the legal effect of its actions, claiming that "[n]o harm befalls" Plaintiffs even as it declared Rhea Lana's consignor-volunteers FLSA employees, raised up the regulatory "hammer" of massive civil fines, and worked to unleash an avalanche of private FSLA suits. Mot. 14. But the Administrative Procedure Act ("APA") does not allow DOL to engage in such activity and to then avoid judicial review. *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

Plaintiffs have suffered sufficient reputational and economic harm to establish constitutional standing and the Determination Letter is an APA final agency action. First, DOL investigated Plaintiffs and then declared them in violation of federal law. This declaration was not only communicated to Plaintiffs, but also to Rhea Lana's *consignor-volunteers and customers*. Second, Rhea Lana's will almost certainly lose a substantial portion of their customer base if consignors cannot volunteer. Consignors wishing to volunteer will instead attend competitors' consignment events. Third, Rhea Lana's Franchise Systems can satisfy Article III standing because prospective franchisees already have delayed or declined to purchase a franchise due to DOL's regulatory action.

Plaintiffs are operating in regulatory purgatory. Though DOL has not taken enforcement action of the type described in its motion to dismiss (Mot. 13-15), it has completed an investigation, publicly declared Plaintiffs to be in violation of the law, raised the hammer of crippling fines and encouraged private litigation against them. Each consignment event puts Plaintiffs at risk.

To evade judicial review, DOL now says "never mind" and disingenuously claims that it hasn't *actually* determined Plaintiffs' actions are illegal. *See* Mot. 12-13. This Court should conclude that by classifying Rhea Lana's consignor-volunteers as employees, DOL engaged in

an adjudication—albeit one where it applied a standard that has no source in statute or regulation—that is a reviewable final agency action under 5 U.S.C. § 704. Alternatively, if the Court requires an opportunity to review the administrative record to determine whether an adjudication occurred, it should order its production.

For these reasons, DOL's motion to dismiss should be denied.

FACTS

Rhea Lana's operates six weeklong consignment sales in Arkansas. Compl. ¶¶ 12-13. For over a decade, Rhea Lana's sales have served families by offering high-quality, gently-used children's clothing and toys at affordable prices. *Id.* These sales, known as the "flagship events," allow families to consign their used children's items and receive a large percentage of the sales price. *Id.* ¶ 25. While Rhea Lana's events are open to the public, young stay-at-home mothers, working mothers, and retired grandmothers make up the bulk of Rhea Lana's shoppers, consignors, and volunteers. *Id.* ¶ 13.

Consistent with the consignment event industry, Rhea Lana's allows consignors to volunteer at events. *Id.* ¶ 18. A consignor's profit depends upon the success of the sale; the more successful the sale, the greater the chance that the consignor will receive the highest price for her items. *See id.* ¶ 25. Accordingly, consignors personally benefit by participating at events. *Id.* These "consignor-volunteers" perform basic tasks like greeting shoppers, setting up display racks, and sorting clothes. *Id.* ¶ 19. As a token of appreciation, Rhea Lana's gives early shopping passes to consignor-volunteers, allowing them to shop before the event opens to the general public. *Id.* ¶ 22.

Rhea Lana's Franchise Systems began offering franchises in 2012.[2] These franchises operate under the "Rhea Lana's®" trademark and in substantial conformity with Rhea Lana's flagship events. *Id.* ¶ 27. For example, like Rhea Lana's flagship events, franchisee events also offer consignors the same opportunity to volunteer and shop early. *Id.*

Despite receiving no complaints, DOL initiated an investigation of Plaintiffs' employment practices in January, 2013. *Id.* ¶ 28. After interviewing Plaintiffs' employees and consignor-volunteers, DOL sent letters to Rhea Lana's consignor-volunteers on or about August 6, 2013, "informing them of their private right under the FLSA to bring an independent suit [against Rhea Lana] to recover any back wages due."[3] *Id.*, Exs. 2 & 3.

DOL's Determination Letter was dated August 26, 2013. *Id.* ¶ 32, Ex. 3. The last sentence of the first paragraph states: "The investigation disclosed that your [consignor-volunteers are] employees…subject to the requirements of the FLSA." *Id.* DOL also said:

> *[T]he investigation disclosed violations of FLSA section 6* resulting from the failure to pay employees at least the applicable minimum wage for all hours worked and/or FLSA section 7 resulting from the failure to pay statutory overtime pay for hours worked in excess of 40 hours per week. . . . It is further my understanding that you refuse to comply with the employee group known as consignors/volunteers.

Id., Ex. 3 (emphasis added). Responding to an inquiry from Congressman Tim Griffin regarding DOL's rationale for classifying consignor-volunteers as employees, DOL said that "'volunteers' and 'consignor volunteers' engaged in activities that are an integral part of the Rhea Lana's FLSA-covered, for-profit business." *Id.*, Ex. 4.

---

[2] *See Rhea Lana's Franchise Systems, Inc.*, Ark. Secretary St., http://www.sos.arkansas.gov/corps/search_corps.php?DETAIL=379069&corp_type_id=&corp_name=rhea+lana%27s+franchise+systems&agent_search=&agent_city=&agent_state=&filing_number=&cmd= (last visited May 27, 2014).

[3] DOL's authority for issuing these letters is scant—it does not derive from any statute or regulation issued under informal notice and comment rulemaking procedures. *See* 5 U.S.C. § 553(b)-(c). Instead, DOL's apparent authority stems from DOL's Field Operations Handbook.

DOL then warned Plaintiffs:

> As you will note, section 16(e) provides for the assessment of a civil money penalty for any repeated or willful violations of section 6 or 7, in an amount not to exceed $1,100 for each such violation. . . . If at any time in the future your firm is found to have violated the monetary provisions of the FLSA, *it will be subject to such penalties.*

Id. (emphasis added).

STANDARD OF REVIEW

Plaintiffs bear the burden of establishing jurisdiction. *See U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cit. 2000). However, a court considering a Rule 12(b)(1) motion must "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting [the] plaintiff the benefit of all inferences that can be derived from the facts alleged.'" *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011). When evaluating a motion to dismiss under Rule 12(b)(1), the court "may consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000); *see also Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

A Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted must be denied so long as a plaintiff's claims are "plausible on their face," meaning that the facts pled must allow the court to draw the reasonable inference that defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 667-68 (2009). Determining whether a complaint states a plausible claim is "a context-specific task that requires the reviewing court to draw on its [judicial] experience and common sense." *Id.* at 679.

"The Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim." *Cotrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999). Thus, the Court must deny a motion to dismiss for failure to state a claim when the complaint contains "a short and plain statement of the claim showing that the pleader is entitled to relief." *Aktieselskabet v. Fame Jeans, Inc.*, 525 F.3d 8, 15, 17 (D.C. Cir. 2008) (quoting Fed. R. Civ. P. 8(a)(2) and rejecting *Bell Atl. v. Twombly*, 550 U.S. 544 (2007), as creating a heightened pleading standard).

ARGUMENT

I. PLAINTIFFS HAVE ARTICLE III STANDING BECAUSE EACH HAS SUFFERED REPUTATIONAL AND ECONOMIC INJURY IN FACT.

To establish standing, Plaintiffs "must present [1] an injury that is concrete, particularized, and actual or imminent [injury-in-fact]; [2] fairly traceable to the defendant's challenged behavior; and [3] likely to be redressed by a favorable ruling." *Davis v. FEC*, 554 U.S. 724, 733 (2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). DOL does not argue that Plaintiffs' injuries fail either the traceability or redressability prongs of the standing test. Instead, it argues only that Plaintiffs' injury-in-fact falls short. Mot. 7-8.

The purpose of the injury-in-fact requirement is to ensure that a plaintiff has a direct stake in the litigation. *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002). But this is not a high bar. The Supreme Court has found standing "by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 (1973). "The basic idea . . . is that an identifiable trifle is enough for standing to fight out a question in principle." *Id.* (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613 (1968)).

Plaintiffs have each properly alleged injury-in-fact. To begin with, DOL's determination that Rhea Lana's "employees are subject to [the FLSA]" forces Plaintiffs to operate at a substantial competitive disadvantage and damages their reputation with customers and prospective franchisees. Compl., Ex. 3. The D.C. Circuit has "repeatedly recognized that parties 'suffer constitutional injury in fact when agencies . . . allow increased competition' against them." *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1331 (D.C. Cir. 2002). Increased competition may injure a plaintiff in various ways, "including losing sales, being forced to lower prices, and 'expend[ing] more resources to achieve the same sales.'" *Sherley v. Sebelius*, 776 F. Supp. 2d 1, 12 (D.D.C. 2011) (alteration in original). A plaintiff is not required to wait until he is competitively harmed before bringing suit. *Id.* Instead, a plaintiff need only show "an actual or imminent increase in competition" to challenge the agency action that increases competition. *Id.*; *see also Clinton v. New York*, 524 U.S. 417, 432-433 (1998) (holding that the government action "inflicted a sufficient likelihood of economic injury" necessary to "establish standing under our precedents"); *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1334 (Fed. Cir. 2008) (finding constitutional standing when the agency action was "likely to cause an economic injury").

A. Rhea Lana's Has Standing.

Rhea Lana's has sufficiently demonstrated economic harm in the form of competitive injury. To avoid civil money penalties, Rhea Lana's must treat its consignor-volunteers as employees and comply with minimum wage, overtime, worker's compensation, and associated deductions for FICA taxes. *See* Determination Letter, Compl., Ex. 3. On information and belief, DOL has not required this of any other consignment event. As a result, Rhea Lana's operating costs will be artificially higher than its competitors. *See Ass'n of Data Processing Serv. Orgs. v.*

Camp, 397 U.S. 150 (1970) (finding injury when petitioners experienced increased competition for their customers due to the government action); *see also Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 138 (D.C. Cir. 1977) (finding that a "distinct and palpable" competitive injury satisfies the injury-in-fact requirement even if the economic injury is "relatively small in magnitude").

Moreover, if consignors are unable to volunteer at Rhea Lana's events due to DOL's prohibition on volunteering, then consignors will likely attend one of the many other children's consignment events that offer nearly identical volunteer opportunities.[4] Because DOL's determination substantially affects Rhea Lana's economic interests, Rhea Lana's should be permitted its day in court to challenge DOL's interpretation of the FLSA.

In addition to economic harm, Rhea Lana's has also suffered reputational harm. After learning about DOL's investigation, a local news station that had previously offered free advertising for Rhea Lana's events decided to revoke its offer: "At this point, we are going to stand by our decision to maintain our distance with Rhea Lana's. As a news organization I don't

---

[4] There are many other similar children's consignment events across the country. There are at least nine in Arkansas alone: Twice as Nice Children's Consignment Sale, http://www.twiceasnice4tots.com/volunteers.html (last visited May 30, 2014); Duck Duck Goose Children's Consignment Event, http://www.duckduckgoosesale.com (last visited June 2, 2014); Growing Kids Consignment Sales Event, http://www.growingkidssale.com/volunteer.html (last visited May 30, 2014); Popsicle Kids Consignment Sale, http://www.popsicleskidssale.com/ (last visited May 30, 2014); Just Between Friends, https://www.jbfsale.com/partOfTeam.jsp (last visited May 30, 2014); Twinkle Twinkle Children's Consignment Event, http://twinkletwinklesale.com/jonesboro/volunteers.php (last visited May 30, 2014); June Bugs Reruns, http://www.junebugsreruns.com/volunteers.html (last visited May 30, 2014); Your Kids' Closets, http://www.yourkidscloset.com/volunteer.html (last visited May 30, 2014); Polka Dots and Lollipops, http://www.polkadotsandlollipops.net/volunteer_opportunities.html (last visited May 30, 2014); *see also* consignmentmommies.com (containing a list of all similar events nationwide).

feel comfortable allowing a business that is under current federal investigation on our air." E-mail from News Station [name redacted] to Rhea Lana Riner (Sept. 30, 2013, 3:40 PM), Ex. 1.[5]

DOL further caused Rhea Lana's to suffer reputational harm by sending letters to Rhea Lana's consignor-volunteers stating that Rhea Lana's violated the FLSA and took advantage of its consignor-volunteers. Compl., Ex. 2. The Consignor Letters unfairly characterize Rhea Lana's as an unscrupulous employer, stating that the Wage and Hour Division ("WHD") "contacted the firm and explained the FLSA wage requirements, *but the firm did not agree to make payments to you*." *Id.* (emphasis added). The Consignor Letters further informed recipients that they could recover not only back wages, but "an equal amount as liquidated damages, plus attorney's fees and court costs." *Id.* Thus, while DOL claimed it did not "encourage or discourage such suits," its Consignor Letters were a collateral attempt to enforce DOL's putatively unreviewable enforcement determination against Plaintiffs in a multitude of private FLSA suits. *Id.*

The Consignor Letters have the likely effect of harming the reputation of Rhea Lana's and potentially damaging its relationship with its consignor-volunteers.[6] This too is enough for Article III standing. *See Meese v. Keene*, 481 U.S. 465, 472-73 (1987) (finding that the risk of injury to one's reputation is sufficiently "distinct and palpable" to constitute a "cognizable injury").

---

[5] The court is permitted to consider extrinsic evidence to determine its subject matter jurisdiction. *See Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987) ("[I]t has long been accepted that the judiciary may make 'appropriate inquiry' beyond the pleadings to 'satisfy itself on authority to entertain the case.'").

[6] While the letters were sent only to Rhea Lana's consignor-volunteers, the reputation of both companies is arguably jeopardized since they operate under the Rhea Lana's trademark.

To counter DOL's negative message, Rhea Lana's has spent considerable time publicly addressing DOL's allegations and explaining how it is in compliance with federal law. *See id.* at 475 ("The need to take such affirmative steps to avoid the risk of harm to reputation constitutes a cognizable injury to [plaintiff]."). This is no easy task considering that "[i]naccurate or misleading information, coming from the government, can be uniquely damaging to a business' reputation, due to the 'moral suasion' deriving from government's presumed authority and impartiality." James W. Conrad, Jr. *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 Kan. J.L. & Pub. Pol'y 521, 530 (2003) (quoting *Airline Pilots Ass'n v. Dep't of Trans.*, 446 F.2d 236, 241 (5th Cir. 1971)). The Fifth Circuit in *Airline Pilots Ass'n* recognized "that 'moral suasion' is a considerably potent force in our society" and may present a "stumbling block" to regulated entities. 446 F.2d at 241. Thus, to say that an agency's determination as to a regulated entity's compliance with the law "is either practically, administratively, or legally insignificant is to ignore reality." *Id.*

Here too, saying that DOL's determination that Plaintiffs' consignor-volunteers are FLSA "employees" is "either practically, administratively, or legally insignificant is to ignore reality." *Id.* DOL declared to the public—and specifically communicated to Rhea Lana's customers—that Plaintiffs violated significant labor laws. DOL's determination therefore erects a "stumbling block" to Plaintiffs' businesses by making it difficult for them to secure new consignors and franchisees. Accordingly, the Court should conclude that Rhea Lana's has established standing.

B. Rhea Lana's Franchise Systems Has Standing.

DOL claims Rhea Lana's Franchise Systems is a "spectator to any proceedings involving Rhea Lana, Inc." and therefore lacks standing. Mot. 20-21. To the contrary, DOL's investigation targeted *both* companies. For instance, on March 19, 2013, a WHD investigator sent a records request to Plaintiffs. Letter from Tamara Haynes, WHD, DOL, to Rhea Lana Riner (Mar. 19, 2013), Ex. 2. The records request stated: "As previously discussed, an investigation to determine compliance of the [FLSA] of your firm, Rhea Lana, Inc. *and Rhea Lana Franchise Systems* is being conducted." *Id.* (emphasis added).

Rhea Lana Riner and Dave Riner, the corporate officers of Rhea Lana's and Rhea Lana's Franchise Systems, reasonably understood the records request to apply to *both* companies. In response to the request seeking a "[l]ist of salaries of employees with a notation stating if exempt or non-exempt," the Riners included an officer of Rhea Lana's Franchise Systems. In response to the request seeking log books, time cards or day sheets for employees, consignors, workers, and volunteers used during the investigative period," the Riners included "all our payroll records generated by Paychex for 2012 . . . for both [Rhea Lana, Inc.] and [Rhea Lana's Franchise Systems]." Letter from Rhea Lana Riner & Dave Riner to Tamara Haynes, WHD, DOL (Mar. 25, 2013), Ex. 3. The signature block on the records response includes both companies. *Id.* It is patently unfair for DOL to specifically state that it is investigating Rhea Lana's Franchise Systems and seek records from that company, only to subsequently claim that Rhea Lana's Franchise Systems is a "spectator" and lacks standing to challenge a decision that significantly impacts its business.

Relying on *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004), DOL argues that "any findings made by WHD with respect to the employment

practices of Rhea Lana, Inc., have only an indirect effect upon [whether potential franchises elect to purchase franchises]." Mot. 21. As a threshold matter, *National Wrestling* is inapplicable because it concerns third-party prudential standing which is not at issue in this case. *See Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1357 (D.C. Cir. 2000) (stating that a third party standing analysis "focuses on who is asserting the claim and why the holder of the asserted right is not before the court"). Not only is Rhea Lana's already a party to this litigation, but Rhea Lana's Franchise Systems is representing its own interests, not those of Rhea Lana's. Even assuming that third party standing is relevant in this case, DOL inaptly relies on *National Wrestling* because DOL convolutes the third party standing inquiry by mischaracterizing the "regulated third party" as prospective franchisees, rather than Rhea Lana's Franchise Systems. Mot. 21-22.

DOL is simply incorrect in asserting that its classification of consignor-volunteers as employees would have only an "indirect effect" upon a prospective franchisee's decision to purchase a Rhea Lana's franchise. An adverse agency action against a franchisor is *precisely* the type of information that prospective franchisees would consider before deciding to purchase a franchise. For instance, a Rhea Lana's franchise may no longer be an attractive investment if franchisees must worry about adverse regulatory action or increased competition by other consignment events offering volunteer opportunities.

Unsurprisingly, several prospective franchisees have reacted negatively to news of DOL's investigation. In an October 9, 2013 e-mail, a prospective franchisee withdrew her franchise application, stating that her "consideration was compounded by . . . [the] unknown level of risk that the entire business model would change and threaten our fledgling franchise." E-mail from [Redacted] to Dave Riner (Oct. 9, 2013, 12:03 PM), Ex. 4, at 1. In another e-mail, a

prospective franchisee stated that her "biggest questions right now are about financials and the current Department of Labor investigation." E-mail from [Redacted] to Rhea Lana Riner & Dave Riner (Sept. 11, 2013, 10:13 PM), Ex. 4, at 2. Yet another asked whether "the government [is] still trying to tax volunteers as employees." E-mail from [Redacted] to Rhea Lana Riner & Dave Riner (Oct. 10, 2013, 10:52 AM), Ex. 4, at 3.

Many more individuals likely never contacted Rhea Lana's Franchise Systems to inquire about franchising, but instead simply purchased a franchise from another franchisor. There are numerous other franchisors offering similar children's consignment events that have *not* been prohibited from using volunteers.[7] Moreover, those individuals most likely to become franchisees—Rhea Lana's consignors—will likely never buy a franchise after having received DOL's letter informing them that Rhea Lana's violated the law. Rhea Lana's Franchise Systems has a sufficient likelihood to continue experiencing economic and reputational harm, which will worsen as more individuals in the industry learn about DOL's adverse action and avoid participating in events hosted by an alleged FLSA violator.

II. THE DETERMINATION LETTER'S CLASSIFICATION OF RHEA LANA'S CONSIGNOR-VOLUNTEERS AS EMPLOYEES IS REVIEWABLE APA FINAL AGENCY ACTION.

DOL's Determination Letter classifying Rhea Lana's consignor-volunteers as FLSA employees, along with its threat of civil money penalties, is APA final agency action. 5 U.S.C. § 704. To be final, an agency action must meet two conditions. "First, the action must mark the

[7] For instance, the following companies offer children's consignment event franchises: Kid's Closet Connection, http://www.kidscloset.biz/ (last visited May 27, 2014), Kids Exchange Consignment Sale, http://kxconsignment.com/raleigh/ (last visited May 27, 2014), Just Between Friends, https://www.jbfsale.com/home.jsp (last visited May 27, 2014); Here We Grow Again, http://herewegrowagain.com/ (last visited May 27, 2014); Baby Posh Garage, http://www.babyposhgarage.com/ (last visited May 27, 2014); The Big Red Wagon, http://thebigredwagon.com/ (last visited May 27, 2014); Kids Haven, http://www.kids-haven.net/ (last visited May 27, 2014) (franchise opportunities coming soon).

'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Second, the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.*

DOL concedes that its determination marked the consummation of its decisionmaking process. Mot. 9 & n.2 ("Although the Department of Labor reached the consummation of its decisionmaking process . . . "). Accordingly, DOL takes issue only with the second element of finality under *Bennett*.

The APA contains a presumption of judicial review for those harmed by agency actions. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). This presumption of review is "intended to 'cover a broad spectrum of administrative actions,' and part of the pattern of generous review provisions" that "must be given a 'hospitable' interpretation." *Nat'l Automatic Laundry v. Shultz*, 443 F.2d 689, 695 (D.C. Cir. 1971); *see also Abbott Labs.*, 387 U.S. at 149 (mandating that the element of "finality" be analyzed in a "pragmatic" manner). As a result, the D.C. Circuit has "found final action in" agency communications having the feature of "expected conformity." *Nat'l Automatic Laundry*, 443 F.2d at 698.

A. The Supreme Court's Decision in *Sackett v. EPA* Reinforced *Abbott* and Recognized the Legal Consequences of Agency Action Exposing Regulated Entities to Civil Penalties.

DOL cites many finality cases that predate the Supreme Court's recent decision in *Sackett v. EPA*, 132 S. Ct. 1367, 1370-72 (2012), reaffirming *Abbott's* holding that the APA

broadly presumes judicial review of administrative actions.[8] In *Sackett*, EPA issued a compliance order to homeowners, charging them with depositing fill materials on their residential lot in violation of the Clean Water Act (CWA). *Id.* at 1370-71. The compliance order not only contained EPA's determination, but also notified the Sacketts that they could be subject to civil penalties for failing to comply with the order. *Compare* Pet'rs' Br. 7-9, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062), *with* Compl., Ex. 3 (Determination Letter).

In a unanimous decision, the Court concluded that the agency's action had "all of the hallmarks of APA finality." *Sackett*, 132 S. Ct. at 1371. Specifically, the Court noted that legal consequences flowed from the order because it "exposes the Sacketts to double penalties in a future enforcement proceeding." *Id.* at 1372. The specter of penalties weighed heavily on the Court's analysis:

> In Clean Water Act enforcement cases, judicial review ordinarily comes by way of a civil action brought by the EPA . . . . But the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability.

Id.

Here, DOL's Determination Letter—as evidenced by the ensuing Consignor Letters—with its affirmation of illegality and threat of civil money penalties, strongly suggests final agency action under *Sackett* and *Abbott*. The Determination Letter threatened civil money

[8] *See* Gary F. Smith et al., *Beyond the Affordable Care Act Decision: Federal Access Issues in the Supreme Court's 2011 Term*, 46 Clearinghouse Rev. 316, 316 (2012) ("In *Sackett v. Environmental Protection Agency* a unanimous Court expanded the ability of plaintiffs to seek judicial review of administrative agency orders via the Administrative Procedure Act."); Damien M. Schiff & Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. Law & Pol. 97, 108 ("Thus, the Court's decision to take up the Sacketts' case is probably explained by the fact that *Sackett* gave the Court an opportunity to expand judicial review without having to hold enforcement provisions of environmental laws unconstitutional.").

penalties for repeated or willful violations of FLSA sections 6 (minimum wage) or 7 (overtime). Compl., Ex. 3. An employer is a "repeated" or "willful" violator if a WHD official issued notice to that employer that its conduct was prohibited. 29 C.F.R. § 578.3(b)(1)-(2). DOL's Determination Letter is precisely the type of evidence used to establish such a violation. *See Bingham v. Jefferson Cnty*, No. 11-48, 2013 U.S. Dist. LEXIS 45826, at *32-33 (E.D. Tex. Mar. 1, 2013) (observing that a letter explaining the outcome of a DOL investigation may be offered as proof of a willful violation of the FLSA); *Abadeer v. Tyson Foods, Inc.*, No. 09-125, 2013 U.S. Dist. LEXIS 145918, at *61-62 (M.D. Tenn. Oct. 3, 2013) (stating that a DOL letter finding a company out of compliance with the FLSA may indicate willful behavior); *see also Reich v. Bay, Inc.*, 23 F.3d 110, 117 (5th Cir. 1994) (finding willfulness when the local director of the WHD office had previously informed one of defendant's representatives that defendants were violating the FLSA).

The penalties are substantial. Under the FLSA, a repeated or willful violator is subject to a maximum of $1,100 *per violation*. 29 C.F.R § 578.3(a). According to DOL's letter, Rhea Lana's could face $660,000 in civil money penalties over the course of just one year because there are approximately 100 volunteers at each of Rhea Lana's six consignment sales. If DOL seeks penalties for the two year period of the investigation, as it typically does, Rhea Lana's could incur substantially larger penalties. WHD, DOL, Field Operations Handbook § 3.52, 52f14(a)(4) ("[Civil money penalties] will ordinarily be assessed based on violations occurring within the normal 2-year investigation period.") (available through LEXIS at FOH 3.52F). Such a hammer-fall is enough to destroy a small business and is consistent with the penalties at issue in *Sackett*.

DOL attempts to downplay the significance of its threat, stating that the imposition of civil money penalties for repeated or willful violations is "remarkably speculative." Mot. 13. Yet, the threat of civil money penalties here is more serious than in *Sackett*. EPA can issue civil penalties for a violation of the CWA, regardless of whether a compliance order is issued. 33 U.S.C. § 1319(d). In contrast, the FLSA only provides for civil money penalties when an employer violates the FLSA *after* receiving notice for such violation. 29 C.F.R. § 578.3(b)-(c). Unlike the Sacketts, who might have been exposed to civil penalties for violating the CWA even before receiving the compliance order, Plaintiffs were not exposed to civil penalties *until* they received DOL's Determination Letter.

In arguing that *Sackett* does not apply to the instant case, DOL asserts many of EPA's well-tread arguments that the Supreme Court has rejected. DOL claims that Plaintiffs will have the opportunity to defend themselves against civil penalties by arguing that they did not previously violate the FLSA. Mot. 14. EPA similarly claimed that its action lacked legal consequences because it could not assess civil penalties until a court determined that the Sacketts had violated the CWA. Resp'ts' Br. 5-6, 11-12. Thus, the possibility of civil penalties was "speculative at best." *Id.* at 30. The Supreme Court cast aside this argument, finding that the *exposure* to penalties in a future enforcement proceeding is enough to constitute final agency action. *Sackett*, 132 S. Ct. at 1372. The imposition of civil penalties is irrelevant for purposes of finality. Indeed, another judge in this Court recently rejected an agency's attempt to distinguish its case from *Sackett* by claiming that penalties did not immediately flow from such agency's decision letter. *Bimini Superfast Operations LLC v. Winkowski*, --- F. Supp. 2d ---, No. 13-1885, 2014 U.S. Dist. LEXIS 2981, at *16-17 n.3 (D.D.C. Jan. 10, 2014) ("Defendants attempt to distinguish this case from *Sackett* on the basis that penalties do not immediately flow from . . .

[the agency] letter. In *Sackett*, the Court noted that the E.P.A[.]'s compliance order had legal consequences because the order itself exposed Plaintiffs to double penalties in a future enforcement proceeding, among other things. *Sackett*, 132 S. Ct. at 1371-2. While this fact was relevant to the Court's analysis, it was not dispositive, which is consistent with the language found in *Bennett*[,] . . . 520 U.S. at 177-78 . . .").

DOL also claims that its Determination Letter imposed no obligations on Plaintiffs but instead "simply advised Rhea Lana of WHD's view of the law." Mot. 17. Similarly, in *Sackett*, EPA argued that its compliance order did not "impose substantive obligations beyond those imposed by the CWA" but merely "expresse[d] the [agency's view] of what the law requires." Resp't's Br. 17, 28 (second alteration in original). The Court, however, found that the compliance order went much further by exposing the Sacketts to double penalties. *Sackett*, 132 S. Ct. at 1371-72. DOL's Determination Letter is no different.

Sackett also rejects DOL's claim that "WHD's correspondence 'was purely informational in nature" and did not compel Plaintiffs to take any action. Mot. 17. First, DOL's threat of civil money penalties removes any voluntariness from the Determination Letter because it creates a false choice of complying with a legal determination with which Plaintiffs disagree or incurring staggering penalties. *See id.* (stating that DOL's Determination Letter "imposed no obligations"). Second, to the extent that the Determination Letter allowed Plaintiffs to choose to comply, *Sackett* states that judicial review is permissible even in response to an agency's request for voluntary compliance. 132 S. Ct. at 1373 ("It is entirely consistent with this function to allow judicial review when the recipient does not choose 'voluntary compliance.'").

Finally, DOL errs in styling Plaintiffs' case as an assertion of the hypothetical possibility of future enforcement. Mot. 12-16. In *Sackett*, it was irrelevant that the compliance order was

not self-executing and that the agency needed to enforce it through judicial action. The Court noted:

> [T]he *next* step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action). As the text . . . of the compliance order makes clear, the EPA's 'deliberation' over whether the Sacketts are in violation of the Act is at an end; *the agency may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation*, but that is a separate subject.

Sackett, 132 S. Ct. at 1373 (second emphasis added). Similarly, whether DOL decides to bring an enforcement action against Plaintiffs is an entirely separate matter. DOL's investigation and subsequent determination is enough to constitute finality under the APA. 5 U.S.C. § 704.

B. Even If *Sackett* Does Not Control, Pre-*Sackett* Case Law Establishes Finality.

Not only does *Sackett* support a finding of finality, but cases predating *Sackett* confirm that DOL's action is subject to judicial review. The Seventh Circuit found that a WHD letter referencing civil money penalties constituted final agency action. The letter was issued after DOL conducted an investigation to determine whether two companies were joint employers under the FLSA. *W. Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 660-61 (7th Cir. 1998). The letter used the same declarative language regarding penalties as the Determination Letter. *Id.* at 661.

The Seventh Circuit found that DOL's letter "establishe[d] the legal obligation" of the companies as joint employers: "Legal consequences flow from it, both with respect to their obligations to their employees and with respect to their vulnerability to penalties should they disregard the DOL's determination." *Id.* at 663. DOL's determination exposed the companies to greater penalties for future violations than they otherwise would have faced.[9] *Id.* While the

[9] While the Court in *Reliable Automatic Sprinkler v. Consumer Prod. Safety Comm'n* suggested that *Western Illinois* might provide a "more permissive standard for final agency action than

letter mentioned a potential follow-up investigation, the court found it more important that DOL warned the companies that they would be treated as willful violators if they failed to comply. *Western Illinois*, 150 F.3d at 663 ("More than that, [the Assistant District Director] warned that [the companies] would be treated either as recidivists or as willful violators if they failed in the future to comply with the legal ruling contained in the letter, thus subjecting them to penalties[.]").

Contrary to DOL's assertion, *Taylor-Callahan-Coleman Cntys. Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953 (5th Cir. 1991), is not the better reasoned authority on this issue. Mot. 15-16. In *Taylor-Callahan*, a probation department challenged two advisory opinions that DOL had issued to *other* probation departments. *Id.* at 957. The court concluded that the opinion letters, which were "expressly limited to the factual situation presented by the requesting party," were not final agency actions. *Id.* Instead, they were "expressly issued subject to change" and did not "have the status of law with penalties for noncompliance."[10] *Id.* at 957. While the court acknowledged the probation department's concern about civil money penalties, it refused to issue an "advisory opinion on any question of willfulness." *Id.* at 959. The court *did not opine* on whether DOL could use the opinion letters to establish evidence of willfulness. *See id.*

Here, the Determination Letter differs from the opinion letters in *Taylor-Callahan* for two important reasons. First, DOL's Determination Letter relates *specifically* to Plaintiffs. Compl., Ex. 3. Civil money penalties are presumably more likely to attach to an agency

---

Standard Oil," it acknowledged that the WHD letter in *Western Illinois* had a direct and immediate effect on the companies. *See j*173 F. Supp. 2d 41, 46 n.4 (D.D.C. 2001). Moreover, *Reliable* was decided before the Supreme Court's decision in *Sackett*. *Western Illinois* is also consistent with *Sackett* as both cases recognize the legal consequences of agency action that exposes regulated entities to increasing penalties.

[10] The court even suggested that the probation departments that requested the opinion letters would have been unable to seek judicial review. *Taylor-Callahan*, 948 F.2d at 957.

statement tailored to the employer's unique situation than to an opinion letter issued to another entity and based on a different set of facts. Thus, the court in *Taylor-Callahan* had little reason to be concerned about the prospect of civil money penalties being assessed based on opinion letters issued to non-parties. Second, DOL's Determination Letter is not subject to possible modification, whereas the Administrator's in *Taylor-Callahan* could be amended or withdrawn at any time.

In addition to *Western Illinois*, the Supreme Court and the D.C. Circuit both found finality in pre-enforcement cases when agency action triggered exposure to civil money penalties. *Abbott Labs.*, 387 U.S. at 149-50; *Ciba-Geigy Corp v. Envtl. Prot. Agency*, 801 F.2d 430, 436-47 (D.C. Cir. 1986). In *Abbott Labs.*, the Court found finality when the Commissioner of Food and Drugs issued regulations changing labeling requirements for prescription drugs. 387 U.S. 137, 152 (1967). The regulations had a "direct effect on the day-to-day business" of prescription drug companies, requiring companies to "change all their labels, advertisements, and promotional materials; . . . destroy stocks of printed matter; and . . . invest heavily in new printing type and new supplies." *Id.* The companies would also risk "serious criminal and civil penalties" for distributing "misbranded" drugs if they failed to comply with the label requirements. *Id.* at 153.

Similarly, the D.C. Circuit in *Ciba-Geigy* held that EPA's new pesticide labeling requirements constituted final agency action, particularly because regulated companies faced a difficult dilemma of pursuing costly compliance or risking civil and criminal penalties for distributing misbranded products. *Ciba-Geigy*, 801 F.2d at 438. The court also found that EPA's action had legal consequences because the agency's interpretation of its governing statute would receive deference in court: "'[T]he authoritative interpretation of an executive official has

the *legal consequence* . . . of commanding deference from a court that itself might have reached a different view if it had been free to consider the issue as on a blank slate.'" *Id.* at 437 (emphasis added).

Plaintiffs face a similar false choice as the regulated parties in *Abbott Labs.* and *Ciba-Geigy*. If Plaintiffs comply with DOL's determination, they will be placed at a severe competitive disadvantage and will certainly lose business. If they refuse to comply, they expose themselves to increasing penalties. And according to the D.C. Circuit in *Ciba-Geigy*, DOL's determination would almost certainly receive deference in a subsequent judicial enforcement proceeding, additionally frustrating Plaintiffs' attempt to challenge DOL's interpretation of the FLSA.

DOL is incorrect in asserting that *Abbott Labs.* is inapplicable based on its premise that the Determination Letter did not modify the legal regime to which Plaintiffs are subject. Mot. 17. Indeed, DOL *has* modified the legal regime because its determination requires Plaintiffs to operate outside the long-standing industry standard. Most children's consignment events operate exactly like Plaintiffs by permitting consignors to volunteer.[11] Because DOL is singling out Plaintiffs to change their business model, Plaintiffs are forced to operate according to different rules from the rest of their industry. This inequitable enforcement is readily distinguishable from *Reliable*, where this Court noted that the plaintiff company had "not been selectively burdened by the [agency's] investigation and threatened complaint." 173 F. Supp. 2d at 50 ("On the contrary, similarly situated sprinkler producers have been subjected to the administrative process.").

---

[11] *See supra* note 4.

In its attempt to escape judicial review, DOL cites numerous pre-*Sackett* authorities that are distinguishable from the instant case.[12] DOL relies upon *Holistic Candlers and Consumers Ass'n v. FDA*, 664 F.3d 940 (D.C. Cir. 2012), to suggest that it was merely "evaluating" Plaintiff's compliance with the law. Mot. 10. In *Holistic Candlers*, the FDA sent "warning letters" to manufacturers of ear candles, advising them that their candles were misbranded medical devices. *Id.* at 942. The FDA letters merely used provisional language—stating that "it *appears*" the products are medical devices and the "FDA *will evaluate* the information you submit and decide whether your product may be legally marketed." *Id.* at 944 (emphasis added); *see also Nat'l Ass'n of Homebuilders v. Norton*, 415 F.3d 8, 14 (D.C. Cir. 2005) (holding that an agency's protocols were not final because they only *recommended* that individuals take certain action). Here, DOL's Determination Letter offers no such latitude. Rather, it declaratively states that "your employees *are subject* to the requirements of the FLSA" and "*you will be subject* to [civil money] penalties. Compl., Ex. 3 (emphasis added).

DOL's reliance on *AT&T v. EEOC*, 270 F.3d 973 (D.C. Cir. 2001), misses the mark for similar reasons. *See* Mot. 10-11. *AT&T* involved an EEOC letter of determination that stated that the company had discriminated against two of its employees. *AT&T*, 270 F.3d at 974-75. Importantly, the letter of determination did not foreclose additional negotiations with the agency. An EEOC letter of determination only states that there is reasonable cause to believe discrimination occurred, *see* Mem. Op. 2-3, *AT&T Corp. v. EEOC* (D.D.C. July 13, 2000) (No. 99-1444), and "invites the parties to join the agency in seeking to resolve the charge" through

---

[12] Plaintiffs acknowledge that DOL accurately states that injunctive relief is generally unavailable to bar future agency actions. *See* Mot. 23-24. However, district courts have substantial discretion in awarding injunctive relief. *See, e.g.*, *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 319 (D.C. Cir. 1987). Based on the magnitude of government overreach in this case, the Court may conclude that injunctive relief is appropriate.

conciliation. *See The Charge Handling Process*, EEOC, http://www.eeoc.gov/employers/process.cfm (last visited May 26, 2014). If conciliation fails, EEOC may either file a lawsuit in federal court or issue a "Notice of Right to Sue" to the charging party. *Id.*

Unlike the EEOC letter of determination, DOL's Determination Letter stated that it found more than "reasonable cause" to believe Plaintiffs violated the FLSA; it conclusively determined that they had by including language like ". . . your employees are subject to the FLSA" and "[t]he investigation disclosed violations of the FLSA. . . ." Compl., Ex. 3. This determination was not subject to "conciliation." *Id.* The Determination Letter and Consignor Letters demonstrate DOL's expectation of immediate compliance devoid of any interest in reaching a compromise that recognized the unique relationship between Plaintiffs and consignor-volunteers. Accordingly, *AT&T* has no bearing on this case.

DOL also attempts to compare its determination to non-binding policy guidelines by relying on *Ctr. for Auto Safety & Pub. Citizen v. Nat'l Highway Traffic Safety Admin*., 452 F.3d 798 (D.C. Cir. 2006). However, the policy guidelines in that case were couched in generalities and acknowledged that their conclusions applied in only "some cases." *Id.* at 809; *see also Indep. Equipment Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (finding an EPA letter lacked finality when it "merely restated in an *abstract setting*" the EPA's interpretation of its regulations (emphasis added)). Moreover, the Associate Administrator who issued the guidelines lacked authority make a final determination. *Ctr. for Auto Safety & Pub. Citizen*, 452 F.3d at 810. In contrast, DOL's Determination Letter did not merely express DOL's general interpretation of the law. Rather, it applied its interpretation to the *specific factual circumstances* of Plaintiffs' businesses. And DOL asserted much more than a general policy statement; it

determined the legal relationship between Rhea Lana's and its consignor-volunteers. There is no indication that the Determination Letter's author lacked authority to render a decision as to Plaintiffs—a decision that was subsequently endorsed by WHD Principal Deputy Administrator Laura Fortman. Compl., Exs. 3, 4.

Reliable Automatic Sprinkler v. Consumer Prod. Safety Comm'n, 173 F. Supp. 2d 41 (D.D.C 2001), *aff'd*, 324 F.3d 726 (D.C. Cir. 2003), does not apply here because DOL's decision is not preliminary or subject to additional administrative procedures. *See* Mot. 11-12. In *Reliable*, the agency could not impose any obligation on the company before holding a formal, on-the-record adjudication. *Reliable*, 324 F.3d 726, 732 (D.C. Cir. 2003). Therefore, the company had "ample opportunity to convince the agency" to change its mind, *id.* at 733, particularly because the agency had merely *initiated* an investigation—it had not yet determined whether the company's product presented a substantial hazard. *Reliable*, 173 F. Supp. 2d at 42-43. Here, DOL has completed its investigation *and* issued a determination as to Plaintiffs, which is an unambiguous indication of a reviewable final agency action. Compl., Ex. 3.

DOL also cites *DRG Funding Corp. v. Sec'y of Hous. & Urban Dev.*, 76 F.3d 1212 (D.C. Cir. 1996), in support of its proposition that its determination does not adversely affect Plaintiffs. Mot. 12. Like *Reliable*, the Secretary's decision in *DRG Funding* was not final because administrative proceedings were still pending. *DRG Funding*, 76 F.3d at 1215. More importantly, however, the court found that the agency's determination *could not* "have a 'direct effect'" on the company because it was *bankrupt* and therefore had no "day-to-day business" to conduct. *Id.* at 1215-16. That is not the case here. Plaintiffs' position as active and growing businesses is sufficiently distinct from the bankrupt company in *DRG Funding* to render that

case inapplicable. Accordingly, to the extent *Sackett* does not control, pre-*Sackett* case law also supports a finding of finality under 5 U.S.C. § 704.

III. ALTERNATIVELY, IF THE COURT CANNOT RULE ON THE PLEADINGS, IT SHOULD COMPEL DOL TO PRODUCE THE ADMINISTRATIVE RECORD.

If this Court cannot conclusively determine on the pleadings whether DOL's Determination Letter is final agency action subject to APA review, it should compel DOL to produce the administrative record. *See* Compl. Exs. 2-3. The D.C. Circuit has previously held that the "district court can consult the record to answer the legal question before the court." *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). By reviewing the administrative record, this Court can determine whether Plaintiffs have stated a plausible claim.

DOL's production of the administrative record may avoid the potential risks associated with relying on its uncorroborated assertions regarding its investigation and subsequent actions. *See Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001) (finding that the district court erred by relying on parties' "representations to discern the basis on which the [agency] acted" and that the proper course would have been to call for the administrative record). Plaintiffs do not have access to any of DOL's investigatory files, which would likely include interviews with employees and consignor-volunteers, correspondence, as well as any investigator notes that would be useful for the Court to consider if it cannot immediately determine whether an adjudication took place. Such information may also shed light on the agency's action and help determine the scope of the investigation, including the extent of DOL's investigation of Rhea Lana's Franchise Systems. *See* Compl., Ex. 2 (WHD letter to Rhea Lana's consignor-volunteers).

Indeed, if the Court orders production of the record, it can efficiently resolve the entire matter because the Parties may include summary judgment arguments under Rule 56(a) with any supplemental briefing that the Court requires. Production of the administrative record at this stage of the litigation would not prejudice DOL because DOL's Rule 12(b)(1) arguments are nonwaivable, and it may reassert its 12(b)(6) arguments under a Rule 12(c) motion for judgment on the pleadings, which applies the same standard as a motion to dismiss under Rule 12(b)(6). *See Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 130 (D.C. Cir. 2012) (stating that a Rule 12(c) motion is "functionally equivalent" to a Rule 12(b)(6) motion).

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court deny DOL's motion to dismiss, or in the alternative, order the production of the administrative record and provide the parties with an opportunity for additional briefing.

Dated: June 3, 2014

Respectfully submitted,

/s/ Daniel Z. Epstein
Daniel Z. Epstein
D.C. Bar No. 1009132
Cause of Action, Inc.
1919 Pennsylvania Avenue, NW, Suite 650
Washington, D.C. 20006
Telephone: (202) 499-4232
daniel.epstein@causeofaction.org

/s/ Reed D. Rubinstein
Reed D. Rubinstein
D.C. Bar No. 400153
Cause of Action, Inc.
1919 Pennsylvania Avenue, NW, Suite 650
Washington, D.C. 20006
Telephone: (202) 499-4232
reed.rubinstein@causeofaction.org

Attorneys for Plaintiffs