ORAL ARGUMENT NOT YET SCHEDULED

No. 17-5259

United States Court of Appeals for the District of Columbia Circuit

RHEA LANA, INC. AND RHEA LANA'S FRANCHISE SYSTEMS, INC.,
Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF LABOR
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
Case No. 1:14:cv-00017 *(Hon. Christopher J. Cooper)*

OPENING BRIEF OF APPELLANTS RHEA LANA, INC. AND RHEA LANA'S FRANCHISE SYSTEMS, INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiffs-Appellants Rhea Lana, Inc. and Rhea Lana's Franchise Systems, Inc., (collectively, "Rhea Lana's" or "Plaintiffs") submit this certificate as to parties, rulings, and related cases.

A. Parties and *Amici*

Plaintiff-Appellant Rhea Lana, Inc. is an Arkansas corporation with its principal place of business in Conway, Arkansas. It is a family-owned business in Arkansas that organizes and hosts three semi-annual, short-term consignment sales for children's clothes, toys, and related items.

Plaintiff-Appellant Rhea Lana's Franchise Systems, Inc. is an Arkansas corporation with its principal place of business in Conway, Arkansas. It offers franchise opportunities to enterprises that operate in substantial conformity with Rhea Lana Inc.'s business model.

Defendant-Appellee Department of Labor is an executive branch department of the United States, an "agency" within the meaning of 5 U.S.C. § 701(b), and is charged with administering the Fair Labor Standards Act. The Department of Labor's principal office is in Washington, D.C.

There were no *amici* or intervenors in the District Court. There are no *amici* or intervenors associated with this appeal at this time.

B. Ruling Under Review

Plaintiffs-Appellants appeal rulings issued by the Honorable Christopher R. Cooper of the United States District Court for the District of Columbia. On September 26, 2017, Judge Cooper issued a memorandum opinion and order granting Defendant-Appellee's motion for summary judgment, denying Plaintiffs-Appellants cross-motion for summary judgment, and denying Plaintiffs-Appellants motion to strike the declaration of Robert Darling. The opinion is published at 271 F. Supp. 3d 284 (D.D.C. 2017).

C. Related Cases

This case was previously before this Court, *see Rhea Lana, Inc. v. Department of Labor*, 824 F.3d 1023 (D.C. Cir. 2016), but has not been before any other court beyond the District Court. Plaintiffs-Appellants are unaware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Rhea Lana, Inc. is an Arkansas-based corporation. It is not publicly traded and has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Rhea Lana's Franchise Systems, Inc., an Arkansas-based corporation, is a wholly-owned subsidiary of Rhea Lana, Inc. It is not publicly traded and has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants respectfully request that this Court grant oral argument. The issues in this case relating to the proper interpretation of the Fair Labor Standards Act and to whether the agency fulfilled its duties under the Administrative Procedure Act are of sufficient importance and complexity that this Court would benefit from oral argument.

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Cases:

[*] Authorities upon which we chiefly rely are marked with asterisks.

Statutes & Other Authorities:

GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
AR	Administrative Record
DOL	United States Department of Labor
FLSA	Fair Labor Standards Act
JA	Joint Appendix
WHD	Wage and Hour Division

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331, 29 U.S.C. § 201 *et. seq.*, and the Administrative Procedure Act, 5 U.S.C. § 702.

STATEMENT OF ISSUES

1. Whether the District Court erred in granting summary judgment for Defendant, as set forth in its Memorandum Opinion and Order dated September 26, 2017, when the administrative record ("AR") indicates that Defendant used the wrong test to make its determination that consigner/volunteers were employees under the Fair Labor Standards Act ("FLSA"), when its actual determination letter offered no rationale for its decision, and when Defendant introduced a post-hoc declaration purporting to state its rationale;

2. Whether the District Court erred in granting summary judgment for Defendant, as set forth in its Memorandum Opinion and Order dated September 26, 2017, when the economic reality, as reflected in the AR, created no employment relationship under the FLSA; and

3. Whether the District Court erred in denying, as set forth in its Memorandum Opinion and Order dated September 26, 2017, Plaintiffs' motion to strike the declaration of Department of Labor official Robert Darling, when such declaration was drafted more than three years after the agency's determination, and

when the declaration provides justifications inconsistent with the contemporaneous record.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

For twenty years, Rhea Lana's has operated three semi-annual, short-term consignment sales in Arkansas. Families have relied on these consignment events to provide their children with clothes, toys, and other items they may otherwise be unable to afford. Mothers within the community gather for back-to-school sales stocked with clothes, backpacks, and sporting gear. Mothers-to-be shop for baby furniture and maternity clothes. Grandmothers find books, toys, shoes, and other items for their grandchildren. The business has grown and thrived, with franchised events in twenty-one states and counting. *See About Rhea Lana*, Rhea Lana's, https://www.rhealana.com/about-rhea-lana (last visited Feb. 12, 2018). In 2017, *Franchise Business Review* named Rhea Lana's one of the "Top 10 Franchises" in the entire country available for initial costs under $50,000. *What to Look For in a Low Cost Franchise*, Franchise Bus. Rev., http://bit.ly/2E08NxP (last visited Feb. 12, 2018) (reposting article by Jan Norman, *What to look for in a low-cost franchise*, Orange Cty. Reg., July 22, 2011, http://bit.ly/2nWQ9gq).

Consignors at Rhea Lana's events supply children's clothing and related goods for sale. J.A. 300. Some consignors also volunteer at the events (these consignors hereinafter are referred to as consignor/volunteers). J.A. 218.

In late 2011, the Arkansas State Department of Labor contacted Rhea Lana's to investigate the company's compliance with the Arkansas Minimum Wage Act. *See* J.A. 263–66. Rhea Lana's entered into a Consent Agreement with the State of Arkansas Department of Labor on January 19, 2012, in which the State agreed that the company "may use and permit individuals who are or will be 'consignors' to work before, during and after a Rhea Lana franchise sale without compensation under the Arkansas Minimum Wage Act." J.A. 263.

Despite this consent agreement and absent any known complaint from a Rhea Lana's participant before or since, in January 2013 the Department of Labor ("DOL") launched an investigation into Rhea Lana's employment practices. On May 20, 2013, DOL officials met with the management of Rhea Lana, Inc. and stated DOL's conclusion that Rhea Lana consignor/volunteers constituted employees under the FLSA. On August 26, 2013, the DOL took final agency action to notify Rhea Lana's of its non-compliance and placed Rhea Lana's on notice of potential penalties for its failure to comply with the FLSA. J.A. 311.

Rhea Lana's Consignment Events

Rhea Lana's semi-annual, consignment events allow families to consign their used children's items and receive 70% of the proceeds. J.A. 217–18, 226–27.[1] The events also allow families to save money by giving them the opportunity to purchase discounted goods. J.A. 154.

Rhea Lana's managers organize the events, consignors sell goods, and volunteers help the events run successfully. J.A. 218.

Rhea Lana's events resemble a community garage sale, except that consignors can sell their used clothing "for dollars rather than quarters or dimes" and Rhea Lana's provides the location. J.A. 214. This model allows Rhea Lana's customers "to provide high quality items for their children at a price they can afford in today's challenging economy . . . [and] facilitates all the same independent work activities they would perform at their own garage sales." J.A. 215.

Each consignment event lasts seven to eight days. J.A. 226–27, 300. Event setup and consignor check-in for dropping off items occur immediately before each event begins. J.A. 126–27, 159. The next days are utilized for "early shopping," also called the "pre-sale." J.A. 271–72. "Early shopping" is the period when managers, consignors, family and friends of consignors, and consignor/volunteers

[1] These three semi-annual "flagship events" are held in Little Rock, North Little Rock, and Conway, Arkansas each spring and each fall. J.A. 150.

shop before the event opens to the public. J.A. 126–27. The next days of the event are open to the public. J.A. 127, 156. The final day is a discount shopping day. J.A. 127, 300. Consignors have the option to sell each item remaining at the event on the last day for 50% off the original price chosen by the consignor.[2] J.A. 300. At the end of the event, consignors can collect their unsold goods or elect to donate them to charity. J.A. 167, 171, 300.[3]

Consignor/Volunteers at Rhea Lana's Events

Consignors supply the children's clothing and related goods for sale. J.A. 203. The consignors clean their own goods, inspect them for tears and stains, register their items in the Rhea Lana's system, set the price, print their own barcodes, affix their own price tags, deliver the items to the event, and hang their items in the appropriate location. J.A. 166, 170, 300. Consignors help market the events by dropping off flyers at daycares, displaying car magnets with sales dates, and sharing announcements on social media. J.A. 259.

[2] Each consignor can choose whether to have his or her goods included in the half-off sale at the conclusion of the event. J.A. 144.

[3] The consignors and consignor/volunteers receive live updates throughout the event using Rhea Lana's online sale-track system, which tells them how much money they have made during the event and allows them to buy and sell an equal amount at each sale. J.A. 226.

Rhea Lana's offers consignors the opportunity to volunteer at the event. Consignor/volunteers personally benefit by ensuring that Rhea Lana's consignment events are well-run, organized, clean, and create an optimal shopping experience. *See* J.A. 188, 190–91. Consignor/volunteers have an interest in the success of the event—the more successful the event, the more sales that each consignor will make. J.A. 018 (Compl. ¶ 25); J.A. 028 (Answer ¶ 25); J.A. 218 (they engage in activity "so that the event (their event) will be successful"). Consignor/volunteers work together so the event "gains a reputation for high quality which increases shopping traffic." J.A. 226.

Consignor/volunteers are employed in a variety of other industries, J.A. 215, and are not dependent on the consignment events for their livelihood. J.A. 220.

All consignors choose whether and how to volunteer. J.A. 190–91, 225, 241–50. Fifty percent of the consignor/volunteers who work one season will not work the next season. J.A. 225. Some will skip a season. J.A. 225. Rhea Lana's provides an online signup sheet allowing the consignor/volunteers to pick a time to volunteer for a part of the event, such as store set up, consignor check-in, or store organization. J.A. 241–50; J.A. 224 ("consignor/volunteers make their own decisions on when and how they wish to participate").

Consignor/volunteers serve an average of four to five hours at an event, with some consignors choosing to volunteer ten to twenty hours during an event. J.A.

183, 222, 260–61. "[V]ery little supervision, if any" of consignor/volunteers occurs. J.A. 223. Consignor/volunteers check in with a Rhea Lana's manager, who tells the consignor/volunteer where help is needed. J.A. 156, 167. Most consignor/volunteers take approximately sixty seconds to catch on and figure out what needs to be done to help make each event a success. J.A. 223. Consignor/volunteers are given very little direction. J.A. 223 ("They see something that needs to be done and they do it."); J.A. 223–24 (Consignor/volunteers focus their efforts on "things they like doing.").

No written instructions exist for how to perform work. J.A. 224.[4] No performance evaluations are given to consignor/volunteers. J.A. 304. Rhea Lana's does not maintain employment records about consignor/volunteers. J.A. 194. Consignor/volunteers do not supervise anyone. J.A. 257.

Consignor/volunteers bring family members with them and often have one family member volunteer if another who signed up is unable to make the event. J.A. 167 ("My husband and I split shifts. He helped set up and I helped stock and sorting of the items."); *see* J.A. 225 ("Maybe 10-15% are family teams who help each other to sell and buy their children's clothing . . . . [T]hey will trade places at the last minute depending on the needs of their own family[.]"); J.A. 258.

[4] The exception to this rule is the cash register—Rhea Lana's provides instruction on how to operate it. J.A. 224.

Rhea Lana's does not compensate consignor/volunteers, nor is compensation expected. J.A. 218 (consignor/volunteers "do not expect any payment from the company in return for their services"). Rhea Lana's only provides consignor/volunteers an opportunity to shop early at the consignment events before the event opens to the public. J.A. 299–310. This opportunity comes with no discounts or other items of tangible value. J.A. 121 (early shopping passes are of "no value other than they allow the volunteers to buy the good stuff"); J.A. 167 (shopping early is "basically a 'thank you' for volunteering"); J.A. 171 ("We didn't get any money."); J.A. 306 (referring to "earlier purchasing access" as an "incentive"). Further, there are no consequences when someone shops early but does not volunteer as promised during the event. J.A. 191, 225.

The DOL Investigation

In or around December 2012, the DOL Wage and Hour Division ("WHD") initiated an investigation into Rhea Lana, Inc.'s employment practices. J.A. 184. Two Arkansas branch officials headed the investigation: Lesbia Rodriguez, the Lead Manager, and Tamara Haynes, the Lead Investigator. J.A. 184. The DOL audited Rhea Lana's employment practices for the period of January 28, 2011 through January 27, 2013. J.A. 302.

Rhea Lana's provided documents, employment records, contact information, and compensation documentation for all Rhea Lana's employees. J.A. 193–94, 196–200, 228–40. Rhea Lana's answered all questions posed by the DOL. J.A. 221–27.[5]

The DOL interviewed five managers, two consignors, and six consignor/volunteers between January 28, 2013 and April 12, 2013. J.A. 122; *see* J.A. 123–70.

Five of the six consignor/volunteer interview summaries were never signed or acknowledged by the interviewee. J.A. 135, 138, 143, 157–58, 168–69; *see* J.A. 153–54 (signed statement). In total, the DOL investigation lasted from January 2013 to May 20, 2013. The DOL expended eighty hours completing the entirety of its investigation. J.A. 292.

WHD's stated position is that, with very limited exceptions, for-profit companies cannot treat workers as volunteers instead of employees under the FLSA. J.A. 102 (Decl. of Robert Darling ¶ 9) ("Darling Declaration"). On March 1, 2013, the DOL recorded in its case diary that Rhea Lana's "is not a public or non-profit/charitable employer." J.A. 289; *see* J.A. 121 ("ER [employer] is a For Profit"); *see also* J.A. 100–02 (Darling Decl. ¶¶ 5 ("the workers did not work shifts at the sale for a charitable purpose"), 9 ("Rhea Lana was a for-profit company".)).

[5] At this point, Rhea Lana's understood that the DOL was simply trying to gain an overall understanding of the children's consignment industry. J.A. 193–95.

The May 20, 2013 Final Conference with Rhea Lana's

On May 20, 2013, the DOL met with Rhea Lana's to discuss the DOL's conclusions following its investigation. J.A. 308. The DOL informed Rhea Lana's that consignor/volunteers constituted employees under the FLSA and were entitled to back wages in accordance with minimum wage and overtime provisions.[6] J.A. 308. The agency completed, at that time, a "Final Conference Rhea Lana" Memorandum. J.A. 257.[7] The Final Conference Memorandum heading states: "Employment relationship Factors in which the US Supreme Court has considered significant to determine independent contractor or employee for purposes of the FLSA." J.A. 257 (emphasis in original).

The Final Conference Memorandum applied a seven-factor test designed for determining whether an individual is an independent contractor or an employee for

[6] While the investigation remained open through August 26, 2013, the DOL determined by May 20, 2013 that Rhea Lana's consignor/volunteers were covered FLSA employees. *See* J.A. 308 ("On May 20, 2013 . . . the firm was put on notice that they were not in compliance[.]"); J.A. 309 ("WHI Haynes informed the firm, the workers known as consignor/volunteers are indeed employees of the firm."); *see also* J.A. 190 (May 28, 2013 letter from C. Tad Bohannon to Darling stating that "[o]ur client, Rhea Lana's, Inc. . . . met with Ms. Haynes and Ms. Rodriguez on May 20, 2013, to discuss the [DOL's] audit of the individuals who assist with Rhea Lana's consignment sales events. It is my understanding that DOL has concluded its audit and considers the individuals in question to be 'employees' under [the FLSA].").

[7] The Final Conference Memorandum is dated May 20, 2011, which is a typographical error. The DOL did not begin the audit until January 2013 and met with the Plaintiffs in person on May 20, 2013.

purposes of the FLSA. J.A. 257–62; J.A. 322; *see also* J.A. 299–310 (June 18, 2013 Case Narrative reiterating the conclusion that consignor/volunteers were employees and applying the independent contractor test).

This test matches the seven-factor test described in Fact Sheet #13, *see* J.A. 322–23, which was attached to a May 24, 2013 letter sent by Deputy Director Darling to Congressman Tim Griffin ("May 24th Letter"). J.A. 293–94. Congressman Griffin had inquired as to the basis of the DOL's determination in this matter. J.A. 293–94 (enclosing Fact Sheet #13, a guide to determining "whether an individual is an independent contractor or an employee for purposes of the FLSA").

The August 26, 2013 Determination Letter

On August 26, 2013, the DOL sent its final Determination Letter to Rhea Lana's setting forth the DOL's decision that consignor/volunteers were covered "employees" under the FLSA. J.A. 311. This letter provided no rationale for DOL's decision beyond stating that:

> The 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 [the DOL's] understanding that you refuse to comply with the employee group known as consignor/volunteers."

Id.

The August 26, 2013 Determination Letter marked the end of the DOL's decision-making process. J.A. 22 (Compl. ¶ 49), J.A. 029 (Answer ¶ 32).

The September 26, 2016 Darling Declaration

More than three years after issuing the DOL's determination letter, and following the reversal by this Court of the District Court's prior grant of the DOL's motion to dismiss, Robert Darling, the DOL official who allegedly oversaw the audit of Rhea Lana's, submitted a new declaration claiming to describe the DOL's decision-making process as part of the AR and to provide a rationale for its decision absent from the August 26, 2013 Determination Letter. J.A. 099–102.

The Darling Declaration introduced purported elements of the DOL's analysis that are wholly absent from the final conference memorandum, the May 24th letter, or any other portion of the contemporaneous record. Despite the post-hoc nature of this declaration and its inconsistencies with the contemporaneous record, the District Court denied Plaintiffs' motion to strike the Darling Declaration and, in fact, based a significant part of its decision on the declaration's claims. The District Court also refused to permit Plaintiffs to supplement the record with a declaration from David Riner, vice president of Rhea Lana Inc., *see* J.A. 103–07 (the "Riner Declaration"), although it allowed for the declaration's consideration as part of summary judgment proceedings. *See* J.A. 035–36.

II. PROCEDURAL HISTORY

This is an appeal of a District Court decision granting summary judgment for Defendants. On January 6, 2014, Plaintiffs filed suit under the Administrative Procedure Act ("APA") to challenge the DOL's August 26, 2013 Determination Letter. *See* J.A. 015. After the District Court found that the Determination Letter did not constitute final agency action under the APA, this Court reversed that dismissal on June 3, 2016, holding that the Determination Letter constituted a final agency action by the DOL and, on this basis, remanded for further proceedings. *Rhea Lana, Inc. v. Dep't of Labor*, 824 F. 3d 1023 (D.C. Cir. 2016).

After remand, the DOL answered the Complaint on August 1, 2016. *See* J.A. 025. On September 26, 2016, the DOL filed the certified AR with the Court and served a copy on Plaintiffs. *See* J.A. 108. On December 19, 2016, the DOL supplemented the AR with an additional eighteen pages. *See* J.A. 116. In its transmission of the AR, the DOL also included the Darling Declaration. The DOL relied heavily on the Darling Declaration to support its litigation position in the District Court.

On January 4, 2017, the DOL filed its motion for summary judgment. *See* J.A. 011 (Mot. for Summ. J., ECF No. 50). On February 8, 2017, Rhea Lana's filed its combined cross-motion for summary judgment and opposition to the DOL's motion for summary judgment. *See* J.A. 012 (Cross Mot. for Summ. J.,

ECF No. 53). On March 15, 2017, the DOL filed its reply and opposition, *see* J.A. 012 (ECF Nos. 56, 57), and on March 29, 2017, Rhea Lana's filed its cross-reply and attached to it a motion to strike the Darling Declaration. *See* J.A. 012 (ECF Nos. 58, 59).

On September 26, 2017, the District Court granted Defendant's motion for summary judgment, and denied Rhea Lana's cross-motion for summary judgment and its motion to strike the Darling Declaration. *See* J.A. 081. On November 14, 2017, Plaintiffs filed a timely notice of appeal. *See* J.A. 098.

SUMMARY OF ARGUMENT

The DOL's determination that consignor/volunteers were Rhea Lana's employees under the FLSA was arbitrary and capricious for a number of reasons. First, the DOL's determination letter failed to set forth reasons for its decision, violating a basic tenet of the APA.

Second, the evidence provided in the AR indicates that, to the extent the DOL conducted a reasoned analysis of the alleged employment relationship, it did so using the wrong legal standard. Rather than applying the *Alamo* "totality of the circumstances" test used to distinguish volunteers from employees, the DOL instead focused on a seven-factor test related to whether individuals constituted independent contractors. Despite the District Court's contrary claims, this faulty analysis, with

its consideration of questionable factors, rendered the DOL's decision arbitrary and capricious.

Third, a common-sense analysis of the facts, taking into account the totality of the circumstances, indicates that the consignor/volunteers were not Rhea Lana's employees. Neither the DOL nor the District Court properly engaged in this analysis. For instance, consignor/volunteers did not have an expectation of compensation, and an opportunity to shop early did not create such an expectation. Consignor/volunteers did not economically depend in any way on Rhea Lana's, and Rhea Lana's lacked the necessary control of them. Further, the remedial purposes of the FLSA, which are a factor in determining FLSA coverage, are not furthered here. The FLSA is primarily focused on protecting workers from substandard conditions in situations of unequal bargaining power. The District Court even acknowledged that Rhea Lana's did not exploit any of the consignor/volunteers, yet somehow the court still accepted the DOL's claims that the agency's determination was consistent with the purposes of the FLSA.

Finally, the District Court abused its discretion when denying Rhea Lana's motion to strike the declaration of Robert Darling. In an APA case, courts should ordinarily consider only contemporaneous evidence, and not evidence containing new or post-hoc rationalizations. The Darling Declaration, upon which the DOL heavily relied, is a classic example of a post-hoc rationalization. This declaration

was submitted more than three years after the issuance of the DOL's final determination letter. Rather than clarifying or explaining the record, the declaration instead is inconsistent with the contemporaneous record. This Court should strike the Darling Declaration from the record or, alternatively, accord it little evidentiary weight.

ARGUMENT

I. STANDARD OF REVIEW

Review of the District Court's grant of summary judgment is *de novo*. *Castlewood Prods., L.L.C. v. Norton*, 365 F.3d 1076, 1082 (D.C. Cir. 2004); *United States v. Spicer*, 57 F.3d 1152, 1159 (D.C. Cir. 1995). Thus, the Court must determine itself whether, under the APA, agency action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm.*, 463 U.S. 29, 43 (1983) (citation omitted).

Review of the District Court's denial of Plaintiffs' motion to strike the Darling Declaration is for abuse of discretion. *Banner Health v. Price*, 867 F.3d 1323, 1334 (D.C. Cir. 2017).

II. THE DOL'S DETERMINATION WAS ARBITRARY AND CAPRICIOUS BECAUSE IT FAILED TO PROPERLY JUSTIFY ITS DECISION

A. The DOL's Determination Letter Failed to Provide Any Rationale for its Decision

The DOL's August 26th, 2013 Determination Letter concluded that consignor/volunteers were covered employees under the FLSA without providing a sufficient rationale. *See* J.A. 311. Failure to provide a sufficient rationale renders an agency decision invalid. *See Tourus Records, Inc. v. Drug Enf't Admin.*, 259 F.3d 731, 737 (D.C. Cir. 2001) ("A 'fundamental' requirement of administrative law is that an agency 'set forth its reasons' for decision; an agency's failure to do so constitutes arbitrary and capricious agency action.") (citations omitted); *Flagstaff Broad. Found. v. Fed. Commc'ns Comm'n*, 979 F.2d 1566, 1569 (D.C. Cir. 1992) ("[A]n agency's action will be set aside by a reviewing court whenever the agency fails to provide a reasoned basis for its decision.") (citations omitted).

The DOL's final determination is thus not "in accordance with law" and must be set aside. 5 U.S.C. § 706(2)(A).

In a belated attempt to provide the rationale missing in its determination letter, the DOL offered the Darling Declaration on September 26, 2016, more than three years after issuance of the determination letter. This declaration purports to describe the DOL's decision-making process. As discussed *infra* at 40–44, the Darling Declaration is nothing more than a post-hoc rationalization substituting for the

agency's failures to properly justify its decision, and it should have been stricken from the record. The basis for the DOL's decision must come from the contemporaneous record. It cannot be created later for litigation purposes. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). Review of this record indicates that the agency analyzed the alleged employment relationship using the incorrect standard and then followed that error with a determination letter containing only conclusory statements rather than the required rationale.

B. The DOL's Determination was Arbitrary and Capricious Because It Applied the Wrong Legal Standard

The FLSA's minimum wage and overtime requirements only govern here if a consignor/volunteer is an "employee" of Rhea Lana's. 29 U.S.C. § 203(e). In order to determine whether an individual is an "employee," an "'economic reality' test" taking into account the totality of the circumstances governs. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 294–95, 301 (1985). This standard is premised on the notion that "[a]n individual who, 'without promise or expectation of compensation, but solely for his personal purpose or pleasure, work[s] in activities carried on by other persons either for their pleasure or profit,' is outside the sweep of the [FLSA]." *Id.* at 295 (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

When taking into account the totality of the circumstances, no particular factors are "dispositive; rather, it is incumbent upon the courts to transcend traditional concepts of the employer-employee relationship and assess the economic realities presented by the facts of each case." *Ellington v. City of E. Cleveland*, 689 F.3d 549, 555 (6th Cir. 2012) (quotes and citation omitted); *accord Morrison v. Int'l Programs Consortium*, 253 F.3d 5, 11 (D.C. Cir. 2001) (noting that "courts are directed to look at the totality of the circumstances and consider any relevant evidence").

The analysis of the economic realities in each case stems from the application of common sense. *Todaro v. Township of Union*, 40 F. Supp. 2d 226, 230 (D.N.J. 1999) (employee status "must be applied in a common-sense way that takes into account the totality of the circumstances surrounding the relationship between the person providing services and the entity for which the services are provided, in light of the goals of the FLSA").

The DOL failed to apply this standard in 2013 and instead focused on factors related to whether individuals constituted "independent contractors." The DOL claimed below, and the District Court accepted, that it applied the appropriate test to reach its determination. Def.'s Mem. of P. & A. in Support of Mot. for Summ. J. at 12, ECF No. 50 [hereinafter "Def.'s Summ. J. Br."]; J.A. 090. However, insufficient evidence, if any, exists in the AR to support such a position.

The DOL did not investigate and analyze this matter using the *Alamo* totality of the circumstances framework because it started with the conclusory premise that individuals cannot volunteer with for-profit companies. *See, e.g.*, U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1999 DOLWH LEXIS 103, at *2–3 (Sept. 30, 1999) (noting "longstanding policy of limiting volunteer status to those individuals performing charitable activities for not-for-profit organizations"); *see also* J.A. 102 (Darling Decl. ¶ 9). This misguided policy, which underlies its entire investigation and enforcement position, was never approved by any court and is inconsistent with the law.[8]

The DOL then shifted its focus to an analysis not aimed at differentiating between volunteers and employees but instead to a seven-factor test designed to address the question of whether consignor/volunteers were independent contractors.

[8] The District Court did not address the propriety of the DOL's policy prohibiting volunteer activities at for-profit corporations except to note it "likely that the Department's decades-old interpretation and consistent application of its policy weigh in favor of its persuasiveness[.]" J.A. 096 (Mem. Op. at 15 n.4). But as Rhea Lana's argued below, this policy, developed largely through interpretive opinion letters, lacks the force of law and cannot bind Plaintiffs. *See, e.g.*, *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters . . . do not warrant *Chevron*-style deference."). Further, this policy, regardless of its age or the consistency of its application by the DOL, conflicts with the Supreme Court's interpretation of the FLSA as laid out in *Alamo*, as *Alamo's* plain language recognizes the possibility that one could volunteer for the profit of another but still fall outside of the FLSA's coverage. *See Okoro v. Pyramid 4 Aegis*, No. 11-267, 2012 WL 1410025, at *8 (E.D. Wis. Apr. 23, 2012).

As the DOL later admitted, this question was irrelevant to the DOL's determination in 2013. Def.'s Summ. J. Br. at 12. The DOL ultimately concluded that consignor/volunteers were not independent contractors and, on this basis, determined they therefore must be employees. *See* J.A. 299–310. But the DOL asked the wrong question and applied the wrong standard. *See, e.g., Okoro v. Pyramid 4 Aegis*, No. 11-267, 2012 WL 1410025, at *6 (E.D. Wis. Apr. 23, 2012) ("[T]his six-factor test . . . is generally utilized in deciding the question of whether a worker is an employee or an independent contractor. But, here, the question is not whether *Okoro* was an employee or an independent contractor. The relevant question is whether Okoro was an employee or a volunteer.").

The record is replete with references to the application of the independent contractor test. The DOL's investigation repeatedly cited factors deemed significant to determining independent contractor status. *See* J.A. 257–259, 303–06. "[T]he court must also look beyond the scope of the decision itself to the relevant factors that the agency considered." *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1216 (11th Cir. 2002) (citing *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43).

The District Court held that the DOL only made "occasional reference" in the record to independent contractor factors. J.A. 091. This is misleading at best. The DOL did not merely occasionally refer to these factors; its analysis of these factors

formed the entire basis for its decision. In fact, the DOL's Final Conference Memorandum explicitly lists the "factors considered significant to determin[ing] independent contractor or employee [status] for purposes of the FLSA," and then proceeds to analyze Plaintiffs' case using those factors. J.A. 257–62. This same test is reiterated in the June 18, 2013 FLSA Case Narrative. J.A. 299–309. These are the central contemporaneous records indicating how the DOL reached its determination. Since the DOL applied these factors, rather than the proper standard, its decision was arbitrary and capricious.

The District Court further held that the DOL did, in fact, use the correct test despite its reliance on the independent contractor factors, but this too is belied by the record. In reaching this conclusion, the District Court relied heavily on analysis contained in the Darling Declaration. J.A. 089, 090, 092, 095. Even if admitted into the record, the Darling Declaration should be accorded little weight. The AR reflects the standard the DOL actually applied when it conducted its investigation, including the contemporaneous analysis it employed. The Darling Declaration, drafted three years later and for purposes of this litigation, adds factors to the DOL's analysis that do not appear in the contemporaneous record in an attempt to suggest that the DOL applied the proper standards all along. Such post-hoc rationalizations are highly suspect. The Darling Declaration is a virtual repudiation of what the DOL stated it was doing at the time of the audit.

The DOL may provide after-the-fact explanations illuminating matters that are "implicit" in the AR, but it may not defend the Determination Letter based on newfound rationalizations that did not actually animate it at the time. *Ardila Olivares v. Transp. Sec. Admin.*, 819 F.3d 454, 463–64 (D.C. Cir. 2016) (allowing the submission of affidavit filed four months after final agency action, but noting that "[t]he critical point is that the [agency] Declaration contains 'no new rationalizations'; it is 'merely explanatory'") (citation omitted); *Consumer Fed'n of Am. & Pub. Citizen v. Dep't of Health & Human Servs.*, 83 F.3d 1497, 1506–07 (D.C. Cir. 1996); *see T-Mobile S, LLC v. City of Roswell*, 135 S. Ct. 808, 816 n.3 (2015) (reviewing court must ensure that "reasons are not *post hoc* rationalizations").

The District Court further maintained that submission of the Darling Declaration was appropriate because, at the time of the 2013 Determination Letter, the DOL "did not consider it a final agency action subject to APA review, and therefore did not include the basis for its decision in the letter itself." J.A. 089 (Mem. Op. at 8 n.1).

The DOL and Mr. Darling may not have considered its 2013 letter final agency action, but it certainly was on notice and anticipated that Plaintiffs would challenge the letter. As Mr. Darling himself stated in a memo to his colleague, Nadia De La Rosa, dated June 27, 2013:

> ER has filed multiple congressionals, written an article in the USA today and appeared on numerous television news pieces. The attorney has stated that their goal is to get WH to litigate with them. Additionally, ER states that when the case is concluded, they intend to request an opinion letter from the Administrator.

J.A. 296.

Given this statement in an internal DOL memo, written two months prior to the issuance of the Determination Letter, the DOL should have recognized the likelihood of a legal challenge to its determination and thus provided its rationale in that letter and certainly long before it did so three years later.[9] In any event, this Court held that the letter constituted final agency action and is thus subject to the same rules on contemporaneous records as all other actions, regardless of the DOL's erroneous and subjective view. *See Rhea Lana, Inc. v. Department of Labor*, 824 F.3d 1023 (D.C. Cir. 2016).

The District Court also suggested that an August 30, 2013 letter written by Laura Fortman, then-Principal Deputy Administrator of the WHD, in response to a congressional inquiry indicates that the DOL applied the correct test in this case. J.A. 091. But little in this letter suggests that the DOL's determination was based on an *Alamo* analysis, as applied to Rhea Lana's.

[9] For these reasons and as discussed in more detail, *infra* at 40–44, the Darling Declaration should have been stricken from the record.

The letter mostly responds to the broader issues raised by the congressional inquiry in which Congressmen Griffin raised the concept of volunteer exemptions. The only analysis relating specifically to Rhea Lana's workers states that "workers who considered themselves to be 'volunteers' and any consignors who also worked at the event . . .were found to be employees. The WHD determined that the 'volunteers' and 'consignor volunteers' engaged in activities that are an integral part of the Rhea Lana's FLSA-covered, for-profit business." J.A. 319.

Far from supporting the District Court's ruling, the letter suggests that the DOL's decision was based on a reflexive application of its non-binding "no volunteers at for-profits" policy, as well as a confused attempt to apply an independent contractor analysis. Further, both Ms. Fortman's letter and an earlier letter from Robert Darling to Congressman Griffin attached Fact Sheet #13. *See* J.A. 294, 318. The attachment of this fact sheet, with its use of independent contractor factors, as part of the response to Mr. Griffin, reveals that this was the operative analysis employed by the DOL. Finally, the letter was factually incorrect: there were no workers who considered themselves to be only volunteers—all the volunteers were also consignors.

In discussing the factors used by the DOL when issuing its Final Conference Memorandum, the District Court acknowledged that "several of the factors typically

relied on by courts that hail from the traditional employee/independent contractor test may not fit the specific context presented here, where the allegation is that the putative employees are volunteers," and that the DOL "may have looked to some specific *factors* that are better suited to the independent contractor-versus-employee scenario[.]" J.A. 090. However, the District Court concluded that since the DOL considered a "multitude of factors," it was not arbitrary and capricious for the department also to consider factors not suited to this specific context. J.A. 090–91.

But the District Court's analysis once again misses the point. While it might not be arbitrary and capricious by itself to examine some of the factors more relevant to independent contractor status, it is arbitrary and capricious to examine the entire matter through the wrong lens. That is what the DOL did here—having already dismissed out of hand any notion that a for-profit company could lawfully engage volunteers it then proceeded to examine the matter through a faulty framework. An arbitrary and capricious process thus led to an arbitrary and capricious result.

Moreover, some of the independent contractor factors analyzed by the DOL, as evident in the Final Conference Memorandum and elsewhere, were irrelevant to the situation here, rendering much of the DOL's analysis nonsensical.

For instance, three of the factors the DOL analyzed were (1) the amount of the alleged contractor's investment in facilities and equipment; (2) the amount of

initiative, judgment, or foresight in open market competition with others; and (3) the degree of independent business organization and operation. J.A. 257–59. None of these categories, which may in fact be relevant to an analysis of independent contractor status, make any sense in the context of analyzing the status of the consignor/volunteers. Use of such categories as central elements of the DOL's analysis indicates arbitrary and capricious decision-making.

III. UNDER THE PROPER FLSA FRAMEWORK, THE DOL'S DETERMINATION THAT THE CONSIGNOR/VOLUNTEERS WERE EMPLOYEES WAS ARBITRARY AND CAPRICIOUS

A. A Common-Sense Analysis of the Facts in this Case Demonstrates that No Employment Relationship Exists between Rhea Lana's and the Consignor/Volunteers.

The *Alamo* standard governs the determination in this case: "An individual who, 'without promise or expectation of compensation, but solely for his personal purpose or pleasure, work[s] in activities carried on by other persons either for their pleasure or profit,' is outside the sweep of the [FLSA]." 471 U.S. at 295 (citation omitted).

This standard must be applied using a totality of the circumstances, common sense approach. *See Morrison*, 253 F.3d at 11; *Okoro*, 2012 WL 1410025, at *9 ("It is the examination of objective indicia and the application of common sense with which this court arrives at its determination of whether the plaintiff here is an employee for purposes of the FLSA."). Under this totality approach, the

consignor/volunteers at issue in this case cannot plausibly be considered employees covered under the FLSA.

Rhea Lana's hosts week-long "pop-up" events three times a year that resemble a neighborhood garage sale or classic craft fair. Individuals, primarily mothers and grandmothers, help put on the sale so that they can sell their own gently-used children's goods and clothing while buying similar items from others. The notion that these consignors become Rhea Lana's employees because they volunteer at these events and enjoy an early shopping perk defies common sense.

As shown below, the District Court erred in holding that "substantial evidence supports the [DOL's] other factual conclusions and, under the totality of the circumstances test, the factors that Rhea Lana's highlights do not outweigh the other factors that the [DOL] reasonably concluded support employee status." J.A. 096.

B. Consignor/Volunteers Did Not Have an Expectation of Compensation

The District Court found that the most important factor weighing in favor of finding the consignor/volunteers employees is that they "expected to receive 'in-kind' benefits for their work." J.A. 092–93. The District Court based this on the fact that consignor/volunteers receive an opportunity to shop earlier than the public. Yet this "benefit" merely allows consignor/volunteers the opportunity to spend their own money at a pre-sale with a larger inventory of used goods. J.A. 121 (DOL

internal report stating that early shopping passes are of "no value other than they allow the volunteers to buy the good stuff"). The opportunity comes with no discount on any of the goods available. It defies common sense to call this "compensation" in terms of determining FLSA coverage and establishing an employment relationship under a totality of the circumstances standard.

The *Alamo* case presents a stark contrast. In *Alamo*, the foundation's associates received food, shelter, transportation, clothing, and medical benefits, all in a context of complete dependence "on the Foundation for long periods, in some cases several years." *Alamo*, 471 U.S. at 301 (quotes and citation omitted). Several former associates testified that they had been "fined" for poor job performance and were denied food if they failed to show up at work. *Id.* at 301 n.22. Some further testified that they were often required to work as long as twelve to fifteen hours per day, six or seven days per week, sometimes without sleep. *Donovan v. Tony & Susan Alamo Found.*, 567 F. Supp. 556, 562 (W.D. Ark. 1982), *aff'd in part, vacated in part, and remanded on other grounds*, 722 F.2d 397 (8th Cir. 1983).

In contrast to *Alamo*, Rhea Lana's consignor/volunteers receive only an early shopping opportunity, J.A. 299–310, not tangible benefits, and they are not economically dependent on Rhea Lana's. J.A. 215–16, 220; *see Morrison*, 253 F.3d at 11 ("'It is *dependence* that indicates employee status. Each test must be applied

with that ultimate notion in mind.'" (quoting *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311–12 (5th Cir. 1976))); *Emanuel v. Rolling in the Dough, Inc.*, No. 10-2270, 2012 WL 5878385, at *3–4 (N.D. Ill. Nov. 21, 2012) (refusing to infer employment relationship when plaintiff worked at a pizza franchise to help her domestic partner, the store manager, but where the corporation continuously advised plaintiff that she would receive no compensation).

The fact that, as the District Court claimed, the consignor/volunteers placed "some relative value" on the early shopping opportunity does not transform them into employees. J.A. 093. Not everything one values is equivalent to a compensable benefit, nor do all exchanges of value create an employment relationship. And as the *Morrison* court noted, "'the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of the FLSA or are sufficiently independent to lie outside its ambit.'" 253 F.3d at 11 (quoting *Usery*, 527 F.2d at 1311–12).

Nor does the fact that consignor/volunteers "as a group" might have "lacked purely altruistic motives" remove them from volunteer status into the realm of employee status. J.A. 096. This is a cramped view of the *Alamo* standard and, if correct, would mean that the trainees in *Walling v. Portland Terminal Co.*, 330 U.S.

148 (1947), would also be considered employees, since they too lacked altruistic motives.

Further, no evidence exists in the AR that the DOL considered the ability to shop early a form of compensation. In fact, the AR demonstrates the opposite. The DOL even conceded that the early shopping pass had no inherent or intrinsic value. J.A. 121 (early shopping passes are of "no value other than they allow the volunteers to buy the good stuff").

The District Court also erred in citing the "bartering agreement" as evidence of "some relative value" that consignors placed on shopping early. *See* J.A. 093.

The specific bartering agreement putatively relied on by the DOL was used only by a Tulsa, Oklahoma franchisee. J.A. 104 (Riner Decl. ¶ 6). Other similar agreements were used only briefly, long before the DOL investigation was completed, and were abandoned as misrepresenting the relationship between Plaintiffs and its consignors. J.A. 105 (Riner Decl. ¶¶ 8, 9). The nonexistence of such agreements during the DOL's investigation and throughout the remainder of Plaintiffs' 20-year business history demonstrates the minimal weight they should be accorded in determining the economic reality of its relationship with consignors. J.A. 203; *see infra* at 42–43.[10]

[10] Note too that the current version of DOL Fact Sheet #13 indicates that agreements signed between employers and workers are not determinative of employment status: "[T]he reality of the working relationship – and not the label given to the relationship

C. Individuals Are Not Employees Under the FLSA Simply Because Rhea Lana's Received a Benefit from Their Activity

The District Court accepted the DOL's argument that Rhea Lana's received an immediate advantage from the consignor/volunteer work and cited it as one of two "particularly critical" factors – alongside early shopping – in determining that the consigner/volunteers were employees. J.A. 094. But if this were a critical factor, the DOL should have found that all of the pure consignors (*i.e.*, consignors who strictly consign and do not volunteer) were employees, as pure consignors also had an opportunity to shop early before the events opened to the public. J.A. 127, 137, 145. Some pure consignors also entered items for sale into the computer system, packaged and prepared items for sale, tagged items, checked-in and priced items, and placed their items on display racks. J.A. 142, 144. This activity arguably conferred an immediate advantage on Rhea Lana's as well. The fact that the DOL did not claim that any of these pure consignors were employees illustrates the arbitrary and capricious nature of its determination.

Properly analyzing this factor, in context and using a totality of the circumstances approach, should have produced a different outcome. *See*, *e.g.*, *Patel v. Patel*, No. 14-0031, 2014 WL 6390893, at *7 (E.D. Cal. Nov. 17, 2014) (finding

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in an agreement – is determinative." U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA), *available at* https://www.dol.gov/whd/regs/compliance/whdfs13.pdf (last visited Feb. 12, 2018).

that despite providing a variety of managerial services at defendant's lodge for several years, plaintiff was not an employee since she did not work with a promise or expectation of compensation.).

The cases relied on by the District Court—*Okoro*, 2012 WL 1410025, and *Hugler v. Cathedral Buffet*, No. 15-1577, 2017 WL 1287422 (N.D. Ohio March 29, 2017), *appeal filed*, No. 17-3427 (6th Cir. Apr. 26, 2017)—do not support its ruling.

In *Okoro*, the plaintiff worked for a residential care facility and expected to be paid $2000 a month for her work. She agreed only to defer her compensation, and the defendants expected to pay her if certain conditions were met. *Id.* The plaintiff worked for defendants for almost one year. *Okoro*, 2012 WL 1410025, *10. It was in this context that the court held that the benefit defendants gained from Okoro's work weighed in favor of finding employment status. *Id.*

In *Hugler*, church members worked at a restaurant owned by the church and were told that they had a religious obligation to provide labor to the restaurant and that failure to do so would be the "same as failing God." 2017 WL 1287422, at *3. Members were "pressured or coerced into volunteering." *Id.* A high level of supervision and control was exerted over these volunteers. *Id.* at *11. In such a setting, the economic reality indicated that the defendant restaurant was "exploiting

free labor from individuals in furtherance of its commercial, for-profit activities." *Id*.

In contrast, here, no consignor/volunteer contemplated or had an expectation of obtaining a full-time paid job with Rhea Lana's. No consignor/volunteers were coerced in any way to participate at the events.

Rhea Lana's did not oversee the work of consignor/volunteers and never evaluated performance. J.A. 223, 304. Consignor/volunteers worked for very short periods of time. J.A. 183, 217–18, 227. Approximately half of them participated only once a year. J.A. 225; *see Perez v. C.R. Calderon Constr., Inc.*, 221 F. Supp. 3d 115, 140–41 (D.D.C. 2016) (economic reality involves "the duration of the relationship between the parties"), *appeal filed*, No. 17-7010 (D.C. Cir. Jan. 27, 2017). The facts in this case are not comparable to those in *Okoro* and *Hugler*.

D. The District Court Misinterpreted Other Parts of the Record

1. Reliance on two emails regarding the importance of volunteers is misplaced

The District Court references two Rhea Lana's emails, dated July 27 and September 3, 2011, as evidence of Rhea Lana's dependence on volunteers, thus suggesting that these emails are significant evidence in favor of the DOL's determination. J.A. 094. However, these emails are neither referenced in the May 20, 2013 Final Conference Memorandum nor the June 18, 2013 FLSA Case

Narrative. *See* J.A. 257–62, 299–310. Only Mr. Darling's declaration, written more than three years after the fact, claims to have relied on these emails.

The District Court erred in stating that a September 3, 2011 Rhea Lana's email offered to pay an hourly wage "for people to work in sales when insufficient volunteers signed to staff the necessary shifts." J.A. at 094. This is an inaccurate reflection of this email. The email merely requests paid help—it says nothing about needing this help as a replacement for an insufficient number of volunteers. J.A. 287. The District Court read in a linkage between volunteers and paid help where none exists.

The July 27, 2011 email, in which Rhea Lana's stated that volunteers "are the lifeblood of our events," is an innocuous comment in the middle of a communication. Leaders often use this type of language to laud those involved with their organizations no matter their type of role, from sports teams crediting fans for victories to businesses acknowledging customer service as essential to their existence. *See, e.g.*, Allison Cary, *Tom Sermanni: Supporters Are "The Lifeblood Of Any Team,"* Orlando City SC, Sept. 9, 2016, http://bit.ly/2DZo4wq; Sarah Metcalfe, *Why Excellent Customer Service Is The Lifeblood Of Our Business*,

NewVoiceMedia, May 6, 2015, http://bit.ly/2DqIE86. The lifeblood of any organization flows through more people than just its employees.[11]

Nor is there evidence that the DOL sought clarity on the import of this statement. The AR shows no record of the DOL asking anyone at Rhea Lana's to explain what was meant by this statement or whether such statements or comments were made elsewhere. The DOL now claims it is an "admission" that was "[p]articularly relevant . . . in concluding that the workers were employees." J.A. 100–01 (Darling Decl. ¶ 6). However, such a statement is belied by the AR, which ignored this "particularly relevant" factor.

2. Rhea Lana's lacked control over the consignor/volunteers

While the District Court claimed that Rhea Lana's exercised a degree of control associated with an employer, the record indicates the opposite. Rhea Lana's had no power to hire and fire the consignor/volunteers. J.A. 304; *see Henthorn v. Dep't of Navy*, 29 F.3d 682, 684 (D.C. Cir. 1994) (detailing factors for consideration of economic reality including control of hiring and firing).

[11] Even the Justice Department considers non-employee workers part of the lifeblood of its organization. *See* Dep't of Justice, Memorandum from Deputy Att'y Gen. to All Department of Justice Employees and Contractors re Government Shutdown (Jan. 22, 2018), *available at* https://www.justice.gov/doj/page/file/1027721/download (calling employees and contractors "the lifeblood of the Department of Justice.").

Rhea Lana's does not control the schedules of the consignor/volunteers. J.A. 141, 167, 225. Consignor/volunteers have the option to choose whether to participate in any given event. J.A. 190–91, 225. Individuals sign up on the website for a time slot convenient to their personal schedule. *See* J.A. 241–50. Consignor/volunteers can pick not only the time they want to volunteer, but also decide how they want to offer their services. J.A. 224; *see* 241–50. Some consignor/volunteers choose to help fold clothes, assist during event check-in, or bring snacks for the other volunteers. *See Morrison*, 253 F.3d at 11 (lack of control a factor in determining relationship); *Henthorn*, 29 F.3d at 684. The consignor/volunteers are not under employer supervision while volunteering at the consignment events. *See Morrison*, 253 F.3d at 11; *Henthorn*, 29 F.3d at 684. Very little training is needed as most tasks take "sixty seconds" to learn. J.A. 223. Throughout the event, many consignor/volunteers just "look around and do what needs done." J.A. 223. The consignor/volunteers are not expected to perform work in a particular manner and there are no methods for folding, sorting, or otherwise displaying items. J.A. 224. There is no oversight of the work, no baseline standard for performance, and no policy for evaluating performance or reprimanding for failure. J.A. 223–224.

E. The DOL's Determination Does Not Comport with the Remedial Purposes of the FLSA

The Supreme Court long ago identified the primary purpose of the FLSA as aiding "the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945). The FLSA was passed "in an 'effort to eliminate low wages and long hours . . . and conditions that were detrimental to the health and well-being of workers.'" *Todaro*, 40 F. Supp. 2d at 230 (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947)); *see* 29 U.S.C. § 202(a).

It is hard to contemplate how imposing FLSA coverage on the consigner/volunteers furthers these purposes. The District Court failed to grapple with this at all, stating only that FLSA is "generally interpreted in favor of workers' rights." J.A. 095. That may be correct but it also misses the point. The FLSA is designed to protect workers from exploitation. But none of the consigner/volunteers require protection and none have sought it. All volunteered willingly to help ensure successful consignment events (which they participated in as co-venturers) and for the perk of shopping early. *See* J.A. 190–91, 194, 226; J.A. 018 (Compl. ¶ 25); J.A. 025 (Answer ¶ 25). These are not unprotected workers lacking in bargaining power or workers toiling away for long hours in sub-standard conditions. Common sense

dictates that this activity does not require remediation of the type contemplated by the FLSA.

The District Court itself recognized that Rhea Lana's labor practices are not "designed to exploit consignors who volunteer to assist with sales." J.A. 097. This acknowledgment undercuts the notion that the DOL's actions were consistent with the FLSA's remedial purposes, even if the District Court failed to draw that obvious conclusion.[12]

Further, the District Court also rejected the significance of Rhea Lana's argument that its actions were consistent with consignment event industry standards, stating that this is "beside the point since industry standards are not one of the economic reality factors courts have traditionally turned to in their analysis." J.A. 096. This did not address Rhea Lana's argument, which was offered to rebut the

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[12] During the hearing on the summary judgment motions, the District Court, in a discussion with DOL counsel, appeared to recognize that Rhea Lana's practices were not contrary to the FLSA's remedial purposes as expressed in *Alamo*:

> THE COURT: But the concern there, wasn't it, was the notion of unequal bargaining power and that employees could be coerced into saying that they really wanted to volunteer their labor, when, in fact, they should be being paid. There's nothing like that here, is there?
>
> MR. MYERS: Your Honor, there's no evidence of coercion in this record, but with respect --
>
> THE COURT: But isn't that -- I get it that the FLSA is to be interpreted broadly, but isn't that the remedial concern that *Alamo* addressed?
>
> MR. MYERS: Yes, Your Honor[.]

J.A. 051 (June 21 Hr'g Tr. 10:14-25).

DOL's claims that Rhea Lana's was getting an unfair competitive advantage from the work of the consignor/volunteers, contrary to the purposes of the FLSA.

In fact, Rhea Lana's gains no unfair advantage as the entire consignment event industry operates on this same model. S*ee e.g.*, *Shop*, Up Up and Away Kids Consignment, http://bit.ly/2DEZhA6 (last visited Jan. 23, 2018) ("[Consignor/volunteers] shop 2 days before the public. . . . Your Pre-Sale pass will allow you and 1 guest to shop for free based on how many shifts you are working during the sale"); *Frequently Asked Questions*, Duck-Duck-Goose, http://bit.ly/2EogJpP (last visited Feb. 13, 2018) ("Each additional shift allows you to shop earlier."); *see* J.A. 192, 204–06.

Here, Rhea Lana's obtains no unfair advantage by offering volunteer opportunities but merely acts consistent with industry standards. *See William J. Lang Land Clearing, Inc. v. Adm'r, Wage & Hour Div., Dep't of Labor*, 520 F. Supp. 2d 870, 882 (E.D. Mich. 2007) (justifying the DOL's final decision because it also appeared "to be consistent with the prevailing practice of Michigan contractors."). The DOL's Determination Letter, if upheld, would actually hamper Rhea Lana's ability to compete.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' MOTION TO STRIKE THE DARLING DECLARATION

Despite the Darling Declaration's inconsistencies with the contemporaneous record, the District Court allowed the declaration into the record, holding that it

provided an "explanation of the administrative record that is necessary to facilitate judicial review." J.A. 089 (Mem. Op. at 8 n.1). This decision was an abuse of discretion.

The Court should strike an affidavit or declaration offered in support of a motion for summary judgment where it is not based on personal knowledge, sets out facts that are not admissible in evidence, or where the declarant is not competent to testify on the matters set forth in the declaration. Fed. R. Civ. P. 56(c)(4); *Canady v. Erbe Elektromedizin GmbH*, 384 F. Supp. 2d 176, 180 (D.D.C. 2005). In an APA case, the court may not consider as evidence any "new rationalizations" for agency action. *Olivares*, 819 F.3d at 463–64 (allowing the government to submit an affidavit filed four months after the final agency action, but stating "[t]he critical point is that the [agency] Declaration contains 'no new rationalizations'; it is 'merely explanatory of the original record,' and thus admissible for our consideration") (citation omitted). Any "'*post hoc* rationalizations' for agency action" are "impermissible." *Id.* (citing *Tourus Records, Inc.*, 259 F.3d at 738).

The Darling Declaration is a textbook example of a post-hoc rationalization for agency action. The Declaration was submitted on September 26, 2016, more than three years after the issuance of the agency's final determination letter.

Rather than furnishing an explanation for the agency's action, the Declaration instead contradicts the analysis already provided in the contemporaneous record, including by deeming several items "particularly relevant" to the DOL's determination that either do not appear to have played a role or should not have played a role in the 2013 determination.

1. Rhea Lana's July 22, 2011 and July 27, 2011 emails to sign up to volunteer in exchange for the opportunity to shop early (J.A. 271, 283)

These emails are referenced in neither the May 20, 2013 Final Conference Memorandum nor the June 18, 2013 FLSA Case Narrative. *See* J.A. 257–62, 299–310. To the extent Mr. Darling and the DOL relied on such information, the DOL should have asked Rhea Lana's about the contents of these emails. The AR demonstrates that the DOL failed to do so. *See* J.A. 106–07 (Riner Decl. ¶¶ 14–15).

2. The August 24, 2011 "Official Bartering Agreement"

Mr. Darling claims to have relied on a "bartering agreement" between certain volunteers and Rhea Lana's. However, neither the Final Conference Memorandum nor the FLSA Narrative Memorandum refer to the bartering agreement. *See* J.A. 257–62, 299–310. In fact, the AR does not contain a single reference to it except for the one-page print out. J.A. 286.

The "bartering agreement" was not related to any consignment event that Rhea Lana's itself organized and was not used in the state of Arkansas. J.A. 104 (Riner Decl. ¶ 6). This agreement was obtained from, and relates to, a Rhea Lana's franchisee located in Tulsa, Oklahoma. J.A. 286. It has no relevance to the operation of any Rhea Lana's events organized in Arkansas. J.A. 105 (Riner Decl. ¶ 8).

The DOL never mentioned or asked questions about this Tulsa bartering agreement or otherwise indicated that the Tulsa bartering agreement was relevant to its conclusions. This deprived Plaintiffs of the necessary opportunity to demonstrate the agreement's insignificant role in the totality of the circumstances surrounding their business. J.A. 104 (Riner Decl. ¶ 7).

Further, no documents of this sort have been in use at Rhea Lana, Inc. or at any franchise after the January 19, 2012 Consent Agreement with Arkansas. *See supra* at 3. If this is, in fact, a relevant document, the DOL should have also considered relevant the fact that it was void and long out of use.

3. September 3, 2011 Email Offering To "Pay People $8 Per Hour To Work Shifts At The Sales"

Mr. Darling claims to have also relied on a September 3, 2011 Rhea Lana's email seeking paid help for a three-hour period at a single consignment event in 2011. J.A. 287. The AR contains no references beyond this email to any such similar offers. Moreover, neither the Final Conference Memorandum nor the FLSA

Narrative Memorandum refer to this email upon which the DOL purportedly relied in 2013. *See* J.A. 257–62, 299–310; *see also supra* at 34-35.

4. Volunteers as the "lifeblood" of the events

As noted, *supra* at 34-35, the contemporaneous record does not support Mr. Darling's claim that this throwaway comment in the middle of an email formed a significant part of the DOL's determination.

Because the Darling Declaration is inconsistent with the contemporaneous analysis and because it was submitted more than three years after that analysis was conducted and a final determination issued, the District Court abused its discretion in allowing it into the record. This Court should reverse that decision and strike the Darling Declaration from the record. Alternatively, the Court should accord this declaration little evidentiary weight.[13]

[13] Additionally, in the May 24, 2013 letter to Congressmen Tim Griffin, Mr. Darling refers to the May 20, 2013 meeting with Rhea Lana's, at which the "results of the investigation" were discussed (presumably based on the final conference memorandum also dated May 20, 2013). J.A. 293. Mr. Darling also encloses Fact Sheet #13, which details the independent contractor factors. Nothing in the May 24th letter indicates that the DOL was considering any other factors beyond those presented at the time. *See supra* at 10-11.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court; declare that the consignor/volunteers are not Rhea Lana's employees under the FLSA; set aside the August 26, 2013 Determination Letter as arbitrary, capricious, or not in accordance with law under the APA; and order any other relief as the Court may find just and proper.

Date: February 16, 2018

Respectfully submitted,

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ADDENDUM

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5 U.S.C. § 706 – SCOPE OF REVIEW

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

29 U.S.C. § 202 – CONGRESSIONAL FINDING AND DECLARATION OF POLICY

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

29 U.S.C. § 203 – DEFINITIONS

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)

(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the [1] Government Publishing Office;

(B) any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)

(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee

shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average

value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—

(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and

(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.

(o) Hours Worked. In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r)

(1) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons—

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

(s)

(1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that—

(A)

(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) “Secondary school” means a day or residential school which provides secondary education, as determined under State law.

(x) “Public agency” means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

(y) “Employee in fire protection activities” means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(e)(2(C), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e)(2)(B) because it contains 10,307 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1). I hereby certify that this brief also 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

Date: February 16, 2018

/s/Joshua N. Schopf
Joshua N. Schopf

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2018 I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

Date: February 16, 2018

/s/Joshua N. Schopf
Joshua N. Schopf