13-4480-cv

United States Court of Appeals

for the

Second Circuit

XUEDAN WANG, on behalf of herself and all others similarly situated, ELIZABETH MANCINI, MATTHEW JORDAN WAGSTER, STEPHANIE LAUREN SKORKA, ERIN E. SPENCER, ALEXANDRA RAPPAPORT, SARAH WHEELS, CAITLIN LESZUK,

Plaintiffs-Appellants,

JESSICA ANN BEST, PAUL VANCE, COURTNEY HOLT, JANET E. GLAZIER, REBECCA E. DIXON, ERIN D. SULLIVAN, CARLY ROCKWELL, DANA LYNN VOGEL,

Plaintiffs,

– v. –

THE HEARST CORPORATION,

Defendant-Appellee.

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

Hearst provides no support for its argument that *Walling v. Portland Terminal Co*., 330 U.S. 148 (1947) supports a primary beneficiary test. *Portland Terminal* explicitly relied on the undisputed fact that the railroads received no "immediate advantage" from the brakemen trainees to hold that they were not employees. *Id*. at 153.

The test that Plaintiffs propose – the U.S. Department of Labor's six criteria for unpaid internships ("DOL Test") – incorporates all of the relevant factors in *Portland Terminal* and is sufficiently narrow to comport with the Fair Labor Standards Act's ("FLSA's") broad "employee" definition.

Hearst does not even try to rebut the evidence that Plaintiffs functioned as regular members of its staff during their internships. It admits that, for months, each Plaintiff performed productive work: organizing its fashion closets; holding casting calls; preparing for and staffing events; creating marketing spreadsheets; and transcribing, interviewing, and fact-checking. Their work did not duplicate paid employees' work – it replaced it – and undisputedly provided Hearst with an "immediate advantage." 330 U.S. at 153.

Hearst relies almost entirely on its so-called academic credit "requirement" to justify its failure to pay interns for their work. First, there was no academic credit requirement at Hearst, just a poorly enforced preference designed to evade

FLSA liability. Moreover, the receipt of credit is not a proxy for a *bona fide* training program – the proper focus is on the training itself, which was deficient at Hearst. Schools have many reasons for granting academic credit for internships and should not be empowered to determine employers' FLSA obligations. Employers must be responsible for the content of their internship programs and should not be allowed to hide behind schools' policies to excuse unlawful compensation policies.

The Court should decide summary judgment in Plaintiffs' favor and not remand the issue. Applying the standard that the Court adopts to Plaintiffs' facts will not be difficult because the key facts, set forth fully in Plaintiffs' Opening Brief ("Pls.' Br."), are not in dispute. Hearst hardly even addresses them. Under any test, Plaintiffs were employees. Even if they benefitted "enormously" from the office skills, school credit, and career advice they obtained, these benefits do not offset the productive work they provided to Hearst. *Archie v. Grand Central P'ship, Inc.*, 997 F. Supp. 504, 533 (S.D.N.Y. 1998) (Sotomayor, J.).

Finally, the Court should also review the legal issues underlying the district court's class certification decision. The classwide evidence, including job descriptions, intern and supervisor testimony, and other Hearst documents uniformly show that interns regularly performed productive work, and that Hearst

relied on this work to run its operations. This evidence will answer key questions under the correct merits standard.

ARGUMENT

I. Hearst Misconstrues *Portland Terminal* and the Legal Standard that Plaintiffs Propose.

A. Hearst Fails to Identify Any Support in *Portland Terminal* for Its Primary Beneficiary Test.

Hearst points to nothing in *Portland Terminal* that even suggests that the Supreme Court endorsed a primary beneficiary test. The Supreme Court did not weigh the benefits that the brakemen trainees received against the benefits that the railroads received. *Portland Terminal*, 330 U.S. at 150-53; Pls.' Br. 34. Instead, it repeatedly emphasized that the trainees were not employees because the railroads did not receive *any* direct benefits from the trainees' work and the trainees derived *all* of the benefits from the training. *Portland Terminal*, 330 U.S. at 150-53.

Hearst's argument hinges on three words in *Portland Terminal* that Hearst takes out of context. Hearst claims that, according to the Supreme Court, "the ultimate question" for determining an individual's employment status "is whether the company or the individual 'most greatly benefited' from the work performed." Def.'s Opp'n 10 (quoting *Portland Terminal*, 330 U.S. at 153).

The Supreme Court did not say this at all. It did not use the phrase "most greatly benefited" to compare the benefits that the trainees received with the

benefits that the railroads received. It used it to describe a type of training program that can fall outside of the FLSA: "The Fair Labor Standards Act was not intended to penalize railroads for providing, free of charge, the same kind of instruction [as a vocational school] *at a place and in a manner which would most greatly benefit the trainees*." *Portland Terminal*, 330 U.S. at 153 (emphasis added). The "most greatly benefit[s]" language simply compares the "place and . . . manner" of the railroad training program with some other "place and . . . manner" that would be less beneficial to the trainees.

Portland Terminal did not direct courts to consider who "most greatly benefit[ed]" from work that trainees perform. It explicitly rested its decision on the fact that the railroads did not benefit at all: "Accepting the unchallenged findings here that the railroads receive no 'immediate advantage' from any work done by the trainees, we hold that they are not employees within the Act's meaning." 330 U.S. at 153. If the railroads had obtained an immediate advantage, because the trainees "expedit[ed] the company business," or "displac[ed] [the work of] regular employees," the trainees would have been employees even though they also benefited. *See id.* at 150.

The only Circuit Court case that provides a rationale for the primary beneficiary test is *Solis v. Laurelbrook Sanitarium & School, Inc.*, 642 F.3d 518 (6th Cir. 2011), but it is not persuasive. *See* Pls.' Br. 34-35. By allowing

employers to accept direct benefits as long as the trainees benefit more, *Laurelbrook*'s rule is much broader than *Portland Terminal*'s holding and, contrary to *Portland Terminal*'s warning, would "open up a way for evasion of the law." 330 U.S. at 153.[1] Furthermore, *Laurelbrook* involved unique circumstances – a vocational program that was *run by a school* where students performed tasks as part of the program's curriculum. 642 F.3d at 520.

This Court did not adopt the primary beneficiary test as "the proper approach in the context of students and trainees" in *Velez v. Sanchez*, 693 F.3d 308 (2d Cir. 2012). Def.'s Opp'n 16. *Velez* did not involve trainees, it mentions the primary beneficiary test only in *dicta*, and it did not adopt the test to answer the question before it – whether the plaintiff was a domestic service worker or a household member. *Id.* at 325-26. Instead, consistent with what Plaintiffs propose here, the Court adopted an objective, multi-factor test under which "the flow of benefits" is just one criterion. *Id.* at 326, 330-31.

[1] In a footnote, Hearst argues that the FLSA's "learner" provision, 29 U.S.C. § 214, "has no bearing on what the legal standard is for determining whether an unpaid intern is an employee." Def.'s Opp'n 30 n.11. Plaintiffs do not argue that the learner provision sets the legal standard. They simply point out that, even where the FLSA contemplates work that provides "little or nothing of value," 29 C.F.R. § 520.300, Congress still required employers to pay something for it.

B. Plaintiffs' Proposed Standard Includes Multiple Criteria and Is Consistent With a Totality of the Circumstances Approach.

Hearst misconstrues the standard that Plaintiffs propose and incorrectly argues that it is inconsistent with a totality of the circumstances approach. Plaintiffs do not ask the Court to adopt a standard that exclusively considers whether interns perform work that provides an immediate advantage. However, because that fact was critical in *Portland Terminal*, it should be a necessary element of the test. *See* Pls.' Br. 26-28.

The Court should adopt the DOL Test because its criteria match the circumstances that were essential in *Portland Terminal*, align with the FLSA's broad "employee" definition, and merit deference.[2] *See* Pls.' Br. 41-42. The test *does* evaluate the benefits of the internship to the interns as one element. *See* SPA14-15. However, unlike Hearst's primary beneficiary test, it does not focus on that criterion to the exclusion of other relevant, less subjective criteria. *See id*.

[2] Hearst argues that deference is not warranted because the DOL Test is an interpretation of a judicial decision. Def.'s Opp'n 41. However, the DOL was interpreting the FLSA's definition of "employee." *See* SPA14; *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001) (deference should be accorded to an agency's "construction of a statutory scheme it is entrusted to administer") (internal quotation marks omitted). The DOL Test merits deference *both* because it is consistent with the FLSA's broad "employee" definition *and* because it faithfully captures the relevant factors in *Portland Terminal*. *See* Pls.' Br. 37, 41-42.

Moreover, as the district court correctly concluded in *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013), the DOL Test is consistent with a totality of the circumstances approach.[3] *Id*. at 531-34. In *Glatt*, the district court considered all of the circumstances of the plaintiffs' internships in concluding that the criteria favored the plaintiffs. *Id.*; *see also Archie*, 997 F. Supp. at 532 (the DOL Test requires "consideration of all the circumstances").

Although, for the most part, Hearst opposes the DOL Test, it does not point to any relevant factors that the DOL Test excludes or argue that any of the DOL criteria are irrelevant. Hearst implies that the DOL Test does not sufficiently account for "the educational value" of internships, which Hearst claims may be established if a school provides an intern with academic credit notwithstanding the nature of the training itself. *See* Def.'s Opp'n 18-20. However, the first DOL criterion, which considers whether the internship "is similar to training which would be given in an educational environment," SPA14, directly addresses the educational value of internships. Unlike Hearst's approach, the criterion

[3] Although the DOL stated in its amicus brief that its test "stands in stark contrast to a 'totality of the circumstances'" test, DOL Br. 8-9, Plaintiffs have interpreted this to reflect its position that all six criteria must be met – not that courts are limited with respect to the factual circumstances they may consider in determining whether an intern is an employee. Consistent with this, elsewhere, the DOL states that, in evaluating the six criteria, courts should consider "all of the circumstances surrounding the[] [intern's] activities on the premises of the employer." DOL Br. 13.

appropriately focuses *on the training itself* – like the Supreme Court did in *Portland Terminal* – and not simply on whether a school is willing to award credit. *See* SPA15.[4]

C. Hearst Should Bear the Burden of Proving an Exception to the FLSA.

Hearst incorrectly argues that Plaintiffs' proposed standard reverses the burden of proof under the FLSA and conflates two distinct issues. The first issue is the standard that the Court adopts to determine Plaintiffs' employment status. This issue is separate from the second issue – who bears the burden of proof. The Court could adopt Plaintiffs' standard, but still determine that Plaintiffs bear the burden of proof by requiring Plaintiffs to prove that Hearst did not meet one of the DOL criteria.

The Court should assign the burden of proof to Hearst, however, because Hearst is the party advancing the argument that Plaintiffs fall within *Portland Terminal*'s "trainee" definition. Typically, when an employer claims that a worker falls outside of the FLSA's coverage, it must prove that a narrowly construed "exception" applies, in recognition of the FLSA's remedial purpose. *See Brown v. N.Y. City Dep't of Educ.*, No. 13-139-cv, --- F.3d ----, 2014 WL 2749428, at *5 (2d Cir. June 18, 2014). Although Hearst argues that a different standard should apply

[4] As *amici curiae* Economic Policy Institute, *et al*. (collectively, "EPI") point out, many schools award credit for internships without ensuring that they provide their students with an educational experience. *See* Part II.A., *infra*.

here because it does not concede that Plaintiffs were employees, Def.'s Opp'n 31, Hearst's labeling of Plaintiffs as "interns" should not impose a special, additional burden to disprove Hearst's "defense."

While it is Plaintiffs' burden to show that the FLSA applies, there is no debate that Plaintiffs made a prima facie showing that Hearst "suffer[ed] or permit[ted]" their work under every traditional articulation of that phrase. *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66 (2d Cir. 2003). Hearst does not dispute that Plaintiffs worked on Hearst's premises, contributed to its day-to-day operations, and were supervised by its employees. Pls.' Br. 10-21, 25. The FLSA's remedial goals and broad coverage support shifting the burden to the employer to show that its interns were "trainees" under *Portland Terminal* after the interns have made a threshold showing under the FLSA's "suffer or permit" standard.[5] *Cf. Ruiz v. Affinity Logistics Corp*., No. 12-56589, --- F.3d ----, 2014 WL 2695534, at *5 (9th Cir. June 16, 2014) (holding that, under California law, "once a plaintiff comes forward with evidence that he provided services for an employer, the [plaintiff] has established a prima facie case that the relationship was one of employer/employee . . . . [and] [t]he burden then shifts to the employer to

[5] Plaintiffs' position is also supported by the DOL, which has found that interns at for-profit employers "will most often be viewed" as employees unless the six criteria are met. *See* SPA14.

'prove, if it can, that the presumed employee was an independent contractor.'") (quoting *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010)).

D. Plaintiffs' Test Would Not End Internships.

Hearst is wrong that a ruling in Plaintiffs' favor would prevent companies like Hearst from "provid[ing] students with real, meaningful assignments connected to the workplace." Def.'s Opp'n 14. Plaintiffs' goal is not to end internships, but to fairly compensate Plaintiffs for the "real, meaningful" work they did every day for Hearst's benefit. Hearst – and other major corporations like it – would not be stopped from providing interns with meaningful work if Plaintiffs prevail. They would simply have to pay them the minimum wage for doing it.

Almost all of the work that Plaintiffs performed – organizing clothes, accessories, and beauty products; doing expenses; creating attendee lists for events; running casting calls; going on errands; staffing events; and performing other office work – provided an immediate benefit to Hearst and was not designed to be any more educational than a regular job. There is a wide gulf between Plaintiffs' work experiences at Hearst and a *bona fide* unpaid internship program that is intentionally designed to educate interns and ensure that unpaid interns do not do work that provides anything more than *de minimis* benefits.

II. Hearst Did Not Enforce Its Credit "Policy" or Run a "School-Sponsored" Internship Program.

A. Hearst Used Its Credit "Policy" to Avoid Liability and Still Failed to Enforce It.

Hearst touts the value of academic credit, but failed to enforce its own credit "policy," which it adopted not out of deference to schools but based on the erroneous belief that it would help it "stay[] on the right side of the labor law." A3328 (¶67).

Hearst's credit "policy" was a sham and Hearst frequently helped interns get around it. *See* A3329-32 (¶¶74, 78, 81-84). Even when an intern's own school would not provide credit, but the intern could find another school that would provide credit (for a price), Hearst accepted the intern. A3332 (¶84).

The actual receipt of credit was not even a requirement. When schools refused to award credit, Hearst accepted a "transcript notation" or enrollment in a "zero credit" course. A3330-31 (¶¶81-83). Plaintiffs Mancini, Wang, and Wagster did not receive credit for their internships. A3345 (¶¶151-52); A3369 (¶269); A3376 (¶302). Hearst did not evaluate whether the schools' criteria for granting credit bore any relation to the legal requirements for unpaid internships – it did not care. A3329-30 (¶¶75-77). Hearst and the schools – not the interns – reaped the

benefits of Hearst's program without ensuring that it provided real educational training.[6]

In exchange for their tuition dollars, Plaintiffs received scant classroom instruction, were not closely supervised, and worked full-day schedules assisting and reducing the workloads of Hearst employees. Pls.' Br. 12-19.

B. Hearst's Internship Program Was Not Comparable to the Vocational Programs that Courts Have Approved.

Hearst's internship program is not like the school-run programs or the specialized vocational programs in cases that Hearst cites. *See* Def.'s Opp'n 18-19. Hearst did not design its program around an academic curriculum, did not provide specialized or vocational instruction, and required interns to do work on a day-to-day basis that directly benefited its operations. Pls.' Br. 20-23; A562-63 (89:25-90:10); A1211 (72:13-21).

In *Laurelbrook*, the students performed work at a school-run sanitarium designed to further the school's vocational curriculum. 642 F.3d at 520-21, 531. There was sufficient staff so that "if the students did not perform work . . . the staff members could continue to provide the same services [] without interruption." *Id*.

[6] As *amici curiae* EPI discuss, interns must pay schools thousands of dollars to receive credit for their internships. EPI Br. 21. Many interns take second (paid) jobs to help shoulder the cost of the credit they are required to buy in order to be an intern for free. *Id.* Despite receiving hefty fees for internship credits, approximately fifty percent of schools admit that they do not monitor the quality of unpaid internships. *Id.*

at 530-31. Moreover, unlike Hearst – a for-profit corporation – the sanitarium was "not in competition with other institutions for labor," and did "not enjoy an unfair advantage over other institutions by reason of work performed by its students." *Id.* at 531.

Similarly, in *Blair v. Wills*, 420 F. 3d 823, 826 (8th Cir. 2005), the plaintiff performed chores for his boarding school that "were an integral part of the [school's] educational curriculum." *Id*. at 829. The students in *Marshall v. Regis Educational Corp.*, 666 F.2d 1324 (10th Cir. 1981), were participants in their school's residential assistant program that was intended to teach them peer-counseling and other educational skills. *Id*. at 1327.

Hearst's program is also unlike the specialized vocational training that the students received in *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App'x 831, 834 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013), and *Demayo v. Palms West Hospital, L.P.*, 918 F. Supp. 2d 1287, 1292 (S.D. Fla. 2013). In *Kaplan*, the plaintiffs received "hands-on" training in medical billing – a specialized skill that they were enrolled in a degree program to learn. *Id.* at 832-35. In *Demayo*, the plaintiff also received training in her field of study – surgical technology. 918 F. Supp. 2d at 1292. In both cases, the record established that the programs impeded the defendants' businesses and provided the companies with

little if any benefit. *Kaplan*, 504 F. App'x at 834; *Demayo*, 918 F. Supp. 2d at 1291.

Hearst's internship program is much closer to the unpaid clinical training program that the Sixth Circuit held was unlawful in *Marshall v. Baptist Hospital, Inc.*, 668 F.2d 234 (6th Cir. 1981). There, the plaintiffs were students studying to be x-ray technicians who, as part of their associate degree program, were required to complete a course of "practicum training" in a hospital x-ray department. *Marshall v. Baptist Hosp., Inc.*, 473 F. Supp. 465, 471-2 (M.D. Tenn. 1979), *rev'd on other grounds*, 668 F.2d 234 (6th Cir. 1981). After a brief orientation, they received minimal supervision from the hospital's staff and spent much of their time doing routine activities with little educational value. *Id.* at 474. Because "the clinical training program was seriously deficient in supervision, and . . . the students continued to perform clerical chores long after the educational value of that work was over," the Sixth Circuit correctly held that the students were employees and not trainees under *Portland Terminal*. *Baptist Hosp.*, 668 F.2d at 236.

Later, relying on *Baptist Hospital*, the Sixth Circuit affirmed that an employer cannot meet the requirements of *Portland Terminal* if the training it provides is "deficient" because it affords only minimal educational benefits and the

remainder of the time is spent doing regular work. *See Laurelbrook*, 642 F.3d at 528.

Here, Hearst does not claim to have provided training that is similar, or even closely related to, any school's educational or vocational curriculum. To the contrary, it argues that its internship program offered "office skills." Def.'s Opp'n 34. Office skills are not like the specialized skills the railroad trainees gained in *Portland Terminal*. As the district court correctly held in *Glatt*, office skills are "incidental to working in the office like any other employee" and are "not the academic or vocational training benefits envisioned by" *Portland Terminal*. *Glatt*, 293 F.R.D. at 533.

Even if learning "office skills" is initially educational, Plaintiffs continued to perform their office tasks "long after the educational value of th[e] work was over." *Baptist Hosp.*, 668 F.2d at 236. Their experiences were not remotely similar to the experiences of *bona fide* trainees. *See Petroski v. H & R Block Enters., LLC*, 750 F.3d 976, 977 (8th Cir. 2014) (training involved "live and web-based courses" and did not "entail working on actual client tax returns or meeting with actual clients"); *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1025, 1027-28 (10th Cir. 1993) (training "overlapped significantly" with what schools provided and included "classroom lectures, tours of the district, demonstrations, physical training, and simulations"); *Kaplan*, 504 F. App'x at 832, 834-35 (hands-

on training in medical billing); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 270 (5th Cir. 1982) (training was "conducted in an academic environment and [wa]s virtually identical to the curriculum offered at vocational schools").

The fact that Hearst's interns are largely students does not make its program comparable to the educational programs discussed above. The Tenth Circuit rejected this premise in *Regis Educational Corp*. While it concluded that the student residential assistants in that case were part of an educational program, other students working at the college may very well have been "employees" – including students whose tasks were not clearly related to an educational purpose, such as "working in the bookstore selling books, working with maintenance, [or] painting walls." *Regis Educ. Corp.*, 666 F.2d at 1327.

C. Hearst Fails to Rebut Plaintiffs' Evidence that They Received Almost No Formal Training.

Hearst does not dispute that Plaintiffs received almost no formal training and learned how to perform their tasks on the job. Pls.' Br. 13-19, 46-48.

Hearst's efforts to concoct factual disputes where there are none fail. For instance, Skorka did not have "a wealth of shadowing experiences" – the testimony Hearst cites shows that she contributed to the magazine where she worked by taking notes for her supervisor during meetings, attending meetings where she pitched stories, and assisting at photo shoots. *See* A4258 (110:14-111:4); A4260-62 (119:18-20:10). The "classroom internship trainings" to which Hearst points,

Def.'s Opp'n 55, consisted of a single "Media Math" session, A3379 (¶319); and four one-hour "Cosmo U" sessions where editors discussed their career paths, A3360-61 (¶232); A3389 (¶363). These token sessions are not comparable to the eight-day training that the railroad brakemen received in *Portland Terminal*, 330 U.S. at 149-50, or to the trainings that other courts have approved. *See Petroski*, 750 F.3d at 977; *Parker Fire*, 992 F.2d at 1027-28; *Am. Airlines*, 686 F.2d at 270.

III. The FLSA Covers Workers Regardless of Whether They Are Paid.

Hearst is wrong that, even if a worker provides productive labor to an employer, she may still fall outside of the FLSA if she provided her labor without the expectation of compensation. *See* Def. Opp'n 24. This misreads *Portland Terminal* and *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), and would undermine the FLSA.

Portland Terminal did not create an exception from the FLSA for workers who agree to work without compensation. The FLSA prohibits employers from paying less than the minimum wage and workers cannot waive these rights. *See Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981). In *Portland Terminal*, if the brakemen trainees' work had provided an "'immediate advantage'" to the railroads, the trainees would have been employees – regardless of whether they expected to be paid. *See* 330 U.S. at 153 (distinguishing the

circumstance where an employer had "evasively accepted the services of beginners at pay less than the legal minimum").

Hearst incorrectly argues that the railroad brakemen did do "actual work." Def.'s Opp'n 23. This ignores that the work – which was done "under close scrutiny" by supervisors who "did most of the work themselves" – did not "expedite the company business" or "displace any of the regular employees." *Portland Terminal*, 330 U.S. at 149-50. The trainees did the work of brakemen in order to learn to be brakemen, while the real brakemen watched them closely. *See id*. They did not displace paid employees because the paid employees stood next to them to make sure they did everything correctly. *Id*.

This is similar to the airline trainees in *American Airlines* and the firefighter trainees in *Parker Fire*, who practiced doing actual job duties of their respective positions during their training programs.[7] *See Am. Airlines*, 686 F.2d 269-71; *Parker Fire*, 992 F.2d at 1025, 1028. None of the "work" in these cases was productive – it did not directly benefit the employers who provided the training. *Am. Airlines*, 686 F.2d at 269-70, 272 (trainees were "not productive for [the airline] until after their training end[ed]" and did not have contact with customers

[7] Unlike here, the trainees in these cases did no more than *de minimis* work, if that. *See Am. Airlines*, 686 F.2d at 272; *Parker Fire*, 992 F.2d at 1028-29. Hearst failed to respond to the cases and DOL Opinion Letters that Plaintiffs cited holding that individuals who perform more than *de minimis* work are employees and not trainees under *Portland Terminal*. *See* Pls.' Br. 28-31.

or replace or supplement employees' work); *Parker Fire*, 992 F.2d at 1025, 1027-29 (firefighters did not do any work, were not assigned to shifts, and did not maintain any equipment other than training equipment); *see also Petroski*, 2014 WL 1719660, at *1 (training did not "entail working on actual client tax returns or meeting with actual clients"). Hearst fails to address this key point because, unlike the companies in these programs, Hearst directly benefited from Plaintiffs' labor.

Hearst also misses the point of *Alamo*. *Alamo* did not "turn on" the fact that the volunteers expected compensation. The record was clear that they "vehemently protest[ed]" being compensated. *Alamo*, 471 U.S. at 300-02. Other objective factors showed that they were economically dependent on the defendants. *Id*. at 301. The objective reality – and not the volunteers' subjective motivations – mattered because making an exception for the volunteers would "affect many more people" by "exert[ing] a downward pressure on wages in competing businesses." *Id.* at 302.

Similarly, here, whether Hearst's interns expected to be paid should not be determinative of whether they are employees. Instead, their status must be evaluated in light of the objective reality as determined by "the discrete facts relevant to [the] particular statutory and regulatory criteria" at issue. *See Brown*, 2014 WL 2749428, at *5.

Hearst violated the law by *accepting* Plaintiffs' free labor. The DOL criterion requiring that a company may not accept free labor where the worker expects to be paid is designed to protect the employee, not the company. *Alamo* forecloses the argument that an individual is exempt simply because she volunteers. *See* 471 U.S. at 302.

IV. The Court Should Review the District Court's Class Certification Decision.

A. This Court and the District Court Certified the Class Certification Issues.

This Court has jurisdiction over the legal issues concerning the district court's class certification decision and should review it. Section 1292(b) vests Courts of Appeal with the authority to exercise jurisdiction over "any question that is included within the order that contains the controlling question of law identified by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204 (1996); *see also City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 391-92 (2d Cir. 2008) ("When a district court certifies . . . a question of controlling law, the entire order is certified and we may assume jurisdiction over the entire order.") Here, the district court included the class certification issues in its Section 1292(b) order. A5613.

Hearst incorrectly argues that an appeal under Rule 23(f) of the Federal Rules of Civil Procedure is the exclusive avenue for an interlocutory appeal of a

class certification decision. *See* Def.'s Opp'n 45. In fact, Rule 23(f) is a less demanding alternative to Section 1292(b) for a party seeking review of a class certification decision. *See Chrysler Fin. Corp. v. Powe*, 312 F.3d 1241, 1245 (11th Cir. 2002) (Rule 23(f) is "an alternative to [Section] 1292(b) that makes available an avenue of permissive appeal from a district court's class certification order in order to avoid [Section] 1292(b) requirements"); *see also Panache Broad. of Pennsylvania, Inc. v. Richardson Elecs., Ltd.*, No. 90-C-6400, 1999 WL 1024560, at *2 (N.D. Ill. Oct. 29, 1999), *appeal denied*, 202 F.3d 957 (7th Cir. 2000) ("Rule 23(f) was enacted to expand the ways for taking an interlocutory appeal"). A party proceeding under Rule 23(f) need not meet Section 1292(b)'s stringent requirements. *See* 28 U.S.C. § 1292(b).

The district court found that the issues raised by its class certification decision met Section 1292(b)'s requirements. Specifically, it held that "whether the facts here support a finding that neither [pre]dominance nor commonality were satisfied so that a class might be certified" is a controlling question of law. A5613. Plaintiffs included this issue in their Petition for Permission to Appeal. *See* A5623, 5630. This Court granted the Petition without modification. A5662-63.

Because Plaintiffs had the right to proceed under Section 1292(b), there is no basis for Hearst's argument that they should have met Rule 23(f)'s deadline. Hearst failed to raise this argument below and did not oppose Plaintiffs' Section

1292(b) motion. *See* Dkt. No. 157. Although it did raise the argument in opposition to Plaintiffs' Petition for Permission to Appeal, the Court granted Plaintiffs' Petition over Hearst's objection. No. 13-2616-cv, ECF No. 13 at 6-7.

Moreover, "there are bound to be circumstances in which a matter that might have been appealed under Rule 23(f) is appropriately appealed under § 1292(b). Concern for preserving the 14-day time set by Rule 23(f) is greatly reduced by the fact that, unlike Rule 23(f), a § 1292(b) appeal is available only on certification by the district court." 16 Wright & Miller, Fed. Practice & Procedure § 3931.1.

As the district court recognized, its class certification decision is bound up with the other issues on appeal, and addressing all of the issues under Section 1292(b) is more efficient than proceeding under two separate mechanisms. *See id.* ("[I]f an issue falls—or may fall—outside the scope recognized for a Rule 23(f) appeal, a § 1292(b) appeal may be desirable not only to supplement Rule 23(f) but also to create an efficient appeal package").

Other Circuit Courts have reviewed class certification issues under Section 1292(b). *See, e.g.*, *Kirkland v. Midland Mortgage Co.*, 243 F.3d 1277, 1279 (11th Cir. 2001) (Section 1292(b) appeal of class certification and summary judgment issues); *James v. City of Dallas, Tex.*, 254 F.3d 551, 557 (5th Cir. 2001) (Section 1292(b) appeal of class certification); *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 265 (5th Cir. 2000) (same).

Richardson Electronics, Ltd. v. Panache Broadcasting of Pennsylvania, Inc., 202 F.3d 957 (7th Cir. 2000), does not support Hearst's argument that Plaintiffs should have moved under Rule 23(f). In *Richardson*, the Seventh Circuit explicitly refused to reach the question of whether Rule 23(f) should be used in place of Section 1292(b) to raise class certification issues. *Id*. at 959 ("We need not, at least at this juncture, consider whether Rule 23(f) may actually supersede section 1292(b) in the area of their overlap."). The *only* question before the *Richardson* court was whether Rule 23(b)(3) was met, and the Seventh Circuit reasoned that the question "fits much more neatly into Rule 23(f)" than into Section 1292(b). *Id.* at 958.

Here, the issues on appeal do not fit "neatly into Rule 23(f)." *Id*. The summary judgment and class certification issues overlap because they implicate the legal standard that the Court adopts to determine whether Plaintiffs were Hearst's employees and the facts that are relevant under that standard.[8] *See* A5630; Dkt. Nos. 151 at 7, 158 at 3.

[8] *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863 (2d Cir. 1996), does not support Hearst's position because it did not involve an appeal of a class certification decision. *See id*. at 866. Although *Kohler* cited *Link v. Mercedes-Benz of N. Am., Inc.*, 550 F.2d 860, 863 (3d Cir. 1977), for the proposition that a district court's class certification order is inappropriate for interlocutory appeal, the Third Circuit has since held that courts *can* certify class certification orders under Section 1292(b) if the decision "involve[s] special circumstances prompting certification by the district judge under [Section] 1292(b) and approval by th[e]

B. Hearst Repeats the District Court's Errors and Does Not Respond to Plaintiffs' Arguments.

Hearst declines to address the common issues and classwide evidence regarding the first four DOL criteria that Plaintiffs identified. *See* Pls.' Br. 56-59. Instead, it argues that that it is irrelevant that interns performed productive work and received *de minimis* educational training. Def.'s Opp'n 51-52.[9] Under *Portland Terminal* and Plaintiffs' proposed standard, this evidence will answer key merits questions.[10]

Contrary to Hearst's claim, Def.'s Opp'n 50-51, the district court labeled Plaintiffs' common evidence as "individualized" in large part because it is not located in a single corporate-level document, which is incorrect. *See* Pls.' Br. 61. Moreover, the district court placed undue emphasis on the specific tasks interns performed, which would be relevant if this was an overtime misclassification case, but is not here. *Id*. at 56-57. The district court should not have rejected the

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Court [of Appeals]." *Sullivan v. Pac. Indem. Co.*, 566 F.2d 444, 445 (3d Cir. 1977). The issues here met this test. *See* A5613-15.

[9] Hearst also does not respond to Plaintiffs' arguments about *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast v. Behrend*, 133 S. Ct. 1426 (2013). Pls. Br. 59-60, 62-63. It only repeats the district court's holding.

[10] Even under Hearst's primary beneficiary test, this classwide evidence is surely relevant because it is probative of the "benefits" that both sides received.

Hearst admits that two other DOL criteria – expectation of compensation and entitlement to a job – can be evaluated with common proof. Def.'s Opp'n 49.

consistent evidence that interns regularly performed productive work and that Hearst relied on this work to run its operations. *Id*.

V. The Court Should Reach the Summary Judgment Issue.

A. Efficiency and Fairness Support Deciding Summary Judgment Now.

The Court should not remand the summary judgment decision. First, Section 1292(b) authorizes the Court to review and rule on summary judgment because it was among the controlling issues that the district court certified. *See* A5613-15; *Yamaha Motor Corp.*, 516 U.S. at 204. Even if the district court did not explicitly certify its application of the law to the facts, "[w]hen a district court certifies, pursuant to 28 U.S.C. § 1292(b), a question of controlling law, the entire order is certified and [the Court] may assume jurisdiction over the entire order, not merely over the question as framed by the district court." *Beretta U.S.A. Corp.*, 524 F.3d at 391-92.

Circuit Courts have frequently reviewed summary judgment denials certified for immediate appeal pursuant to Section 1292(b). *See, e.g.*, *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 396, 403 n. 14, 404 (5th Cir. 2010) (en banc) (reversing denial of summary judgment and remanding with instructions to enter judgment in favor of defendant); *Camacho v. P.R. Ports Auth.*, 369 F.3d 570, 572-3, 578-79 (1st Cir. 2004) (reversing denial of summary judgment after reviewing factual record); *Bartnicki v. Vopper*, 200 F.3d 109, 129

(3d Cir. 1999) *aff'd*, 532 U.S. 514 (2001) (reversing denial of summary judgment and remanding with instructions to grant the motion).[11]

It would not be "unfair and unjust" for the Court to apply the standard that it adopts to this record because Hearst had the opportunity to brief the issue both in the district court and on appeal. In the district court, the parties presented the facts under both Hearst's primary benefit standard and the standard that Plaintiffs urge on appeal. *See* Dkt Nos. 107, 118.

Hearst declined to address the application of the standards on appeal. *See* Def.'s Opp'n 52-57. Hearst's tactical decision not to address most of the record evidence Plaintiffs cite does not foreclose this Court from doing so. In fact, Hearst's failure to rebut Plaintiffs' factual recitation emphasizes that these facts are undisputed and that this Court is in a perfect position to apply the law to them.

It would be much more efficient for the Court to apply the standard it adopts than to remand the determination for yet another round of briefing in the district court, and a possible second appeal. *See Capital Temps., Inc. of Hartford v. Olsten Corp.*, 506 F.2d 658, 660 (2d Cir. 1974) ("judicial economy requires that [the

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[11] *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251 (11th Cir. 2004), is inapplicable because, there, the question involved "whether the district court properly applied *settled* law to the facts or evidence of a particular case." *Id*. at 1259 (emphasis added). Here, the law is not settled and it would be appropriate for the Court to demonstrate how the standard it adopts should be applied. Moreover, because the facts here are largely not in dispute and the issues were fully briefed before the district court and on appeal, the Court will not be required to engage in any "independent fact-finding," as Hearst claims. Def.'s Opp'n 48.

Court address] not only . . . the [certified] question but also . . . the propriety of . . . summary judgment"). The Court would not be required to "comb the record," Def.'s Opp'n 48, because the material facts are already set forth in the fact section of Plaintiffs' Opening Brief, with which Hearst barely quibbles, and in the parties' respective Local Civil Rule 56.1 Statements. *See* A3307-430, A5475-552. The material facts relating to the eight Plaintiffs – the only individuals whose claims are at issue on this appeal – are not in dispute.[12]

B. Hearst Fails to Rebut Plaintiffs' Summary Judgment Showing.

Hearst did not even attempt to rebut Plaintiffs' showing that they all performed productive work that directly benefited Hearst and that their work would have been done by paid employees, temporary workers, and/or couriers if they did not do it – two factors that were critical in *Portland Terminal* and must be met under the DOL Test.[13] *See* Pls.' Br. 13-19, 50-54.

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[12] The district court incorrectly held that certain facts were disputed, when the parties only disputed their legal significance. *See* Pls.' Br. 49-50, 53.

[13] Hearst argues that interns "often impeded or slowed down magazine staff," but cites no examples relating to the Plaintiffs. Def.'s Opp'n 7. In fact, Hearst admitted that it employed paid freelancers and messengers to perform tasks that Wang performed, A3346 (¶¶156-57); A3352 (¶¶186-87), and Wang's supervisor admitted that when he did not have interns, his work hours were "much longer." A3347 (¶160). Hearst also admitted that Wagster, Rappaport, Wheels, and Leszuk all performed some of the same tasks as paid employees. A3378 (¶312); A3380-81 (¶¶322-27); A3385 (¶¶ 348-49); A3387-88 (¶¶358, 360). A supervisor in Mancini's department said the editors "constantly" requested help from interns

With respect to remaining considerations, Hearst's evidence is legally insufficient to create material factual disputes. For example, Hearst claims that Plaintiffs were closely supervised, Def.'s Opp'n 54, but the evidence it cites that Spencer received some feedback on her work performance, got career advice, and gained an understanding of the work she performed does not rebut her testimony that she largely performed her duties on her own. *See* A5518-19 (¶D161); A5522-23 (¶¶D177-78). The evidence does not come close to showing that Plaintiffs' supervisors "st[oo]d immediately by to supervise whatever [Plaintiffs] d[id]," *Portland Terminal*, 330 U.S. at 150, that Plaintiffs primarily "shadowed" their supervisors, SPA15, or that their supervision was greater than what regular employees received, *see id.*

There is also no real dispute about the benefits that Plaintiffs received: credits, career advice, job references, work experience, professional and office etiquette, and some familiarity with the publishing industry. *Compare* Pls.' Br. 49-50, *with* Def.'s Opp'n 55-56. Even under Hearst's primary beneficiary test, no reasonable jury could conclude that these benefits outweighed the direct benefits Plaintiffs provided to Hearst through their productive labor. *See Archie*, 997 F. Supp. at 533 (even though program participants received an "enormous[]" benefit

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because they were so busy. A3363 (¶249). Hearst admitted that Spencer held casting calls and selected models for Hearst on her own. A3359 (¶¶225-26).

from the counseling and basic job skills they obtained, the defendants received an even greater advantage from the work they performed at below market rates).

CONCLUSION

For the foregoing reasons and the reasons in Plaintiffs' Opening Brief, Plaintiffs respectfully request that the Court: (1) reverse the district court's order denying Plaintiffs' motion for summary judgment and hold that Plaintiffs were employees under the FLSA and NYLL; and (2) reverse the district court's denial of class certification and remand the issue for reconsideration in light of the correct legal standards.

Dated: July 11, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,832 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Dated: July 11, 2014

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