IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHERYL C. BRADLEY, *et al.*, for themselves and on behalf of all persons similarly situated,	:	
Plaintiffs	:	**Case No. 1:17-cv-1791**
v.	:	**Collective Action**
	:	**Jury Trial Demanded**
VOX MEDIA, INC., d/b/a SB NATION	:	
Defendant.	:	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Dated: November 27, 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

This is a collective action lawsuit seeking unpaid minimum wages and overtime compensation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. **This dispute reaches to the very core of Congressional policy embodied in the FLSA** "to correct and as rapidly as practicable to eliminate," "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers … [constituting] an unfair method of competition…[and interfering] with the orderly and fair marketing of goods in commerce." 29 U.S.C. § 202.

In this matter, Vox's labor practice of paying Plaintiffs and the putative FLSA Class far below the minimum wage (often less than $1 per hour), without overtime compensation, are likely to fuel an intolerable race to the bottom in the sports journalism industry in which Vox is a major competitor and in which Plaintiffs labor. Vox's actions are incentivizing its competitors to engage in similar detrimental practices in order to attract online advertisers to their publications at competitive prices. As further detailed herein, Vox has engaged in precisely the types of unfair competition that Congress intended to eliminate from the labor markets when it enacted the FLSA almost eighty years ago.

Ironically, Vox, which also covers political and economic news, even recognizes the harm that is done to workers and to the economy when employers pay substandard wages, including the fact that many are forced to work multiple part time jobs.[1] It is even more ironic

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[1] *See* Danielle Kurtzleben, "Nearly 2 million Americans work multiple part-time jobs to make ends meet," Vox Media (Oct. 3, 2014), https://www.vox.com/2014/10/3/6901321/part-time-work-september-jobs-report-unemployment-women-men (last accessed 11/10/2017) ("One thing [the 20% uptick in the number of people working multiple part time jobs from 2004-2014] points to is that unemployment (and employment) figures aren't everything; these people are employed, but to many, their job situations — rushing from one job to the next — may not be optimal [and]

that in this case Vox is asking the Court to make a *factual* finding[2] at this stage that Plaintiffs did not consider themselves employees of Vox, merely because Plaintiffs may have worked a second job in addition to their employment at Vox.[3] Despite Vox's incorrect assertions in this matter, the protections of the FLSA do not depend on an employer's labelling of their workers as "independent contractors" or "volunteers," a worker's subjective belief about their employment status, or whether the worker even desires the protections of the FLSA at all. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985); *Morrison v. Int'l Programs Consortium, Inc*., 253 F.3d 5, 11 (D.C. Cir. 2001). Similarly, neither does the issue of Vox's willful intent in violating the FLSA relate in any way to Plaintiffs' subjective beliefs about their employment status with Vox.

The Plaintiffs in this matter are Cheryl C. Bradley ("Bradley"), John M. Wakefield ("Wakefield"), and Maija Liisa Varda ("Varda" and, together with Bradley and Wakefield, "Plaintiffs"). Plaintiffs bring this action on behalf of themselves and other similarly-situated past and current Site Managers and Managing Editors who performed work for Vox Media, Inc., d/b/a SB Nation ("Vox") within its SB Nation business division from October 23, 2014 through

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… women make up twice as many of these workers as men do. So while the job market is improving in terms of quantity, it's not improving by quality.").

[2] *See* Motion for Judicial Notice, ECF No. 22.

[3] Vox also points to the initiative of Opt-In Plaintiff Jacob Pavorsky (who was a full time college student through much of his tenure as Site Manager at Vox) as somehow demonstrating that he too was not a Vox employee. Motion to Dismiss, ECF No. 21 at p. 12, n. 4. Vox cannot genuinely profess to be unfamiliar with the fact that many college students also work concurrently in paid employment.

the present.[4] Plaintiffs worked 30-40 hours a week and sometimes more for Vox creating online media content and managing Vox's websites in order to drive up traffic and create lucrative advertising revenue streams, but Plaintiffs were compensated at astonishingly low wages. Plaintiffs did not share in any advertising revenue and instead received flat monthly salaries ranging from $50 to $400 per **month**. Vox's practices were exposed in detail in August 2017 investigative articles by the sports website Deadspin.[5]

Given these stark realities, as well as both the time restrictions of their employment at Vox and contractual restrictions on outside employment, as a matter of economic reality, Plaintiffs were economically dependent on Vox as employees. Plaintiffs' extensive allegations in its 27-page First Amended Complaint, ECF No. 16 ("FAC"), plausibly establish an employment relationship.

Recognizing the obvious merits of this case, Vox challenges only the willfulness component of damages in its motion, alleging that even if it did misclassify Plaintiffs as independent contractors, it did so after "arriv[ing] at a thoughtful decision under the advice of counsel." MTD[6] at pp. 18. Vox also nonsensically argues, in its Partial Motion to Dismiss as

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[4] With regard to those who have already filed a signed consent form with the Court, those members of the FLSA Class have an earlier limitations period, tolled as of the dates of their filings.

[5] *See* Laura Wagner, *How SB Nation Profits Off an Army of Exploited Workers*, Deadspin (Aug. 14, 2017), http://deadspin.com/how-sb-nation-profits-off-an-army-of-exploited-workers-1797653841 (last accessed October 11, 2017); Laura Wagner, *SB Nation Bosses, Current And Former Workers Discuss Pay, Management, And More In Emails And Leaked Memos*, Deadspin (Aug. 15, 2017), http://deadspin.com/sb-nation-bosses-current-and-former-workers-discuss-pa-1797868635 (last accessed October 11, 2017).

[6] "MTD" refers to Vox's Memorandum of Law in Support of its Partial Motion to Dismiss Plaintiffs' First Amended Complaint, ECF No. 21.

well as in its related Motion for Judicial Notice, ECF No. 22, that because Plaintiffs may have had some outside employment at various points in time during their employment at Vox, it logically follows that Plaintiffs did not believe themselves to be employed by Vox, and therefore, Vox could not have *willfully* misclassified Plaintiffs as independent contractors. Again, the supposed subjective understandings of Plaintiffs as to their status at Vox is irrelevant to this case. *Tony & Susan Alamo Found.*, 471 U.S. at 302; *Morrison*, 253 F.3d at 11.

The threshold a plaintiff must overcome to allege that an employer's violations of the FLSA were willful, is quite low. In fact, a "plaintiff's general averment of willfulness satisfies the requirements of pleading a willful violation of the FLSA, so as to invoke the three-year statute of limitations." *Litras v. PVM Int'l Corp.*, No. 11-CV-5695 JFB AKT, 2013 WL 4118482, at *6 (E.D.N.Y. Aug. 15, 2013). Plaintiffs go far beyond that low threshold and allege several factors in detail, plausibly demonstrating that Vox's actions were willful. First, Plaintiff Bradley complained to her supervisor about being paid inadequate wages. Her supervisor refused to pay her at least the minimum wage and stated that wages were dependent on increasing web site traffic. Bradley subsequently increased site traffic, but was still paid $125 per month without any changes to her employment conditions.

Secondly, three of Vox's top executives: its Chief Legal Officer Lauren Fisher (recently promoted from General Counsel), CEO James Bankoff, and President Marty Moe (another lawyer with significant corporate law firm experience) began their tenure at Vox as executives in 2008, 2009 and 2011, respectively. All of these executives served as either executives (Bankoff and Moe) at America Online ("AOL") or worked as an attorney in AOL's General Counsel's office (Fisher) prior to moving to Vox. AOL faced a similar nationwide FLSA collective action brought by its "Community Leaders," who, as did Plaintiffs, created and edited online content,

moderated online community interaction and managed or assisted other content creators.[7] In *Hallissey*, AOL defended on the grounds that the plaintiffs and collective class members were "volunteers" rather than employees. In 2006, after significant discovery, Judge Duffy of the United States District Court for the Southern District of New York denied AOL's motion for summary judgment, holding that triable issues of material fact existed as to whether the plaintiffs were in fact employees under the FLSA. In 2010, AOL settled the case for $15 Million.

The *Hallissey* litigation was widely publicized in the media from its 1999 inception through the 2010 settlement. No serious argument can be made (especially at the pleading stage) that Bankoff, Moe or Fisher did not know about the 2006 *Hallissey* decision, or the 2010 settlement. The contracts which Plaintiffs signed with regard to their employment at Vox[8] were all signed by General Counsel Fisher. It is clear that Fisher, armed with knowledge of the illegality of the practices at issue in *Hallissey* and thus the similar illegal practices at issue here, was integrally involved in the decision to classify Plaintiffs as independent contractors, if not one who also authorized the decision. As senior executives also well aware of the illegality of classifying Plaintiffs as independent contractors, Bankoff and Moe too acted willfully in allowing Vox to classify Plaintiffs as independent contractors and avoid FLSA obligations.

Third, part of Deadspin's expose includes statements from an anonymous Site Manager, who states that he, like Plaintiff Bradley, spoke with his League Manager about the employment status of Vox's site contributors. This Site Manager indicates that based on this conversation and his experiences at Vox, he believes Vox management knows that its practice is illegal and is

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[7] *See Hallissey v. America Online, Inc*., Case No. 99-CIV-3785 (S.D.N.Y.) ("*Hallissey*").

[8] *See* FAC, Exs. 1-3.

deliberately obfuscating the issue by referring to contributors as mere fan posters. Discovery will very likely reveal more details about these communications and others and will likely confirm that Vox intended to classify its Site Managers as independent contractors in order to avoid the FLSA's requirements.

Despite Vox's bare assertions that at best it was merely aware "that the FLSA was in the picture," *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132 (1988), and that it "arrived at a thoughtful decision under the advice of counsel," MTD at p. 18, at this stage the Court may reasonably infer from the allegations in the FAC "more than a sheer possibility that [Vox] acted unlawfully," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and indeed that Vox acted at least with reckless disregard towards the issue of whether its classification of Plaintiffs as independent contractors violated the FLSA. It is certainly plausible to say the least that Vox knew, based on its executives' experience with *Hallissey*, its receipt of internal complaints and the sophistication of its General Counsel and/or outside labor counsel, that there was a substantial risk its practices were illegal, but Vox nevertheless recklessly disregarded that risk by classifying Plaintiffs as independent contractors anyway. Vox's factual allegations in its Partial Motion to Dismiss only highlight the factual disputes which need be sorted out through the discovery process.[9]

Plaintiffs cannot be expected to "plead information [they] could not access without discovery*," Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 523 (7th Cir. 2015), such as private discussions involving Fisher, Bankoff, Moe and others

[9] "The court must construe the complaint liberally in *Plaintiff's* [not the Defendant's] favor and grant Plaintiff the benefit of all reasonable inferences deriving from the complaint." *Wilson v. Hunam Inn, Inc.*, 126 F. Supp. 3d 1, 4 (D.D.C. 2015) (*citing Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). (Emphasis added).

concerning the classification issue. Discovery is likely to reveal who knew what when, and who took particular actions (or who failed to act) in relation to classification decisions at various points in time. Whether Vox acted "recklessly" or merely "unreasonably" can only be determined through discovery. For the reasons articulated herein, Plaintiffs respectfully request that the Court deny Defendant's Motion to Dismiss.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History

On September 1, 2017, Plaintiff Bradley first filed this FLSA Collective Action Lawsuit, on behalf of herself and other similarly-situated past and current Site Managers and Managing Editors (collectively "Site Managers") employed by Vox within its SB Nation business division since September 1, 2014, alleging minimum wage and overtime violations. ECF No. 1. Vox filed a Motion to Dismiss the Complaint on October 9, 2017, ECF No. 13, as well as a Motion to Take Judicial Notice in support thereof, ECF No. 14. On October 23, 2017, Plaintiffs Bradley, Wakefield, and Varda filed their First Amended Collective Action Complaint ("FAC"), on behalf of themselves and other similarly-situated past and current Site Managers, ECF No. 16, thereby mooting both Motions. Concurrent with the filing of the FAC, Plaintiffs filed a Motion for Conditional Certification, pursuant to 29 U.S.C. § 216(b), ECF Nos. 17, 18. On October 27, 2017, the Parties filed a stipulation with the Court that Plaintiffs Motion for Conditional Certification would be held in abeyance[10] pending resolution of Defendant's anticipated Motion to Dismiss Plaintiffs' First Amended Complaint, ECF No. 19, which the Court approved on

[10] With tolling of the statute of limitations for those Site Managers who have yet to join the case.

November 3, 2017, ECF No. 20. On November 6, 2017, Vox filed its Partial Motion to Dismiss Plaintiff's First Amended Complaint, ECF No. 21, as well as a Motion for Judicial Notice in support thereof, ECF No. 22.

B. The Parties

Defendant Vox is a Delaware corporation that is headquartered in this judicial district and operates nationwide. Vox is an online media company worth an estimated $1 Billion. One of Vox's business divisions is known as "SB Nation," which maintains hundreds of sports websites affiliated with its business. **FAC ¶¶ 6, 112.**

Plaintiff Bradley was employed by Vox as a Site Manager of Vox's "Mile High Hockey" website from on or about June 2013 through on or about February 2015. **FAC ¶¶ 3, 14**. Mile High Hockey is SB Nation's website for the Colorado Avalanche, a professional ice hockey team, which is part of the National Hockey League ("NHL"). **FAC ¶ 16.** Bradley regularly worked thirty (30) to forty (40) hours per week, and was compensated at a rate of $125 per month. **FAC ¶ 20.** On an annual basis during peak times, such as near the NHL draft, trade and free-agency deadlines, training camps, pre-season (which occurred in late September and early October), or when Bradley was understaffed, Bradley worked in excess of forty (40) hours per week, and as much as fifty (50) hours per week. **FAC ¶ 21.**

Plaintiff Wakefield was employed by Vox as a Site Manager for Vox's "Through It All Together" website from on or about December 2015 through on or about May 2017. **FAC ¶¶ 4, 23**. Through It All Together is SB Nation's website for Leeds United Football Club ("Leeds United"), an English professional soccer team. **FAC ¶ 25.** Wakefield regularly worked thirty (30) to forty (40) hours per week, and was compensated at a rate of $50-75 per month. **FAC ¶ 30.** On an annual basis, during the soccer season, as well as during peak news generating periods

during the off-season, such as the Transfer Window period, Wakefield often worked in excess of forty (40) hours per week, and as much as sixty (60) hours per week. **FAC ¶ 31.**

Plaintiff Varda is currently employed by Vox as a Site Manager for Vox's "Twinkie Town" website and has been so employed since approximately May 2016. **FAC ¶¶ 5, 33**. Twinkie Town is SB Nation's website for the Minnesota Twins, a professional baseball team, which is part of Major League Baseball ("MLB"). **FAC ¶ 35.** Varda regularly worked thirty (30) to forty (40) hours per week, and was compensated at a rate of $400 per month. **FAC ¶ 40.** During peak times, such as near MLB trade, draft and free-agency deadlines, playoffs, MLB All Star game week, Winter Meetings or when Varda was understaffed, Varda often worked in excess of forty (40) hours per week, and as much as fifty (50) hours per week. **FAC ¶ 41.**

Pursuant to 29 U.S.C. § 216(b), all Plaintiffs consented in writing to their party status in this action. **FAC ¶¶ 3-5, ECF Nos. 1, 9, 15**. To date, in addition to Plaintiffs, two other Site Managers, Jacob Pavorsky and Stephen Schmidt, have elected to join this case as Opt-In Plaintiffs. **ECF No. 4**.

C. Plaintiffs Challenge a Common Illegal Pay Practice

In their FAC, all Plaintiffs allege that they:

1. were employed by Vox within the last three (3) years as Site Managers of team sites within Vox's SB Nation business division, **FAC ¶¶ 3-5, 14, 23, 33;**
2. signed a "Blogger Agreement," which, to the extent lawful, dictated the terms of their employment with Vox as Site Managers, and classified them as independent contractors, **FAC ¶¶ 13, 22, 33, Exs. 1-3;**
3. worked under the direction of a League Manager of their respective sport for their respective team site, **FAC ¶¶ 17, 26, 36;**

4. engaged in similar duties, such as: writing, editing and publishing several sports news articles per week concerning their respective teams, managing staff writers on the team sites, communicating with their respective League Managers concerning the team sites, and managing the fan comment sections on their team sites and/or managing and posting content on the Facebook and Twitter feeds relating to their team sites, **FAC ¶¶ 18, 19, 27-29, 37-39;**
5. were classified as independent contractors and paid a flat monthly salary, which did not vary according to the number of hours worked, **FAC ¶¶ 20, 30, 40, 68, 69;**
6. were compensated with monthly salaries which never amounted to at least $7.25 per hour worked in a work week, **FAC ¶¶ 20, 30, 40, 121-131;**
7. to the extent in any given work week they worked over forty (40) hours, Vox failed to pay Plaintiffs an overtime premium of one and one half times their regular hourly rates of pay, **FAC ¶¶ 132-142.**

D. Plaintiffs Allege Vox's Actions Were Willful

In approximately late 2013, Plaintiff Bradley complained to her League Manager Travis Hughes that she was paid inadequate wages. Hughes replied that wages were determined by team site traffic. Bradley subsequently helped increase Mile High Hockey's site traffic significantly, yet her monthly salary never increased. **FAC ¶ 106**.[11]

[11] Upon information and belief, other employee complaints were made to Vox concerning wages. The sports website Deadspin published statements from an anonymous Site Manager who stated that he spoke with his League Manager about the subject of the compensation (or lack thereof) of Vox site contributors. This Site Manager stated that Vox is "attempt[ing] to blur the lines between fanposts, which are written and posted by fans with no oversight/editing by us … and actual unpaid contributors, who write articles on a normal schedule that are edited and posted in

In 1999, Kelly Hallissey and several other plaintiffs filed a nationwide FLSA collective action lawsuit on behalf of themselves and other "Community Leaders" against America Online, Inc. ("AOL"), alleging, inter-alia, AOL's failure to pay its Community Leaders minimum wages required by 29 U.S.C. § 206. **FAC ¶ 89**. The *Hallissey* court denied AOL's motion for summary judgment on the issue of employment status in 2006, certified the case as a nationwide collective action in 2008, and approved settlement in 2010 for $15 Million. **FAC ¶¶ 95-98**. *Hallissey* was widely publicized in the media and involved similar legal and factual issues to the instant litigation. **FAC ¶¶ 90, 92**. Vox's current CEO James Bankoff, President Marty Moe and Chief Legal Officer (former General Counsel) Lauren Fisher each previously worked at AOL for several years as either executives (Bankoff and Moe) or as a lawyer in AOL's office of General Counsel (Fisher) before moving to Vox. **FAC ¶¶ 82-88**.

During all relevant times, Bankoff, Moe and Fisher were aware of the *Hallissey* litigation and of the fact that Vox's decision to classify the FLSA Class Members as independent contractors and fail to pay them at least the minimum wage and overtime compensation was illegal. **FAC ¶¶ 101-105**. Fisher signed Vox's Blogger Agreements as Vox's General Counsel and thus was personally involved in the decision to classify Plaintiffs as independent contractors. **FAC ¶ 102, Exs. 1-3**. Given Vox's awareness of the *Hallissey* litigation, the related USDOL

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the main layout. Again [Vox has] to know the difference between those roles, so I'm not sure if they're confused or trying to deliberately obfuscate the issue." **FAC ¶ 107**. *See also* Laura Wagner, *How SB Nation Profits Off an Army of Exploited Workers*, Deadspin (Aug. 14, 2017), http://deadspin.com/how-sb-nation-profits-off-an-army-of-exploited-workers-1797653841 (last accessed October 11, 2017);

investigation, and internal complaints from Plaintiff Bradley and other Site Managers, Vox knew it was illegal to classify the FLSA Class Members as independent contractors and fail to ensure they were paid at least the minimum wage and overtime required by law, but Vox did so anyway. **FAC ¶ 108**.

III. ARGUMENT

A. Standard on a Motion to Dismiss

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007)) (internal citations omitted). "The court must construe the complaint liberally in Plaintiff's favor and grant Plaintiff the benefit of all reasonable inferences deriving from the complaint." *Wilson v. Hunam Inn, Inc*., 126 F. Supp. 3d 1, 4 (D.D.C. 2015) (*citing Kowal v. MCI Commc'ns Corp*., 16 F.3d 1271, 1276 (D.C. Cir. 1994).

While a plaintiff must set forth a plausible basis to infer the defendant acted unlawfully, the plaintiff is not required to plead information which it can only access through discovery such as private communications that may indicate the defendant's state of mind. *See, e.g., Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 523 (7th Cir. 2015). ("We cannot expect, nor does Federal Rule of Civil Procedure 8 require, a plaintiff to plead information she could not access without discovery"). The Southern District of Texas articulated

the balance courts should strike between requiring *plausible* allegations of wrongdoing, yet not requiring a plaintiff to plead what could only be obtained through discovery:

> This balance, requiring more than boilerplate allegations but not demanding specific facts that prove the existence of [an unlawful] policy, is in line with the approach of other courts post-*Iqbal*. Where a plaintiff provides more than a boilerplate recitation of the grounds for municipal liability, and instead makes some additional allegation to put the municipality on fair notice of the grounds for which it is being sued, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Leatherman*, 507 U.S. at 168–69, 113 S.Ct. 1160.

Thomas v. City of Galveston, 800 F. Supp. 2d 826, 843–45 (S.D. Tex. 2011) (internal citations and footnotes omitted; emphasis added). *See also Taylor v. RED Development, LLC*, No. 11-2178-JWL, 2011 WL 3880881, at *4 (D. Kan. Aug. 31, 2011) ("While it is true that plaintiffs do not include in their complaint additional instances of officers targeting African–American shoppers without probable cause, that omission is not fatal under *Iqbal* because it is unlikely that plaintiffs would have access to such information at the pleading stage."); *Mitchell v. Township of Pemberton*, 2010 WL 2540466, at *6 (D.N.J. June 17, 2010) ("[I]nformation concerning a town's customs or policies, the policymakers' motivations behind such policies, or the facts surrounding police department customs, are typically unavailable to an outsider, so that pleading facts to sufficiently advance a racial profiling claim may be impossible without some assistance through litigation tools such as request for admissions, interrogatories, document requests, and depositions.") (emphasis added); *Wilson v. City of Chicago*, 2009 WL 3242300, at *3 (N.D.Ill. Oct. 7, 2009) ("It is not reasonable to expect a plaintiff to have information about other incidents at the pleading stage; instead, a plaintiff should be given the opportunity to develop an evidentiary record to determine whether he can provide support for his claims.") (emphasis added).

B. The Expansive Reach of the FLSA

Except as otherwise provided under the FLSA, "the term 'employee' means any individual employed by an employer." 29 U.S.C. § 203(e)(1). "'Employ' includes to suffer or permit to work." 29 U.S.C. § 203(g). "The definition of 'employ' is broad." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947). "'In keeping with the broad statutory definitions of the coverage phrases used, the courts have repeatedly expressed and adhered to the principle that the coverage phrases should receive a liberal interpretation, consonant with the definitions, with the purpose of the Act, and with its character as remedial and humanitarian legislation.'" *Falk v. Brennan*, 414 U.S. 190, 205 (1973) (*quoting* H.R.Rep.No.1366, 89th Cong., 2d Sess., 10).

This District recently echoed the Supreme Court's consistently broad reading of the FLSA's coverage in *Wilson v. Hunam Inn, Inc*., 126 F. Supp. 3d 1, 5 (D.D.C. 2015):

> The Supreme Court has emphasized the "expansiveness of the Act's definition of 'employer.' " *Falk v. Brennan*, 414 U.S. 190, 195, 94 S.Ct. 427, 38 L.Ed.2d 406 (1973). Indeed, the definition of employer is "necessarily a broad one in accordance with the remedial purpose of the Act." *Morrison v. Int'l Programs Consortium*, 253 F.3d 5, 11 (D.C.Cir.2001).

The FLSA "was designed to raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation 'from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.'" *United States v. Rosenwasser*, 323 U.S. 360, 361 (1945) (*quoting United States v. Darby*, 312 U.S. 100 (1941); Sen.Rep. No. 884 (75th Cong., 1st Sess.) at pp. 4). Senator Hugo Black, sponsor of the Black-Connery bill, a 1937 precursor to the

FLSA,[12] stated on the floor of the Senate that the term 'employee' had been given 'the broadest definition that has ever been included in any one act.'" *Rosenwasser,* 323 U.S. at 363 (*quoting* 81 Cong.Rec. 7657).

All that is relevant to the issue of employment relationship is whether as a matter of the "underlying economic realities," *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947), a plaintiff is economically dependent on his or her employer. The FLSA's reach does not depend on an employer's labelling of their workers as "independent contractors" or "volunteers," a worker's subjective belief about their employment status, or whether the worker even desires the protections of the FLSA at all. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) ("the purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses.") (emphasis added).

As the District of Columbia Circuit held, a putative employee plaintiff's categorization of herself as a "consultant" is irrelevant in determining employee status because "[F]acile labels and subjective factors[, however,] are only relevant to the extent that they mirror 'economic reality.'" And [Plaintiff]'s self description may not reflect economic reality." *Morrison v. Int'l*

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[12] *See* Jonathan Grossman, "Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage," U.S. Department of Labor, https://www.dol.gov/oasam/programs/history/flsa1938.htm (last accessed 11/2/2017).

Programs Consortium, Inc., 253 F.3d 5, 11 (D.C. Cir. 2001). (Emphasis added; internal citations omitted).

C. Plaintiffs Have Plausibly Stated Claims that Vox Willfully Violated the FLSA Under 29 U.S.C. § 255(a)

1. Vox's Arguments are Easily Dismissed by *Richland Shoe* and Its Progeny

Vox repeatedly refers to the lead case on willfulness under the FLSA, *McLaughlin v. Richland Shoe Co*., 486 U.S. 128 (1988). *Richland Shoe* held that for an FLSA defendant to be subject to the three-year statute of limitations under 29 U.S.C. § 255(a), instead of the "ordinary" two-year statute, the plaintiff must produce evidence that "the employer either knew *or showed reckless disregard for* the matter of whether its conduct was prohibited by the FLSA." *Id*. at 133. (Emphasis added). Importantly, *Richland Shoe* was a summary judgment opinion, developed on a full factual record, not on the pleadings alone.

Black's Law Dictionary defines "reckless" as:

> Characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do.

Black's Law Dictionary, "Reckless" (10th ed. 2014) (emphasis added). In FLSA parlance, a defendant who acts with reckless disregard must, therefore, at a minimum, disregard a substantial and unjustifiable risk that it is not compensating its employees in accordance with the FLSA.

Vox notes that *Galloway v. Chugach Gov't Serv., Inc.,* 199 F.Supp. 3d 145 (D.D.C. 2016), "appears to be the only case in which this District has had occasion to apply the *Iqbal* and *Twombly* pleading standards to an allegedly willful FLSA claim." MTD at pp. 8, n. 3. Through *Galloway*, Vox attempts to create an artificially heightened *Iqbal* standard and push the pleading

benchmark to a new level through litigation of this case. Vox's reading of *Galloway* is highly exaggerated for the reasons that follow.

In *Galloway*, over the defendant's protests that "Plaintiffs' allegations of a willful violation invoke[d] little more than labels and conclusory statements," the court held that "the complaint contain[ed] sufficient detail [of willfulness] to survive a motion to dismiss." *Galloway* at 152. In that case, the plaintiffs alleged merely that the defendant, "was aware of the requirements of the FLSA and its regulations, but despite this knowledge ... failed and refused to pay its employees in accordance with the FLSA," *id*. at 151, that the defendant's "'systems, practices and duties' were 'willful and intentional,' … that [defendant] 'has been aware of the requirements of the FLSA and its regulations' but has nevertheless 'failed and refused to pay its employees in accordance with the FLSA,' … [and defendant's] failure to pay [p]laintiffs and their coworkers for overtime work 'in violation of the FLSA' was 'willful and intentional.'" *Id*. at 152 (*citing* complaint).

The *Galloway* court did not require more detailed pleading about *what* exactly the defendant knew about the illegality of its practice, *how* it knew so, *when* it knew so, *who* defendant spoke with about the subject or *what* those conversations entailed. The court cited Rule 9(b) and reasoned that "allegations regarding an opposing party's state of mind are inevitably fraught [and for] this reason, Rule 9(b) provides that '[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally.'" *Id*. at 152. (Emphasis added). Although recognizing that Rule 9(b) "'does not give a plaintiff license to evade the less rigid—though still operative—strictures of Rule 8,'and that "[t]hose strictures require that the plaintiff allege facts, and not simply labels or conclusions, sufficient to support a plausible claim of willful misconduct," the court also recognized that "the plaintiff is entitled to 'the benefit of all

[plausible] inferences that can derived from the facts alleged,' and [i]n assessing the 'plausibility' of those inferences, moreover, the Court must be cognizant that those engaged in knowing violations of the law seldom announce that fact and that it is not the Court's role to act as factfinder." *Id*. (*quoting Iqbal* at 686–87; *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011)) (emphasis added).

Galloway's unsurprising holding is in keeping with other courts. For example, in the face of a challenge on a partial motion to dismiss very similar to the one advanced by Vox, the Eastern District of New York found a willfulness claim was plausibly stated based on the following bare-bones allegations:

> Plaintiff has alleged that defendants' failure to pay her overtime wages was willful. (See Am. Compl. ¶ 29 (stating that defendants' failure to pay was "willful ... since [defendants] had no regard whatsoever for legal requirements in connection with their wage policies").) At this stage of litigation, plaintiff's general averment of willfulness satisfies the requirements of pleading a willful violation of the FLSA, so as to invoke the three-year statute of limitations.

Litras v. PVM Int'l Corp., No. 11-CV-5695 JFB AKT, 2013 WL 4118482, at *6 (E.D.N.Y. Aug. 15, 2013) (*citing Moran v. GTL Const., LLC*, No. 06 CIV 168 SCR, 2007 WL 2142343, at *1 (S.D.N.Y. July 24, 2007)) (emphasis added).

Vox ignores *Galloway's* (and *Iqbal's*) caution against requiring specific allegations relating to state of mind, and instead focuses on the fact that the *Galloway* plaintiffs alleged that they were "forced to regularly and routinely work through their meal breaks…were not allowed to leave their work locations at the end of their shifts…[and] were not permitted to record this additional time." *Galloway* at 153; MTD at pp. 8, n. 3. But these allegations are nothing more than assertions that the defendant failed to pay its employees overtime compensation for all

hours worked in violation of the FLSA; they have nothing to do with the defendant's state of mind.

Similarly, in this case, Plaintiffs plausibly allege not only that they were misclassified and were denied the minimum wages and overtime compensation required by the FLSA, **FAC ¶¶ 20, 21, 30, 31, 40, 41, 121-142**, but they also allege specific factual circumstances which give rise to the plausible inference that Vox at least acted with reckless disregard as to the issue of whether its practices were illegal. That is, Plaintiffs specifically alleged that Plaintiff Bradley complained to her manager about her wages, to no avail, indicating that her manager's response (that pay was dependent on site traffic) was pre-textual (because even though Bradley increased site traffic and her wages remained the same), rather than a good-faith effort to evaluate the situation. **FAC ¶ 106.** Similarly, Plaintiffs alleged that an anonymous Site Manager revealed to Deadspin that he spoke with his League Manager about "how to use unpaid writers…and [he] would be shocked if [the League Manager's] bosses didn't know that." **FAC ¶ 107.** Plaintiffs also specifically alleged that due to their tenure at AOL, three senior Vox executives, including its General Counsel who signed Plaintiffs' contracts, knew about the 2006 denial of summary judgment and the 2010 $15 Million settlement in *Hallissey,* and with that knowledge in mind, recklessly disregarded whether its classification of Plaintiffs as independent contractors also violated the FLSA. **FAC ¶¶ 82-106, 108, 109, 113, 114.**

The allegations in the FAC therefore go significantly beyond what *Richland Shoe* and *Galloway* require, as Plaintiffs not only identified the illegal practices at issue (failure to pay minimum wage and overtime), and the fact that Vox knew its practices were legal yet continued to implement them anyway – Plaintiffs also alleged detailed factual circumstances (Bradley's complaint to her manager, the *Hallissey* litigation and the movement of Vox's CEO, President

and General Counsel from AOL in the same general timeframe), which together provide a more than reasonable inference as to *how* and *why* Vox would have known that its practices were illegal – something Rule 9(b) does not even require.

2. Vox Failed to Address Two Post-*Richland Shoe* Cases Cited in the FAC, Which Closely Relate to the Willfulness Issues in This Case

In their FAC, Plaintiffs cited *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 141–42 (2d Cir. 1999) and *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 967 (6th Cir. 1991), **FAC ¶ 109**, neither of which Vox addressed in its Partial Motion to Dismiss. In *Herman,* the Second Circuit upheld a trial verdict against an individual defendant (Portnoy), who was a shareholder and chairman of the board of the co-defendant corporation (RSR), finding Portnoy willfully violated the FLSA when he relied on the promises of RSR's president and vice president. Portnoy defended on the grounds that: he was not an employer of the corporation's security guards, he did not have actual knowledge of RSR's FLSA violations, he even inquired repeatedly with the president and vice president as to whether RSR was complying with the law and thus under those circumstances, Portnoy could not have willfully violated the FLSA himself. The Second Circuit flatly rejected those arguments:

> The trial court reasoned that although Portnoy may not have had actual knowledge of the violative practices, the proof demonstrated he recklessly disregarded the possibility that RSR was violating the FLSA. Several reasons support this conclusion. First, when he agreed to form RSR, the trial court found, Portnoy was aware that one of Stern's previous security guard companies had been the subject of an Internal Revenue Service investigation, which led to the filing of an outstanding judgment against Stern. Hence, Portnoy knew Stern had conducted his earlier business activities in an illegal manner. With this background, when appellant subsequently learned that RSR guards were illegally included on 1099 forms as independent contractors—an indication of unlawful activity—he made no effort to ascertain RSR's compliance with the FLSA.
>
> In response, appellant avers he had no independent knowledge that security guards were not being paid overtime, or even that the security

> guards were being paid minimum wages and therefore subject to the requirements of the FLSA. And, Portnoy further states, he repeatedly checked with Michael Stern, Marilyn Stern, and Watkins in order to ensure that RSR was complying with the law. But, for Portnoy to rely on information from Stern and Watkins in this context was reckless because Portnoy already knew of Stern's prior illegal activities and that some of RSR's own pay practices, which had come to his attention, violated the law. Moreover, appellant had independent means of determining the rates at which guards were paid since he was in regular contact with various RSR employees, including RSR's accountant; he could easily have inquired into the pay rates for the security guards. Portnoy was, after all, an expert in this field who had extensive knowledge of the FLSA and its requirements.
>
> Under the circumstances, the district court was correct to rule that for Portnoy to rely upon the promises of Stern and Watkins was a reckless disregard of the risk that RSR was not in compliance with the FLSA. Such reckless disregard constituted a willful violation of the statute.

Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 141–42 (2d Cir. 1999) (emphasis added).

In *Elliott Travel*, the Sixth Circuit entered summary judgment in favor of the Secretary of Labor, *plaintiff* in that action, on the issue of willfulness. In that case, the defendant had knowledge of a Department of Labor settlement of claims against defendant's predecessor entity, entered into almost 13 years prior to filing of the complaint:

> As evidence of willfulness on the part of the defendants, the Secretary asserts that it is undisputed that Schubiner had actual knowledge of the overtime provisions of the FLSA prior to the violations at issue in this case. In support of her motion for summary judgment, the Secretary submitted the affidavit of James Smith, area director of the Wage and Hour Division of the Department of Labor. The affidavit states that a travel agency known as "Elliott Travel Service," the predecessor to Elliott Travel & Tours, Inc., was investigated by the Department of Labor in 1975, and the investigation disclosed overtime violations of the FLSA. The affidavit states that the prior violation was resolved upon payment of overtime wages and an assurance of future compliance with the FLSA. The affidavit further states that following another complaint regarding unpaid overtime wages, Smith personally conferred with Schubiner on May 30, 1975, and Schubiner refused to pay the overtime wages which were due. The Secretary also submitted the affidavit of Shelley Scarfone, the compliance officer who investigated the present case. In the affidavit, Scarfone states that after this action was instituted defendants continued to

> exclude commission payments in calculating the overtime compensation for employees.
>
> The only evidence offered by defendants on the willfulness issue is the affidavit of Schubiner in which he asserts that "at all times the Defendant has agreed to comply with the Act and still remains anxious to do so, and at all times ... has acted in good faith in an effort to comply with the Act." Schubiner states in the affidavit that if the FLSA was violated, "it was an error or an oversight by the bookkeeper, as there was no attempt or interference from Affiant to pay people less than the wages prescribed by law." Schubiner also states that at no time prior to institution of this action did the compliance officer inform defendants that commissions were to be added into gross pay for purposes of computing overtime compensation. Significantly, Schubiner's affidavit does not dispute the statement in Smith's affidavit regarding prior violations of the FLSA by Schubiner's previous travel agency, Elliott Travel Service.
>
> From our review of the record in this case, we hold that there is no genuine issue of material fact as to whether defendants' violation of the FLSA was willful…Under these undisputed circumstances, defendants' violation of the FLSA satisfies the "willfulness" standard of *Richland Shoe*.

Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 967 (6th Cir. 1991) (emphasis added).

There are several take-aways from *Herman* and *Elliott Travel* that are directly relevant to this case and which undermine, if not entirely nullify, Vox's attempts to distinguish its conduct, as alleged by Plaintiffs, from being willful: (1) knowledge of prior, non-identical employment violations (*i.e*., knowledge of prior IRS misclassification violations in an unpaid overtime case) help establish that a defendant recklessly disregarded the possibility that it's practices violated the FLSA; (2) relevant knowledge of a prior illegal practice carried out by a business other than the defendant's helps establish that the defendant recklessly disregarded the possibility that *its* practices, like the practices of the separate business, violated the FLSA; (3) the prior employment violation need not be conclusively adjudicated through judgment (*i.e*., settlement of the claims alleged is enough); (4) the prior employment violation may occur at a relatively distant point in time (*i.e*., more than a decade prior to the acts at issue in the instant litigation);

and (5) the defendant need not have *actual* knowledge of the illegal practices at issue, if the defendant recklessly disregarded the possibility that its practices violated the FLSA.

In its Partial Motion to Dismiss, Vox synthesizes arguments cut from the same cloth as the defendants in *Herman* and *Elliott Travel*. Specifically, Vox attempts to downplay the significance of its knowledge of the *Hallissey* litigation[13] by arguing: (1) *Hallissey* was filed in 1999; (2) *Hallissey* involved a different business (AOL); (3) *Hallissey* involved a different job ("Community Leaders," not "Site Managers"); (4) *Hallissey* involved, in Vox's estimation, "significantly more control over the terms and conditions of their work;" (5) *Hallissey* involved a different classification ("volunteer," not "independent contractor"); (6) *Hallissey* was settled, with a non-admissions clause – it was not adjudicated through judgment. MTD at pp. 13-16. For the reasons just discussed, Vox's arguments on these points are clearly foreclosed by *Herman* and *Elliott Travel.* The fact that Vox felt compelled to so strenuously attempt to distinguish the factual allegations in *Hallissey*[14] from the allegations at issue here, demonstrates that Plaintiffs' willfulness claims cannot be adjudicated through a Rule 12 motion and that discovery is necessary to sort out the who, what, where, why, when and how surrounding the classification issue.

3. Case Law Cited by Vox Does Not Control Resolution of This Motion

In trying to distinguish its conduct from being willful, Vox heavily relies on a number of other cases, almost all of which were summary judgment or trial related opinions. The lone case cited by Vox in which an FLSA willfulness claim was dismissed on the pleadings was an

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[13] *Hallissey* is discussed in further detail in Part D, *infra*.

[14] Which in the final estimation, could still well result in a willfulness finding even if the *evidence* went Vox's way on these factors.

unreported case in the Northern District of Ohio in which "[t]he Plaintiffs allege[d] only that (1) they were employees, (2) [defendant] FedEx knew the FLSA requires it to determine whether the Plaintiffs were employees or independent contractors, (3) FedEx classified the Plaintiffs as independent contractors, and (4) FedEx did so willfully." *Stout v. FedEx Ground Package Sys., Inc*., No. 3:14-CV-02169, 2015 WL 7259795, at *4 (N.D. Ohio Nov. 17, 2015). The *Stoudt* Court noted that plaintiffs' complaint "[did] not contain any factual allegations that FedEx 'knew or showed reckless disregard for' the question of whether it was in compliance with the FLSA." *Id*. at *5. These allegations plainly contrast with the allegations in *Galloway v. Chugach Gov't Serv., Inc.,* 199 F.Supp. 3d 145, 151 (D.D.C. 2016) (court denying motion to dismiss willfulness claims where plaintiffs plead that defendant "was aware of the requirements of the FLSA and its regulations, but despite this knowledge ... failed and refused to pay its employees in accordance with the FLSA."). To the extent *Stoudt* required, "factual allegations about [defendant's] mental state," *Stoudt* at *4, this requirement is foreclosed by Rule 9(b) and *Galloway's* instruction that "[i]n assessing the 'plausibility' of those inferences, moreover, the Court must be cognizant that those engaged in knowing violations of the law seldom announce that fact and that it is not the Court's role to act as factfinder." *Galloway at 152*. (*quoting Iqbal* at 686–87; *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011)) (emphasis added).

Vox also cites *Gonzalez v. Bustleton Servs., Inc*., No. CIV.A 08-4703, 2010 WL 1813487 (E.D. Pa. Mar. 5, 2010) for the proposition that an FLSA "violation was not willful where it was difficult to determine compliance with FLSA and DOL had not identified violations in prior site visits." MTD at p. 17. Yet, Vox conveniently ignores that *Gonzales* was an opinion on a trial record, in which the Court acted as fact-finder and assessed the credibility of the defendant's owner. *Gonzales* at *14. Similarly, Vox cites *Chapman v. BOK Fin. Corp*., No. 12-CV-613-

GKF-PJC, 2014 WL 3700870 (N.D. Okla. July 25, 2014), a summary judgment opinion, developed on a full discovery record, *Barth v. Wolf Creek Nuclear Operating Corp*., No. 97-4174-SAC, 2002 WL 31314829 (D. Kan. Aug. 28, 2002), an opinion on a *motion in-limine* concerning the propriety of disclosing evidence of prior DOL investigations during an impending trial, *Irma Halferty v. Pulse Drug Co.*, 826 F.2d 2 (5th Cir. 1987), a trial opinion, and *Garcia v. Allsup's Convenience Stores, Inc*., 167 F. Supp. 2d 1308 (D.N.M. 2001), a summary judgment opinion. None of the case law Vox cites above governs disposition of this motion because each case opinion was based on a full discovery or trial record, not on the pleadings.

Vox's reliance on *Markey v. Cameron Compression Sys*., No. 10-CV-377A, 2011 WL 90318, at *2 (W.D.N.Y. Jan. 11, 2011) (court refused to dismiss willfulness claims where plaintiff alleged that he "complained to defendant on more than one occasion that he was working non-exempt hours that required overtime compensation under the FLSA.") is misplaced as well. Vox appears to turn the particular facts of *Markey* (multiple complaints) into a pleading *requirement*. Yet, neither *Markey* nor any other case law so requires. Vox's request to extend the reach of *Iqbal* into the realm of requiring specific allegations of mental state or multiple employee complaints, should therefore be rejected.

D. Substantial Precedent Existed Prior to Vox's Classification Decisions, Demonstrating that Vox's Site Managers Are Employees Under the FLSA

Vox points to a single case, *In re Mitchell*, 145 A.D.3d 1404 (N.Y. App. Div. 2016), a New York unemployment compensation case from December 2016, for the proposition that there is "sparse existing legal authority" on the issue of whether "Bloggers" are employees or independent contractors and that "the only on-point authority resulting in a final determination held that the plaintiff blogger was properly classified as an independent contractor." MTD at pp. 12, 16. It is absurd for Vox to argue that searching for the term "Blogger" in Westlaw or Lexis

for many years without retrieving any hits until December 2016 demonstrates that it did not act with reckless disregard as to whether its classification decisions violated the FLSA. There was and remains an abundance of highly relevant precedent that demonstrated years ago Vox's classification of its Site Managers as independent contractors was illegal.

1. *Hallissey v. America Online*

In *Hallissey v. America Online, Inc*., 2006 US Dist. LEXIS 12964 (S.D.N.Y., Mar. 10, 2006), the court reviewed substantial record evidence and concluded that genuine issues of material fact existed as to whether America Online ("AOL") misclassified its Community Leaders ("CL's") as "volunteers," in violation of the FLSA. In *Hallissey*, Kelly Hallissey and ten other CL's filed a nationwide collective action lawsuit against AOL, alleging that they were denied the minimum wages and overtime pay mandated by the FLSA. *Id*. at *2. *Hallissey* involved strikingly similar factual and legal issues. This case, as in *Hallissey*, involves the failure to classify the plaintiffs performing services for the defendant as employees under the FLSA, and the failure of the defendant to ensure compliance with the FLSA's minimum wage and overtime requirements as it related to the plaintiffs. More importantly, there is significant similarity in the duties performed by Vox's Site Managers as compared to AOL's CL's, as all plaintiffs' duties included: creating, deleting and editing online content, moderating online community interaction (whether in chat rooms, web site comment sections, or social media feeds), and managing or assisting other content creators. The *Hallissey* court summarized the CL's duties, including their integral nature, as follows:

> The precise roles and duties of Plaintiffs and other community leaders varied considerably. Plaintiffs' duties included, for example: managing and updating message boards, moderating chat rooms, serving as "guides" to AOL subscribers, updating content on forums, serving as online tutors, and running other activities such as fantasy sports leagues or trivia

> contests… Some Plaintiffs came to be "Assistant Room Managors" [sic] and would supervise and train other AOL volunteers.
>
> AOL provided Plaintiffs with greater powers than regular subscribers. For example, Plaintiffs who moderated chat rooms had the power to "gag" certain members by forcing the members to take a five minute "time out" if they engaged in inappropriate online conduct. Some Plaintiffs also had the power to delete or change the content of certain AOL forums.
>
> …
>
> Plaintiffs, for the most part, were not paid actual wages for their efforts. Indeed, AOL referred to these community leaders as "volunteers." AOL nonetheless provided Plaintiffs, and other community leaders, with a variety of benefits in recognition of their efforts. After December 1996 or January 1997, these benefits included free AOL access, a leather AOL compact disc case, discounts at the AOL employee store, expanded space for web pages, and free anti-virus software.
>
> Plaintiffs maintain that these online communities enabled AOL to retain and attract subscribers and allowed it to reap profits from advertising--the rates for which were based on an internet site's level of traffic. Plaintiffs further allege that these communities could not have functioned (or at least could not have functioned as well) without the community leaders…

Id. at *3-6 (footnote omitted; emphasis added).

Although the legal issues in *Hallissey* differed to the quite limited extent that AOL classified its employees as "volunteers,"[15] rather than "independent contractors," and although the *Hallissey* court "[found] it unnecessary, at th[at] time, to adopt a precise formulation of the appropriate test for purposes of this motion because genuine issues of material fact prevent[ed

[15] Since the CL's in *Hallissey* were not paid *monetary* compensation and instead received compensation in the form of free AOL access and other AOL paraphernalia, *id*. at *6, the court analyzed whether the CL's labored with an expectation of compensation or whether they performed their work purely for personal enjoyment and not for AOL's benefit. The expectancy concept is not at issue in this case since Plaintiffs all worked under a contract for monetary compensation and indeed received monetary compensation, albeit at less than the minimum wage.

the court] from granting [AOL's motion for summary judgment] under *either* proposed test," *id*. at *13 (emphasis added), the court paid significant attention to the five employment relationship factors in *Brock v. Superior Care, Inc*., 840 F.2d 1054, 1058-59 (2d Cir. 1988). *Hallissey* at *12, n. 4. ("As discussed *infra*, the economic realities test considers whether a purported employee was 'dependent' on an employer. The Second Circuit has listed (in the context of independent contractors) the following factors as relevant to this inquiry: '(1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.') (*quoting Brock* at 1058-59; emphasis added).

The *Hallissey* court recognized that "the economic realities test 'presupposes a real economic exchange between the parties,'" *Hallissey* at *12, n. 4 (*quoting Todaro v. Township of Union*, 27 F. Supp. 2d 517, 534 (D.N.J. 1998)), and accordingly held out the possibility of a sixth *Brock* factor of sorts in volunteer cases – that is, whether the putative employee labored under an expectation of compensation. As there is no issue in this case as to Plaintiffs' expectation of compensation, *supra* n. 18, the employment relationship factors collapse to the traditional *Brock* factors, plus any other relevant evidence.

As to the employment relationship factors, the work of plaintiffs in this case and in *Hallissey* were clearly integral to the operation of their employers' businesses (*i.e*., the creation of online media content and management of online community interaction was essential to advertisers paying money to advertise on Vox's and AOL's internet platforms). Similarly, plaintiffs in both cases enjoyed no opportunity of profit or loss because no plaintiffs shared in

advertising revenue. No special skill or investment was required by either the Site Managers or the CL's. In both actions the plaintiffs' work conditions and rates of pay were controlled by the defendants. As to the permanence of the employment relationship, it is clear that the Plaintiffs in this matter satisfy this prong because they each worked at least 30-40 hours per week on a regular basis.

Hallissey was later certified as a nationwide collective action, *Hallissey v. America Online, Inc.*, 2008 WL 465112 (S.D.N.Y., Feb. 19, 2008), and on February 2, 2010, the court approved a $15 Million settlement in the matter, *Hallissey* at ECF No. 2657.

In attempting to distinguish its conduct from *Hallissey*, Vox paints the false impression that *Hallissey* was some ancient, unrelated litigation against a completely unrelated entity and therefore it is implausible that Vox acted willfully when it classified Plaintiffs as independent contractors even if it knew about *Hallissey*. Vox entirely ignores the context detailed in the FAC: although *Hallissey* was filed in 1999, the important years in *Hallissey* were the denial of summary judgment on the issue of employment status (2006) and the $15 Million settlement (2010). FAC ¶¶ 89-98. Furthermore, Vox's General Counsel, CEO and President all came to Vox from AOL in 2008, 2009 and 2011 respectively. FAC ¶¶ 82-88. Clearly, the context makes it at least plausible (indeed, quite probable) that each of these executives were aware of *Hallissey* and the violations at issue in that case. General Counsel Fisher signed Plaintiffs' Blogger Agreements, indicating she was intimately involved in the classification process. Even more specifically, the Blogger Agreements specifically disclaimed an employment relationship, FAC, Exs. 1-3 at ¶ 5, indicating the concept of the employment relationship under the FLSA was fresh

in Ms. Fisher's mind when Vox made its initial classification decision.[16] That Vox now claims the plaintiffs in *Hallissey* had different job titles and classifications,[17] engaged in somewhat different duties or were subject to differing control[18] by AOL, does not change the fact that based on the detailed context in the FAC, it is more than plausible that Fisher, Bankoff and Moe knew about the illegal conduct at issue in *Hallissey*, and disregarded the substantial and unjustifiable risk that Vox's classification of Plaintiffs as independent contractors violated the FLSA. It is also particularly bold for Vox to rely on a supposed lack of control, when it openly publishes advertisements to hire for its League Manager positions (the direct supervisors of the Site Mangers) which state, "[o]ur MLB League Manager will be…[i]dentifying opportunities to *recruit, train, and coach* all site managers."[19]

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[16] To the extent Vox might argue that the initial classification decision years prior is irrelevant to Plaintiffs' claims for work performed in 2014 and later, Vox's continuing disregard of the possibility of FLSA violations would similarly demonstrate willfulness.

[17] "[F]acile labels and subjective factors[, however,] are only relevant to the extent that they mirror 'economic reality.'" *Morrison v. Int'l Programs Consortium, Inc*., 253 F.3d 5, 11 (D.C. Cir. 2001). (Internal citations omitted).

[18] "Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity.' The facts, viewed in the light most favorable to plaintiffs, indicate that [the employer] exercised significant control over plaintiffs such that they did not stand as 'separate economic entities' who were 'in business for themselves.'" *Scantland v. Jeffry Knight, Inc*., 721 F.3d 1308, 1313 (11th Cir. 2013) (*quoting Usery v. Pilgrim Equip*., 527 F.2d 1308, 1312–13 (5th Cir. 1976). (Emphasis added). There can be no serious argument that Plaintiffs were independent business people who functioned as economic units separate from Vox. Rather, Plaintiffs were integrated into a single economic unit with Vox's production of sports journalistic content. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

[19] *See* "Job Application for MLB Site Manager, SB Nation Team Brands at Vox Media." Available at: https://boards.greenhouse.io/voxmedia/jobs/872749#.Wg9MIlWnGUk (last accessed 10/25/2017) (emphasis added).

2. Relevant NLRA Precedent

Yet, *Hallissey* was certainly not the extent of all relevant precedent. In *BKN, Inc. & Local 839, I.A.T.S.E.*, 333 NLRB 143 (2001) ("*BKN*"), the National Labor Relations Board held *unanimously* that freelance writers who wrote television show scripts, were paid on a per-script basis, worked on their own schedules (frequently from home), used their own equipment and materials, were not subject to discipline from management, could engage in outside employment, and did not have taxes or benefits withheld from their paychecks, were employees under the National Labor Relations Act, 29 U.S.C. § 152(3) ("NLRA"). *BKN* at 144. The Board's finding of employment status was based on: the freelance writers' duties (script writing) being integral to their employer's business of producing television content, the freelance writers not having an economic unit that functioned separate from BKN, supervisory control, and the lack of opportunity for profit or loss. *Id.* at 144-5.

The Board contrasted the facts in *BKN* from that of *DIC Animation City*, *Inc.* 295 NLRB 989 (1989), in which the Board did not find employment status in part because the writers in that case formed their own separate "loan out companies" and negotiated script compensation, including the ability to profit from royalties. *BKN* at 145. In further distinguishing *DIC Animation*, the *BKN* Board stated, "[t]hat is not the case here, where the writers do not operate independent businesses, but rather perform functions that are an essential part of the Employer's normal operations. The writers have no substantial proprietary interest and no significant entrepreneurial opportunity for gain or loss when they are writing scripts for the Employer for the Roswell Conspiracy. Rather, the writers are paid the per script fee set by the Employer, and they have no ability to increase their compensation through the exercise of discretion in how they perform their work." *Id*. (emphasis added).

The facts of this case much more closely resemble *BKN* than *DIC Animation* for several reasons. First, Vox Site Managers had no opportunity to negotiate their compensation or to enjoy profit or loss, but were rather paid low flat monthly salaries set by Vox. Similarly, the Site Managers did not function as a separate economic unit from Vox, but rather engaged in the integral duties of producing Vox's sports journalistic content without which Vox could not exist. Vox's Site Managers and their contributors could not and did not perform work as a unit for anyone other than Vox. The Site Managers were even prohibited from working for Vox's competitors. **FAC ¶ 59**.

Here, Vox acted far more flagrantly than did employer BKN. As alleged in the FAC, Vox even maintained freelance contracts completely unrelated to the Site Managers' contracts, which governed rights and duties with respect to *discrete* journalistic pieces. FAC ¶ 79.[20] Vox's decision to bifurcate its Site Manager relationships from that of its freelance writer relationships, demonstrates that Vox considered its Site Managers, who worked 30-40 hours per week or more at Vox, to have a relationship with Vox that was significantly more permanent than that of a "freelance writer." Vox's conscious recognition of this fact demonstrates its willful disregard of the FLSA.

BKN was cited approvingly in *Minnesota Timberwolves Basketball, LP & I.A.T.S.E.*, 365 NLRB No. 124 (Aug. 18, 2017), in which the Board held that crew members "who produce electronic content that is displayed on a [video display] during professional basketball games are

[20] Opt-in Plaintiff Jacob Pavorsky testified that he entered into a separate freelance contract with Vox relating to a specific journalistic piece concerning basketball player Bobby Ray Parks, and having nothing to do with his duties and compensation as Site Manager, which were separately governed by his "Blogger Agreement." *See* Mot. for Cond. Cert., ECF No. 17, Ex. D at ¶ 32.

employees covered under Section 2(3)" of the NLRA. The Board reasoned, "[a]lthough the crewmembers here, similar to the writers in in *BKN*, are expected to bring their technical proficiencies and creative abilities to bear in producing live sports content during the Employer's games, in doing so they are constrained to produce content that conforms to the Employer's rundown and live game-time calls made by the [director of live programming]." *Id*. at *7. The Board addressed the D.C. Circuit's *FedEx* framework, *FedEx Home Delivery* 361 NLRB 610 (2014), *enf. denied* 849 F.3d 1123 (D.C. Cir. 2017), and emphasis of entrepreneurial opportunity and found that the crewmembers met that test. *Minnesota Timberwolves* at *4. The Board found it "significant" that "the video display on which the crewmembers work is an integrated part of the game experience the Employer provides as part of its business, and not easily separated from the rest of the product that the employer provides." *Minnesota Timberwolves* at *8.

3. Other Relevant FLSA Precedent

It is important to note that the scope of employment under the FLSA is *broader* than the scope of employment under the NLRA. Among its various formulations, the NLRA relies on a common-law test that emphasizes control and the presence of entrepreneurial risk above other factors. *BKN* at 144. Furthermore, the NLRA tests appear to recognize the parties' subjective intent as relevant in the analysis, *see BKN* at 144, element 10, whereas under the FLSA the Plaintiffs' subjective beliefs about their employment status are entirely *irrelevant*. *Alamo*, 471 U.S. at 302.

By contrast, under the FLSA, "[t]he common law concepts of 'employee' and 'independent contractor' have been specifically rejected as determinants of who is protected by the Act. The test is not one which allows for a simple resolution of close cases. However, the lesson taught by the Supreme Court's 1947 trilogy is that any formalistic or simplistic approach

to who receives the protection of this type legislation must be rejected." *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (footnotes omitted). No one factor is determinative. Vox places far too much emphasis on the control factor (for which there is still substantial support of employee status, *see* **FAC ¶¶ 52-64**). "None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach." *Baker v. Flint Eng'g & Const. Co*., 137 F.3d 1436, 1441 (10th Cir. 1998) (emphasis added).

The landmark case of *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) as well would have been instructive in telling Vox that their Site Managers were employees. In *Rutherford Food*, the United States Department of Labor brought suit under the FLSA against defendant Rutherford Food, a meat processor and majority owner of co-defendant Kaiser Packing Company, owner of a meat processing plant at which employees worked in the "deboning" section of a slaughter house production line. The FLSA claims related to the work of the deboning employees, who were also employees of Reed, "an experienced boner," and later various successors to Reed. *Id*. at 724-5. As Vox asserts in this case, Rutherford and Kaiser also asserted that they did not employ the deboning employees. Yet, the *Rutherford Food* Court found the presence of employment status, reasoning:

> There may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees… We conclude, however, that these meat boners are not independent contractors. We agree with the Circuit Court of Appeals, quoted above, in its characterization of their work as a part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment. Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act.
>
> …
>
> We think, however, that the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity.

> Viewed in this way, the workers did a specialty job on the production line. The responsibility under the boning contracts without material changes passed from one boner to another. The premises and equipment of Kaiser were used for the work. The group had no business organization that could or did shift as a unit from one slaughter-house to another.

Id. at pp. 729-30 (internal citations omitted; emphasis added).

Similar to *Rutherford Food*, Plaintiffs have alleged that they and the many contributors they managed engaged in duties integral to Vox's production of sports journalistic content. **FAC ¶ 80.** It is also clear that Plaintiffs and their respective contributors (like the CL's in *Hallissey,* the freelance writers in *BKN* and the meat boners in *Rutherford Food*) "had no business organization that could or did shift as a unit from one" media organization to another, and thus formed "a part of the integrated unit of production under such circumstances that" the Site Managers[21] were as a matter of economic reality, employees of Vox. *Rutherford Food* at pp. 729-30.

Cases involving the employment status of workers in the so-called "gig economy" also deserve some mention.[22] For example, in *Razak v. Uber Techs., Inc*., No. CV 16-573, 2016 WL 5874822 (E.D. Pa. Oct. 7, 2016), the court held that the plaintiffs stated FLSA claims against ride-sharing app giant Uber Technologies where employment status was at issue. The *Razak* court recognized that "with respect to the degree of control exercised by Defendants (factor one), Plaintiffs allege, inter alia, that Defendants 'control the number of fares each driver receives,'

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[21] As Plaintiffs bring this case only on behalf of Site Managers, they take no position with respect to the question of whether other SB Nation contributors were employed by Vox.

[22] Vox's own counsel in this matter has even taken gig economy cases to trial over the employment relationship issue. *See, e.g. Lawson v. Grubhub, Inc*., No. 15-CV-05128-JSC, 2017 WL 2951608 (N.D. Cal. July 10, 2017) (Lead counsel for defendant Grubhub, Inc., Theodore J. Boutrous, Jr.).

'have authority to suspend or terminate a driver's access to the App,' 'are not permitted to ask for gratuity,' and 'are subject to suspension or termination if they receive an unfavorable customer rating [.]'" *Id*. at *4 (*quoting* complaint). Approving of such limited allegations, the court went even further, stating that "Courts in this district have found that plaintiffs had adequately pled the existence of an employer-employee relationship based on far less detailed complaints. *See, e.g., Mackereth v. Kooma, Inc*., 14-cv-04824, 2015 WL 2337273, at *5 (E.D. Pa. May 14, 2015) (holding that plaintiffs sufficiently alleged employee-employer relationship by asserting that 'Defendants have employed and/or continue to employ Plaintiff,' 'that they all received paychecks from [Defendants],' that 'they worked at the addresses that correspond with the locations of [Defendants],' and by providing the dates of their alleged employment). *Id*. at *5 (emphasis added).

4. Plaintiffs' Work Schedules and Work Locations Do Not Demonstrate That Plaintiffs Are Independent Contractors

Vox engages in more misdirection by advancing the misleading narrative that Plaintiffs were simply avid fans who wrote about their favorite teams solely for their personal enjoyment and are therefore undeserving of compensation in this matter. Specifically, Vox states, "Plaintiffs blogged when they wanted, on the topics they wanted, and in their own editorial voices…[t]hey blogged from home (or wherever they wanted), using their own equipment, and had the authority to delegate some of their blog-related responsibilities to other contributors." MTD at pp. 12-13. Yet again, Vox disregards the FLSA case law holding that employment status can be found where the plaintiff worked from home, and under non-traditional schedules.

The fact than an FLSA plaintiff may have an irregular schedule, or work from home is not dispositive. As cited to in FAC ¶ 43, the Third Circuit found home telephone researchers to be employees of a telephone marketing firm under the FLSA where, the "[h]ome researchers

were free to choose the weeks and hours they wanted to work and the number of [name] cards they wished to research." *Donovan v. DialAmerica Mktg., Inc*., 757 F.2d 1376, 1380 (3d Cir. 1985). "Upon signing [an 'independent contractor'] agreement to do home-research work, a worker was given an initial box of 500 cards to be researched. The worker was expected to set up an appointment to return the cards one week later. Appointments were designed to prevent too many of the home researchers…from being present in the office at one time." *Id*. Similarly, in *Morrison v. Int'l Programs Consortium*, 253 F.3d 5 (D.C.Cir.2001), the D.C. Circuit held that "[t]he fact that [plaintiff] sometimes worked irregular hours or that she worked at home does not preclude a finding that she was an employee under the economic reality test." *Id*. at 12. So too, in *Goldberg v. Whitaker House Co-op., Inc*., 366 U.S. 28, 29 (1961), the Supreme Court found that members of a cooperative who "knitted, crocheted, and embroidered goods of all kinds" from home were employees under the FLSA:

> The members are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates. Apart from formal differences, they are engaged in the same work they would be doing whatever the outlet for their products. The management fixes the piece rates at which they work; the management can expel them for substandard work or for failure to obey the regulations. The management, in other words, can hire or fire the homeworkers… In short, if the 'economic reality' rather than 'technical concepts' is to be the test of employment, these homeworkers are employees.

Id. at 32-33 (internal citations omitted; emphasis added).

In this matter, although Plaintiffs may not have had a traditional "9-to-5" work schedule, they were obligated to "post a post-game/event commentary/recap, ideally immediately following the completion of any game/event, but in all cases within six (6) hours of the end of each game/event (including pre-season and post-season), or no later than 9 a.m. Eastern Time the

morning following the game/event, whichever is earlier." FAC ¶ 53. Vox cannot hide behind the lack of a 9-to-5 schedule or a brick-and-mortar office to defeat employment status, or to defeat Plaintiffs' plausible allegations that Vox recklessly disregarded the possibility that its classification of Plaintiffs violated the FLSA.

E. The Discovery Cost Concerns Expressed by the Supreme Court are *Not* Present In This Case.

The subtext of Vox's Partial Motion to Dismiss is that Plaintiffs' willfulness claims have much minimal basis and would so increase the cost of litigation that allowing the claims to proceed to discovery would unfairly force Vox into settlement. Vox's implications in this regard are highly exaggerated and represent an unfair attempt to partially immunize itself from its unlawful actions and hide from this Court embarrassing evidence that it did in fact callously disregard the requirements of the FLSA. The very fact that Vox has begun this litigation from a defensive posture that may be summarized as, "if we misclassified our Site Managers, it wasn't on purpose" illustrates the high degree of merit of this case.

In clarifying the plausibility standard developed in *Iqbal* and *Twombly*, the Supreme Court echoed its continuing concern that a "plaintiff with 'a largely groundless claim' [not] be allowed to 'take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558, 127 S. Ct. 1955, 1966, 167 L. Ed. 2d 929 (2007) (*quoting Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). In attempting to balance the dual legitimate concerns of quickly weeding out clearly baseless complaints with still allowing plaintiffs who *may* have viable claims to access the information needed for proof, the Supreme Court clarified that "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (2009). Furthermore,

while a plaintiff must set forth a plausible basis to infer the defendant acted unlawfully, the plaintiff is not required to plead information which it can only access through discovery such as private communications that may indicate the defendant's state of mind. *Runnion* 786 F.3d at 523 (7th Cir. 2015) ("We cannot expect, nor does Federal Rule of Civil Procedure 8 require, a plaintiff to plead information she could not access without discovery"); *Thomas v. City of Galveston*, 800 F. Supp. 2d 826, 843–45 (S.D. Tex. 2011) ("This balance, requiring more than boilerplate allegations but not demanding specific facts that prove the existence of [an unlawful] policy, is in line with the approach of other courts post-*Iqbal*… 'federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.' *Leatherman*, 507 U.S. at 168–69, 113 S.Ct. 1160.") (emphasis added).

Regardless of the result of Vox's Partial Motion to Dismiss, this case will move forward to discovery. The discovery burden of probing into the issue of Vox's willfulness would not unreasonably increase the size and scope of this litigation. If its motion were denied, Vox would be required to turn over documentation concerning its classification decisions and communications relating thereto and it would be required to produce for deposition those knowledgeable about the same. However, many of the same deponents would testify about Vox's employment practices even if the motion were granted, and thus, Vox could not be unreasonably burdened by depositions that may touch on the willfulness issue. The documents which may relate to communications that took place surrounding classification decisions are not expected to be great in number. Furthermore, such documents are not privileged to the extent they arguably show evidence of Vox's willful disregard of the FLSA's requirements and to the extent Vox would continue to assert an affirmative defense of lack of willfulness. *See, e.g., Enea v. Bloomberg L.P.*, No. 12CV4656-GBD-FM, 2015 WL 4979662, at *7–8 (S.D.N.Y. Aug. 20,

2015); *Phelps v. MC Commc'ns, Inc.*, No. 2:11-CV-00423-PMP, 2013 WL 3944268, at *20 (D. Nev. July 22, 2013). In short, producing evidence of who at Vox knew what when, who took various classification actions when, and what the conversations surrounding Vox's classification decisions were, do not present the type of "*in terrorem*…settlement value" concerns expressed by the Supreme Court. Accordingly, all of Plaintiffs' claims, including willfulness claims, should proceed to discovery.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's Partial Motion to Dismiss Plaintiffs' First Amended Complaint.

Dated: November 27, 2017

Respectfully Submitted,

/s/ James E. Goodley_____

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CERTIFICATE OF SERVICE

I, James E. Goodley, Esquire state under penalty of perjury that I caused a copy of the foregoing Opposition to Defendant's Motion to Dismiss the First Amended Complaint to be served via the CM/ECF electronic noticing system on the date and to the addresses below:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHERYL C. BRADLEY, *et al.*, for themselves and on behalf of all persons similarly situated,	:	
Plaintiffs	:	**Case No.: 1:17-cv-1791**
v.	:	**Collective Action**
	:	**Jury Trial Demanded**
VOX MEDIA, INC., d/b/a SB NATION	:	
Defendant.	:	

ORDER

AND NOW, this _____ day of _____, 2018, upon consideration of Defendant's Partial Motion to Dismiss Plaintiffs' First Amended Complaint and all responses and replies thereto, it is hereby **ORDERED** that Defendant's Motion is **DENIED**.

BY THE COURT:

_____
Collyer, J.