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,

v.

VOX MEDIA, INC., d/b/a SB NATION,

Defendant.

Case No. 1:17-cv-01791 (RMC)

DEFENDANT VOX MEDIA, INC.'S PARTIAL MOTION TO
DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendant Vox Media, Inc. ("Vox Media") respectfully moves this Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), to partially dismiss Plaintiffs' First Amended Complaint ("FAC"). As more fully set forth in the accompanying Memorandum filed herewith, Plaintiffs' claim for a "willful" violation of the Fair Labor Standards Act ("FLSA") should be dismissed because it fails to state a plausible claim upon which this Court may grant relief.

WHEREFORE, Vox Media respectfully requests that the Court grant Defendant's partial motion to dismiss the FAC, dismiss Plaintiff Bradley's claims with prejudice, and impose a two-year statute of limitations on Plaintiffs' remaining individual and putative collective claims.

Date: November 6, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2017, I filed and therefore caused the foregoing document to be served via the CM/ECF system in the United States District Court for the District of Columbia on all parties registered for CM/ECF in the above-captioned matter.

/s/ Jason C. Schwartz
Jason C. Schwartz

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT VOX MEDIA, INC.'S PARTIAL MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

Defendant Vox Media, Inc. ("Vox Media") is a media company that includes SB Nation, a sports news website with content written by sports fans, for sports fans. SB Nation owns and operates a network of over 300 team blogs devoted to professional and college sports teams under the SB Nation brand umbrella. The individual team blogs are forums for fans to read about and discuss the latest news regarding their favorite sports teams in detail and at a more passionate level than other sports media outlets. For the bloggers—who range from high school and college students, to teachers, to lawyers and accountants—SB Nation provides a best-in-class platform to write about their favorite teams, engage with other passionate fans, and publish their work.

Through this motion, Vox Media seeks to dismiss Plaintiffs' claims against the company for "willful" violations of the Fair Labor Standards Act's ("FLSA") minimum wage and overtime provisions. Plaintiff Cheryl Bradley—a Colorado Avalanche Fan Blogger who led one of SB Nation's hockey blogs, "Mile High Hockey," from June 2013 to February 2015, FAC ¶ 14—filed her original Complaint in this action on September 1, 2017. ECF No. 1. At the time, Ms. Bradley was the only named Plaintiff. Vox Media promptly moved to dismiss that Complaint because, *inter alia*, it was plain from the face of the Complaint that Ms. Bradley's claims were barred by the two-year statute of limitations for "ordinary" violations of the FLSA, 29 U.S.C. § 255(a). ECF No. 13. Indeed, Ms. Bradley did not commence this action until over two-and-a-half years after she stopped leading the Mile High Hockey site. *See* FAC ¶ 14. Moreover, Vox Media argued, as a matter of law, the Complaint's wholly unremarkable allegations of willfulness—which rested solely on Ms. Bradley's assertion that Vox Media "is a sophisticated multi-national business" with "access to knowledgeable human resource specialists and competent labor counsel"—were insufficient to support a willful violation of the FLSA so as to extend the statute of limitations to

three years. *See* ECF No. 1 ¶ 45; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132 (1988); 29 U.S.C. § 255(a).

In response to Vox Media's Motion to Dismiss—and in a desperate effort to keep her time-barred claims afloat—Ms. Bradley amended her Complaint to incorporate a handful of additional allegations[1] (mainly under a heading titled "willfulness") and to include the claims and allegations of two additional named plaintiffs, John Wakefield and Maija Varda. *See* ECF No. 16 (First Amended Complaint, "FAC"). But these new allegations cannot salvage Plaintiffs' claim for a "willful" violation of the FLSA. As detailed below, the FAC still falls far short of stating a claim upon which relief can be granted. Indeed, the same problem that doomed the original Complaint justifies dismissal of Plaintiffs' FAC: Plaintiffs have not pled the extra-"ordinary" facts that are required to show Vox Media willfully violated the FLSA. *See* 29 U.S.C. § 255(a); *see*, *e.g.*, *Hurd v. NDL*, *Inc.*, 2012 WL 642425, at *6 (D. Md. Feb. 27, 2012) (collecting cases and noting that courts "have found employers willfully violated [the] FLSA where they ignored specific warnings that they were out of compliance with [the] FLSA, destroyed or withheld records to block investigations into their employment practices, or split employees' hours between two companies' books to conceal their overtime work").

In the FAC, Plaintiffs attempted to dress up their willfulness allegations by mentioning specific Vox Media executives who have practiced law and/or previously worked for another company that was sued for alleged FLSA violations. FAC ¶¶ 82-114. But these allegations rest on the same flawed premise that because Vox Media is a "sophisticated multi-national business" with "access to knowledgeable human resources specialists and competent legal counsel" who are

[1] A redline demonstrating the differences between Ms. Bradley's original complain (ECF No. 1) and Plaintiffs' First Amended Complaint (ECF No. 16) is attached hereto as Ex. 1 to G. Williams' Decl.

aware of the FLSA framework generally (ECF No. 1 ¶ 45; FAC ¶ 112), the FLSA violations alleged here must have been "willful" and a three-year statute of limitations should apply. *Compare* ECF No. 1 *with* FAC ¶¶ 82-114. This does not satisfy Plaintiffs' "burden to make a factual showing" that Vox Media had "actual knowledge of a legal requirement, and deliberate[ly] disregard[ded] the risk that [it] was in violation." *Saint-Jean v. Dist. of Columbia*, 846 F. Supp. 2d 247, 255 (D.D.C. 2012). In fact, a holding that such allegations do support a claim for willfulness would directly contravene Supreme Court precedent. *See Richland Shoe Co.*, 486 U.S. at 132-33 (rejecting a pleading standard that "merely requires that an employer knew that the FLSA 'was in the picture'" because it is "virtually impossible for an employer to show that he was unware of the [FLSA] and its potential applicability").

For these reasons, Ms. Bradley's claims must be dismissed with prejudice and Mr. Wakefield's and Ms. Varda's individual and collective claims must be limited to the "ordinary" two-year limitations period.

BACKGROUND

Plaintiffs allege that they were/are Site Managers for three fan blog websites hosted by SB Nation.[2] FAC¶¶ 14-16, 23-25, 33-35. Vox Media is a media corporation that operates hundreds of sports websites through SB Nation, one of its content brands. *Id.* ¶¶ 6, 11. Plaintiffs bring claims under the FLSA for minimum wage and overtime violations, *id.* ¶¶ 121-142, and seek to

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[2] Specifically, (i) Ms. Bradley alleges that she was Site Manager for "Mile High Hockey," SB Nation's website for the Colorado Avalanche, a professional ice hockey team in the National Hockey League ("NHL") from June 2013 through February 2015, FAC ¶¶ 3, 14-16; (ii) Mr. Wakefield alleges that he was Site Manager for "Through It All Together," SB Nation's site for the Leeds United Football Club, a professional English soccer team, from December 2015 through May 2017, FAC ¶¶ 4, 23-25, and; (iii) Ms. Varda alleges that she has been Site Manager for "Twinkie Town," SB Nation's site for the Minnesota Twins, a professional baseball team in Major League Baseball ("MLB"), since May 2016, FAC ¶¶ 5, 33-35.

represent a nationwide collective of "[a]ll current or former Site Managers and Managing Editors who performed work in the United States for Vox Media, Inc. in its SB Nation business division within the past three years." *Id.* ¶ 9.

Pursuant to Blogger Agreements in which Plaintiffs and Vox Media all agreed that they were independent contractors and not employees, *id.* ¶¶ 13, 22, 32; FAC Exs. 1-3 at ¶ 5, Plaintiffs created content for the fan sites of their respective sports teams. *See* FAC ¶¶ 18, 27, 37. Plaintiffs allege that as Site Managers for their particular fan sites, they worked varying hours per week and received different levels of compensation in the form of a monthly stipend. *See* FAC ¶¶ 20-21, 30-31, 40-41. Plaintiffs now claim that they were misclassified as independent contractors rather than employees under the FLSA and that they are owed back pay damages for minimum wage and overtime compensation. *Id.* at 27. Finally, Plaintiffs allege that Vox Media "acted willfully and with reckless disregard of clearly applicable FLSA provisions" by failing to pay them and others in the putative FLSA collective minimum wage and overtime. *Id.* ¶¶ 113-114, 130, 141.

LEGAL STANDARD

A complaint must be dismissed under Fed. R. Civ. P. 12(b)(6) unless it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action . . . do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555); *see also Twombly*, 550 U.S. at 555 (holding that a complaint must include more than just a "formulaic recitation of the elements of a cause of action" to survive a motion to dismiss). Rather, the plaintiff bears the burden of pleading facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

The Court's first task on a motion to dismiss is to separate the complaint's legal conclusions—including conclusory assertions and recitations of the elements of the cause of action—from genuine factual allegations. *Id.* at 678-79. These legal conclusions, unlike factual allegations, are not presumed true. *Id.* Once the legal conclusions are set aside, the Court determines whether the remaining factual allegations permit a plausible inference that the defendant is liable for the violation alleged. *Id.* at 678. For a claim to be "plausible," it is insufficient that the facts alleged are merely "'*consistent with*' a defendant's liability," or make a violation "*conceivable*." *Iqbal*, 556 U.S. at 678, 680 (emphasis added) (quoting *Twombly*, 550 U.S. at 557, 570). The mere "*possibility*" of a violation is not enough. *Iqbal*, 556 U.S. at 678 (emphasis added). Stated differently, if allegations are "not only compatible with, but . . . more likely explained by, lawful [] behavior," they fall short of plausibility. *Id.* at 680.

The Supreme Court made clear in *Twombly* and *Iqbal* that adherence to this heightened pleading standard is important in order to avoid "the potentially enormous expense of discovery" that results from permitting litigation to proceed based on conclusory complaints. *Twombly*, 550 U.S. at 559. It is not enough that claims that fall "shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management.'" *Id.* They must be dismissed at the outset for failure to state a claim. *Id.*

ARGUMENT

I. The Court Should Dismiss Ms. Bradley's Claims As Time-Barred and Limit Mr. Wakefield's and Ms. Varda's Individual and Collective Claims to the "Ordinary" Two-Year Limitations Period

The Court should dismiss Ms. Bradley's claims in their entirety because they are patently time-barred. As detailed below, it is clear from the face of the FAC that Ms. Bradley's claims were not filed within the two-year statutory limitations period applicable for "ordinary" violations of the FLSA. 29 U.S.C. § 255(a). It is also clear that the FAC fails to adequately allege a "willful"

violation of the FLSA such that Plaintiffs would be entitled to a three-year limitations period (which only would salvage Ms. Bradley's claims during the six-month period from September 2014 through February 2015). *See* FAC ¶¶ 82-114. Thus, the Court should dismiss Ms. Bradley's claims in their entirety and limit the remaining individual and collective claims to the "ordinary" two-year limitations period. *See Bregman v. Perles*, 747 F.3d 873, 875 (D.C. Cir. 2014) (dismissal is appropriate on statute of limitations grounds where "the complaint on its face is conclusively time-barred") (internal quotation marks omitted).

A. The FLSA Has a Two-Tiered Statute of Limitations, Providing a Two-Year Limitations Period in the "Ordinary Case"

The FLSA provides different limitations periods for "ordinary violations and willful violations." *Richland Shoe Co.*, 486 U.S. at 132. Claims asserted under the FLSA typically must be "commenced within two years . . . after the cause of action accrued." *Galloway v. Chugach Gov't Servs., Inc.*, 199 F. Supp. 3d 145, 151 (D.D.C. 2016) (citing 29 U.S.C. § 255(a)). Causes of action brought outside the limitations period are "forever barred." 29 U.S.C. § 255(a). It is only when an employer's FLSA violation is "willful"—as opposed to "ordinary"—that the statute of limitations is extended to three years. *Id.*; *Galloway*, 199 F. Supp. 3d at 151. A plaintiff's cause of action accrues (and the limitations period begins to run) "at the time the [FLSA] was allegedly violated and overtime payments were allegedly due." *Marsans v. Commc'ns Workers of Am.*, 1989 WL 43831, at *9 (D.D.C. Apr. 19, 1989) (citing *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 65 (1939)).

B. Ms. Bradley's Claims Are Plainly Barred by the FLSA's Two-Year Statute of Limitations for "Ordinary" Violations

Ms. Bradley alleges that she stopped contributing to the Mile High Hockey website as Site Manager in February 2015. FAC ¶¶ 3, 14. She did not file her original Complaint in this action until September 1, 2017—more than two years later. *See* ECF No. 1. Thus, Ms. Bradley's claims

(and the claims of any other member of the putative FLSA collective that accrued over two years before they commence their actions) are "forever barred" unless Plaintiffs can establish that Vox Media's alleged violations of the FLSA were "willful" in nature. 29 U.S.C. § 255(a). They have not and cannot.

C. The Supreme Court's Standard for "Willfulness" Under the FLSA Sets a High Bar for Extending the Ordinary Statute of Limitations Period to Three Years

The Supreme Court articulated the standard for willfulness under the FLSA in *Richland Shoe Co.*, 486 U.S. at 132. A violation of the FLSA is "willful" only if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id.* at 133. A plaintiff cannot establish willfulness by asserting "that an employer knew that the FLSA 'was in the picture.'" *Id.* at 132. Nor is it enough that "the employer, recognizing it might be covered by the FLSA, acted without a reasonable basis for believing that it was complying with the statute." *Id.* at 134. As the Supreme Court explained, such lenient standards for willfulness "virtually obliterate[] any distinction between willful and nonwillful violations," because it is "virtually impossible for an employer to show that he was unaware of the [FLSA] and its potential applicability." *Id*. at 132-33. Instead, "[a] Plaintiff must be able to show that her employer was aware of its obligations under the FLSA and chose not to copmly with the law or recklessly disregarded its statutory duties." *Galloway*, 199 F. Supp. 3d at 151. For example, courts "have found employers willfully violated [the] FLSA where they ignored specific warnings that they were out of compliance with [the] FLSA, destroyed or withheld records to block investigations into their employment practices, or split employees' hours between two companies' books to conceal their overtime work." *Hurd*, 2012 WL 642425, at *6 (collecting cases).

To maintain an allegedly willful violation of the FLSA at the pleading stage, a plaintiff must "allege facts, and not simply labels or conclusions, sufficient to support a plausible claim of

[a] willful" violation of the FLSA. *Galloway*, 199 F. Supp. 3d at 152-53 (citing *Iqbal*, 556 U.S. at 686);[3] *see also Mell v. GNC Corp*., No. 10-945, 2010 WL 4668966, at *8 (W.D. Pa. Nov. 9, 2010) (holding that "it is insufficient to merely assert that the employer's conduct was willful; the Court must look at the underlying factual allegations in the complaint to see if they could support more than an ordinary FLSA violation," and therefore dismissing a complaint containing "no factual allegations which would support a claim that the [FLSA] violations were willfull").

D. The FAC's Naked Allegations and Legal Conclusions as to Vox Media's Purported "Willfulness" Are Not Entitled to a Presumption of Truth Under *Twombly* and *Iqbal*

Under *Twombly*, this Court must first identify all conclusory statements that are not entitled to any presumption of truth and pare them from the FAC. *Iqbal*, 556 U.S. at 679. As illustrated below, the FAC is littered with barebones allegations and conclusory statements devoid of any factual support.

First, Plaintiffs' various conclusory allegations that Vox Media acted "willfully" and "with reckless disregard" must be removed from consideration. Specifically, Plaintiffs allege that Vox Media "has acted willfully and with reckless disregard of clearly applicable FLSA provisions" by (i) "failing to compensate Plaintiffs . . . with pay of at least [minimum wage]" and (ii) "failing to compensate Plaintiffs . . . for all hours worked in excess of forty (40) during the workweek." FAC

[3] *Galloway* 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. *See Galloway*, 199 F. Supp. 3d at 151-53. And, although the court in *Galloway* held that the plaintiffs had adequately pled willfulness, the allegations at issue there contained far more factual support than Plaintiffs'. There, the plaintiffs alleged, *inter alia*, that they were "forced to regularly and routinely work through their meal breaks," and that they "were not allowed to leave their work locations at the end of their shifts." *Id.* at 153. "Even more importantly," the complaint suggested that the defendant "knew that it had to pay overtime wages" because employees were "regularly denied approval for overtime for work performed in excess of 40 hours per week," thus permitting the reasonable inference that defendant "was aware that any work beyond a 40-hour work week would impose unique burdens on it." *Id.* (internal quotation marks omitted).

¶¶ 113-14; *see also id.* at ¶ 109 (alleging Vox has "willfully and continually refused to pay . . . minimum wages and overtime due for hours worked"); ¶¶ 130, 141 (alleging that "[i]n violating the FLSA, Vox acted willfully and with reckless disregard of clearly applicable FLSA provisions"). "Willfully" and "with reckless disregard" are mere legal conclusions that are afforded no weight in ruling on a motion to dismiss. *See Twombly*, 550 at U.S. 555 (stating that plaintiffs are required "to provide the grounds of [their] entitlement to relief [by pleading] more than labels and conclusions") (internal quotations and citation omitted). For this reason, complaints relying on these kinds of allegations are frequently held not to state a plausible claim of a willful FLSA violation. *See, e.g.*, *Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 921-22 (D. Ariz. 2010) (granting motion to dismiss allegations that defendant acted willfully where plaintiff merely stated without elaboration that defendant "intentionally, willfully, and repeatedly violated the FLSA"). Likewise, Plaintiffs' regurgitation of the underlying FLSA provisions—*e.g.,* Vox Media "failed to compensate" Plaintiffs' with minimum wage and overtime—are nothing more than "threadbare recitals" of the elements, which the Supreme Court has made clear will not suffice. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

Second, Plaintiffs' allegation that "Vox *knew or should have known* that Plaintiffs and FLSA Class Members were employees and were not exempt from the FLSA's minimum wage or overtime requirements"—FAC ¶ 111 (emphasis added)—is not only conclusory but also a "formulaic recitation" of the *Richland Shoe* standard for willfulness that cannot withstand a motion to dismiss. *Iqbal*, 556 U.S. at 681. Courts faced with similar conclusory allegations of willfulness under the FLSA have either dismissed the claim outright, or held that the three-year statute of limitations is improper. *See, e.g., Hurd*, 2012 WL 642425, at *6 (holding that allegations of willfulness fell short of pleading standard where plaintiff made only conclusory allegations that

defendants "willfully violated [the] FLSA by misclassifying her as an exempt employee and denying her overtime" and asserted defendants "knew, or had reason to know of their alleged FLSA violations"); *Ochoa v. Pearson Educ., Inc.*, No. 11-cv-1382, 2012 WL 95340, at *3 (D.N.J. Jan. 12, 2012) (dismissing FLSA claims upon finding plaintiff's allegations that defendant (i) "deliberately misclassified [plaintiff] as a salaried employee," and (ii) "had no good faith basis for believing that their pay practices . . . were in compliance with the law" did "not rise significantly above legal conclusions"); *Rowlett v. Michigan Bell*, No. 1:11-cv-1269, 2013 WL 308881, at *2 (W.D. Mich. Jan. 25, 2013) (dismissing FLSA claims as time-barred where Plaintiff made only "the conclusory assertion that [Defendant] acted willfully," but "failed to allege any facts which would establish such").

E. The Remaining Factual Allegations Do Not Plausibly State a Willful Violation of the FLSA

Having excised Plaintiffs' conclusory statements and legal recitations, the Court must next determine whether any of the remaining factual allegations are well-pleaded and plausibly state a claim for a "willful" violation of the FLSA so as to extend the statute of limitations to three years. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557); 29 U.S.C. § 255(a). They do not. Even assuming, *arguendo*, that the remaining factual allegations are well-pleaded, they do not state a viable claim for "willfulness" under the FLSA.

1. Plaintiffs' original and amended allegations regarding Vox Media's access to "competent" human resources and legal professionals do not plausibly state a willful violation of the FLSA

In Ms. Bradley's original Complaint, the only factual allegations regarding willfulness were that "Vox is a sophisticated multi-national business worth approximately $1 Billion" that "has access to knowledgeable human resource specialists and competent labor counsel." ECF No. 1 ¶ 45. Vox Media moved to dismiss Ms. Bradley's Complaint in its entirety because (among

other reasons) these allegations fall woefully short of plausibly pleading a claim for a willful violation of the FLSA. *See* ECF No. 13 at 11-14. Nevertheless, Plaintiffs have parroted the exact same allegations in the FAC. FAC ¶ 112. These allegations remain wholly unremarkable and do not come close to meeting the plausibility standard necessary to survive a motion to dismiss.

First, if merely alleging that a defendant is a "sophisticated" company with "access" to "human resources professionals and legal counsel" were enough to plead willfulness, then essentially *all mid-to-large-sized companies* defending FLSA claims would automatically be subjected to the three-year limitations period. This outcome is entirely at odds with the Supreme Court's express directives in *Richland Shoe*. *See* 486 U.S. at 132-33, 136 (rejecting Fifth Circuit's willfulness standard that "virtually obliterate[d] any distinction between willful and nonwillful violations," because it is "virtually impossible for an employer to show that he was unaware of the [FLSA] and its potential applicability"). Such overbroad and sweeping liability exposure is also inconsistent with the FLSA's two-tiered statute of limitations. As the Supreme Court observed, "[t]he fact that Congress did not simply extend the limitations period to three years, but instead adopted a two-tiered statute of limitations, makes it obvious that Congress intended to draw a significant distinction" between defendants who commit "ordinary violations" and those who commit "willful violations." *Id.* at 132.

Second, that Vox Media is a "sophisticated" company with "access" to human resources professionals and legal counsel does not lead to a plausible inference that Vox Media "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]." *Richland Shoe*, 486 U.S. at 133. To make this inference, it would have to be clear from the face of the FAC that "knowledgeable human resource specialists and competent labor counsel" would have *known* that Plaintiffs should have been classified as employees rather than independent

contractors. Such an inference is flawed and implausible. In fact, Vox Media is not aware of *any* legal authority holding that bloggers like Plaintiffs should be classified as employees. And the sparse existing legal authority holds that the opposite is true. *See In re Mitchell*, 145 A.D.3d 1404 (N.Y. App. Div. 2016) (holding that blogger for *The Nation* was properly classified as an independent contractor). The fact that prior legal authority favors Vox Media's classification decision severely undercuts the plausibility of an inference that mere access to human resources and legal counsel demonstrates a willful disregard for Vox Media's obligations under the FLSA.

Moreover, Plaintiffs' own allegations and contemporaneous statements establish that no such inference could be plausibly drawn because even the limited evidence available at this stage provides reasonable support for an independent contractor classification. Indeed—notwithstanding Plaintiffs' allegations that their "possibility and extent of outside employment was heavily curtailed" by their role as Site Managers—Ms. Bradley's own LinkedIn profile shows that she held a regular job with education publisher McGraw Hill throughout nearly the entire time that she led the Mile High Hockey fan site. *See* Williams Decl. Ex. 2. Likewise, Ms. Varda's LinkedIn profile shows that she held a regular job with Dolphin Group Companies during some of her tenure as Site Manager.[4] *Id.* Ex. 3. In fact, Ms. Bradley's own posts on Mile High Hockey demonstrate the she considered herself to be employed by McGraw Hill, not by Vox Media. *See id.* Ex. 5. This is not at all surprising—among other reasons, Plaintiffs blogged when they wanted, on the topics they wanted, and in their own editorial voices. *See* FAC Exs. 1-3 ("Blogger Agreements"). They blogged from home (or wherever they wanted), using their own equipment, and had the authority

[4] Similarly, opt-in plaintiff Jacob Pavorsky's (*see* ECF No. 4) public LinkedIn profile demonstrates that he was not only a full time student throughout his tenure as Site Manager of the "Liberty Ballers" website, but also that he held internships with TBT, CBS Radio, and worked as a "Freelance Media Analyst." Williams Decl. Ex. 4.

to delegate some of their blog-related responsibilities to other contributors. *See id.*; *see also* FAC ¶ 76 (Plaintiffs used their own computers and electronic devices to perform their work). In short, Vox Media classified Plaintiffs as independent contractors as a matter of common sense and consistent with existing legal authority—not with a specific knowledge that (or a reckless disregard for whether) this classification "was prohibited by statute." *See* FAC Exs. 1-3 at § 5; *Richland Shoe Co.*, 486 U.S. at 133. Accordingly, there can be no "willful" FLSA violation here.

2. Plaintiffs' new allegations in the FAC are more of the same and do not establish any plausible claim of willfulness

In response to Vox Media's motion to dismiss the original Complaint—and in a desperate attempt to keep Ms. Bradley's claims alive and their class period extended for three-years—Plaintiffs added a handful of purported willfulness allegations into their FAC. *See* FAC ¶¶ 82-108. But these additional allegations are cut from the exact same cloth as the original (and insufficient) Complaint, and do not change the result.

Specifically, Plaintiffs added allegations regarding the work history of three Vox Media executives—James Bankoff (CEO), Marty Moe (President), and Lauren Fisher (General Counsel[5]). FAC ¶¶ 82-88, 99-105. Plaintiffs highlight that Moe and Fisher are both attorneys, *id.* ¶¶ 86, 88, and particularly emphasize that Moe "practiced law at the prominent law firm of Skadden, Arps, Slate, Meagher & Flom LLP for five (5) years" and clerked on the U.S. Court of Appeals for the D.C. Circuit, *id.* ¶ 86. Finally, Plaintiffs allege that all three of these executives were previously employed by America Online, Inc. ("AOL") and thereby supposedly had knowledge of a (completely unrelated) FLSA lawsuit filed against AOL in 1999—nearly twenty years ago and before any of the three executives began working at AOL, *see* FAC ¶¶ 83, 85, 88—

[5] Ms. Fisher's title at Vox Media is Chief Legal Officer, not General Counsel as alleged in the FAC. *See* https://www.voxmedia.com/a/go-deeper/leadership.

by Kelly Hallissey and others ("*Hallissey*"). *See id.* ¶¶ 83, 85, 88, 89-101. Taken together, these additional allegations amount to nothing more than the same, unremarkable and harmless conclusion: that Vox Media is a sophisticated company with access to individuals who have law degrees and are generally aware of the FLSA. On these allegations, and for numerous reasons, Plaintiffs' claim of a willful FLSA violation cannot stand.

a. The *Hallissey* litigation against AOL is both materially different from this case and irrelevant to the willfulness determination

As an initial matter, the *Hallissey* lawsuit is entirely irrelevant. It is a decades-old lawsuit filed not against Vox Media, but against a completely different and unrelated company. Mere knowledge of an FLSA lawsuit filed nearly twenty years ago against *AOL* cannot create any plausible inference that *Vox Media* willfully violated the FLSA. That is especially true here because the facts and legal issues involved in the *Hallissey* litigation vary significantly from those involved in the instant action.

Different Job. *Hallissey* did not involve blog-writers like Plaintiffs. Rather, the *Hallissey* plaintiffs were "Community Leaders" who, among other things, "update[ed] content, "serv[ed] as online tutors," "check[ed] the validity of certain charges assessed to customers' accounts," and "determin[ed] whether AOL's library contained material that infringed upon copyrighted materials." *Hallissey v. Am. Online, Inc.*, 2006 U.S. Dist. LEXIS 12964, *3-4 (S.D.N.Y. 2006).

Different Level of Control. AOL's Community Leaders alleged that AOL exercised significantly more control over the terms and conditions of their work—an important consideration in the employee-independent contractor analysis, *see Escamilla v. Nuyen*, 227 F. Supp. 3d 37, 49 (D.D.C. 2017)—than Plaintiffs allege here. They alleged, *inter alia*, that they were required by AOL to work a minimum number of hours, were closely supervised by other employees, had to

provide regular reports on their activities to their supervisors, and "follow a sequence, order and/or schedule set by the defendants in performing the labor required of them." *Hallissey*, Case No. 99-cv-3785-KTD (S.D.N.Y.), Dkt. No. 4, Am. Compl. ¶¶ 24, 25, 27. Here, on the other hand, there is no allegation of a minimum or specified number of hours per day or per week or that Plaintiffs must submit any regular reports regarding their work. *See* FAC ¶¶ 15, 18-19, 24, 27, 34, 37. And, while Plaintiffs make the conclusory allegation that "Vox maintained control over the manner in which [they] performed their services," *id.* ¶ 52, that allegation is merely a formulaic recitation of one of the factors in the Third Circuit independent contractor test that Plaintiffs cite in the FAC, *id.* ¶ 43. Indeed, the extent of control that Plaintiffs allege is limited to Vox Media's (i) requirement that they adhere to their contractual obligations as independent contractors, *id.* ¶¶ 53, 58, 61-64, (ii) authority to remove content "deemed to be controversial," *id.* ¶¶ 55-56, and (iii) requirement that they watch training videos, *id.* ¶ 60.

Different Classification. The *Hallissey* plaintiffs were also classified differently than the Plaintiffs here. *Hallissey* challenged AOL's decision to classify its Community Leaders as volunteers, *not independent contractors*. *Hallissey*, 2006 U.S. Dist. LEXIS 12964, at *6. Accordingly, the Southern District of New York applied a different multi-factor test than that applied in the independent contractor analysis. *See id.*, at *13-38.

Significantly, these factual dissimilarities are not the only reason that *Hallissey* is irrelevant here. Despite Plaintiffs' heavy reliance on *Hallissey*, the court there never held that the plaintiffs had been misclassified or that AOL had otherwise violated the FLSA, and it certainly did not hold that bloggers like Plaintiffs should be classified as employees rather than independent contractors. *See* FAC ¶¶ 93-98. The court simply held, in denying AOL's motion to dismiss, that there were "issues of material fact . . . as to whether the [plaintiffs] were AOL's employees." FAC ¶ 95;

Hallisey, U.S. Dist. LEXIS 12964, at *7.[6] And, although the *Hallissey* lawsuit eventually settled, FAC ¶¶ 97-98, the settlement agreement was clear that AOL did not admit "liability, fault, or wrongdoing of any kind," *Hallissey v. Am. Online, Inc.*, No. 99-cv-03785, ECF No. 2670 at 7 (S.D.N.Y. May 25, 2010).[7]

In sum, Plaintiffs' *Hallissey* allegations—given the wholly inapposite facts of that case—cannot reasonably demonstrate that Vox Media knew or showed reckless disregard that it was in violation of statutory requirements, particularly where no final determination was made in *Hallissey* and that case involved an entity other than Vox Media. *See Richland Shoe Co.*, 486 U.S. at 133. This is especially true here because the only on-point authority resulting in a final determination held that the plaintiff blogger was properly classified as an independent contractor. *See In re Mitchell*, 145 A.D.3d 1404 ; *see also Allen v. Coil Tubing Servs., LLC*, 846 F. Supp. 2d 678, 712-13 (S.D. Tex. 2012) (deeming employer's exempt classification not willful where employer's interpretation of statute during relevant period was "not unreasonable in light of then-existing precedent").

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[6] Plaintiffs also emphasize that the *Hallissey* plaintiffs prevailed on a motion for conditional certification under the FLSA. FAC ¶ 96; *Hallissey v. Am. Online, Inc.*, 2008 WL 465112 (S.D.N.Y., Feb. 19, 2008). However, that ruling is irrelevant, because it had absolutely nothing to do with the merits of AOL's classification decision. Rather, the court only found that the plaintiffs had made "a modest factual showing" that they were "similarly situated" by virtue of AOL's classification decision. *Hallissey*, 2008 WL 465112, at *1.

[7] Likewise, the U.S. Department of Labor investigation regarding AOL's classification of its Community Leaders was closed without any findings of wrongdoing or any other determination on the merits. *See* FAC ¶¶ 91, 99; Postigo, Hector, *America Online Volunteers: Lessons from an early co-production community*, INTERNATIONAL JOURNAL OF CULTURAL STUDIES, Vol. 12(5) at 451 (September 2009), available at: https://www.researchgate.net/publication/249744327_America_Online_volunteersLessons_from_an_early_co-production_community?enrichId=rgreq-b7ea5f7e41aa610ea3fd7c9fe9ab7643-XXX&enrichSource=Y292ZXJQYWdlOzI0OTc0NDMyNztBUzoxMDczMTU1NTQ0MjY4ODBAMTQwMjU5NzQzMDMyMA%3D%3D&el=1_x_2&_esc=publicationCoverPdf (last accessed 10/31/2017).

Further, the circumstances alleged here are wholly dissimilar to cases in which courts have found prior investigations and lawsuits relevant to the question of willfulness. *See, e.g.*, *Stout v. FedEx Ground Package Sys., Inc.*, 2015 WL 7259795, at *4 (N.D. Ohio Nov. 17, 2015) (finding three-year limitations period for willful violations applied where an employer had actual notice of FLSA requirements, had been the subject of two previous U.S. Department of Labor (DOL) investigations resulting in overtime violations, and had assured DOL that it would comply in the future); *Gonzalez v. Bustleton Servs., Inc.*, 2010 WL 1813487, at *14 (E.D. Pa. Mar. 5, 2010) (holding that violation was not willful where it was difficult to determine compliance with FLSA and DOL had not identified violations in prior site visits). In fact, ***even where the same corporate entity*** was party to the prior lawsuit (which, of course, is not the case here), courts frequently decline to use prior lawsuits as an indication of willfulness under the FLSA where, as here, the facts and classification statuses are dissimilar. *See, e.g., Chapman v. BOK Fin. Corp.*, 12-cv-613-GKF, 2014 WL 3700870, at *4 (N.D. Okla. July 25, 2014) (refusing to consider prior off-the-clock FLSA lawsuit relevant to the issue of willfulness in misclassification lawsuit against same defendant); *Barth v. Wolf Creek Nuclear Operating Corp.*, 97-4174-SAC, 2002 WL 31314829, at *2 (D. Kan. Aug. 28, 2002) ("[T]he fact that defendant has previously been found to have erroneously classified various employees in other positions fails to show that its overtime policies regarding these employees are suspect.").

b. Plaintiffs' *Hallissey* allegations amount to nothing more than Vox Media's generalized awareness of the FLSA, which is not sufficient to state a claim for willfulness

In short, Plaintiffs' new *Hallissey* allegations state that Vox Media's executives (i) have credentialed backgrounds in the law (FAC ¶¶ 86, 88); (ii) were "aware" of the—as demonstrated above, unrelated and irrelevant—*Hallissey* FLSA lawsuit against a different company (including the fact that AOL lost two non-dispositive motions and settled the case) (FAC ¶¶ 83, 85, 88, 89-

90, 92-101; and (iii) were "aware" there was a related DOL investigation of that different company (that resulted in no findings) (FAC ¶¶ 91, 99). The only reasonable inference that can be drawn from these additional allegations under *Twombly* is that Vox Media held general knowledge of the FLSA. But it is black-letter law that this is not sufficient to state a claim for willfulness. *Richland Shoe Co.*, 486 U.S. at 132. As the Supreme Court has made plain (and as previously articulated above), it is not enough "that an employer knew that the FLSA 'was in the picture.'" *Id.* Nor is it sufficient that Plaintiffs' allegations are potentially "consistent with" a willful violation. *Iqbal*, 556 U.S. at 678, 680. The facts alleged must make willfulness "plausible," and they plainly do not. *See id.* In fact, the most reasonable inference that can be drawn from Plaintiffs' allegations that Vox Media had its Chief Legal Officer advise on Plaintiffs' classification is that the company—which, as Plaintiffs themselves acknowledge is led by highly-credentialed executives (FAC ¶¶ 82-88)—arrived at a thoughtful decision under the advice of counsel, not that the company callously disregarded its obligation to comply with the FLSA. *See, e.g., Halferty v. Pulse Drug Co.*, 826 F.2d 2, 3-4 (5th Cir. 1987) (deeming finding of willfulness not warranted where employer consulted with attorney and examined DOL bulletin); *Garcia v. Allsup's Convenience Stores*, *Inc.*, 167 F. Supp. 2d 1308, 1316 (D.N.M. 2001) (holding willfulness not established where employer relied upon opinions of attorney regarding lawfulness of compensation plan).[8]

[8] Vox Media reserves the right to assert an advice of counsel defense at the appropriate time, although it does not intend to do so here but instead is merely highlighting that Plaintiffs' own allegations completely undermine any claim of willfulness. Indeed, these allegations are "not only compatible with, but . . . more likely explained by, lawful [] behavior[.]" *Iqbal*, 556 U.S. at 680.

c. Plaintiffs' cursory and unsupported allegations regarding complaints are insufficient to plausibly allege Vox Media willfully disregarded its obligation to comply with the FLSA

Finally, Plaintiffs also allege that Ms. Bradley "complained to her League Manager Travis Hughes that she was paid inadequate wages." FAC ¶ 106. This allegation does not give rise to a reasonable inference of willfulness either. Courts have found that *repeated* and *specific* complaints to a defendant regarding noncompliance with the FLSA may rise to the level of willfulness if those complaints are unreasonably disregarded. *See, e.g., Markey v. Cameron Compression Sys.*, 2011 WL 90318, at *2 (W.D.N.Y. Jan. 11, 2011) (holding willfulness successfully pleaded where plaintiff "complained to defendant on more than one occasion that he "*was working non-exempt hours that required overtime compensation under the FLSA"*) (emphasis added). Here, by contrast, Ms. Bradley's allegation demonstrates only that she complained (on *one* occasion) that she was unhappy with the level of her pay. FAC ¶ 106. Her allegation that she complained generally about "inadequate wages"—and not about FLSA compliance—does not provide a factual basis for the Court to infer that her singular complaint made Vox Media aware of an FLSA violation. Indeed, a properly classified contractor may still be dissatisfied with her compensation. And, in any event, Ms. Bradley does not allege that Mr. Hughes—to whom she made the alleged complaint—had any involvement whatsoever in the classification decision.[9] *See* FAC ¶¶ 99-105.

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[9] Plaintiffs also offer another unsubstantiated allegation, that"[u]pon information and belief, Vox received other complaints from other Site Managers concerning Vox's pay practices." FAC ¶ 107. But this allegation is not well-pleaded and cannot create a plausible claim of a willful violation. Indeed, the only factual support Plaintiffs offer for this allegation is a quote from a *Deadspin* article that does not mention, or even suggest, that there have been internal complaints regarding FLSA compliance. *See* FAC ¶ 107, n.10. In fact, the irrelevant quote Plaintiffs cite immediately precedes a quote by a site manager—"I think a lot of SB Nation [team site] contributors *are fine with working for free* . . ."—that undermines Plaintiffs' allegation altogether. *See* http://deadspin.com/how-sb-nation-profits-off-an-army-of-exploited-workers-1797653841 (last accessed November 6, 2017).

* * * * *

In sum, the facts alleged in the FAC are insufficient to support a willful violation of the FLSA's minimum wage and overtime provisions so as to extend the statute of limitations to three years. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570; *see also Richland Shoe Co.*, 486 U.S. at 132; 29 U.S.C. § 255(a). Accordingly, because it is clear from the face of the FAC that Ms. Bradley's claims were not commenced within the applicable two-year limitations period for "ordinary" violations, 29 U.S.C. § 255(a), the Court should dismiss her claims in their entirety. *See Bregman*, 747 F.3d at 875. For the same reasons, the statute of limitations on Mr. Wakefield's and Ms. Varda's individual and putative collective claims should be limited to two years.[10] *See* FAC ¶ 9; *see also* ECF No. 17 (Motion for Conditional Certification seeking certification of a nationwide collective based on a three-year class definition).

CONCLUSION

For the foregoing reasons, Vox Media respectfully requests that the Court grant its motion to dismiss Plaintiffs' claims for willful FLSA violations, and issue an order that (i) dismisses Ms.

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[10] Plaintiffs' claim for a willful violation of the FLSA should be dismissed with prejudice. Plaintiffs had the benefit of Vox Media's motion to dismiss the original Complaint, which raised nearly the exact same arguments as this motion to dismiss, but their FAC still fails to state a claim. Courts decline to grant a second opportunity to amend the pleadings under such circumstances. *See*, *e.g.*, *Mason v. Montgomery Cty*., 2015 WL 3891808, at *11 (D. Md. June 23, 2015) ("There comes a time when a plaintiff's serial amendments in the face of motions to dismiss and orders granting that relief must come to an end and he must stand or fall on the basis of what he already has filed."); *TV Commc'ns Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1062, 1076-77 (D. Colo. 1991), *aff'd sub nom.* 964 F.2d 1022 (10th Cir. 1992) ("Considering that plaintiff seeks to offer a third complaint, we are within our sound discretion to deny the request to amend . . . Plaintiff does not have a right to file a second amended complaint."); *Torch Liquidating Tr. ex rel. Bridge Associates L.L.C. v. Stockstill*, 561 F.3d 377, 391 (5th Cir. 2009) ("We conclude that justice does not requir[e] allowing plaintiff additional opportunity to amend. Plaintiff had ample opportunity to cure the noted defects when it amended its complaint."). Because Plaintiffs' allegations in the FAC still fail to state a willful FLSA violation, Plaintiffs' claims with respect to willfulness should be dismissed without leave to amend.

Bradley's claims with prejudice as time-barred and (ii) imposes a two-year statute of limitations on Mr. Wakefield's and Ms. Varda's individual and putative collective claims.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2017, I filed and therefore caused the foregoing document to be served via the CM/ECF system in the United States District Court for the District of Columbia on all parties registered for CM/ECF in the above-captioned matter.

/s/ Jason C. Schwartz
Jason C. Schwartz

Dated: November 6, 2017