IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JASON LAMBRO, individually and on
behalf of similarly situated individuals,

4313 Hanf Farm Road
Nottingham, MD 21236

Plaintiff,

v. Civil Action No. 1:21-cv-255

THE UNITED STATES OF AMERICA,

To Serve:
Michael R. Sherwin,
Acting U.S. Attorney for the District of Columbia
555 Fourth Street, NW
Washington, D.C. 20530

Monty Wilkinson,
Acting U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, D.C. 20530

Defendant.

COMPLAINT

Plaintiff Jason Lambro ("Plaintiff"), individually and on behalf of similarly situated individuals ("Class Members"), by and through undersigned counsel, brings this action under the Fair Labor Standards Act ("FLSA"), 29 USC § 201 *et seq.* against Defendant, The United States ("Defendant"), for acts by US Agency for Global Media ("USAGM"), formally known as, Broadcasting Board of Governors.

NATURE OF THE ACTION

1. This class action arises from USAGM's willful misclassification of Plaintiff and the Class Members as independent contractors rather than employees. USAGM wrongfully lured Plaintiff and the Class Members into purchase order agreements, explicitly limiting the parties' relationship as non-personal service contractors or independent contractors. Contrary to the purchase order agreement's terms, Plaintiff and the Class Members provided USAGM personal services, as defined in 48 CFR § 37.104, creating an employee-employer relationship between the parties and entitling Plaintiff and the Class Members to benefits available to federal employees.

2. The USAGM's willful misclassification is exemplified in its response to the Inspector General of the Department of State ("OIG") June 2014 Audit of the Broadcasting Board of Governors Administration and Oversight of Acquisition Functions. In that audit the OIG determined that the USAGM misclassified Class Members in knowing violation of the law. Even after the OIG's findings, USAGM refused to rectify its wrongs and continued to use purchase orders and vendor agreements to obtain personal services via contract until July or August of 2020. USAGM's acts prevented Plaintiff and the Class Members from receiving benefits and additional compensation for overtime hours as allowed by the FLSA.

3. Even if this Court ignores the OIG's application of 48 CFR § 37.104 to determine an employer-employee relationship, such a relationship would exist under this Court's adoption of the "Economic Realities" test.

4. As a result of USAGM's actions, Plaintiff and the Class Members are entitled to unpaid wages for work performed for which they did not receive any compensation, overtime work for which they did not receive any overtime premium pay as required by law, and are entitled to liquidated damages under the FLSA.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this matter pursuant to 29 USC § 216(b), which authorizes actions by private parties to recover damages for violation of the FLSA's wage and hour provisions. Section 29 USC § 216(b) further provides that suit under the FLSA "may be maintained against any employer … in any Federal or State court of competent jurisdiction."

6. This Court has federal question jurisdiction over the action pursuant to 28 USC. § 1331 as Plaintiff's claims arise under the FLSA.

7. Venue in this District is proper pursuant to 28 USC §§ 1391(b) and (c) because Defendant conducts business within the District and a substantial part of the events and/or omissions giving rise to this claim occurred in this District.

PARTIES

8. Defendant operates the USAGM, an independent governmental agency created to provide international broadcasting. USAGM is comprised of five media organizations, including the Voice of America ("VoA"). USAGM is federally mandated to support daily operations and provide transmission and distribution services and technical support for the media organizations under its umbrella. Each organization within the USAGM has multiple departments, all with separate leadership and workforce

9. Plaintiff Jason Lambro is an adult individual domiciled in Nottingham, Maryland. Plaintiff provides Studio Technician services at VoA's headquarters in Washington, DC, under a purchase order agreement with the VoA. (See Exhibit A).

10. Plaintiff brings this action on behalf of himself and other similarly situated employees under 29 USC § 216(b). Plaintiff and the similarly situated employees are individuals

who were, or are, misclassified by USAGM as independent contractors.

11. At all relevant times, Plaintiff and the Class Members were or are "employees" of USAGM as defined by the FSLA, 29 USC § 203(e)(1).

12. The putative Class is or has been "engaged in commerce" as required by the FLSA, 29 USC §§ 206-207.

FACTUAL ALLEGATIONS

Plaintiff's 2002-2017 Contract with the USAGM

13. VoA is an international multimedia broadcaster with service in more than 40 languages with the sole purpose of providing news, information, and cultural programming via internet, mobile and social media, radio, and television.

14. In 2002, Plaintiff began working with the VoA pursuant to a purchase order agreement as a Studio Technician within VoA's Televisions Operation/ TV Studio Service department.

15. Plaintiff's purchase order agreement with the VoA has been in force from 2002 to approximately July 2020 and has had no substantive changes since Plaintiff began working for the VoA.[1] Moreover, the purchase order agreement contained the following terms:

- Article V – Submission of Deliverables: Plaintiff "shall submit work materials at least one hour prior to when the material is intended for use. (For example, material to be used at the 7:00 am broadcast must be submitted to the [Contracting Officer Representative] COR by 6:00 am)."
- Article X – Subcontracting: "None of the work to be performed under this [purchase agreement] shall be subcontracted, and no obligation or duty arising out of the [purchase agreement] may be transferred or assigned" without the approval of the USAGM, Contracting Officer, and other higher-ups with the governmental organization.
- Article XII – Acceptance of Agreement: Plaintiff "agrees that no employer-

[1] The only changes to the purchase agreement have been increases to Plaintiff's hourly rate.

employee relationship exists" between Defendant and Plaintiff.

16. Plaintiff's employment package included a Statement of Work outlining Plaintiff's duties and responsibilities as a Studio Technician for the VoA. The Statement of Work mandated the following:

- Plaintiff "shall perform the following work at . . . Voice of America, Washington DC Headquarters Building . . . unless otherwise mutually agreed to by the Contracting Officer."
- Plaintiff "shall provide general studio operation service utilizing Government equipment on-site at the office of . . . [VoA's] facilities." Plaintiff's responsibilities as a studio technician "include the operation of studio audio equipment, video device playback equipment, and the ability to perform the duties associated with a Studio Technician I.

17. Plaintiff's first purchase order agreement was initially for a year with an option allowing VoA to extend the contract term for a year at a time. In Plaintiff's case, his contract was renewed 17 times, in one-year increments, for the past seventeen years. The substantive terms in Plaintiff's original purchaser order agreement did not change throughout these seventeen years.

18. The express terms in the purchase order agreement provide ostensible independence to Plaintiff in determining the manner and means of work. However, in practice, the Defendant significantly controls the timing and management of the Plaintiff's work. For example, Plaintiff contracted with VoA to work in its Televisions Operation/TV Studio Service department as a Studio Technician II. Nevertheless, VoA supervisors required Plaintiff to work in the Audio-Mix and Language department to complete tasks audio-mixing tasks not required under his purchase order agreement or the statement of works for a Studio Technician II.

19. It was not uncommon for VoA to demand its non-personal service providers, like Plaintiff, to engage in work not required under their contractual agreement. Non-personal service providers who failed to acquiesce to their supervisor's demands, such as transition over to a new department, were retaliated against and eventually fired.

20. Furthermore, while working at VoA, Plaintiff was never required to provide any equipment to complete his tasks because VoA provided all equipment needed. In fact, VoA had to provide the equipment Plaintiff used given the size and nature of the television and audio switchboards Plaintiff was required to operate.

21. Plaintiff and the Class Members were also unable to choose their schedules or the shows they wanted to work for any particular day. Plaintiff and the Class Members were also unaware of their specific tasks on a given day. VoA even determined what days and hours Plaintiff and the Class Members worked. Plaintiff and the Class Members were required to come into work and check a schedule board to obtain assignments. This board informed Plaintiff and the Class Members which television shows they had to work that day and how long they had to work. VoA also required Plaintiff and the Class Members to remain on-call at all times just in case the agency needed them at the office.

22. While employed with VoA, Plaintiff worked more than 40 hours per week. Yet, he did not receive an overtime premium or any benefits typically received by VoA's full-time employees.

Plaintiff's 2018-2020 Contract with the USAGM

23. In early 2018, Plaintiff created Wayne Industries, LLC, to contract with VoA and take advantage of the available corporate tax breaks. VoA agreed to contract with Plaintiff's company with the contractual terms virtually identical to the original purchase order agreement entered between VoA and Plaintiff.

24. Several Class Members also created a separate legal entity, like Plaintiff, to take advantage of corporate tax breaks. And, like Plaintiff, VoA agreed to contract with these legal entities.

25. Although VoA was contracted with Wayne Industries, LLC, Plaintiff was still constructively barred from hiring workers to fulfill Plaintiff's obligations under the contract without seeking approval from a significant number of USAGM higher-ups. Therefore, although the VoA now contracted with a corporation, the contracting officers expected Plaintiff to show up and work all shifts assigned.

26. During the contract with Wayne Industries, LLC, VoA never treated the Plaintiff's company as a separate entity. This assertion is bolstered by VoA's act of listing Plaintiff's name on the scheduling board and not Wayne Industries, LLC.

27. Because VoA treated Wayne Industries, LLC, as an extension of Plaintiff, Plaintiff could not enjoy the benefits usually afforded a business owner. These benefits include hiring additional employees to work on a project or taking time off whenever he chose and making an employee stand in his stead at work.

28. Throughout this period, Plaintiff worked more than 40 hours per week. Yet, he did not receive an overtime premium or any benefits typically received by VoA's full-time employees.

USAGM's Willfully Misclassified Plaintiff and the Class Members

29. VoA willfully misclassified Plaintiff and the Class Members as independent contractors to minimize costs and avoid violating its congressional hiring authority. In further support of VoA's willfulness, Plaintiff cites the OIG's June 2014 Audit of the USAGM. The OIG determined that the USAGM entered into contracts with people like Plaintiff, labeled for non-personal service to avoid violations under the Federal Acquisitions Regulation "FAR." There the OIG determined that the aforementioned contracts were, in fact, for personal services, as defined in 48 CFR § 37.104(d),[2] and created an employee-employer relationship.

[2] 48 C.F.R. § 37.104(d), mimics in some way the Economic Realities test used by courts in

30. In response to the OIG's audit, USAGM admitted that the contracts issued were personal services contract creating an employee-employer relationship with the government as defined by 48 CFR § 37.104. This admission occurred in 2014.

31. Even after this admission, the USAGM failed to properly convert Plaintiff's and the Class Members' contracts into personal service contracts and award them FLSA benefits.

CLASS ALLEGATIONS

32. Plaintiff files this Complaint on behalf of himself and the Class Members.

33. The Class consists of all persons who provided USAGM services under a contractual arrangement other than full-time employment.

34. The Class is limited to individuals who could obtain redress under the applicable two-year statute of limitations for an ordinary violation of the FLSA and a three-year statute of limitations for a willful violation of the FLSA.

35. Presently, the exact number of those within the Class has not been obtained but can be determined through discovery proceedings. However, the number of individuals in the Class is believed to be greater than 100 individuals. This value is based on the number of individuals who have provided USAGM personal services for the past three years.

36. Given the number of potential Class Members, joinder is impractical.

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private employment transactions and identifies six factors for assessing whether a contractor is providing personal service:

1. Performance on site;
2. Principal tools and equipment furnished by the government;
3. Services that are applied directly to the integral effort of agencies . . . in furtherance of assigned function or mission
4. Services that are comparable to or that meet needs comparable to those performed in the same or similar agencies using civil service personnel
5. A reasonable expected need for the type of service in excess of one year; and
6. An inherent nature of the service, or the manner in which it is provided, that reasonably requires direct or indirect government direction or supervision of contractors in order to: adequately protect the Government's interest. . . .

37. This Complaint involves common questions of law and fact, including:

- Whether Plaintiff and the Class Members provided USAGM personal services as provided under 48 CFR 37.104, thus creating an employer-employee relationship;
- Alternatively, whether Plaintiff and the Class Members were employees of USAGM pursuant to the Economic Realities test;
- Whether USAGM misclassified Plaintiff and the Class Members as independent contractors and whether USAGM's misclassification was willful or intentional; and
- Whether Plaintiff and the Class Members are entitled to unpaid overtime compensation and liquidated damages pursuant to the FLSA.

38. The named Plaintiff will adequately and fairly protect the interest of the Class.

39. Counsel from the undersigned firm will represent the Class. The firm has successfully litigated complex actions and will adequately represent the Class Members.

40. The Defendant's actions, through the USAGM, have affected the entire Class, making global relief for the Class appropriate. Common questions of law and fact predominate over individual questions.

CLAIM FOR RELIEF

Count I
(Violation of the FLSA's Misclassification Provisions)

41. Plaintiff reasserts and re-alleges the allegations set forth above.

42. At all times material herein, Plaintiff and the Class Members have been entitled to the rights, protections, and benefits provided under the FLSA, 29 USC §§ 201, et seq.

43. The FLSA regulates, among other things, the payment of overtime pay by

employers whose employees are engaged in interstate commerce, or engaged in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce. *See* 29 USC § 207(a)(1).

44. Defendant violated the FLSA by misclassifying employees, specifically Plaintiff and other similarly situated individuals.

45. It is well established that a worker agreeing to act as an independent contractor is insufficient to avoid the employee-employer analysis under the FLSA. *See Corp. Exp. Delivery Sys. v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002) (affirming the decision that although workers were described in their contract as independent contractors, they were treated as employees). Simply stated, contractual terms alone do not transmute the nature of an employment contract into one that is favorable to the employer under the FLSA.

46. In determining the existence of an employee-employer relationship, the Wage and Hour Division of the Department of Labor, derived from Supreme Court precedent, codified the Economic Realties test. The Economic Realities test factors are:

(1) The nature and degrees of the potential employer's control

(2) The permanency of the worker's relationship with the potential employer

(3) The amount of the worker's investment in facilities, equipment, or helpers

(4) The amount of skill, initiative, judgment, or foresight required for the worker's services

(5) The worker's opportunities for profit or loss

(6) The extent of integration of the worker's service into potential employer's business.

47. The Economic Realities test used by the Wage and Hour Division of the Department of Labor was further echoed in *Escamilla v. Nuyen et al.*, 227 F. Supp.3d 37 (DDC 2017). In *Escamilla,* the Court also stated that none of the factors are dispositive and the Court

should look at the totality of the circumstances and evidence. *Id.* (citing *Morrison v. Int' l Programs Consortium, Inc.*, 253 F.3d 5, 10 (D.C. Cir. 2001)).

48. Based on the facts provided, Plaintiff and the Class Members were employees instead of independent contractors.

49. VoA exercised significant control over Plaintiff and the Class Members to the extent that VoA supervisors chose Plaintiff and the Class Members schedules and required Plaintiff and Class Members to be on-call at all times. Moreover, Plaintiff and the Class Members were not able to control what shows they worked on and when they worked. In Plaintiff's case, VoA required Plaintiff to complete tasks that were not required under his contract. Furthermore, VoA provided all of the equipment Plaintiff and the Class Members needed to complete their jobs.

50. VoA also prevented Plaintiff and the Class Members from profiting from their investment in the business. Plaintiff was constructively unable to hire employees to fill in for his duties because of the onerous procedure for subcontractor approval. *Compare with FedEx Home Delivery v. NLRB,* 563 F.3d 492, 499 (D.C. Cir. 2009) (Court determined that workers were independent contractors because workers could hire another individual to work in their stead and did not have to tell FedEx, among other reasons).

51. VoA's relationship with the Plaintiff and the Class Members was permanent in nature. The purchase order agreements Plaintiff and the Class Members signed gave VoA a one-year renewal option, and VoA exercised that option. In Plaintiff's case, VoA renewed his purchase order agreement for 19 consecutive years, with no significant substantive changes to Plaintiff's contractual obligations.

52. Finally, Plaintiff's and the Class Members' work was integral to the operation of VoA and thereby the USAGM. This is exemplified by the sheer number of purchase order

agreements USAGM entered and the limited number of full-time employees on staff. Further, without Plaintiff and the Class Members the USAGM's staff would be significantly reduced.

53. Based on the foregoing, Plaintiff and the Class Members were employees of the USAGM and are entitled to overtime pay, liquidated damages, and any other relief provided by the FLSA.

Count II
(Willful violation of the FLSA' Misclassification Provisions)

54. Plaintiff reasserts and re-alleges the allegations set forth above.

55. A "willful violation" of the FLSA will expand the statute of limitations from two years to three. *Escamilla v. Nuyen*, 227 F. Supp. 3d 37, 52 (D.D.C. 2017).

56. A willful violation is one where "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id.* Plaintiff has sufficiently alleged a willful violation in this case.

57. USAGM was aware, at minimum, in June 2014 that the purchase order agreements it entered with Plaintiff and the Class Members created an employee-employer relationship when the OIG audit explicitly told it as much. Yet, USAGM did nothing to convert Plaintiff's or the Class Member's independent contracting status to full-time employment. Nor did USAGM provide Plaintiff or the Class Members with the benefits required under the FLSA.

58. The USAGM was aware of its violation of several federal employment statutes and its refusal to rectify its failings for six years is a testament to its apparent disregard for the FLSA.

59. Based on the foregoing, Plaintiff and the Class Members are entitled to overtime pay, liquidated damages, and any other relief provided by the FLSA for the past three-years.

REQUEST FOR RELIEF

Plaintiff respectfully requests relief as follows:

A. For an award of liquidated damages and prejudgment interest;

B. For an award of reasonable attorneys' fees and costs incurred in prosecuting this action;

C. For an order enjoining Defendants from continuing its unlawful pay practices;

D. Leave to add additional Plaintiffs by motion, the filing of written consent forms, or any other method approved by the Court;

E. Leave to amend to add claims under applicable state laws; and

F. For such further legal and equitable relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury for all issues so triable.

Dated: January 28, 2021

Respectfully submitted,

By: /s/ David Ludwig

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