UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JONATHAN RANGEL, individually and on behalf of all other similarly situated persons, Plaintiffs, vs. DMV PROTECTION, LLC and JOVAN VLADIC Defendants.	Case No. 1:25-cv-01288 (AJT/LRV)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs are current and former security guards who worked for Defendants in Virginia, Maryland, and Washington D.C. Defendant DMV Protection, LLC classified its security guards as independent contractors, paid them straight time for each hour worked, did not pay them at the rate of time and one-half their regular rate for any hours worked over 40 in a work week, and docked their pay if they showed up late or left their shift early. As a result of this payment scheme, Plaintiffs bring collective action claims under the Fair Labor Standards Act, or FLSA, and Rule 23 claims under the laws of Virginia, Maryland, and Washington D.C. Plaintiffs also bring claims against DMV's owner, Jovan Vladic, and collectively they are referred to as DMV.

DMV argues that Plaintiffs' claims should be dismissed based on Rule 12(b)(6) of the Federal Rules of Civil Procedure. DMV seeks to dismiss the complaint on two grounds: a) Plaintiffs did not allege sufficient facts under the FLSA's economic realities test to show that they are employees; and b) DMV alleges that Plaintiffs did not sufficiently allege facts under Virginia's misclassification law. Both arguments fail. Relying on their own factual assertions not found in the complaint, and not incorporated into the complaint, and asking the court to draw inferences in their favor, DMV does not support their arguments with sufficient authority, legal or factual. And even if DMV had provided enough authority to meet their burden as movants, Plaintiffs' complaint satisfies the plausibility standard required at the pleading stage. There will be a time and place for this Court to resolve factual disputes, but it is not at the pleading stage.

Plaintiffs do not dispute DMV's arguments that a) Defendant Vladic is not personally liable under the Virginia Wage Payment Act (VWPA), or b) the waiver of the jury trial.

ARGUMENT

I. Standard of review.

A complaint survives a Rule 12(b)(6) motion to dismiss for failure to state a claim "unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief." *Myland Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). A district court must take a plaintiff's well-pleaded allegations as true and view the complaint in the light most favorable to the plaintiffs. *Naidu-McCown v. Emergency Coverage Corp.*, 2024 U.S. Dist. LEXIS 51608 at *7 (E.D. Va. 2024) (citing *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009)). A plaintiff's factual allegations, taken as true, must only "state a claim to relief that is plausible on its face." *Hall v. DIRECTTV, LLC*, 846 F.3d 757, 765 (4th Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). This standard of plausibility does not require a showing of probability, but "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. A plaintiff satisfies the standard of 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." *Id*.

The party moving for dismissal under Rule 12(b)(6) "has the burden of showing that no claim has been stated." *Pro-Concepts, LLC v. Resh*, 2014 U.S. Dist. LEXIS 18416 at *37 (E.D. Va. 2014) (citing 2 Moore's Federal Practice - Civil § 12.34 (2025)); *see also Sony BMG Music Entm't v. Doe*, 2008 U.S. Dist. LEXIS 106088 at *9 (N.D.N.C. 2008). Because a motion to dismiss under Rule 12(b)(6) is only meant to test the sufficiency of the complaint, "importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Alley v. Quality Eco Techs., LLC*, 2021 U.S. Dist. LEXIS 60591 at *11 (E.D. Va. 2021) (citing *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)).

Considering this standard, Plaintiffs have pleaded more than sufficient nonconclusory factual allegations to plausibly be granted relief on their FLSA and Virginia misclassification claims.

II. DMV has not demonstrated that Plaintiffs' FLSA independent contractor misclassification claims are facially insufficient.

For several reasons, DMV's motion to dismiss Count I, for failure to state a facially plausible claim under the FLSA, fails. First, DMV's lack of authority does not comport with Local Rule 7(F)(1), and it does not meet their burden as movant under Rule 12(b)(6). Second, Plaintiffs allege at least 24 paragraphs of facts to support their claim that they were employees under the FLSA's "economic realities" test. Compl. ¶¶ 33-56, ECF No. 1. Third, the Court cannot consider DMV's factual allegations made in its memorandum and outside of the complaint because DMV improperly seeks to have the Court make factual findings based on DMV's recitals in an exhibit referenced in its motion. That exhibit, a contract, is explicitly challenged by the complaint as unlawful.

A. DMV's motion to dismiss does not comply with the applicable standards of a motion to dismiss under Rule 12(b)(6).

This District's Local Civil Rule 7(F)(1) requires that all motions "shall be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies." E.D. Va. L. Civ. R. 7(F)(1) (underline added). DMV makes blanket factual assertions, and they do not include authority for many of the grounds upon which they base their argument. These unsupported facts include:

- Plaintiffs' allegation that DMV scheduled their shifts and decided their hours "fails to advance the existence of an employer-employee relationship" Def.'s Br. Mot. Dismiss at 4-5, ECF No. 12.

- Independent Contractor Agreement (ICA) provisions regarding withholding of wages for "breaches of its terms, e.g. around timeliness, are similarly not indications of an employee-employer relationship" and instead are "customary hallmarks of a general contractor-subcontractor relationship." Def.'s Br. Mot. Dismiss at 5, ECF No. 12.
- The Terms of the ICA regarding Plaintiffs' furnishing of uniforms and equipment "are consistent with an independent contractor." Def.'s Br. Mot. Dismiss at 5, ECF No. 12.
- Plaintiffs "failed to allege any facts that demonstrate any degree of permanence in [their] relationship with DMV, as required by the Silk [sic] test." Def.'s Br. Mot. Dismiss at 5, ECF No. 12.

Thus, DMV's failure to follow the local rules is grounds to deny its motion.

Further, these unsupported factual arguments by DMV contravene the standard of review at the 12(b)(6) stage, namely that the Court must take a plaintiff's well-pleaded allegations as true and view the complaint in the light most favorable to the plaintiffs. *Naidu-McCown,* 2024 U.S. Dist. LEXIS 51608 at *7. As noted above, Plaintiffs allege at least 21 paragraphs of facts to support their claim that they were employees under the FLSA's "economic realities" test. Compl. ¶¶ 33-56, ECF No. 1. These facts must be taken as true and viewed favorably to Plaintiffs.

Similarly, as the moving party, DMV's motion should be denied because they do not offer sufficient citations to authoritative cases to support their arguments. As the movant, it is incumbent upon DMV to "*show*[] that no claim has been stated" such that Plaintiffs could plausibly prevail on their claim that they were employees under the FLSA and related state statutes. *See Pro-Concepts, LLC*, 2014 U.S. Dist. LEXIS 18416 at *37 (emphasis added). Courts have held that a defendant's burden to articulate their argument in a 12(b)(6) motion to dismiss requires legal authority, and the failure to do so could result in the denial of the motion. *Massaro*

v. Allington Fire Dist., 2002 U.S. Dist. LEXIS 27342 at *10-11 (D. Conn. 2002); *see also Lillios v. Justices of N.H. Dist. Court,* 735 F. Supp. 43, 48 (D.N.H. 1990) (holding that failure to cite authority for arguments made in a Rule 12(b)(6) motion to dismiss was grounds for survival of plaintiff's claims). Here, DMV neglected to offer any legal support for their claims that Plaintiffs' allegations regarding schedules and hours, disciplinary policies, uniforms, and duration of relationship fail to advance an employment relationship. Thus, DMV fails to meet their burden under Rule 12(b)(6), and thus the Court should deny their motion. *See id.*

B. Plaintiffs plead sufficient facts that they could plausibly be entitled to relief under the FLSA.

Workers are protected by the FLSA's minimum wage and overtime laws if they are "employees" as defined by the FLSA. 29 U.S.C. § 216(b). Congress defined "employ," "employee," and "employer" so that a "broad swath of workers [are brought] within the statute's protection." *Salinas v. Com. Interiors, Inc.*, 848 F.3d 125, 133 (4th Cir. 2017) (the FLSA's "'striking breadth' of these definitions brings within the FLSA's ambit workers 'who might not qualify as [employees] under a strict application of traditional agency law principles'") (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992)). Indeed, the terms employer and employee under the FLSA are two of the broadest. As this Circuit explained: "Congress defined 'employee' as 'any individual employed by an employer,' 29 U.S.C. § 203(e)(1), describing this language as 'the broadest definition that has ever been included in any one act.' … *Salinas v. Com. Interiors, Inc.*, 848 F.3d 125, 133 (4th Cir. 2017) (quoting *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3, (1945) (quoting 81 Cong. Rec. 7657 (1937) (statement of Sen. Hugo Black))). "And Congress defined 'employer' in a similarly expansive fashion[.]" *Salinas*, 848 F.3d at 133 (citing 29 U.S.C. § 203(d)).

To determine whether a worker is an employee, this Circuit applies the economic realities test, using the six factors articulated in *United States v. Silk*, 331 U.S. 704, 716 (1947). Those factors are: 1) the degree of control that the putative employer has over the manner in which the work is performed; 2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business. *Schultz*, 466 F.3d 298, 304-305 (4th Cir. 2006) (citing *United States v. Silk,* 331 U.S. 704 (1947)).

Contrary to DMV's suggestion, even though a party may attempt to evade the requirements of the FLSA by requiring workers to sign contracts that they are independent contractors, the contractual terms do not define the relationship under the FLSA. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (holding that "[w]here the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the work from the protection of the [FLSA]"). Further, courts have often found security guards to fall under the auspices of the FLSA's protections as employees, even when labeled as "independent contractors" by employers. *See Schultz v. Capital Int'l Sec., Inc*., 466 F.3d 298, 307-310 (4th Cir. 2006); *Acosta v. Off Duty Police Servs.*, 915 F.3d 1050 (6th Cir. 2019); *Solis v. Int'l Detective & Protective Serv., Ltd.*, 819 F. Supp. 2d 740, 749-754 (N.D. Ill. 2011).

In applying the *Silk* factors, no single factor is dispositive; the factors are "designed to capture the economic realities of the relationship between the worker and the putative employer." *Id.* at 305. The *Silk* factors serve to pose, but not overshadow, the ultimate question of "whether the agents were, as a matter of economic reality, dependent on the business they served, or,

conversely, whether they were in business for themselves." *Schultz*, 466 F.3d at 305; *see also Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (articulating the *Silk* factors and stating that in using these factors to determine the working relationship "[i]t is the total situation that controls").

DMV's critiques of Plaintiffs' allegations are insufficient to warrant dismissal of the FLSA claims. First, in contrast to the allegations made in the complaint, DMV does not argue that as a matter of economic realities Plaintiffs allege facts to show that they are independent contractors and not employees. See Compl. ¶ 39, ECF No. 1 ("Plaintiffs were economically dependent on Defendants. For example, while Named Plaintiff Rangel worked at DMV Protection, it was his only job."). Second, DMV does not dispute that Plaintiffs provided sufficient allegations regarding three of the six *Silk* factors: factor 2 (worker's opportunities for profit or loss based on managerial skill), factor 4 (the degree of skill required), or factor 6 (the degree to which worker's services are integral to the business). To dispute these factors at this stage would be futile since Plaintiffs offer no less than 13 paragraphs of facts in support of these factors. Compl. ¶¶ 45-49, 52, 55, 56 support factor 2, Compl. ¶ 36 supports factor 4, and Compl. ¶¶ 33, 34, 36, and 37 support factor 6. ECF No. 1.

Third, DMV argues that Plaintiffs did not sufficiently allege facts in support of factors 1, 3, and 5. But that is wrong. For each of these factors, Plaintiffs have met their burden, and as a whole, sufficiently allege that they are employees—not independent contractors.

i. Factor 1 - degree of control

Incorrectly, DMV asserts that Plaintiffs provide no support for the control factor beyond the first sentence of paragraph 40 of the complaint. But Plaintiffs did not merely allege, as DMV suggests, that "Plaintiffs were subject to a high degree of control by Defendants when working."

Compl. ¶ 40, ECF No. 1. The next sentence in that paragraph, which DMV ignores, elaborates on the control DMV exerts:

> "For example, Defendants scheduled Named Plaintiff Rangel and other Security Guards for shifts and decided their hours. Defendants require Plaintiffs to 'clock in' when starting their shift, with specific requirements on how and when to do so, and 'clock out' at the end. Defendants monitored Plaintiffs' work to ensure they complied with company policies and procedures. Plaintiffs were required to submit daily activity reports (DARs) stating whether or not any incidents had occurred. Plaintiff Rangel submitted these DARs multiple times during each shift to DMV Protection through the NovaGems application."

Compl. ¶ 40, ECF No. 1.

Plaintiffs allege other facts that support DMV's control. Plaintiffs allege that DMV "retained the authority to hire and fire [Plaintiffs]." Compl. ¶ 41, ECF No. 1. *See Hall,* 846 F.3d at 774; *see also Perez v. Ocean View Seafood Rest., Inc.*, 217 F. Supp. 3d 868, 878-879 (D.S.C. 2016) (citing authority to hire and fire as supportive of a finding of an employment relationship for FLSA purposes). Plaintiffs allege that DMV had the authority to discipline security guards. Compl. ¶ 42, ECF No. 1. *See Chavez-Deremer*, 2025 U.S. App. LEXIS 17726 at *51-52. Plaintiffs further allege that DMV set their hourly rate, and they could not affect their rate of pay other than to work more hours. Compl. ¶¶ 45-46, 49, ECF No. 1. *See, Chavez-Deremer*, 2025 U.S. App. LEXIS 17726 at *47 (quoting *McFeeley*, 825 F.3d at 241-42) ("setting a worker's wages, without affording those workers an opportunity to negotiate, is evidence that an employer exercises 'significant control' over its workers."). These factual allegations, which must be taken as true, demonstrate control indicative of employee status.

Plaintiffs' control allegations are distinguishable from those made in one of the only cases cited by DMV, *Zamora v. Washington Home Servs., LLC*, 2011 U.S. Dist. LEXIS 144298 (D. Md. 2011). In *Zamora*, the plaintiff made two barebone factual allegations in support of the FLSA economic realities test and his FLSA claim: that "(1) Zamora worked as an installation technician installing appliances for Washington Home's customers for one-and-a-half years; and

(2) Zamora regularly worked between seventy and eighty hours per week." *Id.* at *7. Here, Plaintiffs assert more robust factual allegations in support of the control factor than the plaintiff in *Zamora,* alleging no less than 13 paragraphs of supportive facts. *See id*; see also Compl. ¶¶ 40-43, 45-47, 49, 51-53, 55-56.

There is also ample legal authority demonstrating that allegations similar to those made by Plaintiffs have been found sufficient to support an employer-employee relationship under the control factor. For example, courts have held that factors such as control over workers' schedule, sign-in procedures, policies and procedures regarding workplace conduct, and required daily reports demonstrate a level of control that indicates an employment relationship. *McFeeley v. Jackson St. Entm't,* LLC, 825 F.3d 235, 242 (4th Cir. 2016) (finding control over the schedule, sign-in process, and worker conduct supportive of the control factor); *see also Wirtz v. Silbertson*, 217 F. Supp. 148, 152 (E.D. Pa. 1963) (citing daily sales reports as demonstrative of control over workers); Compl. ¶¶ 40, 52, 53, 56, ECF No. 1. In *McFeeley*, this Circuit cited the workers obligation to sign in upon starting work, the defendant dictating the workers' schedules, and the imposition of written guidelines regarding workers' conduct as facts supportive of a finding that the defendants exercised "'significant control' over how plaintiffs performed their work. . . ." 825 F.3d at 242; *see also Chavez-Deremer v. Med. Staffing of Am., LLC*, 2025 U.S. App. LEXIS 17726 at *48-49 (4th Cir. 2025) (also citing control over scheduling, required submission of timesheets, and rules of conduct and workplace expectations as indicating an employer-employee relationship under the control factor).

Plaintiffs allege other facts that indicate a high level of control by DMV such that the relationship was that of employer-employee. Plaintiffs allege that DMV "retained the authority to hire and fire Plaintiffs." Compl. ¶ 41, ECF No. 1. *See Hall,* 846 F.3d at 774; *see also Perez,* 217

F. Supp. 3d at 878-879. Plaintiffs also allege that DMV had the authority to discipline Plaintiffs. Compl. ¶ 42, ECF No. 1. *See Chavez-Deremer*, 2025 U.S. App. LEXIS 17726 at *51-52. Plaintiffs further allege that DMV set their hourly rate and they could not affect their rate of pay other than to work more hours. Compl. ¶¶ 45-46, 49, ECF No. 1. In *Chavez-Deremer*, this Circuit states that "setting a worker's wages, without affording those workers an opportunity to negotiate, is evidence that an employer exercises 'significant control' over its workers." 2025 U.S. App. LEXIS 17726 at *47 (quoting *McFeeley*, 825 F.3d at 241-42). These factual allegations, which must be taken as true, demonstrate a degree of control indicative of an employee.

Second, DMV argues that the wage deduction policy for late arrivals, early departures, and unsubmitted DARs do not evince an employer-employee relationship. DMV does not support its argument with any case law. In contrast, as stated in *Chavez-Deremer*, disciplinary oversight of this nature is evidence of control over the "meaningful economic aspects of the business." 2025 U.S. App. LEXIS at *52-53. DMV relies on *Chao v. Mid-Atl. Installation Servs., Inc.*, to say that the policies could equally support the finding of a contractor relationship; however, the policies in *Chao* significantly differ. 16 Fed. Appx. 104 (4th Cir. 2001). Unlike this case, the quality control and oversight measures discussed in *Chao* were of a highly technical nature regarding installation of cable television. *Id.* at 106. In *Chao*, DMV cites a sentence that addresses compliance with local regulations and technical specifications in the case of performance of "highly technical duties," not basic conduct like arrival, departure, and daily reports. *Id. Cf. McFeeley*, 825 F.3d at 242 (stating that the company's control over sign-in procedures, work schedules, and conduct while working "bore little resemblance to the latitude normally afforded to independent contractors").

Finally, DMV argues that Plaintiffs' allegation of DMV's control over their scheduled shifts and hours could not support a finding of an employer-employee relationship. This contention fails on two grounds. First, DMV improperly contests Plaintiffs' factual allegations despite challenging the complaint under Rule 12(b)(6). Because this is a challenge under Rule 12(b)(6), the Court does not resolve "contests surrounding the facts." *See Republican Party of N.C.*, 980 F.2d at 952. Such factual disputes are better addressed at summary judgment or after trial.

Second, the facts alleged by Plaintiffs about their scheduling and hours plausibly state a claim for which they could get relief. Plaintiffs claim that DMV scheduled their shifts and dictated their hours. Compl. ¶¶ 40, 51, ECF No. 1. On its face, this control over whether and when a worker can work is a fact demonstrating a level of control that supports an employer-employee relationship. *See Hall*, 846 F.3d at 774-775. DMV argues that they did not have such control because Plaintiffs' schedules were created through a "bidding process." Def.'s Br. Mot. Dismiss at 5, ECF No. 12. There is no evidence of this in the complaint or from any admissible evidence from DMV. Whether or not the scheduling arrangement was a "bidding process," as alleged by DMV, is a question of fact which should not be considered in this motion to dismiss. *See Republican Party of N.C.*, 980 F.2d at 952. Even if the Court were to credit DMV's claims about this apparent "bidding process," which Plaintiffs dispute, this would not foreclose the possibility that Plaintiffs could prevail such that relief under Rule 12(b)(6) would be appropriate. A free-market system where workers can review and accept shifts can still be indicative of a high degree of control such that there is an employee-employer relationship if the alleged employer controls the workers' access to those shifts. *Chavez-Deremer*, 2025 U.S. App. LEXIS 17726 at *49 (stating that even though workers selected shifts in an open marketplace system, the

employer ultimately controlled workers' access to shifts, therefore "controlling when and where the nurses worked").

Thus, as alleged in the complaint, there is sufficient evidence to show that the control factor supports employee status. *See Ashcroft v. Iqbal*, 556 U.S. at 678.

ii. Factor 3 - investment in equipment/materials

With respect to the third *Silk* factor (hereinafter "materials factor"), DMV likewise fails to demonstrate that Plaintiffs have not sufficiently alleged facts that could plausibly support relief. DMV only argues that "the terms of the ICA are consistent with an independent contract, e.g. Plaintiff was responsible for furnishing his own uniform and equipment necessary to perform the work in accordance with the requirements set forth by DMV's customers." Def.'s Br. Mot. Dismiss at 5, ECF No. 12. No legal authority is cited. This alone is grounds for Plaintiffs to prevail on this argument. *See Pro-Concepts, LLC*, 2014 U.S. Dist. LEXIS 18416 at *37; *Massaro*, 2002 U.S. Dist. LEXIS 27342 at *11.

Plaintiffs pleaded facts that show this factor favors an employment relationship. Plaintiffs pleaded that DMV required them to purchase their own uniforms, and sometimes DMV provided them with and required them to wear a uniform. Compl. ¶ 43, ECF No. 1. Providing a uniform, especially bearing the logo of the alleged employer, supports a finding of an employment relationship under the materials prong. *See Quality Eco Techs., LLC*, 2021 U.S. Dist. LEXIS 60591 at *19 (citing the fact that installers wore company uniforms during their work as one fact weighing in favor of a finding of an employer-employee relationship under the *Silk* factors); *see also Hall*, 843 F.3d at 775. Even in cases where workers must furnish some of their own equipment, this does not defeat the plausibility of relief under a 12(b)(6) challenge. *See Hill v. Pepperidge Farm, Inc.*, 2022 U.S. Dist. LEXIS 146817 at *13-14 (E.D. Va. 2022).

iii. Factor 5 - permanence of the working relationship

DMV does not satisfy their burden to demonstrate that Plaintiffs have not sufficiently alleged facts that could plausibly support relief under factor 5. This argument fails for two reasons. First, DMV claims that the Named Plaintiffs' relationship with DMV "consisted solely of Plaintiff placing bids on and working those shifts which met his scheduling requirements." Again, it offers no factual support or legal authority as to why this matters. Additionally, this is a factual challenge to Plaintiffs' allegation that DMV controlled his schedule, which should not be resolved at the 12(b)(6) stage. *Republican Party of N.C.*, 980 F.2d at 952.

Second, without authority, DMV claims Named Plaintiff's six-month employment relationship does not support employee status. However, Courts have held that as little as two months can be supportive of the permanence factor. *See Eans v. Lund*, 2023 U.S. Dist. LEXIS 199553 at *9 (D. Ariz. 2023) (finding that employee status was favored because plaintiff "was hired for an indeterminate duration and either Plaintiff or Defendant could terminate the relationship at any time."); *Baker v. Flint Engr. & Const. Co.*, 137 F.3d 1436, 1442 (10th Cir. 1998) (permanent and exclusive relationship during the particular job, which rarely lasted more than two months, favored employee status); *Hobbs v. Petroplex Pipe & Constr., Inc*., 360 F. Supp. 3d 571, 583 (W.D. Tex. 2019) (finding that Plaintiffs' work on a "steady and reliable basis" for periods of time from four months to three years favored employee status under the permanence factor).

DMV also offers challenges the permanence factor by asserting that Plaintiffs' relationship with DMV "consisted solely of Plaintiff placing bids on and working those shifts which met his scheduling requirements." No authority is cited as to why this would render implausible Plaintiffs' ability to be granted relief on the economic realities test permanence

factor. *See* E.D. Va. L. Civ. R. 7(F)(1) (requiring citation to authority on which movant relies); *see also Massaro,* 2002 U.S. Dist. LEXIS 27342 at *10-11 ("As defendants fail to provide sufficient information on which to conclude that there is an applicable immunity, the complaint will not be dismissed on the basis of such alleged immunity."). Additionally, this is a factual challenge to Plaintiffs' allegation that DMV controlled his schedule, which should not be resolved at the 12(b)(6) stage. *Republican Party of N.C.*, 980 F.2d at 952.

Thus, this factor favors employee status.

C. DMV improperly references the independent contractor agreement as an exhibit.

At the pleading stage, a court generally should only consider the allegations in the complaint and those documents attached to the complaint as exhibits or incorporated by reference. *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016). A document is not incorporated by reference only by limited quotation and/or references. *Id.* (citing *Sira v. Morton,* 380 F.3d 57, 67 (2d Cir. 2004) (holding "[l]imited quotation from or reference to documents that may constitute relevant evidence in a case is not enough to incorporate those documents, wholesale, into the complaint"). If extrinsic evidence is not attached to the complaint, it can only be considered if it is attached to the motion to dismiss, is integral to the complaint, and there is no contest as to its authenticity.

This Court should not consider DMV's referenced Exhibit A, the ICA. DMV referenced but did not attach the ICA as Exhibit A to their motion to dismiss, then attached the ICA as Exhibit A to their amended motion to dismiss, contending it "was incorporated into the Complaint by reference." See Def.'s Br. Mot. Dismiss at 6, ECF No. 12. Plaintiffs' complaint reference a contract, titled "Independent Contractor Handbook," that DMV had Plaintiffs sign due to its numerous allegedly unlawful wage-deduction provisions. See Compl. ¶¶ 56(a)-(d) &

73, ECF No. 1. Plaintiffs did this to provide factual support for claims that their wages were unlawfully deducted, including their claim that they were required to sign a contract providing for forfeiture of wages for time worked. Id. ¶ 73. That is the purpose of the references to the contract. Moreover, the contract referenced to by Plaintiffs in paragraphs 56 and 73 is not the contract submitted by DMV as Exhibit A, although DMV's Exhibit A references the wage deduction policies at issue. Plaintiffs' only direct reference to the ICA is in Paragraph 11, which explicitly disputes it: "Although Defendants classified Plaintiff Rangel as an 'independent contractor,' he was an employee of DMV Protection." Compl. ¶ 11, ECF No. 1; id ¶ 13 (similar).

Plaintiffs obviously do not incorporate or agree with the accuracy of the self-serving language in DMV's Exhibit A (drafted by DMV) or any other contract that labels them as "independent contractors" or similar factual statements in the contract. Under governing law in this Circuit, the Court cannot credit such defendant-serving language as true in ruling on a motion to dismiss. "[I]n cases where the plaintiff attaches or incorporates a document for purposes other than the truthfulness of the document, it is inappropriate to treat the contents of that document as true." *Goines*, 822 F.3d at 167. Otherwise, it would be impossible to challenge unlawful contractual provisions, drafted by defendants, where the contract also contained defense-serving recitals. Additionally, on September 15, this Court struck DMV's amended motion because it was submitted over 21 days after DMV had been served and DMV did not seek leave for an extension to amend. Order Striking Def.'s Am. Mot. Dismiss, ECF. No. 16. DMV only submitted their Exhibit A to this Court on September 12, the same day as the amended motion and also in violation of Fed. R. Civ. P. 12(a)(1)(A)(i). Because DMV failed to timely submit their exhibit, it should not be considered by this Court.

Further, this Court does not need to reach the question of whether the ICA was integral or whether there is a contest as to authenticity because that exception only applies to a "document submitted by the movant." *See Goines*, 822 F.3d at 166. Because the amended motion was stricken for untimely submission without leave, and the exhibit was only submitted at the same time as the amended motion, it should not be considered submitted by this Court.

III. Plaintiff Has Sufficiently Alleged Claims for Virginia Misclassification, Va. Code. Ann. 40:1-28.7:7.

DMV's claim that Plaintiffs do not sufficiently plead facts to support a cause of action under Virginia's misclassification statute fails. DMV's argument that Plaintiffs were required to plead facts that would "indicate knowledge on the part of either Defendant" ignores (a) the statutory presumption of an employee-employer relationship articulated in Va. Code Ann. 40.1-28.7:7(b), (b) the numerous factual allegations showing a knowing misclassification, and (c) the express factual allegation of knowledge, Compl. ¶ 77, ECF. No. 1.

Virginia has codified its prohibition of misclassifying employees as independent contractors. Va. Code Ann. 40.1-28.7:7. The Virginia misclassification statute creates a cause of action for employees who have been misclassified. Va. Code Ann. 40.1-28.7:7(a). Subsection (b) of this statutory provision also establishes a presumption that workers bringing an action under the misclassification statute are employees:

> "an individual who performs services for a person for remuneration shall be presumed to be an employee of the person that paid such remuneration, and the person that paid such remuneration shall be presumed to be the employer of the individual who was paid for performing the services, unless it is shown that the individual is an independent contractor as determined under the Internal Revenue Service guidelines."

Va. Code Ann. 40.1-28.7:7(b).

When interpreting a statute, the "analysis must begin with the plain language of the statute [. . .] [a]nd where the statute's terms are 'clear and unambiguous,' analysis must also end

with the statute's plain language." *Pallone v. Marshall Legacy Inst.*, 97 F. Supp. 2d 742, 744 (E.D. Va. 2000).

A. The Virginia misclassification statute presumes employee status.

The statutory presumption under Va. Code Ann. 40.1-28.7:7(b), by its terms, shifts the burden to the party who takes the position that the worker is an independent contractor, not an employee. The statute states that the individual who performs services for remuneration "shall be presumed to be an employee" of the paying person "unless it is shown that the individual is an independent contractor as determined under the Internal Revenue Service guidelines." Va. Code Ann. 40.1-28.7:7(b). This statutory provision must first be interpreted upon its plain language. *Pallone*, 97 F. Supp. 2d at 744. Because there is a presumption of employee status, the plain language of the statute does not place the burden on Plaintiffs to show that they were employees under Virginia law. Instead, the burden is on DMV to show that Plaintiffs were independent contractors under the IRS guidelines. Va. Code Ann. 40.1-28.7:7(b).

This District applied the 40.1-28.7:7(b) presumption in *Naidu-McCown v. Emergency Coverage Corp,* 2024 U.S. Dist. LEXIS 51608 at *15-16 (E.D. Va. 2024). In that case, the worker had similarly pleaded facts in support of finding an employer-employee relationship under the Virginia misclassification statute. *Id.* The worker survived the defendant's Rule 12 motion to dismiss because she alleged that she was the person who performed the services for and was paid by the defendant company. *Id.* The court found that these allegations were enough to support the cause of action under the Virginia misclassification statute. Specifically, the court said "[h]ere, based on the plain language of the statute, Dr. Naidu-McCown is the individual person who performed services for remuneration from TeamHealth. Thus, she has sufficiently alleged that she is an employee under Virginia's misclassification statute." *Naidu-McCown v.*

Emergency Coverage Corp., 2024 U.S. Dist. LEXIS 51608 at *15-16. So too here, Plaintiffs pleaded they were paid by Defendants. See Compl. ¶ 45, ECF No. 1.

B. DMV failed to demonstrate insufficiency of Plaintiffs' well-pled Complaint.

DMV does not support the claim that the complaint does not sufficiently allege a cause of action under the Virginia misclassification statute. Because the motion lacks supporting authority and argument for this claim, Plaintiffs' claim under the Virginia misclassification statute should survive even without the statutory presumption.

As movant, DMV must show that Plaintiffs have not stated a claim. *See Pro-Concepts, LLC v. Resh*, 2014 U.S. Dist. LEXIS 18416 at *37. DMV needed to articulate some authority for the insufficiency of claims 12(b)(6) motion to dismiss to prevail. *See Massaro*, 2002 U.S. Dist. LEXIS 27342 at *10-11. Failure to provide citations to authority is grounds for dismissal. *See Lillios*, 735 F. Supp. at 48. In support of their assertion that Plaintiffs' claims under the Virginia misclassification statute should be dismissed, DMV only asserts 1) that the complaint lacks any factual allegations which could satisfy the pleading standard, and 2) that the ICA demonstrates that DMV "desired and understood" the Plaintiffs to be independent contractors, which negates the knowledge requirement. Def.'s Br. Mot. Dismiss at 7-8, ECF No. 12. Neither offers more than conclusory statements without citation to any argument or authority. DMV does not argue why the 31 paragraphs of factual allegations in Plaintiffs' complaint fail to plausibly show their knowledge of Plaintiffs' misclassification. Nor does DMV elaborate on how a desire and understanding that Plaintiffs be classified as independent contractors negates the possibility of a showing that the misclassification was knowing. DMV neglects to provide any support for their statements that Plaintiffs' claims could not plausibly succeed under the Virginia misclassification statute.

Despite the statutory presumption of employment, Plaintiffs have still pleaded facts sufficient to demonstrate DMV's knowledge of their misclassification. And DMV has not met their burden in demonstrating otherwise.

It is a well-known maxim of law, reiterated by the Virginia courts, that litigants cannot typically claim ignorance of the law's requirements as a defense. *See Swango v. Va. State Bar ex rel. Second Dist.*, 918 S.E.2d 250 (2025); see also *King v. Empire Collieries Co.*, 148 Va. 585 (1927). A knowledge requirement in a prohibitory statute "is usually held to import a knowledge of the essential facts from which the law presumes a knowledge of the legal consequences arising therefrom." *See RF&P Corp. v. Little*, 247 Va. 309, 320 (1994) (citing *Gottlieb v. Commonwealth*, 126 Va. 807 (1920) (stating definition of knowingly in "prohibitory statute[s"). Although not explicitly adopted by the Virginia misclassification statute, the Virginia Wage Payment Act (VWPA) defines knowledge as "with respect to information, (i) has actual knowledge of the information, (ii) acts in deliberate ignorance of the truth or falsity of the information, or (iii) acts in reckless disregard of the truth or falsity of the information." Va. Code Ann. 40.1-29(K); *see also Muratore v. Foster Aesthetics, LLC*, 113 Va. Cir. 414 (Cir. Ct. 2024) (applying the 40.1-29 "knowingly" requirement). As such, Plaintiffs need only plead facts from which this Court could reasonably infer that DMV knew, actually or constructively, the information that rendered Plaintiffs misclassified under the IRS guidelines as cited in the statute.

The IRS test includes 20 factors: (1) instructions; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising, and paying assistants; (6) continuing relationship; (7) set hours of work; (8) full time required; (9) doing work on employer's premises; (10) order or sequence set; (11) oral or written reports; (12) payment by hour, week, month; (13) payment of business and/or traveling expenses; (14) furnishing of tools and materials; (15) significant

investment; (16) realization of profit or loss; (17) working for more than one firm at a time; (18) making service available to general public; (19) right to discharge; and (20) right to terminate. Rev. Rul. 87-41 at *4-7. There is "no threshold number of factors" that demonstrate a level of control sufficient to indicate an employment relationship. *Amazon Logistics, Inc. v. Va. Empl. Comm'n,* 78 Va. App. 521, 542-543 (Ct. App. 2023). The factors are ultimately in aid in addressing the question of "whether a putative employer 'exercise[s] sufficient control over the individual for the individual to be classified as an employee.'" *Amazon Logistics, Inc.*, 78 Va. App. at 539.

Plaintiffs have pleaded facts that demonstrate DMV's knowledge of the "essential facts" of their misclassification under the IRS guidelines. First, DMV classified Plaintiffs as independent contractors , which DMV admits in the motion. Compl. ¶ 35, ECF No. 1. Plaintiffs allege that their work as security guards was integral to DMV's business, which speaks to IRS factor 3, integration. Compl. ¶ 37, ECF No. 1; Rev. Rul. 87-41. Plaintiffs also allege that DMV exercised control over their hours and schedule, which speaks to IRS factor 7, set hours of work. Compl. ¶¶ 40, 51, ECF No. 1; Rev. Rul. 87-41. Plaintiffs allege that DMV required compliance with policies and practices, including clock-in and clock-out procedures and arrival/departure protocols. Compl. ¶¶ 40, 53, 56, ECF No. 1. This addresses IRS factor 1, instructions. Rev. Rule 87-41 ("This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions"). Plaintiffs also allege that they did not have the opportunity for profit or loss based on managerial skill because they were paid hourly at a rate dictated by DMV and had no means of increasing their compensation other than to work more hours. Compl. ¶¶ 45-49, 55, ECF No. 1. This supports IRS factor 16, realization of

profit or loss. Rev. Rule 87-41. These allegations are only a sample of the many pleaded by Plaintiffs that demonstrate their status as employees under the IRS guidelines.

Because of the significant degree of control DMV exercised over Plaintiffs' work conditions, as alleged in the complaint, it is inconsistent to claim that they were not aware of the information resulting in Plaintiffs misclassification. Plaintiffs' allegations, taken as true, demonstrate that DMV was not only aware of the level of control being exercised over Plaintiffs but was the one exercising that control. Because Plaintiffs' allegations demonstrate that DMV was aware of the information resulting in misclassification, as they were the ones implementing of the level but actively instituting the alleged policies and practices, this Court could reasonably infer that DMV had knowledge of the information, the legal consequences of which are misclassification under the Virginia misclassification statute.

IV. DMV's allegation regarding insufficiency under Rule 23(a) and Plaintiffs' state wage and overtime claims should not be considered by this Court.

Out of an abundance of caution, Plaintiffs ask the Court not to consider DMV's positions taken in the motion but then abandoned in their supporting memorandum. In passing, DMV states that the complaint seeks to apply disparate statutory definitions and remedies and therefore does not meet the commonality requirement of Rule 23(a) and that Plaintiffs have not sufficiently pleaded any state wage and overtime claims. Def.'s Mot. Dismiss, ECF No. 11. As the movants, DMV bears the burden of demonstrating that the relief they seek under Rule 12(b)(6) should be granted. *Pro-Concepts, LLC v. Resh*, 2014 U.S. Dist. LEXIS 18416 at *37. Courts have held that this burden requires at least some show of authority. *Massaro*, 2002 U.S. Dist. LEXIS 27342 at *10-11; *Lillios,* 735 F. Supp. at 48. When a movant fails to cite any authority for a proposition in a 12(b)(6) motion to dismiss, the claims raised in the complaint should survive. *Lillios*, 735 F. Supp. at 48. Local Rule 7(F)(1) also requires that movants

accompany their motion with a "written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities." E.D. Va. L. Civ. R. 7(F)(1). In the appellate context, this Circuit has held that "[a] party waives an argument by failing to present it in its opening brief or by failing to 'develop [its] argument' even if [its] brief takes a passing shot at the issue." *Grayson O. Co. v. Agadir Int'l LLC*, 856 F. 3d 307, 316 (4th Cir. 2017) (quoting *Brown v. Nucor Corp.*, 785 F. 3d 895, 923 (4th Cir. 2015)). Because DMV only asserts in the motion that the Rule 23(a) commonality requirement is not met, and does not provide any citation nor even mention this in their supporting memorandum, Plaintiff's Rule 23 claim should survive. Plaintiffs should not be left to guess the substance—if any—of DMV's arguments. For the same reason, DMV's assertion that Plaintiffs "failed to plausibly plead violations of any state wage or overtime laws" should not be addressed by the court and Plaintiffs claims should survive.

CONCLUSION AND ALTERNATIVE MOTION FOR LEAVE TO AMEND

DMV has failed to demonstrate any pleading insufficiencies in Plaintiffs complaint under Rules 12(b)(2) or 12(6)(6). If this Court identifies any insufficiencies in Plaintiffs' complaint, Plaintiffs request leave to amend their complaint in lieu of dismissal. For the foregoing reasons, Plaintiffs' complaint should survive DMV's motion to dismiss.

Date: September 16, 2025

Respectfully submitted,

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CERTIFICATE

I hereby certify that on September 16, 2025 I filed the foregoing with the Court's ECF system which will send electronic notice of the same to all counsel of record.

/s/Timothy Coffield