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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN CHEN, on behalf of himself and all others similarly situated, Plaintiff, v. MAJOR LEAGUE BASEBALL; MAJOR LEAGUE BASEBALL PROPERTIES, INC.; THE OFFICE OF THE COMMISSIONER OF BASEBALL, d/b/a/ MAJOR LEAGUE BASEBALL; and MAJOR LEAGUE BASEBALL ENTERPRISES, INC., Defendants.	No. 13 Civ. 5494 (JGK)

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR COURT-AUTHORIZED NOTICE

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PRELIMINARY STATEMENT

Defendants Major League Baseball, Major League Baseball Properties, Inc., The Office of the Commissioner of Baseball (d/b/a Major League Baseball), and Major League Baseball Enterprises, Inc. (collectively, "MLB") tout their "unwavering commitment to giving back" to the community and claim to "strive to meet [their] many essential social responsibilities." Ex. 1, MLB Community Affairs Report at 1.[1] However, as it concerns their labor practices, MLB strikes out.

For several years, MLB has unlawfully failed to pay minimum wages to the "volunteers" who help run its for-profit events, including its recent 2013 All-Star FanFest, in violation of the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). Instead, MLB provided FanFest volunteers with shirts, caps, backpacks, and free admission as "payment" for their services. Despite reporting annual revenues of nearly $7 billion in 2012, MLB has failed – and continues to fail – to pay mandated minimum wages to its work force at FanFest and other events.

Through publicly available information and Plaintiff's declaration, Plaintiff exceeds his low burden on this motion. He seeks to protect the rights of unpaid MLB volunteers nationwide,[2] all of whom MLB subjects to their unlawful wage and hour policies, by sending them Court-approved notice of this action and letting them decide whether to join it to recover their unpaid minimum wages.

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1 All Exhibits are attached to the Declaration of Justin M. Swartz ("Swartz Decl.").

2 Plaintiff brings this action on behalf of himself and all other similarly situated volunteers who worked for MLB anywhere in the United States between August 7, 2010 and the date of final judgment.

PROCEDURAL HISTORY

Plaintiff John Chen filed this lawsuit on August 7, 2013, bringing nationwide collective and class action claims that MLB unlawfully denied volunteers at for-profit events minimum wages in violation of the FLSA and the NYLL. *See* ECF No. 1. MLB will be served with the Complaint and this motion promptly. Plaintiff will consent to a reasonable extension of time for MLB to respond to this motion, should MLB request one.

THE PARTIES

A. Plaintiff

Plaintiff John Chen worked as an unpaid volunteer for MLB at its 2013 All-Star FanFest on June 1 and July 10, 12, 13 and 16, 2013. Declaration of John Chen ("Chen Decl.") ¶¶ 5, 10, 18-25. Chen attended mandatory information and orientation sessions at Citi Field in Queens and the Javits Center in Manhattan. *Id.* at ¶¶ 3, 5, 10. Chen also worked three FanFest shifts at the Javits center of several hours each. *Id.* at ¶¶ 18-25. Chen was not paid any wages by MLB. *Id.* at ¶ 26.

B. Defendants

MLB is a single integrated enterprise that operates a nationwide professional baseball league. *See* ECF No. 1 at ¶ 45. MLB consists of 30 Major League Baseball Clubs that play in the American League and the National League, as well as agent corporations including Major League Baseball Properties, Inc. and Major League Baseball Enterprises, Inc. *Id.* at ¶ 47. In 2012, MLB had revenues over $7 billion in 2012.[3] The Office of the Commissioner of Baseball, part of the MLB single integrated enterprise, is an unincorporated association that does business as Major League Baseball and has as its members the Major League Baseball Clubs. *Id.* at ¶ 52.

3 *See* http://www.cbssports.com/mlb/blog/eye-on-baseball/21335810/report-mlb-revenues-in-2012-were-75-billion (last visited August 15, 2013).

MLB is a covered employer within the meaning of the FLSA and, at all relevant times, employed and/or jointly employed Plaintiff and other unpaid volunteers.

STATEMENT OF FACTS

A. MLB Controls the Operations of its For-Profit Events, Including the Work of Unpaid Volunteers.

MLB exercises strict control and supervision over its for-profit events, including its annual "All-Star" baseball game ("All-Star Game"), which includes the top players in each league. *See* ECF No. 1 at ¶ 48. The All-Star Game is preceded by four days of events, including FanFest, which are staffed largely by unpaid volunteers. *Id*. at ¶ 49.[4] The 2013 All-Star Game (and related events) was held in New York City.[5] Approximately 2,000 volunteers were recruited by MLB.[6] The 2008 All-Star Game (and related events) was also held in New York City and staffed by unpaid volunteers.[7] MLB has not confined this practice to New York; the MLB All-Star Game and related events in Phoenix, Arizona in 2011 and Kansas City, Missouri in 2012 were also staffed by unpaid volunteers.[8]

From its headquarters in New York City, MLB plans and organizes the All-Star Game and related events, including FanFest. Among other things, it promotes FanFest as "the largest

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4 Events during the 2013 All-Star Weekend included the All-Star 5K and Fun Run, the All-Star Charity Concert, the Futures Game, the Legends & Celebrities Softball Game, the All-Star Workout Day, the Home Run Derby, and the All-Star FanFest at the Javits Center in Manhattan. *See* ECF No. 1 at ¶ 50.

5 Previous locations included Phoenix, Arizona in 2011 and Kansas City, Missouri in 2012. *See* ECF No. 1 at ¶ 32.

6 *See* http://mlb.mlb.com/mlb/events/all_star/y2013/fanfest/faq.jsp (last visited August 15, 2013).

7 *See* http://newyork.yankees.mlb.com/nyy/fan_forum/asg/volunteers_form.jsp (last visited August 15, 2013).

8 *See* http://mlb.mlb.com/mlb/events/all_star/y2011/fanfest_tickets.jsp (last visited August 15, 2013); https://secure.mlb.com/mlb/events/all_star/y2011/volunteer_form.jsp (2012, Kansas City, MO) (last visited August 15, 2013).

interactive baseball theme park in the world," which is described as "baseball heaven on earth."[9] The events are staffed almost entirely by volunteers who are recruited and employed by MLB. MLB sets the conditions of employment for volunteers and, among other things, determines the type of work they will be assigned to perform.[10]

MLB did not pay volunteers any wages for their work. Rather, MLB provided them with "a shirt, a cap and a cinch drawstring backpack," free admission for the volunteer and one guest to FanFest, a water bottle, and a baseball.[11] It is also MLB's policy not to provide All-Star Game tickets to volunteers – instead, MLB offered its approximately 2000 volunteers at the 2013 FanFest the chance to win *one pair* of All Star Game tickets; provided, however, they work "three shifts at any of the All-Star events."[12] MLB did permit volunteers to "experience All-Star Week" at FanFest at times that they were "not required to work."[13] In addition, it is MLB's policy not to pay for volunteers' parking or transportation costs.[14]

MLB strictly controls the marketing and sponsorship of FanFest. For example, in connection with the 2013 FanFest Defendant Major League Baseball Properties' Corporate Sales & Marketing department solicited lucrative corporate sponsorships. Among others, T-Mobile, Taco Bell, Sirius XM, Gatorade, Majestic, Blockbuster, Kellogg's, Gillette, Head & Shoulders, One A Day, Firestone, Scotts, Chevy, Duane Reade, New Era, Budweiser, Party City and Under Armor sponsored events during the five-day 2013 All-Star Weekend. *See* ECF No. 1 at ¶ 15.

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9 *See* "*MLB FanFest Touted As 'Baseball Heaven on Earth,*" CBS New York, July 10, 2013, available at http://newyork.cbslocal.com/2013/07/10/mlb-fanfest-touted-as-baseball-heaven-on-earth (last visited August 15, 2013).

10 *See* http://mlb.mlb.com/mlb/events/all_star/y2013/fanfest/faq.jsp (last visited August 15, 2013).

11 *Id*.

12 *Id.*

13 *Id.*

14 *Id*.

MLB Properties' Corporate Sales & Marketing department solicited lucrative corporate sponsorships by claiming that "Baseball fans of all ages are expected to attend 2013 MLB All-Star FanFest, and your organization will have the ideal venue to leverage the most eagerly awaited fan experience of the summer."[15] Upon information and belief, the corporate sponsorships generated significant revenue for MLB. According to Defendants, the 2013 All-Star Game and related events, including FanFest, brought approximately $191.5 million into the economy of New York City.[16]

B. MLB Recruits and Trains All Volunteers the Same Way.

Consistent with the exercise of strict control and supervision over its for-profit events, MLB recruits and trains all volunteers the same way. MLB required all volunteers to attend the same volunteer information session. *See* ECF No. 1 at ¶¶ 34, 92.[17] Thereafter, when volunteers were notified that they passed the mandatory background check, MLB instructed them to confirm their availability for work.[18] MLB then required volunteers to attend an unpaid mandatory orientation session.[19] If volunteers were unable to attend the mandatory orientation session, they were not allowed to work at FanFest or other events.[20]

During the orientation session, MLB assigned shifts and jobs for each shift to each volunteer by giving them "Player Stat Sheets" detailing their assignments and duties. *See* ECF No. 1 at ¶ 93; Chen Decl. ¶¶ 10-14. Volunteers also received a copy of MLB's "Volunteer

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15 *See* http://mlb.mlb.com/mlb/events/all_star/y2013/fanfest/fanfest_sponsorship.jsp (last visited August 15, 2013).

16 *See* http://minnesota.twins.mlb.com/news/article.jsp?ymd=20130730&content_id=55250430&vkey=news_min&c_id=min (last visited August 15, 2013).

17 *See* http://mlb.mlb.com/mlb/events/all_star/y2013/fanfest/faq.jsp (last visited August 15, 2013).

18 *Id.*

19 *Id.*

20 *Id.*

Quick Reference Guide" and received their volunteer credentials. *Id.* at ¶¶ 10-15. The mandatory information and orientation sessions ensured that volunteers received uniform information and training and were able to complete their assigned tasks in accordance with MLB's directives.

C. MLB's Volunteers Performed the Same Primary Job Duties.

The primary job duty of MLB's volunteers, regardless of where they work, is to "welcom[e] … guests from around the world and assist[] in the smooth operations of all of the [All-Star] events."[21] They perform the same types of routine tasks, including assisting with "hospitality, event logistics, community events, and transportation"[22] and operating attractions that are included with the price of admission to various events, including FanFest. *See* ECF No. 1 at ¶ 90.[23] Volunteers performed similar unpaid work at the 2008, 2011 and 2012 FanFest and other All-Star Game activities. *See* ECF No. 1 at ¶¶ 30, 91.[24]

D. MLB Uniformly Denied Wages to Volunteers.

Throughout the relevant time period MLB uniformly denied wages to all unpaid Volunteers, including Plaintiff, and intends to continue doing so in the future. *See* ECF No. 1 at ¶¶ 3, 18, 33, 35-37.[25] Despite this, volunteers regularly worked multiple shifts sometimes lasting

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21 *Id*.

22 *Id.*

23 *See* http://mlb.mlb.com/mlb/downloads/y2013/fanfest_brochure.pdf (last visited August 15, 2013).

24 *See* http://newyork.yankees.mlb.com/nyy/fan_forum/asg/volunteers_form.jsp (last visited August 15, 2013) (indicating that the work that 2008 Volunteers performed included work at the DHL All-Star FanFest, greeters, hospitality, office/clerical, information booth, event logistics and transportation.").

25 *See* http://mlb.mlb.com/news/article.jsp?ymd=20130730&content_id=55250430&vkey=news_mlb&c_id=mlb (last visited August 15, 2013); http://mlb.mlb.com/min/ticketing/sth/gen/allstar_faq.jsp (last visited August 15, 2013) (confirming that MLB has invited 2013 unpaid Volunteers to work for free at the 2014 All-Star events, including the 2014 All-Star FanFest to be held in

five hours, and spent several hours at MLB's mandatory information and orientation sessions learning how to perform their jobs in accordance with MLB's policies. *See* ECF No. 1 at ¶¶ 21-22, 98-101.[26]

E. Plaintiff's Employment.

Plaintiff Chen worked for MLB as an unpaid Volunteer on June 1 and July 10, 12, 13 and 16, 2013. *See* Chen Decl. ¶¶ 5, 10, 18-25; ECF No. 1 at ¶ 41. Plaintiff worked approximately 16 hours for MLB. *See* Chen Decl. ¶¶ 5, 10, 18-25; ECF No. 1 at ¶ 96. Plaintiff was not paid any wages by MLB. *See* Chen Decl. ¶ 26; ECF No. 1 at ¶ 97. Plaintiff attended a mandatory one-hour information session at Citi Filed on June 1, 2013. *See* Chen Decl. ¶ 5; ECF No. 1 at ¶ 98. Plaintiff attended a mandatory orientation session at the Javits Center on July 10, 2013. *See* Chen Decl. ¶ 10; ECF No. 1 at ¶ 99. Thereafter, Plaintiff worked three shifts at FanFest at the Javits Center in Manhattan. *See* Chen Decl. ¶¶ 18-25; ECF No. 1 at ¶¶ 101-102, 104, 105, 109. Plaintiff was assigned by MLB to assist with the operation of certain FanFest activities and otherwise help direct people at FanFest. *See* Chen Decl. ¶¶ 18-25; ECF No. 1 at ¶¶ 104, 106-108, 110-112.

ARGUMENT

A. The FLSA Protects Plaintiff and the Proposed Collective.

The FLSA requires employers to pay for all work they "suffer or permit." 29 U.S.C. § 203(g). To further its remedial and humanitarian goals, the FLSA broadly defines an "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66 (2d Cir. 2003). "Employer" is also defined expansively as

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Minneapolis, MN).

26 *See* http://newyork.yankees.mlb.com/nyy/fan_forum/asg/volunteers_form.jsp (last visited August 15, 2013) (confirming that MLB required volunteers at the 2008 FanFest to work "a minimum of three shifts (approximately 4 hours each)).

"any person acting directly or indirectly in the interest of an employer in relation to an employee[.]" 29 U.S.C. § 203(d). "Work" is any "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003) (internal quotation marks and citation omitted), *aff'd*, 546 U.S. 21 (2005).

The FLSA's broad definitions of employ, employee, and employer are meant to ensure that commercial businesses do not obtain an unfair competitive advantage in the marketplace by employing individuals who voluntarily work for no wage. *See* 29 U.S.C. § 202(a)(3) (declaring Congress's intention to correct "detrimental" labor conditions that create "an unfair method of competition in commerce" through passage of the FLSA); *see also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) ("[E]xceptions to [FLSA] coverage . . . exert a general downward pressure on wages in competing businesses[.]").

The FLSA does not allow private-sector for-profit companies to accept free "volunteer" work. "If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act." *Alamo Found.*, 471 U.S. at 302. The U.S. Department of Labor has clearly stated that private companies may not accept free "volunteer" labor. *See* Ex. 2 to Swartz Decl.

B. Court-Authorized Notice Is Fair, Efficient and Advances the FLSA's Remedial Goals.

The FLSA authorizes aggrieved employees to bring a collective action on behalf of "themselves and other employees similarly situated." 29 U.S.C. § 216(b). In furtherance of the FLSA's "broad remedial purpose," courts have the authority to notify potential opt-in plaintiffs that they may join an existing action early in the proceedings. *Braunstein v. E. Photo. Labs.,*

Inc., 600 F.2d 335, 336 (2d Cir. 1978) (per curiam); *see also Myers v. Hertz Corp.*, 624 F.3d 537, 554 (2d Cir. 2010) ("[D]istrict courts 'have discretion, in appropriate cases, to implement [§ 216(b)] . . . by facilitating notice to potential plaintiffs' of the pendency of the action and of their opportunity to opt-in as represented plaintiffs") (citation omitted); *Glatt v. Fox Searchlight Pictures*, No. 11 Civ. 6784, 2013 WL 2495140, at *18 (S.D.N.Y. June 11, 2013).

Collective actions provide workers an opportunity to "lower individual costs to vindicate rights by pooling resources," and enable the "efficient resolution in one proceeding of common issues of law and fact." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). Nationwide notice will provide collective members with a single forum in which to recover the compensation owed to them as a result of MLB's unlawful denial of minimum wages.

C. Expeditious Notice Is Necessary to Protect the Rights of Volunteers.

Employees must receive timely notice in order for the "intended benefits of the collective action . . . to accrue." *Cuzco v. Orion Builders, Inc.*, 477 F. Supp. 2d 628, 635 (S.D.N.Y. 2007). Unlike a class action under Fed. R. Civ. P. 23, a worker is not member of an FLSA collective, and the FLSA's statute of limitations continues to run, until he or she affirmatively opts-in to the case by filing a written consent to join. 29 U.S.C. § 216(b); *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 260 (S.D.N.Y. 1997). Therefore, it is critical that similarly-situated employees are afforded notice and an opportunity to opt-in as soon as possible, before their claims are reduced or extinguished by the passage of time. *See Pippins v. KPMG LLP*, No. 11 Civ. 0377, 2012 WL 19379, at *5 (S.D.N.Y Jan. 3, 2012).

D. Plaintiff Faces a Low Burden for Conditional Certification.

Courts in the Second Circuit employ a two-step approach when deciding a motion for conditional certification. *Winfield v. Citibank, N.A.*, 843 F. Supp. 2d 397, 401-02 (S.D.N.Y.

2012). At the first stage, the court makes "an initial determination to send notice to potential opt-in plaintiffs who may be 'similarly situated' to the named plaintiffs with respect to whether a FLSA violation has occurred." *Stevens v. HMSHost Corp.,* No. 10 Civ. 3571, 2012 WL 4801784, at *2 (E.D.N.Y. Oct. 10, 2012) (citation and internal quotation marks omitted). Plaintiffs need only make a modest factual showing that they and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law. *Glatt*, 2013 WL 2495140, at *18 (citing *Myers*, 624 F.3d at 555); *Winfield*, 843 F. Supp. 2d at 402. "Nothing more is needed at this stage of the litigation." *Shajan v. Barolo, Ltd.*, No. 10 Civ. 1385, 2010 WL 2218095, at *1 (S.D.N.Y. June 2, 2010).

At this initial stage, Plaintiff faces a "low standard of proof" and need only make a "modest factual showing" that will allow the Court to "determine *whether* 'similarly situated' plaintiffs do in fact exist . . . ." *Myers*, 624 F.3d at 555. Plaintiff does not need to *prove* that other volunteers are similarly situated at this first stage. The court simply makes "an initial determination to send notice to potential opt-in plaintiffs *who may be* 'similarly situated' to the named plaintiffs with respect to whether a FLSA violation has occurred." *Stevens*, 2012 WL 4801784, at *2 (emphasis added). At the conditional certification stage, "the court does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations." *Winfield*, 843 F. Supp. 2d at 402 (internal quotation marks omitted) (quoting *Cunningham v. Elec. Data Sys. Corp.*, 754 F. Supp. 2d 638, 644 (S.D.N.Y. 2010)); *In re Penthouse Exec. Club Comp. Litig.*, No. 10 Civ. 1145, 2010 WL 4340255, at *2 (S.D.N.Y. Oct. 27, 2010) (same); *see also Salomon v. Adderley Indus., Inc.*, 847 F. Supp. 2d 561, 565 (S.D.N.Y. 2012) ("[A] fact-intensive inquiry is inappropriate at the notice stage, as Plaintiffs are seeking only conditional certification."); *accord Amador v. Morgan Stanley & Co.*, No. 11 Civ. 4326,

2013 WL 494020, at *3, *8 (S.D.N.Y. Feb. 7, 2013). Only at the second stage, based upon a fuller record, can a court determine whether the plaintiffs who have joined are *in fact* similarly situated. *Myers*, 624 F.3d at 555.

Finally, purported factual differences between Plaintiff and other workers do not defeat conditional certification. *Amador*, 2013 WL 494020, at *3. If the court finds that similarly situated workers exist, "the Court should conditionally certify the class, order that appropriate notice be given to putative class members, and the action should continue as a collective action throughout the discovery process." *Ferreira v. Modell's Sporting Goods, Inc.*, No. 11 Civ. 2395, 2012 WL 2952922, at *2 (S.D.N.Y. July 16, 2012) (citation and internal quotation marks omitted). This is because the relevant issue is not whether Plaintiff's duties were identical to that of all the other volunteers, but rather whether Plaintiff is "similarly situated to other [volunteers] with respect to the claimed violation of the FLSA." *Indergit v. Rite Aid Corp.*, Nos. 08 Civ. 9361, 08 Civ. 11364, 2010 WL 2465488, at *8 (S.D.N.Y. Jun. 16, 2010).

E. Plaintiff Comfortably Exceeds His Low Burden.

Plaintiff easily meets his minimal first-stage burden. He makes a strong showing, through his well-pled Complaint, MLB's public statements and his supporting declaration, that Defendants subjected him and its other unpaid volunteers to the same compensation policy. *See Myers,* 624 F.3d at 555. The All-Star Game and surrounding events, including FanFest, were run under the strict supervision, control and direction of MLB. MLB applied the same employment policies, practices and procedures, including hiring criteria and failure to pay wages, to all unpaid volunteers.

MLB's use of unpaid volunteers to run its for-profit operation warrants authorizing notice. *See Glatt*, 2013 WL 2495140, at *18 (granting conditional certification where the plaintiffs were victims of a common policy to replace paid workers with unpaid interns).[27]

1. Plaintiff and Other Volunteers are Similarly Situated with Respect to Their FLSA Claims.

This lawsuit challenges a straightforward, uniform MLB policy – substituting paid workers with unpaid volunteers whom it misclassifies as exempt from minimum wages in violation of the FLSA, 29 U.S.C. § 206(a). Courts have found allegations of "blanket" policies like Defendants', without much more, to meet the low threshold for conditional certification. *Indergit*, 2010 WL 2465488, at *4 ("It may be appropriate in some cases to find plaintiffs and potential plaintiffs similarly situated based simply on plaintiffs' 'substantial allegations' that they and potential plaintiffs were common victims of a FLSA violation, particularly where defendants have admitted that the actions challenged by plaintiffs reflect a company-wide policy") (quoting *Damassia v. Duane Reade, Inc.*, No. 04 Civ. 8819, 2006 WL 2853971, at *3 (S.D.N.Y. Oct. 5, 2006)); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 159 (S.D.N.Y. 2008) ("blanket determination is evidence that differences in the position, to the extent that there are any, are not material to the determination of whether the job is exempt from overtime requirements"); *Hallissey v. Am. Online, Inc.*, No. 99 Civ. 3785, 2008 WL 465112, at *2 (S.D.N.Y. Feb. 19, 2008) (plaintiffs were similarly situated based on allegation that they were denied minimum

27 *See also Khamsiri v. George & Frank's Japanese Noodle Rest. Inc.,* No. 12 Civ. 265, 2012 WL 1981507, at *1 (S.D.N.Y. June 1, 2012) (granting conditional certification based on single plaintiff's declaration stating that she and other non-exempt co-workers were subjected to the same wage violations); *Paguay v. Barbasso, Inc.,* No. 11 Civ. 6266, 2012 WL 2914288, at *1 (S.D.N.Y. July 17, 2012) (granting conditional certification based on the declaration of a single plaintiff); *Siewmungal v. Nelson Mgmt. Grp. Ltd.*, No. 11 Civ. 5018, 2012 WL 715973, at *3 (E.D.N.Y. Mar. 3, 2012) (same); *Francis v. A&E Stores, Inc.*, No. 06 Civ. 1638, 2008 WL 4619858, at *3 (S.D.N.Y. Oct. 16, 2008) (granting conditional certification based upon a single affidavit and deposition testimony that a blanket exemption decision applied at all stores).

wage and overtime payments because they were misclassified as "volunteers"); *Holbrook v. Smith & Hawken, Ltd.*, 246 F.R.D. 103, 106 (D. Conn. 2007) ("The consistent manner in which Smith & Hawken classified its own ASMs is sufficient to carry Holbrook's burden [to show that ASMs are similarly situated].").

MLB's anticipated defenses are also well-suited for collective adjudication. For example, MLB may argue that they did not "employ" Plaintiff and the unpaid volunteer workforce or that they were not "joint employers." Whether that is the case or not will depend on whether Defendants "suffer[ed] or permit[ted]" Plaintiff and the class of unpaid volunteers "to work." *See* 29 C.F.R. § 203(g); 29 C.F.R. § 791.2(a) (extending the provisions of the FLSA to joint employers).

MLB cannot seriously claim that it did not suffer or permit volunteers' work. Volunteers performed almost all of the work at FanFest. MLB subjected each volunteer to a background check. It also required them to attend mandatory information and orientation sessions and undertake required training. It assigned them shifts and assigned them specific jobs during each shift. These jobs, which included handing bags of paraphernalia to FanFest attendees at the entrance, assisting in crowd control, alphabetizing liability waivers, and operating a FanFest fielding station, were essential to operating FanFest. Chen Decl. ¶¶ 21-25. *See Glatt*, 2013 WL 2495140, at *13 (unpaid interns were employees because they "performed routine tasks that would otherwise have been performed by regular employees"); *Okoro v. Pyramid 4 Aegis*, No. 11 Civ. 267, 2012 WL 1410025, at *10 (E.D. Wis. Apr. 23, 2012) (individual whose duties were "undeniably of substantial assistance to [the company]" was an employee); *Archie v. Grand Cent. P'ship, Inc.*, 997 F. Supp. 504, 535 (S.D.N.Y. 1998) (plaintiffs were employees because they "performed productive work for the defendants"); *Donovan v. New Floridian Hotel, Inc.*,

676 F.2d 468, 471 (11th Cir. 1982) (mentally ill patients who "did work which was of economic benefit" to defendant were employees); *Wirtz v. Wardlaw*, 339 F.2d 785, 786-88 (4th Cir. 1964) (high school students who helped to perform office tasks were employees).

Similarly, MLB may claim that its defenses preclude a collective action because they require "fact-intensive inquiries" of the tasks that volunteers performed. "This argument ignores the purposes of the FLSA." *Indergit*, 2010 WL 2465488, at *9. "Just because the inquiry is fact-intensive does not preclude a collective action where plaintiffs share common job traits." *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1263 (11th Cir. 2008); *see also Glatt*, 2013 WL 2495140, at *18 (granting conditional certification on behalf of unpaid interns despite disparate factual and employment settings).

Accordingly, courts in this District have soundly rejected the argument that the fact-intensive nature of certain defenses precludes conditional certification. *Pippins*, 2012 WL 19379, at *12 (conditionally certifying nationwide collective of allegedly misclassified auditors); *Cruz v. Hook-Superx, LLC*, No. 09 Civ. 7717, 2010 WL 3069558, at *2 (S.D.N.Y. Aug. 5, 2010) (conditionally certifying nationwide collective of CVS assistant store managers).[28] Like in these cases, MLB's defenses are no obstacle to granting conditional certification.

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28 *See also Cohen v. Gerson Lehrman Grp., Inc.*, 686 F. Supp. 2d 317, 327-332 (S.D.N.Y. 2010) (conditionally certifying class of misclassified research associates); *Indergit*, 2010 WL 2465488, at *10 (granting conditional certification of class of misclassified drug store managers and assistant managers); *Francis*, 2008 WL 4619858, at *3; *Chowdhury v. Duane Reade, Inc.*, No. 06 Civ. 2295, 2007 WL 2873929, at *6 (S.D.N.Y. Oct. 2, 2007) (conditionally certifying class of misclassified assistant drug store managers); *Damassia*, 2006 WL 2853971, at *8 (same); *Gjurovich v. Emmanuel's Marketplace, Inc.,* 282 F. Supp. 2d 101, 105 (S.D.N.Y. 2003) (granting conditional certification of misclassified supermarket workers); *Jacobsen v. Stop & Shop Supermkt. Co.*, No. 02 Civ. 5915, 2003 WL 21136308, at *4 (S.D.N.Y. May 15, 2003) (conditionally certifying collective of misclassified supermarket managers).

2. Plaintiff and Other Volunteers Are Similarly Situated With Respect to Their Job Duties.

Plaintiff and all other volunteers performed the same primary job duties – "welcoming … guests from around the world and assisting in the smooth operations of all of the [All-Star] events."[29] They all assisted with "hospitality, event logistics, community events, and transportation"[30] and operating attractions that are included with the price of admission. *See* ECF No. 1 at ¶ 90.[31]

In addition, volunteers were uniformly trained on their assigned positions and receive pre-determined "Player Stat Sheets" detailing their assignments and duties. *See* Chen Decl. ¶ 12, 14; ECF No. 1 at ¶ 93. Volunteers also received a copy of MLB's generic "Volunteer Quick Reference Guide. Chen Decl. ¶¶ 12, 15; ECF No. 1 at ¶ 93. The mandatory orientation and training ensures that volunteers receive uniform training and complete their assigned tasks in accordance with MLB's directives no matter where they are located. *See Pippins*, 2012 WL 19379, at *11 (finding plaintiffs are similarly situated and that defendants alleged misclassification as exempt from overtime pay could be determined on a collective basis); *Stevens,* 2012 WL 4801784, at *2 ("Plaintiffs have met this burden [first stage] by submitting evidence on identical job classification and training materials across all ASMs [Assistant Store Managers] nationwide, and presenting testimony from former ASMs across the country regarding their actual job duties").

29 *See* http://mlb.mlb.com/mlb/events/all_star/y2013/fanfest/faq.jsp (last visited August 15, 2013).
30 *Id.*
31 *See* http://mlb.mlb.com/mlb/downloads/y2013/fanfest_brochure.pdf (last visited August 15, 2013).

3. Plaintiff and Other Volunteers Are Similarly Situated With Respect to Their Compensation.

During the relevant time period MLB did not pay its volunteers any wages, and, instead, uniformly classified them as exempt from federal and state overtime laws. MLB's uniform compensation policy did not vary from volunteer to volunteer, regardless of location.

F. The Court Should Approve Plaintiff's Proposed Notice and Proposed Notice Process.

The Court should authorize Plaintiff's Proposed Notice, Ex. 3, to be sent to all volunteers employed by MLB since August 7, 2010. District courts have discretion to implement the collective action provision of the FLSA "by facilitating notice to potential plaintiffs" of the pendency of the action and of their opportunity to join it. *Myers*, 624 F.3d at 554 (quoting *Hoffmann-LaRoche*, 493 U.S. at 169).

In addition to U.S. Mail, the Court should order that notice and the Consent to Join form be distributed electronically by email. This is consistent with "the goals of the notice: to make as many potential plaintiffs as possible aware of this action and their right to opt in. . . ." *Morris v. Lettire Const., Corp.*, 896 F. Supp. 2d 265, 273 (S.D.N.Y. 2012) (internal quotation marks and citation omitted). Courts routinely hold that email is an appropriate method for distributing notice in addition to U.S. Mail. *Pippins*, 2012 WL 19379, at *14 (ordering notice sent by email and finding that "given the reality of communications today . . . the provision of email addresses and email notice in addition to notice by first class mail is entirely appropriate"); *see also Kelly v. Bank of Am., N.A.*, No. 10 Civ. 5332, 2011 WL 7718421, *1-2 (N.D. Ill. Sept. 23, 2011) (authorizing dissemination of notice via mail, email, and website posting).

The Court should approve the form of Plaintiff's proposed notice. It is substantially similar to notices that have been approved in prior cases in this district, and is "timely, accurate, and informative." *See Hoffmann-La Roche*, 493 U.S. at 172.

The Court should also order Plaintiff to send a reminder postcard to all volunteers half-way through the notice period. Ex. 4, Proposed Reminder Postcard. A reminder mailing promotes the FLSA's broad remedial purpose and the goals of court-authorized notice. *See Morris*, 896 F. Supp. 2d at 274-75. It is well documented that people often disregard collective action notices. *See* Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkeley J. Emp. & Lab. L. 269, 295 (2008). Courts regularly authorize reminder mailings in order to increase the chance that workers will be informed of their rights. MLB has no reason to oppose a reminder postcard other than that it may increase the participation rate, which is not a good reason. Plaintiff will bear the cost of the reminder postcard mailing, and it will not change the end of the notice period.

The three-year period before the filing of the complaint is the appropriate period for sending notice. The FLSA permits a three-year statute of limitations to remedy willful violations of the Act. *See* 29 U.S.C. § 255(a). While Defendants may argue that that their violations were not willful and that notice covering a two-year period is appropriate, this argument is premature. "Where willfulness is in dispute, a three year statute of limitations applies at the conditional certification stage." *Hamadou v. Hess Corp.*, 915 F. Supp. 2d 651, 668 (S.D.N.Y. 2013); *Guzelgurgenli v. Prime Time Specials Inc.*, 883 F. Supp. 2d 340, 356-57 (E.D.N.Y. 2012).The Court should also order Defendants to provide Plaintiffs with a computer-readable list of the names, last known addresses, telephone numbers, and email addresses, work locations, and dates of employment for all persons employed by Defendants as volunteers at its for-profit events

nationwide from August 7, 2010 to the present. Courts routinely order defendants to produce this information for notice purposes. *See, e.g., Hamadou*, 915 F. Supp. 2d at 669 (requiring defendants to supply a "computer-readable list containing all potential collective action members' names, last known mailing addresses, last known telephone numbers, work locations, e-mail addresses, dates of employment, dates of birth, and last four digits of the individuals' Social Security numbers."); *Karic v. Major Automotive Cos.*, 799 F. Supp. 2d 219, 229 (E.D.N.Y. 2011) (ordering discovery of the name, last known mailing address, last known telephone number, work location, and dates of employment for all similarly situated employees); *Pippins*, 2012 WL 19379, at *16 (same); *Alonso v. Uncle Jack's Steakhouse, Inc.*, 648 F. Supp. 2d 484, 490 (S.D.N.Y. 2009) (ordering production of names, addresses, and telephone numbers).

Finally, the Court should order Defendants to provide Social Security Numbers for all volunteers for whom a notice is returned undeliverable by U.S. Mail. *See Capsolas v. Pasta Res., Inc.*, No. 10 Civ. 5595, 2011 WL 1770827, *5 (S.D.N.Y. May 9, 2011) ("defendants will produce employees[']' social security numbers only in the event that notice sent to the address provided by defendants is returned as undeliverable"). The Court should set the notice period at 90 days.

CONCLUSION

For the reasons stated herein, Plaintiff respectfully request that the Court conditionally certify this case as a collective action; order MLB to produce a computer-readable data file containing all Potential Opt-In Plaintiffs' names, last-known mailing addresses, last-known telephone numbers, email addresses, work locations, and dates of employment; authorize the issuance of Plaintiff's proposed notice to all Potential Opt-In Plaintiffs; order MLB to produce Social Security Numbers for collective members whose notices are returned to sender; order that

notice and the Consent to Join form be sent to class members by email, in addition to U.S. Mail; set the notice period at 90 days; and authorize Plaintiff to mail a reminder postcard and email to all class members who have not yet opted-in to this matter within 45 days of the first notice mailing.

Dated: New York, New York
August 15, 2013

Respectfully submitted,
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