OUTTEN & GOLDEN LLP
Justin M. Swartz
Juno Turner
Michael N. Litrownik
3 Park Avenue, 29th Floor
New York, New York 10016
Telephone: 212-245-1000

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 PROPERTIES, INC. and THE OFFICE OF THE COMMISSIONER OF BASEBALL, d/b/a/ MAJOR LEAGUE BASEBALL. Defendants.	No. 13 Civ. 5494 (JGK)

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

PRELIMINARY STATEMENT

MLB does not dispute that Plaintiff exceeds the "modest factual showing" necessary for the Court to authorize notice at this early stage. *See Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010). Instead, MLB rehashes arguments it made in its motion to dismiss (and probably intends to make in its renewed motion to dismiss), urging the Court to make a premature merits evaluation, before any discovery. The Court should not abandon the standard two-step Fair Labor Standards Act ("FLSA") collective action process, as MLB suggests it should. Instead, the Court should authorize notice and allow thousands of unpaid workers to protect their claims.

ARGUMENT

I. The Court Should Reject the Heightened Standard that MLB Urges Because It Is Inconsistent with Second Circuit Precedent.

MLB asks the Court to adopt a heightened standard that is inconsistent with Second Circuit precedent and that the almost all district courts in this Circuit have rejected. First, MLB is wrong that Plaintiff must prove that MLB's policy of not paying "volunteers"[1] was unlawful before the Court can authorize notice. There is no requirement that a plaintiff *prove* at this early stage that MLB's policy actually violated the law. To the contrary, a plaintiff must simply *allege* an unlawful policy and make a modest factual showing that he and others were similarly situated with respect to it, which Plaintiff has done here. *See Damassia v. Duane Reade, Inc.*, No. 04 Civ. 8819, 2006 WL 2853971, at *5 (S.D.N.Y. Oct. 5, 2006) ("The focus [at the conditional certification stage] is not on whether there has been *an actual violation of law* but rather on whether the proposed plaintiffs are 'similarly situated' . . . with respect to *their allegations that*

[1] By using the term "volunteer" throughout this brief, the term that MLB uses to describe the workers in question, Plaintiff does not conceded that Plaintiff or any other "volunteers" had no expectation of compensation. To the contrary, as pled in Plaintiff's First Amended Class Action Complaint ("1st Am. Compl."), MLB promised, and the "volunteers" expected, compensation in the form of free admission to events and other items of value. *See* ECF No. 29 (1st Am. Compl.) ¶¶ 39–40, 91–92, 100–103.

the law has been violated.") (citation and internal quotation marks omitted) (emphasis added); *see also Winfield v. Citibank, N.A.*, 843 F. Supp. 2d 397, 405 (S.D.N.Y. 2012) (granting conditional certification based on "the plaintiffs' and declarants' *common allegations* that they were effectively required to work more than forty hours per week but were not compensated for all overtime hours") (emphasis added).

Second, MLB is wrong that the Court should deny first-stage notice because (MLB claims) Plaintiffs will ultimately not be able to meet the higher second-stage standard. MLB jumps the gun by arguing that the analysis will prove to be too fact-intensive and that representative adjudication will be impossible. This argument belongs at the second stage when, after discovery and on a full record, the Court can determine "whether the need for individual analysis makes a collective action inappropriate." *Amador v. Morgan Stanley & Co. LLC*, No. 11 Civ. 4326, 2013 WL 494020, at *8 (S.D.N.Y. Feb. 7, 2013) (citation omitted).

Third, MLB attempts to raise the evidentiary bar that Plaintiff must meet, pointing to cases in which the plaintiffs have relied on more evidence than Plaintiff does here. The Second Circuit confirmed in *Myers v. Hertz Corp.*, however, that "a low standard of proof" is required at the conditional certification stage, 624 F.3d at 555, because plaintiffs typically move for notice before discovery has even begun. *See Amador*, 2013 WL 494020, at *8 ("the overwhelming case law in this Circuit clearly holds that 'a heightened standard is not appropriate during the first stage of the conditional certification process and should only be applied once the entirety of discovery has been *completed*'") (collecting cases and quoting *Winfield*, 843 F. Supp. 2d at 402 n.3).

A. Plaintiff Is Not Required to Prove that MLB Violated the Law at This Stage.

MLB turns the low standard that the Second Circuit approved in *Myers* on its head by arguing that Plaintiff must prove that MLB's no-pay policy was unlawful before the Court can authorize notice. In *Winfield*, faced with a similar argument, this Court held that "the existence of a formal policy that is facially unlawful is not a prerequisite for conditional certification." 843 F. Supp. 2d at 405. In that case, the plaintiffs alleged that the defendant maintained an unofficial practice of discouraging employees from recording their overtime, even though its official policy compensated employees for working overtime. *Id*. This case is much simpler because Plaintiff alleges an official policy – not paying for work that he and others did at MLB events – that MLB admits applied to Plaintiff and potential collective members. *See* Defs.' Opp'n Br. 2–7.

MLB argues that its policy was lawful, but presumes a merits decision that is not appropriate at the conditional certification stage. *See Winfield*, 843 F. Supp. 2d at 402 ("at the conditional certification stage . . . the court does not . . . decide substantive issues going to the ultimate merits") (internal quotation marks omitted). Plaintiff has alleged a policy of using volunteers to cut down on labor costs and perform productive work in contemplation of valuable in-kind compensation, and has supported his allegations with his declaration and MLB's own statements and documents. This policy, if proven, is illegal. *See Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 292, 293, 300–02, 306 (1985) ("volunteers" who staffed defendant's "ordinary commercial activities," including its service stations and retail stores, and who expected to receive in-kind benefits, such as food and clothing, in exchange for their work, were employees covered by the FLSA). At this early stage, that is all Plaintiff must do. *See Damassia*, 2006 WL 2853971, at *6.

All of the cases that MLB cites are distinguishable. Two cases were like *Winfield* and unlike this case, because they involved an unofficial practice of discouraging overtime that

conflicted with the employers' official policy of compensating overtime. Unlike the plaintiffs in *Winfield* and in this case, however, the plaintiffs in those cases failed to point to any evidence showing that the practice went beyond their own personal experiences. *See Eng-Hatcher v. Sprint Nextel Corp*., No. 07 Civ. 7350, 2009 WL 7311383, at *3–5 (S.D.N.Y. Nov. 13, 2009); *Brickey v. Dolgencorp, Inc*., 272 F.R.D. 344, 347–48 (W.D.N.Y. 2011).[2] Similarly, in *Jenkins v. TJX Companies Inc*., 853 F. Supp. 2d 317 (E.D.N.Y. 2012), the plaintiff alleged that his primary duty was non-exempt work but did not allege that the employer's official, formal policy mandated non-exempt work and could not point to any evidence other than his own personal experience to show that others also performed non-exempt work. *Id*. at 321–22. As discussed above, this case is unlike all of those cases because it challenges a policy that MLB admits applied to plaintiff and other potential members of the collective.

B. Courts Routinely Conditionally Certify Cases Involving Fact-Intensive Inquiries and Certification in this Case Would Not Be "Futile."

MLB is wrong that that the Court should not certify the collective because the merits will be highly "individualized." Defs.' Opp'n Br. 10, 16. Even if it were appropriate for the Court to weigh MLB's evidence at this stage, which it is not, *see Amador*, 2013 WL 494020, at *8–9, MLB points to no facts showing that Plaintiff and potential collective members were actually

[2] *Amendola v. Bristol Myers Squibb Co*., 558 F. Supp. 2d 459 (S.D.N.Y. 2008), "has been soundly rejected within this circuit" because it was superseded by *Myers*, which "clarified the continuing vitality of the lower, 'some showing' standard for initial FLSA notice determinations." *Lloyd v. J.P. Morgan Chase & Co*., Nos. 11 Civ. 9305, 12 Civ. 2197, 2013 WL 4828588, at *4 n.6 (S.D.N.Y. Sept. 9, 2013) (internal citation and quotation marks omitted). *Pefanis v. Westway Diner, Inc*., No. 08 Civ. 002, 2010 WL 3564426 (S.D.N.Y. Sept. 7, 2010), relies on the portion of *Amendola* that courts have held *Myers* superseded. *See id*. at *3. The out-of-Circuit cases that MLB cites in footnote 7 of its brief are not on point because they involved application of the higher, second stage standard. *See* Defs' Opp'n Br. 9 (citing *Beauperthuy v. 24 Hour Fitness USA, Inc*., 772 F. Supp. 2d 1111, 1118 (N.D. Cal. 2011); *Brechler v. Qwest Commc'ns Int'l*, No. 06 Civ. 940, 2009 WL 692329, at *3–4 (D. Ariz. Mar. 17, 2009); *Proctor v. Allsups Convenience Stores, Inc*., 250 F.R.D. 278, 279 (N.D. Tex. 2008)).

different in ways relevant to the merits. In fact, MLB argues that Plaintiff was the same as potential collective members because he was "not economically dependent upon his volunteer position" and "had no rational basis to expect any wages or similar compensation" and "[l]ikely the same is true of his fellow proposed class members." Defs.' Opp'n Br. 1–2.

Moreover, MLB admits key facts that Plaintiff alleges were common to the collective, including that: (1) collective members received in-kind benefits, including clothing, free tickets, and other non-cash compensation;[3] (2) collective members performed tasks that contributed to the events (volunteers served as "pre-game rehearsal stand-ins," "set up parade floats," paint[ed] a mural," "greet[ed] and direct[ed]" fans, "hand[ed] out gift bags," or "assist[ed] with transportation");[4] (4) collective members who worked at All-Star Game events received the same Guide;[5] and (5) collective members who worked at All-Star Game events participated in the same "volunteer program" that had the same "intent" from year to year ("The intent of the volunteer program is to build local excitement and involvement for the All-Star Summer experience").

Plaintiff also identified several other important common facts relevant to the merits, which MLB does not deny: (1) collective members were required to wear certain attire and attend training sessions;[6] (2) collective members did work that was the same or similar to work done by paid employees;[7] (3) collective members' work was not similar to typical "volunteer" work, such as providing comfort to the sick, elderly, infirm, indigent, disabled, or disadvantaged;[8] and (4) collective members had an arm's-length, business relationship with

---

3 *See* Defs.' Opp'n Br. 5; 1st Am. Compl. ¶¶ 91, 100–01.
4 *See* Defs.' Opp'n Br. 6; 1st Am. Compl. ¶¶ 98, 22.
5 *See* Defs.' Opp'n Br. 6; ECF No. 5 (Chen Decl.) ¶ 15.
6 *See* 1st Am. Compl. ¶ 107; ECF No. 5 (Chen Decl.) ¶¶ 9–11, 15.
7 *See* 1st Am. Compl. ¶ 99; ECF No. 5 (Chen Decl.) ¶¶ 21–25.
8 *See* 1st Am. Compl. ¶ 110; ECF No. 5 (Chen Decl.) ¶¶ 21–25.

MLB.[9]

Even if the economic reality test that the Court will apply to the merits is fact-intensive, "the type of person-by-person fact-intensive inquiry [sought by MLB] is premature at the conditional certification stage and has been specifically rejected by courts in this Circuit." *Amador*, 2013 WL 494020, at *8 (internal quotation marks omitted). Similarly, MLB's argument that certification would be "futile" because Plaintiff will be unable to defeat decertification, *see* Defs.' Opp'n Br. 16, is also premature and is contrary to the *Myers*' two-step approach. Given that, here, there has been no discovery at all, MLB's prediction about what discovery will show rings especially hollow.

Moreover, courts frequently certify collectives in similar cases involving fact-intensive merits inquiries. *See Glatt*, 2013 WL 2495140, at *18 (certifying class and collective of unpaid interns in case involving a multi-factor economic reality test); *Wang v. Hearst Corp.*, No. 12 Civ. 793, 2012 WL 2864524, at *2–3 (S.D.N.Y. July 12, 2012) (same); *Hallissey v. Am. Online, Inc.*, No. 99 Civ. 3785, 2008 WL 465112, at *2 (S.D.N.Y. Feb. 19, 2008) (certifying collective of unpaid "volunteers" in case involving the same economic reality factors at issue here); *Reab v. Elec. Arts, Inc.*, 214 F.R.D. 623, 629 (D. Colo. 2002) (same).

Hallissey, where the court granted a conditional certification motion, is very similar to this case. There, AOL argued that the court should not certify a collective of volunteer "community leaders" because it claimed the merits would hinge on each individual's subjective belief about his or her volunteer experience, which varied. 2008 WL 465112, at *2. The court rejected this argument for several reasons. First, it held that a plaintiff's subjective belief as to his status under the FLSA is not relevant. *Id*.; *see also Alamo*, 471 U.S. at 302 (holding that even workers who "vehemently protest coverage under the Act" were employees because "the

[9] *See* 1st Am. Compl. ¶ 106; ECF No. 5 (Chen Decl.) ¶¶ 1–3.

purposes of the [FLSA] require that it be applied even to those who would decline its protections"); *Reab*, 214 F.R.D. at 629 ("[Volunteers'] subjective belief as to their status under the FLSA is irrelevant to the question whether to conditionally certify a class."); *c.f. Glatt*, 2013 WL 2495140, at *11 (refusing to adopt a standard that looked to each intern's state of mind to determine whether he or she was a covered employee because the standard was "subjective and unpredictable" and would mean that "the very same internship position might be compensable as to one intern, who took little from the experience, and not compensable as to another, who learned a lot").

Second, the court held that the fact that collective members worked in "a variety of different jobs in a number of different departments at different locations" did not preclude certification. *Hallissey*, 2008 WL 465112, at *2. What mattered was "whether plaintiffs [we]re similarly situated with respect to their allegations that the law has been violated" and not whether they were identical to the potential collective in every respect. *Id.* (citing *Chowdhury v. Duane Reade, Inc.*, No. 06 Civ. 2295, 2007 WL 2873929, at *5 (S.D.N.Y. Oct. 2, 2007)); *see also Winfield*, 843 F. Supp. 2d at 404. Because all collective members shared "the fundamental allegation" that AOL classified them as volunteers and denied them minimum wages and overtime, the plaintiff had met his low burden at the conditional certification stage. *Hallissey*, 2008 WL 465112, at *2.

Here, as in *Hallissey*, MLB admits that all collective members were classified as "volunteers" who are not entitled to minimum wages. *See* Defs.' Opp'n Br. 2–7. Plaintiff's showing is even stronger than the plaintiff's showing in *Hallissey* because MLB admits other similarities between Plaintiff and the collective: the "benefits" they received (swag, free admission to events, tickets), their expectations (in-kind compensation and not minimum wages),

and the requirement that they spend some of their time performing work at the events. *See id*. This common proof weighs strongly in favor of certification. *See Damassia*, 2006 WL 2853971, at *3 (conditional certification is especially appropriate "where defendants have admitted that the actions challenged by plaintiffs reflect a company-wide policy").

C. Plaintiff's Evidence Is Sufficient to Meet His Burden.

The law is clear that Plaintiff's burden is "minimal" and that he can meet his burden based on his own allegations, declaration, and admissions and statements made by MLB. *See*, *e.g.*, *Paguay v. Barbasso, Inc.,* No. 11 Civ. 6266, 2012 WL 2914288, at *1–2 (S.D.N.Y. July 17, 2012) (granting conditional certification based on the plaintiff's declaration); *see also* Pl. Br. 12 n.27 (citing additional cases). The fact that some plaintiffs in more complicated cases rely on more evidence than Plaintiff relies on here is irrelevant because this case challenges a straightforward, uniform policy – substituting paid workers with unpaid volunteers whom MLB classifies as exempt. Moreover, unlike the cases that MLB cites, *see* Defs.' Opp'n Br. 13, as discussed above, MLB admits that it applied the same policies, practices, and procedures, including work requirements and the failure to pay wages, to all collective members.

II. MLB's Amusement or Recreational Establishment Exemption Defense Is Not a Barrier to Certification.

The Court should not address MLB's merits arguments regarding the applicability of its affirmative exemption defense because they are not relevant to this motion and the Court will resolve them if MLB decides to re-file its motion to dismiss.[10] Moreover, because MLB argues

10 MLB's motion is unlikely to be successful because the First Amended Complaint alleges that MLB employs over 400 staff year-round and engages in year-round activity. *See* 1st Am. Compl. ¶¶ 146-54; *see also Brideswell v. Cincinnati Reds*, 68 F.3d 136, 138–39 (6th Cir. 1995) (holding that major league baseball team operated more than seven months a year because it employed 120 year-round workers); *Liger v. New Orleans Hornets NBA Ltd. P'ship*, 565 F. Supp. 2d 680, 683–84 (E.D. La. 2008) (NBA team operated year-round because it "employ[ed] over 100 personnel in year round positions" and engaged in year-round activity, including pre-

that the defense applies to all collective members, *see* Defs.' Opp'n Br. 14–16, it presents another common legal issue that unites Plaintiff and the collective. *See Pippins v. KPMG LLP*, No. 11 Civ. 0377, 2012 WL 19379, at *12 (S.D.N.Y. Jan. 3, 2012) (granting conditional certification where collective was subject to the same exemption defenses).[11]

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant his Motion for Court-Authorized Notice, approve his proposed Notice, and adopt his proposed notice procedure.

Dated: New York, New York
December 20, 2013

Respectfully submitted,
OUTTEN & GOLDEN LLP

By:

/s/ Justin M. Swartz

Justin M. Swartz
Juno Turner
Michael N. Litrownik
3 Park Avenue, 29th Floor
New York, New York 10016
Telephone: (212) 245-1000

Attorneys for Plaintiff

and post-season games, the All Star Game, and other events).

[11] Because MLB has not opposed Plaintiff's proposed Notice or notice process, *see* Pl. Br. 16–18; Swartz Decl. Ex. 3 (Proposed Notice), Plaintiff respectfully requests that the Court approve them.