

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI**

YVETTE JOY LIEBESMAN, individually and on	)	
behalf of all others similarly situated,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.: 4:14-cv-01653-RLW
	)	
COMPETITOR GROUP, INC.,	)	
	)	
Defendant.	)	

**PLAINTIFF’S MOTION FOR CONDITIONAL CLASS CERTIFICATION  
UNDER THE FAIR LABOR STANDARDS ACT OR  
CLASS CERTIFICATION UNDER FED. R. CIV. P. 23  
AND REQUEST FOR DISCOVERY/BRIEFING SCHEDULE**

Plaintiff Yvette Liebesman hereby moves for conditional class certification under the Fair Labor Standards Act, and Fed. R. Civ. P. 23 class certification, for a class consisting of all persons who expended their time, labor, and efforts, purportedly in a volunteer capacity, on behalf of Defendant Competitor Group, Inc., in operating the Rock ‘n’ Roll series of events from October 21, 2012 until present, requests the Court enter a discovery and briefing schedule regarding the same, and states in support as follows:

**Introduction**

1. Defendant Competitor Group, Inc. (“Defendant”) operates the Rock ‘n’ Roll series of marathons and half-marathons. Each one of these races requires for its operation at least one thousand individuals to perform a variety of tasks, including but not limited to, manning water stations, securing the barriers along the route, and riding as escorts for certain of the runners.

2. Defendant, through the use of various charities and under the auspices that the event has a charitable and not-for-profit purpose, does not compensate these individuals for their labor. In addition, the charities are required to pay for the privilege of providing this free labor, usually in the form of a guaranteed number of participants at the going rate of \$165.00 per person in 2014. In other words, Defendant has adopted the model of operating these events that was used for not-for-profit organizations to raise charitable money for good causes, only Defendant is a for-profit corporation and the proceeds inure to it.

3. Plaintiff provided her labor for the St. Louis Rock ‘n’ Roll Half-Marathon on October 21, 2012. She was a bicycle escort, meaning that she provided her own bicycle, cell phone, and hands free device in order to ensure the safety, and keep track, of the fastest runners in the event. These duties were necessary to the operation of the October 21, 2012 event. She provided this labor to Defendant without charge based on the not-for-profit veneer that Defendant created. Because Defendant is a for-profit corporation, it is not allowed to engage volunteers to complete tasks integral to its mission; nor would Plaintiff have volunteered to provide a for-profit corporation with free labor. Plaintiff is owed federal and state minimum wages for her labor.

4. Plaintiff moves to certify a class consisting of: “All persons who expended their time, labor, and efforts, purportedly in a volunteer capacity, on behalf of Defendant Competitor Group, Inc., in operating its events from October 21, 2012 until present.” Complaint at ¶62. Plaintiff moves for conditional class certification under the FLSA (or Rule 23 certification) because this action arises from a “generally applicable rule, policy, or practice.” *Thiessen v. GE Capital Corp.*, 267 F.3d 109, 1102 (10<sup>th</sup> Cir. 2001)).

5. Specifically, Defendant is a for-profit corporation and therefore is not allowed to use volunteers to complete tasks integral to its mission. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985)(expectation of compensation is not dispositive to whether person was employee entitled to the federal minimum wage); *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013); *see also* 29 C.F.R. §553.104 (allowing private individuals to volunteer for government agencies); U.S. Department of Labor Fair Labor Standards Advisor at <http://www.dol.gov/elaws/esa/flsa/docs/volunteers.asp> (“Under the FLSA, employees may not volunteer services to for-profit private sector employees.”). Defendant’s policy to use volunteers instead of paid labor is a generally applicable policy or practice. Nothing about that policy or practice is purely personal to Plaintiff. Conditional certification is warranted.

6. For the same reasons, even at this early stage, Fed. R. Civ. P. 23 class certification is warranted as well since all four Rule 23(a) and 23(b)(3) factors weigh in favor of certification.

7. Plaintiff also herein moves the Court for a discovery and briefing schedule so that this Court is fully apprised of the premises of this motion.

### **Statement of Facts**

8. On September 23, 2014, Plaintiff Yvette Liebesman filed this action under the Fair Labor Standards Act and various state minimum wage laws, on behalf of herself and others who provided their labor to Defendant for operation of the Rock ‘n’ Roll Marathon series of events.

9. Plaintiff provided her labor for the St. Louis Rock ‘n’ Roll Half-Marathon when it was operated on October 21, 2012. She was not compensated at the federal or Missouri state minimum wage for her labor. Complaint at ¶72.

10. Defendant owns and operates the Rock ‘n’ Roll Marathan series of events. *Id.* There have been forty-one such events since October 21, 2012. *Id.* at ¶¶ 8-30. Based on the required volunteers for the St. Louis Rock ‘n’ Roll Half-Marathon, Defendant has utilized approximately 1000 individuals per event since that time. *Id.* at ¶1. Based on information and belief, Defendant has not paid the federal or state minimum wages to those individuals for their labor. *Id.* at ¶¶72 and 77.

### **Argument**

11. Plaintiff seeks to conditionally certify (or certify under Rule 23) a nationwide class of individuals who provided uncompensated labor for Defendant’s Rock ‘n’ Roll Marathon series of races, forty-one in all, occurring since October 21, 2012.

12. As such this lawsuit squarely presents the question of whether a for-profit corporation can rely on “volunteers” for needed labor in order to operate events on which it relies for revenue and profits. There is nothing about the individual circumstances of any given potential member of the conditionally certified class that changes this fundamental question.

### **Legal Standards for Conditional Certification of FLSA Collective Actions.**

13. 29 U.S.C. § 216(b) provides a private cause of action against an employer “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.” These so-called collective actions then require putative class members to opt into the case. *Id.* A majority of courts, including in the Eighth Circuit, use a two-stage process to determine whether plaintiffs and potential opt-ins are similarly situated and may therefore proceed to trial collectively. *Id.*; *see also Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5<sup>th</sup> Cir. 1995); *Nobles v. State Farm Mutual Automobile Ins. Co.*, 2011 WL 3794021, at \*9 (W.D. Mo. Aug. 25, 2011). *Davis v. NovaStar Mortg., Inc.*, 408 F.Supp.2d 811, 815 (W.D. Mo. 2005); *Bouaphakeo v. Tyson Foods, Inc.*, 564 F.Supp.2d 870, 892 (N.D. Iowa 2008); *Luiken v.*

*Domino's Pizza, LLC*, 2010 WL 2545875 (D. Minn. June 21, 2010); *Dietrich v. Liberty Square L.L.C.*, 230 F.R.D. 574 (N.D. Iowa 2005), *Helmert v. Butterball, LLC*, 2009 WL 5066759 (E.D.Ark. Dec. 15, 2009).

14. The first stage is the “conditional certification” stage, where the Court determines whether notice of the action should be issued to potential opt-in plaintiffs and whether the action should proceed initially as a collective action. *See, e.g. White v. MPW Indus. Serv., Inc.*, 236 F.R.D. 363, 366 (E.D. Tenn. 2006); *Laroque v. Domino's Pizza, LLC*, 557 F.Supp.2d 346, 352 (E.D.N.Y. 2008); *De Asencio v. Tyson Foods, Inc.*, 130 F.Supp.2d 660, 662-663 (E.D. Pa. 2001), *rev'd on other grounds*, 342 F.3d 301 (3d Cir. 2003). Plaintiff must make a threshold showing that plaintiff and the putative class members are “similarly situated.” *Mooney*, 54 F.3d at 1214; *see also Bouaphakeo v. Tyson Foods, Inc.*, 564 F.Supp.2d 870, 892 (N.D. Iowa 2008).

15. Courts generally employ a lenient standard at this stage, requiring little more than a modest factual showing and substantial allegations that plaintiff and the putative class members are similarly situated. *Mooney*, 54 F.3d at 1213-1214; *Hoffman v. Sbarro*, 982 F.Supp. 249 (S.D.N.Y. 1997); *Dominguez v. Don Pedro Rest.*, 2007 WL 271567, at \*4 (N.D. Ill. Jan. 25, 2007); *Lewis v. Wells Fargo Co.*, 669 F.Supp.2d 1124, 1127 (N.D.Cal. 2009)(*citing Thiessen v. GE Capital Corp.*, 267 F.3d 109, 1102 (10<sup>th</sup> Cir. 2001)). Employees who are victims of a single decision, policy, practice, or plan, are generally found to be “similarly situated” for purposes of conditional certification. *Thiessen*, 267 F.3d at 1102.

16. Once the Court conditionally certifies the class, potential class members are given notice and the opportunity to “opt-in.” *Nobles*, 2011 WL 3794021 at \*9 (*citing Davis*, 408 F.Supp.2d at 815). The second stage of collective action certification occurs at the close of discovery upon the filing of defendant’s motion for decertification. *Id.*

### Conditional Certification of Class of Purported Volunteers

17. There is nothing about the facts that distinguishes Plaintiff and those similarly situated. Indeed, either a for-profit corporation can rely on volunteers to operate its events, or it cannot. If it cannot, then all individuals who provided uncompensated labor are entitled to federal and state minimum wages.

18. In order to be subject to the Fair Labor Standards Act, two conditions must be met: (1) the business must constitute an “[e]nterprise engaged in commerce or in the production of goods for commerce[;]” and (2) “the associates must be ‘employees’ within the meaning of the Act.” *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 299 (1985) (quoting 29 U.S.C. §203(s)). An “employee” is “any individual employed by an employer.” 29 U.S.C. §203(e). “Employ” is defined as “to suffer or permit to work.” 29 U.S.C. §203(g).

19. Whether “volunteers” or others who work without compensation are “employees” and therefore entitled to compensation is determined by the “economic reality test,” which involves analysis of the totality of the circumstances. *Alamo Foundation*, 471 U.S. at 294; *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947); *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013).

20. Among the factors to be considered as to whether a “volunteer” is entitled to compensation as an employee is the expectation of compensation, to whom the primary benefit of the labor inures, the integral nature of the work to the business, time of the activity, length of the relationship, and whether the “volunteer” displaces regular employees. *Alamo Foundation*, 471 U.S. at 295; *Glatt*, 293 F.R.D. at 531 (citing U.S. Dep’t of Labor Fact Sheet #71 (April 2010)).

21. Regardless of whether Defendant can rely on unpaid labor (it cannot), all such individuals who provided Defendant with unpaid labor are similarly situated and conditional certification should be granted.

**For the Same Reasons, the Factors for Certification Under Fed. R. Civ. P. 23 Are Satisfied.**

22. A Rule 23 motion for class certification involves a two-part analysis. The class must satisfy all four prerequisites of Rule 23(a) and meet one of the three alternative requirements of 23(b). *See Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011). Plaintiff's here seek certification under Rule 23(b)(3) (predominance and superiority). They bear the burden of showing that certification is proper. *See Hopkins v. Kansas Teachers Community Credit Union*, 265 F.R.D. 483, 486 (W.D. Mo. 2010). However, plaintiffs need not prove that they can prevail on the merits at the class certification stage. *See Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S.Ct. 1184, 1191 (2013).

23. Per the above, Plaintiff Yvette Liebesman seeks to certify the following class under Rule 23 for the state minimum wage laws in the states Defendant operated events, unjust enrichment, and fraud:

All persons who expended their time, labor, and efforts, purportedly in a volunteer capacity, on behalf of Defendant Competitor Group, Inc., in operating its events from October 21, 2012 until present.

24. Plaintiff's state minimum wage claims, and unjust enrichment and fraud claims, are well suited for Rule 23 class certification. All of the members of the proposed class provided uncompensated labor to Defendant, which was necessary to operate its Rock 'n' Roll series of marathons and half-marathons, and were uniformly classified as "volunteers" for purposes of Defendant's wage and hour policies. These circumstances, which were the same across the

class, will drive the resolution of the key question in this case: whether a for-profit corporation can utilize free labor in the operation of its events.

**Request for Discovery/Briefing Schedule**

25. Plaintiff Liebesman files this motion without the benefit of any discovery from Defendant and at the outset of the litigation to preserve her rights, and those of her fellow putative class members.

26. As such, Plaintiff respectfully moves this Court for a discovery and briefing schedule so that all issues, particularly those that go to certification under Fed. R. Civ. P. 23 can be fully explored and presented to this Court.

WHEREFORE, Plaintiff respectfully requests that this Court conditionally certify a class as described herein under the Fair Labor Standards Act or Fed. R. Civ. P. 23, or establish a discovery and briefing schedule for this motion, and for such other and further relief as this Court deems just and proper.

DATED: September 26, 2014

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