

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ADAM SHAW, et al.,
Plaintiffs,
v.
WIZARDS OF THE COAST, LLC,
Defendant.

Case No. [5:16-cv-01924-EJD](#)

**ORDER DENYING PLAINTIFFS'
MOTION FOR CONDITIONAL
CERTIFICATION; SETTING CASE
MANAGEMENT CONFERENCE**

Re: Dkt. No. 46

I. INTRODUCTION

This is an unconventional wage and hour suit brought by Plaintiffs Adam Shaw, Justin Turner, Peter Golightly and Joshua Stansfield, one hundred twenty-six opt-in plaintiffs and the putative class (“Plaintiffs”) against Defendant Wizards of the Coast, LLC (“Defendant”), to recover unpaid minimum wages and overtime compensation to which they contend they are entitled because they performed “work” for the benefit of Defendant. Plaintiffs contend that Defendant has a policy of treating Plaintiffs and other similarly situated putative class members as volunteers instead of employees and refusing to pay them for their “work.” Presently before the Court is Plaintiffs’ motion for an order (1) conditionally certifying the case as a collective action on behalf of all individuals who participated as “Magic: the Gathering” judges at events sanctioned by Defendant from April 12, 2013, through the resolution of this case; (2) authorizing the parties to send notices pursuant to 28 U.S.C. Section 216(b) to all potential opt-in plaintiffs informing them that they may join this action and assert claims under the Fair Labor Standards

1 Act, 29 U.S.C. Section 206; (3) approving Plaintiffs' proposed Notice of Collective Action
 2 Lawsuit and Consent to Join forms; (4) directing Defendant to produce a putative class action
 3 member list with contact information; and (5) approving the designation of Kurtzman Carson
 4 Consultants as the Class Administrator. The Court finds it appropriate to take the motion under
 5 submission for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the
 6 reasons set forth below, the motion for conditional certification is denied.

7 II. BACKGROUND¹

8 Defendant sells products relating to a fantasy collectible card game called "Magic: the
 9 Gathering" ("Magic"). First Amended Complaint ("FAC"), ¶12. Defendant organizes, promotes,
 10 sponsors and administers an extensive and highly regulated system of "Events" for its customers.
 11 Id. at ¶13. The Events are "created, controlled and regulated by Defendant" through its network of
 12 certified "Judges." Id. Events are used as a marketing tool to keep customers active in playing
 13 Magic and to give Defendant a means to sell magic products. Id. Plaintiffs are certified Judges.

14 The activities necessary to conduct Defendant's Events are carried out by Judges.
 15 Id. at ¶14. Judges certified by Defendant are "obligated to abide by Defendant's policies and
 16 procedures." Id. Defendant "require[s] Judges to perform labor necessary for [Defendant's]
 17 Events to function," to "routinely fulfill duties and responsibilities including administration and
 18 oversight of Magic gameplay," and to "evaluate and train other Judges." Id. Defendant maintains
 19 and administers its nationwide network of Judges through a progressive system of "Levels" from
 20 one to five. Id. Each level has increasingly higher prerequisites, job duties, scheduling and work
 21 requirements.

22 Becoming a Judge "requires" registering with Defendant, going through training and
 23 testing, and documenting Magic game-play at Events. Id. at ¶15. Acquiring and maintaining
 24 certification as a Judge "requires" approximately "twenty-five hours per month per Judge level."
 25 Id. Judges "are expected to read and stay apprised of extensive announcements, directives,

26
 27 ¹ The Background is a summary of the allegations in the complaint. All well-pleaded facts are
 28 accepted as true for purposes of the present motion.

1 instructions, rulings, and discussions disseminated” by Defendant, to provide their contact
 2 information to Defendant, to create reports, to renew their certifications with regular testing, to
 3 recruit and train other Judges, to provide detailed evaluations of other Judges, and to administer
 4 Defendant’s policies and procedures on Defendant’s behalf. Id.

5 Outside of Events, Defendant “uses” Judges as representatives to retailers and players. Id.
 6 at ¶16. Judges “are expected” to provide customer service, instruction and support to retailers and
 7 players, and to investigate and submit reports regarding retailers’ and players’ compliance with
 8 Defendant’s policies. Id. Defendant maintains a list of the Judges’ contact information,
 9 certifications and activities. Id. Failure of a Judge to comply with Defendant’s policies “is
 10 considered a breach of the Judge’s certification that can and does result in disciplinary or other
 11 punitive measures against the offending Judge.” Id.

12 Plaintiffs allege that the work performed by Judges for the benefit of Defendant “is
 13 performed under close supervision and control by [Defendant] that creates an employer-employee
 14 relationship which obligates Defendant to pay Plaintiffs and similarly situated Judges wages” in
 15 accordance with the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* (“FLSA”) and the
 16 California Labor Code. Id. at ¶17. Based on the foregoing, Plaintiffs assert ten separate causes of
 17 action: (1) failure to pay minimum wages and overtime wages for work performed at Magic
 18 Events in violation of the FLSA; (2) failure to pay minimum wages in violation of California
 19 Labor Code (“CLC”) §§204, 1182.12, 1194, 1197 and applicable IWC Wage Orders; (3) failure to
 20 pay overtime wages for work performed at Magic Events in violation of CLC §§204, 510, 1194,
 21 1198 and applicable IWC Wage Orders; (4) failure to provide meal periods in violation of CLC
 22 §§226.7, 512 and applicable IWC Wage Orders; (5) failure to provide rest periods in violation of
 23 CLC §226.7 and applicable IWC Wage Orders; (6) failure to reimburse for business expenses
 24 incurred during two to three-day tournaments in violation of CLC §2802; (7) late payment of
 25 wages in violation of CLC §204; (8) failure to furnish timely and accurate itemized wage
 26 statements in violation of CLC §§226 and 226.3; (9) unfair business practices in violation of
 27 California Bus. & Prof. Code §17200 *et seq.*; and (10) penalties pursuant to CLC§2699 *et seq.*

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1 III. STANDARDS

2 The FLSA permits an employee to bring suit against his employer on “behalf of himself . . .
3 . and other employees similarly situated.” 29 U.S.C. §216(b); see also Leuthold v. Destination
4 America, Inc., 224 F.R.D. 462 (N.D. Cal. 2004). Determining whether a collective FLSA action is
5 appropriate is within the discretion of the district court. See Rivera v. Saul Chevrolet, Inc., No.
6 16-5966 LHK, 2017 WL 3267540, at *2 (N.D. Cal. July 31, 2017). To certify a FLSA collective
7 action, the court “must evaluate whether the proposed lead plaintiffs and the proposed collective
8 action group are ‘similarly situated’ for purposes of §216(b).” Leuthold, 224 F.R.D. at 466. The
9 term “similarly situated” is not defined in the FLSA, nor has the Ninth Circuit provided a
10 definition. Id. at 467. A majority of courts apply a two-step approach to determine whether
11 plaintiffs are “similarly situated.” See e.g. Leuthold, 224 F.R.D. at 466 (collecting cases); Rivera,
12 2017 WL 3267540, at *3 n. 1 (collecting cases).

13 Under the two-step approach, the court first considers the pleadings and affidavits
14 submitted by the parties to determine whether potential opt-in plaintiffs exist who are similarly
15 situated to the representative plaintiffs, and thus whether a collective action should be certified for
16 purposes of sending notice of the action to potential opt-in plaintiffs. Rivera, 2017 WL 3267540,
17 at *3. At this stage, a court typically “require[s] nothing more than substantial allegations that the
18 putative class members were together the victims of a single decision, policy or plan.” Thiessen v.
19 Gen. Elec. Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001); see also Stanfield v. First NLC
20 Fin. Serv., LLC, No. 06-3892 SBA, 2006 WL 3190527, at *2 (N.D. Cal. Nov. 1, 2006) (plaintiffs
21 “must be generally comparable to those they seek to represent”). The standard for certification at
22 this first stage is “fairly lenient” and the usual result is conditional class certification. Adams v.
23 Inter-Con Security Systems, Inc., 242 F.R.D. 530, 536 (N.D. Cal. 2007). Despite the “fairly
24 lenient” standard, unsupported allegations of FLSA violations are not sufficient to meet the
25 plaintiffs’ burden at the first stage. Shaia v. Harvest Management Sub LLC, 306 F.R.D. 268, 272
26 (N.D. Cal. 2015); Velasquez v. HSBC Finance Corp., 266 F.R.D. 424, 427 (N.D. Cal. 2010). If
27 conditional certification is granted, the second stage occurs after discovery is completed and the

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1 case is ready to be tried. Id. “[T]he Court then determines the propriety and scope of the
2 collective action using a stricter standard.” Stanfield, 2006 WL 3190527 at *2.

3 IV. DISCUSSION

4 Plaintiffs seek an order conditionally certifying the case as a collective action on behalf of
5 all individuals who participated as “Magic: the Gathering” Judges at Events sanctioned by
6 Defendant from April 12, 2013, through the resolution of this case. Plaintiffs contend that all of
7 the Judges are the victims of Defendant’s policy of treating Judges as volunteers and not
8 employees. Plaintiffs assert that they should be regarded as Defendant’s employees because the
9 Judge program is coordinated and administered by Defendant, Judges are Defendant’s
10 representatives to players, tournament operators and others, and Judges perform labor without
11 which Defendant could not operate Magic Events-the driving force behind sales. Motion at p. 20.
12 Plaintiffs emphasize that Judges are highly regulated by Defendant in that they are all subject to
13 the same rigorous training and certification requirements, share similar job duties and
14 responsibilities, wear the same Judge’s uniform at Magic Events, are subject to common policies
15 regarding discipline and termination, are required to abide by the same code of conduct, and are
16 under Defendant’s “control even when not working.” Id. Plaintiffs contend that Defendant’s
17 decision to treat Judges as volunteers instead of employees gives rise to FLSA violations for all
18 Plaintiffs and putative class members. See e.g. Reab v. Elec. Arts, Inc., 214 F.R.D. 623, 628 (D.
19 Colo. 2002) (granting conditional certification based on allegation that class of unpaid
20 “counselors” who performed customer service-oriented duties relating to defendants’ on-line
21 fantasy role-playing game were employees, as opposed to volunteers, who were entitled to
22 minimum wage and overtime under the FLSA); Hallssey v. Am. Online, Inc., No. 99-3785 KTD,
23 2008 WL 465112, at *2 (S.D. N.Y. 2008) (granting conditional certification based on allegation
24 that class of “community leader” participants were denied minimum and overtime wages because
25 of their classification by defendant as volunteers). In support of the motion for conditional
26 certification, Plaintiffs have submitted six declarations describing their experiences as Judges.

27 Defendant opposes conditional certification, arguing that Plaintiffs’ motion is predicated

1 on the erroneous and unfounded presumption that Defendant has a policy of classifying Judges as
 2 volunteers. Defendant's Opposition at 16:2-4. Defendant denies having any policy classifying
 3 Judges as volunteers and refusing to pay them. Defendant explains the Judges participate in
 4 Events under a number of unique employment and/or independent contractor arrangements with
 5 varying compensation practices that are all outside of the direct control of Defendant. Id. 2:27-
 6 3:2. Defendant further asserts that Plaintiffs have failed to carry their burden of demonstrating
 7 that they and the putative class were the victims of a single decision, policy or plan that violates
 8 the FLSA.

9 Having reviewed the allegations and evidence submitted by both sides, the Court finds that
 10 Plaintiffs have failed to carry their burden of demonstrating that they and the putative class were
 11 the victims of a single decision, policy or plan. At its core, Plaintiffs' allegation is that Defendant
 12 has a policy of treating Judges as volunteers, not employees, and refusing to pay Judges wages.
 13 The present case, however, is distinguishable from the two volunteer cases relied upon by
 14 Plaintiffs. In Reab, the defendant's Terms of Service Agreement clearly stated that the Counselor
 15 program in which the plaintiffs were participating was "a volunteer service organization." Reab v.
 16 Elec. Arts, Inc., 214 F.R.D. at 626. Here, there is no comparable agreement reflecting a single
 17 decision, policy or plan by Defendant to treat Judges as volunteers and to refuse to pay Judges
 18 compensation. In Hallssey, the alleged employer, defendant America Online, Inc. contended that
 19 plaintiffs who participated in the company's community leader program were classified as
 20 volunteers, and therefore not entitled to any compensation. Hallssey v. Am. Online, Inc., No. 99-
 21 3785 KTD, 2008 WL 465112, at *2 (S.D. N.Y. 2008). In the present case, Defendant has not
 22 taken the position that Judges are volunteers. Defendant's Opposition at 16:4. Instead, Defendant
 23 asserts that Judges participate in Events under a number of unique employment and/or
 24 independent contractor arrangements. Defendant's uncontroverted evidence fully supports
 25 Defendant's assertion.

26 Defendant explains that it "sanctions" various types of Events where Magic players can
 27 gather together for organized game playing. Decl. of Paul Bazakas In Support of Opposition, ¶6

1 (Dkt. No. 52-4). Sanctioned Events are held throughout the United States and internationally in
 2 stores, convention centers and other public venues. Id. For an Event to be considered sanctioned,
 3 a qualified store or tournament organizer selects a game format, registers the Event through the
 4 Defendant’s Wizards Play Network (“WPN”), announces the event ahead of time, complies with
 5 the Magic Tournament Rules available on the WPN, and reports the results of the Event to
 6 Defendant. Decl. of H el ene Bergeot In Support of Opposition, ¶15 (Dkt. No. 52-9). The WPN
 7 Terms and Conditions provide in pertinent part that stores agree to maintain exclusive
 8 responsibility for in-store staff and individuals who assist in running Events. Bazakas Decl. at
 9 ¶15.

10 In addition to store-based events, there are tournaments. Since October of 2011, Defendant
 11 has contracted with a number of tournament organizers to run sanctioned Events. Bergeot Decl. at
 12 ¶18. The Tournament organizers are “solely responsible for staffing decisions related to
 13 individuals they engage and/or hire to assist in running the sanctioned Magic event.” Bazakas
 14 Decl. at ¶16. Tournament organizers vary in how they manage, staff and run the Events, including
 15 how they engage Judges. Bergeot Decl. at ¶18. As one example, there is a third-party website
 16 commonly referred to as “Judge Apps” that tournament organizers use to publish an upcoming
 17 Event and to post details including compensation and/or travel expenses they are offering to
 18 prospective Judges. Id. at ¶28. The prospective Judges can use the Judge Apps to contact the
 19 tournament organization and express their interest in judging an Event. Id.

20 The vast majority of sanctioned Events (98%) do not require a Judge; Judges are required
 21 only for “premiere” events. Bazakas Decl., ¶¶16, 22. Nevertheless, stores and tournament
 22 organizers may use a Judge at their own discretion. Bergeot Decl. at ¶21. Defendant’s
 23 involvement in sanctioned Events is generally limited to providing promotional items and/or
 24 prizes to be used and distributed by the store or tournament organizers hosting the Events.
 25 Bergeot Decl. at ¶20. “[I]t is the store or tournament organizer that determines, among other
 26 things, whether to run an [E]vent, the date and location of the Event, staffing for the Event, the
 27 number of entrants permitted, the length of the [E]vent including any breaks in game play, and

1 whether to charge players an entry fee, and if so, the price.” Id.

2 Defendant acknowledges that it requires stores and tournament organizer to use Judges for
3 “specific sanctioned competitive level REL Magic [E]vents.” Id. at ¶22. For this type of
4 tournament, the store or tournament organizer is responsible for selecting and engaging the
5 Judge(s), and complying with applicable laws with respect to the Event. Id. at ¶23. Head Judges
6 for the competitive level “Grand Prix” sanctioned Event, however, are selected and engaged by
7 Defendant. Id. For all of the Grant Prix Events held between October 29, 2011 and December 31,
8 2016, Defendant entered into written independent contractor agreements and financially
9 compensated the head Judges that it selected. For Grand Prix events held on or after January 1,
10 2017, the tournament organizer “is responsible for the selection and all other aspects pertaining to
11 the Judges it may utilize for the event.” Id. at ¶25.

12 Defendant organizes and runs only three tournaments: the Magic Pro Tour, the World
13 Magic Cup and the Magic World Championship. Bergeot Decl., ¶19. Defendant runs all aspects
14 of these three tournaments, including among other things, engaging individuals as Judges. Id.
15 Defendant enters into written independent contractor agreements and financially compensates
16 Judges for these three events directly. Id. In sum, there are substantial variations in how
17 sanctioned Events are organized, managed, and run, including the selection and utilization of
18 Judges and the compensation they are provided.

19 Plaintiffs’ declarations, which are fairly characterized by Defendant as “cookie-cutter
20 declarations,” provide many interesting details about the important role Judges play in
21 Defendant’s elaborate Magic card game enterprise, including Plaintiffs’ experiences as Judges,
22 information about the Judge certification process, Defendant’s expectations for Judges, and
23 judging activities Plaintiffs characterize as “work.” Defendant objects to nearly every statement
24 in the declarations, asserting that each statement lacks foundation, constitutes improper opinion
25 testimony by a lay witness, is not based upon personal knowledge, constitutes hearsay, and/or
26 violates the best evidence rule. Many of Defendant’s objections are well taken. Nevertheless, the
27 Court has considered the substance of the declarations, which supports Plaintiffs’ assertion that

1 Defendant viewed Judges as “volunteers.” Specifically, Defendant’s Judge Code states that
 2 “Membership of the Judge Program is voluntary or ‘at will’ from both sides – a judge can
 3 withdraw from the Judge Program at any time, and the Judge Program can choose to suspend a
 4 judge, change a judge’s certification level, or even decertify a judge altogether based on their
 5 conduct.” Dkt. No. 46-7, Ex. B., p. 1. Defendant’s publication entitled “What does it mean to be
 6 a certified judge,” similarly states that being a Judge “is volunteer work” and a “volunteer
 7 activity.” *Id.*, Ex. B, p. 2.

8 More importantly, however, with regard to the engagement and compensation of Judges,
 9 Plaintiffs’ declarations do not contradict Defendant’s evidence in any material respect and fail to
 10 set forth facts establishing that Plaintiffs were the victim of a single decision, policy or plan to
 11 refuse to compensate Judges for sanctioned Events. The declarations are filled with conclusory
 12 statements and generalities that are unsupported by facts. Plaintiff Adam Shaw (“Shaw”) states
 13 that he “worked” as a Judge at approximately seven (7) Magic Events during which he performed
 14 numerous “duties” for the benefit of Defendant and was not paid wages. Shaw Decl. at ¶¶7, 11,
 15 22. There are no facts explaining how any single decision, policy or plan implemented by
 16 Defendant required him (or any other putative class member) to become a certified Judge or to
 17 attend any given sanctioned Event, much less facts explaining how a single decision, policy or
 18 plan implemented by Defendant required or obligated him to perform “work” or “duties” at a
 19 sanctioned Event without getting paid wages or other compensation. Plaintiff Shaw states that he
 20 served as a head Judge for at least three sanctioned Events, and in that capacity, received
 21 instructions directly from Defendant and implemented Defendant’s scheduling and hiring
 22 decisions among the Judges in his group. *Id.* at ¶12. Again, Plaintiff Shaw fails to provide facts to
 23 establish that a single decision, policy or plan implemented by Defendant required or obligated
 24 him (or other putative class members) to attend these three sanctioned Events and to serve as a
 25 head Judge without getting paid wages or other compensation. The other Plaintiffs’ declarations
 26 are similarly deficient.

27 Moreover, two of the named Plaintiffs, Shaw and Justin Turner (“Turner”), admitted

1 during deposition that they had been compensated by Defendant for judging Events. See Turner
2 Depo. at 123:12-125:21, 126:5-23, 133:10-22; Shaw Depo. at 222:160225:17 (Dkt. No. 52-3).
3 Plaintiff Turner also confirmed that Defendant compensated him for travel and hotel expenses on
4 at least one occasion. Turner Depo. at 133:23-134:17.² A third named Plaintiff, Joshua Stanfield,
5 states in his declaration that he has “never been paid regular or overtime wages” for the time he
6 spent judging sanctioned Events. Decl. of Joshua Stanfield, ¶22 (Dkt. No. 46-4). Although
7 Stanfield may not have received “wages,” Defendant’s records show that he entered into three
8 separate independent contractor agreements with Defendant for judging Events and received
9 monetary compensation for the services he provided. Bazakas Decl. at ¶24. That Plaintiffs Shaw,
10 Turner and Stanfield were financially compensated directly by Defendant undermines their
11 assertion that Defendant maintained a common policy requiring Judges to perform “work” at
12 sanctioned Events without getting paid wages or other compensation.

13 In the absence of evidence of a single decision, policy or plan governing the engagement
14 and compensation of Judges at sanctioned Events, adjudication of Plaintiffs’ claims would require
15 an individualized Plaintiff-by-Plaintiff analysis of the specific circumstances under which each
16 Plaintiff “worked” as a Judge at every one of the over one million sanctioned events that were
17 conducted by stores, tournament organizers and/or Defendant throughout the United States.
18 Under these circumstances, it would not serve judicial economy to adjudicate the potential claims
19 of a nation-wide putative class consisting of approximately 3,850 Judges in a single action.

20 V. CONCLUSION

21 For the reasons set forth above, Plaintiffs’ motion for conditional certification is DENIED.
22 A case management conference is scheduled for January 25, 2018 at 10:00 a.m. The parties shall
23

24 _____
25 ² Separate and apart from the compensation provided by Defendant, Turner confirmed that he had
26 received some form of compensation from stores and at least one tournament organizer. Turner
27 Depo. at 66:17-24 and 69:10-25. Shaw similarly testified that a tournament organizer paid for his
28 flight on one occasion. Turner’ and Shaw’s testimony is consistent with Defendant’s assertion
that tournament organizers made their own arrangements with Judges to staff sanctioned Events
without Defendant’s involvement.

1 file an updated joint case management conference statement no later than January 15, 2018.

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3 **IT IS SO ORDERED.**

4 Dated: January 3, 2018



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6 EDWARD J. DAVILA
United States District Judge

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United States District Court
Northern District of California