IN THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT
STATE OF MISSOURI

YVETTE JOY LIEBESMAN, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	Case No. 1622-CC00346
COMPETITOR GROUP, INC.,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On two Sunday mornings in 2011 and 2012 Plaintiff Liebesman ("Plaintiff" or "Liebesman") volunteered as a Lead Cyclist at Defendant Competitor Group, Inc.'s ("CGI" or "Defendant") St. Louis Rock 'n' Roll Marathon ("RNR") racing events. She did so without promise or expectation of any wages or compensation other than a t-shirt and a baggie, both of which she received. Despite agreeing to volunteer her time as part of her not-for-profit bicycle club, Liebesman now claims that she is entitled to minimum wages under the Missouri Minimum Wage Law ("MMWL"), and for the value of her services under the theory of unjust enrichment.

CGI is entitled to summary judgment on all of Liebesman's claims. First, Liebesman cannot establish that she was an "employee" of CGI under the MMWL in the 2012 (her claim related to the time she spent as a volunteer in 2011 is time-barred). Even if Liebesman could establish an employer-employee relationship with CGI under the MMWL, CGI is entitled to summary judgment on Liebesman's MMWL claims because the MMWL excludes her from coverage for two reasons: (1) she volunteered her services for a non-profit corporation (Big

Shark Racing, Inc. (the "Club")), and (2) her work was on a casual and intermittent basis (on one day in 2012).

With respect to her unjust enrichment claim, there is no dispute that Liebesman received everything which she expected to receive in exchange for being a lead cyclist in 2011 and 2012, and, more importantly, that she did not expect to be paid for her time. Because no claim for unjust enrichment lies where an individual has received everything she expected, Defendant is entitled to judgment as a matter of law on this claim as well. For all of the foregoing reasons, Defendant is entitled to summary judgment on the claims in Liebesman's Petition.

II. STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, answers to discovery, and any affidavits filed in support of the motion show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mo.R.Civ.Pro. 74.04(c); *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. 1993). In a motion for summary judgment, the movant need not controvert each element of the non-movant's claim in order to establish a right to summary judgment. *Id.* at 381. Rather, a movant must establish a right to judgment by showing: (1) facts that negate any one of the non-movant's essential elements; (2) that the non-movant, after an adequate period of discovery, has not been able to provide, and will be unable to provide, evidence sufficient to establish any one of the essential elements of the claim; OR (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defenses. *Id.* at 381. Regardless of which of these three means is employed by the defending party in moving for summary judgment, each method establishes a right to judgment as a matter of law. *Id.*

III. FACTS.

On October 23, 2011 and October 21, 2012, CGI organized and held the RNRS, which are part of a series of events which includes marathon and half-marathon races. (Statement of Uncontroverted Material Facts ("Facts") at 1). Prior to the RNRs, CGI contacted the Club,[1] and offered it the opportunity to provide lead cyclists volunteers at the RNRs. (Facts, at 11). When the Club invited its members to participate in the RNR as lead cyclists, Liebesman signed up to "volunteer" at both the 2011 and 2012 RNRs, and chose her assignment – to follow a female half-marathoner. (Facts, at 11). Liebesman was and is at all relevant times a full time professor of law at Saint Louis University. (Facts at 2, 13).[2]

Volunteering as a lead cyclist was presented to the Club members, including Liebesman, as a "who wants to ride and do this activity," and was part of many opportunities that the Club offered its members to perform community service or to benefit charitable organizations. (Facts, at 15-17). The Club rode in the RNRs for "fun and for community," and Liebesman admits to receiving an e-mail from the Club before the 2012 RNR that instructed her to represent the Club well. (Facts, at 18-19).

Liebesman paid to become a member of the Club sometime before October 2011, and afterwards participated in a number of volunteer opportunities with and on behalf of the Club, despite believing it to be a for-profit organization. (Facts, at 4, 6-7). When Liebesman signed up with the Club to volunteer in the 2011 and 2012 RNRs, she did not know who or what

[1] The Club fosters the development of amateur athletes in the areas of triathalons, and for purposes of this motion, bicycling. (Facts, at 5).

[2] Liebesman is paid $129,000 per year at SLU and another $5,000 for a class by Washington University. (Facts, at 3).

Competitor Group was. (Facts, at 12). Before volunteering for any organization, Liebesman does not verify its for-profit or non-profit status. (Facts, at 9).[3]

Liebesman did not fill out an application, registration, online form, or in any way communicate with CGI before participating in 2011 or 2012 as a volunteer. (Facts, at 15, 32). Liebesman did not provide CGI with any information to verify her eligibility to work in the United States before performing lead cyclist activities, did not provide any contact information beyond her e-mail address and phone number, and does not know if CGI maintained any records of her time as a lead cyclist. (Facts, at 37). Liebesman does not recall and did not produce any communications directly from CGI to her prior to either the 2011 or 2012 RNR. (Facts, at 33). Liebesman understood before she volunteered that the only way to volunteer as a lead cyclist was through the Club. (Facts, at 34).

In acting as a lead cyclist volunteer, Liebesman brought all of her own equipment except for a safety vest and some credentials. (Facts, at 20, 42). Liebesman wore the Club's kit or uniform (i.e., jersey, pants, jacket) while performing the lead cyclist activities, something she was supposed to do as a member of the Club. (Facts, at 21, 39). Before both races in 2011 and 2012, Liebesman received written instructions but did not know who prepared the instructions in 2011, and at least part (if not all) of those instructions came from the Club, not CGI. (Facts, 29). The written instructions informed Liebesman when to arrive and to bring her own equipment. (Facts, at 30). Before both races in 2011 and 2012, Liebesman received some oral instructions, but cannot remember how long it took to get those instructions or who gave them to her. (Facts, at 22, 31). She cannot remember how long she actually volunteered at the RNRs in 2011 or

[3] Liebesman also inconsistently testified that she had never faced a situation where she had to consider whether to volunteer her services for a for-profit organization, despite testifying that she thought the Club was a for-profit organization for which she performed volunteer activities. (Facts, at 7-8).

2012, but guesses it was 8-10 hours total for both races. (Facts, at 23). The only verbal communication Liebesman ever had with a CGI representative was a brief set of oral instructions given to her the morning before each race, and the only written communication she received from CGI was a thank you note after each RNR. (Facts, at 15, 31). No one from CGI supervised her during the race or followed-up to see if any of the instructions provided were followed. (Facts, at 40).

Liebesman did not expect to be paid for her time in 2011 or 2012 at the races. (Facts, at 24). Liebesman received the only two things she was told she would receive for her participation: a draw-string backpack and t-shirt. (Facts, at 25). She therefore received everything she was told she would receive in both races. (Facts, at 26).

Liebesman's request to be a lead cyclist went to the Club, and not to CGI. (Facts, at 27). Liebesman was not aware whether there were any consequences to failing to show up as a lead cyclist in 2011 or 2012. (Facts, at 28). Liebesman did not know if CGI had the power to hire or fire her. (Facts, at 28). Liebesman chose the runner she wanted to follow throughout the race. (Facts, at 14). Her only "duties" were to follow the runner of her choice, call in to the race announcer at certain intervals to report the runner's progress, and generally watch for "insane people." (Facts, at 14). Liebesman was not required to report to anyone when she completed her activities as a lead cyclist. (Facts, at 35-36). After she finished following her chosen runner, Liebesman felt free to cycle back out onto the course, though she was never instructed or asked to do so by anyone at CGI or her bike club; and claims she has no idea why she did it other than it might have been part of another job she had unrelated to CGI. (Facts, at 35). Liebesman cannot remember anything else she did after turning in her vest at the RNR in 2012. (Facts, at

36). None of Liebesman's lead cyclist activities were performed on CGI's premises. (Facts, at 38, 41).

IV. ANALYSIS

The Missouri Minimum Wage Law requires employers to pay at least the State minimum wage to "employees." The Court has before it the question of whether Liebesman was an "employee" of CGI on one day in October 2012[4] for a period of what she guesses to be four to five hours. Liebesman bears the burden of adducing evidence demonstrating that she was an "employee" under the MMWL. There is no dispute that Liebesman volunteered at CGI's races as part of her membership in her Club. She had no expectation of compensation besides the baggie and t-shirt that she admits she received. Liebesman utilized all of her own equipment to provide the volunteer services except a safety vest and some credentials, and she was not supervised or otherwise controlled by CGI as a lead cyclist. Though Liebesman's relationship with CGI may or may not merit a title (i.e., volunteer), "employee" is not it.

A. CGI Is Entitled to Judgment on Plaintiff's Claims because the Undisputed Facts Demonstrate that Liebesman Was Not an Employee of CGI in 2012.

1. Missouri Courts Utilize an "Economic Realities" Test in Determining whether an Employer-Employee Relationship Exists.[5]

Under the MMWL, an "employee" is defined as "any individual employed by an employer" § 290.500(3), RSMo. An employer is any person acting directly or indirectly in the interest of an employer in relation to an employee. *Tolentino v. Starwood Hotels & Resorts*

[4] As discussed below, the MMWL's 2 year statute of limitations bars any claim under the MMWL for Liebesman's activities in the 2011 St. Louis Rock 'n' Roll Marathon.

[5] Plaintiff contends that all she must show to demonstrate an employment relationship is that CGI suffered or permitted her to work at the RNR. This is simply not the case. As Judge Limbaugh observed just last year, courts look at the economic realities to determine whether there is an employer-employee relationship, not just whether someone was suffered or permitted to work. *Thornton v. Mainline Communications, LLC*, 157 F.Supp.3d 844 (E.D. Mo. 2016).

Worldwide, Inc., 437 S.W.3d 754, 757 (Mo. 2014) (citing § 290.500(4) RSMo.). The term "employ" is not defined in the MMWL, but MMWL regulation 8 C.S.R. 30–4.010(1) (2004) states that the interpretation and enforcement of the [MMWL] will follow the regulations applicable to the federal Fair Labor Standards Act. Thus, Missouri courts looked to federal decisions interpreting the Fair Labor Standards Act in interpreting whether an individual is an "employee" for purposes of Missouri law. *Fields v. Advanced Health Care Mgmt. Servs., LLC*, 340 S.W.3d 648, 654 (Mo. Ct. App. 2011); *see also Conrad v. Waffle House, Inc.*, 351 S.W.3d 813, 820 (Mo. Ct. App. 2011).

Missouri Courts have applied an "economic realities test" in determining "whether an employment relationship exists under the MMWL." *Conrad*, 351 S.W.3d at 820 (citing *Fields*, 340 S.W.3d at 654); *see also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985)("[t]he test of employment under the [FLSA] is one of "economic reality")(citations omitted). There is no M.A.I. instruction on point for Liebesman's claim under the MMWL. The economic realities test in Missouri centers on the concept that "employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947); *see also Alexander v. Avera St. Luke's Hosp.*, 768 F.3d 756, 763 (8th Cir. 2014)(adopting same definition in FLSA/FMLA analysis); *Conrad*, 351 S.W.3d at 820 ("[T]he factors are not applied mechanically, but must be considered in the context of the economic realities and circumstances of the whole work relationship.")(quoting *Fields*, 340 S.W.3d at 654); *Cleveland v. City of Elmendorf*, 388 F.3d 522, 528 (5th Cir. 2004)(courts should consider volunteer status "in a common-sense manner, which takes into account the totality of the circumstances surrounding the relationship between the individual providing services and the entity for which the services are provided.")

Missouri courts have enumerated the following factors to be considered when evaluating whether an individual is an "employee" for purposes of the MMWL: (1) who has the power to hire and fire the worker; (2) who supervises and controls the workers' work schedule and conditions of work; (3) who determines the rate and method of payment of the worker; and (4) who maintains work records; and (5) whose premises and equipment are used in performing work. *Conrad*, 351 S.W.3d at 820. In a suit such as this one, courts must consider volunteer status "in a common-sense manner, which takes into account the totality of the circumstances surrounding the relationship between the individual providing services and the entity for which the services are provided." *Cleveland v. City of Elmendorf*, 388 F.3d 522, 528 (5th Cir. 2004).

2. The "Economic Realities" of Liebesman's Volunteer Work do not Demonstrate an Employer-Employee Relationship.

The uncontroverted facts demonstrate that no employer-employee relationship existed between Liebesman and CGI. CGI is therefore entitled to judgment on Liebesman's claims.

a. CGI did not have the Power to "Hire" or "Fire" Liebesman.

CGI did not "hire" Liebesman. Liebesman admits that she did not submit any application, registration, or even communicate with CGI before showing up at the 2012 RNR, and that CGI sought out the Club to provide the lead cyclists from its Club members. The only information Liebesman provided was to her Club. Liebesman even chose her own assignment – to follow a female lead half-marathon runner - and brought all the essential equipment to be a lead cyclist, including her Club's uniform, bicycle, cell phone, and Club's uniform.

Liebesman speculated in her deposition that CGI possessed the power to fire her because it could remove her from the race course in 2012 before she finished riding. However, Liebesman admits that she was never removed from the course, that she never saw any volunteer removed from the course, and that only CGI knew whether it had the power to "fire" her. Thus,

Liebesman has no evidence to support any contention that CGI had the power to "terminate" her volunteer activities.

On similar facts, the Missouri Court of Appeals found that the putative "employer" in that case possessed no power to hire or fire. In *Conrad*, an employee of a waffle house alleged the franchisor was the joint employer along with the franchisee. *Conrad*, 351 S.W.3d at 815. However, the Court refused to recognize an employer-employee relationship based on just this kind of conjecture, assumption and speculation on the part of the plaintiff. *Id.* at 820-21. Similar to the testimony in *Conrad*, Liebesman had no idea what happened if someone did not show up the day of the race to be a volunteer, and no idea whether CGI actually ever pulled anyone off the RNR course who was a lead cyclist. In short, she cannot offer any evidence other than speculation as to whether CGI had the power to fire her. The undisputed facts therefore demonstrate that CGI had no power to hire or fire Liebesman.

b. CGI did not Supervise or Meaningfully "Control" Liebesman's Schedule or the Conditions of her Work.

There is also no dispute that CGI exercised no meaningful control or supervision over Liebesman's "work." First, the only claim of "control" by CGI Liebesman identified in her deposition was based on her belief that CGI could pull Liebesman off the course. She believes this despite the fact that no CGI employee monitored her while she was on the course. As noted above, conjecture, assumption and speculation about what CGI could do are not admissible evidence to support her claim. *See Conrad*, at 820-21.*Id.*

CGI could not have "disciplined" Liebesman for either failing to appear to volunteer or improperly performing any "duties" she may have performed. CGI could not verify whether or guarantee that Liebesman was going to show up and ride her bike on October 21, 2012 given that it had no direct communications with her before the race, and had no power to discipline or

otherwise exercise any control over her if she did not. CGI only had her e-mail address and phone number – it did not even have a home address. On the day of the race, after a brief informational meeting, Liebesman had no supervision whatsoever; so much so that she engaged in a personal frolic on the closed race-course after she completed her activities. Last but far from least: Liebesman was volunteering; so CGI could not threaten to withhold any money from Liebesman if she refused to appear or follow an instruction.

These facts demonstrate that CGI exercised no meaningful "control" over Liebseman's activities as a volunteer. As the Sixth Circuit Court of Appeals correctly reasoned:

> The economic reality is that when volunteers work without traditional forms of remuneration like salary and benefits, employers are generally without leverage to control that volunteer's performance. … Since economic dependence is one of the primary sources of employer control over employees, this fact significantly undercuts the [plaintiff's] argument that they were under the control of [the putative employer].

Weary v. Cochran, 377 F.3d 522, 525 (6th Cir.2004); *see also Dudley v. Stonecroft Ministries, Inc.*, No. 2:13-CV-914, 2015 WL 6689589, at *6 (S.D. Ohio Nov. 3, 2015). Indeed, Courts have held that compensation (and the ability to withhold it) is "at the heart of the economic realities test [used to] determine employment status" because that test looks "to whether the putative employee is *economically dependent* upon the principal[.]" *Marie v. Am. Red Cross*, 771 F.3d 344, 358 (6th Cir. 2014)(emphasis in original)(citations omitted). Because there is no dispute that Liebesman volunteered to serve as a bicycle escort without any promise or expectation of wages, and she mentioned no other mechanism for exerting such control, there can be no implication of "control" by CGI of Liebesman.

With respect to control of Liebesman's "schedule," the time the race started and ended controlled Liebesman's schedule, not CGI. True, CGI did set the start time and stop time. However, to find that this was akin to establishing Plaintiff's schedule borders on the absurd. A

race has to start at a particular time, and if Liebesman did not show up on time or failed to show up at all, CGI could not have done anything about it. The fact that CGI asked Liebesman to appear *before the race started* is unremarkable in the extreme, specifically when coupled with the fact that there is no allegation of any consequence for failing to do so. *Marie*, 771 F.3d at 358 (setting schedule not found to evidence control when there were no consequences for failing to adhere to it). Further, Liebesman has not alleged that she was required to remain at the event after the runner she chose to follow finished the race also weighs against any finding that Liebesman was an "employee." *Id.* (lack of "fixed schedule" weighed against finding employment relationship). Recall that Liebesman went back to riding the course for reasons that she cannot even remember in 2012, and that Liebesman chose her own assignment through the Club. The Club then prepared the schedule and assignments and sent it to CGI, not the other way around. Liebesman states the only contact she had with CGI was at the beginning of the race, when she was given some instructions about what to do as a lead cyclist. CGI did not "control" Liebesman's "schedule."

The only alleged control exercised by CGI over Liebesman was that it could remove her from the course before she finished the race. However, as noted above, Liebesman chose her own assignment, brought her own equipment, and wore her own Club's "kit" or uniform to ride in. Liebesman did not have to even report to anyone when she completed her activities as a lead cyclist, a fact that is self evident because she went out on to the race course after her female half marathoner finished without any instruction from CGI that she could remember.

If anything, the entity which exercised control over Liebesman was her own Club. The Club itself presumably controlled its membership by charging a fee to join it. It is undisputed that members of the Club were not solicited individually by CGI to volunteer in 2012, and it is

undisputed that even those persons who were not part of the Club were required to wear a kit or uniform identifying them as a member of the Club while riding as a Lead Cyclist.

Further, the undisputed facts demonstrate that in the one area where "control" in this case matters most – how Plaintiff conducted her bicycle escort activities – Plaintiff had broad discretion. With respect to her activity as a bicycle escort, Plaintiff was only asked to "stay close" to the runner until the last 100-200 yards of the race, and that Liebesman got to choose which runner she wanted to follow when they broke away from the pack. There is no evidence that any supervisor ever oversaw, corrected, or evaluated her performance as a bicycle escort, and the undisputed facts demonstrate that no one from CGI followed her or monitored her performance as a lead cyclist. Where, as here, there is no allegation that "volunteers were terminated for failure to conform to the control exercised by the" putative employer, courts have refused to find an employment relationship. *Dudley v. Stonecroft Ministries, Inc.*, No. 2:13-CV-914, 2015 WL 6689589, at *6 (S.D. Ohio Nov. 3, 2015)(citing *Marie*, 771 F.3d at 358). CGI has located no opinion – in Missouri or elsewhere - where such generalized instruction without any accompanying oversight, evaluation, or ability to terminate the individual has been found to demonstrate an "employer-employee" relationship.

Moreover, Courts have noted that where, as here, the individual performing services was a "volunteer", even if there is found to be some meaningful control over Liebesman's schedule and work, this does not necessarily indicate an employment relationship:

> An individual may volunteer his or her services to an organization, and yet succumb completely to the dictates of the organization in matters of scheduling and assignments. Indeed, a volunteer may work alongside an employee, performing the same task, without losing his or her volunteer status. Put another way, a volunteer, unlike an independent contractor, need not expect to control his or her activities in relation to the services performed.

Krause v. Cherry Hill Fire Dist. 13, 969 F. Supp. 270, 275 (D.N.J. 1997); see also *Todaro v. Twp. of Union*, 27 F. Supp. 2d 517, 536 (D.N.J. 1998)("[T]here is no necessary relation between degree of control exercised over an individual and the [employment] status of that individual.").

For all of the foregoing reasons, CGI exercised no meaningful "control" over Liebesman's activities.

c. Both CGI and Liebesman Agreed that She Would Not be Paid for Volunteering, but Would Receive a T-shirt and Baggie.

Courts have noted that, in the volunteer context, the inquiry into who determined the rate and method of payment is "superseded by a more probative inquiry":

> Was the payment given, by whatever method, more than nominal? If it was, the payment is appropriately deemed compensation, precluding a volunteer determination. If the payment was only nominal, however, DOL regulations instruct that the recipient can still qualify as a volunteer.

Brown v. New York City Dep't of Educ., 755 F.3d 154, 168 (2d Cir. 2014)(citation omitted). As noted above, Liebesman admits she was a volunteer and that she would (and did) only receive a t-shirt and backpack. Although Plaintiff alleges that these items were "valuable compensation" for her volunteer bicycle escort activities, the fact that they were obviously "nominal" negates any suggestion of "economic dependence" and weighs against a finding of an employment relationship under the MMWL.

d. CGI Does Not Maintain any Work Records for Liebesman.

The undisputed facts demonstrate that CGI did not maintain "work records" on Liebesman. Liebesman does not even know if any such records exist. Where there is no evidence that an organization maintains employment records of an individual, this factor weighs against a finding that the individual is an employee. *See Conrad*, 351 S.W.3d at 822 (finding that there was no employment relationship even if the alleged employer maintained a few

records); *see also Freeman v. Key Largo Volunteer Fire & Rescue Dep't, Inc.*, 841 F. Supp. 2d 1274, 1278 (S.D. Fla.) *aff'd*, 494 F. App'x 940 (11th Cir. 2012); *Godlewska v. HDA*, 916 F. Supp. 2d 246, 262 (E.D.N.Y. 2013) *aff'd sub nom. Godlewska v. Human Dev. Ass'n, Inc.*, 561 F. App'x 108 (2d Cir. 2014). Liebesman does not know whether CGI maintained any records related to her time as a lead cyclist. Thus, Liebesman cannot establish a key element in support of her claim and it therefore weighs against her as an employee of CGI.

e. Liebesman Did Not work on CGI's premises, And Did Not Use CGI's Equipment in Performing her "Work"

Liebesman did not work on CGI's premises, which, there is no dispute, is in California. When the work performed is not on the putative employer's premises, this weighs against a finding of an employment relationship. *See Conrad*, 351 S.W.3d at 822. Also, Liebesman brought every piece of equipment she used to be a lead cyclist except for the lead cyclist vest and some credentials. When "the source of the instrumentalities and tools," is the individual rather than the putative employer, courts have found that "weighs more heavily toward the conclusion that [the individual] was an independent contractor than toward the conclusion that she was an employee." *Schwieger v. Farm Bureau Ins. Co. of NE*, 207 F.3d 480, 485 (8th Cir. 2000).[6]

[6] If anything, the Club was possibly an independent contractor of CGI such that CGI reached out to the Club to provide lead cyclists, and the Club provided them. The Club members were allowed to wear their Club uniforms and represent the Club on a morning ride at the RNRs. Everyone brought all of their own equipment except for a Lead Cyclist vest and credentials, which was provided by CGI. The Supreme Court of Missouri has generally described an independent contractor as "one who contracts to perform work according to his own methods without being subject to the control of his employer except as to the result of his work." *Howard v. City of Kansas City*, 332 S.W.3d 772, 782 (Mo. banc 2011) (internal quotation marks and citation omitted); *see also National Heritage Enterprises, Inc. v. Division of Employment Sec.*, 164 S.W.3d 160 (Mo. Ct. App. 2005). Given Liebesman's total lack of contact with anyone other than the Club before the RNRs, her activities as a lead cyclist look far more like she was involved in another Club event as she had done in the past.

f. Liebesman Did not Form an Employment Relationship with CGI Because Both Understood that She was Volunteering her Time Without Expectation of Compensation.

The foregoing discussion demonstrates that, as a matter of law, Liebesman was not an "employee" under the MMWL. At the risk of piling on, however, there are additional factors often discussed by courts in determining the "economic realities" of the employment relationships that reinforce this conclusion.

First, Plaintiff admits that she was aware she was volunteering her services for the 2012 Rock 'n' Roll Half-Marathon and makes no claim that she and CGI were establishing an employment relationship. Liebesman did not expect any monetary compensation for her services at any time. To the contrary, Liebesman admits that she freely offered her services in response to a request for "volunteers" and in fact characterizes her work at the Half-Marathon as that of a "volunteer".[7] When an individual provides services "without promise or expectation of compensation, but solely for his personal purpose or pleasure" the economic reality of the situation does not indicate one of employment. *See Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947) & *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985)(both discussed more below); *see also Roman v. Maietta Const., Inc.*, 147 F.3d 71, 74 (1st Cir. 1998)(affirming dismissal of claims for compensation for time when "plaintiff considered himself a volunteer").

Further, the fact that the parties agreed that no employment relationship exists, "while not dispositive of the issue, is certainly relevant to the inquiry." *Weary v. Cochran*, 377 F.3d 522, 525 (6th Cir. 2004); *see also, Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 218 (6th

[7] The fact that Liebesman may not have volunteered her services had she known more about CGI's for-profit status or its relationship with local charities is irrelevant: Liebesman admits that she provided her services voluntarily and without expectation of compensation at the time.

Cir.1992) (emphasizing that a cosmetic salesperson's employment agreement "unambiguously declared [her] to be an independent contractor"); *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, (6th Cir.1989) (noting the significance of the employment agreement's characterization of the plaintiff insurance agent as "an independent contractor and not an employee"); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir.1993) (the fact that the consultant agreement stated that the plaintiff was hired as an independent contractor was "probative of the parties' intent" regarding the nature of the employment relationship). Certainly Liebesman does not list or acknowledge that CGI was her employer on her curriculum vitae, which she posts online.

Because there is no dispute that Liebesman understood that she was a volunteer and would receive only a t-shirt and backpack, coupled with the lack of any allegation that an employment relationship was being established, Liebesman is not an employee for purposes of the MMWL.

g. Liebesman "Worked" for Only One Morning on One Day.

Lastly, and perhaps most telling, Liebesman's alleged "employment" lasted for exactly one morning on a Sunday in October almost five years ago. CGI has located no case which any court has held that an individual's work for a few hours on one day indicates a "dependen[ce] upon the business to which they render service." *Bartels*, 332 U.S. at 130. Of course, it indicates the opposite. *See Tony*, 471 U.S. at 301 (work lasting little over a week suggests no economic dependence, but entire dependence for work for years indicates employment relationship); *see also Wilde v. Cty. of Kandiyohi*, 15 F.3d 103, 106 (8th Cir. 1994)(noting "the duration of the relationship between the parties" is a factor in determining whether economic reality suggests employment). Liebesman is a full-time Saint Louis University law professor, and has made no allegation that she was ever "economically dependent" upon CGI.

For all of these additional reasons, the undisputed facts demonstrate that Liebesman was not a statutory "employee" of CGI. CGI is therefore entitled to summary judgment as a matter of law.

3. The MMWL Does Not Prohibit Individuals from Volunteering their Time to the Activities of For-Profit Organizations.

The Petition also bases its claim of entitlement to minimum wages on the erroneous assumption that individuals cannot volunteer their services for a for-profit company under any circumstances.[8] There is absolutely no Missouri authority, whether in statute, regulation or case-law, to support that proposition. Furthermore, the United States Supreme Court has weighed in against Liebesman's theory in this regard, as have numerous other courts. The reasoning of two United States Supreme Court cases interpreting the FLSA support this conclusion and their reasoning is persuasive.

In *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), individuals who had performed seven to eight days of work as part of training as prospective yard brakemen for a for-profit operator of a railroad terminal, but were not paid, claimed they were entitled to minimum wage for their work under the FLSA. In holding that not every person who performed any kind of work for a for-profit company was an "employee" under the FLSA, the Court reasoned as follows:

> The [FLSA's] definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. …***[S]uch a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit.*** But there is no indication from the legislation now before

[8] CGI addresses this theory of the Petition because it appears that Plaintiff's entire case rests on this premise. However, CGI maintains that Plaintiff has failed to adduce sufficient facts to show that she is an employee.

> us that Congress intended to outlaw such relationships as these. The Act's purpose as to wages was to insure that every person ***whose employment contemplated compensation*** should not be compelled to sell his services for less than the prescribed minimum wage. The definitions of 'employ' and 'employee' are broad enough to accomplish this. But, broad as they are, they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.

Id. at 152.

The holding that individuals can volunteer their time for for-profit companies was reaffirmed in *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985). In that case, the employer was ostensibly a nonprofit religious organization, but "derive[d] its income largely from the operation of a number of commercial businesses" which were "staffed largely by the Foundation's 'associates,'" who were not paid, but were provided "with food, clothing, shelter, and other benefits." *Id*. at 292. The Secretary of Labor filed suit against the Foundation alleging violations of the FLSA and seeking back-pay for the "associates." *Id*. at 295. The Supreme Court commenced its analysis as follows:

> In order for the Foundation's commercial activities to be subject to the Fair Labor Standards Act, two conditions must be satisfied. First, the Foundation's businesses must constitute an '[e]nterprise engaged in commerce or in the production of goods for commerce.'… ***Second, the associates must be "employees" within the meaning of the Act.***

Id. at 295 (some internal citations omitted). The Court found that because of the nature of the Foundation's activities, it was a covered "enterprise" under the FLSA. *Id.* at 299. But the fact that it was a for-profit "enterprise" was only the first part of the analysis; the second was whether such individuals were, in fact, "employees" within the meaning of the FLSA. *Id.* at 299 (fact that "the Foundation's commercial activities [were] within the Act's definition of 'enterprise' [did not], as we have noted, end the inquiry. ***An individual may work for a covered enterprise and nevertheless not be an 'employee.'***")(emphasis added). To answer whether an individual was an

employee, the Supreme Court reiterated its holding in *Walling*, that "[a]n individual who, 'without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in ***activities carried on by other persons***[9] either ***for their*** pleasure or ***profit***,' is outside the sweep of the Act." *Id.* at 295(emphasis and underlining added) (*quoting Walling*, 330 U.S. at 152.

The conclusion that volunteers may perform work for for-profit entities has been widely reaffirmed. *See Rogers v. Schenkel*, 162 F.2d 596, 598 (2d Cir. 1947) (holding that an individual who volunteered his services to a for-profit company was not an employee under the FLSA); *Hallissey v. Am. Online Inc.*, No. 99-CIV-3785, 2006 U.S Dist. LEXIS 12964, at *22-23 (S.D.N.Y. Mar. 10, 2006) (acknowledging defendant's status as a for-profit company but undertaking an analysis of whether volunteers were actually employees); *Okoro v. Pyramid 4 Aegis*, No. 11-C-267, 2012 WL 1410025, at *8-9 (E.D. Wise. Apr. 23, 2012) ("to say that one cannot under any circumstances volunteer for a for-profit entity might be too sweeping a statement [and] it becomes necessary to consider more than just whether the defendant is a for-profit entity"); *Jeung v. Yelp, Inc.*, No. 15-CV-02228-RS, 2015 WL 4776424, at *1 (N.D. Cal. Aug. 13, 2015)("persons who write reviews appearing on the website" of Yelp – a for-profit company – were, at most, volunteers citing the *Tony* decision in support).

Here, Liebesman rode on behalf of her club for the community and for the "fun" of it. There is little doubt that Liebesman's activities were for personal pleasure and also, quite frankly, for the benefit of the Club. Moreover, Liebesman's alleged intolerance regarding volunteering for for-profit entities is selective and she does not verify whether she is

[9] The FLSA defines "person" to mean "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." 29 U.S.C. § 203(a).

volunteering for a for-profit entity before offering her time for free. To determine that Liebesman was an employee because she rode her bike for an hour or so on one day in a year, following a lead runner but providing that runner no direct assistance, would be a travesty and eliminate the power of choice that individuals have to volunteer their time for races like the RNRs. CGI therefore requests that the Court enter judgment in its favor and against Liebesman on Liebesman's claims under the MMWL for minimum wage.

B. Liebesman's MMWL Claim For the 2011 RNR is Time Barred.

It is undisputed that any claim by Liebesman under the MMWL for her 2011 activities is time barred by the MMWL's statute of limitations. Liebesman did not file her original federal court Complaint - which contained her current MMWL claim - until September 23, 2014. (Facts, at 42). Because her MMWL claim was not filed until more than two years after the October 2011 RNR, it is time barred and must be dismissed with prejudice. § 290.527 RSMo. ("All actions for the collection of any deficiency in wages shall be commenced within two years of the accrual of the cause of action.").

C. CGI is Entitled to Summary Judgment on Liebesman's MMWL Claim Because She Volunteered Her Services for the Club.

While it is plain from the foregoing that Liebesman was not an "employee" of CGI under the MMWL, she is also not an "employee" of CGI for other reasons. Under the MMWL, "employee" does not include an individual who rendered services to a nonprofit organization on a voluntary basis. § 290.500(3)(b) RSMo.

The undisputed facts demonstrate that the Club is a non-profit corporation, and that Liebesman was only able to be a lead cyclist by signing up through the Club. Liebesman actually paid for the privilege of being a member of the Club and through the Club freely volunteered her services to the Club which then provided the lead cyclists to CGI at the RNR.

All of her communication before the RNRs was with the Club, not CGI, and the Club prepared the assignments for lead cyclists based on the requests of the lead cyclist volunteers. The undisputed facts further demonstrate that Liebesman was "representing the" Club, that the lead cyclist opportunity was made available to her as Club member, and that CGI solicited the Club and not Liebesman to provide lead cyclists from its members. In short, acting as a lead cyclist at the RNRs was much more like a Club event, and Liebesman volunteered to ride. As a result, CGI is entitled to summary judgment on Liebesman's claims under the MMWL because she is not an "employee" under the MMWL.

D. CGI is Entitled to Summary Judgment on Liebesman's MMWL Claim Because Her Activities Were on a Casual or Intermittent Basis.

Liebesman admits that she acted as a lead cyclist for the Club for a total of 4-5 hours in 2012 on a single day in October. The MMWL excludes from coverage as an employee any individual "employed on a casual or intermittent basis as a golf caddy, newsboy, or in a similar occupation." § 290.500(3)(j) RSMo. Liebesman's alleged employment was indisputably both casual and intermittent. Liebesman allegedly worked one day, for what she guesses was less than 5 hours, in 2012. Like a caddy, Liebesman followed a participant in a recreational or amusement activity (in this case, running). Liebesman arguably did less than what a caddie does for a golfer, inasmuch as she was not carrying a bag, providing course knowledge, or watching out for the golfer's ball. Her activities were also demonstrably "casual" because Liebesman admits that she was not required to show up at the RNRs and has no idea what would have happened to her if she did not. As a result, Liebesman is excluded from coverage under the MMWL.

This conclusion is justified by the plain definitions of "casual" and "intermittent." Casual employment is defined in Black's Law Dictionary, Eighth Edition, p. 566 as "work that is

occasional, irregular, or for a short time." The Shorter Oxford English Dictionary, 6th edition, defines intermittent as "that ceases for a time; occurring at intervals; not continuous." Examining the undisputed facts, there is no doubt that Liebesman's activities as a lead cyclist were occasional, irregular and for a short time, that they ceased for a time, occurred at intervals, and were not continuous. Likely even more so than a caddie or newsboy, if the Court were to find that Liebesman was an employee under the totality of the circumstances, she is excluded from coverage under the MMWL.

E. CGI is Entitled to Summary Judgment on Liebesman's Unjust Enrichment Claim Because She Received Everything She Expected to Receive, and Never Expected to Receive Any Monetary Compensation, For Her Services.

"The doctrine of quasi-contract, also known as a contract implied in law, is based primarily on the principle of unjust enrichment." *Green Quarries, Inc. v. Raasch,* 676 S.W.2d 261, 264 (Mo. Ct. App. 1984)(citing *Donovan v. Kansas City*, 352 Mo. 430, 175 S.W.2d 874, 884 (Mo. banc 1943)(other citation omitted). "Unjust enrichment occurs where a benefit is conferred upon a person in circumstances in which retention by him of that benefit without paying its reasonable value would be unjust. *Raasch*, 676 S.W.2d at 264 (citations omitted). "For a quasi-contract based upon unjust enrichment, 'the amount of the recovery is not the actual amount of the enrichment, but the amount of the enrichment which, as between the two parties, would be unjust for one party to retain.'" *Grasso Bros.*, 939 S.W.2d at 30.

"The most significant of the elements for a claim of unjust enrichment is …the requirement that the enrichment of the defendant be unjust." *S & J, Inc. v. McLoud & Co.*, 108 S.W.3d 765, 768 (Mo. Ct. App. 2003)(citing *Associate Engineering Co. v. Webbe,* 795 S.W.2d 606, 608 (Mo.App. E.D.1990)). "In determining whether it would be unjust for the defendant to retain the benefit, courts consider whether any wrongful conduct by the defendant contributed to

the plaintiff's disadvantage." *S & J, Inc.*, 108 S.W.3d at 768 (*citing Graves v. Berkowitz*, 15 S.W.3d 59, 61 (Mo.App. W.D.2000)). "'Mere receipt of benefits' is not enough when there is no showing that it would be unjust for defendant to retain the benefit received.'" *Id.* (quoting *Farmers New World Life Ins. Co., Inc. v. Jolley*, 747 S.W.2d 704, 706 (Mo.App. W.D.1988)). "Even if a benefit is 'conferred' and 'appreciated,' if the plaintiff suffers no injustice as a result of the defendant's retention of the benefit, then the plaintiff's claim for unjust enrichment will fail. *Smith v. City of St. Louis*, 409 S.W.3d 404, 419 (Mo. Ct. App. 2013). "There can be no unjust enrichment if the parties receive what they intended to obtain." *Howard v. Turnbull*, 316 S.W.3d 431, 436 (Mo. Ct. App. 2010) (*quoting Am. Standard Ins. Co. of Wisconsin v. Bracht*, 103 S.W.3d 281, 293 (Mo.App. S.D.2003)).

Liebesman has admitted that she received everything in 2011 and 2012 that she intended to obtain from CGI as a result of participating as a lead cyclist. Morever, Liebesman has admitted that she did not expect to be compensated in the form of wages for her time as a lead cyclist. As a result, Liebesman cannot prevail on her unjust enrichment claim and CGI is entitled to summary judgment on that claim.

V. CONCLUSION

This Court is not only permitted, it is required, to exercise its common sense when evaluating claims of employment and unjust enrichment. While Liebesman conflates what may be "work" with "employment," Missouri law does not. Common sense and the undisputed facts of this case dictate that a St. Louis University Law professor was not economically dependent on CGI when, without expectation of compensation, she rode her bicycle behind a half-marathoner of her choice one morning in 2012. For this and the other reasons set forth herein, Liebesman's

claims simply do not find purchase under the MMWL or her common law unjust enrichment claim. .

Wherefore, based on the foregoing, CGI respectfully requests that the Court grant its motion for summary judgment, award CGI its costs and fees as a result of defending this matter, and for such further relief as the Court deems just and proper.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 2nd day of August, 2017, a true copy of the foregoing Memorandum in Support of Motion for Summary Judgment was served by electronic notice on all parties on:

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