

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MIA TOMASELLO, on behalf of herself
and all others similarly situated,

Plaintiffs,

v.

ICF TECHNOLOGY, INC., ACCRETIVE
TECHNOLOGY GROUP, INC.

Defendants.

DOCUMENT ELECTRONICALLY FILED

Civil Action

No. 2:23-cv-03759-MCA-JRA

**JOINT PROPOSED
DISCOVERY PLAN**

1. Set forth the name of each attorney appearing, the firm name, address and telephone number and facsimile number of each, designating the party represented.

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2. Set forth a brief description of the case, including the causes of action and defenses asserted.

PLAINTIFFS' SECTION:

The Class Representative Plaintiff Tomasello brings this Rule 23(b)(3) class action under New Jersey state law, and also under the FLSA, because Defendants misclassified her and the other webcam performers she represents as independent contractors instead of employees. As employees, Plaintiffs are entitled to wages for all hours worked. Defendants, however, did not pay Plaintiffs for all hours worked; they paid them *only* for “paid chats” but not for the full period of time they are working, including “free chat” sessions when

they are performing to attract customers for a “paid chat.” In essence, the Plaintiff-performers were only paid for a part of the show. Defendants track those paid minutes online as well as the total minutes online. This case is primed for class certification based on Defendants’ own records and common evidence in the form of standardized agreements evidencing substantial control over Plaintiffs. Plaintiffs seek all remedies under the law, including unpaid wages and unreimbursed business expenses and/or deductions from their pay as may be available under the law.

Defendants’ conclusory denials below both on the merits and class allegations will be tested in discovery. But unlike in most civil cases Defendants bear the burden on a key merits issue in this employment misclassification case. This is because New Jersey law presumes a worker is an employee unless a defendant can establish all three of the following criteria in the ABC test: (A) the individual has been and will continue to be free from control or direction over the performance of such service, both under her contract of service and in fact; (B) such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) the individual is customarily engaged in an independently established trade, occupation, profession or business. *Hargrove v. Sleepy’s LLC*, 2023 U.S. App. LEXIS 13554 (3d Cir. June 12, 2023) (citing *Hargrove v. Sleepy’s, LLC*, 220 N.J. 289 (2015)).

Not only do Defendants have the burden here on the employment classification issue on the merits here, but the Third Circuit has determined that employment status is a common issue that predominates under Rule 23(b)(3). *See Hargrove*, 2023 U.S. App. LEXIS 14553, at *6-7 (“Common evidence will decide who is right about employee status.”).

Plaintiffs are evaluating the merits of Defendants’ jurisdictional defense to reduce the scope of the nationwide FLSA Collective. Plaintiffs may choose to amend their Complaint by a stipulated Consent Order on or before January 5, 2024, as set forth in the proposed schedule below.

DEFENDANTS’ SECTION:

Defendants deny Plaintiff’s allegations and assertions above and rely on their Amended Answer and Affirmative Defenses filed on September 15, 2023 [Dkt. 16] for a full recitation of the defenses in this matter, but for purposes of this

summary, state Plaintiff cannot pursue an FLSA collective action on a nationwide basis because there is no personal jurisdiction over performers who do not have sufficient contacts with Defendants in the State of New Jersey. *See Fischer v. Federal Express Corp.*, 42 F.4th 366 (3rd Cir. 2022). In addition, the putative collective and class actions fail because the questions of law and fact asserted by Plaintiff are not common and do not predominate to the proposed class or collective. Therefore, the case cannot be certified as a collective action under the FLSA, 29 U.S.C. § 216(b) or as a class action under Rule 23 of the Federal Rules of Civil Procedure. Defendants deny Plaintiff's claims on the merits. Plaintiff (and all other performers) are *independent contractors* who are/were paid properly in accordance with all applicable federal, state, and local laws. Accordingly, class or collective certification is improper and Defendants will seek a dismissal as to all claims asserted. In addition, Defendants will consider filing a motion to compel arbitration to the extent there are binding arbitration agreements applicable to Plaintiff, opt-ins and/or putative class and collective action members.

3. Have settlement discussions taken place? Yes ___ No X.

No substantive settlement discussions have taken place as of the date of this Joint Discovery Plan, but counsel have discussed the possibility of settlement with the assistance of private mediation after some discovery and/or other materials under Rule 408 are exchanged.

(a) What was plaintiff's last demand? N/A

- (1) Monetary demand: N/A
- (2) Non-monetary demand: N/A

(b) What was defendant's last offer?

- (1) Monetary offer: N/A
- (2) Non-monetary offer: N/A

4. The parties [**have X** have not ___] met pursuant to Fed. R. Civ. P. 26(f).

The Parties met on September 7, 2023 and thereafter.

5. The parties [**have X** have not ___] exchanged the information required by Fed. R. Civ. P. 26(a)(1). If not, state the reason therefor.

The Parties have exchanged Initial Disclosures.

6. Explain any problems in connection with completing the disclosures required by Fed R. Civ. P. 26(a)(1). **N/A.**
7. The parties [have ___ **have not X**] filed disclosures of litigation funding. See Local Civil Rule 7.1.1.
8. The parties [have ___ **have not X**] conducted discovery other than the above disclosures. If so, describe.
9. Proposed joint discovery plan:
 - (a) Discovery is needed on the following subjects:

PLAINTIFFS' SECTION:

- **Corporate structure and relationship of and between Corporate Defendants**
- **Any Agreements Between Plaintiff and Defendants during the relevant period**
- **Defendants' policies, practices, and procedures relating to training of Plaintiff and Performers**
- **Any handbooks and/or rules for Performers.**
- **Defendants' policies, practices, and procedures related to duties performing.**
- **Discovery related to the website <https://streamatemodels.com/> and the FAQ's during the relevant period.**
- **Discovery of all class issues under Rule 23(b)(3) and certification of a collective action under the FLSA.**
- **Damages discovery, including payroll data of Plaintiff and Performers.**
- **Expert discovery.**
- **Topics in Defendants' section, including Defendants' denials and affirmative defenses including Defendants' burden to establish the ABC Test set forth above.**

Plaintiffs reserve their rights to take all discovery permitted under the Federal Rules of Civil Procedure to prove her individual and representative

claims, as well as to refute the affirmative defenses in Defendants’ Amended Answer. Plaintiffs do not admit that any of Defendants’ topics below are relevant to the claims or defenses in this case.

DEFENDANTS’ SECTION:

- **The factual and legal basis for Plaintiff’s claims, and, to the extent applicable, the claims of any Opt-In Plaintiffs’ (collectively, “Plaintiffs”);**
- **Whether conditional certification and notice are warranted as a matter of law under 29 U.S.C. § 216(b);**
- **Whether Plaintiff meets the requirements for a class action as a matter of law under Fed. R. Civ. P. 23;**
- **Work performed by Plaintiffs under their performer agreements;**
- **Plaintiffs’ claims for damages and other relief sought in the Complaint;**
- **Plaintiffs’ efforts to mitigate damages (including employment history), if any;**
- **Defendants’ defenses to Plaintiffs’ claims under federal and applicable state law; and**
- **Such other matters that may arise in the course of this litigation, including potential class and collective identities and damages.**

Defendants do not admit that any of Plaintiffs’ topics above are relevant to the claims or defenses to this case. Also, Defendants reserve the right to disclose one or more expert witnesses, whether in support of their defenses or in rebuttal to Plaintiffs’ expert witnesses.

- (b) Discovery [**should X should not _____**] be conducted in phases or be limited to particular issues. Explain.

Given that statute of limitations is running on the FLSA claims and those of the Collective, discovery should be conducted in two phases: (1) an initial 60—day period focusing on collective certification issues, after which Plaintiff will move for conditional certification pursuant to the FLSA, 29 U.S.C. § 216(b); and (2) a period for fact and expert discovery that relates to the merits and class issues. The parties agree that full discovery will be open after the Rule 16 Initial Conference on November 21, 2023, or as the Court directs.

(c) Proposed schedule: The parties propose the following:

(1) Fed. R. Civ. P. 26 Disclosures. See Section 5.

(2) E-Discovery conference pursuant to L. Civ. R. 26.1(d): **Counsel have met and conferred at the Rule 26(f) conference regarding digital information, including computer-based information, and will meet and confer again prior to the initial scheduling conference before Magistrate Judge Jose R. Almonte, which is scheduled on November 21, 2023.**

(3) Service of initial written discovery **by November 30, 2023.**

(4) Maximum of **25** Interrogatories by each party to each other party.

(5) Maximum of **10** depositions to be taken by each party **pursuant to Rule 30(a)(2)(A)(i).**

PLAINTIFFS' SECTION:

Plaintiff's deposition shall be "limited to one day of 7 hours." Rule 30(d)(1). No basis has been articulated by Defendants here to increase the 7-hour limit, and thus they have not met the good cause standard to modify the upper limit under the Rules. If Defendants seek to notice her deposition in connection with the initial phase of discovery related to conditional certification of the FLSA Collective, then Defendants will be limited to that one opportunity in accordance with Rule 30(d)(1), absent the entry of a protective order.

DEFENDANTS' SECTION:

Defendants reserve the right to seek additional time beyond the one day of seven hours. Also, Defendants submit that additional depositions may be needed after the close of any potential collective certification opt-in period based on the number of people who opt-in to any potential collective action. To the extent Defendants seek to exceed this limit, the parties agree to meet and confer regarding a protocol for both the number of depositions of opt-in plaintiffs and also their duration of them, and will submit any disputes to the Court for resolution.

(6) Deadline to amend or to add parties either by stipulation and consent order or by motion [January 5, 2024]

(7) Fact discovery for class and merits to be completed by: [November 15, 2024]

(8) Deadline to file FLSA conditional certification motion on or before February 9, 2024 to meet the March 4, 2024 Motion Day. The briefing schedule for that Motion Day shall govern for this motion.

(9) Plaintiffs' motion for class certification and expert disclosures due on [December 20, 2024]

(10) Depositions of Plaintiffs' experts to be completed by: [January 24, 2025]

(11) Defendants' opposition to class certification; any Daubert motions related to Plaintiffs' experts; and Defendants' expert disclosures due on [February 28, 2025]

(12) Depositions of Defendants' experts to be completed by March 31, 2025.

(13) Plaintiffs' reply brief in support of their motion for class certification; opposition to Defendants' Daubert motions; and any Daubert motions related to Defendants' experts due on April 30, 2025.

(14) Reply briefs for any Daubert motions shall be filed within 10 days of the date the opposition briefs are entered on the electronic docket.

(15) Following the entry of an order by the Court Plaintiff's motion for class certification, the Court shall set a case management conference to set a schedule for any remaining discovery (not expected to exceed 60 days), a briefing schedule for dispositive motions, and a trial date.

(d) Set forth any special discovery mechanism or procedure requested. See Section 9(b) above.

(e) A pretrial conference may take place on: TBD.

(f) Trial date:

DEFENDANTS' SECTION:

To be determined by the Court following the resolution of any dispositive motions and 45 days after the pretrial conference (Jury Trial; Non-Jury Trial). Plaintiff requests a trial by jury in her Complaint. *However, Defendants assert that Plaintiff agreed to a non-jury bench trial pursuant to her performer agreement.*

PLAINTIFFS' SECTION:

Plaintiffs' jury demand controls absent an order by the Court or subsequent amendment to the operative complaint.

10. Do you anticipate any special discovery needs (i.e., videotape/telephone depositions, problems with out-of-state witnesses or documents, etc.)?
Yes **No** . If so, please explain.

PLAINTIFFS' SECTION:

All depositions shall proceed remotely unless otherwise agreed or absent the entry of a protective order. Defendants are tech companies that operate a webcam business that is the subject of this wage and hour class action lawsuit. For over three years, Defendants' local counsel has published the importance of learning the technology for remote depositions to use it effectively.¹ My office has been efficiently taking remote depositions as the predominant method for over three years without any need for a "remote video protocol" to ensure compliance with Rule 1 (Federal Rules shall "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

DEFENDANTS' SECTION:

Defendants are amenable to completing at least some depositions via remote video and will work cooperatively to adopt a remote video protocol for conducting such depositions. Counsel will meet and confer, as needed, with

¹ <https://www.natlawreview.com/article/deposition-distancing-practical-considerations-taking-remote-depositions> (last visited Sept. 13, 2023).

respect to remote depositions. Defendants have not determined whether they intend to conduct Plaintiff's deposition remotely or in person, but take the position that they should be permitted to conduct the deposition in person or remote.

11. Do you anticipate any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced? Yes _____ **No X**.

If so, how will electronic discovery or data be disclosed or produced? Describe any agreements reached by the parties regarding same, including costs of discovery, production, related software, licensing agreements, etc.

Following their initial discovery conference, the parties are working cooperatively to adopt an ESI protocol.

12. Do you anticipate entry of a Discovery Confidentiality Order? See L. Civ. R. 5.3(b) and Appendix S. **Yes X** No _____.

The parties will submit a stipulated confidentiality order for the Court.

13. Do you anticipate any discovery problem(s) not listed above? Describe. Yes _____ **No X**.

14. State whether this case is appropriate for voluntary arbitration (pursuant to Local Civil Rule 201.1 or otherwise) or mediation (pursuant to Local Civil Rule 301.1 or otherwise). If not, explain why and state whether any such procedure may be appropriate at a later time (i.e., after exchange of pretrial disclosures, after completion of depositions, after disposition or dispositive motions, etc.).

Private mediation may be appropriate after the parties have had an opportunity to conduct discovery and/or exchange other materials under Rule 408.

15. Is this case appropriate for bifurcation? Yes ___ **No X**.

With the possible exception of bifurcation at the discovery phase as to collective action matters, as set forth above.

16. An interim status/settlement conference (with clients in attendance), should be held **at the Court's discretion.**
17. We [do _____ **do not X**] consent to the trial being conducted by a Magistrate Judge.
18. Identify any other issues to address at the Rule 16 Scheduling Conference.

PLAINTIFF'S SECTION:

Plaintiffs intend to seek toll the statute of limitations on their FLSA claims, which has not been tolled since this action was filed on July 13, 2023. Defendants oppose any tolling. They have not explained the basis for their position. Plaintiffs had previously explained their basis for seeking a tolling agreement: the statute is running and to avoid motion practice on the basic issue. Courts have granted equitable tolling of FLSA claims in the interest of justice and "fairness" where unanticipated delays hindered the prosecution of the action. *See, e.g., Fogg v. Clean Harbors Env't Serv.*, 2023 U.S. Dist. LEXIS 20793 (D.N.J. Feb. 7, 2023); [*Barghout v. Bayer Healthcare Pharm., Civil Action No. 11-1576 \(DMC\) \(JAD\)*, 2013 U.S. Dist. LEXIS 189755, at *7 \(D.N.J. May 31, 2013\)](#). There were 131 days between the filing of the Complaint on July 13, 2023 and the Rule 16 Conference that was once adjourned to November 21, 2023.

DEFENDANT'S SECTION:

Plaintiff sought a tolling agreement from Defendants. Defendants asked Plaintiff to provide authority for such tolling in this matter. Defendants explained that they were inclined not to stipulate to such tolling because Plaintiff provided no rationale to do so. That said, in a good faith effort to cooperate, Defendants invited Plaintiff to provide authority that may change Defendants' position. Plaintiff only provided the above citation to *Fogg* and *Barghout* cases on Friday, November 10. However, Plaintiff fails to explain how the Court's rescheduling of the Rule 16 Conference serves to prejudice Plaintiff in their prosecution of the claims brought. Indeed, it has not.

Equitable tolling is an extraordinary remedy that is appropriate only if a plaintiff has been prevented from filing in a timely manner due to sufficiently inequitable circumstances, such as if (1) defendants misled Plaintiff respecting her cause of action; (2) plaintiff(s), in some extraordinary way, have been

prevented from asserting their rights; or (3) plaintiff(s) asserted their rights in the wrong forum. *See Santos ex rel. Beato v. United States*, 559 F.3d 189 (3d Cir. 2009). These circumstances are not present here. Moreover, the District for New Jersey has rejected motions for equitable tolling as to potential plaintiffs in an FLSA collective action prior to a grant of conditional certification and opt-ins by members of the collective. *Thompson v. Real Estate Mortgage Network, Inc.*, No. 11-1494, 2019 WL 2636307, at *13-14 (D.N.J. June 26, 2019) (ruling that granting an order for equitable tolling as potential opt-in plaintiffs would constitute an impermissible advisory opinion).

By: *s/Charles J. Kocher*

Attorney for Plaintiffs / November 14, 2023

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