UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JENNIFER MONDELLO, on behalf of herself and all others similarly situated,

Plaintiffs,

v. Case No. 8:24-cv-1037-SPF

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

Defendants.
_____/

ORDER

In this putative class and collective action under the FLSA and the Florida Minimum Wage Act, before the Court is Plaintiff's Motion for Conditional Certification (Doc. 33), Defendants' Opposition and supporting exhibits (Docs. 34-38), and Plaintiff's Reply and supporting exhibits (Docs. 43-44). Upon consideration, the Court grants Plaintiff's motion.

I. BACKGROUND

Plaintiff Jennifer Mondello is a Tampa-based adult content creator who has live-streamed her performances on the website Streamate since October 2022 (Doc. 12 at ¶ 1). Defendant ICF Technology, Inc. ("ICF") is a Washington state corporation that operates social media platforms for adult content and owns the domain streamate.com (*Id.* at ¶ 2). Defendant Accretive Technology Group, Inc. ("ATG"), also a Washington-based corporation, describes itself as a market leader in web-based live video streaming (*Id.* at ¶ 3). It shares a principal place of business with ICF and owns more than 10% of ICF's

stock (*Id.*). The IP address associated with www.streamate.com is registered to Accretive Networks, a d/b/a of ATG (*Id.*). Plaintiff alleges ICF and ATG are joint employers (*Id.* at ¶ 4).

Plaintiff alleges that Defendants misclassify their online performers as independent contractors rather than employees and that she and other similarly situated employees do not receive minimum wage as required by Florida and federal law (*Id.*). Streamate's customers can view some content for free (a "free chat") but must pay to view the most explicit performances (a "paid chat") (*Id.* at ¶¶ 15-16). According to Plaintiff, Defendants distinguish between her "total minutes online" (free chats *plus* paid chats) and "total paid minutes online" (paid chats only) and compensate her only for the latter (*Id.* at ¶¶ 17-18). Plaintiff contends that most of her performance time is spent in free chats, time that she (and the other performers in the class she hopes to represent) is not paid for (*Id.* at ¶¶ 41-43; Doc. 35-5 at ¶ 10).

Plaintiff asserts that Defendants exercise significant control over their performers and have the authority – under a standard Performer Agreement they require every performer to sign – to suspend a performer's Streamate account for violating their rules of conduct (Doc. 12 at ¶¶ 19-37).[1] For example, Plaintiff's Performer Agreement prohibits

[1] With Court permission, Plaintiff submitted ICF's Compliance Handbook – which Defendants designate as Attorneys' Eyes Only pursuant to the parties' Stipulated Confidentiality Order – under seal (Docs. 41-43). According to Plaintiff, all Streamate performers must abide by the uniform rules and disciplinary procedures in the Compliance Handbook (*see* Doc. 44). Defendants counter that these rules track "federal, state, and local laws that apply to any content host on the Internet, particularly those that permit adult content." (Doc. 34 at 5).

her from streaming "inappropriate" content, a subjective standard up to Defendants to interpret (*Id.* at ¶¶ 23-24). Another example Plaintiff offers of how Defendants control their performers is that once customers log into their account, they enter the free chat area of Streamate, where they view thumbnails of teaser performances and then choose whose live stream to join (*Id.* at ¶ 14). Plaintiff alleges that Defendants control the placement and, therefore, the visibility of her thumbnail on the site, which impacts her compensation (*Id.* at ¶ 25).

Against this backdrop, Plaintiff moves to conditionally certify an FLSA collective of all current and former Florida-based performers who worked for Defendants at any time over the past three years, were classified as independent contractors, and wish to opt into the class (Docs. 33, 44). Defendants oppose conditional certification, contending that Plaintiff has not demonstrated that other similarly situated performers want to opt in (Doc. 34).

II. FLSA CERTIFICATION STANDARD

An action to recover unpaid minimum wages may be brought under the FLSA "against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). From an employer's perspective, these collective actions "avoid multiple lawsuits where numerous employees have allegedly been harmed by a claimed violation or violations of the FLSA by a particular employer." *Prickett v. Dekalb Cnty.*, 349 F.3d 1294, 1297 (11th Cir. 2001). Additionally, a collective action "allows . . . plaintiffs the advantage of lower individual

costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution of common issues of fact and law arising from the same alleged . . . activity." *Hoffman-LaRoche v. Sperling*, 493 U.S. 165, 170 (1989). The decision to conditionally certify a collective FLSA action lies within the district court's discretion. *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001).

District courts in the Eleventh Circuit take a two-tiered approach to FLSA collective action certification:

> The first determination is made at the so-called "notice stage." At the notice stage, the district court makes a decision – usually based only on the pleadings and any affidavits which have been submitted – whether notice of the action should be given to potential class members.
>
> Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in "conditional certification" of a representative class. If the district court "conditionally certifies" the class, putative class members are given notice and the opportunity to "opt-in." The action proceeds as a representative action throughout discovery.
>
> The second determination is typically precipitated by a motion for "decertification" by the defendant usually filed after discovery is largely complete and the matter is ready for trial . . .

Id. at 1218 (quoting *Mooney v. Armco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995)); *see also Evans v. Ent. 2851 LLC*, No. 8:23-cv-498-WFJ-SPF, 2024 WL 341164, at *1 (M.D. Fla. Jan. 30, 2024).[2]

At the notice stage, a plaintiff must provide a "reasonable basis" to believe that similarly situated employees want to opt into the lawsuit. *Morgan*, 551 F.3d at 1260; *see*

[2] The Eleventh Circuit describes the decisions to certify a collective action and notify potential collective action members as synonymous; courts collapse the two decisions into the "notice stage." *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261 (11th Cir. 2008).

Dybach v. Fla. Dep't of Corr., 942 F.2d 1562, 1567 (11th Cir. 2008). This standard is lenient, but it *is* a standard, one that a plaintiff must meet by showing (1) a desire to opt in from (2) similarly situated employees. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996). In determining whether a plaintiff meets this standard, courts may consider affidavits of other employees, notices of consent to join the lawsuit, and expert evidence. *See id*. at 1097; *Hart v. JP Morgan Chase Bank, N.A.*, No. 8:12-cv-470-T-27TBM, 2012 WL 6196035, at *4 (M.D. Fla. Dec. 12, 2012). The unsupported allegations of plaintiff or counsel will not suffice. *Id.*; *see also Morgan*, 551 F.3d at 1261.

III. DISCUSSION

Plaintiff argues that conditional certification of the Florida collective is appropriate because all Streamate performers are subject to very similar Performer Agreements and subject to the same pay practices (Docs. 33, 44). Defendants oppose conditional certification, contending (1) not enough other performers are interested in joining this action, (2) Plaintiff has failed to show that other Florida-based performers are similarly situated to her, and (3) the proposed class notice Plaintiff submitted to the Court without Defendants' input is inadequate (Doc. 34). The Court addresses each argument in turn.

A. Other Performers Who Desire to Opt-In

Among the documents attached to Plaintiff's motion is the Declaration of Mia Tomasello (Doc. 33-6). Tomasello declares that she "performed in Florida for Streamate from 2014 through 2021 and was not paid an hourly wage for time working in the 'free chat.'" (*Id.* at 1). She continues that she executed a Performer Agreement under which

Defendants exerted "significant control over [her] streams[,]" and she wishes to opt into Plaintiff's case (*Id*. at 2).

Defendants balk at this. They point out that six months into the case, not only is this the only declaration Plaintiff has obtained from a potential opt-in plaintiff, Tomasello is "the named plaintiff in a virtually identical action in New Jersey, and thus was already known to Plaintiff's counsel prior to the commencement of this action." (Doc. 34 at 10). Quoting *Vondriska v. Premier Mortg. Funding, Inc.*, 564 F. Supp. 2d 1330, 1334, (M.D. Fla. 2007)), Defendants argue that "'[c]ertification of a collective action and notice to a potential class is not appropriate to determine *whether* there are others who desire to join the lawsuit.'" (Doc. 34 at 9).

In reply, Plaintiff attaches the declaration of M.M., a Florida-based performer who has worked for Defendants since 2020. M.M. declares that Defendants do not pay her an hourly wage for "free chat" time, retain "a large portion of [her] tips called 'Gold' on the Streamate platform[,]" and exert "significant control" over her performances through a Performer Agreement that Defendants required her to sign (Doc. 44-4 at 3).[3] She, too, wishes to opt into Plaintiff's action.

Considering the low hurdle at the notice stage, Plaintiff has proffered enough evidence to boost her contention that other potential plaintiffs want to join this lawsuit beyond mere speculation. Tomasello is the named Plaintiff in a similar FLSA case

[3] Performers can earn money during free chats, such as when customers pay them in Gold (Streamate currency), subscription payments, or other content purchases (Doc. 34 at 3). In her declaration, Plaintiff stated that Defendants retained up to 65% of all Gold she received, which comports with M.M.'s statements (Doc. 35-5 at 2).

pending in the District of New Jersey for her time performing on Streamate there. *See Tomasello v. ICF Tech., Inc., et al.*, Civ. Action No. 23-3759-MCA-JRA (D. N.J.). While not controlling on this Court, in August 2024, the district judge in the New Jersey case conditionally certified a similar collective of New Jersey-based performers (Doc. 33-3). After that, out of a putative class of 203 other Streamate performers in New Jersey, 16 opted in before the November 12, 2024 deadline (Doc. 44 at 5). Although neither side mentions this, the time frame Tomasello streamed from Florida is outside the class period in this case. Nonetheless, the Court finds the New Jersey case persuasive evidence that other potential collective members will choose to opt into this action.

Plaintiff's counsel (who also represents Tomasello and the New Jersey Collective) declares that the number of potential collective members located in Florida is 1,218 (Doc. 33-8 at 2), and Plaintiff supports her motion with M.M.'s declaration, who worked for Defendants in Florida during the relevant time and wishes to opt in (Doc. 44-4). *See Lemming v. Sec. Forces, Inc.*, No. 8:10-cv-1469-T-23AEP, 2010 WL 5058532, at *1 (M.D. Fla. Dec. 6, 2010) ("The number of plaintiffs necessary to demonstrate a desire to opt in is not many, sometimes as few as two, three, or four."). Against this backdrop, the Court is satisfied that there is sufficient interest from other potential class members for the notice stage to proceed. *Compare Guerra v. Big Johnson Concrete Pumping, Inc.*, 2006 WL 2290512, at *3 (M.D. Fla. May 17, 2006) (finding plaintiff met the lenient standard at notice stage by attesting that one other co-worker desires to join the suit); *Campbell v. M. Ky. Cmty. Action P'ship, Inc.*, 540 F.Supp.3d 717 (E.D. Ky. 2021) (affidavits from two other employees sufficient at notice stage); *White v. Osmose, Inc.*, 204 F.Supp.2d 1309, 1313 n.2

(M.D. Ala. 2002) (affidavits from three other employees enough to affirm existence of other employees who desire to opt in); *and Harris v. Pro. Staffing – A.B.T.S., Inc.*, No. 4:09-cv-59-HLM-WEJ, 2009 WL 10664798, at *2 (N.D. Ga. Oct. 1, 2009) (same); *with Mackenzie v. Kindred Hosps. E., L.L.C.*, 276 F.Supp.2d 1211, 1221 (M.D. Fla. 2003) (sole plaintiff admitted he did not know anyone who wanted to join his suit and was unsuccessful in interesting two former colleagues to participate in action); *and Barten v. KTK & Assoc., Inc.*, No. 8:06-cv-1574-T-27EAJ, 2007 WL 2176203, at *3 (M.D. Fla. July 26, 2007) (plaintiffs' unsupported allegations that they "think" other employees would opt in were too speculative, vague, and conclusory).

B. Other Similarly Situated Performers

Next, Defendants argue that, even if Plaintiff meets the first element of conditional certification, she has not made a reasonable showing that there are other *similarly situated* potential class members (Doc. 34 at 10-18). Courts generally consider five factors at the conditional certification stage in determining whether members of a class are similarly situated: (1) whether plaintiffs held the same job title; (2) whether they worked in the same geographic location; (3) whether the alleged violations occurred during the same time period; (4) whether plaintiffs were subjected to the same policies and practices, and whether the policies and practices were established in the same manner and by the same decision maker; and (5) the degree to which the actions constituting the claims violations are similar. *Compere v. Nusret Miami, LLC*, 391 F.Supp.3d 1197, 1202 (S.D. Fla. 2019). No single factor is dispositive. *Id*.

Defendants' main argument is that they do not control what, when, or how their performers stream, and performers can make significantly more than minimum wage. But whether Defendants misclassify their performers as independent contractors rather than employees and whether performers make at least a minimum hourly wage are questions that go directly to the merits of Plaintiff's case. *Jackson v. Fed. Nat'l Mortg. Ass'n*, 181 F.Supp.3d 1044, 1051 (N.D. Ga. 2016) ("The focus of the court's inquiry at this stage is not on whether there has been an actual violation of law, but on whether the proposed plaintiffs are similarly situated with respect to their allegations that the law has been violated."). The relevant question at the notice stage is whether the class members are similarly situated in ways essential to the Court's decision on the merits. *See Grayson*, 79 F.3d at 1096 (clarifying that plaintiffs need only show that their positions are similar, not identical, to those held by putative class members) (citation omitted).

Defendants submit two "happy camper" declarations from Streamate performers who typically stream from Florida (Docs. 35-36). They state they set their own per-minute rate in paid chats, make money in free chats, and set their own working hours. One happy camper declares she has performed on Streamate for nine years and makes between $20 and $100 per hour (Doc. 35 at ¶ 4), while the other declares she has been a Streamate performer for 12 years and makes up to $200 per hour (and can do so even in a free chat) (Doc. 36 at ¶ 4). Both state that Defendants do not tell them how to perform. Although the Court considers the happy camper declarations, it is not persuaded by them. *See Metzler v. Med. Mgm't Int'l, Inc.*, No. 8:19-cv-2289-T-33CPT, 2020 WL 1674310, at *5 (M.D. Fla. Mar. 4, 2020) ("[T]his Court is not swayed by [defendant's] submission of

thirty-five 'happy camper' affidavits . . . . [T]he Court's function at this stage of conditional certification is not to perform a detailed review of individual facts from employees hand-picked by [defendant]. Those questions of breadth and manageability of the class are left until the second stage analysis following the receipt of forms from all opt-in plaintiffs.") (quoting *Creely v. HCR Manorcare, Inc.*, 789 F.Supp.2d 819, 839 (N.D. Ohio 2011)).

Defendants and their happy campers overlook the fact that all performers execute a Performer Agreement. According to Plaintiff, Defendants have produced nine versions of their standard agreement in this and the New Jersey litigation, all of which appear to be substantially the same (Doc. 44-2).[4] At its root, the Performer Agreement defines the relationship between performers and Defendants, classifies every performer as an independent contractor subject to the same compensation structure (i.e., no hourly compensation for time in free chats), and includes the rules a performer must follow to remain on the platform—all evidence common to the collective.

Defendants argue that the rules and restrictions in its standard Performer Agreement merely track "federal, state, and local laws that apply to any content host on the Internet, particularly those that permit adult content." (Doc. 34 at 5). According to Defendants, this cuts against an employment relationship. To be sure, Eleventh Circuit precedent suggests that employee status turns on employer control rather than employer oversight of control by a regulatory body. *See N.L.R.B. v. Assoc. Diamond Cabs, Inc.*, 702

[4] There is an arbitration clause in two versions, discussed below (Doc. 44-2 at 33, 39).

F.2d 912, 920 (11th Cir. 1983).[5] But this goes to the merits of Plaintiff's case and is an inappropriate inquiry at the notice stage.

Defendants change tack and emphasize that they regularly update their standard Performer Agreement. Between April 1, 2020, and September 14, 2021, their standard agreement included a mandatory arbitration clause and a waiver of class and collective arbitration actions (Doc. 34 at 7). Meanwhile, Plaintiff's claims are not subject to arbitration because she executed an earlier version of the Performer Agreement that did not include the clause (Doc. 33-4). The implication is that Plaintiff is not similarly situated to potential class members who signed arbitration clauses.

Neither side cites a case that holds that the existence of a performer (or performers) who agrees to arbitrate wage disputes destroys the certificability of a plaintiff's proposed class at the notice stage (*see* Doc. 34 at 17-18; Doc. 44 at 4, fn. 1). Instead, the question is whether the Court should authorize notice to all performers within the class or simply to a subset of those performers within the class who did not sign arbitration agreements. *See Tidwell v. BWW S. Mgm't, Inc.*, No. 5:23-cv-71-AW-MJF, 2023 WL 11762872, at *3 (N.D. Fla. Sept. 5, 2023) (citing *JPMorgan Chase & Co.*, 916 F.3d 494, 503 (5th Cir. 2019) ("BWW is mistaken, though, that the presence of *any* employee who agreed to arbitrate wage disputes means that notifying those who did not is improper.")).

The parties trade district court cases on both sides of the issue, and the Eleventh Circuit has not addressed it. *Compare Tidwell*, 2023 WL 11762872, at *4 (narrowing class

[5] If Plaintiff can show pervasive control by Defendants that exceeds the scope of controlling regulations by a significant degree, courts consider this evidence of an employment relationship. *Id.* (citations omitted).

of potential plaintiffs to those who worked at the defendant restaurant in the past three years and did not agree to arbitrate wage claims), *with Bennett v. BT's on the River, LLC*, No.1:22-cv-20772-SCOLA/DAMIAM, 2023 WL 2838076, at *10-11 (S.D. Fla. Jan. 31, 2023), *report and recommendation adopted*, 2023 WL 2708825 (S.D. Fla. Mar. 30, 2023) (citations omitted) ("[W]hether putative plaintiffs are subject to arbitration agreements is a matter that should be addressed separate and apart from the determination of whether Plaintiffs have satisfied their burden at the notice stage."). At bottom, courts are concerned that notifying performers who cannot join the class – such as individuals who signed arbitration agreements – needlessly stirs up litigation. *See Tidwell*, 2023 WL 11762872, at *2 (citing *JPMorgan Chase*, 916 F.3d at 502 & n.16). This concern is less pressing here. Defendants have produced nine versions of their Performer Agreement; two contain mandatory arbitration clauses (Doc. 44-2 at 33, 39). But other than stating that their standard agreement between April 2020 and September 2021 included an arbitration clause, Defendants have not matched any agreement to any potential class member, either by name or by an estimate of the number of Florida-based performers who signed agreements during that date range. Defendants are essentially asking the Court to validate arbitration agreements but have not identified performers who signed them or provided copies of the performers' executed agreements. *Compere v. Nusret Miami, LLC*, No. 1:19-cv-20277, 2019 WL 13139740, at *3 (S.D. Fla. Nov. 15, 2019) (denying defendants' request to exclude potential class members who signed arbitration agreements from receiving notice, where defendants did not identify employees who agreed to arbitrate or provide executed agreements); *cf. McGuire v. Intelident Sols., LLC*, 385 F.Supp.

3d 1261, 1265 (M.D. Fla. 2019) (finding that the 231 employees who defendants said signed arbitration agreements should not receive notice where "there [was] no challenge to the validity of the arbitration agreements some of the [potential plaintiffs] signed."). There are insufficient facts in the record regarding the validity of the arbitration agreements.

Although it may be appropriate under different facts to notify only those potential class members not subject to a mandatory arbitration clause, it is inappropriate under the facts presented here. If, after the notice stage, Defendants move to compel arbitration as to individual opt-in plaintiffs who signed arbitration agreements, the Court will consider the validity of the arbitration agreements then.[6] At this stage, however, Plaintiff has made a reasonable showing that there are other similarly situated potential class members.

C. Adequacy of Notice

Defendants argue that Plaintiff's proposed notice form is premature and defective and attach a redlined version. Plaintiff does not address this argument. The Court directs the parties to file a proposed joint notice and plan by February 4, 2025. If the parties cannot agree on the notice or plan, they can each file their own by the same deadline.

[6] According to Defendants, it is conceivable that potential plaintiffs exist who list a Florida address but stream performances from outside the state (Doc. 34 at 10). They argue that the Court is precluded from asserting personal jurisdiction over Defendants for claims asserted by out-of-state, opt-in plaintiffs that do not arise from Defendants' contacts with Florida. This argument is premature and speculatory. Defendants cite *Brown v. MUY Pizza-Tejas, LLC*, No. 1:22-cv-1816-MLB, 2024 WL 3489201, at *4 (N.D. Ga. Jul. 18, 2024), an unpublished, out-of-jurisdiction decision in which a district court granted conditional certification to a class of Georgia pizza delivery drivers then denied the defendant's motion to dismiss filed after drivers who neither lived nor worked in Georgia opted into the class. In the end, the *Brown* court found that the out-of-state, opt-in plaintiffs established the court's personal jurisdiction over the defendant under Rule 4(k)(2).

IV. CONCLUSION

It is ORDERED:

(1) Plaintiff's Motion for Conditional Certification Pursuant to 29 U.S.C. § 216(b) is **GRANTED in part** as described above; and

(2) The parties shall file a joint proposed notice and notice plan, or separate notices and notice plans, by **February 5, 2025**.

ORDERED in Tampa, Florida, on January 16, 2025.

SEAN P. FLYNN
UNITED STATES MAGISTRATE JUDGE