IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ERIC MICHAEL ROSEMAN, et al., individually and on behalf of others similarly situated, **Plaintiffs,** **v.** **BLOOMBERG L.P.,** **Defendant.**	**Case No. 14-CV-2657 (TPG) (KNF)**

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANT'S FLSA EXEMPTION DEFENSES

Respectfully Submitted,

by

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INTRODUCTION[1]

Plaintiffs are Analytics Representatives,[2] who staff Bloomberg's help desk[3] in New York and California providing technical support to Bloomberg's customers by answering questions about the Bloomberg Terminal.[4] 56.1 ¶¶ 12-19, 39-47, 57-61, 64-74[5]. Requests for technical support come to the Analytics Reps as chats through Bloomberg's instant messaging system, which is a function bundled with every Bloomberg Terminal. 56.1 ¶ 15. When a user hits the "help" button twice on the Bloomberg Terminal, it opens up a help chat with Analytics Reps. 56.1 ¶¶ 10, 14. Providing technical support by answering individual user questions regarding the Bloomberg Terminal is undoubtedly the most important job duty Plaintiffs perform, and the job duty of principal value to Bloomberg, as that is what Bloomberg hires ADSK Reps to do. 56.1 ¶¶ 12-19, 37-47, 57-61, 64-74. This help desk function is what Analytics Reps do for the vast majority of their eight-hour shift and their success in responding to help requests is the primary basis upon which their performance is measured and upon which their individual bonuses are calculated. 56.1 ¶¶ 39-40, 66-74, 85-101.

Bloomberg has Analytics Help Desks in various cities throughout the world (including New York City, Sao Paolo, San Francisco, Tokyo, Hong Kong, Mumbai, Singapore, Beijing, and

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[1] All facts in support of Plaintiffs' Motion for Partial Summary Judgment as to Defendant's FLSA Exemption Defenses are separately set forth in Plaintiffs' Local Rule 56.1 Statement of Undisputed Material Facts and are not repeated in their entirety here.

[2] Analytics Representatives are also known as "Reps", "ADSK Reps", "Help Desk Reps" and "Customer Service Reps." 56.1 ¶¶ 11, 13.

[3] Bloomberg repeatedly refers to Analytics as its "help desk." *Id*.

[4] The "Bloomberg Terminal" is the proprietary computer software which allows financial professionals and others to access Bloomberg's financial data streams, and to tally, filter, manipulate, or show this data in a variety of different ways. 56.1 ¶ 6.

[5] References to the "56.1" are to Plaintiffs' Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1.

London) and it provides rolling support 24 hours per day, 7 days per week. 56.1 ¶¶ 9, 18. There are currently approximately 305 Analytics Reps in the U.S.. 56.1 ¶ 19.

Bloomberg hires most ADSK Reps straight out of college and the ADSK position is considered an entry level position at Bloomberg. 56.1 ¶ 38. The Analytics Rep position does not require an advanced degree or a degree in business administration, management, finance, computer science or the like. *Id*. Before they begin answering help requests, Reps are giving 5 weeks of generalist training on customer interaction and technical solutions. 56.1 ¶¶ 54, 55. Plaintiffs answer help chats using a variety of resources such as Frequently Asked Questions (FAQ) pages, historic chats, Help Pages within the Bloomberg Terminal, or by consulting with other Reps, specialists and Team Leaders. 56.1 ¶¶ 48-52. Reps handle up to 6 chats at a time and are expected to respond to chats in less than 3 minutes and to spend an average of 20 minutes per chat. 56.1 ¶¶ 45, 98, 99.

Reps regularly work more than 40 hours per workweek, both at and outside the office. Bloomberg pays Reps a salary and an annual bonus. It never pays them time and one-half premium for hours worked over 40 in a workweek. From its inception up through 2013 (when numerous lawsuits were filed and the U.S. Department of Labor resolved an audit of the entire company), Bloomberg failed to pay overtime premium pay to any class of employees except interns. 56.1 ¶ 2. Since then, Bloomberg has reclassified more than 30 positions. 56.1 ¶ 3. The Analytics Reps at issue in this case were employed by Bloomberg in either New York City or San Francisco. 56.1 ¶ 12. This is a wage and hour class action in which Plaintiffs assert that Bloomberg failed to pay them time and one-half as premium overtime compensation as required by the federal FLSA, New York State Labor Law ("NYLL"), and the California Labor Code

("CLC"). Defendant Bloomberg has asserted 21 separate affirmative defenses including that Plaintiffs are exempt from overtime based on their primary job duty. 56.1 ¶ 25.

Bloomberg asserts the affirmative defense that Analytics Reps are either "administratively exempt" or exempt under the computer professional exemptions. 56.1 ¶ 25. Bloomberg bears the "heavy" burden of proof to show that any exemptions from the FLSA, which are to be narrowly construed, apply "plainly and unmistakably" to Plaintiffs. Whether Plaintiffs are exempt from the FLSA under 29 U.S.C. § 213(a)(1) depends on their "primary job duty." 29 C.F.R. §§ 541.200, 541.400. However, Bloomberg has both refused to state what it believes the Plaintiffs' primary duty is or is not in response to Plaintiffs' discovery and has testified that it has never even considered what Plaintiffs' primary duty is. 56.1 ¶¶ 22-36. Because Bloomberg has refused to state what Plaintiffs' primary duty is or is not in discovery, which is now closed, Bloomberg cannot sustain its burden of proof on its affirmative defense that Plaintiffs are exempt from overtime pay, as it cannot show that an unknown primary job duty causes Plaintiffs to plainly and unmistakably to fall within any exemptions. Consequently, Plaintiffs are entitled to summary judgment.[6]

Furthermore, Bloomberg cannot sustain its burden of proof on its affirmative exemption defense based on Plaintiffs' primary job duty because the undisputed facts show that Plaintiffs' primary job duty – as demonstrated by the Plaintiffs - does not fit plainly and mistakably under any exemption. The undisputed facts show that Analytics Reps are primarily employed by Defendant to provide technical support responding to customer requests for assistance regarding how to use proprietary Bloomberg computer software operating on the Bloomberg Terminal.

[6] Should the Court deny summary judgment, Plaintiffs will need discovery regarding Bloomberg's position of what Plaintiffs' primary job duty is that has not been allowed during the discovery period, which Bloomberg refused to extend.

56.1 ¶¶ 12-19, 39-47, 57-61, 64-74. In doing so, Plaintiffs did not primarily perform a duty directly related to the management or business operations of Bloomberg or its customers. Plaintiffs did not primarily perform work in functional areas like accounting, purchasing, personnel management, computer network administration, or legal compliance. 56.1 ¶¶ 102-105. And Plaintiffs were not employed as computer professionals. 56.1 ¶¶ 106-111. Further, they did not in their primary duty exercise discretion and independent judgment with respect to matters of significance, as all of the technical support inquiries Plaintiffs answered by chat were regarding the functionalities of the Bloomberg terminal. 56.1 ¶¶ 12-19, 39-53, 57-61, 64-74, 102-105. In providing technical support by answering user questions about the functions in the Bloomberg terminal, Plaintiffs did not have the authority to formulate, affect, interpret or implement management policies or operating practices; they did not have the authority to negotiate and bind Bloomberg on significant matters; nor were they involved in planning Bloomberg's long- or short-term business objectives.

Technical support help desk employees such as Plaintiffs are not "administratively exempt" nor do they fall within the computer exemption. Consequently, the courts and the United States Department of Labor ("USDOL") have without exception held that this type of primary job duty does not fit under any FLSA exemption. The Court should accordingly grant Plaintiffs' motion for partial summary judgment.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). Substantive law determines

which facts are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Here, there is no genuine issue as to the material facts that show that Bloomberg cannot sustain its burden of proof on its affirmative exemption defense because Bloomberg has refused to state what Plaintiffs' primary job duty is. Alternatively, Bloomberg cannot sustain its burden of proof on its affirmative exemption defense because there is no genuine issue as to the material facts that show Plaintiffs are not exempt from overtime pay under the administrative and/or computer exemptions of the FLSA. By stating that it does not know what Plaintiffs' primary job duty is and does not know what Plaintiffs' primary job duty is not, Bloomberg does not dispute Plaintiffs' identification of Plaintiffs' primary job duty as answering user questions regarding functions contained in the Bloomberg Terminal. And there is no genuine issue as to the material facts that show that Plaintiffs' primary job duty was the performance of non-exempt help desk work. Thus, Plaintiffs are entitled to summary judgment.

ARGUMENT

I. Summary Judgment Should Be Granted to Plaintiffs Because Bloomberg Has Refused to State What Plaintiffs' Primary Job Duty Is

A. As a remedial statute the FLSA is broadly applied and its exemptions should be construed narrowly

The Supreme Court, this Circuit, and this District recognize that the purpose of the FLSA is to provide "specific minimum protections to individual workers and to ensure that each employee covered by the Act . . . receive[s] '[a] fair day's pay for a fair day's work' and [is] protected from 'the evil of "overwork" as well as "underpay."'" *Kavanagh v. Grand Union Co.*, 192 F.3d 269, 271 (2d Cir. 1999); *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728,

739 (1981). In passing the FLSA, Congress intended to address long working hours that "are detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." *Barrentine,* 450 U.S. at 739. To protect against excessive hours of work and also to spread employment across the workforce, the FLSA requires that employers pay employees for hours in excess of 40 in a week "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207 (a)(1); 29 U.S.C. § 202; *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948) (purpose of overtime provisions of the FLSA is to spread employment); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945) (same).

The FLSA's overtime rules, "like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. Such a statute must not be interpreted or applied in a narrow, grudging manner." *Giles v. City of New York*, 41 F. Supp. 2d 308, 316 (S.D.N.Y. 1999) (quoting *Tenn. Coal, Iron & R.R. Co., et al. v. Muscoda Local No. 123, et al.*, 321 U.S. 590 (1944)); *see also Tony & Susan Alamo Found. v. Sec'y of Labor,* 471 U.S. 290, 296 (1985); *Bowrin v. Catholic Guardian Soc.*, 417 F. Supp. 2d 449, 457 (S.D.N.Y. 2006). "Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." *A.H. Phillips v. Walling,* 324 U.S. 490, 493 (1945).

B. The administrative and computer exemptions of the Fair Labor Standards Act are affirmative defenses for which Bloomberg bears the "heavy" burden of proof.

"[B]ecause the FLSA's exemptions are affirmative defenses to minimum wage and overtime claims, an 'employer bears the burden of proving that its employees fall within an exempted category of the Act.'" *Jeong Woo Kim v. 511 E. 5th St., LLC*, 985 F. Supp. 2d 439, 444

(S.D.N.Y. 2013), *quoting Martin v. Malcolm Pirnie, Inc.,* 949 F.2d 611, 614 (2d Cir.1991); *see also Clougher v. Home Depot U.S.A., Inc.*, 696 F. Supp. 2d 285, 289 (E.D.N.Y. 2010) ("In the context of overtime wage claims, as here, application of the 'executive exemption' is an affirmative defense, which any defendant employer bears the burden of proving by a preponderance of the evidence."), *citing Bilyou v. Dutchess Beer Distribs., Inc.,* 300 F.3d 217, 222 (2d Cir. 2002). The burden is "a heavy one," *see Ryduchowski v. Port Auth. of New York & New Jersey*, 203 F.3d 135, 143 (2d Cir. 2000) (discussing exemptions to the Equal Pay Act provisions of the FLSA), as statutory exemptions are "narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 150 (2d Cir. 2010) (citations omitted); *Henderson v. Transp. Grp., Ltd.*, 09 CIV. 7328 (DLC), 2010 WL 2629568, *4 (S.D.N.Y. July 1, 2010) (Cote, J). Thus, it is Bloomberg's heavy burden of proof to show by a preponderance of the evidence that Plaintiffs meet all requirements to qualify "plainly and unmistakably" under the administrative and/or computer exemptions of the FLSA.

C. Both defenses depend upon a "primary duty" matching regulatory criteria

Both the Administrative Exemption and the Computer Exemption that Bloomberg claims apply to Plaintiffs depend on what the allegedly exempt employee's "primary duty" is. The Administrative exemption applies to employees:

> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200. The Computer exemption applies to computer employees whose primary duty consists of:

> (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
>
> (2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
>
> (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
>
> (4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

29 C.F.R. § 541.400.[7] US Department of Labor regulations[8] define "primary duty" as follows:

> (a) To qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. *The term "primary duty" means the principal, main, major or most important duty that the employee performs.* Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

[7] The computer exemption under the DOL's regulations is the same as the computer exemption under the statute. *Compare* 29 C.F.R. § 541.400 *with* 29 U.S.C. § 213(a)(17).

[8] Congress conferred upon the USDOL the authority to "define and delimit" the administrative and computer exemptions. 29 U.S.C. § 213(a)(1). Because it is the USDOL's job to define the exemptions, the USDOL's regulations, interpretations and definitions are entitled to *Chevron* deference. *Saunders v. City of New York*, 594 F. Supp. 2d 346, 354 (S.D.N.Y. 2008) ("The U.S. Department of Labor ('DoL') has issued voluminous regulations to facilitate proper compliance with the overtime provisions of FLSA. Regardless of whether these rules are labeled as 'regulations' or 'interpretations,' they are entitled to *Chevron* deference."); *Doyle v. City of New York*, 91 F. Supp. 3d 480, 484 (S.D.N.Y. 2015) (as the DOL is tasked with administering the FLSA, and specifically tasked with promulgating regulations to implement exceptions, its definitions are entitled to *Chevron* deference).

29 C.F.R. § 541.700 (emphasis added). Although the percentage of an employee's time spent performing exempt versus nonexempt work is an "important" factor, it is not dispositive. *Martinez v. Hilton Hotels Corp.*, 930 F. Supp. 2d 508, 523-24 (S.D.N.Y. 2013); *see also Dalheim v. KDFW–TV*, 918 F.2d 1220, 1227 (5th Cir. 1990) ("the employee's primary duty will usually be what she does that is of principal value to the employer, not the collateral tasks that she may also perform, even if they consume more than half her time"). Thus, to succeed on its affirmative defense, Bloomberg must prove by a preponderance of the evidence that the principal, main, major or most important duty performed by Plaintiffs match those described by the administrative or computer exemption.

D. Bloomberg cannot dispute Plaintiffs' assertion of what Plaintiffs' primary duty is.

Bloomberg has refused to identify what Plaintiffs' primary job duty is (or is not) in response to Plaintiffs' discovery requests. 56.1 ¶¶ 22-36. Interrogatory No. 12 of Plaintiffs' Second Set of Interrogatories requested that Bloomberg identify the primary job duty of each Plaintiff. 56.1 ¶ 28. Bloomberg refused to say what it views as Plaintiffs' primary job duty and thus it refused to respond to the interrogatory. 56.1 ¶ 29.

When Plaintiffs first raised this issue with the Court, Magistrate Fox ruled that while he would not order Bloomberg to identify Plaintiffs' primary job duty in response to an interrogatory served at the commencement of discovery (see Local Civil Rule 33.1), Plaintiffs could explore the issue during deposition. 56.1 ¶ 30. Accordingly, Plaintiffs included topics related to Plaintiffs' primary job duty in its 30(b)(6) deposition notice to Bloomberg. 56.1 ¶ 31. Bloomberg objected to the topics but responded that it would produce Chris Saven "to testify generally as to ADSK Representatives' job duties in the United States during the Relevant Period" and Kate Wheatley to "to testify as to the classification of ADSK Representatives in the

United States as exempt during the Relevant Period." 56.1 ¶¶ 32, 33. But when asked during the 30(b)(6) deposition of Ms. Wheatley, Bloomberg again refused to state what Plaintiffs' primary job duty is, or even to state what it is not:

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30(b)(6) deposition of Bloomberg (Wheatley) at 69:21 to 70:19; 56.1 ¶¶ 35, 36. At the close of the deposition, the parties met and conferred on the matter, with Plaintiffs asking Bloomberg to advise them if Bloomberg intended to take the position that Mr. Saven, as Bloomberg's 30(b)(6) designee on the topic, need not answer questions concerning the job duty Bloomberg considered to be ADSK Reps' primary duty. 56.1 ¶ 36. Bloomberg's counsel suggested that Bloomberg believed such questions to go to Bloomberg's legal position in the litigation and was thus protected by the attorney-client privilege. 56.1 ¶ 36. Plaintiffs then requested, by email, that

Bloomberg confirm its position in writing prior to Mr. Saven's deposition. 56.1 ¶ 36. Bloomberg's counsel responded two days prior to Mr. Saven's deposition that, while Mr. Saven would be able to testify about ADSK Reps' primary duty under a lay definition of that term, they would object to any questions to the extent that the questions asked about legal counsel's analysis of Reps' primary duty as a legal term. 56.1 ¶ 36. Subsequently, at the 30(b)(6) deposition of Mr. Saven, Bloomberg again refused to state what Plaintiffs' primary job duty is:

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6 Q. And if I were to ask you to
7 identify a primary responsibility for a -- for
8 Analytics Reps, is there a primary duty
9 different from the one identified by Lieb
10 Lappen as to the Analytics Department in this
11 document?[9]
12 MR. LAMPE: Objection to the extent
13 it calls for a legal conclusion or legal
14 analysis.
15 A. Everybody works answering
16 questions, but we've never, you know,
17 identified or tried to designate one or more
18 being important than the other, and I don't
19 know what she's referring to or how that
20 relates to Clark's -- how she's evaluating
21 Clark at this particular moment in time.

30(b)(6) deposition of Bloomberg (Saven) at 236:6 to 236:21.

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15 Q. Okay. Taking training isn't the
16 primary duty of anybody in the Analytics
17 Department, is it?
18 MR. LAMPE: Objection to the extent
19 it calls for a legal conclusion. Objection
20 to the extent it misstates the testimony.
21 You can answer.
22 A. We haven't identified the primary

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23 duty so I can't state that.
24 Q. Well, even if you haven't, I'm
25 asking you here today to define the primary
267
2 duty.
3 MR. LAMPE: Objection to the extent
4 it calls for a legal conclusion or legal
5 analysis.
6 MR. GETMAN: And I'm asking for a
7 legal analysis.
8 MR. LAMPE: Well, then, I instruct
9 him not to provide a legal analysis. And
10 he's not designated --
11 MR. GETMAN: Actually not -- not a
12 legal analysis. I'm asking him to provide
13 the legal position of Bloomberg.
14 MR. LAMPE: He's not designated for
15 that and I won't let him do that. That's
16 not a proper use of a 30(b)(6) deposition,
17 as the case law we gave you demonstrates.

30(b)(6) deposition of Bloomberg (Saven) at 266:15 to 267:17; 56.1 ¶¶ 23, 27, 35, 36.

Bloomberg's refusal to identify what it believes Plaintiffs' primary job duty is (or is not) defeats the most basic purposes of the discovery process. One purpose of discovery is to ascertain the position of the adverse party on the controverted issues. *S.E.C. v. Cymaticolor Corp.*, 106 F.R.D. 545, 549 (S.D.N.Y. 1985), *citing Baim & Blank, Inc v. Philco Distributors, Inc*, 25 F.R.D. 86, 87 (E.D.N.Y. 1957) ("The purpose of the deposition-discovery procedure is not only for the ascertainment of facts, but also to determine what the adverse party contends they are, and what purpose they will serve, so that the issues may be narrowed, the trial simplified, and time and expense conserved.").

An employee's primary duty is the one most important to the business's successful operation. *See, Donovan v. Burger King Corp.*, 675 F.2d 516, 521 (2d Cir. 1982). Thus, the employer's view of the job function within its organization, while not determinative, must be considered. Plaintiffs are thus entitled to know what Bloomberg considers to be the primary duty

– and ought to be able to test the *bona fides* of any such allegation. Yet, Bloomberg has sandbagged Plaintiffs by refusing to state what it considers Plaintiffs' primary duty to be.

In *Muller v. McGraw-Hill, Inc.*, No. 84 CIV. 7757-CSH, 1986 WL 1170 (S.D.N.Y. Jan. 23, 1986), the plaintiff employee brought an action pursuant to the Age Discrimination in Employment Act (ADEA) against his former employer. The defendant employer raised the affirmative defense that the employee was "in a bona fide executive, or a high policy making position" and thus was not covered by the ADEA. *Id.* at *1. Accordingly, plaintiff asked, via interrogatory, for the employer to identify all policies that the employee made and to describe the employee's role with respect to the making of such policy. *Id.* In response to the interrogatory, the employer referred the employee to its answer to the complaint in which it summarized the employee's job responsibilities and to the employee's own Monthly Operations Reports. *Id.* The employee then moved to compel the employer to identify the specific policies it claims the employee made or played a significant role in making. *Id.*

In reversing the Magistrate Judge's denial of the motion to compel, this Court found that the employer's "conclusory assertion" that the employee had policy making responsibilities in a couple of broadly defined areas was an inadequate answer to that question. *Id.* The court similarly found that the proffer of certain business records was inadequate. *Id.* at *2. This Court found that it was unfair to expect the employee to speculate as to which of plaintiff's various activities, as summarized in the reports, were considered by the employer to be policy making activities. *Id.* The Court noted that the point of this discovery was to inform the employee, before trial, what policies *the employer believed* the employee made and what role he played in making them, and to seek out the facts on which the employer based its conclusory statement that the employee had a high policy making position. *Id.* The Court also noted that, because the burden

of proof was on the employer to show that the employee was exempt from the ADEA, the employer would have to do precisely what the employee was asking it to do in order to prepare its own defense, i.e., decide what specific policies it believed the employee made, determine what role he played in making those policies and assemble its proof in support of its contentions. *Id.* The Court noted that failure of the employer to identify particular policies in response to the interrogatory would be grounds for precluding that evidence at trial.

Plaintiffs and the Court are entitled to know what Bloomberg asserts is the specific *primary job duty* of each Plaintiff in order to properly litigate the exemption issue. Requisitions and training materials do not unequivocally state what the employer views as the primary duty – they generally state a variety of functions and they require interpretation as to what is primary. Bloomberg has thus concealed the facts on which it makes its conclusory assertion that Plaintiffs are exempt from the FLSA.

If Bloomberg has gone through the entire discovery period without stating the basis for its exemption defense, then it cannot say so for the first time on summary judgment or at trial. Taking a position on summary judgment different from that in discovery is entirely improper. *Palazzo v. Corio,* 232 F. 3d 38, 43 (2d Cir. 2000) (On summary judgment "a party who has testified to a given fact in his deposition cannot create a triable issue merely by submitting his affidavit denying the fact."); *Mack v. United States,* 814 F. 2d 120, 124 (2d Cir. 1987) ("It is well settled in this circuit that a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment."); *Perma Research & Development Co. v. Singer Co.,* 410 F. 2d 572, 578 (2d Cir. 1969) ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a

procedure for screening out sham issues of fact."); *see also Reilly v. Natwest Markets Grp. Inc.*, 181 F.3d 253, 268 (2d Cir. 1999) (deposition testimony given by 30(b)(6) witness is binding on corporation). Accordingly, because Bloomberg is precluded from offering any evidence to support its "heavy" burden of proof on the exemption issue, Plaintiffs' motion for partial summary judgment should be granted.

E. Bloomberg testified it never considered what Plaintiffs' primary duty is.

In addition to refusing to state what Plaintiffs' primary job duty is, Bloomberg has also testified that it has never analyzed what Plaintiffs' primary duty is. 56.1 ¶¶ 23, 24, 27, 35, 36. During the 30(b)(6) depositions of Bloomberg, L.P., Bloomberg's designated witnesses, Kate Wheatley and Christopher Saven, testified repeatedly on behalf of Bloomberg that it had never identified or done any analysis of what Plaintiffs' primary job duty is:

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30(b)(6) deposition of Bloomberg (Wheatley) at 69:9 to 69:20. And Bloomberg through former Global Head of Analytics, Mr. Saven, testified:

232
15 Q. Okay. And what is the primary
16 duty for -- for an Analytics Rep?
17 A. We've never identified --
18 MR. LAMPE: Hang on.

19 Object to the extent it calls for a
20 legal conclusion.
21 You can answer.
22 A. I don't know what you mean. We
23 never identified a primary duty.[10]***
234
9 Q. Okay. Do you see the first line on
10 Page 3 under "Manager Comments" which says,
11 "The primary responsibility of the Analytics
12 Department is to provide realtime, 24-hour
13 global support via IB and phone interaction
14 for Bloomberg's clients"?
15 A. I see that.
16 Q. Is that accurate in your view?
17 MR. LAMPE: Let me first of all say
18 that if you're going to ask him questions
19 about this document, you should give him as
20 much time as he needs to review it. I
21 don't think it's fair that you ask --
22 MR. GETMAN: Absolutely.
23 Q. I'm asking about just one line,
24 but you're welcome to take the time you need
25 to review it.
235
2 MR. LAMPE: To the extent you need
3 it, you should familiarize yourself with
4 the document.
5 A. Yes, I mean I've never seen this
6 document before. I didn't write this
7 document. I didn't provide feedback on this
8 document. So I would say that.
9 And your question is?
10 Q. Is that statement accurate?
11 A. I don't know the frame of
12 reference or the lens that she's writing that
13 in regards, and I don't ever recall us
14 identifying a primary responsibility.
15 Q. Okay. And is it inaccurate --
16 A. Again --
17 Q. -- in your view?
18 A. We've never identified a primary
19 responsibility.
20 Q. Okay. So you're not aware -- is

[10] Bloomberg also testified that it did not know Reps' "core responsibilities" were. 30(b)(6) deposition of Bloomberg (Saven) at 232:24 to 233:9.

21 there a primary responsibility different than
22 the primary responsibility that is identified
23 by Lieb Lappen in this "Manager Comments"?
24 MR. LAMPE: Object to the extent it
25 calls for a legal conclusion.
236
2 A. There's all kinds of
3 responsibilities that an Analytics employee
4 has and I don't know and we've never
5 identified a primary one.

30(b)(6) deposition of Bloomberg (Saven) at 232:15 to 236:5. *See also* 30(b)(6) deposition of Bloomberg (Saven) at 249:13 to 250:2 (same); 56.1 ¶¶ 23, 24, 27, 35, 36. Bloomberg cannot now claim that a primary job duty that it has never identified falls under the administrative or computer exemption of the FLSA. If Bloomberg has never done an analysis of and so does not even know what Plaintiffs' primary duty is (or is not), and in discovery it refuses to state what Plaintiffs' primary job duty is, Bloomberg cannot now assert that an entirely undisclosed primary job duty matches the duties set forth in the relevant regulations. Moreover, Bloomberg cannot now contest Plaintiffs' assertion that Plaintiffs' primary job duty is to answer user questions about functions within the Bloomberg Terminal.

F. Bloomberg's refusal to identify what it considers to be Plaintiffs' primary job duty cannot be insulated from discovery by attorney client privilege.

Bloomberg may argue that it did not need to disclose what it considered to be Plaintiffs' primary job duty during its deposition because such information was learned through conversation with counsel. But this objection would be invalid. Attorney-client privilege protects only the disclosure of "confidential *communications* made for the purpose of obtaining legal advice." *Vingelli v. United States Drug Enforcement Agency,* 992 F.2d 449, 454 (2d Cir. 1993) (emphasis added). It does not protect disclosure of the underlying *facts* by those who communicated with the attorney:

> [T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

Upjohn Co. v. United States, 449 U.S. 383, 395–96 (1981), *quoting City of Philadelphia, Pa. v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962). The privilege should be strictly confined within the narrowest possible limits underlying its purpose. *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir. 1991).

Courts have consistently held that, in the context of a 30(b)(6) deposition, the privilege does not apply to facts even though they were communicated to a corporation's 30(b)(6) witness by an attorney in the preparation of that witness. *See, e,g.*, *Orchestratehr, Inc. v. Trombetta*, No. 3:13-CV-2110-P, 2015 WL 11120526, at *6–7 (N.D. Tex. July 15, 2015) ("[I]t is improper to instruct a deponent designated to give Rule 30(b)(6) corporate representative testimony not to answer a question asking for facts that are responsive to the noticed topics based on attorney-client privilege because the deponent learned the facts from the company's attorney."); *Sprint Commc'ns Co., L.P. v. Theglobe.com, Inc.*, 236 F.R.D. 524, 529 (D. Kan. 2006), *citing Sec. Ins. Co. of Hartford v. Trustmark Ins. Co.*, 218 F.R.D. 29, 33 (D. Conn. 2003) ("When a corporation produces an employee under Fed. R. Civ. P. 30(b)(6) to testify to corporate knowledge, the employee must provide responsive underlying factual information even though such information was transmitted through a firm's corporate lawyers.").

Bloomberg's position on what Plaintiffs' primary job duty is, while perhaps informed by communications with counsel, is not a communication itself but a fact. *See Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) ("An opinion is a fact, and it may be a very relevant fact; the expression of an opinion is the assertion of a belief…"); *Songbird Jet Ltd., Inc.*

v. Amax, Inc., 581 F. Supp. 912, 925 (S.D.N.Y. 1984) ("[T]he corporate state of mind [is] a fact capable of ascertainment."). *See also Auto. Holdings, L.L.C. v. Phoenix Corners Portfolio*, L.L.C., No. CV0901843PHXJATPHX, 2010 WL 1781007, at *4 fn 3 (D. Ariz. May 4, 2010), *citing* Restatement (First) of Contracts § 474 (1932) ("[T]hough fact and opinion are often contrasted, an opinion is a fact and a statement of opinion is a statement of fact, namely that the person making the statement holds that opinion."). Because the fact of Bloomberg's contention is critical to the defense and Magistrate Fox directed the parties to explore the defense in deposition, Bloomberg was required to testify about this fact during the 30(b)(6) deposition. *See Johnson v. Samsung Elecs. Am., Inc.*, No. CIV.A. 10-1146, 2011 WL 2847696, at *5 (E.D. La. July 15, 2011),*citing Brazos River Authority v. GE Ionics Inc.,* 469 F. 3d 416, 433 (5th Cir. 2006) ("[C]orporations are capable of having an opinion. A Rule 30(b)(6) designee does not give his personal opinions, but presents the corporation's 'position' on the topic."); *Kelley v. Provident Life & Accident Ins. Co.,* No. 04cv807–AJB (BGS), 2011 WL 2448276, at *2 (S.D. Cal. June 20, 2011) ("A Rule 30(b)(6) deponent's role is 'to provide the entity's interpretation of events and documents.'"); *Sara Lee Corp. v. Kraft Foods Inc.*, 276 F.R.D. 500, 503 (N.D. Ill. 2011) (topics appropriate for 30(b)(6) deposition include "matters about which the corporation's official position is relevant, such as corporate policies and procedures, or the corporation's opinion about whether a business partner complied with the terms of a contract.").

Bloomberg's refusal to answer questions about its position regarding Plaintiffs' primary job duty based on the incorrect assertion that it is protected by the attorney-client privilege in order to evade providing its position is completely improper. *Johnson v. Samsung Elecs. Am., Inc.*, No. CIV.A. 10-1146, 2011 WL 2847696, at *5 (E.D. La. July 15, 2011) (a corporation's opinion does not fall under any of the enumerated exceptions in which a deponent may be

instructed to refrain from responding). Bloomberg had an obligation to give its 30(b)(6) designee information so that he could testify about all proper subjects. Bloomberg cannot insulate the designee from testifying, merely by conveying information to him through its attorneys. The consequence of Bloomberg's refusal is that Bloomberg cannot sustain its heavy burden of proof on its affirmative defense that Plaintiffs' primary duty falls within the administrative or computer exemptions of the FLSA. Accordingly, summary judgment must be granted to Plaintiffs.

II. Summary Judgment Should Be Granted to Plaintiffs Because Plaintiffs Are Not Exempt From Overtime Based on Their Primary Job Duty

Plaintiffs' contention that their primary job duty as ADSK Reps was to answer user questions about functions contained in the Bloomberg Terminal is undisputed. 56.1 ¶¶ 12-19, 39-47, 57-61, 64-74. Answering user questions regarding the Bloomberg Terminal was undoubtedly the most important job duty Plaintiffs performed. *Id.* It was the job duty of principal value to Bloomberg. That is what Bloomberg hired ADSK Reps to do. 56.1 ¶¶ 37-40. That is what Bloomberg described the job to be. *Id*. Further, answering user questions is what Plaintiffs spent the significant majority of their scheduled shift time doing. 56.1 ¶¶ 39-40, 66-74, 85-101. Analytics Reps spend vastly more time answering tech support questions than any other job task. 56.1 ¶¶ 66-74. Bloomberg admits that all ADSK Reps' answer customer questions regarding the functions contained within the Bloomberg Terminal. 56.1 ¶¶ 12-19, 39-47, 57-61, 64-74. Nobody else at Bloomberg has that job duty as their primary duty. 56.1 ¶ 10. Bloomberg has never identified another job duty as more important and never claimed that Reps had a different primary job duty. 56.1 ¶¶ 12-19, 39-47, 57-61, 64-74. Global Head of Analytics, Ian Yeulett testified that Bloomberg does not consider Reps to be "administrative employees." Yeulett Depo. 206:21-207:7; 56.1 ¶ 104. Nor did Bloomberg have them do computer programming or other

exempt computer professional work. 56.1 ¶¶ 106-111. Plaintiffs' primary duty does not fall within the terms of either claimed exemption.

Congress exempted from the FLSA overtime and minimum wage "any employee employed in a bona fide executive, administrative, or professional capacity …as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]. 29 U.S.C. 213(a)(1). By regulation, the Secretary of Labor defined and delimited the administrative and "computer professional" exemptions. 29 C.F.R. §§ 541.200, 541.400. To further explain its regulations, the DOL has issued opinion letters explaining that help desk and technical support positions similar to the Analytics Rep position are not exempt under either the administrative or computer exemption. DOL's regulations implementing its authority to define and delimit the white collar exemptions and its actions interpreting its own regulations are thus entitled to "controlling deference." *Auer v. Robbins,* 519 U.S. 452, 461 (1997).

The Department of Labor has made abundantly clear that technical support help desk positions like those in the Analytics Department are not administratively or computer professionally exempt. In its role of defining and delimiting the scope of the FLSA exemptions, the USDOL has repeatedly found that employees who have the primary duty of responding to user inquiries and problems do not fall under any exemption to the FLSA. *See* USDOL Opinion Letter, 2006 WL 3406603 (DOL WAGE-HOUR, Oct. 26, 2006); USDOL Opinion Letter, 2001 WL 1558967 (DOL WAGE-HOUR, May 11, 2001); USDOL Opinion Letter, 1999 WL 33210907 (DOL WAGE-HOUR, Nov. 5, 1999); USDOL Opinion Letter, 1999 WL 1788144 (DOL WAGE-HOUR, Aug. 19, 1999). These decisions must be given "controlling deference" here. *Auer, supra.* Similarly, in every single reported case decision that Plaintiffs can find, the Courts have held that tech support help desk positions are not exempt under either exemption.

Indeed, Judge Cote specifically ruled that a similar help desk position at Bloomberg was not exempt in the *Seigel v. Bloomberg L.P.* case and Judge Oetken expressed the same opinion with respect to Bloomberg's Customer Support help desk in *Jackson v. Bloomberg L.P.,* 298 F.R.D. 152, 157, 163 (S.D.N.Y. 2014) (certifying class of Global Customer Support Reps, class settlement subsequently granted final approval). There is no opinion letter or reported decision standing for the proposition that Plaintiffs are exempt under the administrative or computer professional exemption.

A. Analytics Reps are Not Administratively Exempt

Plaintiffs' primary job duty of answering individual user questions regarding the functions contained in the Bloomberg Terminal through chats is not a primary duty falling "plainly and unmistakably" administrative work falling within the administrative exemption. *See* 29 C.F.R. § 541.200 *et seq*. Global Head of Analytics, Ian Yeulett, candidly admitted that Bloomberg does not consider Reps "administrative employees" Yeulett Dep. at 206:21 to 207:7; 56.1 104. The DOL's regulations, opinion letters and case decisions interpreting the administrative exemption make clear that giving tech support via chats to Bloomberg users at companies such as Goldman Sachs or Wells Fargo administers neither their business nor Bloomberg's.

The Department of Labor's regulations concerning the administrative exemption are set forth at 29 C.F.R. § 541.200 *et seq*. with additional guidance set forth at § 541.700. To be administratively exempt from the FLSA,

> (a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week …
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200. The regulations go further to define "work directly related to management or general business operations":

> (a) … The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.[11]

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[11] The regulation thus specifies that production work is not administrative work - "where an employee is primarily involved in producing the product of the company rather than 'servicing' the company, the administrative exemption does not apply." *Owens v. CEVA Logistics/TNT*, No. CIV.A. H-11-2237, 2012 WL 6691115, at *8 (S.D. Tex. Dec. 21, 2012) (denying employer's motion for summary judgment because defendant did not establish that employee's primary duty was distinguishable from work necessary to produce the employer's products and services) (citation omitted); *see also, Reich v. New York*, 3 F.3d 581, 587–89 (2d Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994) (police investigators conduct or "produce" criminal investigations and were thus non-exempt); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230-31 (5th Cir. 1990) (television station's producers, directors, and assignment editors "produced" newscasts, and were thus non-exempt). "In a service industry, production activities relate to the 'primary service goal' of the entity." *Parker v. Syniverse Techs., Inc.*, No. 8:10-CV-1635-T-30TBM, 2011 WL 3269639, at *7 (M.D. Fla. Aug. 1, 2011) *citing Cotten v. HFS–USA, Inc.*, 620 F. Supp. 2d 1342, 1348 (M.D. Fla. 2009) (*citing Smith v. City of Jackson, Miss.*, 954 F.2d 296, 299 (5th Cir. 1992)) (employer's motion for summary judgment denied where employer's primary service goal was to provide access to telecommunications system and employee's job was to assist customers in routing signals by accessing employer's telecommunications system and was thus non-exempt work). As is necessarily implicated, the nature of the employer's business must be identified in order to ascertain whether an employee's work consisted of production work or administrative activities. *Bennett v. Progressive Corp.*, 225 F. Supp. 2d 190, 217 (N.D.N.Y. 2002).

Here, Plaintiffs work is, in effect, part of the product which Bloomberg sells to its customers – it provides the terminal and the means to understand and use its full functionality. Bloomberg's business is to provide news and financial tools to financial companies and organizations around the world through the Bloomberg Terminal. 56.1 ¶¶ 1-19. A large part of the Bloomberg Terminal is 24/7 support for the software. 56.1 ¶ 9. Indeed, it is "a huge selling point to Bloomberg's Terminal."*Id*. Thus, ADSK Reps' primary duty of answering user questions regarding the functions on the Bloomberg Terminal is part and parcel of Bloomberg's products and services themselves, rather than servicing the company generally in an activity that every business must perform in order to function. *See Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 254, 264 (D. Conn. 2008) (work that relates to management or business operations "includes only activities 'clearly related to servicing the business itself,'" and "are not

> (b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

29 C.F.R. § 541.201. Plaintiffs' primary job duty here is not in the functional areas listed in § 541.201(b); 56.1 ¶¶ 102-105. Plaintiffs' primary duty is help desk work answering tech support questions generally via chats. 56.1 ¶¶ 12-19, 39-47, 57-61, 64-74. Plaintiffs' primary duty has nothing to do with what DOL considers "directly related to the management or general business operations … assisting with the running or servicing of the business." 29 C.F.R. § 541.201(a).

DOL regulations go on to give a sample list of job activities which DOL considers administrative and some that it considers not administrative. 29 C.F.R. § 541.203 (insurance claims adjusters, team leaders, executive assistants, HR managers, purchasing agents are exempt, inspectors, graders, comparison shoppers, investigators are not exempt). None of the examples of administrative work applies to Plaintiffs in any respect, but one bears greater explanation. DOL gives the example of:

> (b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption **if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products.** However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

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activities that involve what the day-to-day business specifically sells or provides, rather these are tasks that every business must undertake in order to function.").

29 C.F.R. § 541.203(b) (emph. added). Plaintiffs here did nothing remotely similar to the exempt activities on the list. Indeed, Plaintiffs were specifically *prohibited* from providing Bloomberg's customers with financial advice. 56.1 ¶ 103. Plaintiffs' primary job duty was to ensure that Bloomberg's customers' questions and problems regarding the functionality of the Bloomberg terminal were correctly and timely answered. 56.1 ¶¶ 14, 45, 98, 99. This work administers no business. Because Plaintiffs' primary job duty of answering user questions regarding the functions on the Bloomberg Terminal did not itself administer or service Bloomberg's or their customer's business as those terms are defined, Plaintiffs do not plainly and unmistakably fall within the administrative exemption.

The exemption defense also fails because to qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200(a)(3). "The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." 29 C.F.R. § 541.202(e). Thus, even if an employee exercised independent judgment and discretion, if it was not with respect to matters of significance, the employee would not fall under the administrative exemption. *See Siegel v. Bloomberg L.P.*, No. 13CV1351 DLC, 2015 WL 223781, at *3 (S.D.N.Y. Jan. 16, 2015) (finding on summary judgment that plaintiffs were not administratively exempt from the FLSA because "[a]ssuming that this duty includes the exercise of discretion and independent judgment, it does not do so with respect to matters of significance.").

> Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a

> substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b). Plaintiffs' primary job duty of answering tech support questions is in no way exercising discretion and judgment about matters of importance as defined and described in this regulation. Responding to individual user questions using various sources such as FAQs, training materials, databases of previous chat history or Help Pages located in the Blomberg Terminal, as Plaintiff did here (see 56.1 ¶¶ 46-53), does not demonstrate the exercise of discretion and independent judgment, as it was nothing more than the use of preexisting materials and personal skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

Answering individual chats also does not constitute "matters of significance" within the meaning of the regulation. The USDOL holds that employees with the primary job of assisting users with computer issues do not exercise discretion and independent judgment with respect to matters of significance within the meaning of the administrative exemption. *See* USDOL Opinion Letter, 2006 WL 3406603 (DOL WAGE-HOUR, Oct. 26, 2006) at *4 (employees primarily responsible for diagnosis, problem analysis, research, troubleshooting and resolution of computer-related problems as requested by employees, physicians, and contractors of the employer, either in person or by using remote control software, through ticket system and who resolve complex problems with business applications; accurately document all work in

appropriate problem tracking software; prioritize tasks based on service level agreement criteria with limited supervision; assist users in identifying hardware/software needs and provide advice regarding current options, policies, and procedures are not exempt from FLSA under the administrative exemption); USDOL Opinion Letter, 2001 WL 1558967 (DOL WAGE-HOUR, May 11, 2001) at *2 (employees who spent 80% of time providing support services to local businesses; designing computer solutions to fit the client's need at a variety of local businesses, which involved analyzing current equipment and software, identifying equipment and software needs, determining a scope of work for implementation and integration of old with new, and continuing with support of hardware and software after implementation; who worked without direct supervision; and whose workweeks differed in projects and responsibilities dependent upon clients' needs was not exempt from FLSA under the administrative exemption); USDOL Opinion Letter, 1999 WL 33210907 (DOL WAGE-HOUR, Nov. 5, 1999) at *2 (employee who was primarily responsible for network activities; oversaw other Information Technology Department personnel; performed computer hardware and software troubleshooting; prepared status reports; trained and mentored staff; and researched and assisted with network problem solving was not exempt from FLSA under the administrative exemption); USDOL Opinion Letter, 1999 WL 1788144 (DOL WAGE-HOUR, Aug. 19, 1999) at *1 (employees who primarily install computer systems and train customers on installed software; train employees on customers' specialized computer software; manipulate and modify software settings and specifications (e.g. toolbars and setup) to fit and respond to customer needs; install, debug, troubleshoot, and convert data from old systems to new conversions; and test customer modems; and conduct customer follow-up visits to ensure customer satisfaction; but who do not write programs or develop software are not exempt from the FLSA under the administrative

exemption). The fact that terminal users and Reps communicate by chat is itself indicative of the lack of significance as well.

USDOL has consistently found that computer help-desk work does not involve formulating management policies or operating practices, committing the employer in matters that have significant financial impact, negotiating and binding the company on significant matters, planning business objectives, or other indicators of exercising discretion and independent judgment with respect to matters of significance, as discussed in 29 C.F.R. § 541.202(b). *See* USDOL Opinion Letter, 2006 WL 3406603 (DOL WAGE-HOUR, Oct. 26, 2006) at *4; USDOL Opinion Letter, 1999 WL 1788144 (DOL WAGE-HOUR, Aug. 19, 1999) at *1.

The USDOL has also found that employees such as Plaintiffs whose primary duty is resolving computer user inquiries and problems are using skills and established procedures or techniques acquired by special training or experience. *See* USDOL Opinion Letter, 2006 WL 3406603 (DOL WAGE-HOUR, Oct. 26, 2006) at *4; USDOL Opinion Letter, 1999 WL 33210907 (DOL WAGE-HOUR, Nov. 5, 1999) at *2. Thus, their primary job duty does not involve, with respect to matters of significance, the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered, as required by 29 C.F.R. § 541.202(a).

Relying on DOL's regulations and interpretations as they must, the courts have consistently held that neither help desk employees with the primary job of providing technical support to computer users, nor call center employees with the primary job duty of providing customer support are exempt from the overtime provision of the FLSA.

Indeed, even this Court in other litigation against Bloomberg has held that help desk employees are not exempt from the FLSA. Specifically, in *Siegel v. Bloomberg*, this Court found

on summary judgment that help desk employees whose primary duty was to provide technical support to other Bloomberg employees were not exempt under the administrative exemption of the FLSA because they did not exercise independent judgment and discretion on matters of significance:

> Here, neither the level of importance nor consequence of the work plaintiffs performed rises to the level of a "matter of significance." Plaintiffs did not have authority to formulate, affect, interpret, or implement management policies or operating practices. Plaintiffs did not carry out major assignments in conducting the operations of the business. Plaintiffs did not perform work that affected business operations to a substantial degree. Plaintiffs did not have authority to commit Bloomberg in matters that had significant financial impact. Plaintiffs did not have authority to waive or deviate from established policies and procedures without prior approval. Plaintiffs did not have authority to negotiate and bind Bloomberg on significant matters. Plaintiffs did not provide consultation or expert advice to management. Plaintiffs were not involved in planning long- or short-term business objectives. Plaintiffs did not investigate or resolve matters of significance on behalf of management. And plaintiffs did not represent Bloomberg in handling complaints, arbitrating disputes, or resolving grievances.
>
> There is no binding authority on the applicability of the administrative exemption to IT employees. What the Second Circuit has recently said about the administrative exemption in general, however, confirms its nonapplicability here:
>
> > [I]n th[e] context [of the administrative exemption], the deployment of discretion and judgment is manifested by the authority to formulate, affect, interpret, or implement the employer's management policies or its operating practices, by involvement in planning the employer's long-term or short-term business objectives, or by the carrying out of major assignments or committing major financial resources in the conduct of the employer's business.
>
> *Pippins,* 759 F.3d at 240–41 (citation omitted). The record lacks evidence either of plaintiffs' involvement in planning Bloomberg's long-term or short-term business objectives, or of plaintiffs' carrying out major assignments or committing major financial resources in the conduct of Bloomberg's business.
>
> There is scant nonbinding authority on the applicability of the administrative exemption to IT employees. The principal case on which plaintiffs rely is *Martin v. Indiana Michigan Power Co.,* 381 F.3d 574 (6th Cir.2004). There, the Sixth Circuit held that an IT support specialist whose primary duties included troubleshooting and fixing computer problems did not fall within the

> administrative exemption, *inter alia* because the specialist's work was not "of substantial importance to the management or operation of the business of his employer." *Id.* at 583 (citation omitted). Among other things, the specialist did not design or develop his employer's computer network or determine how to configure the software available on that network. *Id.*
>
> *5 Bloomberg attempts to distinguish *Martin* by pointing out that, there, the plaintiff did not decide or recommend when equipment needed to be serviced and replaced; by contrast, says Bloomberg, plaintiffs here exercised that sort of discretion and judgment. This distinction serves to highlight what has already been assumed: plaintiffs here exercised discretion and judgment. But it does not speak to the fact that this discretion and judgment was not exercised with respect to matters of significance.
>
> Bloomberg states that the DOL recognizes "computer network" as the type of "management or general business operation" that can satisfy the "matters of significance" test under the administrative exemption. In support of this statement, Bloomberg cites 29 C.F.R. § 541.201. That regulation relates to the second element of the administrative exemption, offering examples of the type of the work that is directly related to management or general business operations. The regulation does indeed list "computer network" as one such type of work. Even assuming that Bloomberg has raised a genuine dispute as to a material fact on the second element, Bloomberg cannot rely on this regulation in support of the proposition that "computer network" work constitutes a "matter[ ] of significance." The requirement that the exercise of discretion and judgment relate to "matters of significance" is part of the administrative exemption's third element, to which § 541.201 does not pertain.

Siegel v. Bloomberg L.P., No. 13CV1351 DLC, 2015 WL 223781, at *4–5 (S.D.N.Y. Jan. 16, 2015).

Also, in *Jackson v. Bloomberg*, Judge Oetken recognized that Global Customer Service (GCUS) Representatives, whose primary job duty was to answer phone calls for Bloomberg and to determine where to route the calls within the company, were similar to other call center employees who have generally been found to be non-exempt from the FLSA.

> On the present record, GCSRs are less like the plaintiffs in *Haywood* and *Verkuilen* and more like call technicians, which have generally been deemed non-exempt. *See, e.g., Ribot v. Farmers Ins. Group,* 2013 WL 3778784 (C.D.Cal. July 17, 2013) (certifying class of customer service representatives in call centers for FLSA and state overtime claims); *Kritzer v. Safelite Solutions, LLC,* 2012 WL 1945144 (S.D.Ohio May 30, 2012) (certifying settlement class of customer

> service representatives for same); *see also Martin v. Ind. Mich. Power Co.,* 381 F.3d 574, 576–78 (6th Cir.2004) (directing summary judgment in favor of help-desk IT employee on administrative exemption); *Bruner v. Sprint/United Mgmt.,* 2007 WL 2436667, at *1 (D.Kan. Aug. 22, 2007) (recognizing call center customer specialists to be non-exempt).

Jackson v. Bloomberg, L.P., 298 F.R.D. 152, 167 (S.D.N.Y. 2014). Indeed, GCUS Reps had already been reclassified by Bloomberg as non-exempt as the result of an audit by the U.S. DOL. In *Jackson*, Bloomberg eventually withdrew its affirmative defense that GCUS Reps were exempt from overtime under the FLSA. *See Jackson v. Bloomberg*, Case No. 13-cv-02001 (JPO)(GWG) (S.D.N.Y.), Dkt. 75 at ¶ 2. This Court subsequently approved a settlement between the parties. *See id.*, Dkt. 120.

This Court's rulings in the other Bloomberg cases is in line with other court rulings around the country finding that neither help desk employees with the primary job duty of resolving computer problems nor call center employees with the primary job duty of providing customer support is exempt from the overtime provisions of the FLSA. *See e.g., Clarke v. JPMorgan Chase Bank, N.A.*, 08 CIV. 2400 CM/DCF, 2010 WL 1379778 (S.D.N.Y. Mar. 26, 2010) (differentiating between non-exempt help desk work and computer exempt work of plaintiff whose primary duty was capacity management of fifty to sixty physical servers and 1,500 virtual servers); *Bobadilla v. MDRC*, 03 CIV. 9217, 2005 WL 2044938 (S.D.N.Y. Aug. 24, 2005) (employees who assisted other employees with basic computer problems, including those related to personal computers, Microsoft Word and Excel, printers, email accounts, and laptops, providing users with access to certain parts of network, not exempt from overtime pay); *Martin v. Indiana Michigan Power Co.,* 381 F.3d 574 (6th Cir. 2004) (directing summary judgment for help-desk IT employee on administrative and computer professional exemptions); *Allen v. Enabling Techs. Corp.*, No. CV WMN-14-4033, 2016 WL 4240074, at *7 (D. Md. Aug.

11, 2016) ("In general, employees who provide basic assistance with computer problems are not exempt from the FLSA's overtime provisions."); *Longlois v. Stratasys, Inc.*, 88 F. Supp. 3d 1058 (D. Minn. 2015) (employee, who performed installation and maintenance services for three-dimensional printers at client sites, was not exempt from FLSA under administrative exemption; employee's main duty was to provide technical support to customers, rather than to perform management or general business operations, 85% of employee's day was troubleshooting for and interfacing with customers, employee exercised no discretion, and he followed checklists and manuals provided by employer); *Decker v. Smithville Communications, Inc.*, No. 1:11-CV-0005, 2012 WL 4116996 (S.D. Ind. Jul 18, 2012) (denying summary judgment to employer because help desk functions are not administrative or computer exempt); *Hunter v. Sprint Corp.*, 453 F. Supp. 2d 44, 48, 52 (D.D.C. 2006) (denying summary judgment on the employer's administrative and computer exemption claims because the record indicated that the employee who "respond[ed] to telephone inquiries from clients who were having technological difficulties with [defendant's] internet services" "functioned as a technically proficient help-desk employee whose primary duty was customer service"); *Turner v. Human Genome Scis., Inc.*, 292 F. Supp. 2d 738, 745, 747 (D. Md. 2003) (although employees responsible for troubleshooting and correcting hardware and software problems and network connectivity issues utilized "knowledge and skill to solve computer problems, primary duties did not involve discretion or independent judgment as required" under administrative exemption); *Burke v. County of Monroe*, 225 F. Supp. 2d 306, 320 (W.D.N.Y. 2002) (employees whose work included installing and operating computer networks, analyzing hardware and software problems, testing, and problem solving did "highly-skilled work," but these were "routine duties without requirement of discretion and independent judgment" under administrative exemption); *Eicher v. Advanced Bus. Integrators,*

Inc., 151 Cal. App. 4th 1363, 1370, 61 Cal. Rptr. 3d 114, 117 (2007) (administrative exemption did not apply where plaintiff spent half of his time in office and half on-site at customers' venues, and where he devoted majority of his work time in training customer employees on employer's computer software and troubleshooting computer software when he was engaged in implementation on customer's site and spent majority of his time, when in employer's office, performing customer service work). Indeed, every single court to consider the question has found that help desk employees whose primary job duty is to respond to user inquiries and problems and call center employees whose primary job duty is to provide customer support are not exempt from the FLSA. Plaintiffs have not found one decision to the contrary.

In *Longlois v. Stratasys, Inc.*, *supra.,* the district court found on summary judgment that the plaintiff employee, whose primary duty was to perform installation and maintenance services for three-dimensional printers manufactured by the defendant employer, was not administratively exempt from the FLSA, in part because he did not exercise independent judgement and discretion in carrying out his primary duty:

> The record demonstrates that, to install and service printers, Longlois followed checklists and manuals provided to him by Stratasys. Even when a broken printer presented a difficult or unfamiliar problem, Longlois used his skill and experience—what he called in his deposition his "instinct"—to apply and adapt the techniques and procedures in those materials to it. In fact, Stratasys itself summed it up well when it pointed out that "Longlois testified that there could be 'endless' amount of things wrong with a 3D printer and that he was creative in performing his job duties. At the end of the job, Longlois would simply make sure he did everything on the checklist."

88 F. Supp. 3d 1058, 1069 (D. Minn. 2015). Here, in answering user questions about the functions on the Bloomberg Terminal, ADSK Reps also used a wide variety of company created resources, e.g., historic chats, Help Pages, FAQs, training materials, etc. to find the correct answer. 56.1 ¶¶ 48-53. If they were presented with a difficult or unfamiliar problem, they simply

used skill and experience to apply and adapt the techniques and procedures in those resources to get an answer. *Id*. As in *Longlois*, this is not the exercise of independent judgment and discretion. *See also Turner v. Human Genome Sci.*, Inc., 292 F. Supp. 2d 738, 747 (D. Md. 2003) (employees deciding how and when to address and resolve computer system problems, deciding order in which to perform different duties, and following or choosing between set of "techniques, procedures, repetitious experience, and specific standards to perform their work" were not exercising discretion under administrative exemption of the FLSA); *Burke v. Cty. of Monroe*, 225 F. Supp. 2d 306, 320 (W.D.N.Y. 2002) ("[The plaintiffs] did not decide what software was loaded, or whether to update the software on a particular system. They performed highly-skilled work when troubleshooting problems, but this is not evidence of discretion and independent judgment.").

Further, any discretion or independent judgment that Plaintiffs may have exercised in answering user questions regarding functions within the Bloomberg Terminal, for example deciding what function to suggest to a user first, was related solely to that individual Terminal user, and thus was not related to matters of significance or directly related to the to the management or general business operations of Bloomberg or its customers. 56.1 ¶ 105; *see also Siegel v. Bloomberg L.P.*, No. 13CV1351 DLC, 2015 WL 223781, at *4 (S.D.N.Y. Jan. 16, 2015) (fielding inquiries from single employees about their technical support needs is not exercise of discretion or independent judgment with respect to matters of significance).

Most ADSK Reps were recent college graduates and the generalist position was considered an entry level position at Bloomberg. 56.1 ¶ 38. The position did not require an advanced degree or a degree in business administration, management, finance, computer science or the like. *Id*. The only training ADSK Reps had to have is Bloomberg's own internal training.

56.1 ¶¶ 54-56. Reps perform their work primarily through chats. 56.1 ¶¶ 57-60, 67-74. ADSK Reps do not administer Bloomberg or its customers' business, nor did they exercise of discretion and independent judgment with respect to matters of significance. Thus, the administrative exemption does not apply.

B. Analytics Reps are Not Exempt Computer Professionals.

Plaintiffs' primary job duty of providing technical support by answering user questions about functions contained in the Bloomberg Terminal also fails to meet the criteria required for the computer exemption to apply. *See* 29 C.F.R. § 541.400, *et seq*. The computer exemption applies to computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field whose primary job duty consists of:

> (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
> (2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
> (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
> (4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

29 C.F.R. § 541.400.

Bloomberg's 30(b)(6) designee testified that Analytics Reps performed none of the duties of a computer professional.[12] 56.1 ¶¶ 102-105. Plaintiffs were not computer systems analysts, programmers, software engineers or anything remotely similar. 56.1 ¶ 102. Plaintiffs' primary duty did not entail applying systems analysis techniques or procedures to determine software or system functional specifications. 56.1 ¶ 108. Nor was Plaintiffs' primary duty to design, develop, document, analyze, create, test or modify computer systems based on user or system design

[12] Bloomberg 30(b)(6) depo (Saven), 330:18 to 333:4.

specifications. 56.1 ¶ 109. Plaintiffs' primary duty was not to design, document, test, create or modify computer programs related to machine operating systems. 56.1 ¶ 110. Plaintiffs' primary duty was not to determine what hardware, software, or system functional specifications Bloomberg includes on its Terminals, nor to create the Terminal hardware or software, nor to determine the desired settings for the Terminal, the way Bloomberg's computer programmers, network designers, and/or software developers would. 56.1 ¶¶ 106-111. If a user wanted a specific function added to the Terminal, Plaintiffs were required to notify Research & Development, who would then make the decision about whether and how to add that function to all Terminals and actually program the necessary software. 56.1 ¶ 52. In performing their primary duty of answering user questions about functions on the Bloomberg Terminal, Plaintiffs simply did not perform any of the duties required for the computer exemption to apply. 56.1 ¶¶ 106-111.

The US Department of Labor has found that help desk employees whose primary duty consists of assisting users with technical issues do not fall under the computer exemption of the FLSA because the primary duty of these employees does not involve the "application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications." USDOL Opinion Letter, 2006 WL 3406603 at *6, *citing* 29 C.F.R. § 541.400(b)(1); USDOL Opinion Letter, 1999 WL 33210907 at *3; 1999 WL 1788144 at *1. Nor is the primary duty of help desk employees:

> "[t]he design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications' (29 C.F.R. § 541.400(b)(2)), "[t]he design, documentation, testing, creation or modification of computer programs related to machine operating systems" (29 C.F.R. § 541.400(b)(3), or "[a] combination of these duties, the performance of which requires the same level of skills." 29 C.F.R. § 541.400(b)(4).

USDOL Opinion Letter, 2006 WL 3406603 at *6, *citing* 29 C.F.R. § 541.400(b)(1); USDOL Opinion Letter, 1999 WL 33210907 at *3; 1999 WL 1788144 at *1. Because the primary duty of help desk employees does not consist of duties required by 29 C.F.R. § 541.400(b)(1)-(4) to be considered exempt, the DOL has found that these employees do not qualify for the computer professional employee exemption under FLSA sections 13(a)(1) and 13(a)(17). *Id.* at 7. Case law is also equally clear that tech support work is not computer exempt. *See e.g. Hunter v. Sprint Corp.,* 453 F. Supp. 2d 44, 48, 52 (D.D.C. 2006) (denying summary judgment on the employer's administrative and computer exemption claims because the record indicated that the employee who "respond[ed] to telephone inquiries from clients who were having technological difficulties with [defendant's] internet services" "functioned as a technically proficient help-desk employee whose primary duty was customer service"); *Decker v. Smithville Communications, Inc.*, No. 1:11-CV-0005, 2012 WL 4116996 (S.D. Ind. Jul 18, 2012) (denying summary judgment to employer because help desk functions are not computer exempt); *Clarke v. JPMorgan Chase Bank, N.A.*, 08 CIV. 2400 CM/DCF, 2010 WL 1379778 (S.D.N.Y. Mar. 26, 2010) (differentiating between non-exempt help desk work and computer exempt work of plaintiff whose primary duty was capacity management of fifty to sixty physical servers and 1,500 virtual servers); *Bobadilla v. MDRC*, 03 CIV. 9217, 2005 WL 2044938 (S.D.N.Y. Aug. 24, 2005) (employees who assisted other employees with basic computer problems, including those related to personal computers, Microsoft Word and Excel, printers, email accounts, and laptops, providing users with access to certain parts of network, not exempt from overtime pay); *Martin v. Indiana Michigan Power Co.,* 381 F.3d 574 (6th Cir. 2004) (directing summary judgment for help-desk IT employee on administrative and computer professional exemptions); *Allen v. Enabling Techs. Corp.*, No. CV WMN-14-4033, 2016 WL 4240074, at *7 (D. Md. Aug. 11,

2016) ("In general, employees who provide basic assistance with computer problems are not exempt from the FLSA's overtime provisions.").

Because Plaintiffs' primary job duty of answering tech support chats from individual users does not clearly and unequivocally match the explicit terms of the FLSA's computer exemption, summary judgment must be granted to Plaintiffs.

C. Combination Exemption

Bloomberg's affirmative defense makes oblique reference to the combination exemption set forth in 29 C.F.R. § 541.708:

> Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

However, this exemption equally does not apply, because Plaintiffs' primary duty of providing technical support through customer chats does not involve a combination of exempt administrative and computer work. *See, e.g., Kadden v. VisuaLex, LLC*, 910 F. Supp. 2d 523, 542 (S.D.N.Y. 2012) (because none of plaintiff's duties fell under either creative or learned professional exemptions, she could not be exempt under combination exemption); *IntraComm, Inc. v. Bajaj,* No. CIV A 05-0955, 2006 WL 4535991, at *3 (E.D. Va. Apr. 19, 2006), *aff'd,* 492 F.3d 285 (4th Cir. 2007) (combination exemption did not apply to plaintiff because he did not qualify for either outside salesman or administrative exemptions); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1232 (5th Cir. 1990) (because employees did not do any exempt work, district court did not err in failing to consider combination exemption). As set forth in DOL's opinion letters and case law, plaintiffs' primary job duty is simply non-exempt work.

D. Variances in secondary duties do not affect the primary duty analysis

Bloomberg is expected to argue that the job duties of Plaintiffs varied over time. Indeed, at the scheduling conference before the Court on September 17, 2015, Bloomberg's counsel claimed that the job duties of each Plaintiff, including putative class members, changed over time and that each Plaintiff, including putative class members, had various job duties.

However, this does not mean that Plaintiffs' core, "primary job duty" ever changed or varied in any way. In other cases against it, Bloomberg has also refused to identify the primary job duty of other employees due overtime wages and has unsuccessfully claimed that "variances" matter. In *Jackson v. Bloomberg,* in opposition to class certification, Bloomberg argued that all plaintiffs were different and had various secondary job duties; the court disagreed and Bloomberg ultimately conceded that it misclassified plaintiffs by withdrawing its exemption from overtime defense. Despite eventually conceding the meritlessness of its exemption defense, Bloomberg caused all parties and the Court substantial work on class certification, wading through declarations regarding various unspecific, non-primary job duties. *See e.g. Jackson v. Bloomberg*, 13-cv-2001, (S.D.N.Y.), Dkt. Nos. 21 and 22. In the class certification decision in *Jackson v. Bloomberg,* Judge Oetken wrote:

> While Bloomberg stresses that GCSRs are involved in a variety of special projects and are subject to different levels of supervision, the GCSR experience appears to vary only "at the margins." [*Jacob v. Duane Reade, Inc.,* 289 F.R.D. 408, 420-21 (S.D.N.Y.) on reconsideration in part, 293 F.R.D. 578 (S.D.N.Y. 2013) aff'd, 602 F. App'x 3 (2d Cir. 2015)].[4] The administrative exemption focuses on an employee's primary duty, and DOL has instructed that the time spent performing exempt work, while not conclusive, "can be a useful guide in determining whether exempt work is the primary duty of the employee," and "employees who spend more than 50 percent of their time performing exempt work will *generally* satisfy the primary duty requirement." 29 C.F.R. § 541.700(a)-(b) (emphasis added). Consequently, it probably will not matter whether, for instance, one GCSR spent three hours a day specializing in a particular area of Bloomberg's business, while another spent three hours a day participating in a think tank to make the customer service process more efficient. The crux of the inquiry will be whether the GCSRs' main activity—answering and routing calls—is exempt. This conclusion

> is bolstered by Bloomberg's own treatment of GCSRs, which, while not dispositive of the predominance issue, suggests that Bloomberg "believes some degree of homogeneity exists among the employees, and is thus in a general way relevant to the inquiry."
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> [4] Bloomberg notes that GCSRs spend varying amounts of time working on special projects on any given day because they have significant discretion in determining what to work on. (Shannon Decl. ¶¶ 9, 11.) As noted, however, Bloomberg admits that GCSRs spend, on average, five hours of their day handling phone calls. An employee is not exempt one day and non-exempt the next. Rather, the administrative exemption focuses on the employee's primary duty, as defined, *inter alia,* by the general breakdown of their time between exempt and non-exempt activities.

Jackson v. Bloomberg, L.P., 298 F.R.D. 152, 166-67, fn 4 (S.D.N.Y. 2014) (internal citations omitted).

And Bloomberg argued the same in *Siegel v. Bloomberg,* and ultimately lost summary judgment after the court found that, despite their various secondary duties, plaintiffs there had the same primary job duty and were entitled to overtime: "Notwithstanding any special projects that plaintiffs may have undertaken, the record reveals that their primary duty consisted of troubleshooting and fixing problems with other Bloomberg employees' information technology." *Siegel v. Bloomberg L.P.*, No. 13CV1351 DLC, 2015 WL 223781, at *3 (S.D.N.Y. Jan. 16, 2015). Variations in Plaintiffs' secondary duties here does not negate the fact that Plaintiffs' primary job duty was to answer user questions about functions contained in the Bloomberg Terminal, which does not fall plainly and unmistakably within any exemptions to the FLSA.

CONCLUSION

For all the forgoing reasons, Plaintiffs' motion for partial summary judgment should be granted in its entirety.

Dated: September 22, 2016
New Paltz, NY

Respectfully Submitted,

/s/ Dan Getman

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