Maryssa A. Mataras
Terri L. Chase (*admitted pro hac vice*)
Kristina A. Yost (*admitted pro hac vice*)
JONES DAY
250 Vesey Street
New York, NY 10281
Tel: (212) 326-3939
Fax: (212) 755-7309
mmataras@jonesday.com
tlchase@jonesday.com
kyost@jonesday.com

Attorneys for Defendant
Bloomberg L.P.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JANE DOE 1, and JANE DOE 2, individually and on behalf of others similarly situated, *Plaintiffs*, v. **BLOOMBERG L.P.,** *Defendant*.	**Case No. 3:19-cv-09471-FLW-TJB**

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT BLOOMBERG L.P.'S MOTION TO COMPEL COMPLIANCE WITH FEDERAL RULES 10(A) AND 17(A)

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INTRODUCTION

Defendant Bloomberg L.P. ("Defendant" or "Bloomberg") demonstrated in its Motion[1] that Jane Doe 1 and Jane Doe 2 (together, "Plaintiffs") cannot meet the Third Circuit's standard to proceed pseudonymously. Plaintiffs' arguments to the contrary miss the mark and disregard the presumptive rule of public disclosure.

As a preliminary matter, Plaintiffs failed to seek the requisite Court approval prior to proceeding pseudonymously. *B.L. v. Zong*, 2016 U.S. Dist. LEXIS 117509, at *39 (M.D. Pa. Aug. 30, 2016) *report and recommendation adopted in relevant part by B.L. v. Lamas*, 2017 U.S. Dist. LEXIS 20650 (M.D. Pa., Feb. 14, 2017). Moreover, Plaintiffs misstate the standard to proceed pseudonymously. The Court must balance the litigant's reasonable fear of severe harm against the public's interest in open judicial proceedings, *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011), *not* "the public interest in furthering the remedial purpose of the wage and hour laws and the . . . Plaintiffs' reasonable fear of harm against the public's interest in knowing who the Named Plaintiffs are," (Dkt. 49 at 1).[2] Under the appropriate standard, the public's interest in open judicial proceedings outweighs Plaintiffs'

[1] "Motion" refers to Bloomberg's Motion to Compel Compliance with Federal Rules 10(a) and 17(a). (Dkt. 35.)

[2] Docket 49 (hereinafter, "Opp.") is Plaintiffs' Memorandum of Law in Opposition to Bloomberg's Motion to Compel Compliance with Federal Rules 10(a) and 17(a).

unsubstantiated fears because Plaintiffs have chosen to assume the "fiduciary" role of named plaintiffs and thus must fairly and adequately represent the rights of certain members of the public. *In re Ashley Madison Customer Data Sec. Breach Litig.*, 2016 U.S. Dist. LEXIS 46893, at *18 (E.D. Mo. Apr. 6, 2016). In any event, Plaintiffs do not express *reasonable* fears because the possibility of "embarrassment" or "economic harm" is "not enough" to justify anonymity. *Megless*, 654 F.3d at 408. For all of these reasons, Bloomberg respectfully requests that the Court grant its Motion.

ARGUMENT

I. PLAINTIFFS FAILED TO SEEK THE REQUISITE APPROVAL TO PROCEED PSEUDONYMOUSLY.

Plaintiffs may not "unilaterally decide" to file a lawsuit pseudonymously. *Zong*, 2016 U.S. Dist. LEXIS 117509, at *38. A party who wishes to proceed under a pseudonym may only do so with "*the prior approval* of the Court." *Id.* at *39 (emphasis added). The remedy for failing to obtain prior court approval is directed compliance with Rule 10 (i.e. "full[]" and "proper[]" identification of the pseudonymous parties). *Id.* at 42; *see also Doe v. Police Officer of the Solebury Pa.*, 2018 U.S. Dist. LEXIS 214155, at *1 n.1 (E.D. Pa. Dec. 20, 2018) (revealing plaintiff's name because plaintiff "purport[ed] to proceed under a pseudonym but . . . failed to file a motion requesting permission to do so"); *Prof'l Orthopedic Assocs., PA v. CareFirst BlueCross BlueShield*, 2015 U.S. Dist. LEXIS 84996, at

*13 (D.N.J. June 30, 2015) (dismissing one plaintiff's claims because he did not seek leave to proceed pseudonymously and instructing him to file an amended complaint "properly identifying himself"); *Marrakush Soc'y v. N.J. State Police*, 2009 U.S. Dist. LEXIS 68057, at *102 (D.N.J. July 30, 2009) ("A complaint that supplies a pseudonym for a party . . . does not meet [Local Rule 10.1's] simple requirements and cannot be filed.").

Here, Plaintiffs erroneously contend (Opp. at 5) that Bloomberg had an obligation to meet and confer prior to filing its Motion. In so asserting, Plaintiffs conveniently ignore that it is they who failed to seek the requisite Court approval to proceed pseudonymously. Indeed, Plaintiffs filed pseudonymously with the Court numerous documents, including the Complaint (Dkt. 1) and a Motion to Approve Collective Action Notice (Dkt. 20), without seeking prior Court approval to proceed in such a fashion. To remedy this procedural shortcoming, the Court should direct Plaintiffs to comply with Fed. R. Civ. P. 10 by revealing their full legal names. *Police Officer of the Solebury Pa.*, 2018 U.S. Dist. LEXIS 214155, at *1 n.1.

II. PLAINTIFFS CANNOT MEET THE THIRD CIRCUIT'S STANDARD TO PROCEED PSEUDONYMOUSLY.

A. The *Megless* Factors Weigh in Favor of Disclosure.

Each of the *Megless* factors weigh in favor of requiring disclosure of Plaintiffs' full legal names.

1. First Factor: Extent to Which the Identity of the Litigant Has Been Kept Confidential

The first factor should be disregarded because Plaintiffs failed to seek the proper approval to proceed pseudonymously. *See supra*, at 2–3. Plaintiffs' failure to follow the Court's procedure necessitates the disclosure of their identities. *Id.* Thus, the fact that Plaintiffs have, to this point, kept their names confidential (Opp. at 7) should be ignored because Plaintiffs eschewed both local and federal rules.

2. Second Factor: Bases Upon Which Disclosure Is Feared and the Substantiality of Such Bases

With respect to the second factor, Plaintiffs' claimed fear of "economic harm" (Opp. at 7) is an insufficient basis to avoid disclosure of their full legal names. *Megless*, 654 F.3d at 408 (finding that it is "not enough" that "a plaintiff may suffer embarrassment or economic harm").

3. Third Factor: Magnitude of the Public Interest in Maintaining the Confidentiality of the Litigant's Identity

The third factor weighs heavily in favor of disclosure. The public does not have an interest in maintaining the confidentiality of a named plaintiff's identity. *Michael v. Charter Commc'ns, Inc.*, 2017 U.S. Dist. LEXIS 101927, at *10 (E.D. Mo. June 30, 2017) ("Plaintiff's status as the putative named plaintiff requires that he be the named plaintiff.") (emphasis in original). Instead, the public's interest is heightened in the class action context because plaintiffs purport to represent members of the public. *Id.* at *9 ("The Court finds that the general presumption in

favor of public disclosure of a plaintiff's identity is *even stronger* in a case which is pled as a putative class action[] because the named plaintiff is purporting to represent other members of the public.") (emphasis added). This is because named plaintiffs assume the "fiduciary" role of putative class representative, and the members of the public who are part of the putative class have a strong interest in knowing the identities of the named plaintiffs who seek to represent them. *In re Ashley Madison Customer Data Sec. Breach Litig.*, 2016 U.S. Dist. LEXIS 46893, at *18 ("There are significant differences between the roles of class representative and class member. Because class actions determine the rights of absent class members, due process requires the class be fairly and adequately represented . . . . Given the importance of the role of class representative, the Court will require Plaintiffs to disclose their identities so that the public, including the putative class members they seek to represent, know who is guiding and directing the litigation.").

Plaintiffs nevertheless argue (Opp. at 22) that "even if the Jane Doe Plaintiffs proceed under pseudonyms, these proceedings will remain public, thereby preserving any general public interest in the subject matter of this litigation." (internal quotation marks and citation omitted). But, the cases cited by Plaintiffs contain extraordinary circumstances that are not present here *and* fail to address the importance of named plaintiffs' identities in the class action context. *See Doe v. Evans*, 202 F.R.D. 173, 175 (E.D. Pa. 2001) (non-class civil rights suit where

pseudonymous plaintiff was a sexual assault victim); *Doe v. Provident Life & Acc. Ins. Co.*, 176 F.R.D. 464, 465 (E.D. Pa. 1997) (single-plaintiff suit for employee benefits where pseudonymous plaintiff suffered from numerous psychiatric disabilities).

4. Fourth Factor: Whether, Because of the Purely Legal Nature of the Issues Presented or Otherwise, There Is an Atypically Weak Public Interest in Knowing the Litigant's Identity

The fourth factor weighs in favor of disclosure because Plaintiffs' claims are "fact-sensitive." *Megless*, 654 F.3d at 411 (finding this factor to weigh in favor of disclosure where plaintiff's claim was not purely legal and was of a "fact-sensitive" nature) (citation omitted). Specifically, the exemption analysis requires a "fact-intensive" analysis of, among other issues, Plaintiffs' job titles, job duties, hours worked, and compensation. *Chemi v. Champion Mortg.*, 2006 U.S. Dist. LEXIS 100917, at *13–14 (D.N.J. June 19, 2006) ("[A]ny determination of whether an employee is properly exempted under the FLSA involves a fact-intensive inquiry into each putative collective member[']s employment circumstances.").[3] Plaintiffs'

[3] Plaintiffs assert (Opp. at 22) that they have already provided Bloomberg "all the substantive facts that Bloomberg needs to evaluate the claims of Plaintiffs and the class of Global Data Analysts." This assertion is utterly false. The filed documents cited by Plaintiffs describe the duties of Plaintiffs in a boilerplate fashion and do not provide information sufficient for an individualized, "fact-intensive" exemption analysis. In their declarations attached to Plaintiffs' Motion to Approve Collective Action Notice, Plaintiffs merely assert that they, and some unspecified group of Global Data Analysts, supposedly followed protocols to

argument (Opp. at 7) ignores the "fact-sensitive" nature of Plaintiffs' claims, as well as that Plaintiffs are the *named representatives* of a putative class and collective.[4]

5. Fifth Factor: Undesirability of an Outcome Adverse to the Pseudonymous Party and Attributable to His Refusal to Pursue the Case at the Price of Being Publicly Identified

As for the fifth factor, 11 opt-in plaintiffs have filed consents to sue using their full legal names. To the extent that Plaintiffs' counsel is concerned about maintaining the action (Opp. at 7–8), Plaintiffs' counsel could substitute in as named plaintiff any one of the 11 opt-ins—all of whom have already provided their names.[5] *Cf Megless*, 654 F.3d at 410–11 ("A plaintiff's stubborn refusal to litigate openly . . . cannot outweigh the public's interest in open trials.").

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collect data, maintain data, update the formatting of data, and troubleshoot problems. (Dkt. 20-7, ¶ 14; Dkt. 20-8, ¶ 14.) The Complaint suffers from the same broad generalizations. *See, e.g.*, Dkt. 1, ¶ 31 ("Bloomberg's Global Data Division is responsible for acquiring, maintaining, and updating data for Bloomberg's various data delivery platforms.").

[4] Plaintiffs' related argument (Opp. at 22–23) that the disclosure of Plaintiffs' identities is not required where "an employer . . . already possess[es] all information about current and former employees" is unsupported by relevant case law. *Chao v. Raceway Petroleum, Inc.*, 2008 WL 2064354, at *4 (D.N.J. May 14, 2008) (addressing the applicability of the informant's privilege, which is inapplicable here).

[5] Plaintiffs would still need to reveal their identities if they stepped out of their named plaintiff role because their unsubstantiated fears and privacy concerns would not outweigh the public's interest in open proceedings.

6. Sixth Factor: Whether the Litigant is Seeking to Use a Pseudonym for Nefarious Reasons

Plaintiffs' self-serving assertion (Opp. at 8) that they have "no illegitimate ulterior motives" is insufficient to tip the sixth factor in their favor. By seeking to proceed pseudonymously, Plaintiffs are attempting to gain a "tactical advantage" by "impair[ing]" Bloomberg's ability to defend itself. *Doe v. Megless*, 2010 U.S. Dist. LEXIS 79098, at *12 (E.D. Pa. Aug. 5, 2010). Without Plaintiffs' identities, Bloomberg cannot fully investigate the merits of Plaintiffs' claims or adequately prepare defenses. The offer to provide Bloomberg their true identities does not remedy the situation because individuals who might otherwise voluntarily come forward to Bloomberg with evidence about the named plaintiffs will remain undiscovered if Plaintiffs' identities are hidden. Additionally, in the Fair Labor Standards Act ("FLSA") collective and Rule 23 class action context, courts have rejected the notion that a plaintiff may provide his identity to the defendant but keep it secret from the public. *See, e.g.*, *Michael v. Bloomberg L.P.*, 2015 U.S. Dist. LEXIS 16683, at *8–9 (S.D.N.Y. Feb. 11, 2015) ("It is true that plaintiff has offered to disclose his true identity to Bloomberg, as long as it remains under seal . . . . But this unorthodox arrangement still runs against the public's traditional right of access to judicial proceedings, and may also preclude potential class members from properly evaluating the qualifications of the class representative."); *see also Charter Commc'ns. Inc.,* 2017 U.S. Dist. LEXIS 101927, at *5–10 (similar).

7. Seventh Factor: Universal Level of Public Interest in Access to the Identities of Litigants

The seventh factor disfavors anonymity because of the "thumb on the scale that is the universal interest in favor of open judicial proceedings." *Megless*, 654 F.3d at 411. Plaintiffs concede (Opp. at 8–9) that this factor weights against them.

8. Eighth Factor: Whether, Because of the Subject Matter of this Litigation, the Status of the Litigant as a Public Figure, or Otherwise, There Is a Particularly Strong Interest in Knowing the Litigant's Identities, Beyond the Public's Interest which Is Normally Obtained

Plaintiffs wrongly argue (Opp. at 8) that the eighth *Megless* factor is inapplicable. In fact, the public has a particularly strong interest in this lawsuit because it is a putative class action. *See supra*, at 4–5.

9. Ninth Factor: Whether the Opposition to Pseudonym by Counsel Is Illegitimately Motivated

Ninth and finally, Bloomberg does not have an "illegitimate[] motivat[ion]" for opposing Plaintiffs' use of pseudonyms. *Megless*, 654 F.3d at 409. Plaintiffs' assertion (Opp. at 1, 5, 8, 10, 17, 22, 23) that Bloomberg suffers no prejudice from Plaintiffs' use of pseudonyms is patently false. Bloomberg requires Plaintiffs' true identities to conduct thorough discovery of Plaintiffs' claims and to adequately defend itself. In addition, there are the due process concerns of the putative class and collective action members, who have a right to know the identities of their proposed representatives. *See supra*, at 4–5. Even if Plaintiffs were to provide their full names to Bloomberg and use partial names in the case caption, their identities

would remain secret from the putative class and collective members who would be unable to determine the adequacy of representation. *Id.*

In sum, each of the nine factors weighs in favor of Plaintiffs publicly disclosing their full legal names.

B. Plaintiffs' Additional Arguments Are Equally Unavailing.

Plaintiffs' hodgepodge of additional arguments fare no better.

1. The Alleged Remedial Nature of the FLSA and its Enforcement Scheme Are Irrelevant.

Seeking to distract from the issue at hand, Plaintiffs devote pages to a discussion of the remedial nature of the wage laws (Opp. at 10–13), which has no bearing on whether to allow litigants to proceed pseudonymously. *See generally Megless*, 654 F.3d at 409. Courts consistently decline to allow named plaintiffs to proceed pseudonymously in FLSA collective actions. *See, e.g.*, *Bloomberg L.P.*, 2015 U.S. Dist. LEXIS 16683, at *8 ("To depart in this case from the general requirement of disclosure would be to hold that nearly any plaintiff bringing a lawsuit against an employer would have a basis to proceed pseudonymously. The court declines to reach such a holding."); *Li v. A Perfect Day Franchise, Inc.,* 270 F.R.D. 509, 517 (N.D. Cal. 2010) ("A finding that the 'perhaps typical' retaliations of FLSA defendants, such as termination, blacklisting . . . constitute 'extraordinary' harm would permit plaintiffs in many FLSA actions the right to proceed anonymously. Such a rule would be inconsistent with" the general rule "that

anonymity may only be granted in the 'unusual case.'"). So, this Court should follow suit and decline to allow Plaintiffs to proceed pseudonymously.

2. Plaintiffs Cannot Claim the Informant's Privilege.

As established by Plaintiffs' own authority, the informant's privilege belongs to the government—not to private plaintiffs. *See Fermaintt v. McWane, Inc.*, 2008 U.S. Dist. LEXIS 129028, at *24 (D.N.J. Dec. 15, 2008) ("What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.") (citation omitted). Moreover, this privilege must be *formally invoked by the government. Chao v. Raceway Petroleum, Inc.*, 2008 U.S. Dist. LEXIS 39018, at *12–13 (D.N.J. May 12, 2008) ("There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual consideration by the officer.") (citation omitted); *see also Perez v. Am. Future Sys.*, 2013 U.S. Dist. LEXIS 151324, at *8–9 (E.D. Pa. Oct. 21, 2013) (same).[6] Accordingly, Plaintiffs cannot assert the informant's privilege.

Plaintiffs nevertheless contend that they should be able to assert the privilege, mistakenly relying on *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058

[6] Plaintiffs fail to cite a single case (Opp. at 13–17) where a private party was permitted to assert the privilege.

(9th Cir. 2000). In *Advanced Textile Corp.*, the Ninth Circuit did not apply the informant's privilege in a private FLSA action but instead found that public interest would not be obstructed by keeping plaintiffs' identities concealed. *Id.* at 1072–73. In so finding, the court expressly distinguished between the "typical" threats facing FLSA plaintiffs, such as "termination" and "blacklisting," and the "extraordinary retaliation" facing the *Advanced Textile Corp*. plaintiffs, which included "deportation, arrest, and imprisonment." *Id.* at 1071. Here, Plaintiffs assert "typical" threats of economic harm, which are insufficient concerns to mandate anonymous protection. *Id.*

Regardless, as also noted by Plaintiffs' own cited authority, "[T]he privilege must give way where the disclosure of an informer's identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Mitchell v. Roma*, 265 F.2d 633, 635 (3d Cir. 1959). Plaintiffs' identities are "relevant and helpful" to Bloomberg's defenses; Bloomberg cannot determine the full extent of applicable defenses without knowing Plaintiffs' identities. And, Plaintiffs' identities are "essential" to the exemption analysis—and thus the fair determination of Plaintiffs' claims—because Bloomberg cannot determine Plaintiffs' exact job titles, compensation, hours worked, duties, and responsibilities without knowing Plaintiffs' names.

3. Plaintiffs' Fear of Severe Harm is Unreasonable.

Plaintiffs mainly argue (Opp. at 17–20) that their fear of severe harm is reasonable because they will be identified online and in media coverage as "troublemakers" and thus may lose out on future employment opportunities. However, the possibility "that news media outlets may discuss the story, which will then live in perpetuity through web searches on the internet," does not equate to "serious harm" requiring anonymity. *K.W. v. Holtzapple*, 299 F.R.D. 438, 441 (M.D. Pa. 2014) (holding that potentially negative news attention does not equate to serious harm that requires anonymity). Plaintiffs' routine fears about reputation are insufficient to establish the need to use a pseudonym. *See id*.

III. PLAINTIFFS' REQUEST FOR TEMPORARY ANONYMITY SHOULD BE DENIED.

Plaintiffs only cited authority providing for temporary pseudonymous treatment is a single, nonbinding case, *Advanced Textile Corp.*, which dealt with materially different concerns. *See supra*, at 12. Indeed, Plaintiffs' stated fears will exist regardless of when Plaintiffs disclose their names. This remains true regardless of the size of any class or collective. Accordingly, Plaintiffs should not be permitted to use pseudonyms as a security blanket until they feel that they have strength in numbers.

Moreover, Plaintiffs' assertion (Opp. at 24) that that putative class and collective members will not be harmed at this early stage in litigation falls flat.

Though collective notice has not been approved by the Court, a putative collective member may nevertheless file a consent to sue before the Court's ruling. Moreover, though Plaintiffs contend that they do not intend to file for class certification in the immediate future, class members may already inquire about the case on Plaintiffs' counsel's website. Plaintiffs assumed a fiduciary responsibility as putative representatives of a class and collective action and must be named should they wish to proceed as such. *See supra*, at 4–5.

As such, Plaintiffs' request for temporary protection should be denied.

CONCLUSION

For the foregoing reasons, Defendant's Motion should be granted.

Date: September 30, 2019

Respectfully submitted,

/s/ Maryssa A. Mataras

Maryssa A. Mataras
JONES DAY
250 Vesey Street
New York, NY 10281
Tel: (212) 329-3939
Fax: (212) 755-7306
mmataras@jonesday.com

Attorneys for Defendant Bloomberg L.P.

CERTIFICATE OF SERVICE

I, Maryssa A. Mataras, certify that on September 30, 2019, I caused the foregoing Reply Memorandum of Law in Support of Defendant Bloomberg L.P.'s Motion to Compel Compliance with Federal Rules 10(a) and 17(a) to be filed electronically via the Court's CM/ECF System.

s/ Maryssa A. Mataras
Maryssa A. Mataras

Attorney for Bloomberg L.P.