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.

Case No.: 3:19-CV-09471

BLOOMBERG L.P.,

Defendant.

REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO APPROVE COLLECTIVE ACTION NOTICE

Respectfully Submitted,

by

Michael Korik
Law Offices of Charles A. Gruen
381 Broadway
Suite 300
Westwood, NJ 07675
Tel.: 201-342-1212
Fax: 201-342-6474
E-mail: mkorik@gruenlaw.com

Dan Getman (*Pro Hac Vice*)
Artemio Guerra (*Pro Hac Vice*)
Getman, Sweeney & Dunn PLLC
260 Fair St.
Kingston NY 12401
Tel: (845) 255-9370
Fax: (845)255-8649
Email: dgetman@getmansweeney.com

Counsel for Plaintiffs

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INTRODUCTION

In January 2019, Bloomberg reclassified its Global Data Analysts as overtime eligible, but it failed to pay a dime of back pay or liquidated damages to its non-exempt workers. The Court should deny Bloomberg's request to deny Data Analysts notice of their rights in this suit.

A note about class definition: Plaintiffs have defined the class as "all Global Data employees who worked as Data Analysts, Data Specialists, or related titles, who were not paid time and one-half for hours over 40 in one or more weeks." Pls. Brf. p. 21. Plaintiffs agree that Bloomberg need not supply the contact information for those individuals during the 3 preceding years: 1) whose compensation always met the "Highly Compensated Worker" [1] exemption threshold; or, 2) who have only held the Analyst III or Specialist III position (or both).[2]

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[1] Employees that earn over $100,000 in any calendar year (or in any designated rolling 52-week period) would be considered exempt under the HCW exemption. 29 C.F.R. § 541.601.The attorneys on both sides of this case have previously handled several Bloomberg FLSA cases in which they recognized that these individuals have no claims for such periods.

[2] Individuals in the Level III positions may yet have claims that can be amended in, if necessary, after discovery has been conducted in this case or brought in a separate legal action. Bloomberg states that it created the Analyst III and Specialist III levels only after reclassification in January 2019. Bloomberg does not state whether individuals who were previously mere "Analysts" had their job titles changed, whether their job duties changed, or whether individuals from other departments were moved into those positions. At this early stage Plaintiffs do not have sufficient information to address these questions. Since the levels were

The FLSA stands as one of Congress's bedrock protections of U.S. workers – enduring for almost 90 years - requiring employers to pay overtime to all workers unless they meet the specific terms of an exemption. 29 U.S.C. § 213. An employer bears the heavy burden to show that an exemption to the requirement to pay overtime applies. *See, McKinney v. Union City Med. Supply, Inc.*, CV 19-8864 (SRC), 2019 WL 3812451, at *2 (D.N.J. Aug. 14, 2019); *see also, e.g. Carr v. Flowers Foods, Inc.*, CV 15-6391, 2019 WL 2027299, at *6 (E.D. Pa. May 7, 2019) (holding that the employer bears the burden to show that an exemption applies and rejecting defendant's argument that exemptions must be determined on an individualized basis). Because the FLSA limitation period means that notice decisions must occur before the start of discovery, considerations of the merits of an exemption defense cannot be part of the Court's certification decision.[3] *Porter v. Merrill Lynch Pierce Fenner & Smith, Inc.*, CV 178043-FLW-TJB, 2018 WL

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created in January 2019, Plaintiffs can amend their definition of the class, or assert these claims later, without losing claims through the statute of limitations.

[3] Notably, the authorities cited by Bloomberg deal with certification after substantial discovery and courts, therefore, engaged in a stricter or "second stage" analysis. *See, Morisky v. Pub. Serv. Elec. and Gas Co.*, 111 F. Supp. 2d 493, 497–98 (D.N.J. 2000) (because motion was made after the completion of discovery it was "appropriate, therefore, for the Court to apply a stricter standard in its analysis"); *In re Morgan Stanley Smith Barney LLC Wage and Hour Litig.*, 11-CV-3121 (WJM), 2016 WL 1407743, at *2 (D.N.J. Apr. 11, 2016)(same); *Tahir v. Avis Budget Group, Inc.*, CIV.A. 09-3495 SRC, 2011 WL 1327861, at *4 (D.N.J. Apr. 6, 2011)(same); *Freeman v. Sam's E. Inc.*, CV 2:17-1786 (WJM), 2018 WL 5839857, at *1 (D.N.J. Nov. 8, 2018) (motion made after one year of discovery).

5874094, at *3 (D.N.J. Nov. 9, 2018, Wolfson, J)("Defendant's arguments … about the individualized job roles … are more appropriate for the second stage of the certification analysis, which occurs after discovery is completed."); *see also, Herring v. Hewitt Associates, Inc.,* CIV. 06-267, 2007 WL 2121693, at *8 (D.N.J. July 24, 2007)(declining to consider the merits of an FLSA action involving exempt or nonexempt employees at the notice stage) (citing cases).

Bloomberg suggests that Analysts are not "similarly situated" because they do lots of different things and now have multiple job titles. But these differences have no significance to the life of this case – <u>because only the "primary job duty" matters in deciding whether an exemption applies</u>. 29 C.F.R. § 541.700 ("To qualify for exemption under this part, an employee's 'primary duty' must be the performance of exempt work."). Bloomberg has not said what it believes class members' primary duty is, that any class member has a primary job duty different from another, and has not disputed Plaintiffs' description of the primary duty.

Plaintiffs argued that all members of the class performed the same primary job duty (to supply properly formatted data to Bloomberg's platforms), were wrongfully classified as exempt from overtime, worked overtime hours, and were not paid overtime compensation. Pls. Brf. p. 1. Plaintiffs supplied ample documentation of all. *See,* Doc. 20-5 at ¶¶ 3-5, 8-11, 13-17; Doc. 20-6 at ¶¶ 3-5, 8-

11, 13-17; Doc 20-7 at ¶¶ 3-5, 8-11, 13-15; Doc. 20-8 at ¶¶ 3-5, 8-11, 13-15. In its response, Bloomberg does not dispute any of this.[4]

It simply does not matter how many different things Analysts do at work. These various activities are entirely irrelevant to the case as only the "primary job duty" determines whether an exemption defense applies.[5] *See* 29 C.F.R. §

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[4] And Bloomberg's briefing misrepresents what its declarant says about the amount of time that certain individuals spend performing certain job duties. The amount of time spent by employees is not determinative because "the term 'primary duty' means the principal, main, major or most important duty that the employee performs" and "time alone, however, is not the sole test". 29 C.F.R. § 541.700(a) and (b). More importantly, the three arguments are wholly unsupported by the declaration they cite to. First, Compare Def. Brf. p. 25, with O'Grady Decl., ¶27, which states that an unidentified individual "who covers the municipal bond market exclusively works with the Product team to develop and design new data functions, [and also] also frequently interfaces with customers." In its brief, Bloomberg takes the ambiguously placed word "exclusively" to refer to the work with the product team and not to refer to working exclusively in the bond market. But if O'Grady meant what Bloomberg's brief claims, it would be flatly contradicted by the very next sentence which declares that person also works with customers. Second, Bloomberg's brief, p. 26, refers to Data Analyst IIIs "who spend most of their time training and mentoring" again citing the O'Grady declaration which says nothing about how much time workers spend at that task. Third, Bloomberg's brief references that "many Data Analysts … spend their time exclusively using coding and/or other technical software to create computer programs for use on the Terminal (O'Grady Dec. ¶¶ 22–24) meet the requirements of this [computer] exemption." But the O'Grady Declaration paragraphs <u>absolutely do not say</u> that Analysts "spend their time *exclusively* using coding and/or other technical software." (Emph. Added).

[5] In the modern workplace workers must use software tools and computers to perform their work. But merely using software tools does not make one an exempt computer professional because the exemption is directed to computer systems analysts, computer programmers, and software engineers. 29 C.F.R. § 541.400 (b); *see also, e.g., Strauch v. Computer Scis. Corp.*, 3:14-CV-956 (JBA), 2018 WL 4539660, at *3–5 (D. Conn. Sept. 21, 2018), *appeal dismissed* (Dec. 3, 2018). In

541.200(a)(2) and (3); 29 C.F.R § 541.400(b) and 29 C.F.R. § 541.700. Because Bloomberg does not deny that all individuals have the same *primary* duty, it has not showed any material way in which any of the Plaintiffs are dissimilarly situated under the FLSA. Plaintiffs thus meet the lenient similarly situated standard.

Courts have already certified collective actions over Bloomberg's opposition in at least 5 other cases against Bloomberg for similar technical positions. In *Michael v. Bloomberg L.P.,* 14 Civ. 2657, 2015 WL 1810157, *2 (S.D.N.Y. Apr. 17, 2015), Judge Griesa certified a collective and directed notice finding that, "If the court were to hold that the mere existence of possible exemptions could defeat conditional certification, no FLSA action that is premised upon an alleged misclassification under [an] exemption could be resolved through the collective action process, thereby defeating the stated purpose of the FLSA and wasting judicial resources by requiring courts to consider each individual plaintiff's claim in a separate lawsuit." (citations omitted). When Judge Cote assumed the case, she certified two state law classes, and denied decertification of the collective. As

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Strauch, a 9-person jury found that a class of Systems Administrators who worked extensively with hardware and software did not fall within the computer professional exemption. The district court upheld the jury verdict because, characterizations of job duties notwithstanding, "reasonable jurors could conclude that Plaintiffs' primary duty did not consist of the type of exempt work" required by the computer professional exemption. *Id.*

Judge Cote explained, variances in job responsibilities are irrelevant to the exemption analysis.

> While the defendant points out variances in the proposed class members' responsibilities and impressions of their jobs, individual issues nevertheless do not predominate. The evidence presented by both plaintiffs and the defendant converge on one, basic point: Analytics Representatives answer client questions about the Bloomberg Terminal. This is their primary duty. All the testimony offered in this case ultimately points to that role, despite the varying amounts of time, discretion, and responsibility described by class members as they perform that primary duty.

Roseman v. Bloomberg L.P., No. 14CV2657 (DLC), 2017 WL 4217150, at *7 (S.D.N.Y. Sept. 21, 2017), *aff'd*, No. 14CV2657 (DLC), 2018 WL 1470587 (S.D.N.Y. Mar. 23, 2018).[6] The same reasoning applies here.

ARGUMENT

I. Plaintiffs Are Similarly Situated.

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[6] *See also, Enea v. Bloomberg, L.P.*, 12 CIV. 4656 GBD FM, 2014 WL 1044027 (S.D.N.Y. Mar. 17, 2014) (certifying New York class of Global Technical Support Reps who provide technical support to Bloomberg's customers concerning Bloomberg Terminals and/or software products); *Siegel v. Bloomberg L.P.*, 13 CIV. 1351 DLC, 2013 WL 4407097 (S.D.N.Y. Aug. 16, 2013) (granting conditional certification to Service Desk Reps who handle tickets generated by Bloomberg employees and only denying Rule 23 class for lack of numerosity); *Jackson v. Bloomberg, L.P.*, 298 F.R.D. 152 (S.D.N.Y. 2014) (granting conditional certification and certifying New York Rule 23 class of Global Customer Support Reps who answer phone calls for Bloomberg and determine where to route the calls within the company); *Martinez v. Bloomberg L.P.*, 17 CV. 4555 (RMB), 2017 WL 6988039, (S.D.N.Y. Dec. 7, 2017)(granting conditional certification to Installations Representatives assisting customers with the installation of Bloomberg's platforms).

Bloomberg's opposition only cements the conclusion that Plaintiffs are sufficiently "similarly situated" to merit the mailing of a notice with the opportunity to join this case. Bloomberg does not deny that all class members work in the same department; all had the same primary job duty of providing properly formatted data to Bloomberg's platforms; all carried out their primary job by following protocols to collect large amounts of data, maintain the data to ensure that it is free of errors, and update the format of the data so that it can be used in Bloomberg's platforms; all had their on-site hours recorded through Bloomberg's badge data system; all typically worked beyond scheduled shift hours to complete work assignments. In fact, Bloomberg fills out some details about the department and the reclassification, confirming that none of the Plaintiffs received overtime premium pay for the overtime hours they worked prior to reclassification. On this unrebutted record, Plaintiffs are similarly situated within the meaning of the FLSA.

Under the "modest factual showing" standard, a plaintiff must "produce some evidence, beyond speculation, of a factual nexus between the manner in which the employer's alleged policy affected [her] and the manner in which it affected other employees." *Porter*, 2018 WL 5874094, at *2 (finding "two sworn declarations attesting to the universality of Defendant's overtime practices…provided the requisite factual nexus between [plaintiffs'] situation and the situation of other employees sufficient to determine that they are similarly situated.").

It should be noted that FLSA overtime claims for employers of Bloomberg's size, have only two elements – work hours over 40 in any week and failure to pay overtime premium pay at the rate of time and one half. 29 U.S.C. § 207(a)(1). Thus, showing a "nexus" only requires that the Plaintiffs have reason to know that others worked hours over 40 and were not paid overtime. That is amply demonstrated by the Plaintiffs' declarations which all assert that Bloomberg "suffered or permitted" them all to work hours over forty and that the company failed to pay any Global Data Analysts overtime premium pay. Bloomberg's opposition admits that the company uniformly failed to pay overtime to all Global Data Analysts through the end of 2018. Def. Brf. p. 7, fn.2. While Bloomberg highlights the many different things Plaintiffs also do at work it says nothing about their primary duty and thus it offers no grounds for denying notice here.[7]

The mere assertion of an exemption defense, or the possibility of such defenses cannot be allowed to derail collective actions merely because a defendant asserts that dissimilarity exists.[8] But Bloomberg has not asserted that any individual or any

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[7] *See e.g., Siegel v. Bloomberg L.P.*, 13CV1351 DLC, 2015 WL 223781, at *3–5 (S.D.N.Y. Jan. 16, 2015)(finding that help desk workers were entitled to overtime –notwithstanding Bloomberg's insistence that the court consider ancillary job responsibilities such as special projects –because only the primary job duty matters in the analysis of exemption defenses).

[8] And Bloomberg certainly cannot defeat conditional certification with one self-serving declaration claiming individual differences among the non-primary duties of Data Analysts. *See, Goodman v. Burlington Coat Factory,* CIV.A. 11-4395 JHR, 2012 WL 5944000, at *6 (D.N.J. Nov. 20, 2012)("Accordingly, at this stage,

subgrouping of Global Data Analysts stand in a different position with respect to any defense from any other individual or sub-group; it merely suggests that differences in the things employees do will have to be considered. That is simply untrue to the extent that Bloomberg refers to non-primary duties. 29 CFR 541.700(a)("To qualify for exemption under this part, an employee's 'primary duty' must be the performance of exempt work.") Because Bloomberg does not describe employees' primary duty, its reference to other duties is irrelevant.

Bloomberg admits that prior to reclassification it had only one job title, but that beginning in January 2019, it created 6 different titles. Not surprisingly, Bloomberg has failed to provide the Court with a single job description, and it supplied nothing showing that the different titles have different primary job duties. Of course, job titles alone are not determinative of entitlement to an exemption. *Oddo v. Bimbo Bakeries USA, Inc.*, 2:16-CV-04267-KM-JBC, 2017 WL 2172440, at *12 (D.N.J. May 17, 2017) ("A job title alone is insufficient to establish the exempt status of an employee.") (citing: 29 C.F.R. § 541.2). The claim that different class members had different knowledge, different expertise, worked in different datasets and the like, worked with software, etc. have no relevance to the

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the Court declines to consider the 38 declarations that Burlington submits to show individual differences among the ASMs' actual duties."); *see also, Depalma v. Scotts Co. LLC,* 13-CV-7740 (KM)(JAD), 2016 WL 7206151, at *3 (D.N.J. Mar. 31, 2016)(declining to consider declarations from other sales managers to demonstrate the variation of experiences).

statutory landscape. Beyond its vague declaration testimony, Bloomberg has failed to substantiate a single difference about a fact that matters to the exemption defenses and has failed to adduce any evidence that would show Plaintiffs are more dissimilar than similar with respect to the matters in issue in this case.

In extreme or manifestly clear cases, the availability of different exemption defenses to different groups within a purported class can justify denial of certification at the first stage. When a company can muster incontrovertible evidence that Plaintiffs seek to describe an overbroad class of many different job functions, it will frequently deny stage one notice. *See e.g., Romero v. H.B. Automotive Group, Inc.* No. 11 CIV. 386 , 2012 WL 1514810 (S.D.N.Y. May 01, 2012) (denying motion to certify collective of almost a dozen job titles because "[p]laintiff—the only plaintiff, named or otherwise—was employed in two substantially different roles.").[9] But here, Plaintiffs have identified one group

[9] Bloomberg's opposition relies on *Evancho* where the court exercised its discretion to deny notice to a proposed class of pharmaceutical reps that worked across the United Sates in hundreds of geographically and demographically distinct districts where the employer argued that their primary duty was outside sales or administratively exempt work. *Evancho v. Sanofi-Aventis U.S. Inc.*, CIV. A. 07-2266 (MLC), 2007 WL 4546100, at *1 (D.N.J. Dec. 19, 2007) ("PRs work in ninety-nine different regions in the United States [consisting of] approximately eight districts [and the] number of PRs working in each district varies depending on…geographic and demographic factors..."). In this case, Bloomberg has admitted that the much smaller proposed class of Data Analysts worked primarily out of its Princeton and New York City offices (Doc. 34-1 at ¶ 11) and does not deny that all had the same primary job of supplying formatted data to its platforms.

performing the same primary job duty with ample evidence to justify mailing notice and the merits of any defense are highly remote and speculative (particularly given Bloomberg's own classification of the entire class as exempt).

Bloomberg also argues that Plaintiffs have failed to identify a "single alleged unlawful common policy" but in two-element overtime claims, the relevant policy can only be a policy refusing to pay overtime. That policy is not speculative here. Plaintiffs' declarations explain the policy. *See,* Doc. 20-5 at ¶¶ 29-31; Doc. 20-6 at ¶¶ 29-31; Doc 20-7 at ¶¶ 27-30; Doc. 20-8 at ¶¶ 27-30. And such a blanket policy is admitted by Bloomberg. Def. Brf. p. 7, fn. 2. Nor is the claim so speculative or unlikely as to merit jaundiced-eye review at this pre-discovery stage. *Porter*, 2018 WL 5874094, at *2. Bloomberg's reclassification decision prior to this suit, underlines the evident merit of Plaintiffs' entitlement to overtime.

II. Bloomberg's Proposed Changes to the Form and Method of Notice Would Discourage Participation and Should be Denied.

This Court has repeatedly declined employers' proposals that a notice should threaten putative class members with vague, dubious, and hypothetical, threats of liability for costs or discovery obligations. *See, Bath v. Red Vision Systems, Inc.*, No. 13–02366, 2014 WL 2436100, at *7 (D.N.J. May 29, 2014) (rejecting threat of discovery obligations and liability for costs); *Shakib v. Back Bay Rest. Group, Inc., 10*-CV-4564 DMC JAD, 2011 WL 5082106, at *5 (D.N.J. Oct. 26, 2011) (same). This Court has been concerned about the chilling effect of

vague language where neither the perceived harm nor its likelihood can be properly evaluated by the recipient. *Bath,* 2014 WL 2436100, at *7. Bloomberg's request to include the threat that class members could have to pay Bloomberg's litigation costs can only serve an *in terrorem* effect and utterly disregards the improbability or even legal impossibility that costs would ever be imposed on opt-in class members.[10] Bloomberg has not cited a single case in which opt-ins were obligated to pay a winning employer's costs.

Similarly, including within the notice a threat that class members will be saddled with vague and unspecified discovery obligations, when no such obligations have been determined and when none may materialize, similarly discourages participation at a time when employees have no opportunity to learn the value of their claims. And while some class members may choose or even be required to participate in the discovery process (along with non-party witnesses), representative evidence can be and is regularly used to prove liability and damages on a class-wide basis in FLSA. *Reich v. Gateway Press, Inc.,* 13 F.3d 685, 702 (3d Cir. 1994)("Not all employees need to testify in order to prove the violations or to recoup back wages" because plaintiffs in FLSA actions "can rely on testimony and

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[10] Even if there was a theoretical basis for assessing costs of the litigation on a losing party, in the class context such costs are assessed only on the class representatives. *Newberg on Class Actions* § 16:1 (4th ed.).

evidence from representative employees to meet the initial burden of proof requirement.") (citations omitted). Bloomberg's invitation to include vague threats at a time the benefit of participation cannot be discerned should be rejected. *Bath*, 2014 WL 2436100, at *7; *Shakib*, 2011 WL 5082106, at *5.

Bloomberg contends that the notice is misleading because it tells potential class members that the only way to recover on their claims is to opt into the case. But the notice does not tell anyone that opting into this litigation is the only way to recover from their claims. *See,* Doc. 20-2 at p. 2. The notice simply informs potential class members that if they do not opt-in, they will not be entitled to receive any share of a settlement or judgment, and that if they join, they will be bound by the results of the litigation. *Id.* And the notice accurately informs potential class members that they have the right to retain their own lawyer. *Id.* ("You have the right to be represented by your own lawyer if you wish."). Plaintiffs' proposed notice is accurate.[11]

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[11] Bloomberg did identify a vestigial error in the notice where it refers to class members as "Installations Representatives." Plaintiffs agree that the error should be corrected to refer to "Data Analysts" instead. Of course, the reason for this error is that the proposed notice here is based on a notice recently approved by Judge Berman in the Southern District of New York for a similar class of Bloomberg tech workers. *Martinez v. Bloomberg L.P.,* 17 CV. 4555 (RMB), 2017 WL 6988039, (S.D.N.Y. Dec. 7, 2017) (granting conditional certification); *see also, Michael v. Bloomberg L.P.*, No. 14-CV-2657 TPG, 2015 WL 1810157, at *3-*4 (S.D.N.Y. Apr. 17, 2015) (approving dissemination of a similar form of notice: "The court sees no reason to depart from these precedents here. The court approves plaintiff's proposed notice.").

Plaintiffs' proposed plan for the distribution of notice is also appropriate as it is the most comprehensive and provides the greatest likelihood that each affected worker will receive it through one means or another.[12] If the Court decides notice should be sent, there is no reason to hamstring its reach from the outset. Notice should be sent by the best means practicable just as it must in a class action. There is no reason why less comprehensive reach is appropriate in a collective action.

Notice by email and a post-card reminder are also important components of reaching affected workers. This Court has previously found such elements appropriate. *See e.g. Porter v. Merrill Lynch Pierce Fenner & Smith, Inc.*, CV178043FLWTJB, 2018 WL 5874094, at *5 (D.N.J. Nov. 9, 2018) (Your Honor authorized the distribution of notice via e-mail). Bloomberg has not offered any valid reason to prohibit Plaintiffs from distributing notice by e-mail. Issuing a reminder notice is also an important aspect of proper notice that Your Honor has also previously authorized. *Porter*, 2018 WL 5874094, at *5. There is no reason to depart form the methods of distribution previously authorized by this Court.

With respect to posting, Bloomberg does not disagree that posting at the worksite is an efficient, non-burdensome means that courts regularly employ. *See,*

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[12] Of course, each means has its own separate limitations. Mail gets lost, thrown out without opening, and is often misdelivered or misplaced. Email is distrusted or filtered by service providers or users as "junk." Posters are often overlooked or put in inconvenient locations. Together however, these various means constitute "the best notice that is practicable."

Gervasio v. Wawa Inc., 17-CV-245 (PGS), 2018 WL 385189, at *7 (D.N.J. Jan. 11, 2018). Plaintiffs hereby limit their request for dates of birth and last four digits of social security numbers to when a notice is returned undeliverable to any class member – so that counsel can locate the affected worker.[13]

Bloomberg's suggestion to remand crafting notice to the parties to work out is merely an invitation to lessen its exposure through delay, causing claims to evaporate through the statute of limitations. The parties have briefed their respective positions and the issues are clearly ripe for decision now.

CONCLUSION

This Court should direct Bloomberg to supply all contact information necessary for notice to be issued to "Global Data employees who worked as Data Analysts, Data Specialists, or related titles, who were not paid time and one-half for hours over 40 in one or more weeks." [14] The Court should direct that notice be mailed, e-mailed, and posted. Bloomberg should be directed to promptly supply phone numbers and last four digits of SSNs for individuals whose notice is returned as undeliverable.

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[13] Such information allows counsel to differentiate and locate individuals with common names.

[14] Not included in the definition of the class are individuals whose compensation always met the "Highly Compensated Worker" exemption threshold; or, who have only held the Analyst III or Specialist III position (or both).

Date: August 27, 2019

Respectfully submitted,

/s/ Michael Korik
Michael Korik (MK0377)
Law Offices of Charles A. Gruen
381 Broadway
Suite 300
Westwood, NJ 07675
Tel.: 201-342-1212
Fax: 201-342-6474
E-mail: mkorik@gruenlaw.com

Counsel for Plaintiffs