IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NILAB RAHYAR TOLTON, *et al.*, *Plaintiffs*, *v.* JONES DAY, *Defendant.*	Civ. No. 1:19-00945 (RDM) **MOTION TO COMPEL COMPLIANCE WITH FEDERAL RULE 10(A)**

MOTION TO COMPEL COMPLIANCE WITH FEDERAL RULE 10(A)

Defendant Jones Day respectfully moves this Court for an order enforcing Federal Rule of Civil Procedure 10(a) as to the Jane Doe Plaintiffs, and rejecting their use of pseudonyms in this litigation. For reasons explained in the supporting memorandum and declaration of Terri L. Chase, the Jane Does' *ex parte* motion misled the Court, and failed to demonstrate sufficient grounds or evidence to hide their identities from the public.

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NILAB RAHYAR TOLTON, *et al.*, *Plaintiffs*, *v.* JONES DAY, *Defendant.*	Civ. No. 1:19-00945 (RDM) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

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INTRODUCTION

Proceeding under a pseudonym is a practice reserved for exceptional cases: where public disclosure would put a life in danger, for example, or cause severe psychological trauma through public exposure of highly intimate personal information. Absent circumstances like those, the law recognizes that public disclosure serves the public interest, by making the judicial system transparent and accountable, and by discouraging plaintiffs from leveling baseless accusations from beneath a cloak of anonymity.

The Jane Doe Plaintiffs in this case—four former Jones Day associates who allege gender and/or pregnancy discrimination—come nowhere close to establishing the type of exceptional circumstances that justify pseudonymous litigation. Indeed, their *ex parte* motion was unadorned by any evidence at all. Contrary to the Does' vague assertions, their employment claims do not involve highly sensitive personal information, much less require identification of minor children. Nor do the Does offer any credible basis to fear "retaliation" by Jones Day, which no longer employs them and has no intention of doing anything other than responsibly defending itself in this Court. And the short-term nature of the Does' request for pseudonymous treatment—*i.e.*, only until Jones Day files its answer or defenses—betrays the lack of merit to their supposed fears. Meanwhile, Jones Day is already suffering prejudice from the pseudonyms, which are obstructing its efforts to investigate the Does' claims. The putative class is also prejudiced by being unable to evaluate the individuals who seek to become its legal representatives.

Ultimately, this is not a close call. The Jane Does are not materially different from the countless employment discrimination plaintiffs who routinely file under their real names, including the named Plaintiffs here who, rather than fearing publicity, have invited extensive media attention to themselves and their claims. Any fair balancing of the law, facts, equities, and public interest make it clear that the use of pseudonyms is unwarranted in this case.

FACTUAL BACKGROUND

A. Plaintiffs' Complaint.

On April 3, 2019, six former associates sued Jones Day. Dkt. 4 ("Compl."). The two named plaintiffs and four Jane Does generally allege that they were discriminated against based on their sex and, in two cases, based on their pregnancies and family leaves.

As to retaliation, Jane Does 1 and 3 allege none. Jane Doe 2 alleges, on information and belief, that her question at an office women's event led to unspecified retaliation, although she also admits receiving a "negative annual review" of her performance. *Id.* ¶¶ 132, 154-155. And Jane Doe 4 alleges that when she challenged the negative reviews of her job performance, she was "attacked in a memorandum circulated among partners for lacking 'integrity.'" *Id.* ¶ 202.

As to health conditions purportedly caused by Jones Day, Jane Does 1, 2 and 4 allege nothing. Jane Doe 3 claims that her allegedly discriminatory treatment caused her to suffer undefined "serious health problems" that led to an extended medical leave. *Id.* ¶¶ 190-192.

As to minor children, Jane Does 1, 3 and 4 allege nothing. Jane Doe 2 alleges that she has two children and took parental leave. *Id.* ¶¶ 137, 148.

As to current employment, Jane Doe 1 works at a "competing law firm" (*id.* ¶ 136); Jane Doe 2 "left 'Big Law'" (*id.* ¶ 170); Jane Doe 3 accepted "a government position" (*id.* ¶ 191); and Jane Doe 4 "works in the public sector" (*id.* ¶ 222).

B. Plaintiffs' Motion To Proceed Under Pseudonyms.

At the same time as they sued, the four Jane Doe Plaintiffs moved for leave to proceed under pseudonyms. Dkt. 1. They moved on an *ex parte* basis "because Defendant has not yet been served" (Dkt. 1-1 at 1 n.1), although that lack of service was their own choice; their counsel had been in communication with Jones Day about these claims for months and thus could easily have effectuated service had they desired. *See* Chase Decl. ¶ 2.

None of the Jane Does filed a sworn declaration in support of their motion; only their attorney did, and it purportedly did nothing more than identify their names. Dkt. 1-1 at 2 n.2. Jones Day cannot evaluate the declaration, however, because Plaintiffs' counsel refused to share a copy of it unless Jones Day agreed to extend Plaintiffs' time to file a class certification motion. Chase Decl. ¶ 3. As a result, the "facts" supporting the motion were purportedly "derived from the allegations in the Complaint" (Dkt. 1-1 at 2 n.3)—not from any evidence.

As grounds for their motion, the Jane Does represented (without citation to anything, even their complaint) that their lawsuit "implicates sensitive information, including confidential health information and information pertaining to minor children." *Id.* at 2. The only detailed health information in their complaint pertains to Plaintiff Mazingo, however, who did not seek anonymity; and the complaint does not mention or "implicate" any information about any minor child, other than by noting that Tolton and Jane Doe 2 have children. The Does also claimed to have a "reasonable fear" that Jones Day would "publicly impugn" their reputations (*id.* at 2, 5), though they again offered no explanation or evidence to support that offensive assertion. Jane Does 3 and 4 represented that they "face special vulnerabilities given their sensitive employment circumstances" (*id.* at 6), but gave no factual support or explanation.

Chief Judge Howell granted the motion *ex parte* on the day it was filed, subject to further consideration by the assigned judge. Dkt. 2. On April 9, 2019, after assignment of this case to Judge Moss, but before any briefing, the Court entered a minute order stating that it "agrees that Plaintiffs' significant interest in maintaining their anonymity at this stage of the litigation is sufficient to overcome any general presumption in favor of open proceedings." Minute Order (Apr. 9, 2019). The Court thus prohibited Jones Day from publicly disclosing the Jane Does' identities or personal identifying information to non-parties. *Id.*

More than 45 days after its filing, Plaintiffs have yet to serve their complaint (or any of the Court's orders) on Jones Day. Plaintiffs did, however, "serve" their complaint on the media before they filed it. Chase Decl. ¶ 4. And the two Plaintiffs who disclosed their identities, Tolton and Mazingo, have volunteered for interviews and photo shoots. Chase Decl. Ex. 1. In contrast, Jones Day has issued no press release; it merely posted on its website and social media pages the actual data about the success of women lawyers at Jones Day, and made clear that the Firm will "litigate this case in court, not in the media." Chase Decl. Ex. 3.

LEGAL STANDARD

Under the Federal Rules of Civil Procedure as well as the common law and constitutional right of public access to judicial proceedings, "parties to a lawsuit must typically openly identify themselves." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995); *see* Fed. R. Civ. P. 10(a); L.R. 5.1(c)(1). This rule "serves more than administrative convenience. It protects the public's legitimate interest in knowing all of the facts involved, including the identities of the parties." *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992); *see also John Doe Co. No. 1 v. CFPB*, 195 F. Supp. 3d 9, 23 (D.D.C. 2016) (Moss, J.) (describing "substantial public interest in knowing the identity of the parties to litigation in federal court"). Moreover, "when courts require litigants to use real names, they encourage suits by the most zealous, passionate, and sincere litigants, those who are willing to place their personal and public stamp of approval upon their causes of action." *Qualls v. Rumsfeld*, 228 F.R.D. 8, 13 (D.D.C. 2005). And because defendants cannot avoid being publicly identified, which "may cause damage to their good names and reputation," requiring plaintiffs who are leveling "serious" accusations against them to mutually identify themselves is also "dictate[d]" by "[b]asic fairness." *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979).

The rule is not absolute. Courts may grant a "rare dispensation" of anonymity, after taking into account the "risk of unfairness to the opposing party" and "presumption of openness in judicial proceedings." *Microsoft*, 56 F.3d at 1464. But "[p]seudonymous litigation has been permitted 'only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure" of plaintiff's name. *Nat'l Ass'n of Waterfront Emp'rs v. Chao*, 587 F. Supp. 2d 90, 99 (D.D.C. 2008). "It is the exceptional case in which a plaintiff may proceed under a fictitious name." *Frank*, 951 F.2d at 323; *accord Qualls*, 228 F.R.D. at 13.

Applying these standards, courts in this district have authorized pseudonymous litigation where an Iraqi national showed that identifying himself as having aided U.S. reconstruction in Iraq would "expose him and his family to life-threatening danger," *Doe v. U.S. Dep't of State*, No. 1:15-cv-01971, 2015 WL 9647660, at *1 (D.D.C. Nov. 3, 2015); where a woman who alleged a brutal rape introduced evidence from a "licensed clinical social worker" that disclosure of her identity was "very likely to result in psychological trauma," *Doe v. Cabrera*, 307 F.R.D. 1, 6-7 & n.10 (D.D.C. 2014); and where an FBI employee alleged that he had been discriminated against based on "mental illnesses" that he had "kept confidential for decades," *Doe v. Sessions*, No. 18-cv-0004, 2018 WL 4637014, at *1, 4 (D.D.C. Sept. 27, 2018).

At the same time, "requests to proceed anonymously have been denied where the plaintiff merely cites personal embarrassment as the basis of the need for confidentiality." *Nat'l Ass'n*, 587 F. Supp. 2d at 100. As one court explained, "bringing litigation can subject a plaintiff to scrutiny and criticism and can affect the way plaintiff is viewed by coworkers and friends, but fears of embarrassment or vague, unsubstantiated fears of retaliatory action by higher-ups do not permit a plaintiff to proceed under a pseudonym." *Qualls*, 228 F.R.D. at 12; *see also Doe v. Teti*,

No. 1:15-cv-1380, 2015 WL 6689862, at *4 (D.D.C. Oct. 19, 2015) (denying motion to proceed under pseudonym, despite lack of any showing of unfairness to defendant, because plaintiff demonstrated nothing "more than protecting an economic interest and avoiding criticism that may attend litigation"); *Frank*, 951 F.2d at 324.

Whatever the ground for seeking anonymity, it is the plaintiff who "bears the burden to demonstrate a legitimate basis for proceeding in that manner." *Qualls*, 228 F.R.D. at 13. To do so, the plaintiff must present "evidence," such as in the form of "sworn declarations." *John Doe Co. No. 1*, 195 F. Supp. 3d at 21; *see also Whalen v. United States*, 80 Fed. Cl. 685, 691-92 (2008) (requiring plaintiffs seeking anonymity to provide "evidence" to support "explicit cause for proceeding anonymously," not merely "bare allegation"). In *John Doe Company No. 1*, for example, the plaintiffs filed two sworn declarations "to show the magnitude of the harm they might suffer if their identities were publicly disclosed." 195 F. Supp. 3d at 21. This Court accepted the first of the two declarations, which came from an individual with "substantial experience" in the relevant industry, explained why disclosure of the corporate plaintiff's identity would "likely" lead to the "substantial demise" of the company, and was "supported by references to specific experiences by the declarant." *Id.* at 22. At the same time, however, the Court gave the second declaration "no weight," as it merely advanced speculative assertions "about what 'could' happen, without any elaboration, explanation, or support." *Id.*

In short, "as a matter of fundamental principle and the governing rules, the identity of those who participate in federal litigation should remain a matter of public record absent substantial countervailing considerations," and exception-seekers must "bear the heavy burden of demonstrating that the cost of disclosure outweighs the public interest in transparency." *Id.* at 13, 18.

ARGUMENT

This case is starkly similar to *Southern Methodist*, which involved another set of female lawyers who alleged that law firms "discriminated against women in hiring." 599 F.2d at 709. They contended that disclosure of their identities would "leave them vulnerable to retaliation from their current employers," "prospective future employers," and the bar at large. *Id.* at 713. The court denied the request: "Defendant law firms stand publicly accused of serious violations of federal law. Basic fairness dictates that those among the defendants' accusers who wish to participate in this suit as individual party plaintiffs must do so under their real names." *Id.*

The same is true here. Simply put, the Jane Does have not carried the heavy burden of justifying concealment of their identities. Indeed, they have not come forward with any evidence at all—only arguments in a brief, most of which are not supported even by allegations in their complaint. And the complaint shows this is not an exceptional case. It does not involve intimate details of the Does' personal lives or any real fear of harm. It is simply an employment dispute alleging discrimination based on sex and pregnancy (neither of which is confidential). Such claims are "routinely brought ... under the plaintiff's real name." *Doe v. Zinke*, No. CR 17-2017, 2018 WL 1189341, at *2 (D. Minn. Feb. 14, 2018). The Jane Does do not begin to distinguish themselves from the many women who have complied with Rule 10(a) in bringing similar suits in recent years. *E.g.*, *Griesing v. Greenberg Traurig LLP*, No. 1:12-cv-8734 (S.D.N.Y); *Ribeiro v. Sedgwick LLP*, No. 3:16-cv-4507 (N.D. Cal.); *Campbell v. Chadbourne & Parke LLP*, No. 1:16-cv-6832 (S.D.N.Y.); *Bertram v. Proskauer Rose, LLP*, No. 1:17-cv-901 (D.D.C.); *Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, No. 8:19-cv-60 (C.D. Cal.). And in *Doe v. Morrison & Foerster LLP*, No. 3:18-cv-2542 (N.D. Cal.), even though the defendant did not oppose the pseudonyms, Judge Corley recently made clear that their use was untenable, as the case was not "any different ... than every other employment case." Chase Decl. Ex. 4 at 4.

Meanwhile, Jones Day, the putative class, and the public all have interests in disclosure: Jones Day because the secrecy is impairing its informal investigation and falsely implying that it is likely to retaliate; the putative class because the Does purport to be acting on its behalf; and the public because Plaintiffs are feeding it a false, one-sided narrative. The Court should therefore require the Jane Does to disclose their identities, as Federal Rule 10(a) dictates.

I. THE JANE DOES HAVE NOT DEMONSTRATED ANY COMPELLING GROUND FOR HIDING THEIR IDENTITIES FROM THE PUBLIC.

The "default procedure" in federal court requires disclosure of Plaintiffs' identities, and it is therefore the Jane Does who "bear[] the burden to demonstrate" why a pseudonym should be permitted. *Qualls*, 228 F.R.D. at 13; *see also John Doe Co.*, 195 F. Supp. 3d at 13. In Plaintiffs' motion, they identify two supposed grounds for anonymity: that their claims require disclosure of sensitive information, and that disclosure of their identities could put them at risk of retaliation. *See* Dkt. 1-1 at 5-6. Both grounds wilt under examination.

A. Plaintiffs' Claims Do Not Involve Highly Sensitive Personal Information.

Use of a pseudonym may be warranted if pursuing a claim would "compel" the plaintiff "to disclose information of the utmost intimacy." *Frank*, 951 F.2d at 323. That was the basis for the decision in *Cabrera*, where the claim arose from an "alleged altercation with the defendant" that "was not only physical, but also sexual," and where the allegations thus included "graphic details of the alleged incident, including multiple references to the plaintiff's genitalia." 307 F.R.D. at 5. So too in *Sessions*, where the plaintiff was alleging discrimination "because of his Asperger's Syndrome and other sensitive mental conditions," which he had kept secret "from everyone except his wife for twenty-five years before that diagnosis was allegedly disclosed by an FBI employee to Plaintiff's supervisors." 2018 WL 4637014, at *4.

There is nothing remotely like that here. The Jane Does allege discrimination based on their sex or pregnancy. But neither their sex nor their pregnancies are confidential or would lead to stigmatization; this case is thus not analogous to the disability-discrimination case they cite, which involved "cognitive impairments." *Dep't of Fair Emp't & Hous. v. Law Sch. Admission Council, Inc.*, No. C-12-1830, 2012 WL 3583023, at *3-4 (N.D. Cal. Aug. 20, 2012).

The Jane Does vaguely claim they will "be required to disclose ... information related to medical and psychological symptoms that they have suffered because of the unlawful treatment alleged in the Complaint." Dkt. 1-1 at 5. But they cite nothing—not even allegations, much less evidence—to support that assertion. In fact, as to Jane Does 1 and 4, the complaint includes no allegations of any medical or psychological symptoms. As to Jane Doe 2, the complaint alleges that she suffered a miscarriage, but not that Jones Day caused that condition or punished her for it; to the contrary, she says she did not even tell the Firm about it. Compl. ¶ 158. That allegation was irrelevant to her claims and certainly not needed to comply with Federal Rule 8; the fact that she volunteered it cannot serve as a bootstrap to justify anonymity.

Only Jane Doe 3 alleges that she faced "serious health problems" due to "discrimination she experienced." *Id*. ¶ 190. But unlike Plaintiff Mazingo's allegations about her psychiatric treatment and fibromyalgia, which she alleged publicly, the complaint does not identify Jane Doe 3's health problems with any specificity (nor does it need to), so this is hardly a reason to conceal her identity. And, as the Jane Does themselves acknowledge in a footnote (Dkt. 1-1 at 8 n.5), a protective order would be an appropriate way to safeguard information that should remain private (on both sides). That narrower remedy suffices to protect any legitimate interest in medical privacy that Jane Doe 3 may come to assert. *See, e.g.*, *Wheeler–Whichard v. Doe*, No. 10-cv-0358S, 2010 WL 3395288, at *6-7 (W.D.N.Y. Aug. 25, 2010) (denying prisoner's request

to use pseudonym, despite relevance of "medical condition," as "courts routinely file medical records under seal, without sealing the action or having plaintiff proceed under a pseudonym"). Indeed, if pleading health issues or emotional distress were sufficient to warrant pseudonymous litigation, every personal injury action would qualify for this treatment. That cannot be right: Pseudonyms are reserved for "critical or unusual cases." *Qualls*, 228 F.R.D. at 10.

Finally, Jane Doe 2 asserts that she "will need to disclose ... the identities of her minor children." Dkt. 1-1 at 5. That is false. This case was not filed on behalf of a minor child and, apart from the fact that Jane Doe 2 was pregnant and took maternity leave, her child is irrelevant (just as Tolton's children are irrelevant and not alleged to be a basis for anonymity for her). *Cf. Eley v. Dist. of Columbia*, No. 16-cv-806, 2016 WL 6267951, at *2 (D.D.C. Oct. 25, 2016) (granting anonymity in case about disabled child as the "child's identity would effectively be revealed"). And while *Doe v. Deschamps*, 64 F.R.D. 652 (D. Mont. 1974), cited by the Does, reflects the willingness of courts in the 1970s to afford anonymity to women seeking abortions in violation of then-applicable law, the considerations there are plainly irrelevant here.

B. Plaintiffs Offer No Basis To Fear Retaliation.

Courts sometimes allow pseudonymous litigation if the plaintiff "show[s] a reasonable fear of severe harm." *Doe v. Trs. of Dartmouth Coll.*, No. 18-CV-690, 2018 WL 5801532, at *4 (D.N.H. Nov. 2, 2018). In *Department of State*, for example, the plaintiff made a convincing showing that "his life will be in greater danger if his name is publicly connected to a complaint revealing his help with U.S.-led efforts in Iraq." 2015 WL 9647660, at *3. Likewise, in a case that Plaintiffs cite, a court allowed a group of nude dancers to maintain anonymity based partly on the risk of harm from "nightclub patrons if their names or addresses are publicly disclosed," where the defendant *agreed* that public disclosure "presents substantial risk of harm." *Jane Roes 1-2 v. SFBSC Mgmt., LLC*, 77 F. Supp. 3d 990, 992, 995 (N.D. Cal. 2015).

Again, the Jane Does allege nothing like this. They worry about their career prospects but, as another judge recently exclaimed in the *Morrison & Foerster* gender discrimination case filed by Plaintiffs' counsel, "that's also the case for every employment plaintiff that I have in front of me. Every single one. Every single one." Chase Decl. Ex. 4 at 5.

The Does here argue that their fear is reasonable in light of the retaliation they allegedly suffered while at Jones Day. Dkt. 1-1 at 6. But if that were enough, every retaliation plaintiff could proceed pseudonymously. Plus, only two of the Jane Does even allege retaliation, and their claims are inapposite: Jane Doe 2 speculates that the Firm retaliated for a question she asked at a women's event; Jane Doe 4 says an internal memo criticized her after she questioned her negative reviews. Compl. ¶¶ 154-155, 202. Neither allegation—each made on "information and belief"—remotely supports the inflammatory accusation that Jones Day will harm them if their identities are made public. Ultimately, the Does here assert only "vague, unsubstantiated fears of retaliatory actions," which do not suffice. *Qualls*, 228 F.R.D. at 12.

Indeed, it is hard to understand exactly what the Jane Does are worried about. They are not current employees, so Jones Day could not take adverse employment action against them in any event. That distinguishes *Gomez v. Buckeye Sugars*, which let "migrant farmworkers" use fictitious names to sue their *current employers*. 60 F.R.D. 106, 106 (N.D. Ohio 1973).

Jane Does 3 and 4 claim they face "special employment circumstances" at their new jobs that put them at greater risk for retaliation. Dkt. 1-1 at 6. That assertion is vague, unsupported, and insufficient. In all events, Jones Day has no intent to harm the Does by taking advantage of any special employment circumstances they may face, and there is no basis to claim otherwise.

The Jane Does appear to worry that Jones Day might disparage them in a "public forum." Dkt. 1-1 at 6. Insofar as that implies some type of media campaign like Tolton and Mazingo are

conducting, that is baseless. In her preliminary order, Chief Judge Howell mistakenly described the Does as having alleged that Jones Day had "disparag[ed] them to others outside the firm." Dkt. 2 at 6. In fact, their motion alleged disparagement only "inside the Firm" (Dkt. 1-1 at 6), without citation but apparently referring to the complaint's allegation that an internal memo criticized Jane Doe 4. Obviously Jones Day has a right to discuss its personnel issues *internally*; that is not disparagement. And it certainly does not support a credible fear of *external* disparagement. *Cf. Qualls*, 228 F.R.D. at 11. Jones Day has taken no such action against Tolton or Mazingo, notwithstanding their defamatory media campaign, and has been clear that it will "litigate this case in court, not in the media." Chase Decl. Ex. 3.

To be sure, Jones Day's defense of this case in court will involve rebutting the allegations that the Jane Does were star associates who failed to advance only due to discrimination. Jones Day will show instead that, to the extent any of them were not as highly rated or compensated as other female and male associates, it was a result of a fair, gender-neutral evaluation of their performance and contribution to the Firm. But Plaintiffs have chosen to put their employment performance at issue and, as in any employment dispute, Jones Day has a legal right to defend itself, including by refuting their claims. The Jane Does' concern that their claims will be proved false in a legal proceeding that they initiated is no basis for them to remain anonymous.

II. STRONG PUBLIC AND PRIVATE INTERESTS FAVOR TRANSPARENCY IN THIS CASE.

The general reasons for transparency—allowing the public to "fully assess the merits of the lawsuit and the quality of the courts," and incentivizing suit by "the most zealous, passionate, and sincere litigants"—are, even standing alone, "legitimate reason[s] to require unsealing Doe plaintiffs' names." *Qualls*, 228 F.R.D. at 13; *see also Teti*, 2015 WL 6689862, at *4 (refusing to allow pseudonym even though defendant faced no "unfairness"). Beyond that, however, strong private and public interests would be prejudiced by allowing the Does to hide their identities.

A. Secrecy Is Prejudicial to Jones Day.

While Jones Day knows the identities of the Jane Does, allowing them to proceed under pseudonyms prejudices the Firm in at least two respects. *First*, "the mere filing of a civil action" against private defendants can "cause damage to their good names and reputation." *S. Methodist Univ.*, 599 F.2d at 713. It therefore "would be fundamentally unfair to allow plaintiff to make such serious allegations ... without standing, as they must, in a public forum." *Doe v. Bell Atl. Bus. Sys. Servs., Inc.*, 162 F.R.D. 418, 422 (D. Mass. 1995); *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996) (where plaintiff "made serious charges and has put her credibility in issue," "[f]airness requires that she be prepared to stand behind her charges publicly").

Importantly, pseudonyms exacerbate that reputational harm. For one thing, the Court's approval of the pseudonyms itself impugns Jones Day's reputation by implying, without basis in evidence, that Jones Day would improperly retaliate against the Jane Does if their identities were made public. For another, pseudonyms prevent the public—including clients, potential clients, lateral recruits, and law students—from fully evaluating the Does' allegations and credibility.

Second, Jones Day is hamstrung in pursuing discovery by an order that prevents it from identifying the Jane Doe Plaintiffs. For example, the Firm cannot reach out to former co-workers to obtain relevant testimony about the Jane Doe Plaintiffs' performance. And the Firm is unable to seek evidence from others outside the Firm with whom the Jane Does might have shared relevant information. "Even if, as Plaintiff[s] suggest[], Defendant[] already know[s] Plaintiff[s'] real name, the prejudice results from withholding Plaintiff[s'] name from third parties [in discovery], and eventually from the jury." *Zuegel v. Mountain View Police Dep't*, No. 17-cv-3249 (N.D. Cal. Oct. 18, 2017), Dkt. 16.

The Jane Does demur that this prejudice will not come into play until "a later stage of litigation," and ask to proceed anonymously at least until "Defendant presents its answer and

defenses." Dkt. 1-1 at 7. Their premise is not true. Anonymity is *currently* hindering Jones Day's ability to prepare its defense to the Jane Does' claims. Plaintiffs should not be permitted to force Jones Day to delay witness interviews. And, unless the Jane Does' former co-workers know who they are, the witnesses within Jones Day do not know to come forward, and Jones Day cannot approach them. This prejudice is current, tangible, and substantial, which is why Jones Day is filing this motion before being served. Jones Day is also already being harmed by the removal of a safeguard, provided in Rule 10(a), that is meant to discourage baseless claims.

Even if the prejudice were solely prospective, delaying disclosure makes no sense here. It might have made sense in *Gomez*, which the Does cite, because that case involved a threshold dispositive issue and "all of the information that would determine this question [was] in the possession of the defendants." 60 F.R.D. at 107.[1] But here, unless the Does anticipate that their claims will be dismissed at the threshold, no valid purpose is served by granting anonymity even on an interim basis. It will be impossible to try this case without disclosing the parties' identities, rendering anonymity temporary at best. *See Cabrera*, 307 F.R.D. at 10. And if the Does are serious about moving to certify a class—a motion due within 90 days of the complaint being filed, LCvR 23.1(b)—they will surely need to identify themselves then. Plaintiffs' counsel recently admitted as much in the *Morrison & Foerster* case. *See* Chase Decl. Ex. 4 at 12-14. After all, "[h]ow is any putative class member supposed to make some sort of decision as to whether to opt in or opt out if they don't even know who [the class representative] is?" *Id.* at 12. Accordingly, disclosure of the Jane Does' identities is inevitable, and temporary anonymity does them no favors. As sophisticated lawyers, they presumably understand that, in addition to their

[1] On this point, the Jane Does also cite the *ex parte* order in *Doe v. Proskauer Rose LLP*, No. 17-cv-00901, which granted leave to proceed under a pseudonym pending further briefing after service and response to the complaint. What the Does do not say is that, before that could occur, the plaintiff told the Court that she wished to proceed under her real name after all. Order, *Doe v. Proskauer Rose LLP*, No. 17-cv-00901 (Apr. 30, 2018).

other obvious problems under Rule 23, they cannot possibly seek to serve as the "named" plaintiffs in a class action without being "named," or try their own individual claims in a sealed courtroom. The only conceivable purpose of short-term anonymity is thus to support an apparent effort to troll for more plaintiffs by offering the false hope that they will be able to preserve their privacy forever. The Court should not perpetuate that.

B. Secrecy Is Prejudicial to the Public Interest.

The Jane Does seek to minimize the public interest in transparency, claiming that they are merely "private citizens seeking to litigate private issues." Dkt. 1-1 at 8. In fact, though, Plaintiffs are "attempting to try [their] case in the media [and] gain a tactical advantage through their public statements." *Cabrera*, 307 F.R.D. at 9. A private citizen seeking to litigate private issues while preserving her privacy does not provide her complaint to the press before filing it, or issue a lengthy press release proclaiming that it is "time for Jones Day to ... implement full pay transparency" (Chase Decl. Ex. 2), even before serving the complaint on the defendant.

Waging a public relations war is plainly a key part of Plaintiffs' litigation strategy. Whatever else may be said about that, it makes the use of pseudonyms particularly inappropriate. "If plaintiff[s] were permitted to prosecute this case anonymously, [Jones Day] would be placed at a serious disadvantage, for [it] would be required to defend [it]self publicly while plaintiff[s] could make [their] accusations from behind a cloak of anonymity." *Shakur*, 164 F.R.D. at 361. That unfairness goes beyond the prejudice to Jones Day; it is also unfair to the public, which is being pitched a misleading narrative from unnamed sources whose credibility cannot be tested.

The Jane Does also argue that anonymity would serve the public interest because they might "choos[e] not to proceed" rather than face the "stigmatization" that would follow from "public scrutiny." Dkt. 1-1 at 8-9. There are several holes in that reasoning. *First*, the Does tellingly never say that they *will* abandon their claims if put to the choice; that is a fact that only

they know, but have declined to share. It is thus speculative to claim that the interest in "seeing a case resolved on the merits" (*id.* at 9) weighs in favor of the pseudonyms here.

Second, "this is a civil suit for damages, where plaintiff[s] [are] seeking to vindicate primarily [their] own interests." *Shakur*, 164 F.R.D. at 361. Even if the Jane Does were to drop their claims, that would not bear on the public interest, as it would have no effect on the authority of EEOC or a state agency "to vindicate the public's interest in enforcement of our laws." *Id.*; *see also Qualls*, 228 F.R.D. at 13 (noting that while public identification of plaintiffs means "a few valid causes of action, by plaintiffs' own choices and calculations, may stay out of court," that does not outweigh the fact that publicity prevents "many more frivolous and less heartfelt causes, which is in the interest of both the public and the courts").

Finally, there is no need to wonder about whether the Jane Does would be "stigmatized" by coming forward. Tolton and Mazingo used their real names, and "said in an interview that the lawsuit has not yet harmed their legal careers, and they don't expect it to." Chase Decl. Ex. 1. The Jane Does provide no evidence to suggest they would be treated any differently.

CONCLUSION

Jones Day has not found a single case in which a court, over objection, has authorized the use of pseudonyms for civil plaintiffs alleging sex discrimination by a former employer. That is because such claims do not involve personal information of the "utmost intimacy" or give rise to credible fears of unlawful retaliation. This case is no exception. The Jane Does may prefer to attack Jones Day from beneath a cloak of anonymity, but as a matter of law and basic fairness, they must be "willing to place their personal and public stamp of approval upon their causes of action." *Qualls*, 228 F.R.D. at 13. For these reasons, the Court should compel the Jane Does to disclose their identities, as required by Federal Rule of Civil Procedure 10(a).

May 20, 2019

Respectfully submitted,

/s/ Beth Heifetz
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Beth Heifetz (Bar No. 417199)
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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NILAB RAHYAR TOLTON, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. No. 1:19-00945 (RDM)
JONES DAY,	)	
Defendant.	)	

DECLARATION OF TERRI L. CHASE
IN SUPPORT OF DEFENDANT'S
MOTION TO COMPEL COMPLIANCE WITH FEDERAL RULE 10(a)

I, Terri L. Chase, declare as follows:

1. My name is Terri Chase. I am a partner in the law firm of Jones Day. My business address is 250 Vesey Street, New York, NY 10281. I have personal knowledge of the facts described in this declaration.

2. Since August 2018, I have engaged in discussions with Plaintiffs' counsel regarding their claims against Jones Day.

3. After Plaintiffs filed their *ex parte* motion for leave to proceed under pseudonyms, accompanied by an under-seal declaration from one of their attorneys, I asked Plaintiffs' counsel for a copy of that declaration. Plaintiffs' counsel responded that Jones Day could have a copy only if Jones Day agreed to extend Plaintiffs' time to file a class certification motion.

4. Although Plaintiffs have still not served Jones Day with their complaint or any of the court orders issued to date, Plaintiffs shared their complaint with the media before they filed it. I know this because Jones Day was asked for comment by reporters who had seen the complaint, even before the complaint was publicly available on PACER.

5. The named Plaintiffs have given media interviews and posed for photo shoots. Attached as Exhibit 1 is a copy of the article "'Someone Has to Speak Up': Lawyers Suing Jones Day Say Career Risk Is Worth It," published in *The Recorder* on April 5, 2019.

6. Plaintiffs' attorneys also issued a press release the day they filed the complaint. Attached as Exhibit 2 is a copy of the press release.

7. Jones Day has not issued a press release regarding this case. It has not publicly commented on Plaintiffs' specific allegations (or Plaintiffs in particular). Instead Jones Day's sole public response to this lawsuit was a post on its website and social media pages that highlighted the success of women attorneys at Jones Day. In that post, the Firm made clear that it will "litigate this case in court, not in the media." Attached as Exhibit 3 is a copy of that post.

8. Attached as Exhibit 4 is an excerpt of a hearing transcript in *Jane Doe 1 v. Morrison & Foerster LLP*, No. C 18-2542 (N.D. Cal. Apr. 18, 2019).

In compliance with 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 20, 2019.

/s/ *Terri L. Chase*
Terri L. Chase

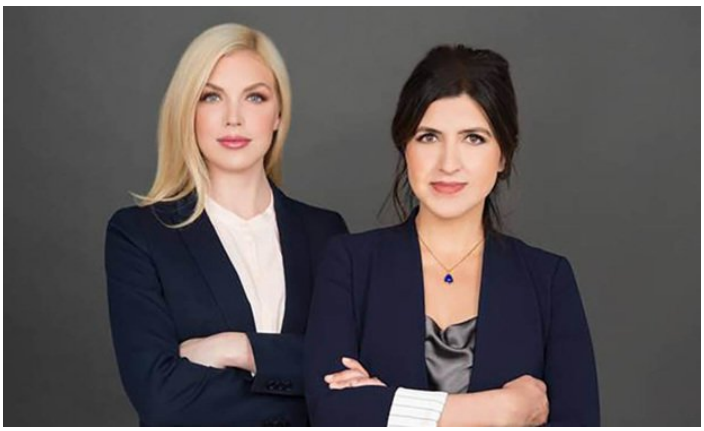
EXHIBIT 1

LegalWeek

'Someone Has to Speak Up': Lawyers Suing Jones Day Say Career Risk Is Worth It

"I think the fear for me is in not holding powerful institutions and larger employers accountable, and in allowing law institutions like Jones Day to escape scrutiny," lawyer and plaintiff Nilab Tolton said.

By **Lizzy McLellan** | April 05, 2019



Andrea Mazingo and Nilab Rahyar Tolton

No woman who sues her current or former law firm for alleged gender bias can expect her career to remain unaffected.

But two California-based law firm associates, who are part of a proposed class suing Jones Day (https://www.law.com/therecorder/2019/04/03/associates-assail-fraternity-culture-at-jones-day-in-200m-sex-bias-suit-403-32261/), say more female attorneys should come forward about injustices they say they face in the workplace.

Nilab Rahyar Tolton and Andrea Mazingo, the two named plaintiffs in a proposed $200 million class action filed against Jones Day this week, said in an interview that the lawsuit has not yet harmed their legal careers, and they don't expect it to.

Tolton is now an associate at California boutique firm Call & Jensen, while Mazingo joined Orrick Herrington & Sutcliffe, where she's now managing associate for the firm's Los Angeles office. Both said their current firms have been supportive, though they would not comment on whether Call & Jensen and Orrick knew during the hiring process about their plans to sue Jones Day.

Reached on Thursday through a spokesman, Orrick declined to comment. Call & Jensen managing shareholder Julie Trotter also declined to comment.

"I think the fear here is not that the legal industry is unprepared, or not ready for switching the ball toward paid equity," Tolton said on Thursday. "I think the fear for me is in not holding powerful institutions and larger employers accountable, and in allowing law institutions like Jones Day to escape scrutiny."

Both Tolton and Mazingo worked as associates in Jones Day's Irvine, California, office until last year – Tolton beginning in 2010 and Mazingo beginning in 2014. The other four plaintiffs in the case are suing as Jane Does, after a federal judge in Washington, D.C., said they could proceed anonymously.

"Being blacklisted is not a concern for me because at some point someone has to speak up, and I feel a responsibility to do so," Mazingo said. "The other reason is that I am fortunate to have a new employer who has agreed to let me pursue this matter in my personal capacity."

Sanford Heisler Sharp is representing the six plaintiffs, who allege that Jones Day's 'black-box' compensation model, leadership structure and culture serve to systematically deny women equal pay and opportunity for advancement.

Jones Day has not responded to multiple requests for comment on the complaint.

Tolton alleged in the complaint (https://www.documentcloud.org/documents/5793276-JonesDaycomplaint.html) that when she returned to the firm from maternity leave, she was greeted with a salary freeze, a negative performance review and fewer work opportunities. After a second maternity leave, she said, she was told to find a new job.

"I had a very troubling and concerning experience at Jones Day from the moment I started – asking about information relating to Jones Day's policies as they apply to me and other women – and later when I took maternity leave and came back from maternity leave," Tolton said Thursday.

Mazingo alleged she was denied mentorship opportunities and that she was subjected to sexual harassment, as well as verbal abuse by a male partner at the firm when she took a weekend off for health reasons. She claims she was forced to leave the firm last year following that incident.

Deborah Marcuse, Sanford Heisler Sharp's Baltimore managing partner and lead counsel on the case, noted the significance of bringing a complaint as a named plaintiff, when not all people bringing discrimination claims are willing to do so. If some plaintiffs are willing to go public, she said, it is likely to have more impact and can make others more comfortable joining the suit.

"It is [becoming] more common for [lawyers to] push back in this arena of pay equity, and for women and for men to also demand change in the workplace on this issue, because it ultimately affects everybody," Tolton said. "It is important for me to put a face to this experience as it is common, if not universal, among women in the legal profession."

Looking Back

Tolton and Mazingo have already found new firms since leaving Jones Day. But Washington, D.C., lawyer Kerrie Campbell (https://www.law.com/americanlawyer/2018/04/12/ex-chadbourne-partner-kerrie-campbell-is-ready-to-talk/) was still practising at Chadbourne & Parke (now part of

Norton Rose Fulbright) when she sued the firm in 2016. Like the Jones Day associates, she was represented by Sanford Heisler Sharp. Campbell left and started her own solo firm while the case was ongoing.

The experience of suing Chadbourne directly impacted her career and practice, she said in an email interview, though she said that both have since changed for the better.

"Shunning is real and challenging. It was difficult to manage pending matters without support," Campbell said, referring to the time directly after she filed her suit. She was not allowed to take on new clients during that time, she said, which, needless to say, makes it "hard to grow your practice".

Staying at the defendant firm while litigation is ongoing does not appear to be typical.

Bonnie Porter, a former Boies Schiller Flexner associate who sued the firm in 2002, alleging that it routinely routed women away from the partnership track, told *The American Lawyer* in 2016 (https://www.law.com/americanlawyer/almID/1202768463823/women-lawyers-who-sued-firms-reflect-on-their-decision/) that the case had a "devastating" effect on her career. She left for another firm, but said she felt like even her colleagues at the subsequent firm viewed her differently because of the litigation.

"I thought people would look at me like, 'Wow, she's a really courageous person.' Instead, it was 'I don't want to be tainted by her,'" Porter said in 2016.

Like Campbell, Philadelphia-based lawyer Francine Griesing also started her own firm after suing her former Big Law employer. In that suit, she alleged that Greenberg Traurig paid women lawyers unfairly and that she was forced out of the firm after complaining about its pay practices. The case settled in 2013.

In an interview on Thursday, Griesing said she could not discuss that suit or settlement. But she spoke about her experience representing other law firm and legal department employees who have brought discrimination claims.

"Sometimes both law firms and other legal employers are actually surprisingly supportive of people, men or women, who… are bringing these claims when they're at a new employer. Clients are also surprisingly supportive," Griesing said. "That's not always the case, but I've seen it more than I expected."

But that doesn't mean it comes without consequence. Plaintiffs who sue their former employers still may find that certain companies will not hire them, for fear of getting sued later, Griesing said.

Campbell said she admires the women bringing claims against Jones Day.

"They have the guts to do what's right rather than turning a blind eye to wrongdoing to collect a paycheck," Campbell said. "Bringing a suit like this bears upon far more than the plaintiffs' careers."

Campbell reached a settlement with her former firm last year. She can't discuss the terms, but it's public record that the firm agreed to pay her $1 million, as well as $750,000 to another lawyer who joined the suit and $250,000 to a third. Sanford Heisler got more than $1 million in attorney fees as well.

Her new firm focuses on representing clients in reputation protection, discrimination, First Amendment and product safety or risk management matters. Her work includes sexual harassment, retaliation, wrongful discharge and discrimination suits.

"In my experience, the journey is hard, at times lonely, incredibly important, worth it and ultimately empowering," Campbell said.

Read More

Calif. Associates Take Aim at 'Fraternity Culture' at Jones Day in New Sex Bias Suit (https://www.law.com/therecorder/2019/04/03/associates-assail-fraternity-culture-at-jones-day-in-200m-sex-bias-suit-403-32261/)

Women Lawyers Who Sued Firms Reflect on Their Decision (https://www.law.com/americanlawyer/almID/1202768463823/women-lawyers-who-sued-firms-reflect-on-their-decision/)

EXHIBIT 2

Sanford Heisler Sharp Files $200+ Million Class and Collective Action Against Jones Day

Posted April 3rd, 2019.

Six Female Plaintiffs Detail How "Black Box" Pay and Managing Partner Autocracy Lead to Systemic Gender, Pregnancy and Maternity Discrimination

Click here to read the complaint

April 3, 2019 WASHINGTON, D.C. – Attorneys from Sanford Heisler Sharp, LLP today filed a $200,000,000+ gender, pregnancy, and maternity discrimination class and collective action in U.S. District Court for the District of Columbia against Jones Day.

The six plaintiffs – Nilab Rahyar Tolton, Andrea Mazingo, and Jane Does 1 through 4 – allege Jones Day is a fraternity led by one man. The Complaint details how Jones Day's culture harms female associates in compensation and partnership decisions. The women are represented in the matter by David W. Sanford, Chairman of Sanford Heisler Sharp; Deborah K. Marcuse, Baltimore Managing Partner; and Russell L. Kornblith, New York Managing Partner.

"The Complaint chronicles how male senior partners give the best work to male associates, who earn more and are promoted more rapidly, and how female lawyers' work is regularly undervalued," said Marcuse.

The Complaint alleges that women who become pregnant and have children are assumed to be uncommitted to their work. For Plaintiff Tolton, all it took was asking a question about Firm policies relating to maternity leave to

transform her reputation from that of a Harvard Law superstar to a problem child. When, the next year, she became pregnant herself and went out on leave, she returned to a salary freeze, unsubstantiated negative reviews, and diminished work opportunities. When she returned from a second leave, she was promptly told to look for a new job.

Plaintiff Mazingo worked tirelessly for Jones Day at great personal cost, but, as the Complaint recounts, she was denied mentorship opportunities, sexually harassed, and subjected to verbal abuse by a male partner when she was forced to take a weekend off for health reasons. Frozen out by that partner, the principal partner with whom she had worked, and deprived of any mentoring support to advance to partnership herself, Ms. Mazingo was forced to leave the Firm.

The Complaint also includes detailed allegations of gender discrimination and retaliation from four other former Jones Day associates who are seeking to proceed under pseudonyms.

Kornblith noted, "Jones Day proudly touts that it is not like its peer firms, because it does not pay its associates in lockstep. However, plaintiffs allege that this 'black box' compensation system masks gender discrimination in pay. It is time for Jones Day to open the black box and implement full pay transparency."

The Complaint includes class allegations under Rule 23 of the Federal Rules of Civil Procedure, with the Rule 23 class comprising all female associates who are, have been or will be employed by Jones Day in the U.S. during the applicable liability period until the date of judgment. Plaintiffs bring class claims of gender discrimination on behalf of a nationwide class under both Title VII of the Civil Rights Act of 1964 and the District of Columbia Human Rights Act, the latter of which applies to allegedly discriminatory decisions made by Jones Day's all-powerful Managing Partner, Stephen J. Brogan.

Plaintiffs also bring collective action claims under the federal Equal Pay Act and class claims on behalf of female Jones Day associates in California under, inter alia, the California Fair Employment and Housing Act; the California Family Rights Act; the California Equal Pay Act, as amended by the California Fair Pay Act; the California Business and Professions Code; and the California Private Attorneys General Act of 2004.

Since 2016, Sanford Heisler Sharp has represented female attorneys at more than twenty U.S. law firms who experienced career-crushing gender discrimination, shining a bright light on the dark employment practices that have historically prevented women from attaining compensation and leadership roles comparable to men throughout the legal profession.

For more information, contact Jamie Moss, newsPROs, 201-788-0142, jamie@newspros.com

Share this Press Release

Media Inquiries

Contact **Jamie Moss** of newsPROs at (201) 493-1027 or jamie@newspros.com.

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Sanford Heisler Sharp, LLP is a public interest law firm representing individuals and groups against corporations and governmental entities. The firm also represents individual citizens when a corporation is committing an act of fraud against the U.S. Government. As a private attorney general, Sanford Heisler Sharp, LLP specializes in a number of areas: employment discrimination, Title VII, ERISA, and wage and hour cases; representation of executives and attorneys; *qui tam* and whistleblower matters; consumer fraud; housing discrimination; mass torts; complex civil litigation; and, appellate litigation.

EXHIBIT 3

Jones Day Responds to Recently Filed Litigation

April 2019

Jones Day is proud of its success in promoting a diverse group of outstanding lawyers. Our partnership includes approximately 240 women, many of whom have become leaders in the Firm and the legal profession. The success of Jones Day's women lawyers has been supported by our inclusive culture that rewards talent, teamwork, integrity, and mutual commitment to our clients and the Firm.

The majority of our women partners are mothers who took family leaves and often worked flexible schedules during their Jones Day careers. More than half (18 of 35) of the U.S. lawyers promoted to the partnership in January 2019 were women and almost three-quarters of them had taken or were on family leave at the time of promotion, and the vast majority of the U.S. men promoted to partnership also took family leave. In January 2018, 42% (or 14 of 33) of the U.S. lawyers promoted to partnership were women, and approximately 71% of them had taken family leave.

The success of working mothers at Jones Day is not a new phenomenon. Almost 70% of the U.S. women promoted to partnership over the past decade had taken or were on family leave at the time of their promotion to partnership.

Becoming a partner is just the first step, and we are equally proud of Jones Day's track record in developing strong women leaders in numbers few firms can match. Seventeen of our offices and regions—including our largest region—are led by women partners, almost all of whom have children. Our 17-member Partnership Committee, which advises on partner admissions and compensation, has five women, all of whom took family leave during their Jones Day careers and one of whom worked part-time for a number of years. Forty percent of the members of our Advisory Committee are women, almost all mothers. Women serve as the relationship partner for hundreds of clients, including two of the five largest clients of the Firm.

Our largest practice group is co-chaired by one of the top female trial lawyers in the country. Our premier Issues & Appeals Practice—which in the past five years has attracted 36 former U.S. Supreme Court clerks from across the different Justices—is chaired by a woman partner who became the practice leader while working part-time after returning from a multi-year family leave. And dozens of women partners hold other Firm, office, and practice leadership positions.

These statistics belie the recent claims of six former associates (four unnamed) that women—and, in particular, women who take family leave—cannot succeed at Jones Day. The claims of pay discrimination—made only "on information and belief," without any factual support—are equally without merit. The distorted picture of the Firm portrayed in the complaint is not Jones Day. We will litigate this case in court, not in the media, and are confident we will prevail.

EXHIBIT 4

Pages 1 - 57

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JACQUELINE SCOTT CORLEY, MAGISTRATE JUDGE

JANE DOE 1 et al., on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
VS.	)	**No. C 18-2542 JSC**
MORRISON & FOERSTER LLP,	)	
Defendant.	)	
	)	San Francisco, California Thursday, April 18, 2019

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

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1350 Avenue of the Americas
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BY: DAVID W. SANFORD, ESQ.
(Via telephone)

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BY: DEBORAH K. MARCUSE, ESQ.

For Defendant:

GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90017
BY: CATHERINE A. CONWAY, ESQ.
MICHELE L. MARYOTT, ESQ.

(Appearances continued on next page)

Reported By: Katherine Powell Sullivan, CSR #5812, RMR, CRR
Official Reporter - U.S. District Court

APPEARANCES (CONTINUED):

For Defendant: GIBSON, DUNN & CRUTCHER
555 Mission Street, Suite 3000
San Francisco, California 94105-092333
BY: RACHEL S. BRASS, ESQ.

Thursday - April 18, 2019 **2:00 p.m.**

P R O C E E D I N G S

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THE CLERK: Calling civil action C18-2542, Doe versus Morrison Foerster.

Counsel, please come up to the podium and state your appearance.

MS. CONWAY: Good afternoon, Your Honor. Cathy Conway on behalf of Morrison & Foerster. Along with me is...

MS. MARYOTT: Nice to see, Your Honor. Michele Maryott.

THE COURT: Good afternoon.

MS. BRASS: Nice to see you, Your Honor. Rachel Brass.

THE COURT: Good afternoon.

MS. MARCUSE: Good afternoon, Your Honor. Debra Marcuse, of Sanford Heisler Sharp, here for plaintiffs and the class.

I have my fellow Chris Yandel, here with me at counsel table; although, I think he's not yet admitted.

THE COURT: That's all right. Welcome.

MR. YANDEL: Thank you, Your Honor.

MR. SANFORD: And good afternoon, Your Honor. This is David Sanford, plaintiffs' counsel, from Sanford Heisler Sharp. Thank you for allowing me to appear by telephone.

THE COURT: Sure. Good afternoon.

All right. So we have three, maybe four things to talk about. First is the motion to proceed anonymously. Second is the 12(c) motion. Third is our CMC. And fourth may be a sealing motion, as well. So let's start with the motion to proceed anonymously.

Here's the issue. I don't know how this case is any different, Ms. Marcuse, than every other employment case that we see.

And I did -- by virtue of not ruling, have allowed the case to proceed, the plaintiffs to proceed anonymously for close to a year now, I think, and gave you time to see if you could get it resolved.

But now we're here, and I just don't know how different from -- if I were to allow the plaintiffs here to proceed anonymously, why wouldn't I have to do so in every employment case?

MS. MARCUSE: Your Honor --

THE COURT: You have to come to the podium.

MS. MARCUSE: Your Honor, if I may just have a moment, I didn't anticipate arguing this motion, inasmuch as the defendant, I believe, has consented to the motion.

THE COURT: Well, they haven't objected. But I have an independent obligation, right --

MS. MARCUSE: Understood, Your Honor.

THE COURT: -- in the Ninth Circuit.

Okay. We can pass that and think about it, and maybe -- but I'll just tell you flat out, really the argument, the main argument -- because the issues about any confidential information can absolutely and will be taken care of through protective order and sealing. Anyone's personal health information or name of the children, which I don't see why it would ever come up, but to the extent it did, it would be sealed.

MS. MARCUSE: Understood.

THE COURT: No question about that. And your client should know that.

But in terms of who they are, right, no question that it could have adverse effects on their career, but that's also the case for every employment plaintiff that I have in front of me. Every single one. Every single one.

So if I were to seal or allow them to proceed anonymously in this case, it would be precedent to allow it in every case. And that would certainly be contrary to Ninth Circuit law, to Rule 10, and to going forward.

So I won't let you answer that. You can think about it some more. But that's the issue.

All right. So let's move, then, on to the 12(c). And, obviously, at the moment they will stay anonymous because I don't know who they are. We are dealing with Jane Doe 4 and

Jane Doe 5. And, Ms. Brass, you're going to argue.

Let me tell you sort of what my tentative -- I'll tell you my tentative view, having read through this, and then either side could argue. And the issue here is there was a release that was signed. There's no question about that. But Jane Doe 4 argues rescission based on economic duress and undue influence. And then she also has a retaliation claim that the defendant has moved to dismiss.

So I think, at this stage, she's pled enough to plead a claim for economic duress, not enough for undue influence. And I don't believe she's pled a retaliation claim.

So that is my tentative view, and I'll let whoever wants to talk first, talk first.

MS. MARCUSE: Well, Your Honor, may I just ask for a clarification on the retaliation point?

And in particular, I do want to note that for the first time in -- well, I guess I should go back and ask, first, what your concerns are about the retaliation claim and then suggest that one recent revelation from the defendant indicates the relevance of additional discovery to, you know, being able to pursue the claim.

THE COURT: Well, if I dismissed it, it would be with leave to amend. There's no question. I would be required to do that.

But all, really, that's alleged right now is that she's

been unable to get a job despite -- or at least was; I think she does now have a job despite -- being a finalist for three positions and not really getting a satisfactory response as to why she didn't get the job.

But if that was enough to state a claim for retaliation, then, again, virtually every employment plaintiff would be able to state a claim for retaliation because most that I see -- and, also, I do a lot of settlement -- by the time they file their lawsuit or even after they file their lawsuit they have not secured other employment even though they've applied for jobs.

So it's not enough that they haven't been able to get another job, I believe, to state a plausible claim that the defendant has actually retaliated in an unlawful way.

For example, one plausible inference -- and we don't even know, for example, that these employers, future employers, even spoke to Morrison & Foerster. But one thing is, Morrison & Foerster may have said that Jane Doe 4 was terminated. Well, that wouldn't be a retaliatory act. That would be the truth.

Now, Jane 4 Doe has claimed that that was an unlawful termination, but it was still a termination. So that wouldn't have been a retaliation. And that could cause someone not to hire them.

In other words, there are not enough facts alleged to plausibly suggest that Morrison & Foerster retaliated. That's

my view as to what's been alleged thus far on that claim.

MS. MARCUSE: Okay. Thank you, Your Honor, for clarifying.

Certainly, we can consider various ways in which we could amend. I think that the one crucial issue here I might differ with the suggestion that the defendant disclosing, for example, that the plaintiff had been terminated would not be retaliatory in every instance.

It seems to me that one would have to look at it in the context of what is customary. Which is to say, if MoFo or like many, you know, entities is in the habit of giving name, rank and serial number, period, and gave different information about this individual, then obviously that might give rise to some concerns.

THE COURT: Sure. There may be facts, but I guess what I'm saying is there's nothing here other than they didn't get a job.

MS. MARCUSE: Well, Your Honor, again, the crucial distinction to me -- and perhaps we did not flesh this out adequately in the complaint -- is the fact that three times she went all the way to the point where it was very clear, and the recruiter was indicating to her, you are in, you have the job, and then very abruptly, all three times, you know, something changed. And the reasons given were, again from the standpoint of the recruiter, unusual to the point where it suggested that

there was something that was unsaid.

So I hear what you're saying, and I will think about the ways in which it may be possible. We also have dealt with, you know, challenges in pleading this having to do with the pseudonym. And I do want to address that issue, if I may.

THE COURT: Sure.

MS. MARCUSE: Because I think it's all tied together, both the nature of this case as a class action, the nature of these kinds of cases in which attorneys are litigating against law firms, and the question of, you know, whether it's possible or permissible to remain under a pseudonym.

We have a number of cases where individuals are proceeding under pseudonyms, and I would argue that they are -- you know, the experience of individuals in the legal industry in particular has been really dramatically and meaningfully different in terms of the amount of retaliation that they anticipate they may experience, and the amount of career difficulty. For the three initial plaintiffs in this case, a distinguishing factor is the fact that they are all still employed by the firm.

THE COURT: But I see that all the time. And, quite honestly, your clients are, frankly, in a better position than most of the employment plaintiffs I see. They're well-educated. They're obviously quite good at their jobs because they were working or are working at a very prestigious

law firm. Right?

So a lot of the employment plaintiffs we see, they're working class workers, right. If you have a named plaintiff in a wage and hour class action, right, and they're the named plaintiff, and it's going to be on the Internet, what employer is going to want to hire them after they do that? And they don't have the wherewithal, the skills, they can't work with for themselves or do those other things.

So while I agree that's true, I don't think you've cited me a case that that's been the factor that's been allowed to seal the case.

It would flow even more beyond employment. We get a lot of cases in which there are startups -- you can imagine -- and they have this great new idea and great new product, and they go and they show it to some bigger company, and then that bigger company, they allege, stole their idea. So then they sue them for stealing their trade secret.

Now, what other big company is ever going to want to see their product? By suing them, they are really jeopardizing and putting at risk their entire startup together. They're taking a big risk there. They would have a strong argument as well. Seal it. Don't identify who I am.

In fact, filing a lawsuit by anyone actually has negative consequences. Anyone, really. And so I don't know how this case is special. And it has to be sort of exceptional

circumstances, in particular given that these particular plaintiffs are in, really, a better position being lawyers themselves.

And my concern is it sets this precedent that would be contrary to Ninth Circuit law in that we would have this secret litigation.

MS. MARCUSE: Your Honor, I hear what you're saying. I do think that there is a way to look at these plaintiffs. I completely agree that in many respects they are better situated than, for example, low-wage workers. But from the standpoint of the impact of reputational harm -- and I've dealt with this at the damages stage most frequently. I'm more familiar with law in the Second Circuit than in the Ninth Circuit. But I'd be happy to address this issue in supplemental briefing if it turns out to be crucial.

The potential for reputational harm here, I would argue, is much more significant than with a low-wage worker where the likelihood is that employers are not going to be engaged in extensive Internet due diligence on, for example, you know, construction workers or, you know, other individuals in the food service industry perhaps.

I would argue that the scrutiny to which these individuals will be subject and the potential harm -- you know, it's a difficult argument, but it does exist also in the economic damages.

Difficult -- I find it difficult morally, I guess, not legally, in that you're saying, basically, there are higher potential consequences here because these individuals have been trained and have followed a life path where they have ascended through -- you know, they are highly educated and they are able to get these jobs, and so the stakes economically are very, very significant if they get pushed out of this entire specialized field in which they've trained their entire lives.

THE COURT: And I don't even know that that will happen. Of course, this is not the only lawsuit. And we do know that many of the women in these lawsuits are not proceeding anonymously.

MS. MARCUSE: More and more, Your Honor. And I'm very hopeful for a time when everyone will feel empowered to do that.

THE COURT: Let me ask you a different question. How can we litigate a (b)(3) class action in which the named plaintiffs are anonymous?

How is any putative class member supposed to make some sort of decision as to whether to opt in or opt out if they don't even know who it is?

MS. MARCUSE: We would be happy to brief that issue, but I would argue that what would be at issue would be the sort of crucial characteristics for the purposes of the class action.

I mean, when you say before they know who it is --

THE COURT: Can you cite to me a case in which a class certification has been litigated? Not a (b)(2). A (b)(2), I understand how that could be done. A (b)(3)?

MS. MARCUSE: Not off the top of my head, Your Honor.

THE COURT: I'll let you brief it.

MS. MARCUSE: Thank you.

THE COURT: I'll let you brief it more.

MS. MARCUSE: Thank you.

THE COURT: Is anybody for the defense?

I mean, to be honest, you've put me in a difficult position because I can't say -- although I can think of many ways that the defendant is prejudiced by it, you've taken the position that you don't oppose it.

MS. MARYOTT: That's right, Your Honor. And I think one of the key things that we point out is that we didn't oppose it at this time.

And we do agree there may come a time where it will become necessary, and Your Honor has pointed out some circumstances in which that might be the case, but for the time being we are not opposing it.

THE COURT: Well, okay, in light of that -- I was thinking about this, too, because even if I denied it we're going to sort of move in a next phase in that event because it puts MoFo in a difficult position if it's anonymous. But if

they're willing to do that, then I think you're right in a sense, I suppose. And there's nobody here pounding on the door, then I won't do it.

But I do think and your client should know that, right -- and your submission acknowledges that you're not asking for it until the end of the case; right? So they do know that.

At some point, if they're going to want to proceed, they're going to have to no longer be anonymous.

MS. MARCUSE: Absolutely, Your Honor.

And, I mean, from the standpoint of a litigator, I would say that this arguably puts the defendant in a better position inasmuch as in class actions in particular I often see, you know, retaliation issues cropping up absolutely for people who continue to work at the employer during the pendency of litigation.

So the fact that that information is not widely available, but it's available, obviously, to counsel and to the sort of crucial individuals, you know, who are parties in the case, I would say that that is actually advantageous to defendant in ensuring that it meets its obligations of avoiding retaliation against these individuals.

THE COURT: I don't know that's the case. In any event, they are not articulating to me, at this time, any prejudice. And that's one of the factors to consider in the Ninth Circuit test.

file it. But you get to file a response to that.

MS. MARCUSE: Understood.

THE COURT: But one each. Can't keep going, because no one will have learned anything after that.

MS. MARCUSE: That sounds great.

THE COURT: I believe it closes on May 21st.

MS. MARCUSE: May 21st, yes, that's correct.

THE COURT: So if you learn something -- if they learn something after their opposition, then I'd say, okay, let them submit it. You get to file a reply to that. Not anything else onto that. And then that will be the end of it.

MS. MARCUSE: Yes, Your Honor. And would that then contemplate moving the hearing date?

THE COURT: Yeah. Maybe we should move the hearing date. What did I say?

MS. MARCUSE: June 11th.

THE COURT: Why don't we move it to June 25th instead. June 25th. And we'll see what happens.

It's so long from now. And, who knows, maybe resolution efforts will work out, right.

MS. CONWAY: You never know.

THE COURT: You never know.

All right. I will issue an order. We'll do a docket order, at least have all those dates in there. And I will issue a written order on the motion to dismiss.

For now the motion to proceed anonymously is granted, for the time being, given defendant's lack of objection. But at some point they will not be allowed to do so. They should know that.

MS. MARCUSE: Yes, Your Honor. Understood. And that is what we initially contemplated.

THE COURT: All right.

MS. CONWAY: Thank you, Your Honor.

THE COURT: Thank you.

MS. MARCUSE: Thank you.

(At 3:17 p.m. the proceedings were adjourned.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Thursday, April 25, 2019

Katherine Sullivan

Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NILAB RAHYAR TOLTON, *et al.*, *Plaintiffs*, *v.* JONES DAY, *Defendant.*	Civ. No. 1:19-00945 (RDM) **[PROPOSED] ORDER**

[PROPOSED] ORDER GRANTING
MOTION TO COMPEL COMPLIANCE WITH FEDERAL RULE 10(A)

Upon consideration of Defendant Jones Day's motion to compel compliance with Federal Rule 10(a), as well as materials submitted by all parties in relation to the motion, it is hereby ORDERED that Defendant's motion is GRANTED.

It is further hereby ORDERED that Plaintiffs shall, within seven days of this order, file an Amended Complaint that complies with Federal Rule of Civil Procedure 10(a) and does not use pseudonyms for any Plaintiffs.

It is further hereby ORDERED that the minute order entered by this Court on April 9, 2019, is VACATED.

SO ORDERED on this day, _____.

_____
Judge, United States District Court

LIST OF NAMES AND ADDRESSES OF ALL ATTORNEYS ENTITLED TO BE NOTIFIED OF THE ORDER'S ENTRY

Pursuant to Local Civil Rule 7(k), the following is a list of the names and addresses of all attorneys entitled to be notified of this order's entry:

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