IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

JANE AND JOHN DOES 1-4, individually and on behalf of all others similarly situated, Plaintiffs, v. UNIVERSITY HOSPITALS HEALTH SYSTEM, INC., et al., Defendants.	CASE NO. 20P000722 JUDGE CAROLYN J. PASCHKE **UNIVERSITY HOSPITALS DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO PROCEED PSEUDONYMOUSLY OR, IN THE ALTERNATIVE, LEAVE TO AMEND THE COMPLAINT**

I. INTRODUCTION

Plaintiffs' motion for leave to proceed under "Jane and John Doe" pseudonyms—which Plaintiffs filed nearly three months after they ignored Civ.R. 10(A) by filing a complaint without identifying their own names or addresses—is a belated attempt to cure their Rule 10(A) violation and should be denied for multiple reasons. In fact, this Court should never even consider Plaintiff's motion for the reasons set forth in the University Hospitals Defendants' ("UH Defendants") pending motion to dismiss for lack of subject-matter jurisdiction. Because compliance with Rule 10(A) is *jurisdictional*, Plaintiffs never properly invoked this Court's subject-matter jurisdiction, with the consequence that this Court may not reach their motion for leave. *Pratts v. Hurley*, 102 Ohio St.3d 81, 85-86, 806 N.E.2d 992, 2004-Ohio-1980, ¶ 21 ("[I]n the absence of subject-matter jurisdiction a court lacks the authority to do anything but announce its lack of jurisdiction and dismiss.").

But even if this Court decides that Plaintiffs' motion *is* properly before it, this Court should deny Plaintiffs leave to proceed under pseudonyms because they have not demonstrated a privacy

interest sufficient to overcome Ohio's "strong policy towards open judicial proceedings," which Ohio courts will set aside only in "exceptional circumstances." *Doe v. Bruner*, 12th Dist. No. CA2011-07-013, 2012-Ohio-761, ¶ 6. Plaintiffs cite to no case law—Ohio or otherwise—that has held that a plaintiff's status as an in-vitro fertilization patient *per se* merits proceeding under a pseudonym. And tellingly, these Plaintiffs do not allege anything in the Complaint or offer any evidence in support of their Motion to explain why they feel that proceeding under a pseudonym is necessary, particularly in light of their proposal to represent a class of all similarly situated Fertility Center patients. Plaintiffs have thus failed to carry the heavy burden necessary to excuse compliance with the plain requirements of Rule 10(A).

II. LAW AND ARGUMENT

A. Plaintiffs carry a heavy burden of proving a privacy interest sufficient to justify proceeding under pseudonyms.

As Plaintiffs acknowledge, *Doe v. Bruner*, 12th Dist. No. CA2011-07-013, 2012-Ohio-761, is the only Ohio appellate decision in which a court has examined the exceptional circumstances under which a plaintiff may be excused from complying with Rule 10(A)'s requirement that "every complaint list the names and addresses of all parties involved in the suit," *id.* at ¶ 5. In *Bruner*, the court recognized that "[a]lthough the practice of proceeding under a pseudonym is well established in Ohio, neither the Ohio Supreme Court nor any Ohio appellate court has yet addressed a challenge to this practice." *Id.* at ¶ 4.[1] But the court also noted that "the

[1] While Plaintiffs assert that Ohio courts "routinely allow parties to proceed using pseudonyms—often, with little or no analysis of the issue" (Pls' Mot. at 2), the cases Plaintiffs cite for that proposition—*Doe v. Shaffer*, 90 Ohio St.3d 388, 738 N.E.2d 1243, 2000-Ohio-186; *Doe v. George*, 12th Dist. No. CA2011-03-022, 2011-Ohio-6795; and *Doe v. Trumbull Cty. Children Servs. Bd.*, 11th Dist. No. 2004-T-0034, 2005-Ohio-2260—are the same three cases that the Twelfth District

federal courts have developed a body of law regarding this issue" and then "chose to follow the Sixth Circuit's approach" because Ohio's Civ.R. 10(A) contains the same substantive requirement as Federal Rule of Civil Procedure 10(a). *Id.* Plaintiff concedes that the Sixth Circuit test applies here. (Pls' Mot. at 3.)

Under the Sixth Circuit's approach, which *Bruner* adopted and Plaintiffs invoke, "[p]roceeding pseudonymously is the exception rather than the rule, and plaintiff faces a 'heavy burden' to avoid her obligation under the rules of civil procedure to disclose her identity." *Doe v. The University of Akron*, No. 5:15-cv-2309, 2016 WL 4520512, at *2 (N.D. Ohio Feb. 3, 2016) (*citing Doe v. Warren County, Ohio*, No. 1:12-cv-789, 2013 WL 684423, at *2-3 (S.D. Ohio Feb. 25, 2013)). To discharge that burden, the plaintiff must allege a privacy interest that "substantially outweighs the presumption of open judicial proceedings" under the balancing test set forth in *Doe v Porter*, 370 F.3d 558 (6th Cir. 2005). *University of Akron*, 2016 WL 4520512 at *2. The factors the court may consider under *Porter* include:

> (1) whether the plaintiffs seeking anonymity are suing to challenge governmental activity; (2) whether prosecution of the suit will compel the plaintiffs to disclose information "of the utmost intimacy"; (3) whether the litigation compels plaintiffs to disclose an intention to violate the law, thereby risking criminal prosecution; and (4) whether the plaintiffs are children.

Porter, 370 F.3d at 560. At the same time, it "is also relevant for the Court to consider whether permitting plaintiff to proceed under a pseudonym would deprive the defendants of sufficient information to defend against plaintiff's case." *University of Akron*, 2016 WL 4520512 at *2 (citing *Porter*, 370 F.3d at 561). Plaintiffs only invoke one of the four *Porter* factors—"utmost intimacy"—in their motion. (Pls' Mot. at 3.)

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in *Bruner* distinguished precisely because the practice of anonymous pleading had not been challenged in those cases.

B. Plaintiffs have not alleged privacy interests of the "utmost intimacy" sufficient to justify proceeding under pseudonyms.

Plaintiffs do not—and cannot—direct this Court to any decision in which a court has held that in-vitro fertilization is a topic of the "utmost intimacy" such that it should *per se* exempt plaintiffs from compliance with Rule 10(A). This Court would be the first. Indeed, Plaintiffs cite only one decision in their brief that has *anything* to do with in-vitro fertilization, *Doe v. Irvine Scientific Sales Co., Inc.*, 7 F. Supp.2d 737 (E.D. Va. 1998), and that decision is irrelevant to the issue before this Court. The *Irvine Scientific* case did not address whether in-vitro fertilization is of the "utmost intimacy" or whether pleading under a pseudonym is appropriate. It did not *need* to because the court dismissed the plaintiff's allegations for failure to state a claim. *Id.* at 743.[2]

As a rule, cases in which Rule 10(A) compliance is excused often involve sexual assault, abuse, or fear of future harm, and more than one of the *Porter* factors. The cases cited by Plaintiffs in their motion illustrate this well. In *NMIC Ins. Co. v. Smith*, No. 2:18-cv-533, 2018 WL 7859755 (S.D. Ohio Oct. 24, 2018), the court permitted the plaintiff to proceed under a pseudonym where the plaintiff not only alleged "battery, assault, and sexual misconduct against her former chiropractor," but was also pressing criminal charges in a state-court criminal case in which her name had not yet been revealed, *id.* at *2. In *Doe v. Mitchell*, No. 2:20-cv-00459, 2020 WL 6882601 (S.D. Ohio Nov. 24, 2020), a magistrate judge allowed the plaintiff to proceed with anonymity where the plaintiff was suing a governmental entity *and* was afraid to disclose her identity in light of her allegations of rape and physical abuse by a police offer, and because she feared for her safety and media exposure due to the nature of her allegations, *id.* at *2-3. And in

[2] Moreover, the *Irvine Scientific* decision is more than 20 years old. Public awareness of fertility challenges and acceptance in-vitro fertilization procedures has changed dramatically in that time.

Doe v. City of Detroit, No. 18-cv-11295, 2018 WL 3434345 (E.D. Mich. July 17, 2018), the court allowed the plaintiff to proceed with anonymity where she alleged that the City terminated her employment after she "informed the City that she would be undergoing gender reassignment surgery to transition from male to female," *id.* at *1. The court not only noted that the plaintiff's argument invoked both the "utmost intimacy" and "governmental activity" factors, but that the plaintiff "has alleged several instances of harassment, including notes threatening her life because of her transition." *Id.*

Moreover, a plaintiff's request to proceed under a pseudonym should be supported by evidence—or at least specific allegations in the Complaint—to substantiate the request for anonymity. In *Porter*, the court reviewed evidence of letters to the editor in the local paper threatening the plaintiffs. 370 F.3d at 560. In *City of Detroit*, the plaintiff's complaint included allegations of "specific instances of harm that have resulted from her transition" to substantiate the plaintiff's privacy interest. 2018 W: 3434345 at *2. In *Mitchell*, the plaintiff alleged in her complaint that she "is proceeding anonymously based on a fear for her safety posed by defendants and others." 2020 WL 6882601 at *1.

Plaintiffs' request to proceed under pseudonyms here simply does not compare. There is no authority on which Plaintiffs can rely for the proposition that in-vitro fertilization *per se* implicates privacy concerns of the "utmost intimacy" to outweigh the heavy presumption in favor of requiring compliance with Rule 10(A). And, tellingly, Plaintiffs *have not alleged*—much less provided any evidence to substantiate—any such concerns. While Plaintiffs' counsel hypothesize that "[i]ndividuals who struggle with fertility issues may feel embarrassed that they need help to conceive and would prefer not to have that information be permanently public" (Pls' Mot. at 3),

they never assert that *these* Plaintiffs, specifically, feel that way.[3] Nor is there any allegation in the Complaint that Plaintiffs fear retaliation, harassment, or threats from bringing their lawsuit. Plaintiffs have therefore failed to carry the heavy burden necessary to excuse compliance with Civ.R. 10(A).

C. The fact that Plaintiffs seek to represent a class of similarly situated persons further undercuts their argument for proceeding under pseudonyms.

The fact that Plaintiffs purport to represent a class of similarly situated Fertility Center patients as the lead plaintiffs in a class action likewise weighs against their request to proceed under pseudonyms. Courts—including at least one Ohio court—have recognized that requests for class certification necessarily dilute a plaintiff's privacy interests because the rules governing class certification require providing members of the class "the opportunity to discern whether the named representatives of the class can fairly and adequately represent their interests." *Parker v. Berkeley Premium Nutraceuticals, Inc.*, Montgomery Cty. C.P. No. 04-1903, 2004 WL 5335046 (April 8, 2004); *see also, e.g., In re Ashley Madison Customer Data Security Breach Litig.*, MDL No. 2669, 2016 WL 1366616, at *4 (E.D. Mo. Apr. 6, 2016) ("Given the importance of the role of class representative, the Court will require Plaintiffs to disclose their identities so that the public, including the putative class members they seek to represent, know who is guiding and directing

[3] Plaintiffs' counsel's statement that in-vitro fertilization is particularly private contrasts with their tactics of hosting public press conferences on behalf of Fertility Center patients and putting their own plaintiffs forward for interviews and public statements. *See, e.g.*, "Deadline approaches for lawsuits in UH fertility clinic failure" (Feb. 5, 2020) *available at* https://fox8.com/news/news-conference-on-university-hospitals-fertility-clinic-failure/ (last visited Feb. 22, 2021); "Family whose embryos are no longer viable files lawsuit against UH: 'It's a tremendous loss'" (Mar. 14, 2018), *available at* https://www.wlfi.com/content/national/476594863.html (last visited Feb. 22, 2021) (identifying and providing interview excerpts from plaintiffs Amber and Elliott Ash represented by the DiCello Levitt firm).

the litigation."). And because a decision on whether Plaintiffs may proceed as class representatives must necessarily precede trial, Plaintiffs' statement that "[n]aturally, if this case proceeds to trial it will be open to the public and Plaintiffs will be required to reveal their identities" does not resolve the problem. (*See* Pls' Mot. at 5 n.3.)

It is significant that these same Plaintiffs' counsel filed previous Fertility Center class action cases in which the Plaintiffs *did* disclose their names. The DiCello firm was one of the first firms to file a class action on March 12, 2018, in *Ash v. University Hospitals Health System, Inc.*, No. CV 18 894343 (Cuyahoga C.P.). The Peiffer Wolf firm also filed a class action captioned *Clark v. University Hospitals Health System, Inc.*, No. CV 18 894339. Although neither lawsuit reached the class certification stage, neither firm expressed privacy concerns regarding either set of plaintiffs. It thus marks a substantial about-face for these same firms to now belatedly take the position that in-vitro fertilization is so innately private that the plaintiffs' privacy concerns outweigh the interest that alleged class members have in knowing the identities of the persons who purportedly wish to represent them in a class action lawsuit that will determine their own rights.[4]

D. The UH Defendants' decision not to challenge anonymous pleading in other Fertility Center cases before this Court is irrelevant.

Plaintiffs make much of the fact that this Court has overseen multiple cases in which Plaintiffs filed suit under pseudonyms without any objection from the UH Defendants (Pls' Mot. at 1-2), but offer no legal authority or reasoning for why that matters. Even if the pseudonym issue could be waived—and because it relates to subject-matter jurisdiction, it *cannot* be waived, *Pratts*,

[4] Plaintiffs make much of the fact that this Court has previously overseen cases in which Plaintiffs captioned their lawsuits with pseudonyms (Pls' Mot. at 1-2), but none of the cases they reference involved class-action allegations like those at issue here.

2004-Ohio-1980 at ¶ 11—waiver "in one case does not constitute waiver in another case." *Bogart v. Blakely*, 2d Dist. No. 2010 CA 13, 2010-Ohio-4526, ¶ 42. Thus, the UH Defendants' actions in other cases filed by Plaintiffs are irrelevant.

Besides, there are significant reasons why the UH Defendants object to proceeding under pseudonyms *here* when they did not in previous cases.

First, none of the previous cases overseen by this Court were class action lawsuits. Plaintiffs allege that they represent *all* UH patients affected by the cryopreservation tank incident at the Fertility Center. Thus, Plaintiffs' identities are intertwined with the issue of their adequacy as class representatives, which is part of the class certification inquiry that Plaintiffs will eventually ask this Court to perform under Civ.R. 23(A). The members of the class who Plaintiffs purport to represent are entitled to know who their representatives are as part of determining whether they will adequately protect the alleged class's interests. *Parker*, 2004 WL 5335046.

Second, as the UH Defendants explained in the reply brief filed in support of their motion to dismiss, Plaintiffs' lack of transparency in the previous federal incarnation of this lawsuit in the Northern District of Ohio has heightened the need for disclosure of Plaintiffs' identities. In that federal case, Plaintiffs' counsel not only filed suit on behalf of a couple that had no frozen embryos (and were therefore not part of the class they purported to represent), but also, when confronted, sought to substitute in new plaintiffs while refusing to disclose the new proposed plaintiffs' names. (*See* Defs' Reply in Supp. of Mot. to Dismiss at 6-7.) This stonewalling by Plaintiffs' counsel made it impossible for the UH Defendants to evaluate whether the plaintiffs proposed to be substituted in the federal action were appropriate parties. Pleading under a pseudonym here raises the very same concerns. For all the UH Defendants know, two of the Plaintiffs in this action may

be the very same persons who tried to bring claims in the federal court despite having no cryopreserved embryos.

E. Amendment is inappropriate given the subject-matter jurisdiction challenge pending before this Court.

Finally, Plaintiffs' request that this Court grant leave to amend the Complaint as an alternative to the UH Defendants' pending motion to dismiss should be denied because Plaintiffs' violation of Civ.R. 10(A) means that this Court lacks subject-matter jurisdiction over this matter. A court lacking subject-matter jurisdiction also "lacks the authority to do anything but announce its lack of jurisdiction and dismiss." *Pratts*, 2004-Ohio-1980 at ¶ 21. Therefore, granting leave to amend under Civ.R. 15 is not an option.

The decision of a Southern District of Ohio magistrate judge allowing amendment in *Doe v. Mitchell* is no exception. Not only was the *Mitchell* decision an advisory Report & Recommendation, but it is currently subject to Objections filed with the district court judge overseeing the case. (*See* Defs' Reply in Supp. of Mot. to Dismiss at 4.) That district judge will conduct a de novo review of the magistrate judge's recommendations and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Thus, the *Mitchell* Report & Recommendation is entitled to no weight. Nor does *MCS Acquisition Corp. v. Gilpin*, on which Plaintiffs rely, require that Plaintiffs be given an opportunity to amend. *MCS Acquisition*, which Plaintiffs cite for the proposition that Ohio has "longstanding general policy of deciding cases on substantive rather than procedural grounds," did not address a jurisdictional error like the one Plaintiffs committed here. 11th Dist. No. 2011-G-3037, 2012-Ohio-3018 at ¶ 25 ("This case does not present a question regarding lack of personal jurisdiction over appellants; it is a question of an infirmity related to procedural due process.").

III. CONCLUSION

This Court should not address Plaintiffs' motion for leave because, as illustrated in the UH Defendants' pending motion to dismiss, this Court lacks subject-matter jurisdiction over Plaintiffs' Complaint due to Plaintiffs' violation of Civ.R. 10(A). Dismissal is therefore the only appropriate outcome. If however, this Court determines that jurisdiction exists, then this Court should nevertheless deny Plaintiffs' motion for leave because Plaintiffs have not demonstrated a privacy interest of the "utmost intimacy" sufficient to excuse their noncompliance with Rule 10(A) and permit them to continue under pseudonyms.

Respectfully submitted,

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PROOF OF SERVICE

A copy of the foregoing was filed electronically on February 24, 2021. Service of this filing will be made pursuant to Civ.R. 5(B)(2)(f) and Civ.R. 5(B)(3) by operation of the Court's electronic filing system upon:

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