

No. 11-

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In the

**Supreme Court of the United States**

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**MICHAEL SHANE CHRISTOPHER  
and FRANK BUCHANAN,**

Petitioners

v.

**SMITHKLINE BEECHAM, CORP.,  
D/B/A, GLAXOSMITHKLINE**

Respondent

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITES STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI**

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## PETITION FOR A WRIT OF CERTIORARI

### QUESTIONS PRESENTED

The outside sales exemption of the Fair Labor Standards Act exempts from the overtime requirements of the Act “any employee employed . . . in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary . . .).” 29 U.S.C. § 213(a)(1). The Secretary of Labor has implemented various regulations that “define and delimit” the outside sales exemption and, filing as *amici* in this and other related matters, has interpreted these regulations to find the exemption inapplicable to pharmaceutical sales representatives. A split exists between the Second and Ninth Circuits concerning whether this interpretation is owed deference and whether the outside sales exemption of the Fair Labor Standards Act applies to pharmaceutical sales representatives.

The questions presented are:

- (1) Whether deference is owed to the Secretary’s interpretation of the Fair Labor Standards Act’s outside sales exemption and related regulations; and
- (2) Whether the Fair Labor Standards Act’s outside sales exemption applies to pharmaceutical sales representatives.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Michael Shane Christopher and Frank Buchanan respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-36a) is reported at 635 F.3d 383 (9th Cir. 2011). The order of the district court granting respondent's motion for summary judgment (App., *infra*, 37a-47a) is unreported but is available at 2009 WL 4051075, and the order of the district court denying petitioners' Motion to Alter or Amend Judgment (App., *infra*, 48a-52a) is also unreported but is available at 2010 WL 396300.

### JURISDICTION

The judgment of the court of appeals was entered on February 14, 2011. A petition for Panel Rehearing and for Rehearing En Banc was denied on May 17, 2011 (App., *infra*, 53a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Department of Labor's regulation outlining the "General rule for outside sales employees" provides in pertinent part:

(a) The term “employee employed in the capacity of outside salesman” in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.

(b) The term “primary duty” is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work.

...

29 C.F.R. § 541.500(a) & (b).

Section 3(k) of the Fair Labor Standards Act provides that: “Sale’ or ‘sell’ includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” 29 U.S.C. § 203(k).

The Department of Labor’s regulation at 29 C.F.R. § 541.501(b) provides that: “Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of intangible and valuable evidences of

intangible property. Section 3(k) of the Act states that ‘sale’ or ‘sell’ includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.”

A related Department of Labor regulation entitled “Promotion work” provides in pertinent part that: “Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule.” 29 C.F.R. § 541.503(a).

Other pertinent provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, and pertinent regulations of the Department of Labor promulgated thereunder, 29 C.F.R. §§ 541.500 – 541.503, are set forth in the appendix to this petition (App., *infra*, 54a-63a).

### STATEMENT

This petition presents a recurring issue of national importance, on which circuit courts of appeals are split, as to the deference owed to an interpretation by the Department of Labor of its own regulations promulgated under the Fair Labor Standards Act (“FLSA”). In enacting the Fair Labor Standards Act of 1938 to protect American workers,

Congress expressly delegated authority to administer the Act to the Department of Labor (“DOL”). As a result of Congress’s delegation of authority, the DOL has acquired over seventy years of experience interpreting and administering the FLSA, promulgating regulations thereunder, and considering the statute’s application to diverse positions across the broad spectrum of employment settings in this country.

Petitioners are two among approximately 90,000 pharmaceutical sales representatives (“PSRs”) employed within the American pharmaceutical industry<sup>1</sup> to visit physicians’ offices and encourage physicians to prescribe their employer’s products to their patients. Petitioners filed suit under the FLSA seeking overtime pay on behalf of a nationwide class of PSRs employed by Respondent SmithKline Beecham, Corp., dba GlaxoSmithKline (“GSK”). Numerous similar suits have been filed throughout the country by PSRs performing identical business functions for various pharmaceutical companies.<sup>2</sup>

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<sup>1</sup> See App., *infra* 8a, n. 10.

<sup>2</sup> *E.g.*, *Kuzinski v. Schering Corp.*, 384 F. App’x 17 (2d Cir. 2010) (holding in plaintiffs’ favor in connection with *Novartis* decision on same date), *cert. denied*, 131 S. Ct. 1567 (U.S. Feb.28, 2011) (No. 10-459); *Palacios v. Boehringer Ingelheim Pharm., Inc.*, 2011 WL 2837464 (S.D. Fla. July 12, 2011); *Harris v. Auxilium Pharm., Inc.*, 2010 WL 3817150 (S.D. Tex. 2010), *appeal docketed*, No. 11-20027 (5th Cir. Jan. 24, 2011); *Jackson v. Alpharma, Inc.*, 2010 WL 2869530 (D.N.J. 2010), *appeal docketed*, No. 10-3531 (3rd Cir. Aug. 26, 2010); *Jirak v. Abbott Labs., Inc.*, 716 F. Supp. 2d 740 (N.D. Ill. 2010); *Delgado v. Ortho-McNeil, Inc.*, 2009 WL 2781525 (C.D. Cal. Feb. 6, 2009), *appeal docketed*, No. 09-55225 (9th Cir. Feb. 11, 2009); *Schaefer-LaRose v. Eli Lilly & Co., Inc.*, 663 F. Supp. 2d 674 (S.D. Ind. 2009), *appeal docketed*, No. 10-3855 (7th Cir. Dec. 13,

The pharmaceutical industry uniformly considers its PSRs exempt from the overtime provisions of the FLSA as outside sales employees.

Because Congress delegated administrative authority to the Department of Labor to define and delimit the scope of FLSA exemptions, the DOL's regulations and reasonable interpretations thereof "are legally binding." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 164 (2007); *Auer v. Robbins*, 519 U.S. 452 (1997). The overtime exemptions are affirmative defenses as to which the employer bears the burden of proof. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). FLSA exemptions are construed narrowly against the employer in order to further the remedial purposes of the Act. *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945).

Filing as *amicus curiae* in this matter (App., *infra*, 64a-90a) and in the Second Circuit, the Department of Labor set forth its interpretation of the relevant regulations pertaining to the outside

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2010); *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 254 (D. Conn. 2008); *Kaiser v. Daiichi Sankyo, Inc.*, No. 1:10-cv-918 (S.D. Ohio filed Dec. 21, 2010); *Shatto v. Astrazeneca Pharm., LP*, No. 1:10-cv-1519WTL-MJD (S.D. Ind. filed Nov. 23, 2010); *Bethune v. Bristol-Myers Squibb Co.*, No. 10-CIV-08700 (S.D.N.Y. filed Nov. 18, 2010); *Heldman v. King Pharm., Inc.*, No. 3-10-1001 (M.D. Tenn. filed Oct. 22, 2010); *Jones v. Takeda Pharm. N. Am., Inc.*, No. 1:10-cv-06240 (N.D. Ill. filed Sep. 29, 2010); *Camp v. Lupin Pharm., Inc.*, No. 3:2010cv01403 (D. Conn. filed Sep. 2, 2010); *Quinn v. Endo Pharm., Inc.*, No. 1:2010cv11230 (D. Mass. filed July 22, 2010); *Curley v. Astellas US LLC*, No. 1:10-cv-05240-WHP (S.D.N.Y. filed Jul. 9, 2010); *Evavold v. Sanofi-Aventis US Inc.*, No. 09-cv-05529 (D.N.J. filed Oct. 19, 2009); *Coultrip v. Pfizer, Inc.*, No. 06-cv-09952-AKH (S.D.N.Y. filed Oct. 19, 2006).

sales exemption, along with its conclusion that PSRs are non-exempt and therefore entitled to overtime pay. The Second Circuit deferred to this interpretation by the DOL in the matter of *In re Novartis Wage & Hour Litigation*, 611 F.3d 141, 149 (2d Cir. 2010) (“*Novartis*”). The Ninth Circuit, however, declined to defer to the DOL’s position. The Ninth Circuit’s decision created a circuit split not only on the underlying issue of applying the exemption to PSRs, but also on the issue of deference owed to the DOL’s interpretation of its regulations.

### **1. The Outside Sales Employee Exemption.**

By regulatory definition, employees falling within the outside sales exemption necessarily “make sales.” 29 C.F.R. § 541.500(a). The FLSA articulates that a “sale” “includes any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition.” 29 U.S.C. § 203(k). Regulations pertaining to the exemption further describe “sales” as including “transfer of title” to property, 29 C.F.R. § 541.501(b), and explain that promotional work “incidental to sales made, or to be made, by someone else” does not qualify as sales, *id.* § 541.503(a). In short, the regulations provide that employees who merely promote goods and services cannot qualify for the exemption; rather, only those who “sell” goods and services are exempt. *See id.*

Consistent with the FLSA definition and this regulatory scheme, the DOL has declined repeatedly over several decades to apply the exemption to promoters who do not make their own sales. In 1940, stating that “exemptions [have] been asked” for “sales promotion men and missionary men,” the DOL

concluded that “it would be an unwarrantable extension” of the exemption “to describe as a salesman anyone who does not in some sense make a sale” and that “sales promotion and missionary men are persons who normally make no sales at all.” Wage and Hour Division, U.S. Department of Labor, *Executive, Administrative, Professional . . . Outside Salesman Redefined, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearing Preliminary to Redefinition* 46-47 (Oct. 10, 1940) (“Stein Report”).

Since that time, the DOL has found the exemption inapplicable to: workers engaged in “soliciting promises of future charitable donations or ‘selling the concept’ of donating to a charity,” WH Opinion Letter, 2006 WL 1698305 (May 26, 2006); college recruiters “engaged in identifying qualified customers, i.e., students, and inducing their application to the college, which in turn decides whether to make a contractual offer of its educational services to the applicant,” WH Opinion Letter, 1998 WL 852683 (Feb. 19, 1998); and individuals employed to encourage, or “sell the concept” of, donating tissue and organs, WH Opinion Letter, 1994 WL 1004855 (Aug. 19, 1994). Courts likewise have found the exemption inapplicable to employees who merely promote in furtherance of another’s sales. *See e.g. Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir. 2008) (selling the idea of joining the army, without obtaining binding commitments, does not qualify as making sales); *Wirtz v. Keystone Readers Services, Inc.*, 418 F.2d 249, 260 (5th Cir. 1969) (employees who “pave the way” for magazine subscription orders ultimately taken by other employees do not make their own sales).

## 2. The Question of Pharmaceutical Sales Representatives Making “Sales.”

Consistent with its regulations and prior pronouncements regarding the exemption, the DOL views PSRs as promoters who do not make their own sales. App., *infra*, 77a. A PSR’s role is to promote pharmaceuticals to physicians in an effort to influence their prescribing habits. In furtherance of this goal, PSRs visit physicians’ offices, seek out opportunities to promote the employer’s products by discussing the products with physicians, provide samples of the products to physicians, and sometimes ask physicians for non-binding “commitments” to prescribe the products where medically appropriate. App., *infra*, 4a-6a. Industry standards prevent PSRs from obtaining any kind of binding commitment from the physicians they visit. App., *infra*, 27a.

Neither physicians nor patients can purchase or order pharmaceuticals from a PSR. PSRs do not negotiate prices or contracts for pharmaceutical products with anyone. App., *infra*, 5a. Actual sales of pharmaceutical products occur when hospitals, pharmacies and wholesalers purchase the products from the pharmaceutical company. App. *infra*, 4a. In short, there is no direct link between a PSR’s promotional efforts directed to a physician and the actual purchase of a pharmaceutical product from the PSR’s employer.

As such, the position of Petitioners, and of the DOL, is that the outside sales employee exemption does not apply to PSRs, because they do not make their own sales.

### 3. The Second Circuit's Decision in *Novartis*.

In an amicus brief filed in the Second Circuit, the DOL articulated its position that PSRs' duties do not fall within the exemption because they do not "make sales." See *Novartis*, 611 F.3d at 149. The Chamber of Commerce, filing as *amicus curiae* supporting the pharmaceutical company, argued that the regulatory sales definition merely "parrots" the statutory sales definition and that, as such, the DOL's interpretation thereof is entitled to no deference under this Court's decision in *Gonzales v. Oregon*, 546 U.S. 243 (2006). *Novartis*, 611 F.3d at 149. Under *Gonzales*, an agency is not entitled to controlling deference on its interpretation of a regulation that merely "parrots" Congress's statutory language, because "an agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Gonzales*, 546 U.S. at 257.

The Second Circuit noted that the regulatory scheme pertaining to the outside sales exemption elaborates on the sales definition contained in the FLSA by articulating that sales of commodities "include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." *Novartis*, 611 F.3d at 151. The Second Circuit also observed that the regulations create a distinction between sales and promotional work. *Id.* It found that these regulations, defining and delimiting the outside sales exemption by articulating what types of efforts qualify employees

for the exemption, “do far more” than simply paraphrasing or parroting the FLSA’s sales definition. *Id.* at 153.

Considering the work performed by PSRs in the context of these regulations, the Second Circuit concluded:

In sum, where the employee promotes a pharmaceutical product to a physician but can transfer to the physician nothing more than free samples and cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it, we conclude that it is not plainly erroneous to conclude that the employee has not in any sense, within the meaning of the statute or the regulations, made a sale.

*Novartis*, 611 F.3d at 154. Thus, finding the DOL’s interpretation of its defining and delimiting regulations neither erroneous nor inconsistent with the FLSA, the Second Circuit granted it controlling deference under *Auer v. Robbins*, and held that PSRs do not make sales and therefore are not outside salesmen. *Novartis*, 611 F.3d at 154-55.

Thereafter, *Novartis* petitioned this Court for a writ of certiorari, but the petition was denied. *Novartis Pharm. Corp. v. Lopes*, 131 S.Ct. 1568 (2011).

#### **4. The Ninth Circuit’s Refusal to Defer to the Department of Labor.**

With the same question before the Ninth Circuit, the DOL again filed an *amicus curiae* brief indicating that, per its interpretation of the regulations, PSRs do not fall within the outside sales exemption. The Ninth Circuit, however, expressly rejected the Second Circuit’s analysis on deference as well as the DOL’s interpretation, concluding that it owes “no deference” to the DOL’s interpretation. App., *infra*, 17a. The Ninth Circuit relied heavily on *Gonzales* in arriving at this conclusion. Focusing on the reference in 29 C.F.R. § 541.501 to the statutory definition of “sale,” the court opined that the term “sales” remain “very undefined, very un-delimited” by the regulation. The panel found in *Gonzales* what it deemed “an analogous situation” in which the administering agency “fail[ed] to add specificity to the statutory scheme.” App., *infra*, 22a-23a. Characterizing the DOL’s amicus brief interpretation of the regulatory scheme as merely a “reinterpretation” of the statute itself, and furthermore, as “plainly erroneous and inconsistent” with the regulations, the Ninth Circuit declined to defer to the agency. App., *infra*, 23a-24a.

The panel therefore undertook its own analysis of the exemption, concluding that PSRs “make sales” and qualify for the exemption based primarily on what the panel termed “the structure and realities of the heavily regulated pharmaceutical industry.” App., *infra*, 25a. The panel reasoned that although limitations imposed on the pharmaceutical industry prevent PSRs from making traditional “sales,” similarities between the job duties of PSRs and of the

“classical salesman” support a finding that PSRs “make sales” within the meaning of the exemption. App., *infra*, 28a-31a.

## REASONS FOR GRANTING THE PETITION

### I. THIS CASE PRESENTS A CIRCUIT SPLIT ON IMPORTANT QUESTIONS OF NATIONAL APPLICATION.

The Ninth Circuit acknowledged its split with the Second Circuit on the issue of deference to the DOL and the underlying issue of applying the outside sales exemption to PSRs. App., *infra*, 17a. While the PSRs in the Second and Ninth Circuit cases worked in different parts of the country for different employer pharmaceutical companies, their positions were essentially identical; indeed, the Ninth Circuit panel observed that “PSRs carry out the same business function regardless of which drug manufacturers they represent.” App., *infra*, 8a. As such, the question of whether the exemption applies to PSRs is one that affects the operations of an entire industry, not just the specific parties in this matter.

This is a question of national application. Both *Novartis* and *Christopher*, along with a multitude of similar cases across the country, seek overtime pay under a federal law on behalf of a nationwide class of employees. With potential representatives of nationwide classes available to file in any seemingly friendly jurisdiction, national uniformity on the question is critical.

Beyond the question of whether PSRs qualify as outside sales employees, however, is the even more potentially far-reaching issue of the deference owed

to an administering agency. Given the Second Circuit's deference to the DOL on the issue, the Ninth Circuit's decision creates a split among the circuits on how and where *Gonzales* applies to limit deference owed to an administering agency. This conflict between the circuits leaves confusion as to appropriate application of *Gonzales* in administrative deference cases.

These recurring issues are ripe for resolution, and this case offers the best vehicle for resolving them. This Court denied certiorari when sought by the pharmaceutical company in *Novartis*; however, at the time certiorari was requested, no circuit split yet existed on the question. The Ninth Circuit decided *Christopher* while *Novartis*'s petition for a writ of certiorari was pending. At the time the Court denied certiorari, it was aware that Petitioners were preparing a petition for reconsideration in the Ninth Circuit. Petitioners' petition for Panel Rehearing and Rehearing En Banc was denied. Unless this Court intervenes, the question of whether PSRs are exempt from the overtime requirement as outside sales employees will remain simply a matter of the jurisdiction in which they file suit. A fundamental split between the circuits on the question of deference owed to agency interpretations of regulations likewise remains unresolved without this Court's intervention.

**II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH PRECEDENT IN THIS COURT AND WITH THE PURPOSES AND REQUIREMENTS OF THE FLSA.**

**A. Determining Deference to Administrative Agencies under *Auer* and *Gonzales*.**

The Ninth Circuit’s opinion dramatically affects the landscape of administrative deference under *Auer* and *Gonzales*. The Ninth Circuit expressed concern that deferring to the DOL in this instance would amount to an expansion of *Auer*, see App., *infra* 24a, but in fact, its refusal to defer amounts to a vast expansion of *Gonzales*. Before the Ninth Circuit’s decision in *Christopher*, *Gonzales* formed a straightforward exception to *Auer* deference, preventing an administrative agency from improperly creating “rules” outside of the notice-and-comment rulemaking process where the agency’s regulations do nothing more than echo the statute. *Gonzales*, in short, furthers the principle that an agency may authoritatively interpret its own regulations that reflect its considerable experience and that were formed according to proper notice-and-comment rulemaking procedures, but may not authoritatively interpret the statute itself outside that process. After *Christopher*, however, *Gonzales* may stand for much more.

*Gonzales* was a federalism case in which the U. S. Attorney General, having no explicit authority to promulgate rules on the issue, attempted to overrule state-level regulations. This Court held that *Auer* deference need not be afforded to an agency interpretation of a regulatory scheme which merely

“parrots” the statute. The “parroting” regulation at issue in *Gonzales* merely “repeat[ed] two statutory phrases and attempt[ed] to summarize the others. It [gave] little or no instruction on a central issue in this case.” *Gonzales*, 546 U.S. at 257. Historically, however, *Gonzales* is inapplicable as long as the regulations offer some amount of interpretation beyond merely the language of the statute. *See, e.g., Sierra Club v. Johnson*, 436 F.3d 1269, 1283 n.5 (11th Cir. 2006) (declining to apply *Gonzales* where a statute and regulation have some identical language, but “the regulation does more”); *Haas v. Peake*, 525 F.3d 1168, 1187 (Fed. Cir. 2008) (similar); *see also U.S. v. W.R. Grace & Co.*, 429 F.3d 1224, 1241-45 (9th Cir. 2005) (deferring to agency interpretations even though regulations in part parroted statutory language).

With respect to the meaning of “sales” for purposes of the outside sales exemption in the FLSA, the regulations offer guidance that goes well beyond merely reiterating the statutory definition. For example, while the regulation at 29 C.F.R. § 541.501 does quote the Act’s statutory definition of “sale,” the quotation is preceded by an explanatory statement: “[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of intangible and valuable evidences of intangible property.” Additionally, the promotional work regulation at § 541.503 further defines and delimits the type of work that qualifies as “sales” for purposes of the exemption.

In applying *Gonzales*, the Ninth Circuit panel dismissed the additional explanatory language in 29 C.F.R. § 541.501 regarding the “transfer of title to

tangible property” as merely “open-ended.” It likewise downplayed the promotional work regulation, virtually ignoring the directly applicable language of § 503(a)<sup>3</sup> and instead contrasting PSRs’ duties with an example of promotional work provided at § 503(c). App., *infra*, 31a. The example, the court concluded, is distinguishable from PSRs’ work because the promoters in the example, who visit stores to arrange merchandise and consult with the manager regarding inventory, do not ask for the type of non-binding commitments that PSRs seek from physicians. *Id.* Nothing in the regulation, however, suggests that the example provided at § 503(c) is intended as the exclusive application of the promotional work regulation. Avoiding or dismissing all of the non-parroting regulatory language addressing the meaning of “sales” under the exemption, the court rested its application of *Gonzales* on the fact that the regulatory scheme in part quotes the FLSA’s definition of “sales.”

The panel’s holding that parroting language “is present” in the regulations, App., *infra*, 23a, is insufficient to apply *Gonzales*, since non-parroting language is also “present.” Under the Ninth Circuit’s rationale in applying *Gonzales* to this case, any regulation that references or quotes some portion of the underlying statute is arguably a “parroting” regulation, even where the regulation also expands upon the statutory language. *See* App., *infra*, 21a.

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<sup>3</sup> Indeed, to the extent that the promotional work regulation is unambiguously applicable to the work of PSRs, the panel should have accorded deference to that regulation under *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984), rather than virtually ignoring it.

(applying *Gonzales* simply because some parroting language “is present” in the outside sales regulations). As a result of the panel decision in this case, an administrative agency risks losing the authority to interpret any such regulation. Such a rule dramatically reduces administrative agencies’ interpretive authority and upsets the balance formed by this Court’s rulings in *Gonzales* and *Auer*.

### **B. The Merits of the Department of Labor’s Interpretation Under the Act.**

In addition to creating confusion on the issue of administrative deference, the Ninth Circuit’s interpretation of the outside sales exemption departs from decades of appropriately narrow construction of the exemption, with which the DOL’s interpretation, in contrast, is consistent. The preamble to the 2004 regulations addressed the question of how technological advances affecting the manner in which orders for products are placed might affect the applicability of the outside sales exemption to employees selling or promoting those products. *See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22122, 22124 (Apr. 23, 2004). While the DOL agreed that technological advances should not remove from the exemption employees who “in some sense” make sales, it nevertheless emphasized that:

[T]he Department does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee’s primary duty must be to make sales or to obtain

orders or contracts for services. An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales. *See* 1940 Stein Report at 46 (outside sales exemption does not apply to an employee “who does not *in some sense* make a sale”) (emphasis added). Extending the outside sales exemption to include all promotion work, whether or not connected to an employee’s own sales, would contradict this primary duty test.

69 Fed. Reg. at 22162. This language requiring that employees “in some sense” make sales in order to qualify for the exemption, much quoted by both opponents and proponents of applying the exemption to PSRs, is clearly intended to limit, not broaden, the coverage of the exemption. The DOL further articulated in the 2004 preamble its intent to include within the exemption’s coverage only those employees who “obtain a commitment to buy’ from the customer and are credited with the sale.” *Id.* at 22162-63.

Consistent with this principle, as discussed above, the DOL and the courts have, for decades, narrowly interpreted the “make sales” requirement of the exemption, excluding from its coverage a variety of promoters who merely pave the way for others’ sales, including college recruiters, charitable solicitors, private army recruiters and student salesmen whose efforts lead to sales by others. *See* WH Opinion Letters, *supra*; *Wirtz*, 418 F.2d at 260; *Clements*, 530 F.3d 1224. Like these promoters, PSRs cannot be directly credited with any sale. While they may ask physicians for non-binding

“commitments” to prescribe, such commitments simply do not amount to “commitments to buy” as referenced in the preamble.<sup>4</sup> Indeed, physicians make such “commitments” without even necessarily knowing the product’s price. Such commitments may lead to ultimate purchases of pharmaceutical products; however, such ultimate purchases do not involve the PSR whatsoever. In short, the “sale” is made by someone else. Thus, unlike typical exempt outside sales employees, a PSR does not receive commissions for “sales,” since no “sale” or commitment can actually be “credited” to the PSR. PSR incentive compensation is linked not to the number of “commitments” obtained, but rather (in part) to actual market share, or products purchased within their territories, which may be influenced by many factors separate from the PSR’s efforts (e.g. other marketing efforts, such as direct-to-consumer advertising). App., *infra*, 78a-79a. PSRs indeed may pave the way for ultimate sales of pharmaceuticals, but as such they are promoters, not salesmen.

The DOL’s interpretation of its regulations, finding that “sales” requires some consummated transaction, comports with accepted rules of statutory construction as applied to the FLSA definition of “sales.” Under § 203(k), “[s]ale’ or ‘sell’ includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” Of these options, the Ninth Circuit

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<sup>4</sup> As an example, a physician might “commit” to a PSR to prescribe a particular pharmaceutical for appropriate patients, but then not see any patients requiring that pharmaceutical. In such circumstances, a commitment would not equate to any sale whatsoever.

panel fit PSRs' activities into the final term, "other disposition," finding it to be a broad catch-all category that encompasses meaning well beyond the other terms contained in the FLSA's definition of "sale." App., *infra*, 25a. This Court has explained, however, that under the *ejusdem generis* rule of statutory construction, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). Under the DOL's interpretation, "other disposition," like the terms that precede it, must require some consummated transaction. App., *infra*, 79a. The panel's interpretation to the contrary, however, amounts to an expansive interpretation, inconsistent with the principle that FLSA exemptions are to be construed narrowly. See *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945).

The DOL's interpretation is neither "plainly erroneous" nor "inconsistent" with its regulation. See *Auer*, 519 U.S. at 461 (citations omitted). In substituting its judgment for the DOL's delegated authority to interpret the FLSA, the panel states summarily that it finds the DOL's amicus brief interpretation plainly erroneous and inconsistent with its regulations, App., *infra*, 24a, but the panel's analysis fails to indicate such plain error or inconsistency. The closest the panel comes to indicating some inconsistency between the DOL's regulations and amicus brief interpretation is the statement that "[w]e cannot square [the conclusion that PSRs are not salespeople] with Section 3(k)'s open-ended use of the word 'sale,' which includes

‘other disposition[s].’ App., *infra*, 28a. However, as discussed above, applying the rules of statutory construction to the term “other disposition” indicates that even that open-ended term involves a consummated transaction; accordingly, the DOL’s interpretation to this effect is both reasonable and consistent with the text of the regulation. Furthermore, the DOL’s interpretation takes into account not only the terms used in the statutory definition, but also places them in the context of the relevant defining and delimiting regulations, as discussed herein. The panel’s disagreement with the DOL’s interpretation is not enough to render that interpretation “plainly erroneous” or “inconsistent with the regulation,” and does not justify simply adopting an alternate view of the regulation. *See e.g. Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) (where a regulation is subject to two “plausible” interpretations, the agency’s interpretation is entitled to controlling deference).

To the extent that the regulations defining and delimiting the outside sales exemption are confusing or conflicting in the context of PSRs, it is within the DOL’s delegated authority as the administering agency to resolve the question. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). The DOL’s interpretation is reasonable and consistent with the plain language of its regulations and with the statutory definition of sales. It comports with past interpretations of the exemption by both the DOL and the courts and with accepted rules of statutory construction. The Second Circuit properly deferred to this reasonable and consistent interpretation by the administering agency. The Ninth Circuit’s interpretation, in contrast, is broad and expansive,

retrofitting the exemption to an industry in which promoters simply cannot and do not make “sales.” Since PSRs promote pharmaceutical products in furtherance of sales made by others, and since they do not in any sense sell or take orders for such products, they do not fit within the outside sales exemption. Certiorari is warranted to resolve the split on the DOL’s regulatory interpretation and authority and to provide needed national uniformity of application of the FLSA across the pharmaceutical industry.

### **CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted.

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August, 2011

APPENDIX A - Opinion of the United States Court  
of Appeals for the Ninth Circuit

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 10-15257

**MICHAEL SHANE CHRISTOPHER and FRANK  
BUCHANAN**, *Plaintiffs-Appellants*,

v.

**SMITHKLINE BEECHAM OPINION  
CORPORATION**, DBA GlaxoSmithKline,  
*Defendant-Appellee*.

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Appeal from the United States District Court for the  
District of Arizona, D.C. No. 2:08-cv-01498-FJM

Argued and Submitted: November 3, 2010

Filed February 14, 2011

**Before:** Mary M. Schroeder, Richard C. Tallman,  
and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

**Opinion of the Court**

**COUNSEL**

Michael R. Pruitt, Esq.; Christine F. Crockett, Esq.,  
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Neal D. Mollen, Esq.; Barbara L. Johnson, Esq., Paul Hastings Janofsky & Walker, L.L.P., Los Angeles, California, for defendant-appellee SmithKline Beecham Corporation.

### **OPINION**

Plaintiffs-Appellants Michael Christopher and Frank Buchanan appeal the judgment of the district court that they are not entitled to overtime pay under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.* Plaintiffs were employed as Pharmaceutical Sales Representatives (PSRs) for Defendant-Appellee SmithKline Beecham Corporation d/b/a GlaxoSmithKline (Glaxo). Glaxo classified Plaintiffs as “outside salesmen”—a legal designation that exempts an employee from the FLSA’s overtime-pay requirement. Plaintiffs’ suit challenges Glaxo’s classification and seeks back pay.

The district court granted summary judgment to Glaxo. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### **I. Pharmaceutical Sales Representatives**

Glaxo is in the business of developing, producing, marketing, and selling pharmaceutical products. Christopher and Buchanan began working as PSRs for Glaxo in 2003. Glaxo terminated Christopher in May 2007. Buchanan’s career at Glaxo ended when he accepted a PSR position at another pharmaceutical company. Since the enactment of the Pure Food and Drug Act of 1906, Pub. L. No. 59-384,

34 Stat. 768, federal law has, to varying degrees, regulated and influenced the sale of pharmaceuticals.<sup>5</sup> In 1938, the Federal Food, Drug, and Cosmetic Act, Pub. L. 75-717, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301 *et seq.*), clothed the Food and Drug Administration with broad regulatory authority over, *inter alia*, drug manufacturers.<sup>6</sup> The Durham-Humphrey Amendment of 1951 established the first comprehensive scheme governing the sale of prescription pharmaceuticals to the public. *See* Pub. L. No. 82-215, 65 Stat. 648 (1951) (codified at 21 U.S.C. § 353(b)). Importantly, for our purposes, Durham-Humphrey formalized the now well-established distinction between prescription and over-the-counter drugs.<sup>7</sup> The Controlled Substances Act of 1970, Pub. L. 91-513, 84 Stat. 1260, continues the prescription/non-prescription dichotomy, and prohibits dispensing the former without the authorization of a “practitioner, other than a pharmacist, to an ultimate user.” 21 U.S.C. § 829(b)-(d). Currently, all pharmaceuticals requiring a physician’s prescription are branded “Rx only.” 21 U.S.C. § 353(b)(4)(A).

We analyze this case within the framework of how Glaxo sells its “Rx only” products to an “ultimate user.” A key, undisputed fact underlying our analysis is that the ultimate user—the patient—cannot purchase a prescription drug without first obtaining a physician’s authorization.

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<sup>5</sup> *Cf.* Francis B. Palumbo & C. Daniel Mullins, *The Development of Direct-to-Consumer Prescription Drug Advertising Regulation*, 57 Food & Drug L.J. 423, 424-27 (2002).

<sup>6</sup> *See* Palumbo & Mullins, *supra*, at 425 & n.17.

<sup>7</sup> *See* Palumbo & Mullins, *supra*, at 426.

Because Glaxo is proscribed from selling Rx-only products directly to the public, it sells its prescription pharmaceuticals to distributors or retail pharmacies, which then dispense those products to the ultimate user, as authorized by a licensed physician's prescription. In this restrictive sales environment, Glaxo employs PSRs to make "calls" on physicians to encourage them to prescribe Glaxo products. On calls, PSRs typically present physicians with a variety of information about Glaxo products, provide product samples, and attempt to convince the physicians to prescribe Glaxo products, when medically appropriate, over competitor products. PSRs also try to build business relationships with physicians, respond to their concerns, and recruit them to attend Glaxo-organized dinners and conventions. Each PSR is responsible for a particular "drug bag" of medications he or she tries to induce physicians to prescribe. As perceived by the Plaintiffs, the primary duty of a PSR is to communicate features and benefits of Glaxo products to physicians. In Buchanan's words, he tried to "convince prescribers that the benefits of [Glaxo's] products warranted them prescribing that product to the appropriate patient."

PSRs usually work outside of a Glaxo office and spend much of their time traveling to the offices of, and working with, physicians within their assigned geographic territories. Plaintiffs visited between eight and ten physicians each day, usually between the hours of 8:30 a.m. and 5:00 p.m. Plaintiffs claim that they worked between ten and twenty hours each week outside of normal business hours, for which they received no overtime wages. When not making calls on physicians, Plaintiffs studied Glaxo products

and relevant disease states, prepared new presentation modules, answered phone calls, checked email, generated reports, and attended events on evenings and weekends.

Before a PSR makes his or her daily calls, Glaxo provides him or her with detailed reports about the physicians he or she will visit. These reports include information about a physician's prescribing habits and drug preferences, the market volume of Glaxo products prescribed by the physician versus the volume of competitor products, and the volume of prescriptions filled in a particular region. Glaxo also provides each PSR with a budget to use for speaker programs and to engage socially with physicians.

Glaxo prepares and provides information about its products —called “Core Messages”—for PSRs to present to physicians during calls. Core Messages include information about product benefits and risks, dosage instructions, and the types of patients for whom Glaxo recommends each product. Glaxo expects PSRs to use the Core Messages and then “[d]evelop and deliver informative sales presentations based on customer needs.”

PSRs do not carry any prescriptions with them for direct sale; rather, Glaxo provides PSRs with small amounts of sample products to distribute to physicians. PSRs do not contact patients or market anything to them. To the contrary, in compliance with federal law, PSRs cannot sell the samples, take orders for any medication, or negotiate drug prices or contracts with either physicians or patients.

Glaxo recruits applicants who have prior sales experience for its PSR positions. When Glaxo hires new PSRs, it provides them with more than one month of training that focuses on making

presentations, learning about Glaxo products, and building interpersonal skills. PSRs are taught how to ask for a commitment from a physician to prescribe Glaxo products if the physician believes the medication is appropriate.

Since 2001, Glaxo has instructed PSRs on various methods of completing a call. When Plaintiffs were hired, they received training in Glaxo's "Assertive Selling Always Professional (ASAP)" model. They were also trained to follow Glaxo's "Winning Practices" program. ASAP and Winning Practices are similarly structured and emphasize that a PSR should: (1) analyze and understand what is happening in an assigned region; (2) work with the team to drive results; (3) master professional knowledge to understand clinical management of patients; (4) prepare for calls; (5) "Sell Through Customer-Focused Dialogue"; (6) obtain the strongest commitment possible from a healthcare professional at the end of the call; and (7) provide added value to the customer relationship.

In 2004, Glaxo started a new program called "When? Why? How?" which distilled the old model into three questions PSRs should use to bond the targeted physician to the Glaxo brand: "(1) When should I use this product? (2) Why should I use this product? (3) How should I use this product?" PSRs strive to ensure that their targeted physicians have the answers to all three questions before PSRs leave the physicians' offices.

Plaintiffs received two types of pay—salary and incentive based compensation. Incentive-based compensation is paid if Glaxo's market share for a particular product increases in a PSR's territory, sales volume for a product increases, sales revenue

increases, or the dose volume increases. Glaxo aims to have a PSR's total compensation be approximately 75% salary and 25% incentive compensation.<sup>8</sup> However, the dollar value of incentive-based compensation is uncapped.

The process of providing information to physicians is referred to within the pharmaceutical industry as "detailing," and PSRs have traditionally been known by the moniker "detail men" or "detailers." Plaintiffs' job functions during their tenures at Glaxo varied little from those of their predecessors of fifty or sixty years ago.<sup>9</sup> Moreover,

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<sup>8</sup> In 2004, Christopher received \$72,576 gross pay, of which \$29,993 was incentive compensation (41% of gross); in 2005, he received \$67,243, of which \$21,231 was incentive (32% of gross); and in 2006, he received \$77,552, of which \$28,249 was incentive (37% of gross).

In 2004, Buchanan received \$70,740 gross pay, of which \$19,232 was incentive compensation (27% of gross); in 2005, he received \$74,358, of which \$27,743 was incentive (32% of gross); in 2006, he received \$84,932, of which \$32,519 was incentive (38% of gross); and in 2007, he received \$75,776, of which \$19,957 was incentive (26% of gross).

<sup>9</sup> See Thomas L. Hafemeister, et ano., *Beware Those Bearing Gifts: Physician's Fiduciary Duty to Avoid Pharmaceutical Marketing*, 57 U. Kan. L. Rev. 491, 493-94 (2009) ("Detailing is the term used to denote the practice of pharmaceutical representatives visiting the offices of physicians or otherwise contacting physicians to promote their company's drugs and/or medical devices."). The pharmaceutical-representative/detailist position has deep roots in the industry, dating back until at least the 1930s. See Lars Noah, *Death of a Salesman: To What Extent Can the FDA Regulate the Promotional Statements of Pharmaceutical Sales Representatives*, 47 Food & Drug L.J. 309, 311 (1992) ("During the 1930s, . . . [m]arketing efforts by salesmen therefore focused almost exclusively on retail pharmacies."). Indeed, we trace the first mention of detail men

there is homogeneity within the industry—PSRs carry out essentially the same business functions regardless of which drug manufacturers they represent.<sup>10</sup>

The pharmaceutical industry self-regulates PSRs and their contacts with physicians by way of a voluntary industry-wide code of conduct—the Pharmaceutical Research and Manufacturers of

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in the federal case reports to 1940. *See United States v. Fifty-Nine Tubes, More or Less, of Lutein Tablets*, 32 F. Supp. 958, 960 (S.D.N.Y. 1940) (describing how “detail men or salesmen” interacted with physicians); *see also Motus v. Pfizer, Inc.*, 358 F.3d 659, 661 (9th Cir. 2004) (referring to “Pfizer’s detail men” providing drug information to a physician); *N. Cal. Pharm. Ass’n v. United States*, 306 F.2d 379, 386 (9th Cir. 1962) (“‘Detail men,’ or local sales representatives of the out-of-state manufacturers are constantly at work in northern California acquainting physicians and pharmacists with new drugs, stimulating interest generally in the firm’s products, and urging physicians to prescribe, and pharmacists to order, the manufacturer’s goods.”); *Schering Corp. v. Sun Ray Drug Co.*, 320 F.2d 72, 74 (3d Cir. 1963) (explaining company’s advertising included “efforts on the part of its detail men (who are salesmen)”); *Hoffmann-La Roche, Inc. v. Schwegmann Bros. Giant Super Mkts.*, 122 F. Supp. 781, 783 (E.D. La. 1954) (“[Detail men] regularly call upon physicians . . .”).

<sup>10</sup> *See e.g., IMS Health, Inc. v. Mills*, 616 F.3d 7, 14 (1st Cir. 2010) (“Detailing is a massive and expensive undertaking for pharmaceutical manufacturers, which spend billions of dollars a year to have some 90,000 pharmaceutical sales representatives make weekly or monthly one-on-one visits to prescribers nationwide.”); *Pfizer, Inc. v. Astra Pharm. Prods., Inc.*, 858 F. Supp. 1305, 1314 (S.D.N.Y. 1994) (“It is not disputed that the parties’ marketing efforts are conducted in substantially similar ways through (a) advertising in medical journals, (b) mailings sent to doctors, and (c) the use of large forces of ‘detail men’ who solicit doctors at the latter’s offices and discuss their products directly with the doctors.”).

America (PhRMA) Code. The PhRMA Code does not speak of selling, but, rather, provides that “[i]nteractions [with health care professionals] should be focused on informing [them] about products, providing scientific and educational information, and supporting medical research and education.” The PhRMA Code refers to PSRs as “industry representatives” and states that “[i]nformational presentations and discussions by industry representatives speaking on behalf of a company provide valuable scientific and educational benefits.” The PhRMA Code also regulates the provision of meals and gifts to physicians and professes an industry commitment to independent medical decisionmaking.

## **II. Proceedings in the District Court**

This litigation commenced in August 2008, when Plaintiffs filed the Complaint challenging Glaxo’s practice of requiring overtime work without paying additional compensation as a violation of 29 U.S.C. §§ 207(a)(1), 216(b). The parties crossmoved for summary judgment, and Plaintiffs moved to certify a conditional class. Glaxo contended that Plaintiffs were exempt under the “outside salesman” provision in FLSA or, alternatively, under the “administrative” exemption. 29 U.S.C. § 213(a)(1).

In granting Glaxo’s motion for summary judgment, the district court addressed only the outside sales exemption and held that PSRs “unmistakably fit within the terms and spirit of the exemption.” *Christopher v. SmithKlein Beecham Corp.*, No. 08 Civ. 1498 (FJM), 2009 WL 4051075, at \*5 (D. Ariz. Nov. 20, 2009). The court observed that PSRs “are not hourly workers, but instead earn

salaries well above minimum wage —up to \$100,000 a year,” and that they receive bonuses in lieu of overtime as “an incentive to increase their efforts.” *Id.* The district court continued, “A PSR’s ultimate goal is to close an encounter with a physician by obtaining a nonbinding commitment from the physician to prescribe the PSR’s assigned product. In this highly regulated industry, that is the most a PSR can achieve.” *Id.*

Thereafter, Plaintiffs moved to alter or amend the judgment based on the district court’s failure to consider an *amicus* brief filed by the Secretary (Secretary) of the Department of Labor (DOL) in a FLSA appeal then pending before the United States Court of Appeals for the Second Circuit, *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010). The district court rejected Plaintiffs’ argument that the DOL brief was entitled to deference under either *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Auer v. Robbins*, 519 U.S. 452 (1997), and noted that the DOL’s brief recapitulated the points argued at summary judgment. Finding the DOL’s “current interpretation inconsistent with the statutory language and its prior pronouncements, [and] [ ] also def[ying] common sense,” the district court denied the motion to amend the judgment. Plaintiffs appeal.

### **JURISDICTION AND STANDARD OF REVIEW**

We have jurisdiction under 28 U.S.C. § 1291.

We review a district court’s interpretation of the FLSA and its grant of summary judgment *de novo*.

*Gieg v. DDR, Inc.*, 407 F.3d 1038, 1044-45 (9th Cir. 2005); *see also Dent v. Cox Commc'ns Las Vegas, Inc.*, 502 F.3d 1141, 1143 (9th Cir. 2007). Summary judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

## DISCUSSION

### I. The FLSA Outside Sales Exemption

The FLSA imposes minimum labor standards on employers to promote “the health, efficiency, and general well-being of workers.” 29 U.S.C. § 202(a); *Nigg v. U.S. Postal Serv.*, 555 F.3d 781, 784 (9th Cir. 2009). The FLSA was “enacted because Congress found that the existence ‘in industries engaged in commerce or in the production of goods for commerce’ of labor conditions detrimental to maintaining minimum standards of living necessary for health, efficiency and general well-being of workers perpetuates substandard conditions among workers, burdens commerce, constitutes an unfair method of competition in commerce, leads to labor disputes, and interferes with the orderly and fair marketing of goods.” *Hale v. Arizona*, 993 F.2d 1387, 1396 (9th Cir. 1993) (en banc) (quoting 29 U.S.C. § 202(a)) (emphasis added); *see also Nigg*, 555 F.3d at 784.

[1] To meet those goals and expand employment opportunities across the economy, the FLSA includes a baseline “overtime payment requirement” that employers must pay employees “a rate not less than

one and one-half times the regular rate at which he is employed” for hours worked in excess of forty per week. 29 U.S.C. § 207(a)(1). There are numerous exceptions to this general rule. *See* 29 U.S.C. § 213. These exemptions to the overtime-pay requirement vary widely from “white-collar” executive, administrative, and professional exemptions to those for babysitters. 29 U.S.C. § 213(a)(1), (15). Relevant here is one part of the “white-collar” exemption for persons employed “in the capacity of outside salesman.” 29 U.S.C. § 213(a)(1); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009). The white-collar exemption removes from the overtime pay requirement:

any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]). . . .

29 U.S.C. § 213(a)(1) (emphasis added).

As the statute indicates, a proper interpretation of the FLSA is necessarily guided by the regulations issued by the Secretary of Labor—“[t]he FLSA grants the Secretary broad authority to ‘define and delimit’ the scope of the exemption for executive, administrative, and professional employees.” *Auer*, 519 U.S. at 456 (alterations and citation omitted). Congress did not define the term “outside salesman” or the other white-collar exemptions in the FLSA. Rather, “[p]ursuant to Congress’s specific grant of rulemaking authority, the [DOL] has issued implementing regulations, at 29 C.F.R. Part 541 [(Part 541)], defining the scope of the section 13(a)(1) exemptions.” *See* *Defining and Delimiting the*

Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004). In 2004, the DOL's Wage and Hour Division promulgated supplemental rules concerning the outside sales and administrative exemptions (the 2004 Rule). Among other things, the 2004 Rule explained that "the major substantive provisions of the Part 541 regulations have remained virtually unchanged for 50 years." 69 Fed. Reg. at 22,124.

**[2]** The Secretary defines an "outside salesman" as any employee:

- (1) Whose primary duty is: (i) making sales within the meaning of section 3(k) of the Act; or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- (2) Who is primarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

29 C.F.R. § 541.500(a). An employee's "primary duty" is "the principal, main, major, or most important duty that the employee performs." 29 C.F.R. § 541.700. The outside sales regulation provides:

In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or

display catalogue, planning itineraries and attending sales conferences.

29 C.F.R. § 541.500(b).

The Secretary's outside sales regulation references Section 3(k) of the Act. 29 C.F.R. § 541.500(a). Section 3(k) provides that "[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). The Secretary's regulations provide:

Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 C.F.R. § 541.501(b).

In the regulations, the Secretary draws a distinction between sales work and promoting:

Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

29 C.F.R. § 541.503(a). To illustrate the concept of promoting sales, as opposed to selling, the Secretary's regulations provides two examples—a

manufacturer's representative and a company representative who visits chain stores:

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. . . . Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work. . . .

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

29 C.F.R. § 541.503(b)-(c).

In a FLSA overtime-wage case, the question of how an employee spends his or her workday is one of fact, while the question of whether his or her activities exclude him or her from the overtime-pay

requirement is one of law. *See Icicle Seafoods v. Worthington*, 475 U.S. 709, 714 (1986); *Bratt v. Cnty. of Los Angeles*, 912 F.2d 1066, 1068 (9th Cir. 1990). Although the outside sales exemption is more than seven decades old, our encounters with the exemption are few and limited to the class-certification context. *See In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953 (9th Cir. 2009); *Vinole*, 571 F.3d at 939, 945. Thus, whether a PSR’s job duties make him or her an outside salesperson is a question of first impression for our court.

We construe the outside sales exemption consistent with other Section 13(a) exemptions under the FLSA. The employer always has the burden of showing the exemption applies to its employee. *Bratt*, 912 F.2d at 1069; *see also Nigg*, 555 F.3d at 788. The exemption can only apply to persons “plainly and unmistakably within [its] terms and spirit.” *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Klem v. Cnty. of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000). Because exemptions are “narrowly construed” against the employer, to meet its burden, an employer must establish that the employee satisfies *each* of the criteria set forth in the Secretary of Labor’s regulations. *See Bratt*, 912 F.2d at 1069; *see also Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 751 (9th Cir. 2010). Reviewing a FLSA exemption is well understood to be “a fact-intensive” inquiry. *Vinole*, 571 F.3d at 945 (citation omitted).

## **II. Whether Deference to the Secretary’s Position is Appropriate**

[3] The Secretary’s appearance as *amicus* supporting Plaintiffs requires us to determine what,

if any, deference we must accord to her view that PSRs do not meet the primary duties test for the outside sales exemption. The Secretary also advocated this construction of the regulations before the Second Circuit in *Novartis*. 611 F.3d at 149. Although the *Novartis* court held that Secretary's interpretation was owed *Auer* deference, 611 F.3d at 153, our review of the relevant authorities leads us to a different conclusion. We conclude that we owe no deference to the Secretary's current interpretation of the regulations, and, in any event, we respectfully disagree with that interpretation.

#### **A. Administrative Deference in the FLSA**

When a question arises as to the meaning of the FLSA or the Secretary's regulations, we apply traditional rules of construction and, where required, administrative deference. *See, e.g., Webster v. Pub. Sch. Emp. of Wash., Inc.*, 247 F.3d 910, 915 (9th Cir. 2001) (citing *Auer*, 519 U.S. at 457). Thus, if the language of a statute or regulation is unambiguous, we apply the terms as written. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) (“[D]eference is warranted only when the language of the regulation is ambiguous.”); *Chevron*, 467 U.S. at 842-43 (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”). By contrast, when Congress has *not* “directly spoken to the precise question at issue,” *Auer*, 519 U.S. at 457, we will defer to the Secretary's regulation “so long as it is ‘based on a permissible construction of the statute.’ ” *Id.* (citing *Chevron*, 467 U.S. at 842-43). If the Secretary's regulations are themselves ambiguous, and the

Secretary uses her rulemaking authority to provide clarity, we give controlling deference to the Secretary's view unless it is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (citation and internal quotation mark omitted); *see also Christensen*, 529 U.S. at 586-87, 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *cf. In re Farmers Ins. Exch., Claims Representatives' Overtime Pay Litig.*, 481 F.3d 1119, 1129 (9th Cir. 2007) ("We must give deference to the DOL's interpretation of its own regulations through, for example, Opinion Letters."). Lastly, if the Secretary interprets an *unambiguous* statute by way of an opinion letter, enforcement guidelines, or the like, her opinion is merely "entitled to respect" to the extent the interpretation has the "power to persuade" the court. *See Christensen*, 529 U.S. at 587 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

In *Novartis*, the Second Circuit held that PSRs did not meet the requirements of the outside sales exemption. As it has done here, the DOL took the position that "when an employee promotes to a physician a pharmaceutical that may thereafter be purchased by a patient from a pharmacy . . . the employee does not in any sense make the sale." *Novartis*, 611 F.3d at 153. In reviewing the Secretary's position, the Second Circuit laid out the relevant statutory and regulatory history and focused its attention on the Secretary's regulations, and, in particular, the Preamble in the 2004 Rule which "emphasized that no one could be considered a salesman within these regulations unless he in some sense made a sale." *Id.* at 152. The *Novartis* court highlighted a series of comment letters sent to the

DOL by manufacturers' associations and industry trade groups that had requested "the Department [ ] eliminate the emphasis upon an employee's 'own' sales . . . because of team selling, customer control of order processing, and increasing computerization of sales and purchasing activities. . . ." 69 Fed. Reg. at 22,162. The United States Chamber of Commerce emphasized that "promotional activities, even when they do not culminate in an individual sale, are nonetheless an integral part of the sales process." *Id.* Based on these concerns, the DOL made a "minor change" to "address commenter concerns that technological changes in how orders are taken and processed should not preclude the exemption for employees whose primary duty is making sales." *Id.* The 2004 Rule continues: "[T]he Department does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services. An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales." *Id.*

The *Novartis* court also quoted the Preamble's elaboration of the primary-duty standard: "*Employees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale.*" 611 F.3d at 152 (quoting 69 Fed. Reg. at 22,162) (emphasis in original). The Secretary's interpretation is based on a 1949 DOL interpretation, which provided: "In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent

of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt.” 69 Fed. Reg. at 22,162-63 (citation omitted).

The Second Circuit determined that the Secretary’s regulations “do far more than merely parrot the language of the FLSA.” *Novartis*, 611 F.3d at 153. For that reason, “the Secretary’s interpretations of her regulations are [ ] entitled to ‘controlling’ deference unless those interpretations are ‘plainly erroneous or inconsistent with the regulation.’ ” *Id.*(quoting *Auer*, 519 U.S. at 461 (internal quotation omitted)). The *Novartis* court could find no inconsistencies or errors in the Secretary’s amicus position. *Id.* The court stated it did not believe the distribution practices of the drug company constituted an “other disposition,” as that term is used in the FLSA. Rather, the court said that because “other disposition” followed a line of words which, apparently, emphasized “a sale” being consummated, “other disposition” was not intended as a “catch-all” category. *Id.* Ultimately, the *Novartis* court summarized *its reasoning*:

[W]here the employee promotes a pharmaceutical product to a physician but can transfer to the physician nothing more than free samples and cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it, we conclude that it is not plainly erroneous to

conclude that the employee has not in any sense, within the meaning of the statute or the regulations, made a sale.

*Id.* at 154.

### **C. Deference Owed in this Case**

[4] Our view of the level of deference we owe to the Secretary in this matter is best captured by the Supreme Court’s instruction in *Gonzales v. Oregon*: “An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.” 546 U.S. 243, 257 (2006); *see also Chase Bank USA, N.A. v. McCoy*, 562 U.S. \_\_\_, (slip op. at 15) (Jan. 24, 2011) (“Accordingly, no deference was warranted to an agency interpretation of what were, in fact, Congress’ words.”); *N. Cal. River Watch v. Wilcox*, 620 F.3d 1075, 1088 (9th Cir. 2010) (“Here, the three rules cited by the United States essentially parrot the statutory language.”). The “parroting” with which the *Gonzales* Court took issue is present in the Secretary’s interpretation of Section 3(k).

According to the Secretary’s regulations, a salesman is someone who either “mak[es] sales within the meaning of section 3(k) of the Act” or someone who “obtain[s] orders or contracts.” 29 C.F.R. 541.500(a)(1). Since there is no dispute that PSRs do not obtain orders for anything, only the “sales” element is relevant here. To define “sales within the meaning of section 3(k),” we look to 29 C.F.R. § 541.501(b), which provides that “[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of

intangible property.” Section 3(k) of the Act states that “ ‘[s]ale’ or ‘sell’ includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” 29 U.S.C. § 203(k). Thus, the Secretary has given us two meanings with which to set the boundaries of the sales exemption. First, in 29 C.F.R. § 541.501(b), the Secretary provides an open-ended definition that sales, unsurprisingly, “include the transfer of title to tangible property.” In the next sentence, the Secretary cross-references back to the language of Section 3(k) of the Act—the very language purportedly being defined. Accordingly, the Secretary’s regulations define “sale” or “sell” by statutory renvoi—that is, a “sale” means a “sale.” This clarifies nothing about the meaning of Section 3(k); it merely incorporates the very undefined, very un-delimited term the Secretary seeks to clarify. A definition dependent almost entirely on Congress’s seventy-two-year old statutory language is not an example of the DOL employing its “expertise” to elucidate meaning to which we owe *Auer* deference. See *N. Cal. River Watch*, 620 F.3d at 1085-87.

In *Gonzales v. Oregon*, the Supreme Court confronted an analogous situation when it rejected the Attorney General’s regulatory attempt to frustrate the implementation of Oregon’s Death with Dignity Act. In that case, Oregon statutory law exempted licensed physicians from liability when they prescribed medication to hasten death for terminally ill individuals. 546 U.S. at 249-54. In 2001, shortly after a change of presidential administration, the Attorney General promulgated a new interpretive rule that restricted the use of controlled substances in physician-assisted suicides.

*Id.* at 254. In defending that rule, the government contended in its appeal that the judiciary was required to give “considerable deference” to the Attorney General’s interpretive rule as it was “an elaboration of one of [his] own regulations.” *Id.* at 256. In rejecting that contention, the Supreme Court drew meaningful distinctions with its decision in *Auer*:

In *Auer*, the underlying regulations gave specificity to a statutory scheme the Secretary was charged with enforcing and reflected the considerable experience and expertise the [DOL] had acquired over time. . . . *Here, on the other hand, the underlying regulation does little more than restate the terms of the statute itself.* The language the Interpretive Rule addresses comes from Congress, not the Attorney General, and the near equivalence of the statute and regulation belies the Government’s argument for *Auer* deference.

*Id.* at 256-57 (emphasis added).

[5] The failure to add specificity to the statutory scheme that troubled the *Gonzales* Court, indeed the “parroting” of statutory language, is present in the Secretary’s outside sales regulations. Rather than setting forth a particular test for “sale” or instructing employers to look for indicia of sales, the Secretary’s regulations direct employers, employees, and this court back to the language of the FLSA. Given the admonition in *Gonzales*, we are unable to accord *Auer* deference to a regulation written in this manner.

[6] Thus, when we look to the Secretary’s brief for her application of the regulations, we see only a *reinterpretation* of Section 3(k). Rather than applying

the regulation to the facts presented, the Secretary has used her appearance as *amicus* to draft a new interpretation of the FLSA’s language. Were we to accept the Secretary’s offer, and give controlling deference even where there exists no meaningful regulatory language to interpret, we would unduly expand *Auer*’s applicability to interpretations of statutes expressed for the first time in case-by-case *amicus* filings. See *N. Cal. River Watch*, 620 F.3d at 1088 (“In this case, the *amicus* brief purports to interpret statutory, not regulatory, language.”). In essence, we would sanction bypassing of the Administrative Procedures Act and notice-and-comment rulemaking. *C.f. Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (“Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking.”). Accordingly, we hold that we need not give “controlling” deference to the Secretary’s interpretations in this matter.<sup>11</sup> Furthermore, even if *Auer* applied, deference is not warranted because the Secretary’s position is both plainly erroneous and inconsistent with her own regulations and practices, as demonstrated in the analysis that follows.

### **III. “Sales” and “Selling” in the Pharmaceutical Industry**

Absent an agency-determined result, it is the province of the court to construe the relevant statutes and regulations. *N. Cal. River Watch*, 620

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<sup>11</sup> As explained *infra*, we likewise find unpersuasive the Secretary’s interpretation of the FLSA provisions, thus vitiating any *Skidmore* deference. See Section III.

F.3d at 1088-89. As noted *supra*, Plaintiffs argue that by not transferring any product to physicians, they are not selling pharmaceuticals, but only “promoting” them. Plaintiffs say this distinction is warranted in light of the rule that the FLSA be “narrowly construed against . . . employers.” *Webster*, 247 F.3d at 914. For its part, Glaxo urges us to view “sale” in Section 3(k) in a commonsensical fashion, while contending that the meaning of “sale” is permissive. Glaxo urges us to adopt the rationale that the phrase “other disposition” in Section 3(k)’s definition of “sale” is a broad catch-all category.<sup>128</sup> This view was cited with approval by the district court here, and is supported by the Secretary’s usage, dating back to 1940, of the language that an employee must “*in some sense* make a sale.” 69 Fed. Reg. at 22,162 (quoting “Executive, Administrative, Professional Outside Salesman” Redefined, Wage and Hour Division, U.S. Dept. of Labor, Report & Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition, at 46 (Oct. 10, 1940)) (emphasis added).

[7] Plaintiffs’ contention that they do not “sell” to doctors ignores the structure and realities of the heavily regulated pharmaceutical industry. It is undisputed that federal law prohibits pharmaceutical manufacturers from directly selling prescription medications to patients. Plaintiffs

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<sup>12</sup> See Steven I. Locke, *The Fair Labor Standards Acts Exemptions and the Pharmaceuticals Industry: Are Sales Representatives Entitled to Overtime?*, 13 Barry L. Rev. 1, 25 (2009) (“Applying these [common-usage] definitions, it is logical to conclude that the term ‘other disposition,’ as it is used to define a ‘sale’ under the Act, includes a physician’s decision to write a prescription for a particular medication.”).

suggest that despite being hired for their sales experience, being trained in sales methods, encouraging physicians to prescribe their products, and receiving commission-based compensation tied to sales, their job cannot “in some sense” be called selling. This view ignores the reality of the nature of the work of detailers, as it has been carried out for decades. Plaintiffs’ argument also fails to account for the fact that the relevant “purchasers” in the pharmaceutical industry, and the appropriate foci of our inquiry, are not the end-users of the drug but, rather, the prescribing physicians whom they importune frequently. *See, e.g., Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669, 678-79 (W.D. Pa. 2009) (discussing why the “professional paradigm” places the physician as the relevant decision maker in the health services industry), *aff’d on other grounds*, 372 Fed. App’x 246 (3d Cir. 2010). Unlike conventional retail sales, the patient is not at liberty to choose personally which prescription pharmaceutical he desires. As such, he cannot be fairly characterized as the “buyer.” Instead, it is patient’s physician, who is vested with both a moral and legal duty to prescribe medication appropriately, who selects the medication and is the appropriate focus of our “sell/buy” inquiry. In this industry, the “sale” is the exchange of non-binding commitments between the PSR and physician at the end of a successful call. Through such commitments, the manufacturer will provide an effective product and the doctor will appropriately prescribe; for all practical purposes, this is a sale. Because pharmaceutical manufacturers appreciate who the “real” buyer is, they have structured their 90,000-person sales force and their marketing tactics to accommodate this unique environment.

[8] When a PSR visits a doctor, he or she attempts to obtain the absolute maximum commitment from his or her “buyer”—a non-binding commitment from the physician to prescribe the PSR’s assigned product when medically appropriate. In most industries, there are no firm legal barriers that prohibit the *actual physical* exchange of the goods offered for sale. Because such barriers do exist in this industry, the fact that commitments are non-binding is irrelevant; the record reveals that binding or non-binding, a physician’s commitment to a PSR is nevertheless a meaningful exchange because pharmaceutical manufacturers value these commitments enough to reward a PSR with increased commissions when a physician increases his or her use of a drug in the PSR’s bag. *See, e.g., Baum*, 605 F. Supp. 2d at 681 (“This Court believes that other courts, and perhaps regulatory agencies, underestimate the significance of this oral commitment from physicians. In part, this error emerges from a misunderstanding of the ways in which human beings are socially and informally motivated. Sometimes lawyers and judges forget that a person’s word means something; remarkably, many people do not actually need a 400-page contract to bind themselves to their word.”).

Moreover, the industry has agreed upon and abides by the PhRMA Code to regulate the marketing of medicine to healthcare professionals—just as any consumer-products maker might develop rules to limit the express warranties its sales force might offer to a customer. Such industry practice and prevailing customs should inform our disposition. *Cf. Reiseck v. Universal Commc’ns of Miami, Inc.*, 591 F.3d 101, 106 (2d Cir. 2010) (in resolving whether

advertising sales director was an administrative or sales worker in the publishing industry “a careful consideration of [employer’s] business model provides some clarity”).

Under Plaintiffs’ view, PSRs are not salespeople, despite the fact that more than 90,000 pharmaceutical representatives make daily calls on physicians for the purpose of driving greater sales. *See IMS Health*, 616 F.3d at 14. We cannot square this view with Section 3(k)’s open-ended use of the word “sale,” which *includes* “other disposition[s].” While we recognize that the FLSA is to be narrowly construed in light of its remedial nature, that general principle does not mean that every word must be given a rigid, formalistic interpretation. For example, for over seventy years, the Secretary has emphasized a sensible application of the exemptions; in the Preamble to the 2004 Rule, the Secretary employs the openended concept that a salesman is someone who “in some sense” sells. 69 Fed. Reg. at 22,162-63 (emphasis added). In other words, while the Secretary asks us to narrowly interpret this exemption, she herself acknowledges that technical considerations alone and changes in the way sales are made should not be grounds for denying the exemption. *See* 69 Fed. Reg. at 22,162.

To further explain our common sense understanding of why PSRs make sales, we find the paradigm “outside salesman” case *Jewel Tea Co. v. Williams*—instructive. 118 F.2d 202 (10th Cir. 1941). The importance of *Jewel Tea* is illustrated by the fact that both parties and the *amicus* offer it as favorable precedent for their conflicting positions. *Jewel Tea* involved a FLSA overtime-wage suit brought by three employees of a tea, coffee, and sundry goods

manufacturer and distributor. 118 F.2d at 203. The plaintiffs held the position of “route salesmen” to “sell and distribute” products to customers in their homes. *Id.* The area in which the company sold its goods was divided and “[e]ach salesman [was] assigned an exclusive territory which he cover[ed].” *Id.* The employees made no immediate deliveries but instead took orders for future delivery, although they might advance an item to a customer. *Id.* The company provided sales training and sent a supervisor with a new hire on early sales calls before permitting the employee to “go out on a route by himself.” *Id.* at 204. Further, employees were taught a “five-point sale” method to employ when speaking with customers. *Id.* A certain degree of knowledge about the products and potential customers was also required—“[t]he salesman must know recipes for the preparation of the Company’s products . . . [and] must learn the general requirements of each family, in order to avoid over-stocking his customer and in order to anticipate the family’s needs.” *Id.* After working in the field during the day, employees completed some clerical tasks at night. *Id.* at 205. Finally, employees were paid a base salary plus a commission if their collections were in excess of a sum certain. *Id.*

The *Jewel Tea* plaintiffs brought suit to collect unpaid overtime, asserting they did not fall within the “outside sales” exemption, primarily employing the argument that they were “delivery men.” *Id.* at 208. In its decision denying plaintiffs overtime pay, the Tenth Circuit penned the oft-quoted justification for the outside sales exemption:

The reasons for excluding an outside salesman are fairly apparent. Such salesman, to a great

extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.

*Id.* at 207-08.

[9] Reviewing the undisputed facts here, we consider the rationale for applying the outside sales exemption to PSRs to be as “apparent” as it was in *Jewel Tea*. Of course, this case does not involve door-to-door consumer-product sales. But, the FLSA is not an industry-specific statute. As the Second Circuit recognized in *Reiseck*, not all FLSA claims will involve the “archetypal businesses envisaged by the FLSA,” 591 F.3d at 106. Even though there are differences, it is notable that the salesmen in *Jewel Tea* and Plaintiffs here each (1) worked in assigned territories, (2) did not make immediate deliveries, (3) were required to analyze client backgrounds, (4) received product training, (5) employed a pre-planned routine for client interaction, (6) were accompanied by supervisors for training, (7) were later subject to minimal supervisor oversight, (8) completed clerical activities at the end of the day, and (9) had a dual salary and commission-based compensation plan tied to their performance. Even

though PSRs lack some hallmarks of the classic salesman, the great bulk of their activities are the same, as is the overarching purpose of obtaining a commitment to purchase (prescribe) something.

**[10]** The primary duty of a PSR is not promoting Glaxo's products in general or schooling physicians in drug development. These are but preliminary steps toward the end goal of causing a particular doctor to commit to prescribing *more* of the particular drugs in the PSR's drug bag. Without this commitment and the concomitant increase in prescriptions, or drug volume, or market share—i.e. without more *sales*—the PSR would not receive his or her commission salary and could soon find himself or herself unemployed. While not all steps in the PSR's daily activities constitute "selling," that fact does not render the totality of those activities non-exempt promotion; "work performed incidental to and in conjunction with the employee's own outside sales or solicitations . . . shall be regarded as exempt outside sales work . . . [and] . . . other work that furthers the employee's sales efforts also shall be regarded as exempt work." 29 C.F.R. § 541.500(b).

The Secretary's distinction between selling and promoting is only meaningful if the employee does not engage in *any* activities that constitute "selling" under the Act. This much is seen from the plain language of the regulations, which gives the example of promotional work as "a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but *does not obtain a commitment for additional purchases.*" 29 C.F.R. § 541.503(c) (emphasis added). PSRs do far

more than collect general data or provide consultations; indeed they ask for, and sometimes obtain, a commitment by the doctor to prescribe Glaxo drugs, and whether the doctor keeps that commitment is verified and traced using aggregated pharmacy data Glaxo collects. *See IMS Health*, 550 F.3d at 44-47 (“A valuable tool in this endeavor, available through the omnipresence of computerized technology, is knowledge of each individual physician’s prescribing history.”).

In *Reisick*, the Second Circuit highlighted an important distinction between selling and promoting, noting that the latter is directed to the public at large, as opposed to a particular client:

Consider a clothing store. The individual who assists customers in finding their size of clothing or who completes the transaction at the cash register is a salesperson under the FLSA, while the individual who designs advertisements for the store or decides when to reduce prices to attract customers is an administrative employee for the purposes of the FLSA.

*Reiseck*, 591 F.3d at 107. At Glaxo, Plaintiffs had no interest in “generally” promoting sales by the company or improving sales across the board. Rather, Plaintiffs directed their sales efforts only towards certain products, only to a discrete group of physicians, and only within a defined geographic area. Targeting physicians is not based on mass appeals or general advertisements, but is the result of a personalized review of each physician’s prescribing habits and history. The process, like any sales process, is *tailored* to the customer’s preferences.

[11] We also find that the Secretary's acquiescence in the sales practices of the drug industry for over seventy years further buttresses our decision. The outside sales exemption has existed since 1938. Detail men have practiced their craft over that same period. Generally, they have been considered salespeople.<sup>13</sup> Until the Secretary's appearance in *Novartis*, the DOL did not challenge the conventional wisdom that detailing is the functional equivalent of selling pharmaceutical

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<sup>13</sup> See *N. Cal. Pharm.*, 306 F.2d at 386 (9th Cir. 1962) (" 'Detail men,' or local sales representatives. . ."); see also *IMS Health*, 550 F.3d at 54 ("In the service of *maximizing drug sales*, detailers use prescribing histories as a means of targeting potential customers more precisely and as a tool for tipping the balance of bargaining power in their favor. As such, detailing affects physician behavior and increases the likelihood that physicians will prescribe the detailers' (more expensive) drugs." (emphasis added)); *Williams v. Bristol-Myers Squibb, Co.*, 85 F.3d 270, 273 (7th Cir. 1996) ("Federal law requires a maker of prescription drugs to have a samples control program designed to prevent its salesmen, who frequently give free samples to the physicians they call on, from distributing prescription drugs outside authorized channels."); *Sun Ray Drug*, 320 F.2d at 74 ("efforts on the part of its detail men (who are salesmen)"); *Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007) ("In each of these cases, the courts found that the drugs were overpromoted by salesmen known as 'detail men,' who visited physicians' offices and encouraged physicians to prescribe the drug."); *Skill v. Martinez*, 91 F.R.D. 498, 508 (D.N.J. 1981) ("comments by drug 'detail men' (drug salesmen who visit physicians)"); *Smith, Kline & French Lab. v. State Tax Comm'n*, 403 P.2d 375, 378 (Or. 1965) ("By soliciting the stocking of plaintiff's products by druggists and the prescription of those drugs by physicians, plaintiff's detail men perform the same sales function in plaintiff's field that salesmen soliciting actual orders from the ultimate user perform in other businesses.").

products. Indeed, the DOL has recognized as much in its Dictionary of Occupation Titles, which provides the following definition for pharmaceutical detailers:

Promotes use of and *sells* ethical drugs and other pharmaceutical products to physicians, [dentists], hospitals, and retail and wholesale drug establishments, utilizing knowledge of medical practices, drugs, and medicines: Calls on customers, informs customer of new drugs, and explains characteristics and clinical studies conducted with drug. Discusses dosage, use, and effect of new drugs and medicinal preparations. Gives samples of new drugs to customer. Promotes and *sells* other drugs and medicines manufactured by company. May sell and take orders for pharmaceutical supply items from persons contacted.

D.O.L. Dictionary of Occupational Titles § 262.157-010 (4<sup>th</sup> ed. 1991) (emphases added). Likewise, although it emerged in a different context, we find Judge Posner’s observation in *Yi v. Sterling Collison Centers, Inc.*, 480 F.3d 505, 510-11 (7<sup>th</sup> Cir. 2007), informative—while it is “possible for an entire industry to be in violation of the [FSLA] for a long time without the Labor Department noticing[, the] more plausible hypothesis is that the . . . industry has been left alone” because DOL believed its practices were lawful.

[12] In view of many similarities between PSRs and salespeople in other fields, pharmaceutical industry norms, and the acquiescence of the Secretary over the last seventy-plus years, we cannot accord even minimal *Skidmore* deference to the position expressed in the *amicus* brief. Under *Skidmore*, “[t]he fair measure of deference to an

agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (internal citations omitted); *see also League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1189 (9th Cir. 2002) (quoting *Skidmore*, 323 U.S. at 140) (internal quotation marks omitted). Many, if not all, of these hallmarks of "respectful" deference are absent here. The about-face regulation, expressed only in ad hoc *amicus* filings, is not enough to overcome decades of DOL nonfeasance and the consistent message to employers that a salesman is someone who "in some sense" sells. Moreover, we are unable to accept an argument that fails to account for industry customs and emphasizes formalism over practicality, in particular the argument that "obtaining a commitment to buy" is the *sine qua non* of the exemption. Under the Secretary's view, "sale" means unequivocally the final execution of a legally binding contract for the exchange of a discrete good. In addition to the point that such stringent wording is not found in Section 3(k), or plausibly implied from phrases like "other disposition," the Secretary's approach transforms what since the time of *Jewel Tea* has been recognized as a multifactor review of an employee's functions into a single, stagnant inquiry.

Telephones, television, shopping malls, the Internet and general societal progress have largely relegated the professional pitchman embodied in *Jewel Tea* to the history books. But selling continues, and, as in prior eras, a salesperson learns the

nuances of a product and those of his or her potential clientele, tailors a scripted message based on intuition about the customer, asks for the customer to consider her need for the product, and then receives a commission when the customer's positive impression ultimately results in a purchase.

[13] For the past seventy-plus years, selling in the pharmaceutical industry has followed this process. PSRs are driven by their own ambition and rewarded with commissions when their efforts generate new sales. They receive their commissions in lieu of overtime and enjoy a largely autonomous work-life outside of an office. The pharmaceutical industry's representatives—detail men and women—share many more similarities than differences with their colleagues in other sales fields, and we hold that they are exempt from the FLSA overtime-pay requirement.

### **CONCLUSION**

For the foregoing reasons, we **AFFIRM** the district court's summary judgment for Defendant-Appellee SmithKline Beecham Corporation.

**AFFIRMED**

**APPENDIX B – Order of the United States District  
Court for the District of Arizona on Motion for  
Summary Judgment**

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**United States District Court  
for the District of Arizona**

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No. CV-08-1498-PHX-FJM

**MICHAEL SHANE CHRISTOPHER and FRANK  
BUCHANAN, *Plaintiffs,***

v.

**SMITHKLINE BEECHAM OPINION  
CORPORATION, DBA GlaxoSmithKline,  
*Defendant.***

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Filed November 20, 2009

**Order of the Court**

[Re: Defendants' motion for summary judgment]

The court has before it plaintiffs' motion for conditional class certification (doc. 29), defendant's response (doc.34), and plaintiffs' reply (doc. 47). We also have before us defendant's motion for summary judgment (doc. 52), plaintiffs' response and cross motion for partial summary judgment (doc. 75), defendant's response and reply (doc. 77), plaintiffs' reply (doc. 82), and plaintiffs' motion for leave to file supplemental record in support of motion for

conditional class certification (doc. 83), defendant's response (doc. 87), and plaintiffs' reply (doc. 89).

Defendant SmithKlein Beecham Corporation d/b/a GlaxoSmithKlein ("GSK") is in the business of developing, marketing, and selling pharmaceutical products. Plaintiffs Michael Shane Christopher and Frank Buchanan worked for GSK as pharmaceutical sales representatives ("PSR"), and were responsible for marketing and promoting GSK products to physicians and encouraging them to prescribe those products to their patients. GSK at one time maintained as many as 9,000 PSRs to promote their products. PSOF ¶ 59. Plaintiffs brought this action contending that their jobs regularly required them to work in excess of forty hours per week and that GSK violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207, by failing to pay them overtime compensation.

The FLSA requires employers to pay overtime compensation for hours worked in excess of forty hours per week unless a FLSA exemption applies. 29 U.S.C. § 207(a)(1). GSK contends that plaintiffs are not entitled to overtime pay because they fall within either the "outside sales" or the "administrative employee" exemptions. Id. at § 213(a)(1). Due to the remedial nature of the overtime pay requirement, "FLSA exemptions are to be narrowly construed against employers and are to be withheld except as to persons plainly and unmistakably within their terms and spirit." Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1125 (9th Cir. 2002) (quotation omitted). The employer bears the burden of showing that an exemption applies. Id.

The FLSA's overtime compensation requirement does not apply to "any employee employed . . . in the

capacity of outside salesman.” 29 U.S.C. § 213(a)(1). An employee is exempt as an outside salesperson if (1) the employee’s “primary duty” is “making sales within the meaning of [29 U.S.C. § 203(k)]” or “obtaining orders or contracts,” and (2) “is customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.” 29 C.F.R. § 541.500(a). The parties do not dispute that plaintiffs customarily and regularly performed their duties away from GSK’s offices. They spent the majority of their working time in the field calling on physicians or at home preparing for their calls. Therefore, the only issue in dispute is whether plaintiffs’ primary duty as a pharmaceutical sales representative was “making sales” within the meaning of § 203(k).

The FLSA defines “sale” as “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” 29 U.S.C. § 203(k). The regulations provide that “[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.” 29 C.F.R. § 541.501(b). In promulgating the 2004 regulations, the Department of Labor explained that “[a]n employer cannot meet [the outside sales exemption] unless it demonstrates objectively that the employee, *in some sense*, has made sales.” Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22162 (Apr. 23, 2004) (“Comments to 2004 Final Rule”) (emphasis added). Employees “make sales” if they “obtain a commitment to buy from the customer and are credited with the sale.” Id. (quotation

omitted). “In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt.” *Id.* at 22162-63. Therefore, the Department of Labor contemplates that while a sale or order may be processed in different ways, the employee only makes “sales” if his job involves obtaining commitments for purchases that are creditable to his own efforts. There is no requirement that these must be binding commitments.

Here, it was plaintiffs’ responsibility as PSRs to call on physicians and discuss the features, benefits, and risks of GSK products. PSOF ¶¶ 15, 22. Their primary objective was convincing physicians to prescribe GSK products to their patients. DSOF ¶¶ 104-06. GSK furnishes PSRs with detailed reports on physicians, including their prescribing habits, their market share, and volume of prescriptions filled. PSOF ¶ 120. These reports identify healthcare professionals who have a higher likelihood of responding to marketing, based in part on how they have historically prescribed and responded to promotional activities. PSOF ¶ 116. The PSRs’ efforts are focused on the top 250 physicians in their territory who prescribe for a particular disease state. PSOF ¶ 120.

All PSRs receive extensive specialized training upon hire and throughout the course of their careers with GSK. DSOF ¶¶ 5, 7. PSRs are trained on GSK’s program entitled “Winning Practices,” in which they

learn to drive sales for each promoted product, collaborate to deliver seamless selling and service, develop expert product knowledge, gain insight into customers, organize sales calls to maximize selling time and results, sell through customer-focused dialogue, and get the best possible commitment on every call. DSOF ¶¶ 8, 9. Each PSR is expected to “close” each physician visit, ideally by requesting a commitment from the physician to prescribe the GSK drug to patients. DSOF ¶ 126.

A PSR’s compensation generally consists of approximately 75% base salary and 25% incentive compensation. PCSO ¶ 10. While it is not possible to directly link a PSR’s marketing activities to a particular patient filling a prescription, PSOF ¶ 55, the incentive compensation is based, in part, on the number of prescriptions written by physicians in a PSR’s assigned geographic area. DSOF ¶¶ 11-12. Plaintiffs’ incentive compensation ranged from 26% to 41% of their total annual compensation between 2004 and 2007. DSOF ¶¶ 64-66, 138-41.

Despite job descriptions and job duties that incorporate standard sales training and methodology, plaintiffs contend that they do not fit within the outside sales exemption because they do not actually execute sales within the meaning of the FLSA. They contend that as PSRs they do not consummate transactions or take orders as required by the regulations. While they acknowledge that they may create a demand for GSK products, Response at 5, they contend this is promotional or educational work, not sales.

Defendant responds that plaintiffs’ argument ignores the unique nature of “sales” in the pharmaceutical industry. In the traditional sales

model, a salesperson pitches a product to a buyer, the buyer purchases the product, and the salesperson leaves with cash in hand. But that model does not fit the pharmaceutical industry. The Food and Drug Administration heavily regulates the pharmaceutical industry and prohibits pharmaceutical companies from selling directly to either physicians or patients. Instead, patients must obtain prescriptions from physicians, and subsequently purchase the prescribed drugs from pharmacies. However, without a prescription from a physician, there is no sale. GSK argues that in the pharmaceutical industry the true customer, in other words the individual who generates the sale, is the physician. Sales volume is directly and exclusively driven by the number of prescriptions written by physicians, and plaintiffs' job was to encourage such prescriptions.

Therefore, according to GSK, PSRs make sales in the manner that sales are made in the pharmaceutical industry. See DSOF ¶¶ 102, 107 (Plaintiff Buchanan concedes that he made sales in the way that sales are made in the pharmaceutical industry.).

Plaintiffs disagree, contending that the only "sale" that occurs in the pharmaceutical industry is from GSK to wholesalers who in turn sell the drugs to pharmacies and hospitals. But wholesalers, pharmacies, and hospitals purchase their drugs, not because a persuasive salesperson touts the merit of the product, but because of the number of prescriptions the wholesalers, pharmacies, and hospitals expect to fill. Ultimately the demand is driven by prescriptions written by physicians.

Several courts have considered whether PSRs "make sales" within the meaning of the outside sales

exemption and have reached conflicting conclusions. Some have adopted a strict construction of the term “sale,” concluding that because PSRs do not directly consummate actual sales, they do not fit within the exemption. Ruggeri v. Boehringer Ingelheim Pharm., Inc., 585 F. Supp. 2d 254, 268 (D. Conn. 2008) (“PSRs lack [the] capacity to sell, and physicians lack [the] capacity to purchase,” in the strictest sense of these terms, therefore they cannot fit within the outside sales exemption); Smith v. Johnson & Johnson, No. 06-CV-4787, 2008 WL 5427802 (D.N.J. Dec. 30, 2008) (same).

Others have concluded that adopting such a “constricted reading of the FLSA ignores the Act’s spirit, purpose, and goals.” In re Novartis Wage & Hour Litigation, 593 F. Supp. 2d 637, 648 (S.D.N.Y. 2009), see also Schaefer-LaRose v. Eli Lilly & Co., No. 07-CV-1133, 2009 WL 3242111 (Sept. 29, 2009); Harris v. Auxilium Pharm., Inc., No. 07-CV-3938, 2009 WL 3157275 (S.D. Tex. Sept. 28, 2009). These courts recognize that in all relevant respects a PSR’s encounter with a physician is the functional equivalent of an outside sale. PSRs “make sales by obtaining commitments to prescribe . . . drugs from physicians. They are credited with those sales and compensated accordingly by means of incentive payments.” In re Novartis, 593 F. Supp. 2d at 653. As such, PSRs “qualify as exempt outside salespersons.” Id.

There is nothing striking about the characteristics of a traditional “sale” that explains the exemption for outside sales work. In fact, the FLSA and the Department of Labor define the term “sale” somewhat loosely. The Act defines a sale as “any sale, exchange, contract to sell, consignment for

sale, shipment for sale, *or other disposition.*” 29 U.S.C. § 203(k). The Department of Labor is of the view that the exemption requires a sale “*in some sense,*” Comments to 2004 Final Rule, 69 Fed. Reg. at 22162. In both cases, the definitions provide for an interpretation of “sale” beyond a constricted, traditional sense of the word.

Shortly after the enactment of the FLSA, the Tenth Circuit recognized the rationale underlying the outside sales exemption:

Such salesm[a]n, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer’s place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.

Jewel Tea Co. v. Williams, 118 F.2d 202, 207-08 (10th Cir. 1941). Outside salespeople are exempt from the overtime compensation requirement because of the distinct characteristics of their jobs— incentive pay based on individual effort; flexible, unregulated work hours; and minimal supervision “mak[ing] adherence to an hours-based compensation scheme impractical.” See In re Novartis, 593 F. Supp. 2d at 649.

The Department of Labor more recently recognized that the legislative history of the § 213(a)(1) exemptions “were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay.” Comments to 2004 Final Rule, 69 Fed. Reg. at 22124. Moreover, the kind of work these employees performed was “difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult.” Id.

Each of these factors directly correlates with a PSR’s work. PSRs are not hourly workers, but instead earn salaries well above minimum wage—up to \$100,000 a year. Bonuses give them an incentive to increase their effort and work longer hours. They receive bonuses in lieu of overtime. Their work is largely unsupervised. They do not punch a clock or otherwise verify their hours, making compliance with overtime provisions unrealistic. “To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.” Jewel Tea Co., 118 F.2d at 208.

The statute and supporting regulations defining the outside sales exemption were adopted in 1938, long before the development of the pharmaceutical sales industry, and few clarifications or changes have been enacted since then. The statute and regulations are intended to broadly address a multiplicity of industries found in the national economy and

accordingly provide flexibility in the definition of a “sale.” See 29 U.S.C. § 203(k) (a sale includes “any other disposition”). Even the Department of Labor recognizes this flexibility by suggesting that there must be a sale “in some sense,” such as “obtaining a commitment to buy.” Comments to 2004 Final Rule, 69 Fed. Reg. at 22162-63. The pharmaceutical industry is unique in that federal regulations prohibit a direct sale to an end-user, thereby shifting the focus of sales efforts from the consumer to the physician—the catalyst behind any pharmaceutical sale. A PSR’s ultimate goal is to close an encounter with a physician by obtaining a non-binding commitment from the physician to prescribe the PSR’s assigned product. In this highly regulated industry, that is the most a PSR can achieve. His compensation is designed to encourage him to work during his lunch hour and into the evening, hosting meals, meetings, and presentations, all for the purpose of increasing the sales of his assigned products in his territory, with a payoff in the form of bonuses. In all regards, a PSR engages in what is the functional equivalent of an outside salesperson and to hold otherwise is to ignore reality in favor of form over substance. We decline to adopt a hyper-technical construction of the regulations that runs counter to the purpose of the Act. Instead, because plaintiffs plainly and unmistakably fit within the terms and spirit of the exemption, we conclude that they are exempt employees under the outside sales exemption.<sup>14</sup> Pharmaceutical sales representatives are salespeople.

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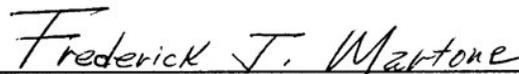
<sup>14</sup> Because we conclude that plaintiffs qualify as exempt employees under the FLSA’s outside sales exemption, we need

Therefore, **IT IS ORDERED GRANTING** GSK's motion for summary judgment (doc. 52), and **DENYING** plaintiffs' cross motion for summary judgment (doc. 75).

**IT IS FURTHER ORDERED DENYING** plaintiffs' motion for conditional class certification as moot (doc. 29), and **DENYING** plaintiffs' motion to supplement the record as moot (doc. 83).

The clerk shall enter final judgment.

DATED this 20th day of November, 2009.



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Frederick J. Martone  
United States District Judge

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not consider whether they also fit within the administrative employee exemption. Moreover, our summary judgment ruling in favor of GSK obviates the need to consider plaintiffs' motion for conditional class certification.

**APPENDIX C - Order of the United States District  
Court for the District of Arizona on Motion to Alter  
or Amend Judgment**

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**United States District Court  
for the District of Arizona**

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No. CV-08-1498-PHX-FJM

**MICHAEL SHANE CHRISTOPHER and FRANK  
BUCHANAN, *Plaintiffs,***

v.

**SMITHKLINE BEECHAM OPINION  
CORPORATION, DBA GlaxoSmithKline,  
*Defendant.***

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Filed February 1, 2010

**Order of the Court**

[Re: Motion to Alter or Amend Judgment]

On November 20, 2009, we entered an order (doc. 93) granting summary judgment in favor of defendant, based on our conclusion that pharmaceutical sales representatives fit within the outside sales exemption of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 213(a)(1). We now have before us plaintiffs' motion to alter or amend the judgment (doc. 96), defendant's response (doc. 97), and plaintiffs' reply (doc. 98).

This case turns on the definition of “sale” under the FLSA. Before we entered our order, plaintiffs submitted an *amicus curiae* brief filed by the Department of Labor (“DOL”) in an action pending in another circuit, in which the DOL took the position that a “sale” for the purpose of the outside sales exemption “requires a consummated transaction directly involving the employee for whom the exemption is sought.” DOL brief at 11. The DOL opined that because pharmaceutical sales representatives do not make “actual sales,” *id.* at 5, 10, the outside sales exemption does not apply. The arguments raised in the DOL brief were the same arguments presented in plaintiffs’ briefs in the instant action. We have considered each of those arguments and rejected them. Nevertheless, plaintiffs now contend that the position taken by the DOL in its *amicus* brief is entitled to controlling deference. We disagree.

Under Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2782 (1984), a court must give effect to an agency’s regulation containing a reasonable interpretation of an ambiguous statute. Here, the DOL’s interpretation is contained in an *amicus* brief and was not subject to the rigors of the Administrative Procedure Act, or otherwise promulgated in the exercise of the agency’s rulemaking authority. “[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference.” Christensen v. Harris County, 529 U.S. 576, 587, 120 S. Ct. 1655, 1662 (2000); see also Martin v. Occupational Safety & Health Review Comm’n, 499 U.S. 144, 157, 111 S. Ct. 1171, 1179

(1991); Gonzales v. Oregon, 546 U.S. 243, 255-56, 126 S. Ct. 904, 915 (2006).

Nor is the DOL's *amicus* brief entitled to deference under Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997). While an agency's interpretation of its own regulations is generally entitled to substantial deference, *id.*, the regulations at issue here merely restate the terms of the statute itself. The FLSA defines "sale" as "includ[ing] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). The regulations, in turn, provide that an employee is exempt as an outside salesperson if the employee is "making sales within the meaning of [29 U.S.C. § 203(k)]." 29 C.F.R. § 541.500(a)(1)(i). The regulations only marginally expound upon the statutory definition by providing that "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." *Id.* § 541.501(b). Plaintiffs' reference to regulations that define "promotion work," 29 C.F.R. § 541.503, and "primary duty," *id.* § 541.700, do not serve to define or delimit the definition of "sale," and therefore do not advance their position. Because the underlying regulations largely repeat the statutory language, they "give[ ] little or no instruction on a central issue in this case." Gonzales, 546 U.S. at 257, 126 S. Ct. at 915.

The DOL "does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Id.* 546 U.S. at 257, 126 S. Ct. at 916. Instead, the DOL's current interpretation in the

*amicus* brief is “entitled to respect” only to the extent it has the “power to persuade.” *Id.* at 256, 126 S. Ct. at 915 (quoting Skidmore v. Swift & Co., 323 S. Ct. 134, 65 S. Ct. 161 (1944)). We find the DOL’s interpretation unpersuasive.

According to the DOL, “a ‘sale’ for the purposes of the outside sales exemption *requires a consummated transaction* directly involving the employee for whom the exemption is sought.” DOL brief at 11 (emphasis added). This language, however, is inconsistent with the statutory definition which provides that a “sale” includes not only a “sale” as that term is traditionally defined, but also “other disposition.” 29 U.S.C. § 203(k). Moreover, the DOL’s attempt to now constrict and limit the statutory definition to “actual sales,” DOL brief at 5, 10, is contrary to the DOL’s previous interpretations that broadly defined the outside sales exemption as requiring a sale “in some sense.” Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22162 (Apr. 23, 2004).

Not only is the DOL’s current interpretation inconsistent with the statutory language

and its prior pronouncements, but it also defies common sense. Pharmaceutical sales representatives are salespeople. They make sales the way that sales are made in the pharmaceutical industry. Any other construction ignores reality and defeats the spirit and purpose of the exemption. Under the DOL’s interpretation, there are no salespersons in the pharmaceutical industry. This would come as a great surprise to the physicians of this country whose waiting rooms are filled with drug sales reps and the millions of television viewers who are bombarded

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with drug advertising every time the set is turned on. But because title under the Uniform Commercial Code passes at the drugstore, under the DOL view, the drugstore clerk is the salesperson. We reject this absurdity.

**IT IS ORDERED DENYING** plaintiffs' motion to alter or amend the judgment (doc. 96).

DATED this 29th day of January, 2010.

*Frederick J. Martone*

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Frederick J. Martone  
United States District Judge

**APPENDIX D** - Order of the United States Court of Appeals for the Ninth Circuit on Petition for Panel Rehearing and for Rehearing En Banc

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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No. 10-15257

**MICHAEL SHANE CHRISTOPHER and FRANK  
BUCHANAN, *Plaintiffs-Appellants,***  
v.  
**SMITHKLINE BEECHAM OPINION  
CORPORATION, DBA GlaxoSmithKline,**  
*Defendant-Appellee.*

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Filed May 17, 2011

**Order of the Court**

Before: SCHROEDER, TALLMAN, and M. SMITH, Circuit Judges.

The panel has unanimously voted to deny Appellants' petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

**APPENDIX E – Relevant Statutory and Regulatory Provisions**

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**29 U.S.C. § 207(a) (Maximum hours)**

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

**29 U.S.C. § 213(a) (Exemptions)**

**(a) Minimum wage and maximum hour requirements**

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to--

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub.L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub.L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four

thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

**(9)** Repealed. Pub.L. 93-259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69

**(10)** any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

**(11)** Repealed. Pub.L. 93-259, § 10(a), Apr. 8, 1974, 88 Stat. 63

**(12)** any employee employed as a seaman on a vessel other than an American vessel; or

**(13), (14)** Repealed. Pub.L. 93-259, §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69

**(15)** any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

**(16)** a criminal investigator who is paid availability pay under section 5545a of Title 5; or

**(17)** any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is--

**(A)** the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

**(B)** the design, development, documentation, analysis, creation, testing, or modification of

computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than \$27.63 an hour.

**29 C.F.R. § 541.500 (General rule for outside sales employees)**

(a) The term “employee employed in the capacity of outside salesman” in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

(b) The term “primary duty” is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and

collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

(c) The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

**29 C.F.R. § 541.501 (Making sales or obtaining orders)**

(a) Section 541.500 requires that the employee be engaged in:

- (1) Making sales within the meaning of section 3(k) of the Act, or
- (2) Obtaining orders or contracts for services or for the use of facilities.

(b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that “sale” or “sell” includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(c) Exempt outside sales work includes not only the sales of commodities, but also “obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.” Obtaining orders for “the use of facilities” includes the selling of time on radio or television, the solicitation of advertising for newspapers and other

periodicals, and the solicitation of freight for railroads and other transportation agencies.

(d) The word “services” extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

**29 C.F.R. § 541.502 (Away from employer’s place of business)**

An outside sales employee must be customarily and regularly engaged “away from the employer's place or places of business.” The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (i.e., one or two weeks) should not be considered as the employer's place of business.

**29 C.F.R. § 541.503 (Promotion work)**

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule.

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is

63a

incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

**APPENDIX F** – Brief for the Secretary of Labor as *Amicus Curiae* in support of Plaintiffs-Appellants, filed in the United States Court of Appeals for the Ninth Circuit

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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No. 10-15257

**MICHAEL SHANE CHRISTOPHER and FRANK  
BUCHANAN, *Plaintiffs-Appellants,***

v.

**SMITHKLINE BEECHAM OPINION  
CORPORATION, DBA GlaxoSmithKline,  
*Defendant-Appellee.***

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**BRIEF FOR THE SECRETARY OF LABOR AS  
*AMICUS CURIAE* IN SUPPORT OF  
PLAINTIFFS-APPELLANTS**

Filed August 10, 2011

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Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor (“Secretary”) submits this brief as *amicus curiae* in support of Plaintiffs-Appellants. The district court committed legal error when it concluded that the Plaintiffs-Appellants, who were employed as pharmaceutical sales representatives (“Reps”), are exempt from the overtime requirements of the Fair Labor Standards Act (“FLSA” or “Act”) under the “outside sales” exemption. *See* 29 U.S.C. 213(a)(1).

**STATEMENT OF INTEREST OF THE  
SECRETARY OF LABOR**

The Secretary administers and enforces the FLSA and has a strong interest in ensuring that it is interpreted correctly in order to ensure that all employees receive the wages to which they are entitled. *See* 29 U.S.C. 204(a) and (b), 211(a), 216(c) and 217. She is thus necessarily interested in the correct interpretation of the exemptions to the Act’s overtime requirements.

Under the Department of Labor’s (“Department”) regulations, the Reps do not meet the requirements

for the outside sales exemption. The Reps do not sell or take orders for defendant SmithKline Beecham d/b/a GlaxoSmithKline's ("GSK") drugs;<sup>15</sup> rather, they provide information to target physicians about GSK's drugs with the goal of persuading the physicians to prescribe those drugs to their patients. The actual sale of drugs takes place between GSK and pharmacies. Although the Reps' duties bear some of the indicia of sales -- they use methods of persuasion similar to those of salespersons, they receive some of their compensation in the form of incentive compensation, and their promotion work affects GSK's actual drug sales -- the fact that the Reps do not actually "make sales" conclusively demonstrates that the position is not that of an outside salesperson consistent with the Department's legislative rules.

By concluding that the Reps are exempt as outside salespersons despite the fact that they do not engage in any sales, the district court failed to follow the Department's regulatory provisions limiting the outside sales exemption to employees who make sales or obtain orders or contracts for services for which a consideration will be paid by the client or customer. *See* 29 C.F.R. 541.500.

### **STATEMENT OF THE ISSUES**

1. Whether the district court erred by concluding that the Reps are exempt outside salespersons, despite the fact that they do not "make sales" as

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<sup>15</sup> The district court's rulings spell the defendant's name as "SmithKlein" and "GlaxoSmithKlein." The defendant's name, however, is properly spelled "SmithKline" and "GlaxoSmithKline."

required by the Department's "outside sales" regulations.

2. Whether the district court erred by failing to accord the Department's regulations or, alternatively, its interpretations of those regulations, controlling deference.

### STATEMENT OF THE CASE

1. The Reps were employed by GSK and were tasked with marketing and promoting GSK products to physicians. *See Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2009 WL 4051075, at \*1 (D. Ariz. Nov. 20, 2009). They were responsible for visiting physicians in their assigned territory, and discussing the features, benefits, and risks of GSK products. *Id.* at \*2. GSK provided Reps with training, as well as with detailed reports on the physicians to be visited. *Id.*

A Rep's goal is to "close" each physician visit by requesting a non-binding committing from the physician to prescribe the Rep's assigned product. *Christopher*, 2009 WL 4051075, at \*5. This non-binding commitment is the most a Rep can achieve at each physician visit, as the Food and Drug Administration prohibits pharmaceutical companies, and by extension Reps, from selling drugs to physicians or patients. *Id.* at \*3-\*5. Patients are the ultimate consumer, and must obtain prescriptions from physicians and then purchase the prescribed drugs at pharmacies. *Id.* at \*3. Because it is not possible to directly link Reps' marketing and promotional activities to individual patients filling prescriptions, incentive compensation, which comprised about 26-41% of the Reps' total compensation, was partially based upon the number

of prescriptions written by physicians in the Reps' assigned territories. *Id.* at \*2-\*3.

2. The Reps brought an action in district court alleging that GSK violated the FLSA by failing to pay overtime compensation. *See Christopher*, 2009 WL 4051075, at \*1. On November 20, 2009, the district court granted summary judgment to GSK. The court concluded that "because plaintiffs plainly and unmistakably fit within the terms and spirit of the exemption, we conclude that they are exempt employees under the outside sales exemption." *Id.* at \*5. While acknowledging that various courts had reached differing conclusions regarding the application of the exemption to Reps, the court concluded that Reps "engage[] in what is the functional equivalent of an outside salesperson and to hold otherwise is to ignore reality in favor of form over substance." *Id.* at \*4-\*5. The district court supported this conclusion by relying on the fact that the Reps are not hourly workers and do not punch a clock, that the Reps' work is largely unsupervised, and that bonuses are paid in lieu of overtime. *Id.* at \*5. The court also noted that "[t]he statute and supporting regulations defining the outside sales exemption were adopted in 1938, long before the development of the pharmaceutical sales industry, and few clarifications or changes have been enacted since then." *Id.* Because it had determined that the Reps were exempt pursuant to the outside sales exemption, the court declined to address the applicability of the administrative exemption, although the parties had briefed that issue as well.

3. Prior to the court's ruling on the summary judgment motions, the Reps filed a Notice of Supplemental Authority, submitting the *amicus*

*curiae* brief (“DOL brief”) that the Secretary had filed in a case before the Second Circuit, *In re Novartis Wage & Hour Litigation*, No. 09-0437-cv, 2010 WL 2667337 (2d Cir. July 6, 2010). See Docket No. 91, Notice of Supplemental Authority. The DOL brief articulated the Department’s position that the outside sales exemption does not apply to pharmaceutical sales representatives. However, the court did not address the DOL brief in its summary judgment ruling. The Reps subsequently filed a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e), requesting that the court reconsider its decision based on deference owed to the DOL brief. See Docket No. 96, Motion to Alter or Amend Judgment.

By order dated February 1, 2010, the court denied the Reps’ motion, concluding that the DOL brief was not entitled to deference under either *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), or *Auer v. Robbins*, 519 U.S. 452 (1997). The court concluded that “[n]ot only is the DOL’s current interpretation inconsistent with the statutory language and its prior pronouncements, but it also defies common sense.” See *Christopher v. SmithKline Beecham Corp.*, 2010 WL 396300, at \*2 (D. Ariz. Feb. 1, 2010). This appeal followed.

## ARGUMENT

I. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE REPS ARE EXEMPT OUTSIDE SALESPERSONS DESPITE THE FACT THAT THEY DO NOT “MAKE SALES” AS REQUIRED BY THE DEPARTMENT’S “OUTSIDE SALES” REGULATIONS

1. Section 13(a)(1) of the FLSA provides a complete exemption from the overtime pay requirement for “any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman[,] as such terms are defined and delimited from time to time by regulations of the Secretary.” 29 U.S.C. 213(a)(1). Thus, Congress has never defined the term “outside salesman.” See 69 Fed. Reg. 22,122, 22,123 (Apr. 23, 2004). Rather, pursuant to Congress’s expressly delegated rulemaking authority, the Secretary issued regulations after notice and comment that “define and delimit” the FLSA’s overtime exemptions. See 69 Fed. Reg. at 22,122. The Act’s “exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit.” *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); see *Cleveland v. City of Los Angeles*, 420 F.3d 981, 988 (9th Cir. 2005), *cert. denied*, 546 U.S. 1176 (2006).

The Department’s regulations define the statutory phrase “outside salesman” as including “any employee . . . [w]hose primary duty is . . . making sales within the meaning of section 3(k) of the Act, or . . . obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.” 29 C.F.R. 541.500(a)(1)(i)-(ii).<sup>16</sup> “Primary duty” means “the principal, main, major, or most important duty that the employee performs,” 29

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<sup>16</sup> It is undisputed that the Reps are “customarily and regularly engaged away from” GSK’s place of business. 29 C.F.R. 541.500(a)(2).

C.F.R. 541.700(a), and section 3(k) of the FLSA defines “[s]ale” as including “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” 29 U.S.C. 203(k); *see* 29 C.F.R. 541.501. The Department’s regulations further explain that “[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property,” and that “‘services’ extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.” 29 C.F.R. 541.501(b) and (d).

The regulations explicitly distinguish promotional work from exempt outside sales work, clarifying that [p]romotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

29 C.F.R. 541.503(a). In other words, “[p]romotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.” 29 C.F.R. 541.503(b).

Thus, under the Department’s regulations, the Reps do not meet the primary duties test for the

outside sales exemption.<sup>17</sup> Because the Reps do not sell any drugs or obtain any orders for drugs, and can at most obtain from the physicians a non-binding commitment to prescribe GSK drugs to their patients when appropriate, they do not meet the regulations' requirement that their primary duty must be "making sales." 29 C.F.R. 541.500(a)(1)(i). Contrary to the district court's assertion that Reps "engage[] in what is the functional equivalent of an outside salesperson", *Christopher*, 2009 WL 4051075, at \*5, the actual sale of GSK drugs occurs between the company and distributors (and then to the pharmacy). Insofar as the Reps' work increases GSK sales, it is non-exempt promotional work "designed to stimulate sales that will be made by someone else." 29 C.F.R. 541.503(b). As a district court recently concluded, "[t]he regulations *dictate* that if an employee does not make any sales and does not obtain any orders or contracts, then the outside sales exemption does not apply." *Jirak v. Abbott Labs., Inc.*, -- F. Supp. 2d --, No. 07-C-3626, 2010 WL 2331098, at \*6 (N.D. Ill. June 10, 2010) (emphasis added).

2. To the extent that there is any ambiguity in the Department's regulations, the Department's Preamble to the 2004 final rule ("Preamble"), Wage

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<sup>17</sup> "A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations." 29 C.F.R. 541.2. Therefore, contrary to the district court's suggestion in *Christopher*, 2009 WL 4051075, at \*3, the fact that the Reps' "job descriptions and job duties . . . incorporate standard sales training and methodology" is not in any way dispositive.

and Hour Division (“WH”) opinion letters, and WH Field Operations Handbook (1965) (“FOH”) provide additional guidance. The Preamble emphasizes that the Department “does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee’s primary duty must be to make sales or to obtain orders or contracts for services.” 69 Fed. Reg. at 22,162. “Employees have a primary duty of making sales if they ‘obtain a commitment to buy’ from the customer and are credited with the sale.” *Id.* The Preamble further notes that “[e]xtending the outside sales exemption to include all promotion work, whether or not connected to an employee’s own sales, would contradict this primary duty test.” *Id.* Indeed, the exemption does not extend to employees engaged in paving the way for salesman or assisting retailers. *Id.* “In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt.” 69 Fed. Reg. at 22,162–22,163 (quoting Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep’t of Labor, Report and Recommendations on Proposed Revisions of Regulations, Part 541, at 83 (June 30, 1949)).

In this case, it is undisputed that Reps are unable to obtain any sort of “commitment to buy” from the physician; they are in fact prohibited from doing so.

*See Novartis*, 2010 WL 2667337, at \*12 (“The type of ‘commitment’ the Reps seek and sometimes receive from physicians is not a commitment ‘to buy’ and is not even a binding commitment to prescribe.”). Nor can a Rep consummate his or her own specific sale. GSK is unable to link a Rep’s marketing activities to a patient filling a prescription; thus, Reps cannot be directly credited with the sale. Due to this inability to credit Reps with specific sales, Reps’ incentive compensation is based in part on the number of prescriptions written by the physicians in their territories, as well as a variety of other factors. As the Incentive Compensation Information & Governance Manager for GSK explains, incentive compensation is designed to reward Reps for meeting “*various* goals” that are designed to incentivize Reps to achieve objectives GSK determines are important. *See Pellegrino Dec.* at SER 0621-0622 (emphasis added). This incentive compensation is awarded using a “*number of* different approaches” and it “can, and regularly does, *change* from quarter to quarter.” *Id.* at SER 0622 (emphases added). Furthermore, the Department’s Wage and Hour Division has consistently reiterated its position that a “sale” for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought.<sup>18</sup> For

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<sup>18</sup> In the context of addressing the “retail or service establishment” criteria of the FLSA’s section 7(i) exemption, *see* 29 U.S.C. 207(i), Wage and Hour noted when discussing the definition of “sale” in section 3(k) of the FLSA that “[t]hough the term sale does not always have a fixed or invariable meaning, it is generally held to be a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold.” WH Opinion

example, the Wage and Hour Division rejected the application of the outside sales exemption to individuals soliciting charitable contributions, noting that “[s]oliciting promises of future charitable donations or ‘selling the concept’ of donating to a charity does not constitute ‘sales’ for purposes of the outside sales exemption. . . . [These] solicitors do not obtain orders or contracts for services or for use of your client's facilities for which a consideration will be paid.” WH Opinion Letter FLSA 2006-16, 2006 WL 1698305 (May 26, 2006); *see* WH Opinion Letter, 1994 WL 1004855 (Aug. 19, 1994) (concluding that soliciting organ and tissue donors by selling the concept of being a donor does not constitute “sales” under the regulations). Additionally, the Department’s FOH states that “[a]n employee whose duty is to convince a dealer of the value of his employer’s service to the dealer’s customers and who does not in fact obtain firm orders or contracts from either the dealer or his customers is not making sales within the meaning of FLSA Sec. 3(k).” FOH § 22e04.

3. In concluding that the Reps are exempt as outside salespersons, the district court in this case relied in part on *In re Novartis Wage & Hour Litigation*, 593 F. Supp. 2d 637 (S.D.N.Y. 2009), a case with nearly identical facts as the instant case. *See Christopher*, 2009 WL 4051075, at \*4.<sup>19</sup> However,

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Letter FLSA 2005-06, 2005 WL 330605 (Jan. 7, 2005) (internal quotation marks and citation omitted).

<sup>19</sup> This Court has not addressed the question whether Reps are exempt as outside salespersons. Currently before this Court are at least two other cases in which the District Court for the Central District of California concluded that Reps are exempt

the district court's ruling in *Novartis* has since been reversed by the Second Circuit. On July 6, 2010, the Second Circuit ruled in favor of the Reps, concluding that the district court did not properly apply the outside sales or administrative exemptions. The Second Circuit explained that the Secretary's regulations "define and delimit the terms used in the statute; that under those regulations as interpreted by the Secretary, the Reps are not outside salesmen or administrative employees; and that the Secretary's interpretations are entitled to 'controlling' deference." *Novartis*, 2010 WL 2667337, at \*7 (citation omitted). The court concluded that the Department's regulations "make it clear that a person who merely promotes a product that will be sold by another person does not, in any sense intended by the regulations, make the sale." *Id.* at \*11. In concluding that the Reps are not exempt under the outside sales exemption, the Court noted

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as outside salespersons under the FLSA. See *Yacoubian v. Ortho-McNeil Pharm., Inc.*, SACV 07-00127-CJC(MLGx), 2009 WL 3326632 (C.D. Cal. Feb. 6, 2009), appeal docketed, No. 09-55229 (9<sup>th</sup> Cir. Feb. 11, 2009); *Delgado v. Ortho-McNeil, Inc.*, SACV 07-00263-CJC(MLGx), 2009 WL 2781525 (C.D. Cal. Feb. 6, 2009), appeal docketed, No. 09-55225 (9<sup>th</sup> Cir. Feb. 11, 2009). These cases have been consolidated with the instant appeal for oral argument purposes only. In addition, in *D'Este v. Bayer Corp.*, 565 F.3d 1119 (9<sup>th</sup> Cir. 2009), this Court certified to the California Supreme Court the question whether the District Court for the Central District of California correctly concluded that Reps are exempt outside salespersons under California state law; the underlying district court decision relied in part on the interpretation of the FLSA's requirements. The California Supreme Court denied the request for certification.

that “the interpretation of the regulations given by the Secretary in her position as *amicus* on this appeal is entirely consistent with the regulations.”

*Id.* The Second Circuit’s summary is instructive:

In sum, where the employee promotes a pharmaceutical product to a physician but can transfer to the physician nothing more than free samples and cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it, we conclude that it is not plainly erroneous to conclude that the employee has not in any sense, within the meaning of the statute or the regulations, made a sale.

*Id.* at \*13. Finally, the Second Circuit stated that “[t]o the extent that the pharmaceuticals industry wishes to have the concept of ‘sales’ expanded to include the promotional activities at issue here, it should direct its efforts to Congress, not the courts.”

*Id.*

The district court in the instant case also relied upon *Jewel Tea Co. v. Williams*, 118 F.2d 202 (10th Cir. 1941). However, the facts of *Jewel Tea* only serve to highlight the differences between properly exempt outside salespersons and the Reps in this case. In *Jewel Tea*, the Tenth Circuit considered whether door-to-door salesmen selling assorted merchandise were exempt under the FLSA’s outside sales exemption. In concluding that the salesmen were exempt, the court noted that the employees had “no restrictions” on the time they worked, that they could earn as much or as little as “ambition” dictates,

and that their commissions were based on the total amount of goods sold. *Id.* at 207-08. Here, the Reps were expected to be visiting physician offices between the hours of 8:30 a.m. and 5:00 p.m. every day, and their compensation generally consisted of approximately 75% base salary, and 25% incentive compensation, which was not a straight commission but rather based on multiple factors, as discussed *supra*. See *Christopher*, 2009 WL 4051075, at \*3.

Most critically, the *Jewel Tea* employees plainly sold a variety of merchandise to their customers, with their days comprised of a series of consummated transactions. By contrast, Reps engage in a series of promotional meetings with physicians, never conducting any consummated transactions. As subsequently noted by the Tenth Circuit in *Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir. 2008), “[t]he touchstone for making a sale, under the [Department's regulations], is obtaining a commitment.” *Id.* at 1227 (concluding that civilian military recruiters are not within the outside salesperson exemption even though they “engaged in sales training and ‘sold’ the idea of joining the Army to potential recruits,” because they did not engage in sales work as defined by the Department's regulations).

4. Finally, GSK’s attempt to deflect attention from the outside sales exemption — the very crux of this case — by focusing on the statutory definition of “[s]ale,” which includes the terms “consignment for sale” and “other disposition.” 29 U.S.C. 203(k), is unpersuasive.<sup>206</sup> The term “other disposition” must

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<sup>20</sup> GSK’s reliance on *Gieg v. DDR, Inc.*, 407 F.3d 1038 (9th Cir. 2005), is similarly misplaced. In *Gieg*, a case which does not

be read in the context of the language that precedes it, i.e., in the context of making some kind of a sale. It must also be read in the context of the outside salesman exemption regulations themselves, which the Department promulgated pursuant to explicit congressional authorization and after notice and comment. *See* 29 U.S.C. 213(a)(1); 69 Fed. Reg. at 22,122. Indeed, the regulations require that an “other disposition” must be, in some sense, a sale. *See* 69 Fed. Reg. at 22,162 (Preamble) (“An employer cannot meet this requirement [that the primary duty consists of makes sales or obtaining orders or contracts for services] unless it demonstrates objectively that the employee, in some sense, has made sales.”). The most the Reps can obtain is a non-binding commitment from a physician to prescribe GSK drugs as appropriate. As the Second Circuit has explained, “[a]lthough the phrase ‘other disposition’ is a catch-all that could have an expansive connotation, we see no error in the regulations’ requirement that any such ‘other disposition’ be ‘in

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involve the outside sales exemption, the court concluded that for purposes of determining whether other car dealerships qualified as retail or service establishments under section 7(i) of the FLSA, 29 U.S.C. 207(i), individual automobile leases were “sales” that were not “for resale” and proceeds from those leases could be counted toward dealerships’ annual dollar volume. *See* 407 F.3d at 1049. In *Gieg*, however, the court explicitly noted that “[t]he customer who signs a retail automobile lease is the intended consumer of that vehicle.” *Id.* There is no such correlation in the instant case. There is no binding commitment between the Rep and physician, as there is between a customer and the dealership when entering into an automobile lease. The physician is not the “intended consumer” of the drugs; rather, as discussed *supra*, it is patients that ultimately purchase GSK products from pharmacies.

some sense a sale.” *Novartis*, 2010 WL 2667337, at \*11. The Second Circuit thus concluded that “[s]uch an *ejusdem generis*-type interpretation<sup>21</sup> is consistent with the interpretive canon that exemptions to remedial statutes such as the FLSA are to be read narrowly, and is neither erroneous nor unreasonable.” *Id.* (citations omitted).

## II. THE DISTRICT COURT ERRED BY NOT ACCORDING THE DEPARTMENT’S REGULATIONS OR, ALTERNATIVELY, ITS INTERPRETATIONS OF THOSE REGULATIONS, CONTROLLING DEFERENCE

By order dated February 1, 2010, the district court denied the Reps’ motion to alter or amend the judgment, concluding that the DOL amicus brief submitted in the *Novartis* case was not entitled to deference under either *Chevron* or *Auer*, both of which set forth highly deferential standards. *See Christopher*, 2010 WL 396300, at \*2. The district court further concluded that the Department’s regulations “only marginally expound upon the statutory definition” and “largely repeat the statutory language.” *Id.* at \*1. By failing to give the highest level of deference to the Department’s regulations or, alternatively, to its interpretation of those regulations, as set out in the Preamble, WH

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<sup>21</sup> “Ejusdem generis” is “[a] canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.” Black’s Law Dictionary 594 (9th ed. 2009).

opinion letters and FOH, and the DOL brief, the district court committed error.<sup>22</sup>

Although Congress included the outside sales exemption in enacting the FLSA in 1938, it provided no definitions, guidance, or instructions as to its meaning. *See* 69 Fed. Reg. at 22,123. Rather than define the section 13(a)(1) exemptions in the statute, Congress granted the Secretary of Labor broad authority to “define and delimit” these terms “from time to time by regulations.” 69 Fed. Reg. at 22,123. A unanimous Supreme Court reaffirmed the broad nature of this delegation in *Auer*, 519 U.S. at 456, stating that the “FLSA grants the Secretary broad authority to ‘defin[e] and delimi[t]’ the scope of the exemption for executive, administrative and professionals employees.” *See Spradling v. City of Tulsa*, 95 F.3d 1492, 1495 (10th Cir. 1996) (the Department “is responsible for determining the operative definitions of these terms through interpretive regulations”), *cert. denied*, 519 U.S. 1149 (1997); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1224 (5th Cir. 1990) (the FLSA “empowers the Secretary of Labor” to define by regulation the terms executive, administrative, and professional). The regulations promulgated pursuant to this express delegation of authority by Congress, and after notice and comment (i.e. legislative rules), are entitled to controlling deference. *See Chevron*, 467 U.S. at 843-44; *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165-68, 171-74 (2007); *National Cable*

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<sup>22</sup>The Secretary recognizes that the district court was specifically addressing the deference to be accorded to her amicus brief’s interpretation of the regulations. However, the broader issue of deference to Secretary’s regulations was also necessarily before the court.

& *Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

The Department's regulations provide substantial detail as to the definition and application of the exemption. Those regulations define the statutory phrase "outside salesman," discuss the primary duty of an outside salesman, define "primary duty," and expound upon what constitutes outside sales work. See 29 C.F.R. 541.500(a)(1), 29 C.F.R. 541.700, 29 C.F.R. 541.501. The regulations further explain the exemption by distinguishing promotional work related to sales made by other individuals from sales qualifying for the outside sales exemption. See 29 C.F.R. 541.503(a). As such, contrary to the district court's conclusion, the Department's regulations addressing this exemption do far more than merely "parrot" the language of the FLSA. See, e.g., *Harrell v. U.S. Postal Serv.*, 445 F.3d 913, 925 (7th Cir. 2006) ("[T]he regulation goes beyond the mere recitation of the statutory language and speaks to the issue presented in this case."); *Jirak*, 2010 WL 2331098, at \*6 ("The regulations . . . go further and provide guidance directly applicable to the issue in this case: when the outside sales exemption applies.").<sup>239</sup> In fact, the regulations themselves lead to the conclusion that the Reps' promotional work does not qualify for the outside sales exemption.

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<sup>23</sup> *Gonzales v. Oregon*, 546 U.S. 243 (2006), which the district court cited in support of not according deference, is inapposite as applied to the Department's regulations for several reasons. As discussed *supra*, the Secretary promulgated the regulations pursuant to an express delegation by Congress. In addition, the regulations here do more than simply restate the terms of the statute itself.

To the extent that the plain language of the Department's outside sales or administrative regulations are deemed to be ambiguous, courts must give controlling deference to the Department's interpretation of its own regulations unless such interpretation is plainly erroneous or inconsistent with those regulations. *See Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008); *Auer*, 519 U.S. at 461. This principle holds true whether the Secretary's interpretation is found in a Preamble to a final rule published in the Federal Register, an opinion letter or other interpretive materials, or a legal brief. *See, e.g., Coke*, 551 U.S. at 171 (controlling deference to Department's Advisory Memorandum issued during the course of litigation); *Auer*, 519 U.S. at 462 (controlling deference to legal brief); *cf. Disability Law Ctr., Inc. v. Anchorage Sch. Dist.*, 581 F.3d 936, 939-40 (9th Cir. 2009) ("Where an agency is tasked with administering a statute, we defer to its interpretation of the statute so long as the statute itself is silent or ambiguous on the issue and the agency's interpretation is not arbitrary or capricious. An agency's interpretation expressed in an amicus brief receives the same deference.") (citing *Chevron*, 467 U.S. at 842-43, and *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1082 (9th Cir. 1999), which in turn cites to *Auer*, 519 U.S. at 462). Accordingly, the district court's conclusion that the DOL brief that had been filed in the *Novartis* case was not entitled to any deference constituted error. The DOL brief, together with the WH opinion letters and FOH, is entitled to controlling deference to the extent the regulations themselves are not found to be controlling. *See Jirak*, 2010 WL 2331098, at \*7 ("[P]ursuant to both the plain text of the outside

sales exemption and the DOL's interpretation of it, Representatives fail to satisfy the primary duty test of the exemption because they do not 'make sales' under the statute."<sup>24</sup>

### CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision and conclude that

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<sup>24</sup> In addition to the outside sales exemption, the parties also briefed the applicability of the administrative exemption before the district court. *See* 29 U.S.C. 213(a)(1). However, the district court declined to address the applicability of this exemption. It is the Secretary's position that the Reps are not exempt under the administrative exemption, as they do not exercise discretion and independent judgment with respect to matters of significance. Under the Department's administrative exemption regulations, an "employee employed in a bona fide administrative capacity" means "any employee . . . [w]hose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers[] and . . . [w]hose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. 541.200(a)(2)-(3). The requirement that the employee's primary duty include the exercise of discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed." 29 C.F.R. 541.202(a). Although Reps work independently (i.e., without direct supervision), determine what time of day to visit the physicians on their lists, and decide how best to execute their presentations within clearly prescribed parameters, this does not suffice to qualify for the administrative exemption. The Reps do not perform any primary duties that are largely comparable to those found in 29 C.F.R. 541.202(b), such as formulating or implementing management policies, utilizing authority to deviate from established policies, providing expert advice, or planning business objectives.

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the outside sales exemption does not apply to the  
Reps in this case.

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