

09-0437-cv
In re Novartis
Wage and Hour
Litigation

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4 August Term, 2009

5 (Argued: February 19, 2010 Decided: July 6, 2010)

6 Docket No. 09-0437-cv
7

8 In re NOVARTIS WAGE AND HOUR LITIGATION
9

10 Before: KEARSE and HALL, Circuit Judges, RAKOFF, District Judge*.

11 Appeal from a judgment of the United States District
12 Court for the Southern District of New York, Paul A. Crotty,
13 Judge, dismissing claims of pharmaceutical company sales
14 representatives for overtime pay under the Fair Labor Standards
15 Act of 1938, 29 U.S.C. § 201 et seq., and state law, finding that
16 such representatives fell within exemptions for outside salesmen
17 and for administrative employees exercising discretion and
18 independent judgment. See 593 F.Supp.2d 637 (2009).

19 Vacated and remanded.

20 * Honorable Jed S. Rakoff, of the United States District Court
21 for the Southern District of New York, sitting by designation.

1 JEREMY HEISLER, New York, New York (David W.
2 Sanford, Katherine M. Kimpel, Sanford,
3 Wittels & Heisler, Washington, D.C., Steven
4 Wittels, Andrew Melzer, Sanford, Wittels &
5 Heisler, New York, New York, on the brief),
6 for Plaintiffs-Appellants.

7 RICHARD H. SCHNADIG, Chicago, Illinois (Vedder
8 Price, Chicago, Illinois, Jonathan A.
9 Wexler, Vedder Price, New York, New York,
10 on the brief), for Defendant-Appellee.

11 JENNIFER R. MARION, United States Department of
12 Labor, Washington, D.C. (Carol A. De Deo,
13 Deputy Solicitor for National Operations,
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17 Department of Labor, Washington, D.C., on
18 the brief), for Amicus Curiae Secretary of
19 Labor in support of Plaintiffs-Appellants.

20 OUTTEN & GOLDEN, New York, New York (Justin M.
21 Swartz, Rachel Bien, Outten & Golden, New
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23 National Employment Law Project, New York,
24 New York, George A. Hanson, Bradley T.
25 Wilders, Stueve Siegel Hanson, Kansas City,
26 Missouri, Rebecca M. Hamburg, National
27 Employment Lawyers Association, San
28 Francisco, California, Richard J. (Rex)
29 Burch, Bruckner Burch, Houston, Texas, of
30 counsel), filed a brief on behalf of Amicus
31 Curiae National Employment Lawyers
32 Association in support of Plaintiffs-
33 Appellants.

34 PAUL, HASTINGS, JANOFSKY & WALKER, Washington,
35 D.C. (Neal D. Mollen, Paul, Hastings,
36 Janofsky & Walker, Washington, D.C., Robin
37 S. Conrad, Shane B. Kawka, National Chamber
38 Litigation Center, Washington, D.C., of
39 counsel), filed a brief on behalf of Amicus
40 Curiae Chamber of Commerce of the United
41 States of America in support of Defendant-
42 Appellee.

1 April 7, 2007, as sales representatives ("Reps") in California or
2 New York, and who are parties to class actions in the United
3 States District Courts for the Central District of California or
4 the Southern District of New York, respectively, along with Reps
5 employed by Novartis in other states during that period who have
6 opted to join these actions. The actions were consolidated in the
7 Southern District of New York by the Judicial Panel on
8 Multidistrict Litigation for coordinated pretrial proceedings
9 pursuant to 28 U.S.C. § 1407. Plaintiffs alleged principally that
10 under the FLSA and state law, they were entitled to overtime pay
11 at the rate of one and one-half times their normal compensation
12 for time worked in excess of 40 hours per week. The following
13 facts are not in dispute.

14 A. Novartis's Use of Pharmaceutical Sales Representatives

15 To market its pharmaceuticals, Novartis has a team of
16 "brand" managers who, cognizant of limitations imposed by the
17 United States Food and Drug Administration ("FDA"), devise
18 descriptions of the essential features of each Novartis drug.
19 Marketing managers assist in the production of written promotional
20 materials. Novartis has regional managers who are involved in
21 hiring, firing, and business planning decisions, including working
22 on marketing strategy with the marketing team. Reporting to the
23 regional managers are district managers who supervise the Reps.

24 Under federal regulations, Novartis is prohibited from
25 selling its prescription drugs directly to patients. Instead,

1 Novartis typically sells its products to wholesalers, which sell
2 them to individual pharmacies. Physicians write prescriptions
3 that permit patients to purchase those products from pharmacies.
4 Novartis employs some 6,000 Reps nationwide and assigns them to
5 make what Novartis characterizes as "sales" calls on physicians.

6 Reps do not sell the Novartis products to physicians.
7 Although Novartis advertises openings for Reps as sales positions,
8 the Reps' duties do not include "the exchange of good[s] or
9 services, contracting to sell any good or service, consigning for
10 the sale of any good or service, or obtaining orders or contracts
11 for the use of facilities." (Plaintiffs' Rule 56.1 Statement of
12 Undisputed Material Facts in Support of Their Motion for Summary
13 Judgment ¶ 107; Defendant Novartis Pharmaceuticals Corporation's
14 Responses to Plaintiffs' Rule 56.1 Statement of Undisputed
15 Material Facts in Support of Their Motion for Summary Judgment
16 ¶ 107.) Rather, in visits typically lasting no longer than five
17 minutes, the Reps provide physicians with information about the
18 benefits of particular Novartis pharmaceuticals and encourage the
19 physicians to prescribe those products. Reps give physicians
20 reprints of clinical studies reporting findings about the Novartis
21 products. Reps also inform doctors as to whether Novartis
22 products are among those for which insurers will pay, resulting in
23 little or no cost to patients. The Reps give the physicians
24 samples of drugs; these samples are not sold, and no money is
25 exchanged. Indeed, selling drug samples is a federal crime. See
26 21 U.S.C. §§ 353(c)(1), 333(b)(1)(B). The goal of the Reps is to

1 get physicians to say they will prescribe Novartis products for
2 their patients.

3 To enable the Reps to reach that goal, Novartis puts them
4 through a training program for several weeks. The training is
5 extensive, ranging from instruction on the medical benefits of
6 each Novartis drug--and the way in which Reps should present
7 favorable scientific studies--to matters of technique as detailed
8 as how they should hold their pens when showing Novartis's written
9 material to physicians.

10 In the training program, a Rep is taught how to question
11 physicians to determine why they may be hesitant about prescribing
12 Novartis products and then to offer arguments to overcome their
13 reluctance. Novartis instructs the Reps on four "social styles"
14 that a given individual may have in interacting with others and
15 teaches the Reps how to tailor their presentations to a
16 physician's particular social style. Novartis has also hired
17 consultants to observe its most successful Reps and incorporate
18 their techniques into the training program.

19 Novartis sets the number of times per trimester a Rep must
20 call on each physician and how often specific drugs should be
21 promoted. For each product in each trimester, Novartis has a
22 principal marketing message--its "core message"--developed by the
23 Novartis brand managers, which Reps are instructed to convey to
24 physicians on each call. Novartis gives the Reps written
25 promotional materials developed by its brand and marketing
26 managers, including posters, brochures, and laminated cards, to

1 use on sales calls. The Reps do not play any part in formulating
2 the core message or the written materials; nor do they play any
3 part in devising Novartis's advertising. During training, Reps
4 are required to engage in role-playing, using scripts to practice
5 delivering the core message and parrying objections from
6 physicians.

7 Although the Novartis training material encourages the
8 Reps to tailor their pitches to an individual physician, they are
9 not allowed to deviate from the core message. They are not
10 allowed to use any written materials other than those provided by
11 Novartis. One Rep testified that Reps were expected to act like
12 "robots" because of the limitations on what they could say during
13 sales calls. If a physician asks a Rep a medical question for
14 which Novartis has not prepared an answer, the Rep is required to
15 refer the doctor to Novartis's medical department.

16 The Reps report to their district managers by telephone at
17 least every week or two, and sometimes report or confer daily. In
18 addition, once or twice a month, the district managers accompany
19 the Reps on their visits to physicians. During these ride-alongs,
20 the managers observe the Reps' meetings and critique their
21 performance. Reps receive negative reviews if they deliver the
22 Novartis core message in a way that violates FDA-imposed
23 limitations or Novartis policies.

24 As the Reps do not make sales, they are trained to end
25 their meetings with physicians with a "closing" in which they may
26 ask, "Doctor, will you prescribe this product for your patients

1 who suffer from [the appropriate medical conditions]?" They may
2 also ask, "Doctor, do I have your commitment to prescribe it[?]"
3 One Novartis district manager described this type of colloquy as a
4 "persuasive sale" but acknowledged that there was no way to know
5 whether any physician actually followed through on such a
6 commitment. One Rep stated that a physician might answer
7 affirmatively just to get the Rep out the door.

8 As to physicians who refuse to entertain office visits
9 from Reps, Novartis instructs the Reps to use other techniques to
10 make contact, such as showing up at hospitals early in the morning
11 before medical rounds. Reps also organize meals and other
12 programs for physicians where speakers promote Novartis products.
13 For such programs, Novartis maintains a list of cooperating
14 doctors, from which Reps must book speakers. Reps manage the
15 budgets for these events, but do so within limits set by Novartis
16 managers; Novartis sets a minimum number of such events that it
17 expects each Rep to hold.

18 Novartis does not know how many prescriptions individual
19 physicians write for its products. It subscribes to several
20 services that provide it with information as to when prescriptions
21 for Novartis products are filled at pharmacies that report such
22 information to the services; this information identifies the
23 prescribing physicians. Because the data are gathered from
24 pharmacies, however, these reports represent only the number of
25 prescriptions the reporting pharmacies filled, not all the
26 prescriptions actually written. Further, because some 19,000

1 pharmacies do not report sales to these services, Novartis has
2 data for only about 72% of all filled prescriptions. Novartis
3 extrapolates from the reported sales in order to estimate the
4 sales at non-reporting pharmacies, and it believes those estimates
5 generate a fairly accurate picture of how many prescriptions are
6 being filled at non-reporting pharmacies; however, the latter
7 prescriptions cannot be traced to particular physicians.

8 Notwithstanding the absence of actual information as to
9 the numbers of prescriptions for Novartis drugs written by
10 particular physicians, the Reps, whose base wages are at least
11 \$455 a week, receive up to a quarter of their compensation as
12 bonuses based on their performance with physicians. Given the
13 limits of its ability to monitor physicians' actual prescriptions,
14 Novartis sets goals for the number of prescriptions it hopes to
15 have filled in a particular territory, and it pays a Rep a bonus
16 when the number of filled prescriptions attributable to physicians
17 in the Rep's territory exceeds the goal Novartis has set. Some
18 Novartis Reps earn more than \$100,000 a year. In 2005, Novartis
19 Reps' total compensation averaged \$91,539.

20 The FLSA provides that many employees must be paid one and
21 one-half times their regular rate of compensation for time worked
22 in excess of 40 hours a week, see 29 U.S.C. § 207(a)(1), but
23 provides that certain categories of workers are excluded from this
24 requirement, see id. § 213. Novartis Reps are expected to be in
25 the field from 8 a.m. to 5 p.m. on work days; they eat lunch with
26 physicians or while driving to or from their physician visits; and

1 they attend the mandatory dinner programs, which sometimes prevent
2 them from returning home before 9 or 10 p.m. Notwithstanding a
3 standard week of five such nine-hour days plus the occasional
4 evening work, Novartis does not give its Reps overtime pay. As is
5 the practice throughout the pharmaceuticals industry, Novartis
6 treats its Reps as exempt from the overtime pay requirement in the
7 FLSA, as well as from comparable state-law requirements.

8 B. The Decision of the District Court

9 In the consolidated proceedings, Novartis moved for
10 summary judgment dismissing the complaints on the ground that
11 plaintiffs were "outside salesm[e]n" and/or "administrative"
12 employees, 29 U.S.C. § 213(a)(1), and thus exempt from the
13 overtime pay provisions of FLSA and state labor laws. Novartis
14 also argued that those Reps who earned more than \$100,000 a year
15 were exempt under 29 C.F.R. § 541.601 (entitled "Highly
16 compensated employees"). Plaintiffs cross-moved for partial
17 summary judgment ruling that they are not in an exempt category.

18 Ruling that it need not determine whether any Reps were
19 exempt as highly compensated employees, the district court denied
20 plaintiffs' motion and granted Novartis's motion on the ground
21 that the "Reps are not entitled to overtime compensation because
22 they are exempt from coverage as outside salespersons under the
23 FLSA and state laws, and even if they are not outside
24 salespersons, they are administrative employees and are still

1 exempt." In re Novartis Wage & Hour Litigation, 593 F.Supp.2d
2 637, 640 (S.D.N.Y. 2009) ("Novartis I").

3 With respect to the contention that the Reps were exempt
4 as outside sales employees, see 29 U.S.C. § 213(a)(1); 29 C.F.R.
5 § 541.500, the district court reasoned that the Reps met the
6 spirit and the letter of that exemption. It stated that excluding
7 Reps from the exemption merely because they may not "'sell'" in a
8 "technical[]" sense, Novartis I, 593 F.Supp.2d at 649 (citing
9 Jewel Tea Co. v. Williams, 118 F.2d 202 (10th Cir. 1941)), would
10 "ignore[] the Act's spirit, purpose, and goals." Novartis I, 593
11 F.Supp.2d at 648. The court stated that

12 Jewel Tea teaches that outside salespersons are
13 exempt from the overtime requirement not because they
14 "sell," as that term is technically defined, but
15 rather because they (1) generate commissions for
16 themselves through their work and (2) work with
17 minimal supervision, making adherence to an
18 hours-based compensation scheme impractical.

19 Novartis I, 593 F.Supp.2d at 648-49 (emphasis added). The court
20 also found that Reps do make sales for Novartis ("NPC"), stating
21 as follows:

22 Legally, Reps cannot sell NPC drugs directly to
23 physicians. . . . Further, physicians have an ethical
24 obligation to prescribe only drugs suitable for their
25 patients' medical needs, meaning that they cannot
26 make a binding commitment to a Rep to prescribe
27 certain NPC products. . . . Nevertheless, . . . the
28 physicians called upon by Reps ultimately control the
29 purchase of NPC products by writing prescriptions.
30 . . . [A]bsent a prescription from a doctor, the
31 patient end-users of NPC drugs are not able to obtain
32 those drugs. NPC spends in excess of \$500 million
33 annually to have its Reps meet on a frequent and
34 repeat basis with these physicians to seek their
35 commitments to prescribe NPC products. In other
36 words, Reps make sales in the sense that sales are
37 made in the pharmaceutical industry.

1 Id. at 650 (emphases added).

2 Rejecting plaintiffs' contention that the Reps do not make
3 sales because sales of pharmaceuticals are made only by
4 manufacturers to wholesale distributors, then by distributors to
5 pharmacies, and finally by pharmacies to patients, the district
6 court stated that

7 [t]he Court cannot ignore reality. Distributors are
8 not the end-users of NPC's products. If physicians
9 did not prescribe NPC products, patients would be
10 unable to buy them and distributors would have no
11 incentive to make purchases from NPC. The purchase
12 cycle commences with a prescription from physicians,
13 who are therefore the appropriate target of the Reps'
14 sales efforts. When the physician writes a
15 prescription for the NPC product, then a sale can
16 take place.

17 Id.

18 With respect to the exemption for administrative
19 employees, see 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.200,
20 541.202, the district court concluded that the Reps also fell
21 within that category, stating that they earn in excess of \$455 a
22 week, "they engage in work that is directly related to the
23 management or general business operations of NPC and they exercise
24 discretion and independent judgment with respect to matters of
25 significance." Novartis I, 593 F.Supp.2d at 655. The district
26 court concluded that Reps are engaged in work related to the
27 management or general business operations of Novartis because Reps
28 are not engaged in the production of Novartis pharmaceuticals and
29 because the Reps are critical to dissemination of information
30 about Novartis products:

1 Reps meet with physicians and provide them with
2 information about NPC drugs in an attempt to persuade
3 the physicians to write prescriptions for those
4 drugs. The Reps' success in obtaining prescriptions
5 is critical to NPC's business. The sizeable
6 incentive payments made to Reps for generating
7 prescriptions, as well as the more than \$500 million
8 paid to the 6,000 Reps, buttress[] the conclusion
9 that obtaining prescriptions for its drugs is
10 critical to NPC's success. There is no other
11 rational explanation for the commitment of this level
12 of financial resources to NPC's sales effort.

13 Id. at 656. The court concluded that Reps exercise "discretion
14 and independent judgment with respect to matters of significance"
15 because

16 Reps are expected to use initiative to increase the
17 number of prescriptions written for their drugs--
18 oftentimes, this involves building a good rapport
19 with the physicians and their staffs. Within the
20 confines of the "core messages" created by NPC, Reps
21 must decide how best to present their information and
22 must determine what type of "close" is most
23 appropriate in a given situation. This, of course,
24 depends on how much time the physician will allow the
25 Rep, the physician's patient base and prescribing
26 history, and numerous other factors. Reps set their
27 daily call schedules and are expected to use their
28 entertainment budgets to host informational events
29 for the physicians on their target lists. In
30 carrying out these activities, they are quite
31 clearly attempting to increase prescriptions for
32 their drugs--a matter of considerable significance
33 for NPC.

34 Id. at 657. The district court was unpersuaded that Novartis's
35 training and expectations rendered Reps "robots" or automatons who
36 did not exercise significant discretion:

37 These labels are not facts, but merely arguments
38 designed to avoid the overtime exemptions. They do
39 not begin to answer why or how a robot or an
40 automaton could or should earn an average salary of
41 \$91,500 per year. Nor do they explain why NPC would
42 employ 6,000 Reps at a cost in excess of half a
43 billion dollars per year. They are an attempt to
44 avoid the consequences of what Reps do every day--

1 arranging to call on physicians and, after assessing
2 how much time is available for the call, choosing the
3 best possible approach to convince the physician to
4 prescribe NPC drugs the next time an appropriate
5 patient opportunity presents itself. NPC pays a good
6 salary and material incentives to encourage this
7 behavior. Reps are given drug samples, printed
8 materials, and core messages. They are dispatched to
9 the offices of physicians in an attempt to convince
10 those physicians to prescribe NPC products. It
11 defies logic to accept that, in such a situation,
12 Reps are expected to do nothing but chant slogans and
13 mouth platitudes. At the bare minimum, Reps must be
14 capable of tailoring their presentation to a given
15 timeframe--deciding how best to convey the "core
16 message" in a manner that will have the desired
17 effect on the physician. Such a decision involves
18 making an independent judgment, free of direct
19 oversight, even if NPC has provided Reps with
20 guidelines for conveying certain information in a
21 certain manner. Thus, while the exact nature of the
22 discretion and independent judgment exercised by Reps
23 may be in dispute, . . . on the present facts, NPC's
24 Reps have discretion and exercise independent
25 judgment.

26 Id.

27 Accordingly, having found both the outside salesman and
28 administrative employee exemptions applicable, the district court
29 granted Novartis's motion for summary judgment dismissing
30 plaintiffs' claims under the FLSA. In addition, finding that the
31 New York overtime pay exemptions were defined and applied in the
32 same manner as those in the FLSA, see Novartis I, 593 F.Supp.2d at
33 646, and that California law, although differing slightly in the
34 ways it defined the exemption, was "essentially the same as the
35 FLSA and New York law," id. at 647, the court granted summary
36 judgment dismissing plaintiffs' state-law claims.

37 This appeal followed.

1 II. DISCUSSION

2 On appeal, the Reps contend principally that the district
3 court erred in concluding that they are outside sales employees,
4 given that the "[t]he undisputed evidence in this case shows that
5 the Reps do not obtain orders, form contracts, or engage in any
6 type of sale as that term is defined by the FLSA" (Plaintiffs'
7 brief on appeal at 46), and in concluding that Reps are
8 administrative employees given that "[t]hey lack discretion and
9 independent judgment within [the] meaning of the administrative
10 exemption" (id. at 63). Novartis defends the district court's
11 conclusions, arguing that Reps make sales "in the only practical
12 sense applicable to the pharmaceuticals industry" (Novartis brief
13 on appeal at 27), and that, in so doing, the Reps exercise
14 discretion and independent judgment (see id. at 48-55).

15 The Secretary of Labor, participating in this appeal as an
16 amicus curiae in support of the Reps, points out that Department
17 of Labor ("DOL" or "Department") regulations promulgated under the
18 FLSA (a) provide, in pertinent part, that an "outside salesman" is
19 one who, inter alia, has the primary duty of "making sales," and
20 (b) provide that an exempt "administrative" employee is one who,
21 inter alia, exercises discretion and independent judgment with
22 respect to matters of significance. The Secretary contends that
23 because the Reps do not make sales or obtain orders and do not
24 exercise discretion and independent judgment, they are not within
25 the "outside salesman" or the "administrative" employee

1 categories that are exempted from the FLSA overtime pay
2 requirements. Novartis argues that the Secretary's
3 interpretations are contrary to the regulations themselves. The
4 United States Chamber of Commerce has filed a brief as amicus
5 curiae in support of Novartis, citing Gonzales v. Oregon, 546 U.S.
6 243, 257 (2006), and arguing that the Secretary's interpretations
7 are not entitled to deference, on the theory that the regulations
8 merely parrot the FLSA's language and that the Secretary is thus
9 interpreting only the words of Congress, not those of the
10 regulations.

11 For the reasons that follow, we conclude that the
12 Secretary's regulations define and delimit the terms used in the
13 statute; that under those regulations as interpreted by the
14 Secretary, the Reps are not outside salesmen or administrative
15 employees; and that the Secretary's interpretations are entitled
16 to "controlling" deference, Auer v. Robbins, 519 U.S. 452, 461
17 (1997).

18 A. The FLSA's Overtime Pay Requirement

19 Congress enacted the FLSA in 1938 to combat "labor
20 conditions detrimental to the maintenance of the minimum standard
21 of living necessary for health, efficiency, and general well-being
22 of workers." FLSA § 2(a), 29 U.S.C. § 202(a). Section 7(a)(1) of
23 the FLSA provides, in pertinent part, that

24 no employer shall employ any of his employees who in
25 any workweek . . . is employed in an enterprise
26 engaged in commerce or in the production of goods for
27 commerce, for a workweek longer than forty hours

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

5 29 U.S.C. § 207(a)(1) (emphases added). To the extent pertinent
6 to this appeal, FLSA § 13(a)(1) exempts from that overtime pay
7 requirement

8 any employee employed in a bona fide . . .
9 administrative . . . capacity . . . or in the
10 capacity of outside salesman (as such terms are
11 defined and delimited from time to time by
12 regulations of the Secretary[]).

13 29 U.S.C. § 213(a)(1) (emphases added). The FLSA definitions
14 section provides that

15 "[s]ale" or "sell" includes any sale, exchange,
16 contract to sell, consignment for sale, shipment for
17 sale, or other disposition.

18 FLSA § 3(k), 29 U.S.C. § 203(k).

19 "The overtime requirements of the FLSA were meant to apply
20 financial pressure to 'spread employment to avoid the extra wage'
21 and to assure workers 'additional pay to compensate them for the
22 burden of a workweek beyond the hours fixed in the act.'" Davis
23 v. J.P. Morgan Chase & Co., 587 F.3d 529, 535 (2d Cir. 2009)
24 (quoting Overnight Motor Transportation Co. v. Missel, 316 U.S.
25 572, 578 (1942), superseded by statute, Portal-to-Portal Pay Act
26 of 1947, ch. 52, 61 Stat. 84). Because the FLSA is a "remedial
27 law," Reiseck v. Universal Communications of Miami, Inc., 591 F.3d
28 101, 104 (2d Cir. 2010), exemptions to the overtime pay
29 requirement are "'narrowly construed against the employers seeking
30 to assert them and their application limited to those
31 establishments plainly and unmistakably within their terms and

1 spirit.'" Bilyou v. Dutchess Beer Distributors, Inc., 300 F.3d
2 217, 222 (2d Cir. 2002) (quoting Arnold v. Ben Kanowsky, Inc., 361
3 U.S. 388, 392 (1960)). The burden of proving that employees fall
4 within such an exemption is on the employer. See, e.g., Bilyou v.
5 Dutchess Beer Distributors, Inc., 300 F.3d at 222.

6 We review de novo a district court's grant or denial of
7 summary judgment, viewing the record in the light most favorable
8 to the party against whom summary judgment is sought. See, e.g.,
9 Dillon v. Morano, 497 F.3d 247, 251 (2d Cir. 2007). Whether the
10 duties of a job qualify an employee for a FLSA exemption is a
11 question of law, which we review de novo. See, e.g., Icicle
12 Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986); Zheng v.
13 Liberty Apparel Co., 355 F.3d 61, 76 (2d Cir. 2003).

14 B. The "Outside Salesman" Exemption

15 Pursuant to her statutory mandate to "define[] and
16 delimit[]" the terms "outside salesman" and "administrative"
17 employee, 29 U.S.C. § 213(a)(1), the Secretary has promulgated
18 several regulations. Regulations issued in 2004 provide, inter
19 alia, that "[a] job title alone is insufficient to establish the
20 exempt status of an employee," 29 C.F.R. § 541.2; rather, that
21 status may be determined only on the basis of the employee's
22 "salary and duties," id. With respect to "outside salesman," the
23 regulations provide as follows:

24 (a) The term "employee employed in the capacity
25 of outside salesman" in section 13(a)(1) of the Act
26 shall mean any employee:

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(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) 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.

Id. § 541.500 (emphases added). Elaborating on the meaning of sales of commodities, as contrasted with sales of services or the use of facilities, 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. 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) (emphasis added).

The regulations go on to describe the circumstances in which an employee's efforts to "promot[e]" a product constitute-- or do not constitute--"sales" within the meaning of the regulations:

1 (a) Promotion work is one type of activity
2 often performed by persons who make sales, which may
3 or may not be exempt outside sales work, depending
4 upon the circumstances under which it is performed.
5 Promotional work that is actually performed
6 incidental to and in conjunction with an employee's
7 own outside sales or solicitations is exempt work.
8 On the other hand, promotional work that is
9 incidental to sales made, or to be made, by someone
10 else is not exempt outside sales work. . . .

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

23 Id. §§ 541.503(a) - (b) (emphases added).

24 As described in the preamble to the 2004 DOL regulations,
25 these rules had their origins in regulations adopted after DOL
26 hearings conducted in the 1940s (resulting in a 1940 "Stein
27 Report" and a 1949 "Weiss Report"), see Defining and Delimiting
28 the Exemptions for Executive, Administrative, Professional,
29 Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22124
30 (Apr. 23, 2004) ("2004 Final Rule" or "Final Rule"). The Final
31 Rule's preamble ("Preamble") discussed whether an outside
32 employee's promotional activities qualify him as a "salesman" and
33 emphasized that no one could be considered a salesman within these
34 regulations unless he in some sense made a sale.

35 Addressing concerns expressed by such groups as the
36 Grocery Manufacturers Association, the National Association of

1 Manufacturers, and the U.S. Chamber of Commerce for the emphasis
2 on an employee's "own" sales, given the technological advances
3 that enable a customer to place its own order directly with a
4 supplier, the DOL agreed that a determination of whether an
5 employee is exempt as an outside salesman "should not depend on
6 whether it is the sales employee or the customer who types the
7 order into a computer system and hits the return button." 2004
8 Final Rule at 22163. But while the Preamble stated that the DOL
9 "agree[d] that technological changes in how orders are taken and
10 processed should not preclude the [outside salesman] exemption for
11 employees who in some sense make the sales," id. at 22162, it
12 emphasized that

13 the Department does not intend to change any of the
14 essential elements required for the outside sales
15 exemption, including the requirement that the outside
16 sales employee's primary duty must be to make sales
17 or to obtain orders or contracts for services. An
18 employer cannot meet this requirement unless it
19 demonstrates objectively that the employee, in some
20 sense, has made sales. See 1940 Stein Report at 46
21 (outside sales exemption does not apply to an
22 employee "who does not in some sense make a sale")
23 (emphasis added). Extending the outside sales
24 exemption to include all promotion work, whether or
25 not connected to an employee's own sales, would
26 contradict this primary duty test.

27 2004 Final Rule at 22162 (first two emphases ours). The Preamble
28 also elaborated on the primary-duty standard:

29 Employees have a primary duty of making sales if
30 they "obtain a commitment to buy" from the customer
31 and are credited with the sale. See 1949 Weiss
32 Report at 83 ("In borderline cases the test is
33 whether the person is actually engaged in activities
34 directed toward the consummation of his own sales, at
35 least to the extent of obtaining a commitment to buy
36 from the person to whom he is selling. If his
37 efforts are directed toward stimulating the sales of

1 his company generally rather than the consummation of
2 his own specific sales his activities are not
3 exempt").

4 2004 Final Rule at 22162-22163 (emphases ours).

5 We note that the distinction between obtaining commitments
6 to buy and promoting sales by other persons has been respected in
7 areas other than the pharmaceutical industry. See, e.g., Gregory
8 v. First Title of America, Inc., 555 F.3d 1300, 1309 (11th Cir.
9 2009) (employee who obtained commitments to buy her employer's
10 title insurance service and was credited with those sales, and all
11 of whose efforts were directed towards the consummation of her own
12 sales and not towards stimulating sales for the employer in
13 general, was an outside sales employee within the meaning of the
14 FLSA and the regulations); Clements v. Serco, Inc., 530 F.3d 1224,
15 1228 (10th Cir. 2008) (civilian military recruiters who did not
16 obtain commitments from recruits were not outside salesmen within
17 the meaning of, e.g., 29 C.F.R. § 541.504); Wirtz v. Keystone
18 Readers Service, Inc., 418 F.2d 249, 253, 260 (5th Cir. 1969)
19 ("student salesmen" were not outside sales employees where their
20 promotional activities were incidental to sales made by others).

21 We think it clear that the above regulations, defining the
22 term "sale" as involving a transfer of title, and defining and
23 delimiting the term "outside salesman" in connection with an
24 employee's efforts to promote the employer's products, do far more
25 than merely parrot the language of the FLSA. The Secretary's
26 interpretations of her regulations are thus entitled to
27 "controlling" deference unless those interpretations are "'plainly

1 erroneous or inconsistent with the regulation.'" Auer, 519 U.S.
2 at 461 (quoting Robertson v. Methow Valley Citizens Council, 490
3 U.S. 332, 359 (1989) (other internal quotation marks omitted)).

4 We find no such inconsistency and see no such error.
5 Although Novartis contends that the position taken by the
6 Secretary as amicus on this appeal is contrary to the regulations,
7 we disagree. The basic premise of the regulations explaining who
8 may properly be considered an exempt "outside salesman"--a term
9 for which the FLSA explicitly relies on the Secretary to
10 promulgate defining and delimiting regulations--is that an
11 employee is not an outside salesman unless he does "in some sense
12 make the sales," 2004 Final Rule at 22162. And although that
13 phrase (on which Novartis relies heavily (see, e.g., Novartis
14 brief on appeal at 12, 22, 25, 29)) does not appear in any of the
15 regulations that explicate the term "outside salesman," the
16 regulations quoted above make it clear that a person who merely
17 promotes a product that will be sold by another person does not,
18 in any sense intended by the regulations, make the sale. The
19 position taken by the Secretary on this appeal is that when an
20 employee promotes to a physician a pharmaceutical that may
21 thereafter be purchased by a patient from a pharmacy if the
22 physician--who cannot lawfully give a binding commitment to do
23 so--prescribes it, the employee does not in any sense make the
24 sale. Thus, the interpretation of the regulations given by the
25 Secretary in her position as amicus on this appeal is entirely
26 consistent with the regulations.

1 Nor can we conclude that the regulations constitute an
2 erroneous interpretation of the FLSA definition of "sale" to
3 "include[] any sale, exchange, contract to sell, consignment for
4 sale, shipment for sale, or other disposition," 29 U.S.C.
5 § 203(k). Although the phrase "other disposition" is a catch-all
6 that could have an expansive connotation, we see no error in the
7 regulations' requirement that any such "other disposition" be "in
8 some sense a sale." Such an eiusdem generis-type interpretation
9 is consistent with the interpretive canon that exemptions to
10 remedial statutes such as the FLSA are to be read narrowly, see
11 Arnold, 361 U.S. at 392; see generally A.H. Phillips, Inc. v.
12 Walling, 324 U.S. 490, 493 (1945), and is neither erroneous nor
13 unreasonable, see, e.g., Chevron U.S.A. Inc. v. Natural Resources
14 Defense Council, Inc., 467 U.S. 837, 842-43 (1984). We
15 accordingly owe the Secretary's interpretation deference, and we
16 turn to the question of its applicability to the present cases.

17 There is no genuine dispute over the sales path generally
18 traversed by Novartis pharmaceuticals. As described in Part I.A.
19 above, Novartis sells its drugs to wholesalers; the wholesalers
20 then sell them to pharmacies; and the pharmacies ultimately sell
21 the drugs to patients who have prescriptions for them. The Reps
22 promote the drugs to the physicians; the Reps do not speak to the
23 wholesalers or to the pharmacies or to the patients.

24 Nor is there any dispute as to what occurs during the
25 Reps' "sales" calls on physicians. The meetings are brief--
26 generally less than five minutes--and the physicians neither buy

1 pharmaceuticals from the Reps nor commit to buying anything from
2 the Reps or from Novartis. The Reps may give physicians free
3 samples, but the Reps cannot transfer ownership of any quantity of
4 the drug in exchange for anything of value. The physician is of
5 course an essential step in the path that leads to the ultimate
6 sale of a Novartis product to an end user; a patient cannot
7 purchase the product from a pharmacy without a prescription, and
8 it is the physician who must be persuaded that a particular
9 Novartis drug may appropriately be prescribed for a particular
10 patient. But it is reasonable to view what occurs between the
11 physicians and the Reps as less than a "sale."

12 Novartis suggests that "sale" should be read broadly in
13 light of the statement in the Preamble that "'[e]mployees have a
14 primary duty of making sales if they "obtain a commitment to buy"
15 from the customer and are credited with the sale.'" (Novartis
16 brief on appeal at 23 (quoting 2004 Final Rule at 22162) (emphases
17 in brief).) It argues that the Reps "make sales in some sense"
18 because "they are responsible for eliciting commitments from the
19 physicians on whom they call to write prescriptions for NPC drugs
20 and that these prescriptions are, in essence, orders for NPC drugs
21 to be used by the patients in purchasing the drugs from
22 pharmacies." (Novartis brief on appeal at 25-26 (emphasis in
23 original) (internal quotation marks omitted).) Novartis's
24 emphatic reliance on the word "commitments," however, does not
25 lead to a conclusion that the Reps make sales, for it ignores the
26 nature of the "commitment" expressly envisioned by the Secretary

1 in enacting the regulations: "a commitment to buy," 2004 Final
2 Rule at 22162, 22163 (emphasis added). The type of "commitment"
3 the Reps seek and sometimes receive from physicians is not a
4 commitment "to buy" and is not even a binding commitment to
5 prescribe. As the district court noted, "physicians have an
6 ethical obligation to prescribe only drugs suitable for their
7 patients' medical needs, meaning that they cannot make a binding
8 commitment to a Rep to prescribe" a particular Novartis product.
9 Novartis I, 593 F.Supp.2d at 650 (emphasis added). Thus, although
10 physicians may say that they will prescribe a given Novartis drug
11 for patients with appropriate diagnoses, such an assurance is not
12 a binding commitment, and physicians remain entirely free to
13 prescribe a competing product made by a company other than
14 Novartis.

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

24 Novartis points out that a number of district courts have
25 held that pharmaceutical sales representatives are exempt from
26 the FLSA overtime pay requirements as outside salesmen (and/or

1 administrative employees). Those cases are, of course, not
2 binding on us, and their reasoning does not persuade us that the
3 Secretary's interpretations of the regulations should be
4 disregarded. To the extent that the pharmaceuticals industry
5 wishes to have the concept of "sales" expanded to include the
6 promotional activities at issue here, it should direct its efforts
7 to Congress, not the courts. Given the existing statute and
8 regulations, we conclude that the district court should have ruled
9 that the Reps are not outside salesmen within the meaning of the
10 FLSA and the regulations.

11 C. The "Administrative" Employee Exemption

12 The Secretary's regulations interpreting the FLSA
13 exemption for "any employee employed in a bona fide . . .
14 administrative . . . capacity," 29 U.S.C. § 213(a)(1), establish
15 three criteria that must be met for an employee to fit within that
16 category. To be such an "administrative" employee, (1) the
17 employee must earn at least \$455 a week, (2) his "primary duty"
18 must be "the performance of office or non-manual work directly
19 related to the management or general business operations of the
20 employer or the employer's customers," and (3) his "primary duty"
21 must "include[] the exercise of discretion and independent
22 judgment with respect to matters of significance," 29 C.F.R.
23 § 541.200(a); see, e.g., id. § 541.201 (elaborating on the second
24 criterion); id. § 541.202 (elaborating on the third criterion).
25 For purposes of this appeal, the relevant issue is whether

1 Novartis has adduced sufficient evidence to permit a rational
2 juror to infer that the Reps meet the third criterion.

3 With respect to the requirement that the employee's
4 primary duty include "the exercise of discretion and independent
5 judgment with respect to matters of significance," the regulations
6 provide, in relevant part, as follows:

7 In general, the exercise of discretion and
8 independent judgment involves the comparison and the
9 evaluation of possible courses of conduct, and acting
10 or making a decision after the various possibilities
11 have been considered. The term "matters of
12 significance" refers to the level of importance or
13 consequence of the work performed.

14 (b) The phrase "discretion and independent
15 judgment" must be applied in the light of all the
16 facts involved in the particular employment situation
17 in which the question arises. Factors to consider
18 when determining whether an employee exercises
19 discretion and independent judgment with respect to
20 matters of significance include, but are not limited
21 to: whether the employee has authority to formulate,
22 affect, interpret, or implement management policies
23 or operating practices; whether the employee carries
24 out major assignments in conducting the operations of
25 the business; whether the employee performs work that
26 affects business operations to a substantial degree,
27 even if the employee's assignments are related to
28 operation of a particular segment of the business;
29 whether the employee has authority to commit the
30 employer in matters that have significant financial
31 impact; whether the employee has authority to waive
32 or deviate from established policies and procedures
33 without prior approval; whether the employee has
34 authority to negotiate and bind the company on
35 significant matters; whether the employee provides
36 consultation or expert advice to management; whether
37 the employee is involved in planning long- or
38 short-term business objectives; whether the employee
39 investigates and resolves matters of significance on
40 behalf of management; and whether the employee
41 represents the company in handling complaints,
42 arbitrating disputes or resolving grievances.

43

1 (e) The exercise of discretion and independent
2 judgment must be more than the use of skill in
3 applying well-established techniques, procedures or
4 specific standards described in manuals or other
5 sources. . . .

6 Id. § 541.202(a), (b), and (e).

7 On appeal, the Reps contend that they do "low-level,
8 discretionless marketing work, strictly controlled by Novartis,"
9 and that their duties and authority do not satisfy the
10 requirements for applicability of the administrative employee
11 exemption. (Plaintiffs' brief on appeal at 40.) Novartis, in
12 contending that the Reps exercise discretion and independent
13 judgment, argues that the Reps, for example, "must determine how
14 best to develop a rapport with a physician and develop strategies
15 to engage physicians in an interactive dialogue to draw out their
16 patient concerns, treatment styles and predilections"; must "be
17 able to react to expressed physician concerns by emphasizing
18 particular clinical findings regarding the efficacy and safety of
19 NPC's drugs for specific patient types"; "must determine when and
20 how to deliver the [Novartis-determined core] message, taking into
21 consideration," e.g., "the prior call history with each physician,
22 the physician's time constraints, expressed concerns,
23 prescription-writing tendencies and patient population"; and must
24 "determine how best to close each call by evaluating whether
25 sufficient groundwork has been laid to seek the physician's
26 commitment on that call to write prescriptions." (Novartis brief
27 on appeal at 50-51.)

1 The Secretary points out that the regulations make clear
2 that the requirement for authority to "exercise . . . discretion
3 and independent judgment" means more than simply the need to use
4 skill in applying well-established techniques or procedures
5 prescribed by the employer, see 29 C.F.R. § 541.202(e). The
6 Secretary takes the position that for the administrative
7 exemption to apply to the Reps, the regulations require a showing
8 of a greater degree of discretion, and more authority to use
9 independent judgment in matters of significance, than Novartis
10 allows the Reps. Again we find it appropriate to defer to the
11 Secretary's interpretation.

12 Comparing the record as to the Reps' primary duties
13 against the illustrative factors set out in § 541.202(b), for
14 example, we see no evidence in the record that the Reps have any
15 authority to formulate, affect, interpret, or implement Novartis's
16 management policies or its operating practices, or that they are
17 involved in planning Novartis's long-term or short-term business
18 objectives, or that they carry out major assignments in conducting
19 the operations of Novartis's business, or that they have any
20 authority to commit Novartis in matters that have significant
21 financial impact. Although Novartis argues that the Reps do
22 commit Novartis financially when they enter into contracts with
23 hotels, restaurants, and other venues for promotional events,
24 "which may cost NPC thousands of dollars" (Novartis brief on
25 appeal at 3-4), the record reveals that the Reps have been given
26 budgets for such events by the Novartis managers and that the Reps

1 have no discretion to exceed those budgets. Nor have we been
2 pointed to any evidence that the Reps have authority to negotiate
3 and bind Novartis on any significant matters, or have authority to
4 waive or deviate from Novartis's established policies and
5 procedures without its prior approval. What Novartis
6 characterizes as the Reps' exercise of discretion and independent
7 judgment--ability to answer questions about the product, ability
8 to develop a rapport with a physician who has a certain social
9 style, ability to remember past conversations with a given
10 physician, ability to recognize when a message has been
11 persuasive--are skills gained and/or honed in their Novartis
12 training sessions. As described in Part I.A. above, these skills
13 are exercised within severe limits imposed by Novartis. Thus, it
14 is undisputed that the Reps, inter alia,

15 ▪ have no role in planning Novartis's marketing
16 strategy;

17 ▪ have no role in formulating the "core messages" they
18 deliver to physicians;

19 ▪ are required to visit a given physician a certain
20 number of times per trimester as established by Novartis;

21 ▪ are required to promote a given drug a certain number
22 of times per trimester as established by Novartis;

23 ▪ are required to hold at least the number of
24 promotional events ordered by Novartis;

25 ▪ are not allowed to deviate from the promotional "core
26 messages";

27 ▪ and are forbidden to answer any question for which
28 they have not been scripted.

29 Novartis argues that the Reps exercise a great deal of
30 discretion because they are free to decide in what order to visit

1 physicians' offices, free to decide how best to gain access to
2 those offices, free to decide how to allocate their Novartis
3 budgets for promotional events, and free to determine how to
4 allocate their samples. (See Novartis brief on appeal at 51.) In
5 light of the above controls to which Novartis subjects the Reps,
6 we agree with the Secretary that the four freedoms advanced by
7 Novartis do not show that the Reps are sufficiently allowed to
8 exercise either discretion or independent judgment in the
9 performance of their primary duties. Accordingly, we conclude
10 that the district court should have ruled that the Reps are not
11 bona fide administrative employees within the meaning of the FLSA
12 and the regulations.

13 D. State Law

14 The district court concluded that the overtime wage
15 requirements of New York law and California law are not
16 meaningfully different from the requirements of the FLSA, see
17 Novartis I, 593 F. Supp. 2d at 654, 658, and no party has argued
18 on this appeal that the requirements differ. Accordingly, we also
19 vacate the district court's rulings that the Reps fall within the
20 exemptions provided by state law.

21 CONCLUSION

22 We have considered all of Novartis's arguments in support
23 of the judgment and have found in them no merit. We vacate the

- 1 judgment of the district court and remand for further proceedings
- 2 not inconsistent with this opinion.