No. 10-15257

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SHANE CHRISTOPHER and
FRANK BUCHANAN,

Plaintiffs-Appellants,

v.

SMITHKLINE BEECHAM CORPORATION,
D/B/A GLAXOSMITHKLINE,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona

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

M. PATRICIA SMITH
Solicitor of Labor

WILLIAM C. LESSER
Acting Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

MELISSA MURPHY
Attorney

Office of the Solicitor
U.S. Department of Labor
200 Constitution Ave., NW
Room N-2716
Washington, DC 20210
Murphy.melissa@dol.gov
(202) 693-5559

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

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;[1] 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

[1] 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."

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 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.

<u>ARGUMENT</u>

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).[2] "Primary duty" means "the principal, main, major, or most important duty that the employee performs," 29 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

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[2] 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).

[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.[3] 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.

[3] "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.

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 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.[4] For example, the Wage and Hour Division

[4] 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

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 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

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or sold." WH Opinion Letter FLSA 2005-06, 2005 WL 330605 (Jan. 7, 2005) (internal quotation marks and citation omitted).

instant case. *See Christopher,* 2009 WL 4051075, at *4.[5] However, 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

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[5] 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 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 (9th 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 (9th 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 (9th 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.

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 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.[6] The term "other disposition" must 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

[6] 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 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.

[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 some sense a sale.’” *Novartis,* 2010 WL 2667337, at *11. The Second Circuit thus concluded that “[s]uch an *ejusdem generis*-type interpretation[7] 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

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[7] “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).

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 opinion letters and FOH, and the DOL brief, the district court committed error.[8]

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

[8] 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.

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 & 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.").[9] In fact, the regulations themselves lead to the conclusion that the Reps' promotional work does not qualify for the outside sales exemption.

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

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[9] *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.

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.").[10]

[10] 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.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision and conclude that the outside sales exemption does not apply to the Reps in this case.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

WILLIAM C. LESSER
Acting Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

s/Melissa A. Murphy
MELISSA A. MURPHY
Attorney
Office of the Solicitor
U.S. Department of Labor
200 Constitution Ave., NW
Room N-2716
Washington, DC 20210
Murphy.melissa@dol.gov
(202) 693-5559

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND NINTH CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a) and Ninth Circuit Rule 32-1, the undersigned certifies that this brief complies with the applicable type volume limitation, typeface requirements and type style requirements.

1. This brief complies with the type volume limitation because it contains 5,337 words, including footnotes but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements because it has been prepared in monospace typeface, Courier New, in 12 point font in text and 12 point font in footnotes. This brief was prepared using Microsoft Word.

3. The text of the electronic version of this brief is identical to the text of the paper copies of this brief that will subsequently be submitted upon approval.

Dated: August 10, 2010

s/Melissa A. Murphy
MELISSA A. MURPHY
Attorney

STATEMENT OF RELATED CASES PURSUANT TO NINTH CIRCUIT RULE 28-2.6

The two consolidated appeals, *Delgado v. Ortho-McNeil, Inc.*, Ninth Cir. No. 09-55225, and *Yacoubian v. Ortho-McNeil Pharmaceutical, Inc.*, Ninth Cir. No. 09-55229, concern closely-related issues. This Court has granted consolidation of these cases with the instant appeal for oral argument purposes only.

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of August, 2010, the Secretary of Labor's brief as *amicus curiae* in support of Plaintiffs-Appellants is being filed electronically and notice of such filing will be issued to all counsel of record through the Court's electronic filing system.

s/Melissa A. Murphy
MELISSA A. MURPHY
Attorney