No. 10-3855

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SUSAN SCHAEFER-LAROSE,

Plaintiff-Appellant,

v.

ELI LILLY & CO.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Indiana

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the Plaintiff-Appellant. The district court committed legal error when it concluded that the Plaintiff-Appellant, Susan Schaefer-LaRose ("Schaefer"), a Pharmaceutical Sales Representative ("Rep") employed by Eli Lilly & Co. ("Lilly"), was exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA" or "Act") under both the "outside sales" exemption and the "administrative" exemption. *See* 29 U.S.C. 213(a)(1).

INTEREST OF THE SECRETARY

The Secretary administers and enforces the FLSA, *see* 29 U.S.C. 204(a) and (b), 211(a), 216(c), 217, and has a compelling interest in ensuring that it is interpreted correctly. By concluding that Schaefer was exempt as an "outside salesperson" despite the fact that she did not engage in any actual sales, the district court failed to follow the Department of Labor's ("Department") regulatory provisions limiting the exemption to employees who make sales or obtain orders or contracts for which consideration is paid. *See* 29 C.F.R. 541.500-501, 503. Moreover, the court's conclusion that Schaefer was exempt as an administrative employee, even though she was required to memorize and follow pre-approved scripts and "verbatims" during each of her promotional visits, is inconsistent with the Department's regulation limiting the administrative exemption to employees who exercise "discretion and independent judgment with respect to matters of significance." 29 C.F.R. 541.200(a)(3).[1]

STATEMENT OF ISSUES

(1) Whether the district court erred by concluding that Schaefer was an exempt outside salesperson despite the fact that

[1] A Notice of Appeal was recently filed in another case in this Circuit raising these same issues and apparently presenting nearly identical facts. *See Jirak v. Abbott Labs., Inc.*, 716 F. Supp. 2d 740 (N.D. Ill. 2010), *appeal docketed*, No. 11-1980 (7th Cir. April 27, 2011).

she did not "make sales" as required by the Department's "outside sales" regulations.

(2) Whether the district court erred by concluding that Schaefer was an exempt administrative employee despite the fact that, in promoting drugs under circumscribed conditions dictated by her employer, she did not exercise discretion and independent judgment with respect to matters of significance as required by the Department's regulations.

STATEMENT OF FACTS

1. Schaefer, the plaintiff in this case, worked for Lilly in New York as a Rep, marketing and promoting Lilly's products to physicians.[2] *See Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674, 678 (S.D. Ind. 2009).[3] Schaefer's duties included visiting physicians in their offices and encouraging them to prescribe Lilly's drugs to their patients. *Id.*[4] However, Schaefer "never sold any product directly to the physicians or otherwise took orders for Lilly medications from the doctors she

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[2] The case was conditionally certified as a collective action, but Schaefer's individual case was later severed for purposes of discovery and summary judgment. The collective action is continuing with a new lead plaintiff. *See Schaefer-LaRose v. Eli Lilly & Co.*, 2010 WL 3892464, at *2 (S.D. Ind. Sept. 29, 2010).

[3] Schaefer was initially hired as a "Sales Representative," and was later promoted to "Senior Sales Representative"; her duties, however, remained the same. 663 F. Supp. 2d at 678 n.3.

[4] It is undisputed that Schaefer was "customarily and regularly engaged away from" Lilly's place of business. 29 C.F.R. 541.500(a)(2).

visited." *Id.* at 685. Rather, she limited her efforts to attempting to persuade doctors to prescribe Lilly's brand-name pharmaceutical products instead of those produced by competitors. *Id.* at 685-86. Schaefer's goal was to obtain a "non-binding commitment" from each physician she visited to prescribe Lilly's medications. *Id.* Such a non-binding commitment was the most she could achieve due to regulatory and ethical restrictions on the "heavily regulated pharmaceutical industry." *Id.*

2. In promoting the company's drugs, Schaefer was required to follow a prepared script which contained information about Lilly's products, and was further required to respond to physicians' questions about the products by reciting prepared verbatim statements or "verbatims." *See Schaefer-LaRose*, 663 F. Supp. 2d at 680. Lilly provided Schaefer with promotional materials containing pre-approved and scripted messages to use in her presentations, together with instructions on how these materials should be utilized; she could be disciplined for deviating from these messages. *Id.* at 679, 692.

Lilly also gave Schaefer detailed reports or "tiering lists" of physicians to be visited and their prescribing habits, as well as pre-approved routing schedules showing who she was to call on and how often to visit each physician. *Schaefer-LaRose*, 663 F. Supp. 2d at 678-79. She was expected to call on nine

doctors per day, and was required to analyze and summarize monthly reports showing the numbers of prescriptions written for drugs (of both Lilly and its competitors) in her territory. *Id.* at 679-80. Schaefer was trained in sales techniques, and was provided with detailed scientific and pharmacological information about Lilly's drug products and their ingredients, their efficacy for treatment of certain conditions or diseases, and their contraindications and side effects. *Id.* at 678, 680. Lilly provided her with instructions on which products to target, free samples to distribute, a budget for organizing informational events and meals, and detailed instructions for how to spend that budget. *Id.* at 679, 687, 693.

Lilly supervised Schaefer with weekly or biweekly conference calls, periodic "ride-alongs" during which a supervisor accompanied her on her daily rounds and rated and critiqued her performance, and periodic performance reviews. *Schaefer-LaRose*, 663 F. Supp. 2d at 679, 681, 693. Schaefer was paid a base salary as well as "incentive bonus compensation," which was partly based upon the number of prescriptions for Lilly drugs issued and filled in her assigned territory. *Id.* at 681. She was not paid any actual sales commissions or any compensation directly tied to her individual promotional work. *Id.*

SUMMARY OF ARGUMENT

1. The district court erred by concluding that the requirements for the outside sales exemption were met under the Department's regulations. It is undisputed that Schaefer did not sell, or take orders for, Lilly's products; instead, her primary duty was to increase demand for those products by attempting to persuade certain physicians to prescribe Lilly drugs to their patients, rather than those of its competitors. As such, Schaefer's work involved marketing and promotion designed to stimulate sales made by others -- the company sells to wholesale distributors, who in turn sell to pharmacies, who in their turn sell to customers with prescriptions -- the very type of activity that the Department's regulations state is not exempt outside sales work. *See* 29 C.F.R. 541.503.

The district court erred in relying on certain "indicia of sales" as substitutes for the actual sales required under the regulations. For example, it noted that Schaefer used methods of persuasion similar to those of salespersons, that her promotion work boosted Lilly's actual drug sales, that she was trained in sales techniques, that she received some of her compensation in the form of bonus or incentive payments, and that her title was "sales representative." However, none of these facts can substitute for the salient and relevant fact that Schaefer never actually "made sales," which demonstrates

that she was not an outside salesperson as defined by the Department's legislative rules.

2. The court also erred by concluding that Schaefer was exempt as an "administrative employee," since she lacked the discretion and independent judgment with respect to matters of significance which is required for that exemption under the Department's regulations. Schaefer was provided with scripts and "verbatims," target lists, a territory, routing schedules, and monthly prescription reports, and was expected to call on nine physicians every day. When making her visits to promote drugs to the physicians, she was not permitted to deviate from the scripts, "verbatims," and other pre-approved materials Lilly provided to her. Schaefer had discretion only over minor matters such as deciding what time of day to see which physician, tailoring her message to a particular physician's personality or time constraints, and deciding how many free samples to leave at each office or whom to take out to lunch. The constraints on Schaefer's primary duties support the conclusion that she did not exercise discretion and independent judgment with respect to matters of significance.

Schaefer did not have any real responsibility over management policies or operating practices; she did not provide expert advice to management; she did not have the authority to commit Lilly as to any significant financial matters; she did

not have the authority to depart from the company's prepared scripts in any meaningful way; and she was not involved in managerial planning or decision-making. *See* 29 C.F.R. 541.202(b). Thus, Schaefer did not qualify for the administrative exemption as "defined and delimited" by the Secretary.

ARGUMENT

I. THE DISTRICT COURT ERRED BY CONCLUDING THAT SCHAEFER WAS AN EXEMPT OUTSIDE SALESPERSON DESPITE THE FACT THAT SHE DID 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). "The burden is on the employer to prove that an employee is exempt under FLSA, and such exemptions are to be narrowly construed against the employer seeking the exemption." *Schmidt v. Eagle Waste & Recycling, Inc.*, 599 F.3d 626, 631 (7th Cir. 2010) (citations omitted). The Act's exemptions apply "only where it 'plainly and unmistakably comes within the statute's terms and spirit' to deny the employee overtime." *Jackson v. Go-Tane Servs.*, 56 F. App'x 267, 270 (7th Cir. 2003) (quoting

Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)).

Pursuant to Congress's express delegation of rulemaking authority, the Secretary of Labor has issued regulations after notice and comment that "define and delimit" the FLSA's overtime exemptions. *See* 69 Fed. Reg. 22,122 (Apr. 23, 2004). As such, they are entitled to controlling deference. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165-68 (2007); *Harrell v. U.S. Postal Serv.*, 445 F.3d 913, 923, 925-26 (7th Cir. 2006) (granting *Chevron* deference to the Department's reasonable Family and Medical Leave Act interpretative regulation that was found not to parrot the relevant statutory language).

To the extent that the plain language of the Department's regulations are deemed ambiguous, controlling deference must be given to the Department's interpretation of its own regulations unless such interpretation is "plainly erroneous or inconsistent with the regulations." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted) (granting controlling deference to the Department's position as expressed in amicus brief); *see Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) (controlling deference to an agency's interpretation of its own regulations that was neither plainly erroneous nor inconsistent with those regulations); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) ("Just as we defer to an

agency's reasonable interpretations of the statute when it issues regulations in the first instance, the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force.") (citations omitted); *Long Island Care at Home*, 551 U.S. at 171-74; *University of Chicago Medical Center v. Sebelius*, 618 F.3d 739, 744 (7th Cir. 2010) ("[I]f we were faced with a possibly ambiguous regulation, deference to the agency's construction of an ambiguous regulatory provision would be at its height."); *In Re Novartis Wage and Hour Litigation,* 611 F.3d 141, 155 (2d Cir. 2010) (granting controlling deference to the Secretary's amicus brief and holding that Reps do not meet the outside sales or administrative exemption), *cert. denied,* 131 S. Ct. 1568 (2011); *Jirak*, 716 F. Supp. 2d at 746-47 (same).[5]

2. The Department's regulations define the statutory term "outside salesman" as including "any employee . . . whose 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.

[5] These principles of deference apply equally to the outside sales and administrative exemptions. It bears noting that regardless whether *Chevron* deference (to the regulations) or *Auer* deference (to the interpretation of the regulations) applies, the level of deference is the same, i.e., controlling deference.

541.500(a)(1)(i)-(ii).[6] They define "primary duty" in turn as "the principal, main, major, or most important duty that the employee performs." 29 C.F.R. 541.700. The Department's regulations go on to 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 between nonexempt "promotional work" and exempt outside "sales" work:

> 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

[6] Section 3(k) of the FLSA defines a sale to "include[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. 203(k). As the Second Circuit recognized in *Novartis*, "[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.' Such an . . . interpretation 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." 611 F.3d at 153 (citations omitted). The phrase "in some sense make a sale" (69 Fed. Reg. at 22,162) does not encompass the promotion of a product that is not incidental to one's own sale.

> 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). The regulation emphasizes that "[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. at 541.503(b).

Thus, under the plain language of the Department's regulations, Schaefer did not meet the primary duties test for the outside sales exemption. Because she did not sell any drugs or obtain any orders for drugs, and could at most obtain a "non-binding commitment" from a doctor to prescribe Lilly's drugs to his or her patients if appropriate, Schaefer did not qualify as exempt under the regulation's requirement that her primary duty be "making sales" as set forth in 29 C.F.R. 541.500(a)(1)(i).

3. To the extent that there is any ambiguity in the Department's regulations, the Department's Preamble to the 2004 final rule ("Preamble") and Wage and Hour ("WH") opinion letters 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," and that "[e]mployees have a primary duty of making sales [only]

if they 'obtain a commitment to buy' from the customer and are credited with the sale." 69 Fed. Reg. at 22,162. 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.* It expressly instructs that 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 (internal quotation marks omitted); *see* WH Opinion Letter FLSA 2006-16, 2006 WL 1698305 (May 22, 2006) (rejecting application of the outside sales exemption to individuals soliciting charitable contributions); 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). Here, because Schaefer does not "consummate her own specific sales," she clearly falls on the nonexempt "promotion" side of the line drawn by the Secretary pursuant to

express congressional authorization and after notice and comment.

4. The district court erred in asserting that "Reps make sales in the sense that sales are made" in the pharmaceutical industry. *See Schaefer-LaRose,* 663 F. Supp. 2d at 686. In fact, the actual sale of pharmaceutical drugs occurs when the company sells them to wholesalers, who then sell them to pharmacies before they are sold to customers. *See, e.g.*, *Jirak*, 716 F. Supp. 2d at 743 (company "recognized revenue" when its "trade group" made sales to wholesalers or hospitals). Insofar as Schaefer's work increased these sales, it was non-exempt promotional work "designed to stimulate sales that will be made by someone else," i.e., the wholesaler or the pharmacist. 29 C.F.R. 541.503(b).

As the Second Circuit recognized:

> The basic premise of the regulations explaining who may properly be considered an exempt "outside salesman" -- a term for which the FLSA explicitly relies on the Secretary to promulgate defining and delimiting regulations -- is that an employee is not an outside salesman unless he does "in some sense make the sales," 2004 Final Rule at 22162 . . . . [T]he regulations quoted above 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. The position taken by the Secretary on this appeal is that when an employee promotes to a physician a pharmaceutical that may thereafter be purchased by a patient from a pharmacy if the physician -- who cannot lawfully give a binding commitment to do so -- prescribes it, the employee does not in any sense make the sale. Thus, the interpretation of the regulations given by

> the Secretary in her position as *amicus* on this appeal is entirely consistent with the regulations.

Novartis, 611 F.3d at 153 (emphases added). Dismissing the employer's argument, the Second Circuit agreed with the Secretary that "it is reasonable to view what occurs between the physicians and the Reps as less than a 'sale.'" *Id.* at 154. The court 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 <u>in any sense</u>, within the meaning of the statute or the regulations, made a sale.

Id. (emphasis added).[7] The *Jirak* court concluded similarly, stating that "pursuant to the Seventh Circuit's mandate that FLSA exemptions must be narrowly construed against the employer seeking the exemption, the Court finds that Representatives do not plainly and unmistakably come within the outside sales exemption." 716 F. Supp. 2d at 748 (internal quotation marks and citations omitted). The district court also erred by relying on what it termed "indicia of sales" such as Schaefer's job title, training, incentive-based compensation, use of monthly prescription reports, and distribution of free

[7] The Second Circuit noted 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." *Novartis,* 611 F.3d at 155. The Ninth Circuit, in *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011) (amicus brief filed by the Secretary in support of the Reps), *reh'g denied*, May 17, 2011, disagreed with the Second Circuit's reasoning in *Novartis*, concluding that the Reps in that case were exempt as outside salespersons (the administrative exemption was not at issue). The Secretary filed with the Ninth Circuit an amicus brief in support of the Reps' petition for panel rehearing and rehearing *en banc*. In the Secretary's view, the Ninth Circuit incorrectly concluded that *Auer* deference was not applicable to the Secretary's outside sales legislative rules because, according to the Ninth Circuit, those regulations merely parroted the statutory language of section 3(k). *See Christopher*, 635 F.3d at 393-95. The Secretary maintains that her view is supported by the regulations' discussion of "promotion work," which section 3(k) does not address. As to the Ninth Circuit's conclusion that even if *Auer* were applicable the Secretary's position is plainly erroneous and inconsistent with her regulations, *see id.* at 395-401, the Secretary refers to the sound reasoning of the Second Circuit's decision in *Novartis* in regard to the outside sales exemption.

samples to physicians as evidence that she was, in fact, engaged in sales. "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; *see Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 870 (7th Cir. 2008) ("An employee's title is not controlling; courts instead must engage in a case-by-case analysis of the employee's duties and responsibilities"); *Jirak*, 716 F. Supp. 2d at 748 ("It is clear that Representatives bear some indicia of salesmen (as evidenced by hiring considerations, training, their evaluation criteria and incentive pay). However, pursuant 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."); *Kuzinski, et al. v. Schering Corp.*, 604 F. Supp. 2d 385, 394-95 (D. Conn. 2009) ("Th[e] indicia-of-sales inquiry . . . is limited to circumstances where the employee actually makes sales.") (citing *Ackerman v. Coca-Cola Enters. Inc.*, 179 F.3d 1260, 1265 (10th Cir. 1999)), *aff'd,* 384 F. App'x 17 (2d Cir. 2010), *cert. denied,* 131 S. Ct. 1567 (2011).[8] Therefore,

[8] The district court in *Kuzinski* also stated that "[t]o the extent [the Reps] lay foundation or groundwork, it is to

contrary to the district court's suggestion, whether Lilly hired, trained, and treated Schaefer as a sales representative is not dispositive. Instead, the district court should have looked only to her primary duty. "The 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*, 716 F. Supp. 2d at 747.

The district court in the instant case further erred by comparing Schaefer's duties to those of the classic outside salesmen described in *Jewel Tea Co. v. Williams*, 118 F.2d 202 (10th Cir. 1941) (finding door-to-door salesmen to be exempt). *See Schaefer-LaRose*, 663 F. Supp. 2d at 688. The Jewel Tea employees sold a variety of merchandise to their customers, with their days comprised of a series of consummated transactions; they had "no restrictions" on the time they worked, and could earn as much or as little as their "ambition" dictated, since they were paid strictly by commissions based on the total amount of goods that they themselves sold. *Id.* at 207-08. By contrast, Schaefer engaged in a daily routine of promotional meetings with physicians, but never consummated any transactions

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increase or maintain their employer's market share for the products they promote. In this sense they pave the way for sales but in no more direct a manner as a pharmaceutical company's direct-to-consumer advertising, which raises demand for that company's products. Neither of these activities constitutes 'sales' under the FLSA." 604 F. Supp. 2d at 399.

in which money was exchanged or a binding commitment given. She was required to work at least eight hours per day, and was paid a base salary with bonuses, not a straight commission derived from a percentage of her own sales. Thus, Schaefer had little in common with the *Jewel Tea* salesmen who were held to be exempt in 1941. Instead, she is more like the civilian military recruiters who were held not to be exempt by the Tenth Circuit in *Clements v. Serco, Inc.*, 530 F.3d 1224, 1229 (10th Cir. 2008), because they, like Schaefer, only laid the groundwork (by selling the idea of joining the Army to potential recruits), but did not engage in sales as defined by the Department's regulations.

5. In sum, Schaefer did not "sell" or "make sales" as those terms are defined in the FLSA and its implementing regulations but, rather, was engaged in "promotion" as defined in those same regulations. Thus, the district court erred by failing, at minimum, to accord controlling deference to the Secretary's interpretation of her own regulations, and by concluding that Schaefer came within the outside sales exemption.

II. THE DISTRICT COURT ERRED BY CONCLUDING THAT SCHAEFER WAS AN EXEMPT ADMINISTRATIVE EMPLOYEE DESPITE THE FACT THAT SHE DID NOT, WITHIN THE STRINGENT EMPLOYER-IMPOSED LIMITATIONS UNDER WHICH SHE PERFORMED HER DUTIES, EXERCISE DISCRETION AND INDEPENDENT JUDGMENT WITH RESPECT TO MATTERS OF SIGNIFICANCE

1. The Department's regulations also "define[] and delimit[]" the FLSA exemption for administrative employees. 29 U.S.C. 213(a)(1); *see* 29 C.F.R. 541.200-204. Under these regulations, an "employee employed in a bona fide administrative capacity" means "any employee . . . whose 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 district court erred by concluding that Schaefer exercised the requisite discretion and independent judgment with respect to matters of significance to qualify for this exemption.[9]

Discretion and independent judgment "involves the

[9] In order to fall within the administrative exemption, the employee must also meet the salary requirement of $455 per week, which is not disputed here. *See* 29 C.F.R. 541.200(a)(1). Further, because Schaefer cannot satisfy the "discretion and independent judgment with respect to matters of significance" prong of the administrative exemption, this brief does not address whether her "primary duty [wa]s 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." 29 C.F.R. 541.200(a)(2) and (3).

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). Significantly, the regulations state that

> [f]actors to consider [in this determination] include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. 541.202(b).[10] Although this list is not exhaustive, it indicates the kind of activities that constitute "matters of

[10] As the Preamble to the final rule, 69 Fed. Reg. at 22,143, explained, federal courts generally find employees who meet at least two or three of these indicators to be exercising discretion and independent judgment with respect to matters of significance, although a case-by-case analysis is required.

significance."

Moreover, the exercise of discretion and independent judgment must involve more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources. *See* 29 C.F.R. 541.202(e); *see also* 541.203(g)-(i) (clarifying through examples of exempt and non-exempt administrative employees that reliance on techniques and skills developed through specialized training and use of manuals is insufficient for application of the exemption). The regulations also clarify that "[a]n employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly." 29 C.F.R. 541.202(f).

2. Wage and Hour has consistently reiterated that both the nature and level of the employee's decisions as they relate to the employer's business operations determine whether the employee exercises discretion and independent judgment with respect to matters of significance. "In this regard, it is not sufficient that an employee makes decisions regarding when and where to do different tasks, as well as the manner in which to perform them." WH Opinion Letter FLSA 2006-45, 2006 WL 3930478 (Dec. 21, 2006) (copy editors do not exercise discretion as to matters of significance even though they "organize work

priorities to meet production deadlines set by management . . . [and] make decisions on workflow within their areas and communicate these decisions to club copywriters") (citing *Clark v. J.M. Benson Co.*, 789 F.2d 282, 287 (4th Cir. 1986)) (internal quotation marks omitted). Another Wage and Hour opinion letter from 2006, denying the application of the administrative exemption to legal analysts, provides a helpful analogous example:

> Although you state that you work independently and use your own judgment as to how to prioritize your work assignments, including how the projects will be executed and how much time to spend on each assignment, it is not sufficient that an employee makes decisions regarding relatively insignificant matters . . . . Nor is it sufficient that an employee makes limited decisions, within clearly "prescribed parameters." *See Dalheim v. KDFW-TV*, 706 F. Supp. 493, 509 (N.D. Tex. 1998), *aff'd*, 918 F.2d 1220 (5th Cir. 1990). Rather, there must be the exercise of discretion and independent judgment on matters of significance or consequence related to the management or general business operations of the employer or the employer's customers. For instance . . . you do not formulate or implement management policies, utilize authority to waive or deviate from established policies, provide expert advice, or plan business objectives in accordance with the dictates of § 541.202(b).

WH Opinion Letter FLSA 2006-27, 2006 WL 2792441 (July 24, 2006).[11]

[11] Wage and Hour's opinion letter on legal analysts also notes that regulatory or legal limitations may also curtail an employee's exercise of discretion and thus preclude application of the administrative exemption: "The implication of such strictures is that paralegal employees would not have the amount

3. Much like the legal analysts, Schaefer worked largely independently (i.e., without direct daily supervision), determined what time of day to visit the physicians on her lists, and decided how best to execute her presentations within clearly prescribed parameters. This, however, similarly does not suffice to qualify for the administrative exemption; Schaefer did not perform any primary duties that are largely comparable to those found in 29 C.F.R. 541.202(b). Thus, Schaefer did not formulate, affect, interpret, or implement management policies or operating practices; did not perform work that affected business operations to a substantial degree; did not have any authority to commit the employer in matters that had significant financial impact; did not have authority to waive or deviate from established policies and procedures without prior approval; did not negotiate for management; and did not plan the company's business objectives, resolve matters for the company, or resolve grievances.[12] In fact, Schaefer, who

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of authority to exercise independent judgments with regard to legal matters necessary to bring them within the administrative exemption." WH Opinion Letter FLSA 2006-27. Similarly, Schaefer's legal and ethical constraints as a Rep, coupled with her lack of autonomy, meant that her authority was inherently limited.

[12] The cases set out in the Preamble to the 2004 Part 541 regulations to support the factors listed in 29 C.F.R. 541.202(b) clearly do not refer to the kind of work engaged in by Schaefer here. *See* 69 Fed. Reg. at 22,143-144. Those cases speak of making recommendations to management on policies and

was required to follow scripts and "verbatims" at all times, did not play any role in the business operations of Lilly beyond promoting its drugs. *Compare* WH Opinion Letter FLSA 2006-34, 2006 WL 3227789 (Sept. 21, 2006) (applying administrative exemption to community events supervisors because their authority to negotiate and bind their employers on significant matters such as negotiating contracts with vendors was sufficient to demonstrate discretion and independent judgment with respect to matters of significance); WH Opinion Letter FLSA 2006-46, 2006 WL 3930479 (Dec. 21, 2006) (location managers' primary duties, such as creating and enforcing regulations for the production crew, committing the employer in financial matters, and negotiating site rentals, included the exercise of discretion and independent judgment as to matters of significance).

4. This court has not addressed whether Reps like Schaefer qualify as exempt administrative employees. While the Second and Third Circuits have reached opposite conclusions on this issue, the decisions are not in conflict. In *Novartis*, the

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procedures; conducting independent investigation and resolution of issues without prior approval; having authority to waive or deviate from established policies and procedures without prior approval; developing guidebooks, manuals, and other policies and procedures for the employer or the employer's customers; negotiating on behalf of the employer with some degree of settlement authority; having authority to commit the employer in matters that have financial impact. *Id.*

Second Circuit deferred to the Secretary's interpretation that "the regulations require[d] a showing of a greater degree of discretion, and more authority to use independent judgment in matters of significance, than Novartis allow[ed] the Reps." 611 F.3d at 156. The Second Circuit found no evidence "that the Reps have any authority to formulate, affect, interpret, or implement Novartis's management policies or its operating practices, or that they are involved in planning Novartis's long-term or short-term business objectives, or that they carry out major assignments in conducting the operations of Novartis's business, or that they have any authority to commit Novartis in matters that have significant financial impact." *Id.* Further, the court concluded that the Reps play no role in planning marketing strategy or in formulating "core messages" to be delivered to physicians, are required to visit a given physician a certain number of times as established by the employer, are required to promote a given drug a certain number of times per trimester, are required to hold a certain number of promotional events, and are not allowed to deviate from "core messages" and preapproved scripts (including in answering questions). *Id.* at 157; *see Jirak,* 716 F. Supp. 2d at 750 (finding Reps to be lacking in discretion and independent judgment because they applied the company's well-established techniques and procedures -- they were given "call lists" for

the purpose of soliciting doctors, were told how often to visit each "target," were not truly independent or free from immediate direction in making their sales calls, were expected to adhere to company policies and deliver "core messages" about each product during calls, were prohibited from creating their own marketing materials, and could not negotiate with doctors or enter into binding contracts).

In *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010), which was cited with approval by the district court, the Third Circuit upheld a lower court ruling that the Rep in that case did have sufficient discretion and independent judgment to qualify as an exempt administrative employee. The Third Circuit, however, was careful to indicate the narrow nature of its holding. The court relied heavily on the Rep's own deposition testimony to reach its conclusion. Specifically, in regard to discretion and independent judgment concerning matters of significance, the Third Circuit relied on the Rep's having "described herself as the manager of her own business who could run her own territory as she saw fit." *Smith*, 593 F.3d at 285. As the Third Circuit stated, "Our opinion . . . focuses on Smith and the specific facts developed in discovery in this case. Consequently, we recognize that based on different facts, courts, including this Court, considering similar issues involving sales representatives for other pharmaceutical

companies, . . . might reach a different result than that we reach here." *Id.* at 283 n.1.

Further, two decisions of this Court, which found employees to have exercised discretion and independent judgment as to matters of significance outside of the pharmaceutical industry context, are distinguishable. Indeed, this Court's decision in *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 374-75 (2005), although analyzing the pre-2004 regulations, provides a useful comparison of what constitutes the exercise of discretion related to matters of significance.[13] In *Kennedy*, this Court, in concluding that the Work Planners were exempt administrative employees, stated that they were "essentially problem solvers" and that their "job is to come up with a set of instructions that will remedy reported problems around the plant." 410 F.3d at 368, 375. Even though the planners "look to past work packages for guidance and use a computer to aid their recommendations . . . . [when] [f]aced with novel or not-so-novel problems, . . . Work Planners must use their independent judgment to determine how best to respond." *Id.* at 375. This includes "decid[ing] what kind of labor, materials, and equipment will be needed for the project." *Id.* at 368. The Work Planners, although heavily regulated, thus had the

[13] The 2004 regulations clarified that discretion and independent judgment must concern matters of significance. *See* 69 Fed. Reg. at 22,143.

discretion to develop new ways to resolve issues. Schaefer did not exercise that kind of discretion.

And, in *Roe-Midgett*, 512 F.3d at 865, in holding that Material Damage Appraisers ("MDA") possessed sufficient discretion and independent judgment to qualify for the exemption, this Court noted that the MDAs "spend most of their time in the field investigating, estimating, and settling auto damage claims -- unsupervised and up to their $12,000 limit of authority." *Id.* at 874-75. This Court also noted that the MDAs detect possible fraud, negotiate with body shops, determine which parts to repair or replace, and explain the estimate to the claimant; further they "have the leeway to deviate from the adjusting manual provided they document their reasons for doing so." *Id.* at 875.[14] Schaefer did not exercise a similar kind of discretion.

5. Finally, the district court appears to have misunderstood the "matters of significance" requirement. In noting that Schaefer's efforts may "drive the market demand,"

[14] "Insurance claims adjusters generally meet the duties requirements for the administrative exemption" if their duties include such activities as preparing damage estimates, evaluating and making recommendations regarding coverage of claims, determining liability and total value of a claim, negotiating settlements, and making recommendations concerning litigation. 29 C.F.R. 541.203(a). The MDAs in *Roe-Midgett* did not determine liability or make recommendations as to litigation, but did perform the other listed activities. *See* 512 F.3d at 874.

and increase the numbers of prescriptions written, "a matter of considerable significance to Lilly," *Schaefer-LaRose*, 663 F. Supp. 2d at 692, 694, it blurred the distinction between an employee who exercises discretion and independent judgment related to matters of significance and one who makes money for the company. As noted by the Department's regulations, "[a]n employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly." 29 C.F.R. 541.202(f); *see Ruggeri v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 585 F. Supp. 2d 254, 276 n.13 (D. Conn. 2008) (rejecting the argument that the exemption applied because of the Reps' impact on the company's financial success). Indeed, if the "matters of significance" standard were interpreted to include any actions that in some manner improve business, it would effectively broaden the administrative exemption to swallow the rule requiring the payment of overtime compensation under the FLSA.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision and conclude that neither the outside sales exemption nor the administrative exemption applies to Schaefer.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FED. R. App. P. 32(a)(7)(C)

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), and Seventh Circuit Rule 29, this brief complies with the applicable type volume limitation, typeface requirements, and type style requirements.

1. This brief complies with the applicable type volume limitation because it contains 6896 words, including footnotes but excluding the parts of the brief excepted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements and type style requirements because it has been prepared in monospaced typeface, Courier New 12 point font, using Microsoft Office Word 2003.

Dated: May 25, 2011

/s/
Sarah J. Starrett

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit today, May 25, 2011, using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service is to be accomplished by the appellate CM/ECF system upon the following attorneys of record:

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