No. 09-0437

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE NOVARTIS
WAGE AND HOUR LITIGATION

On Appeal from the United States District Court
for the Southern District of New York

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

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Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the Plaintiffs-Appellants. The district court committed legal error when it concluded that the Plaintiffs-Appellants, Pharmaceutical Sales Representatives ("Reps") employed by Novartis Pharmaceutical Corporation ("NPC"), are exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA" or "Act") under the "outside sales" exemption or, alternatively, the "administrative" exemption. *See* 29 U.S.C. 213(a)(1).

STATEMENT OF INTEREST OF THE SECRETARY OF LABOR

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 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 of Labor's ("Department's") regulatory provisions limiting the 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. Moreover, the court's conclusion that the Reps, who are given lists of physicians to visit and are not allowed to go beyond the messages crafted by NPC (as set out in scripts and related materials with which they are provided), are exempt administrative employees is inconsistent with the regulatory requirement that employees must exercise discretion and independent judgment with respect to matters of significance in order to qualify for the administrative exemption. *See* 29 C.F.R. 541.200(a)(3).

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 concluding that the Reps are exempt administrative employees in accordance with the Department's "administrative exemption" regulations, which limit

the exemption to employees who exercise discretion and independent judgment with respect to matters of significance.

STATEMENT OF FACTS

The plaintiffs in this case are a class of over 2,500 Reps who worked for NPC in New York, California, and other states. The Food and Drug Administration ("FDA") prohibits Reps from selling drugs to physicians, *see In Re Novartis*, 593 F. Supp. 2d 637, 642 (S.D. N.Y. 2009); their primary duty is to call on physicians and provide them with information about NPC's drugs. *Id.* at 641. The goal of providing the physicians with this information is to convince them to prescribe NPC's drugs to their patients. *Id.*[1]

NPC trains the Reps in sales techniques as well as giving them basic training in pharmacology and other relevant subjects. *Id*. NPC expects the Reps to deliver a "core message" about the drugs to each physician, and provides them with scripts and other materials to help them do so. *Id*. They may not elaborate on the messages crafted by NPC, such as making claims about a drug's effectiveness, absent NPC authorization. *Id*. NPC also provides the Reps with materials to use in their presentations,

[1] The patient does not purchase the prescribed drugs from a physician, but rather from a pharmacy. NPC sells its drugs directly to distributors, who in turn sell them to pharmacies, who then sell them to patients with prescriptions (Oral Argument Transcript, Nov. 18, 2008 at 5:9-10).

such as pamphlets, clinical studies, and visuals aids, together with instructions on how these materials should be utilized; Reps may not use other materials unless NPC has cleared them. *Id*.[2] Within these stringent parameters, the Reps "tailor" their presentations to each physician based on such considerations as the amount of time the physician is willing to meet with the Rep, the physician's patient base and prescribing habits, and the physician's personality. *Id*. at 642. NPC also provides the Reps with a budget for organizing informational events for their target physicians, following NPC guidelines for speakers and invitees. *Id*.

Each Rep is assigned a target list of physicians to call on; Reps may not remove or add physicians to their list without NPC's consent, and are reprimanded for failing to adhere to their target lists (Plaintiffs-Appellants' Statement of Facts ("SOF") at ¶¶ 37-40). NPC also assigns the Reps specific drugs to promote. *In Re Novartis*, 593 F. Supp. 2d at 641. Although NPC does not directly supervise the Reps, it expects them to call on a certain number of physicians on their list between 8 a.m. and 5 p.m. each weekday, determines how often Reps should

[2] If a Rep does not have a scripted response from NPC to a physician's concerns, she must try to "sidestep" the question by restating the "core message" or refer the physician to medical experts and NPC (Plaintiffs-Appellants SOF at ¶¶ 77-78).

call on each physician, and ranks each physician and drug in order of importance for each Rep (Plaintiffs-Appellants SOF at ¶ 37). *Id*. at 642. NPC also expects the Reps to "close" each physician visit by requesting a non-binding commitment to prescribe NPC drugs to their patients when appropriate or, in other cases, giving a physician a clinical study to review or thanking the physician for his time. *Id*. The Reps earn an average annual "salary" of $91,500 that includes both base pay and "incentive payments" based on the number of prescriptions written by physicians. *Id*.

SUMMARY OF ARGUMENT

Under the Department's regulations, the Reps do not meet the requirements for either the outside sales or administrative exemption. The Reps do not sell or take orders for NPC's drugs; rather, they provide information to target physicians about NPC's drugs with the goal of persuading the physicians to prescribe those drugs to their patients. The actual sale of drugs takes place between NPC 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 bonus or incentive payments, and their promotion work affects NPC's actual drug sales -- the fact that the Reps do not actually "make sales" conclusively demonstrates that the position is not

that of an outside salesperson consistent with the Department's legislative rules.

Furthermore, when promoting the drugs to the physicians, the Reps are not permitted to deviate from the "core message" found in the scripts, manuals, brochures, and other materials NPC provides them. If the Reps do not have a scripted response to a physician's question, they are required to either reiterate the "core message" or refer the physician to NPC's medical experts. These constraints on the Reps' primary duties demonstrate that, although the Reps have some discretion (such as deciding what time of day to see which physician, tailoring their message to a physician's personality or time constraints, and deciding whether to ask for a non-binding commitment at the end of a visit), they do not exercise discretion and independent judgment with respect to matters of significance. Thus, the Reps do not qualify for the administrative exemption.

ARGUMENT

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

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 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 Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 222 (2d Cir. 2002).

Pursuant to Congress's express delegation of rulemaking authority, the Secretary issued revised 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, 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).[3]

[3] To the extent that the plain language of the Department's outside sales or administrative regulations are 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*, 128 S. Ct. 1147, 1155 (2008); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). This principle holds true whether the Secretary's interpretation is found in a Preamble to a final rule published in the Federal Register, an opinion letter or other interpretive materials, or in a legal brief. *See, e.g., Coke*, 551 U.S. at 171 (controlling deference to Department's Advisory Memorandum issued during the

1. As noted *supra*, section 13(a)(1) of the FLSA provides an exemption from the statute's minimum wage and overtime requirements for "any employee employed . . . in the capacity of outside salesman." The Department's regulations define that phrase 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. 541.500(a)(1)(i)-(ii).[4] "Primary duty" means "the principal, main, major, or most important duty that the employee performs," 29 C.F.R. 541.700, and section 3(k) of the FLSA defines "sale" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. 203(k); *see* 29 C.F.R. 541.501.[5] The Department's regulations further explain that

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course of litigation); *Auer*, 519 U.S. at 462 (controlling deference to legal brief).

[4] It is clear that the Reps are "customarily and regularly engaged away from" NPC's place of business. 29 C.F.R. 541.500(a)(2).

[5] Contrary to the conclusions of two recent district court decisions, the Reps' activities do not come within the "other disposition" language found in section 3(k). *See Schaefer-LaRose v. Eli Lilly & Co.*, S.D. Ind. No. 07-1133 (Sept. 29, 2009); *Delgado v. Ortho-McNeil, Inc.*, 2009 WL 2781525 (C.D. Cal. Feb. 6, 2009). 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. The most the Reps can obtain is

"[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 also explain the relationship between promotional work and the outside sales exemption, clarifying that

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

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

Thus, under the plain language of the Department's

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a non-binding commitment from a physician to prescribe NPC drugs as appropriate.

regulations, the Reps do not meet the primary duties test for the outside sales exemption.[6] 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 NPC's drugs to their patients when appropriate, the Reps do not meet the regulation's plain and unmistakable requirement that their primary duty must be "making sales." 29 C.F.R. 541.500(a)(1)(i). Contrary to the district court's assertion that "Reps make sales in the sense that sales are made" in the pharmaceutical industry, *In Re Novartis*, 593 F. Supp. 2d at 650, the actual sale of NPC's drugs occurs between the company and distributors (and then to the pharmacy).[7] Insofar as the Reps' work increases NPC's 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).

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[6] "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 *In Re Novartis*, 593 F. Supp. 2d at 654 n.7., the fact that NPC "hired, trained, paid, and incentivized [the Reps] as sales personnel" is not in any way dispositive.

[7] Even if it is true that absent a prescription no drugs would be sold to patients, *see In Re Novartis*, 593 F. Supp. 2d at 650, it nonetheless is "irrelevant to the dispositive inquiry of whether [Reps] make sales of those products as defined in the FLSA." *Kuzinski, et al. v. Schering Corp.*, 604 F. Supp. 2d 385, 398 (D. Conn. 2009) (internal quotation marks omitted).

2. To the extent, however, that there is any ambiguity on this point in the Department's regulations, 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.[8] For example, Wage and Hour 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; *see* WH Opinion Letter August 19, 1994, 1994 WL 1004855 (concluding that soliciting organ and tissue donors by selling the concept of being a donor does not constitute "sales"

[8] In the context of addressing the "retail or service establishment" criteria of the FLSA's section 7(i) exemption, *see* 29 U.S.C. 207(i), Wage and Hour noted when discussing the definition of "sale" in section 3(k) of the FLSA that "[t]hough the term sale does not always have a fixed or invariable meaning, it is generally held to be a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold." WH Opinion Letter FLSA 2005-06, 2005 WL 330605 (citing *Wirtz v. Charleston Coca-Cola Bottling Company, Inc.*, 237 F. Supp. 857 (E.D.S.C. 1965)) (internal quotation marks omitted).

under the regulations). Further, Wage and Hour's Field Operations Handbook ("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 (1965).

3. This Court has not addressed the question whether Reps are exempt as outside salespersons.[9] Within the Second Circuit, the district courts that have addressed the question have, with the exception of the decision in the instant case, concluded that the outside sales exemption does not apply to Reps because

[9] No circuit court has addressed this specific question. There are, however, cases involving the application of the outside sales and administrative exemptions pending in the Third and Ninth Circuits. In *Smith v. Johnson & Johnson*, No. 09-1223, now before the Third Circuit on appeal, the district court determined that the outside sales exemption does not apply to Reps because they do not "make sales," but that they are exempt administrative employees who exercise discretion as to matters of significance. *See Smith v. Johnson & Johnson*, 2008 WL 5427802, at *11-12 (D. N.J. Dec. 30, 2008). Currently before the Ninth Circuit are two cases in which the Central District of California concluded that Reps are exempt as outside salespersons. *See Yacoubian v. Ortho-McNeil Pharmaceutical Corp.*, Ninth Cir. No. 09-55225 (No. 07-127, C.D. Cal. Feb. 6, 2009); *Delgado v. Ortho-McNeil Primary Care, Inc.*, Ninth Cir. No. 09-55229 (No. 07-263, C.D. Cal. Feb. 6, 2009); *cf. D'Este v. Bayer Corp.*, 565 F.3d 1119 (9th Cir. 2009) (certifying to California Supreme Court the question whether the Central District of California correctly concluded that Reps are exempt outside salespersons under California state law; the district court's decisions relied in part on its interpretation of the FLSA's requirements).

they do not make sales as required by the Department's regulations. *See Kuzinski*, 604 F. Supp. 2d. at 403 ("Because [the Reps] undisputedly do not sell or make any sales as those terms are defined in the FLSA and its implementing regulations, they fall outside the FLSA's outside sales exemption.") (internal quotation marks omitted); *Ruggeri v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 585 F. Supp. 2d 254, 272 (D. Conn. 2008) ("Because [the pharmaceutical company] has not shown that [the Reps] make sales or obtain contracts or orders, the outside sales exemption is inapplicable."); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 470 (S.D.N.Y. 2008) ("As a starting point, the interpretation of the [FLSA outside sales] exemption rests on the plain meaning of the statutory and regulatory texts that define it.").

The district court here relied upon this Court's statement in an FLSA "salary basis" case that "[g]iven the broad scope of the FLSA and its implementing regulations, [the Department's] regulations provide only general guidance to accommodate the varying needs of employers and employees in a diverse and varied national economy," *see Havey v. Homebound Mortgage, Inc.*, 547 F.3d 158, 163 (2d Cir. 2008), for its conclusion that it could "take[] into account the characteristics of the industry in question when determining the applicability of the outside sales exemption." *In Re Novartis*, 583 F. Supp. 2d at 649. As noted

by the district court in *Kuzinski*, however, "that observation . . . does not mean that an exemption to an employer's obligation to pay overtime under the FLSA can apply more broadly than the regulations specify." 604 F. Supp. 2d at 397 (internal quotation marks omitted).[10] "The conclusion that [Reps] fall within the outside sales exemption from FLSA's overtime provisions on the basis of the characteristics of the industry in question . . . notwithstanding [the Reps'] lack of capacity to sell, and physicians' lack of capacity to purchase" is an attempt at "back-fitting . . . the FLSA to industry practices." *Id.* at 399 (internal quotation marks omitted); *see Ruggeri*, 585 F. Supp. 2d at 267 ("The justification for the pharmaceutical industry's use of [Reps] and direction of their efforts at physicians based on the artifact of medical and drug regulation . . . does not provide justification for applying the outside sales exemption to [the Reps], especially given that FLSA exemptions apply only to those employees who are plainly and unmistakably within them.") (internal quotation marks omitted).

As noted by the Tenth Circuit, "[t]he touchstone for making a sale, under the [Department's regulations], is obtaining a

[10] This Court, despite referring to the "general guidance" provided by the regulations, did not ignore what the regulations plainly and specifically prescribe. *See Havey*, 547 F.3d at 163-64 ("[T]he regulations specify that a salaried employee must be paid a fixed and predetermined amount . . . but do not prescribe when or how frequently this fixed element of compensation may be determined . . . .").

commitment." *Clements v. Serco*, 530 F.3d 1224, 1227 (2008) (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). In a similar situation to that presented here, the district court in *Kuzinski* concluded:

> [T]he closest that [Reps] come to consummating "sales" is increasing the overall demand for its products, such that [other company] employees negotiate and commit to contracts with wholesalers -- not the physicians to whom [the company's] products are promoted. An employee does not consummate a "sale" for purposes of the FLSA merely by "lay[ing] the groundwork" for another employee to obtain a customer's commitment. . . . To the extent [the Reps] lay foundation or groundwork, it is to 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 (citing *Clements*, 530 F.3d at 1229).

4. The cases cited by the district court as support for its conclusion that the Reps "make sales" are inapposite. In *Gregory v. First Title of America, Inc.*, 555 F.3d 1300, 1308-10 (2009), the Eleventh Circuit concluded that a "Marketing Director" was an exempt outside salesperson because she obtained orders for title insurance services. In contrast to the instant case, there was no "evidence of any other intervening sales

effort between [the Marketing Director] and orders placed with [her employer]"; once she obtained the order for title insurance services, the sale was complete. *Id.* at 1309. The First Circuit case cited by the district court, *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 47 (2008), *cert. denied*, 129 S.Ct. 2864 (2009), involved the question whether Reps (which that court referred to as "detailers") were entitled to access to "patient-identifiable and prescriber-identifiable data" about prescriptions written in New Hampshire. Although the First Circuit referred to the Reps effect in increasing the pharmaceutical companies' market share, the question of pharmaceutical sales, in relation to the FLSA or any other law, was not before it. Similarly, although the district court in *Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085 (D. Minn. 1981), *aff'd*, 684 F.2d 565 (8th Cir. 1982), described the employees of cardiac pacemaker manufacturers' who promoted the pacemakers to physicians as "sales representatives" and their work in terms of "sales," the issue implicated in that case was a covenant not to compete, not the FLSA's outside sales exemption. *Id.* at 1094-95. The court was interpreting the term "customer" under applicable contract construction (i.e., the customers with whom Gibbons had contact in the year immediately preceding his employment with the employer), not the term "sale" under the FLSA or, more specifically, what is required before an employer

may avail itself of the outside sales exemption.

II. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE REPS ARE EXEMPT ADMINISTRATIVE EMPLOYEES IN ACCORDANCE WITH THE DEPARTMENT'S "ADMINISTRATIVE EXEMPTION" REGULATIONS, WHICH LIMIT THE EXEMPTION TO EMPLOYEES WHO EXERCISE DISCRETION AND INDEPENDENT JUDGMENT WITH RESPECT TO MATTERS OF SIGNIFICANCE

1. The employer failed to show that the Reps 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 . . . 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).[11] 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

[11] In order to fall within the administrative exemption, the employee must also meet the salary requirement of $455 per week. *See* 29 C.F.R. 541.200(a)(1). The salary requirement is not at issue in this case. Further, because the Reps do not satisfy the "discretion and independent judgment with respect to matters of significance" prong of the administrative exemption, this brief does not address whether the Reps' "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." 29 C.F.R. 541.200(a)(2) and (3).

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). Furthermore, the phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation, with the following factors to be considered:

> 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).[12] Although this list is not exhaustive, it

[12] As the Preamble to the final rule, 69 Fed. Reg. 22,143 (Apr. 23, 2004), explained, federal courts generally find that employees who meet at least two or three of the indicators mentioned in 29 C.F.R. 541.202(b) are deemed to be exercising discretion and independent judgment with respect to matters of significance, although a case-by-case analysis is required.

indicates the kind of activities that constitute "matters of significance."

Moreover, the exercise of discretion and independent judgment must be 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 (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.[13]

[13] Wage and Hours' opinion letter on legal analysts also demonstrates that regulatory or legal limitations on an employee's exercise of discretion are, in fact, limitations that may preclude application of the administrative exemption: "In addition, most jurisdictions have strict prohibitions against the unauthorized practice of law by laypersons. . . . The implication of such strictures is that paralegal employees would

Much like the legal analysts, 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, however, similarly 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.[14] *Compare* WH Opinion Letter FLSA 2006-34,

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not have the amount 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, there are legal constraints placed on the Reps. "Since the Reps are advocating products which are routinely and closely regulated by the Food and Drug Administration (FDA), NPC prepares scripts and related materials which the Reps are expected to use to deliver a 'core message' about NPC products to each physician they visit. Reps may not go beyond the boundaries of the messages crafted by NPC." *In Re Novartis* 593 F. Supp. 2d at 641.

[14] 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 refer to the kind of work not engaged in by the Reps here -- making recommendations to management on policies and 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

2006 WL 3227789 (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 (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).

3. No circuit court has addressed whether Reps are exempt administrative employees. Besides the instant case, one district court within the Second Circuit, relied upon by the district court in *In Re Novartis*, 593 F. Supp. 2d at 656-58, has concluded that the "discretion and independent judgment with respect to matters of significance" test for the administrative exemption "likely" applies to Reps because their daily decisions (which are similar to those in this case) "seek to influence prescription writing practices -- a matter of great consequence to [their employer's] business" -- and their "exercises of judgment [are] ways to drive the business [and] move market

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commit employer in matters that have financial impact. *See* 69 Fed. Reg. 22,143-144 (April 23, 2004).

share," and because "if the doctor didn't like [the Rep], then the doctor was not going to prescribe the drug." *Amendola*, 558 F. Supp. 2d at 477. At issue in *Amendola*, however, was the plaintiff Rep's motion for discovery of the names and addresses of the pharmaceutical company's Reps, authorization for notice of the collective action to be sent to those potential plaintiffs, and equitable tolling of any claims they may file. *See* 558 F. Supp. 2d at 462. As such, the district court looked only at the "likelihood" that the pharmaceutical company would successfully argue the application of the administrative exemption to the Reps when deciding whether to grant the plaintiff's motion. *Id.* at 477.

Furthermore, the district court in *Amendola* relied in part on a 1945 Wage and Hour opinion letter which concluded that drug companies' "medical detailists" were administratively exempt. Those medical detailists, though, "were consulted with respect to individual nutritional problems encountered by hospitals and physicians, such as determining whether the use of subject's product was related to the occurrence of an epidemic," and "work[ed] virtually without supervision." *Ruggeri*, 585 F. Supp. 2d at 276 (internal quotation marks omitted). In addition, the court's analysis appears to have misunderstood the "matters of significance" requirement. In commenting on "driving the business" and "market share," it blurred the distinction between

an employee who exercises discretion and independent judgment related to matters of significance and one whose skillful job performance necessarily has some impact on her employer's bottom line (something undoubtedly important to the company).[15] *See, e.g.*, *Robinson-Smith v. Government Employees Insurance Co.*, 323 F. Supp. 2d 12, 25 (D. D.C. 2004) (noting, in the course of concluding that auto damage adjusters, who assess, negotiate, and settle automobile damage claims, travel to and from

[15] In addition to the decision in *Amendola*, the district court in the instant case relied heavily on another district court case, *Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883 (E.D. Pa. 1982), as persuasive authority for concluding that the Reps are exempt administrative employees. In *Cote*, the court concluded that a Rep exercised sufficient discretion for the administrative exemption to apply because, even though she worked within a tightly-controlled marketing environment, the Rep could tailor her presentation to individual doctors in terms of her manner and the frequency of her visits and could "cultivat[e] a good working relationship with the nurses at a particular clinic and asking for their help in reminding physicians about the drug." 558 F. Supp. at 887. As a threshold matter, contrary to the district court's reasoning in *Ruggeri*, 585 F. Supp. 2d at 276, the fact that *Cote* was decided under the "old" Part 541 regulations does not vitiate its reasoning. *See* 69 Fed. Reg. 22,143 (April 23, 2004) (making the phrase "matters of significance" part of the regulatory test for the administrative exemption instead of having it as part of the Department's interpretive guidance). Nevertheless, the analysis in *Cote* fails for all the reasons set out *supra*. "Tailoring" one's strictly circumscribed presentations and establishing good personal working relationships do not equate to primarily performing duties requiring the exercise of discretion and independent judgment concerning matters of significance. Of course, as district court decisions, neither *Amendola* nor *Cote* is controlling vis-à-vis this Court. *See Lombard v. Whitman*, 485 F.3d 73, 83 (2d Cir. 2007) (distinguishing between own precedent and district court decisions).

inspection sites, inspect vehicles for damage, and write estimates for repairs were not exempt, that "'the use of skill is to be clearly distinguished from work requiring discretion and independent judgment'") (quoting *Reich v. American Int'l Adjustment Co.*, 902 F. Supp. 321, 324 (D. Conn. 1994)). As noted by the Department's regulations, an employee does not exercise discretion and independent judgment related to matters of significance merely because his success (or lack thereof) in performing his duties has a financial impact on his employer's business. *See* 29 C.F.R. 541.202(f); *see also Ruggeri*, 585 F. Supp. 2d at 276 n.13 (when denying summary judgment to pharmaceutical company on the question of whether its Reps were exempt administrative employees, the court rejected the argument that the exemption applied because of Reps' impact on company's financial success). Indeed, if the "matters of significance" standard were interpreted to include any actions that in some manner "move market share" or "drive the business," it would potentially broaden the exemption to include the host of employees whose successful performance of their duties contributes in some way to the success of the company; such an interpretation would effectively swallow the "rule" requiring the payment of the minimum wage and overtime compensation under the FLSA.[16]

[16] It is worth noting that the district court in *In Re Novartis*

4. In sum, as with the outside sales exemption, the district court's administrative exemption ruling in this case is unpersuasive in its attempt to "back-fit" the FLSA regulations into the pharmaceutical industry's practices. The facts are clear that, within the stringent restrictions on Reps' work activities, the Reps' discretion is limited to such matters as what time of day to visit a particular doctor, the manner in

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did not rely upon the First Circuit's decision in *Reich v. John Alden Life Insurance Company*, 126 F.3d 1, 9 (1st Cir. 1997), to show that the Reps exercised discretion and independent judgment concerning matters of significance; rather, it used *Alden* to show that the Reps performed office or non-manual work directly related to management or general business operations. *See* 593 F. Supp. 2d at 655-58. In any event, the decision in *Alden* can be distinguished on its facts. In *Alden*, marketing representatives working for a company that designed, created, and sold insurance products (primarily for businesses that were purchasing group coverage for their employees) did not sell through direct contacts with the ultimate consumers but, rather, relied upon licensed independent insurance agents to make sales of the employer's financial products. The marketing representatives were responsible for maintaining contact with hundreds of these independent sales agents to keep them apprised of the employer's financial products, inform them of changes in prices, and discuss how the product might fit their customer's needs (they would also inform the employer of what they learned from these agents, e.g., regarding a competitor's products or pricing). The First Circuit concluded that these marketing representatives were administratively exempt. Significantly, however, the First Circuit, in concluding that the discretion and independent judgment prong was met, noted that the marketing representatives "do not use prepared scripts or read from a required verbatim statement, nor do they operate within the contours of a prescribed technique or 'sales pitch.'" *John Alden Life Ins. Co.*, 126 F.3d at 14. By contrast, the Reps in the instant case are provided with scripts, which they are required to use, to help them deliver the requisite "core message." *In Re Novartis*, 593 F. Supp. 2d at 641.

which to approach the doctor based on the doctor's personality, and how best to deliver (i.e., to "fit in") the NPC's "core message" for a particular drug given the time constraints of a visit. To the extent that the Department's administrative exemption regulations instruct that "[t]he phrase 'discretion and independent judgment' must be applied in the light of all the facts involved in the particular employment situation in which the question arises," *see* 29 C.F.R. 541.202(b), this guidance does not extend to ignoring the clear parameters and requirements of the regulations. *See, e.g.*, *Kuzinski*, 604 F. Supp. 2d at 397-99. The Seventh Circuit'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 within a highly regulated industry. In *Kennedy*, the Seventh Circuit concluded that, despite the heavily regulated nature of the nuclear power industry, work planners whose "job is to come up with a set of instructions that will remedy reported problems around the plant" were exempt. 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, judges and Work Planners must use their independent judgment to determine how best to respond." *Id.*

The work planners, although heavily regulated, thus had the discretion to develop new ways to resolve issues. The NPC Reps, on the other hand, do not have such discretion; NPC provides them with specific instructions for each aspect of their job, including scripted responses for physician concerns, from which NPC does not permit them to deviate. They therefore should not be deemed to exercise discretion and independent judgment regarding matters of significance.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision.

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(s)*/s/ Jennifer R. Marion*

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Dated: October 13, 2009

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I hereby certify this 13th day of October 2009 that:

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CERTIFICATE OF SERVICE

I certify that copies of the Secretary's amicus brief have been served on October 13, 2009 on the following:

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