No. 09-3545

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ADRIAN PARKER, *et al.*
Plaintiffs-Appellants,

v.

NUTRISYSTEM, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

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

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INTEREST OF THE SECRETARY OF LABOR

Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the Plaintiffs-Appellants. The Secretary administers and enforces the Fair Labor Standards Act ("FLSA" or "Act"), *see* 29 U.S.C. 204, 211(a), 216(c), 217, and has a compelling interest in ensuring that it is interpreted correctly. Specifically, the Secretary will argue here, contrary to the conclusions of the district court, that state law class claims are not incompatible with the FLSA, and that the FLSA's section 7(i) exemption for commission-paid employees of retail and service establishments, 29 U.S.C. 207(i), does not

apply to flat-fee compensation schemes that bear no relationship to the cost of the goods sold.

STATEMENT OF THE ISSUES

1. Whether the provision for collective actions under section 16(b) of the FLSA, 29 U.S.C. 216(b), is incompatible with a class action under Federal Rule of Civil Procedure 23 of state law claims analogous to the FLSA, thereby precluding the exercise of supplemental jurisdiction.

2. Whether the district court correctly held that NutriSystem call center employees, who are paid a flat fee per sale regardless of the cost of the sale, were exempt from the overtime compensation requirements under the FLSA pursuant to the retail or service establishment exemption for commission-paid employees at 29 U.S.C. 207(i).

STATEMENT OF THE CASE

1. Sales of NutriSystem's 28-day weight-loss program (based on pre-packaged meals) by its call center employees are the focus of this litigation. *See Parker v. NutriSystem, Inc.*, No. 08-1508, slip op. at 4 n.1 (E.D. Pa. July 30, 2009) ("July 2009 slip op."). The cost of the 28-day program varies depending on the meal type and whether the customer orders for only one month or orders the "auto-ship" method (where the customer signs up to receive monthly shipments and is automatically charged on a monthly basis until the customer

cancels, typically within three months). *See id.* at 2, 19. In 2008, the women's 28-day meal plan, a "silver" plan for older customers, a diabetic plan, and a vegetarian plan each cost $342.36, or $293.72 under the auto-ship method, and the men's 28-day plan cost $371.50, or $319.95 under the auto-ship method. *See id.* at 2. The price of the plans changes based on market conditions. *See id.* at 3.

Under the NutriSystem compensation plan that has been in effect since March 2005, call center employees receive the larger of either their hourly pay ($10 per hour for the first 40 hours per week, and $15 per hour for overtime) or their flat-rate payments per sale of NutriSystem's weight loss program. *See* July 2009 slip. op. at 2, 4. The flat rates are $18 for each 28-day plan sold on an incoming call during daytime hours; $25 for each 28-day plan sold on an incoming call during evening or weekend hours; and $40 for each 28-day plan sold on an outbound call or during the overnight shift. *See id.*

2. Plaintiff Adrian Parker brought an FLSA section 16(b) collective action and a Pennsylvania Minimum Wage Act ("PMWA") Federal Rule of Civil Procedure 23 class action in federal district court alleging that he and other current and former NutriSystem call center employees were entitled to overtime compensation (time and one-half for all hours in excess of 40 per week under both laws) for the weeks in which they worked

more than 40 hours. *See* July 2009 slip op. at 1; *Parker v. NutriSystem, Inc.*, No. 08-1508, slip op. at 1-2 (E.D. Pa. July 25, 2008) ("July 2008 slip. op.").

On July 25, 2008, the district court granted NutriSystem's motion to dismiss Parker's PMWA state class action overtime claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* July 2008 slip op. The court declined to exercise supplemental jurisdiction over the state law class claim "because the opt-out mechanism of a Rule 23 class action is 'inherently incompatible' with the opt-in scheme specified by Congress with respect to FLSA collective actions." *Id.* at 2. In so doing, the court adopted the reasoning of "inherent incompatibility" cases such as *Woodard v. FedEx Freight E., Inc.*, 250 F.R.D. 178 (M.D. Pa. 2008), and *Ramsey v. Ryan Beck & Co.*, No. 07-0635, 2007 WL 2234567 (E.D. Pa. Aug. 1, 2007). *See* July 2008 slip. op. at 2. On July 30, 2009, the district court granted NutriSystem's summary judgment motion, concluding that the call center employees were paid on a commission basis and were therefore exempt from overtime requirements under both section 7(i) of the FLSA and a nearly identical PMWA retail commission exemption. *See* July 2009 slip op. at 21-23.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY DECLINED TO EXERCISE SUPPLEMENTAL JURISDICTION BASED ON THE PURPORTED "INHERENT INCOMPATIBILITY" OF FLSA SECTION 16(b) AND RULE 23

1. As a threshold matter, 28 U.S.C. 1367 reflects a strong presumption by Congress in favor of having related federal and state law claims proceed together in one federal court lawsuit. Specifically, a federal court "shall have supplemental jurisdiction" over all state law claims that are "so related" to the federal law claims over which the federal court has original jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution," unless an exception specified by the rule applies. 28 U.S.C. 1367(a); *see Lindsay v. Gov't Employees Ins. Co.,* 448 F.3d 416, 421 (D.C. Cir. 2006).[1]

[1] The few exceptions to the exercise of supplemental jurisdiction set forth in 28 U.S.C. 1367 are not likely to apply in dual actions asserting FLSA and state law wage claims. Section 1367(a) provides that a district court shall not have supplemental jurisdiction if a federal statute provides otherwise; the FLSA contains no such provision. *See* 29 U.S.C. 201, *et seq.*; *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 308 n.10 (3d Cir. 2003). The exceptions in section 1367(b) apply only in actions based on diversity jurisdiction, which is not the case in actions involving the FLSA. The discretionary exceptions set forth in section 1367(c) -- if the claim raises a novel or complex issue; if the claim substantially predominates over the claim over which the district court has original jurisdiction; if the district court has dismissed all claims over which it has original jurisdiction; or if, given exceptional circumstances, there are compelling reasons for

In *De Asencio*, this Court observed that federal and state law claims are sufficiently related when they share a "common nucleus of operative fact," and recognized that FLSA and state wage law claims based on whether employees should have been paid for a particular activity derive from the same nucleus of operative fact. 342 F.3d at 308. In addition, this Court specifically stated, before denying supplemental jurisdiction under 28 U.S.C. 1367(c)(2) based on a determination that the state wage law claim predominated over the FLSA claim, that "the interest in joining these [federal and state] actions is strong" and that the district court could "efficiently manage the overall litigation." 342 F.3d at 310. Indeed, this Court has noted that "when the same acts violate parallel federal and state laws, the common nucleus of operative facts is obvious and federal courts routinely exercise supplemental jurisdiction over the state law claims." *Lyon v. Whisman*, 45 F.3d 758, 761 (3d Cir. 1995). This Court has further observed that "district courts will exercise supplemental jurisdiction if the federal and state claims 'are merely alternative theories of recovery based on the same acts.'" *Id.* (quoting *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 479 (3d Cir. 1979)).

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declining jurisdiction -- are more fact-specific and are addressed *infra*.

2. The FLSA is a remedial statute that was enacted in 1938 in response to Congress's finding that there existed "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . ." 29 U.S.C. 202(a). Among other protections, the FLSA requires covered employers to pay non-exempt employees a minimum wage for each hour worked and a wage at least one and one-half times the regular rate for each hour worked over 40 in a workweek. *See* 29 U.S.C. 206, 207.

Enactment of the FLSA, however, was not an attempt by Congress to exclusively regulate the payment of employees' wages. Indeed, section 18(a) of the Act contains a "savings clause" making clear that states and localities may enact wage laws that are broader and more protective than the FLSA's provisions. *See* 29 U.S.C. 218(a); *see also Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1151 (9th Cir. 2000) (section 18(a) demonstrates that the FLSA is not the exclusive remedy in the area of wage payment and that Congress did not intend to occupy the entire field); *Overnite Transp. Co. v. Tianti*, 926 F.2d 220, 222 (2d Cir. 1991) (section 18(a) demonstrates Congress's intent to allow state regulation to coexist with the FLSA; state overtime law is not preempted by the FLSA). "The intent of § 218(a) is to leave undisturbed 'the traditional exercise of the states' police powers with respect to wages and

hours more generous than the federal standards.'" *Lehman v. Legg Mason, Inc.*, 532 F. Supp. 2d 726, 731 (M.D. Pa. 2007) (quoting *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1421 (9th Cir. 1990)).[2]

3. Furthermore, neither the text nor the legislative history of section 16(b) supports the district court's conclusion that the provision for an opt-in collective action under the Act is incompatible with a Rule 23 opt-out class action brought under analogous state wage laws. Section 16(b) provides that one or more employees may bring an action under the FLSA's minimum wage, overtime, or anti-retaliation provisions "in behalf of himself or themselves and other employees similarly situated," and that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party." 29 U.S.C. 216(b) (reprinted in Addendum 1 to this Brief).

Section 16(b) applies only to three specific FLSA actions: minimum wage, overtime, and anti-retaliation claims; no state or other claims are mentioned at all. *See* 29 U.S.C. 216(b). Further, section 16(b) plainly authorizes employees to bring

[2] Many state wage payment laws parallel the FLSA, although they may provide for a higher minimum wage, require overtime in more circumstances, provide a higher overtime rate, contain a longer statute of limitations, and/or cover more employees than the FLSA. *See generally*, ABA Section of Labor & Employment Law, *Wage and Hour Laws, A State-by-State Survey* (Gregory K. McGillivary ed., 2004 & Supp. 2008).

claims on behalf of themselves and others who are similarly situated for violations of those FLSA provisions specifically identified in section 16(b). *See id*. Likewise, its opt-in requirement applies only to "any such action" –- in other words, only to actions brought for violations of those FLSA provisions specifically identified in section 16(b). *See id*. There is nothing in the text of section 16(b) regarding state wage law claims -- whether they may be brought in federal court, whether federal courts may exercise supplemental jurisdiction over them, or whether federal courts may certify them as class actions. *See id*. Thus, by its plain terms, section 16(b)'s opt-in provision does not apply to state wage law claims.

4. The legislative history of section 16(b) demonstrates Congress's intent to restrict FLSA actions, not to prohibit Rule 23 state wage law class actions in federal courts. Section 16(b) originally permitted an employee to bring a collective action on behalf of similarly situated employees, or to "designate an agent or representative" to bring a representative action on behalf of similarly situated employees. *See* Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (1938). It was silent on whether employees who were not named plaintiffs were required to affirmatively opt in to a collective or representative action. *See id*.

The opt-in provision was added in 1947 by the Portal-to-Portal Act. The impetus for the Portal-to-Portal Act was the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), in which it ruled that time spent by employees performing certain preliminary activities was time worked and thus compensable under the FLSA. *See id.* at 690-93. Influenced by what it perceived as a wave of employee lawsuits following *Mt. Clemens* and its concern that these lawsuits were a threat to the financial well-being of U.S. industry, Congress enacted the Portal-to-Portal Act to restrict FLSA lawsuits. *See* Portal-to-Portal Act, Pub. L. No. 80-49, § 1, 61 Stat. 84, 84-85 (1947). The Portal-to-Portal Act eliminated representative actions (actions by non-employees designated by the employees); collective actions (actions by employees on behalf of themselves and other employees) remained permissible, although they were thereafter subject to an express opt-in requirement. *See id.*, § 5, 61 Stat. at 87 (reprinted in Addendum 2 to this Brief). The plain text of the Portal-to-Portal Act makes clear that the opt-in requirement "shall be applicable only with respect to actions commenced under the Fair Labor Standards Act of 1938." *Id*. Moreover, the reports issued by Congress in connection with its enactment of the Portal-to-Portal Act contain no suggestion of any intent to prevent class certification of, or the exercise of supplemental jurisdiction over, state wage law claims. *See*

Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes, H.R. Rep. No. 80-71 (1947); Exempting Employers from Liability for Portal-to-Portal Wages in Certain Cases, S. Rep. No. 80-48 (1947); Portal-to-Portal Act of 1947, H.R. Conf. Rep. No. 80-326 (1947).

In fact, the lack of any basis for concluding that Congress's enactment of the opt-in provision for FLSA collective actions was somehow a choice against, or a relegation of, the opt-out process of Rule 23 is further demonstrated by the fact that, at the time, Rule 23 did not even contain an opt-out provision; the modern opt-out version of Rule 23 was not enacted until 1966 -- almost 20 years after the passage of the Portal-to-Portal Act. *See* Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 Buff. L. Rev. 53, 174-75 (1991).[3] Significantly, the Advisory Committee Notes accompanying the 1966 amendments to Rule 23 state that "[t]he present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended." Fed. R. Civ. P. 23 advisory committee notes (1966). The fact that the Rule 23 amendments made no effort to reconcile the FLSA's opt-in process

[3] "Addition of the opt-in rule brought FLSA section 216(b) into conformity with the Rule 23 opt-in requirement in effect at the time, and made explicit what courts at the time had already [inferred] from the statute." Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkeley J. Emp. & Lab. L. 269, 280 (2008).

and Rule 23's opt-out process further confirms that FLSA collective actions and Rule 23 class actions are not incompatible.

5. In *De Asencio*, this Court did not expressly address the issue of the supposed incompatibility between a section 16(b) collective action and a Rule 23 state wage law class action. Rather, this Court's conclusion in *De Asencio* that the district court abused its discretion by exercising supplemental jurisdiction over a Rule 23 opt-out state wage law class action brought concurrently with a section 16(b) opt-in collective action was based primarily on two findings that were specific to that case.[4] First, this Court noted that the state law claim at issue was not based on a statute entitling employees to a minimum wage and overtime compensation that paralleled the FLSA but, instead, was based on the Pennsylvania Wage Payment and Collection Law, which provides a remedy when employers breach a contract to pay earned wages. *See De Asencio*, 342 F.3d at 309-10. The employees asserted that the "contract" breached by the employer was an implied oral contract, and Pennsylvania courts had never addressed whether such a claim was permissible. *See*

[4] This Court in *De Asencio* reviewed the history behind the enactment of section 16(b) and stated that in 1947, with the passage of the Portal to Portal Act, "Congress chose to limit the scope of representative actions for overtime pay and minimum wage violations." 342 F.3d at 306, 310. As discussed *supra*, however, there is no basis for concluding that Congress made that "choice" for anything other than FLSA actions.

id. This Court therefore viewed the state law claim as presenting novel legal issues that would require more proof and testimony as compared to the "more straightforward" FLSA claim. *See id.* Second, although this Court acknowledged that the "predominance" inquiry under 28 U.S.C. 1367(c)(2) goes to the types of claims as opposed to the number of claimants (*see Lindsay*, 448 F.3d at 425), it was concerned that the disparity in numbers between the FLSA opt-in class (447 employees) and the Rule 23 opt-out class (4,100 employees) would substantially transform the case "by causing the federal tail represented by a comparatively small number of plaintiffs to wag what is in substance a state dog." *See* 342 F.3d at 305, 311.

The present case is readily distinguishable from *De Asencio*. As noted *supra*, the "dispositive" supplemental jurisdiction concern in *De Asencio* was the "predomination" of the state law class action with its novel state law questions and different standards of proof. *See* 342 F.3d at 309. Here, there is no such concern -- the PMWA state law overtime claim is parallel to the FLSA overtime claim, and both arise from NutriSystem's classification of the employees as exempt from the overtime requirements.[5] Consequently, under a proper

[5] At the time the district court disposed of Parker's state law cause of action, Parker was the sole plaintiff in the state class, and approximately 15 plaintiffs had opted into the FLSA collective action. *See* Dist. Ct. Dckt. Sht.

supplemental jurisdiction analysis, there is no apparent reason for the district court to have refused to exercise jurisdiction over the PMWA claim in this case. *See Lyon*, 45 F.3d at 761.[6]

Indeed, many district courts within the Third Circuit since *De Asencio* have rejected the "incompatibility" argument and have allowed dual actions to proceed. Thus, in *Lehman*, 532 F. Supp. 2d at 731, the district court stated that "[t]his court is persuaded that nothing in the plain text of the FLSA reflects Congressional intent to limit the substantive remedies available to an employee under state law, nor to limit the procedural mechanism by which such a remedy may be pursued." In *Di Nardo v. Ned Stevens Gutter Cleaning & Installation, Inc.*, No. 07-5529, 2008 WL 565765, at *1-2 (D.N.J. Feb. 28, 2008), the district court denied a motion to dismiss the state wage law class claims on inherent incompatibility grounds. And, in *Freeman v. Hoffman-La Roche, Inc.*, No. 07-1503, 2007 WL 4440875, at *2-3 (D.N.J. Dec. 18, 2007), the district court rejected the

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[6] Rather than conducting a proper, case-specific supplemental jurisdiction analysis, *see De Asencio*, 342 F.3d at 312, the district court adopted the reasoning of cases such as *Woodard*. The district court in *Woodard* turned the logic of *De Asencio* on its head by refusing to exercise supplemental jurisdiction over a PMWA overtime claim that mirrored a concurrently-brought FLSA overtime claim, concluding that the purported "incompatibility" between section 16(b) collective actions and Rule 23 class actions "is accentuated where the two schemes are utilized to assert parallel claims." *Woodard*, 250 F.R.D. at 188.

argument that inherent incompatibility requires dismissal of state wage law class claims and deferred its supplemental jurisdiction analysis until class certification was sought. *But see, e.g., Burkhart-Deal v. Citifinancial, Inc.*, No. 7-1747, 2008 WL 2357735, at *2 (W.D. Pa. June 5, 2008) (dismissing state law class claims based on "inherent incompatibility" in accordance with Third Circuit district court caselaw, "[a]bsent clear guidance from our Court of Appeals"); *Woodard*, 250 F.R.D. at 187-88 (declining to exercise supplemental jurisdiction pursuant to section 1367(c)(4) because it found incompatibility "accentuated where the two schemes are utilized to assert parallel claims"); *Ramsey*, 2007 WL 2234567, at *4 (declining to exercise supplemental jurisdiction based on incompatibility and the novel and complex questions of state law presented in plaintiffs' Rule 23 state law claim).

6. Outside the Third Circuit, the weight of the case law supports the conclusion that there is no incompatibility between a section 16(b) opt-in collective action and a Rule 23 opt-out state wage law class action. In the only appellate decision to rule directly on the issue thus far, the D.C. Circuit squarely rejected the incompatibility argument and reversed the district court's decision that supplemental jurisdiction should not be exercised over the state wage law class claims. *See Lindsay*,

448 F.3d at 421-25.[7] The D.C. Circuit stated that, under 28 U.S.C. 1367(a), supplemental jurisdiction over state law claims that are sufficiently related to the underlying federal claims is mandatory unless a federal statute expressly provides otherwise or the exceptions set forth elsewhere in 28 U.S.C. 1367 apply. *See* 448 F.3d at 421. According to the court, neither the text of section 16(b) nor the intent of that opt-in provision prohibits the exercise of supplemental jurisdiction over state law wage claims. *See id.* at 421-22. The D.C. Circuit acknowledged the difference between section 16(b)'s opt-in provision and Rule 23's opt-out provision, but stated that "we doubt that a mere procedural difference can curtail section 1367's jurisdictional sweep." *Id*. at 424 (emphases in original).

The court of appeals in *Lindsay* then looked to see whether any of the four factors enumerated in 28 U.S.C. 1367(c), pursuant to which a court may decline to exercise supplemental jurisdiction, *see supra*, was present. *See* 448 F.3d at 424-25. The court concluded that the first three factors in 28 U.S.C.

[7] The question of the incompatibility between section 16(b) and Rule 23, in the context of a refusal to certify a Rule 23 state wage law class action, is currently before the Seventh Circuit in *Ervin, et al. v. OS Rest. Servs., Inc.*, No. 09-3029. The Secretary has also filed an *amicus curiae* brief in support of the employees in that case, setting forth her position that the section 16(b) opt-in requirement is not inherently incompatible with state wage law opt-out class actions under Rule 23.

1367(c) were not present and specifically determined that "[p]redomination under [28 U.S.C.] 1367(c)(2) relates to the type of claim and here the state law claims essentially replicate the FLSA claims –- they plainly do not predominate." 448 F.3d at 424-25. The D.C. Circuit permitted the district court to consider on remand whether to decline to exercise supplemental jurisdiction under 28 U.S.C. 1367(c)(4), which provides that such jurisdiction may be declined in exceptional circumstances when there are compelling reasons, but expressly prohibited the district court from relying on the difference between section 16(b)'s opt-in provision and Rule 23's opt-out provision to conclude that there is a compelling reason to decline jurisdiction. *See* 448 F.3d at 425.

The clear majority of district courts outside the Third Circuit have rejected the principle of "incompatibility." Thus, in *Esparza v. Two Jinn, Inc.*, No. SACV 09-0099, 2009 WL 2912657, at *3 (C.D. Cal. Sept. 9, 2009), the district court denied the employer's motion for judgment on the pleadings, concluding that an FLSA opt-in collective action and a state wage law class opt-out action can coexist. In *Perkins v. S. New England Tel. Co.*, No. 3:07-cv-967, 2009 WL 350604, at *3 (D. Conn. Feb. 12, 2009), the district court denied the employer's motion to dismiss/strike state law class actions, stating that an FLSA collective action and a Rule 23 opt-out class action may coexist

-- the court "knows of no rule of law that provides that it must dismiss state class allegations based on 'incompatibility' with parallel federal claims." Further, in *Osby v. Citigroup, Inc.*, No. 07-cv-06085, 2008 WL 2074102, at *2-3 (W.D. Mo. May 14, 2008), the district court rejected an argument that a Rule 23 class action conflicts with a section 16(b) collective action, stating that there is no reason that they cannot be fairly adjudicated together. And, in *Westerfield v. Washington Mut. Bank*, No. 06-CV-2817, 2007 WL 2162989, at *2 (E.D.N.Y. July 26, 2007), the district court stated that the assertion of incompatibility between section 16(b) and Rule 23 is "an imaginary legal doctrine." *See, e.g., Salazar v. Agriprocessors, Inc.*, 527 F. Supp.2d 873, 880-86 (N.D. Iowa 2007); *Bamonte v. City of Mesa*, No. CV 06-01860, 2007 WL 2022011, at *2-5 (D. Ariz. July 10, 2007); *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 367-75 (S.D.N.Y. 2007); *Frank v. Gold'n Plump Poultry, Inc.*, No. Civ. 041018, 2005 WL 2240336, at *5 (D. Minn. Sept. 14, 2005); *Chavez v. IBP, Inc.*, No. CT-01-5093, 2002 WL 31662302, at *1-2 (E.D. Wash. Oct. 28, 2002); *Beltran-Benitez v. Sea Safari, Ltd.*, 180 F. Supp.2d 772, 774 (E.D.N.C. 2001); *but see, e.g., In re American Family Mut. Ins. Co. Overtime Pay Litig.*, 638 F. Supp. 2d 1290, 1298-99 (D. Colo. 2009) (granting motion to dismiss state wage law class allegations; exercising supplemental jurisdiction over them

would thwart Congress's intent behind section 16(b)'s opt-in provision); *Williams v. Trendwest Resorts, Inc.*, No. 2:05-CV-0605, 2007 WL 2429149, at *3-4 (D. Nev. Aug. 20, 2007) (dismissing state law class claims after certifying FLSA collective action because "the class action mechanisms of the FLSA and Rule 23 are incompatible").[8]

In sum, the text and legislative history of section 16(b), as well as the weight of the caselaw, argues against a conclusion of incompatibility between section 16(b) and Rule 23.

II. THE SECTION 7(i) RETAIL OR SERVICE ESTABLISHMENT EXEMPTION FOR EMPLOYEES PAID ON A COMMISSION BASIS DOES NOT APPLY TO FLAT-FEE PAYMENTS THAT BEAR NO RELATIONSHIP TO THE COST OF THE GOODS SOLD

1. Section 7(i) was originally enacted in 1961, when Congress amended the Fair Labor Standards Act to provide coverage for "employees of large enterprises engaged in retail trade or service[.]" Pub. L. No. 87-30, 75 Stat. 65 (1961). As originally enacted, the exemption provided that a retail or service establishment employer would not violate the overtime requirements of the Act with respect to an employee who worked

[8] As the district court in *Ervin* acknowledged, there is a split among district courts in the Seventh Circuit. *Compare*, *e.g.*, *Musch v. Domtar Indus., Inc.*, 252 F.R.D. 456, 458-62 (W.D. Wis. 2008) (certifying FLSA collective action and Rule 23 class of state wage claims) *with Ervin v. OS Rest. Servs., Inc.*, No. 08 C 1091, 2009 WL 1904544, at *1-3 (N.D. Ill. July 1, 2009) (noting clear incompatibility between section 16(b) and Rule 23, thereby precluding certification of the state law wage claims), *appeal docketed*, No. 09-3029 (7th Cir. Aug. 17, 2009).

overtime if: "(1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services." *Id.* § 6(g), 75 Stat. at 70. In 1966, Congress added the following sentence to the section 7(i) exemption: "In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee." Pub. L. No. 89-601, § 402, 80 Stat. 830, 842 (1966) (the current version of section 7(i), 29 U.S.C. 207(i), is reprinted in Addendum 3 to this Brief). There is, however, no legislative history that sheds light on the inclusion of this sentence, *see Herman v. Suwannee Swifty Stores, Inc.*, 19 F. Supp. 2d 1365, 1369-72 (M.D. Ga. 1998), or the meaning of the term "commission," *see Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 508 (7th Cir. 2007).[9]

[9] The Act's "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *see Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir.), *cert. denied*, 129 S. Ct. 763 (2008).

2. In 1970, the Department of Labor ("Department") issued interpretive regulations to provide guidance on the 1966 Amendments. *See* 35 Fed. Reg. 5856 (April 9, 1970). These regulations provide a non-exhaustive list of various common compensation methods for retail or service establishment employees. *See* 29 C.F.R. 779.413. Significantly, among these methods, a "[s]traight commission" is described as "a flat percentage on each dollar of sales [the employee] makes." 29 C.F.R. 779.413(a)(4); *see* 29 C.F.R. 779.414 (linking commissions generally to the sale of big ticket items). Thus, although the regulations do not define explicitly what a "commission" is, they highlight the need for some correlation between an employee's compensation and the cost of the goods and services sold.

3. The Department has consistently viewed a "commission" for purposes of the section 7(i) exemption as a sum that is linked to the cost of the product sold or services provided to the customer. The relationship is typically, but not exclusively, expressed as a percentage of sales. *See* U.S. Dep't of Labor, Glossary of Current Industrial Relations & Wage Terms, Bulletin No. 1438, at 15 (1965) (defining "commission earnings" as "[c]ompensation to salespeople based on a predetermined percentage of the value of sales"); U.S. Dep't of Labor, Glossary of Currently Used Wage Terms, Bulletin No. 983, at 4

(1950) (defining "commission earnings" as "compensation to sales personnel based on a percentage of value of sales") (attached as Addendum 4).

The percentage method also is referred to approvingly in the Department's Wage and Hour Division Field Operations Handbook ("FOH"). *See* FOH § 21h04(a) ("Some retail or service establishments compute an employee's compensation on the basis of percentage of the charge to the customer . . . . Compensation computed in this manner 'represents commissions on goods or services' for purposes of applying Sec[tion] 7(i)."). In addition, the FOH states that "[c]ommissions, for purposes of Sec[tion] 7(i), usually denotes a <u>percentage</u> of the amount of monies paid out or received." FOH § 21h04(c) (emphasis in original). By contrast, the Department has consistently viewed straight flat-fee payments as being synonymous with piece-rate compensation, which is governed by the piece-rate overtime requirements. *See* 29 C.F.R. 778.111. Thus, flat fees "which are paid without regard to the value of the service performed do not represent 'commissions on goods or services' for purposes of Sec[tion] 7(i). Such employees are considered to be compensated on a piece rate basis and not on the basis of commissions." FOH § 21h04(c).

The Department's Wage and Hour Division opinion letters addressing commissions have consistently required a degree of

proportionality (generally as measured by a percentage) between the payment an employee receives and the amount or cost of the sale or services provided to the customer. Thus, a service charge that was a specific percentage of the bill levied on customers of hotels, motels, and restaurants was deemed to be a "commission" (and therefore exempted waiters and waitresses employed by such businesses from overtime compensation) because "it is keyed to sales in the sense that it bears a direct relationship to the goods and services which an establishment sells." DOL Op. Ltr. WH-379, 1976 WL 41731 (Mar. 26, 1976); *see* DOL Op. Ltr., 1997 WL 971257 (Aug. 29, 1997) (same). On the other hand, the Department has opined that a flat fee of $1.70-$3.00 paid to employees for each used car they cleaned for resale was "paid without regard to the value of the service performed," and therefore did not constitute "commissions on goods or services." DOL Op. Ltr., 1982 WL 609715 (Oct. 14, 1982). Instead, the Department advised that those employees would be subject to the FLSA overtime requirements, computed in accordance with 29 C.F.R. 778.111, the piece-rate overtime regulation. *See id.*

In another opinion letter, the Department stated that if alarm system installers "were to be compensated on a percentage of the sales price of the alarm systems they installed[,] [s]uch a method of payment would constitute payment on a commission

basis for purposes of section 7(i) of the FLSA." DOL Op. Ltr., 1996 WL 1031770 (Apr. 3, 1996). However, if the installers were "paid a flat fee per installation, we would not consider such a payment to be a commission payment for purposes of section 7(i) of the FLSA." *Id.* In yet another opinion letter, this one involving flat fees paid to gym membership sales employees and gym instructors, the Department stated that "[f]lat fees 'paid without regard to the value of the service performed do not represent "commissions on goods or services" for purposes of Sec[tion] 7(i).'" DOL Op. Ltr. FLSA2005-53, 2005 WL 3308624 (Nov. 14, 2005) (quoting FOH § 21h04(c)). The letter opines that instructors who were paid based on a "percentage of a 'club's revenue per lesson or session'" would qualify for the section 7(i) exemption. *Id.; see* DOL Op. Ltr. FLSA2006-33, 2006 WL 3227788 (Sept. 14, 2006) (commissions usually denote a percentage of money paid or received).

The Department also has approved a certain method of payment (the so-called "flag-rate" or "flat rate" method) as meeting the section 7(i) definition of commission in the automobile detailing and repair industry, whereby mechanics receive a flat rate per car serviced based on the number of hours assigned to that job. *See* FOH § 21h04(d). That provision explains:

> Each job is assigned a certain number of hours for which the customer is charged, regardless of the actual time it takes to perform the job. The employee is given a

> certain proportion of that charge expressed in terms of so many dollars and cents per "flat rate" hour rather than in terms of a percentage of the charge to the customer. . . .

FOH § 21h04(d). Such compensation plans qualify for the section 7(i) commission exemption because there is a correlation between the labor hours credited to an employee for a particular task and the labor hours charged to the customer. *See, e.g.,* DOL Op. Ltr. FLSA2006-15NA, 2006 WL 4512957 (June 29, 2006) ("[I]t is our opinion that [flag hours] payments under the plan represent 'commissions on goods or services' because the amount of the payment appears to be related to the value of the service performed.").[10]

4. The Department's consistent view that commission payments must be related to the cost passed on to the customer is entitled to deference. *See Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1156-57 (2008) (deference for EEOC's statutory interpretation embodied in policy statements contained in compliance manual and internal directives); *Christensen v.*

[10] The Department's interpretation is supported by dictionary definitions of "commission." *See, e.g., Black's Law Dictionary* 306 (9th ed. 2009) ("A fee paid to an agent or employee for a particular transaction, usu. as a percentage of the money received from the transaction."); *Webster's Third New International Dictionary* 457 (1986) ("[A] fee paid to an agent or employee for transacting a piece of business or performing a service . . . esp: a percentage of the money received in a sale or other transaction paid to the agent responsible for the business."); *see generally Chao v. Cmty. Trust Co.*, 474 F.3d 75, 85 (3d Cir. 2007) (reliance on dictionary definition by this Court).

Harris County, 529 U.S. 576, 587 (2000) (Department's opinion letters, agency manuals, and enforcement guidelines are due "respect" under *Skidmore* to the extent they have the "power to persuade"); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (weight of deference accorded to agency's judgment and guidance depends upon, *inter alia*, the consistency of its pronouncements); *see also Donovan v. Tavern Talent & Placements, Inc.*, No. 84-F-401, 1986 WL 32746, at *5 (D. Colo. Jan. 8, 1986) (where Department had maintained an interpretation for over ten years, court was obligated to give "great weight" to the position articulated in the opinion letters).

5. The Department's interpretation as to what constitutes a commission for purposes of the section 7(i) exemption is supported by the limited caselaw on this issue. For example, the Sixth Circuit and a district court in Washington rejected flat rate schemes where the amount charged to the customer varied but the flat rate paid to the employee never varied, reasoning that this system did not comport with the Department's interpretation or the common understanding of a "commission" as having some kind of proportional relationship between the amount charged to the customer and the amount paid to the employee. *See Wilks v. Pep Boys*, 278 Fed. Appx. 488, 489 (6th Cir. 2008), *aff'g* No. 3:02-0837, 2006 WL 2821700 (M.D. Tenn. Sept. 26, 2006); *Huntley v. Bonner's, Inc.*, No. C02-1004L, 2003 WL

24133000, at *3 (W.D. Wash. Aug. 14, 2003). The Sixth Circuit adopted the district court's conclusion that "as a matter of law . . . to constitute a commission under 29 U.S.C. § 207(i), the employer must establish some proportionality between the compensation to the employees and the amount charged to the customer." *Wilks*, 278 Fed. Appx. at 489. The court of appeals explicitly approved of the district court's detailed analysis, which gave *Skidmore* deference to the Department's opinion letters -- "Each of these documents seems to reflect a DOL requirement that, in order to be considered a commission under Section 7(i), an employee's compensation must somehow be linked to the cost passed on to the customer" -- and concluded that "wages paid to flat-rate employees must be at least somewhat proportional to the charges passed on to customers." *Wilks,* 2006 WL 2821700, at *14-15. Similarly, after examining the Department's section 7(i) guidance, the district court in *Huntley* explained that "[a]bsent some relationship between the amount charged to the customer and the amount paid to the employee, defendant's system is more akin to piece work, where the technician is paid a set amount per task and the employer is free to keep whatever additional charges it is able to impose on the customer. Such payments are not 'commissions' under the FLSA." 2003 WL 24133000, at *3.

Additionally, consistent with the Department's interpretation, in *Mechmet v. Four Seasons Hotel, Ltd.*, 825 F.2d 1173, 1177 (7th Cir. 1987), the Seventh Circuit concluded that banquet employees who earned a share of an 18 percent service charge were exempt from the overtime requirements under section 7(i), with Judge Posner observing that a commission "in common parlance often just means a percentage-based charge or fee". *See Cantu-Thacker v. Rover Oaks, Inc.*, No. H-08-2109, 2009 WL 1883967, at *3-4 (S.D. Tex. June 30, 2009) (concluding that a dog groomer who received 50 percent of the revenue generated from each dog she groomed was exempt under section 7(i)).

Further, the Seventh and Eleventh Circuits have determined that particular flat-rate payment systems utilized to compensate auto repair employees, consistent with FOH § 21h04(d), are valid commission payments. Thus, in *Yi*, 480 F.3d at 508-11, the employer charged its customers based upon the number of hours normally required to do the job, and the mechanics working on the repairs also were paid according to the number of hours established for the jobs, which was "equivalent to paying the team a percentage . . . of the labor component of the price of their service to the customer." In fact, in *Yi*, Judge Posner, writing for the Court, illustrated how the mechanic in question would essentially be earning a percentage of the amount charged to the customer -- "The essence of a commission is that it bases

compensation on sales, for example a percentage of the sales price." *Id.* at 508. And, in *Klinedinst v. Swift Invs., Inc.*, 260 F.3d 1251, 1254-56 (11th Cir. 2001), the court of appeals concluded that compensation based on a pre-determined number of hours multiplied by the auto shop's hourly rate constituted a commission. These cases support the conclusion that payment schemes that exhibit no correlation between the charge to the customer and the employee's earnings do not meet the section 7(i) commission requirement.

6. The district court here considered its conclusion regarding the applicability of section 7(i) to NutriSystem's flat fees to be consistent with the purported purpose of the retail commission exemption -- to "enable[] employers to use a non-hourly compensation system to motivate employees to make more sales and increase company revenue." July 2009 slip op. at 21. As the district court stated in *Wilks*, however, the "incentive-to-hustle" rationale has only been recognized as a "judicially created overlay to the FLSA," rather than in any statute, rule, or administrative interpretation. *See* 2006 WL 2821700, at *15. Moreover, being paid on a piece-rate basis is also "incentivizing." NutriSystem claims that requiring strict proportionality would preclude establishments using a percentage-based commission plan from offering additional compensation to recognize senior staff or to provide incentives

for more difficult sales, and would prevent NutriSystem from running a 24-hour operation because it could no longer set the nighttime commission higher. But neither the Department nor the courts have ever prohibited such additional compensation, provided that there is some degree of proportionality with respect to the "commission" payment itself.

7. In sum, it is undisputed that while the price charged to NutriSystem's customers varied based on the plan and type of order, as well as market conditions, the flat fees paid to the call center employees never varied. Thus, the district court erred by ruling that the NutriSystem call center employees were exempt even though there was no showing that the flat fees paid were in any way related to cost to the customer. Had, for instance, NutriSystem utilized fixed payments that varied according to the differences in the cost to the customer, this would have constituted a commission under section 7(i).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATIONS OF COMPLIANCE

I hereby certify that:

1. As an attorney representing an agency of the United States, I am not required to be a member of the bar of this Court. *See* 3d Cir. L.A.R. 28.3, Committee Comments.

2. This brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Office Word 2003, Courier New 12-point font containing no more than 10.5 characters per inch.

4. The text of the electronic version of this brief is identical to the text of the paper copies of this brief.

5. A virus scan using McAfee VirusScan Enterprise v.8.0.0 was performed on the electronic version of the brief. No virus was detected.

Date: January 21, 2010

s/ Laura Moskowitz_____
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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2010, I electronically filed the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

ADDENDUM 1

29 U.S.C. 216(b), FLSA Right of Action, Collective Action, and Opt-In Process

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

(emphasis added)

ADDENDUM 2

Section 5 of the Portal-to-Portal Act, 61 Stat. 84, 87 (1947)

(a) The second sentence of section 16(b) of the Fair Labor Standards Act of 1938, as amended, is amended to read as follows: "Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

(b) The amendment made by subsection (a) of this section shall be applicable only with respect to actions commenced under the Fair Labor Standards Act of 1938, as amended, on or after the date of the enactment of this Act.

(emphasis added)

ADDENDUM 3

29 U.S.C. 207(i), Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.