

09-1945-CV

United States Court of Appeals for the Second Circuit

EUGENE KUZINSKI, MARC CAMPANO,
JERRY HARRIS and SHAWN JONES,

Plaintiffs-Appellees,

v.

SCHERING CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Connecticut
No. 07-cv-233 (Hon. Janet Bond Arterton)

BRIEF FOR DEFENDANT-APPELLANT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellant Schering Corporation, a private non-governmental party, certifies that its parent company is Schering-Plough Corporation and that no other company owns 10% or more of its stock.

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LOCAL RULE 28.2 PRELIMINARY STATEMENT

The decision appealed from was rendered by Hon. Janet Bond Arterton and is published as *Kuzinski v. Schering Corp.*, 604 F. Supp. 2d 385 (D. Conn. 2009).

JURISDICTIONAL STATEMENT

Plaintiffs-Appellees (“plaintiffs”) filed suit on February 13, 2007 in the United States District Court for the District of Connecticut, alleging a claim under the Fair Labor Standards Act of 1938 (“FLSA” or “Act”), 29 U.S.C. §§ 201 *et seq.* Plaintiffs invoked the district court’s jurisdiction under 28 U.S.C. § 1331.

On March 30, 2009, the district court entered an order denying the motion for summary judgment filed by Defendant-Appellant Schering Corp. (“Schering”), *Kuzinski v. Schering Corp.*, 604 F. Supp. 2d 385 (D. Conn. 2009); SPA 7-38, and, on April 17, it certified the order for interlocutory appeal, *Kuzinski v. Schering Corp.*, 614 F. Supp. 2d 247 (D. Conn. 2009); SPA 39-46. On May 1, Schering filed a petition for interlocutory review in this Court. The petition was granted on August 6. JA 879. The jurisdiction of this Court rests on 28 U.S.C. § 1292(b).

INTRODUCTION

Plaintiffs were previously employed by Schering as pharmaceutical sales representatives. While so employed, they spent their days visiting physicians for the purpose of soliciting commitments to prescribe Schering-branded pharmaceuticals. They were hired because of their experience in sales, were given sales training, described themselves as salespersons, and were compensated in part based on their success in generating sales. By virtue of the legal and ethical rules that govern the sale of pharmaceuticals, however, they did not physically dispense Schering products to the clients they visited and the commitments they secured were not legally binding.

Plaintiffs' lawsuit is one of more than 20 class or collective actions that have been filed against more than 15 different pharmaceutical companies in the last three years, each alleging that pharmaceutical sales representatives were misclassified as exempt from federal and state overtime laws. At issue here is whether pharmaceutical sales representatives fall within the exemption for "outside salesm[e]n" in the FLSA. Numerous district courts—including another district court in this Circuit—have concluded that pharmaceutical sales representatives

are “outside salesm[e]n” under the FLSA and equivalent state laws, and thus are not entitled to overtime wages in addition to their base salaries and incentive pay.

The court below concluded otherwise. It held that Congress intended to distinguish between pharmaceutical sales representatives and other employees who peddle a company’s wares outside the office.

This Court should reverse. In defining “sale”—and, by extension, “salesman”—Congress went to great lengths to emphasize the intended breadth of the term and imposed neither purposeless limitations nor rigid technicalities. The broad language effectuated Congress’s objective, which was to exempt employees who work on their own and earn substantial incentive compensation. The FLSA’s text and purpose thus confirm what an ordinary person would immediately recognize: pharmaceutical sales representatives are outside salespersons.

STATEMENT OF THE ISSUE

Whether pharmaceutical sales representatives, whose primary job duty is to increase market volume and share by persuading physicians to prescribe Schering products for the appropriate patient class, are “employed * * * in the capacity of outside salesm[e]n,” 29 U.S.C.

§ 213(a)(1), and are properly classified as exempt employees under the FLSA.

STATEMENT OF THE CASE

On February 13, 2007, plaintiffs filed a complaint against Schering in district court. As amended on May 8, 2007, the complaint alleges that plaintiffs were entitled to overtime pay under the FLSA and demands declaratory relief, damages, and attorney's fees. JA 1-10. Plaintiffs seek to represent themselves and other current and former pharmaceutical sales representatives through the procedure of an opt-in collective action under Section 16(b) of the FLSA, 29 U.S.C. § 216(b). On May 16, 2008, Schering moved for summary judgment on the ground that plaintiffs are exempt from FLSA overtime requirements under the "outside salesman" exemption.¹

The district court denied the motion, *Kuzinski*, 604 F. Supp. 2d 385; SPA 7-38, but authorized an interlocutory appeal to this Court, *Kuzinski*, 614 F. Supp. 2d 247; SPA 39-46. Schering thereafter filed a petition for interlocutory review. This Court granted the petition and

¹ Pursuant to an agreement between the parties, Schering reserved the right to seek summary judgment at a later time on the basis of two other FLSA exemptions: those for administrative and highly compensated employees.

ordered the case calendared for argument in tandem with *In re Novartis Wage & Hour Litigation*, No. 09-0437-cv. JA 879.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

The FLSA imposes various wage and hour requirements on employers, including, in Section 7(a)(1), the requirement that certain employees who work more than 40 hours in a week receive time-and-a-half overtime for work in excess of 40 hours. 29 U.S.C. § 207(a)(1). In Section 13(a)(1), the Act exempts a variety of “white-collar” employees from the overtime-pay requirements. *See id.* § 213(a)(1).

The exemptions were premised on Congress’s belief that these employees did not need overtime pay because they typically “earned salaries well above the minimum wage” and “enjoy[ed] other compensatory privileges such as above average fringe benefits and better opportunities for advancement.” *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22122, 22124 (Apr. 23, 2004). Congress also exempted these employees because their work “was difficult to standardize to any time frame” and “could not be easily spread to other workers after 40 hours in a week,” thereby “making compliance

with the overtime provisions difficult” and “generally precluding the potential job expansion intended by the FLSA’s time-and-a-half overtime premium.” *Id.*

Since the FLSA’s enactment in 1938, one of these “white-collar” exemptions has covered “any employee employed * * * in the capacity of outside salesman.” 29 U.S.C. § 213(a)(1). In light of the wide variations in industry practices, Congress did not itself define “outside salesman” but instead entrusted the Secretary of Labor to “define[] and delimit[]” the term through notice-and-comment rulemaking. *Id.*

The regulatory definition of “outside salesman” has been substantially the same since the early days of the FLSA. The version currently in effect was promulgated in 2004 and provides:

The term “employee employed in the capacity of outside salesman” in section 13(a)(1) of the [FLSA] shall mean any employee:

- (1) Whose primary duty is:
 - (i) making sales within the meaning of section 3(k) of the [FLSA], or
 - (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

29 C.F.R. § 541.500(a). Section 3(k) of the FLSA in turn defines "sale" to "include[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k).²

A different regulation indicates that an employee engages in "exempt outside sales work" if he or she either "consummate[s] the sale" or "direct[s] efforts toward the consummation of a sale" and that it is sales work to "obtain a commitment for * * * purchases." 29 C.F.R. § 541.503(c). In the preamble to the regulations, the Department of Labor takes the position that an employee engages in "outside sales" work if "the employee, in some sense, has made sales," and it re-emphasizes that "obtaining a commitment to buy" is sufficient. 69 Fed. Reg. at 22162-63.

² The regulations define "primary duty" to mean the "principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a).

B. Factual Background

1. Schering's business

Schering sells branded pharmaceutical products to treat a variety of diseases and disorders, including allergy and respiratory conditions, infectious diseases, cardiovascular disease, high cholesterol, and hepatitis. JA 477. Schering develops these pharmaceuticals through its research and development efforts, but its corporate success depends on its ability to sell the drugs. *Id.* To achieve this end, it employs a network of pharmaceutical sales representatives to visit physicians, teach them about the benefits of Schering products, and secure their commitment to prescribe the products for their patients when indicated. JA 250.

Like other pharmaceutical companies, Schering must conduct its business consistent with the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. §§ 301 *et seq.*, and the accompanying regulations, 21 C.F.R. Parts 200-299. One requirement imposed by those laws is that certain pharmaceutical products be dispensed by pharmacists pursuant to the “written or oral prescription of a practitioner licensed by law to administer such drug[s].” 21 U.S.C. § 353(b)(2). Thus, under federal

law, Schering cannot sell its prescription pharmaceuticals directly to the patients who ultimately consume them.

As a consequence of this legal regime, sales efforts in the pharmaceutical industry are necessarily directed at obtaining commitments from physicians to prescribe the company's products. These commitments cannot be legally binding, however, because physicians are ethically obligated to prescribe a drug only when it is clinically appropriate for the particular patient. *See, e.g.,* JA 758; *see also In re Novartis Wage & Hour Litig.*, 593 F. Supp. 2d 637, 650 (S.D.N.Y. 2009).

2. Schering's pharmaceutical sales representatives

Plaintiffs are four former employees of Schering who worked there for different periods between December 1980 and December 2006. JA 213-20. They held the titles of pharmaceutical sales representative, professional sales representative, and sales representative (collectively, "pharmaceutical sales representatives"), *id.*, and were classified by Schering as exempt employees for purposes of the FLSA. The record demonstrates that, from their hiring until their departure, plaintiffs understood that their job was to sell Schering pharmaceuticals outside Schering's place of business.

a. *Hiring*

Plaintiffs joined Schering after responding to postings for jobs that they understood to be sales positions that required prior sales experience. *E.g.*, JA 221. Each plaintiff did have sales experience. JA 202-12. Plaintiff Campano, for example, began his career as a salesperson for Philip Morris USA before working as a sales representative for Garber Brothers, selling products to convenience stores. JA 223. As Campano explained it, he was qualified to work as a pharmaceutical sales representative because his “13 years of progressively responsible experience in sales” made him “[s]killed in consumer product sales.” JA 222. Likewise, plaintiff Harris submitted an employment application that stated, in boldfaced capital letters, “SALES REPRESENTATIVE.” JA 206. After interviewing for the position, he sent Schering a letter explaining that his “last couple of sales positions” would help him in this job, which was a “complex and very technical sales position.” JA 227. For his part, plaintiff Jones applied to Schering “To Advance [His] Professional Sales Career” and testified that he was hired into “Schering’s sales force.” JA 124, 225.

b. *Job responsibilities*

Plaintiffs' job responsibilities consisted of making sales calls to physicians. JA 230, 235, 245, 250. They received extensive training on Schering pharmaceuticals and targeted physicians within a designated geographical region. JA 38, 101-02.

Schering provided a list of targeted physicians in each plaintiff's geographical area, but plaintiffs themselves determined which physicians to contact and when to do so, and they could call on physicians who were not on the list as well. JA 37, 98-100, 298. Each of plaintiffs' visits to a physician was tailored to that particular physician. As plaintiffs explained, they would study sales data in advance to learn the physician's prescribing habits and would determine, based on that history, how best to target their pitch. JA 99, 117, 197, 250. They would then explain to the physician the benefits of prescribing certain Schering pharmaceuticals along with their medical indications and counter-indications. JA 234, 249.

At the end of the sales call, the pharmaceutical sales representative would seek a commitment from the physician to prescribe the particular product when a patient next presented with the applicable

indications. JA 250, 272-74. As plaintiff Jones explained it, “[t]he ultimate goal in pharma is to obtain a verbal commitment.” JA 142. Accordingly, plaintiffs would note the extent of the commitment in their records. *E.g.*, JA 279. If a physician was unwilling to commit, plaintiff Harris would schedule a lunch with the physician to get another chance at sealing the deal. JA 280.

By virtue of the nature of pharmaceuticals, a physician’s commitment does not immediately result in an exchange of goods for cash. Instead, after learning about Schering products, physicians commit to prescribe the products to patients for whom they are appropriate. *See, e.g.*, JA 274. Pharmaceutical sales representatives track the sales from their physicians to monitor their success, JA 161, and make repeat visits to them to develop an ongoing relationship, *see, e.g.*, JA 33, 37, 39. Plaintiffs became skilled at building a rapport with the physicians, to whom they referred as their “customers.” JA 116.

Schering maintained job descriptions for its pharmaceutical sales representatives. JA 228-57. These descriptions reinforce the sales nature of the jobs. Among the “essential responsibilities” identified for pharmaceutical sales representatives, plaintiffs must:

- “[i]nvest the time and effort to achieve the established goals for the territory such as sales, market share, [and] physician calls”;
- “[p]lan and organize daily sales call activities to optimize the use of time and maximize the achievement of sales and market share objectives”; and
- “[r]ecognize changes * * *, develop and implement alternate plans to achieve objectives, [and] modify call plan/business plan activities accordingly.”

JA 230, 245.

Based on these job descriptions, plaintiffs understood when they were hired, and throughout their employment, that they were expected to (i) create, achieve, and maximize sales objectives; (ii) create daily sales call schedules; (iii) implement plans to achieve sales objectives; (iv) have superior knowledge of the products they were selling; (v) meet with their customers; (vi) listen and respond to their customers’ needs; (vii) persist with their customers if they would not commit; and (viii) maintain a positive relationship with their customers. JA 228-57.

c. Training and supervision

To promote the success of their pharmaceutical sales representatives, Schering provided extensive training on products and disease states as well as sales techniques. Pharmaceutical sales representa-

tives became certified to sell particular drugs after an initial round of training and later participated in advanced training on those drugs. They were expected to have complete knowledge in order to sell Schering products convincingly to their customer-physicians. The training modules emphasized the need to know about competing products to be able to explain why the Schering alternative was preferable. *See, e.g.*, JA 34-35, 41, 76-77, 101-02, 198.

Pharmaceutical sales representatives worked independently, with only minimal supervision from district sales managers. Plaintiff Kuzinski testified that he would see his supervisor in person for two-day “ride-alongs,” which “could be once a quarter, maybe twice a quarter.” JA 110. Plaintiffs Jones, Harris, and Campano all testified that they saw their managers two or three days a month. JA 56, 70, 131. For the remainder of the time plaintiffs were unsupervised.

d. *Evaluation and compensation*

Plaintiffs were evaluated based on their ability to satisfy sales objectives. On periodic ride-alongs conducted by district managers, plaintiffs were rated on their “selling skills,” such as proficiency at opening, questioning and probing, and confirming a medical provider’s

commitment. JA 282-94. These field coaching reports tracked the market shares that pharmaceutical sales representatives were able to secure in their geographical areas. *Id.*

In self-evaluations, plaintiffs also focused on their selling skills. For example, plaintiff Harris touted his “sales skills and product knowledge” and claimed that he had asked for commitments on all of his sales calls. JA 90, 261. Plaintiff Kuzinski boasted that he went “that extra mile * * * to gain access and commitment” from his customers. JA 201.

Plaintiffs’ emphasis on selling skills is unsurprising, because their sales success resulted in substantial incentive compensation. Plaintiffs received incentive pay after they met their sales targets, as measured by the number of Schering products prescribed within their geographical areas. JA 111; *see* JA 302-81. Likewise, a pharmaceutical sales representative’s eligibility for merit-based pay increases depended on three criteria: sales results and market share (50%); selling skills (30%); and professional development (20%). JA 176-77.

Plaintiffs were well-compensated during their employment with Schering. Plaintiffs Kuzinski and Harris, for example, routinely earned

more than \$100,000 per year, of which as much as \$24,000 was incentive compensation resulting from sales success. JA 118-19, 215-16, 302-56.

C. Proceedings in the District Court

On February 13, 2007, plaintiffs filed a complaint against Schering, and, on May 8, 2007, they filed an amended complaint. Plaintiffs allege that they were entitled to overtime wages under the FLSA and seek to represent themselves and other current and former pharmaceutical sales representatives in an opt-in collective action. JA 1-10.

On May 16, 2008, Schering moved for summary judgment on the ground that plaintiffs were exempt from FLSA overtime requirements under the “outside salesman” exemption. The district court denied the motion, holding that plaintiffs did not fall within the exemption because they did not make “sales.” *Kuzinski*, 604 F. Supp. 2d at 393-403; SPA 20-37.

The district court believed that pharmaceutical sales representatives do not make “sales” because (a) they “do not make, or engage in, any of the[] things” listed in the statutory definition of “sale”—*i.e.*, any “sale, exchange, contract to sell, consignment for sale, shipment for sale,

or other disposition,” *id.* at 398; SPA 28 (quoting 29 U.S.C. § 203(k))— and (b) they do not “consummate sales” or obtain “binding commitments” from physicians, *id.* at 393, 395, 398-99, 401; SPA 21, 23-24, 28-29, 31, 35. The court reached that conclusion despite the fact that the list of items in the statutory definition of “sale” is non-exclusive and despite the fact that neither a “consummated sale” nor a “binding commitment” is required by any applicable statute or regulation. In holding that pharmaceutical sales representatives do make “sales,” other courts have relied on the “reality” of pharmaceutical-industry practices and various “indicia” of sales. *Id.* at 397, 401; SPA 25, 35. The district court here found the former “irrelevant” and the latter “inapplicable.” *Id.* at 398, 401; SPA 28, 35. The court relied heavily on the interpretive canon that exemptions from the FLSA’s overtime requirements should be narrowly construed. *Id.* at 393, 395, 397, 398 n.14; SPA 21, 24, 28, 29 n.14.

Notwithstanding its view of the law, the court acknowledged that “several district courts have weighed in differently on what is essentially the identical question.” *Kuzinski*, 614 F. Supp. 2d at 250; SPA 42. The court therefore certified its decision for interlocutory appeal. *Id.* at

249-52; SPA 41-45. Schering then petitioned this Court to hear the appeal under 28 U.S.C. § 1292(b). On August 6, 2009, the Court granted the petition and directed that the case be heard in tandem with *In re Novartis Wage & Hour Litigation*, No. 09-0437-cv, an appeal from a decision of a district court in the Southern District of New York that reached the opposite conclusion on the same issue and materially indistinguishable facts. JA 879.

SUMMARY OF ARGUMENT

Plaintiffs are covered by the FLSA’s “outside salesman” exemption.

A. The district court’s holding that pharmaceutical sales representatives do not “make sales” is inconsistent with the statutory text.

To begin with, the FLSA’s definition of “sale,” 29 U.S.C. § 203(k), is broad on its face. Its use of the word “includes” shows that the activities listed in the definition are merely illustrative examples. Its use of the word “any” shows that the examples have the broadest possible meaning. The fact that one of the examples of a “sale” is a “sale” shows that the defined term is not restricted to any narrow, technical meaning. And the definition’s use of the catch-all “other disposition” fills

whatever conceivable gaps might remain. The context of “sale” here, moreover, is what an outside “salesman” does, 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.500, and the activities of a “salesman” are not limited to the formal consummation of transactions.

Consistent with the statute’s breadth, the Department of Labor has promulgated regulations providing that an employee engages in “exempt outside sales work” if he or she either “consummate[s] the sale” or “direct[s] efforts toward the consummation of a sale.” 29 C.F.R. § 541.503(c). The regulations also indicate that it is sales work to “obtain a commitment for * * * purchases.” *Id.* The preamble to the regulations states that an employee engages in “outside sales” work if he or she, “*in some sense*, has made sales,” and it re-emphasizes that “obtaining a commitment to buy” is sufficient. 69 Fed. Reg. at 22162-63 (emphasis added).

As the majority of courts to consider the question have held, the activities of pharmaceutical sales representatives easily satisfy this broad definition of “sale.” Pharmaceutical sales representatives “direct efforts toward the consummation of a sale,” 29 C.F.R. § 541.503(c), by “obtain[ing] a commitment for * * * purchases,” *id.*, and thereby “in

some sense * * * ma[k]e sales,” 69 Fed. Reg. at 22162. The unambiguous language of the regulations thus compels the conclusion that pharmaceutical sales representatives make sales.

Even if it did not, plaintiffs would still fall within the “outside sales” exemption, for two related reasons. *First*, obtaining commitments from physicians is how sales are made in the pharmaceutical industry. Pharmaceutical companies cannot sell prescription drugs directly to patients, and patients cannot purchase those drugs from a pharmacist without a physician’s prescription. Pharmaceutical sales representatives therefore direct their sales efforts toward the people who ultimately control the purchase of prescription drugs—physicians—and who are in that sense their customers. *Second*, the activities at issue bear all the hallmarks of outside sales. Plaintiffs were hired for sales jobs based on their sales experience and abilities; they received specialized sales training; a significant part of their income was incentive compensation; they were authorized to solicit new business independently; and they saw their supervisors only a handful of days each quarter.

The textual analysis that led to the district court’s contrary conclusion is flawed. The court believed that pharmaceutical sales representatives do not make “sales” because their activities do not fall within any of the items listed in the FLSA’s definition of “sale.” Even if the court’s premise were correct, its conclusion would not follow, because the definition merely “includes” the listed activities. 29 U.S.C. § 203(k). The court also believed that pharmaceutical sales representatives are not exempt because they do not “consummate sales” or obtain “binding commitments.” *Kuzinski*, 604 F. Supp. 2d at 393-403; SPA 20-37. Those requirements cannot be found in the text of the statute, and in fact are contradicted by the regulations, which require only that the employee “*direct efforts toward* the consummation of a sale” or “obtain a commitment for * * * purchases” (without requiring any “binding” commitment). 29 C.F.R. § 541.503(c) (emphasis added). The district court thus disregarded expansive language that appears in both the statute and the congressionally directed regulations, and it relied on restrictive concepts that do not appear in either.

B. The district court’s decision is also inconsistent with the statutory purpose. Congress exempted outside salespersons from the

FLSA’s overtime requirements because they work on their own and earn various forms of compensation that are unavailable to most workers. *See, e.g., Jewel Tea Co. v. Williams*, 118 F.2d 202, 208 (10th Cir. 1941). Pharmaceutical sales representatives possess those characteristics to the same degree as other outside salespersons. Congress’s objective is thus undermined, not furthered, by holding that they are entitled to overtime pay. The district court suggested no reason why Congress would have intended to treat pharmaceutical sales representatives differently merely because they do not *formally* consummate transactions. And there is no such reason. The requirement of a “consummated sale” or “binding commitment” is entirely divorced from the statutory purpose.

C. The district court’s decision cannot be justified by the interpretive canon that exemptions from the FLSA’s overtime requirements should be narrowly construed. That canon is “at best [a] tie-breaker[],” and the Court “do[es] not * * * face a tie” here. *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1177-78 (7th Cir. 1987) (Posner, J.). The more “traditional tools of statutory construction,” *Richlin Sec. Serv. Co. v. Chertoff*, 128 S. Ct. 2007, 2019 (2008)—in this case, Congress’s

broad language and clear purpose—point to only one possible conclusion: pharmaceutical sales representatives are exempt outside salespersons.

STANDARD OF REVIEW

This Court “review[s] the district court’s grant or denial of summary judgment *de novo*.” *A & J Produce Corp. v. Bronx Overall Econ. Dev. Corp.*, 542 F.3d 54, 57 (2d Cir. 2008) (per curiam). Likewise, when an “appeal presents a matter of statutory interpretation, which is purely a question of law, [this Court’s] review is *de novo*.” *United States v. Delis*, 558 F.3d 177, 180 (2d Cir. 2009). Whether particular job activities are exempt under the FLSA is a question of law. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

ARGUMENT

PLAINTIFFS ARE COVERED BY THE FLSA’S “OUTSIDE SALES” EXEMPTION

Plaintiffs were hired, because of their backgrounds in sales, to perform the duties of outside salespersons. They understood that their job was to sell Schering products by making in-person visits to physicians. When they succeeded, they gladly accepted the incentive compensation that followed, and they planned their own work days in

pursuit of that pay. Under the statutory definition—and, indeed, under any reasonable definition of the term—plaintiffs made sales.

The majority of courts to consider the issue have so held. Indeed, earlier this year a district court in the Third Circuit, after “reviewing approximately ten other recent district court cases addressing similar situations,” observed that “nearly all [had] found * * * that the pharmaceutical salespeople at issue were exempt.” *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669, 687 (W.D. Pa. 2009). At least two more courts have reached the same conclusion since.³ As far as we are aware, only

³ The decisions holding that pharmaceutical sales representatives fall within the “outside sales” exemption of the FLSA and comparable state laws are *Schaefer-LaRose v. Eli Lilly & Co.*, No. 1:07-cv-1133 (S.D. Ind. Sept. 29, 2009) (FLSA and New York law); *Harris v. Auxilium Pharms., Inc.*, 2009 WL 3157275 (S.D. Tex. Sept. 28, 2009) (FLSA); *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669 (W.D. Pa. 2009) (Pennsylvania law); *Delgado v. Ortho-McNeil, Inc.*, 2009 WL 2781525 (C.D. Cal. Feb. 6, 2009) (FLSA and California law); *Yacoubian v. Ortho-McNeil Pharm. Inc.*, No. 8:07-cv-127 (C.D. Cal. Feb. 6, 2009) (FLSA and California law); *In re Novartis Wage & Hour Litig.*, 593 F. Supp. 2d 637 (S.D.N.Y. 2009) (FLSA, New York law, and California law); *Rivera v. Schering Corp.*, No. 2:08-cv-1743 (C.D. Cal. Aug. 14, 2008) (California law); *Brody v. AstraZeneca Pharms., LP*, No. 2:06-cv-6862 (C.D. Cal. June 11, 2008) (California law); *Menes v. Roche Labs., Inc.*, 2008 WL 6600518 (C.D. Cal. Jan. 7, 2008) (California law); *Barnick v. Wyeth*, 522 F. Supp. 2d 1257 (C.D. Cal. 2007) (California law); and *D’Este v. Bayer Corp.*, 2007 U.S. Dist. LEXIS 87229 (C.D. Cal. Oct. 9, 2007) (California law).

three decisions have come out the other way, and two of them (including the decision on appeal here) were issued by the court below.⁴

Disagreeing with the weight of authority, the district court concluded that pharmaceutical sales representatives cannot be outside “salesm[e]n” because, by virtue of regulations unique to the pharmaceutical industry, their transactions look somewhat different. Whereas salespersons in most other industries can immediately exchange their goods for payment, federal law requires that pharmaceutical sales be channeled through a controlled system of distribution. But nothing about this process changes the fundamental nature of plaintiffs’ job responsibilities, and nothing about it takes them outside the definition of salespersons.

This Court should reverse the district court and join the growing number of courts that have held that pharmaceutical sales representatives are properly classified as exempt outside salespersons. As we

⁴ See *Kuzinski*, 604 F. Supp. 2d 385; *Smith v. Johnson & Johnson*, 2008 WL 5427802 (D.N.J. Dec. 30, 2008); *Ruggeri v. Boehringer Ingelheim Pharms., Inc.*, 585 F. Supp. 2d 254 (D. Conn. 2008); see also *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 472 (S.D.N.Y. 2008) (finding that defendant had not demonstrated that exemption applies “at th[e] [discovery] stage”).

explain below, the district court’s decision (a) is inconsistent with the text of the exemption; (b) undermines its purpose; and (c) cannot be justified by the canon of “narrow construction.”

A. The District Court’s Interpretation Of The Exemption Is Inconsistent With The Statutory Text

In interpreting the FLSA’s “outside sales” exemption, the Court must “start, as always, with the language of the statute.” *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009) (internal quotation marks omitted). The relevant language—the definition of “sale” in Section 3(k) of the Act—is broad on its face, and the Department of Labor’s implementing regulations reflect a similarly broad understanding of “sale.” Under the statute and regulations, pharmaceutical sales representatives easily qualify as “outside salesman,” both because obtaining commitments from physicians is how sales are made in the pharmaceutical industry and because the activities of pharmaceutical sales representatives bear all the hallmarks of sales. The district court’s contrary conclusion, while purportedly grounded in the statutory text, in fact disregarded expansive language that appears in the statute and depended on restrictive language that does not.

1. The statutory definition of “sale” is broad

As relevant here, an employee falls within the FLSA’s “outside salesman” exemption if he or she “mak[es] sales” within the meaning of Section 3(k) of the Act. 29 C.F.R. § 541.500(a)(1)(i).⁵ Section 3(k), in turn, provides that “[s]ale’ or ‘sell’ includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” 29 U.S.C. § 203(k). As other circuits have correctly recognized, this definition is “not limit[ed],” *Wirtz v. First Nat’l Bank & Trust Co.*, 365 F.2d 641, 645 (10th Cir. 1966), but instead is “broad,” *Schultz v. Falk*, 439 F.2d 340, 347 (4th Cir. 1971), and “capacious[],” *Wirtz v. Jernigan*, 405 F.2d 155, 158 (5th Cir. 1968). Indeed, the FLSA’s definition of “sale” contains multiple indicia of breadth.

First, Congress provided that the term “sale” merely “includes” the listed activities. 29 U.S.C. § 203(k) (emphasis added). “[T]he word “includes” is usually a term of enlargement, and not of limitation.” *Burgess v. United States*, 128 S. Ct. 1572, 1578 n.3 (2008) (quoting 2A

⁵ The other elements of the exemption are not at issue. Plaintiffs do not dispute that the activities in question—whether “sales” or not—were their “primary duty,” 29 C.F.R. § 541.500(a)(1), and they do not dispute that they were “customarily and regularly engaged away from the[ir] employer’s place * * * of business in performing such primary duty,” 29 C.F.R. § 541.500(a)(2).

NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:7, at 305 (7th ed. 2007)). In particular, “[t]he use of the word ‘includes,’ rather than a more restrictive term such as ‘means,’ ‘indicates that the list is not exhaustive but merely illustrative.’” *United States v. Angelilli*, 660 F.2d 23, 31 (2d Cir. 1981) (quoting *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979)). It “conveys the conclusion that there are other items includable, though not specifically enumerated.” 2A SINGER & SINGER § 47:7, at 305 (internal quotation marks omitted). It makes clear that the listed items are merely “examples,” *West v. Gibson*, 527 U.S. 212, 218 (1999)—not an “all-embracing definition” but simply “illustrative application[s] of the general principle,” *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941).

Congress, moreover, did not merely choose the expansive verb “includes” in defining “sale” in Section 3 of the FLSA; it chose a *restrictive* verb in defining *other* terms in the same section. Section 3 is the general definitional provision of the Act, and several other terms are defined to “mean[]” something, *e.g.*, 29 U.S.C. § 203(h), (i), (j), (l), such that the listed items in those definitions are “exclusive,” *Groman v. Comm’r*, 302

U.S. 82, 86 (1937). “[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (internal quotation marks omitted). That “‘includes’ is not a finite word of limitation * * * would [thus] seem particularly so when the statute elsewhere uses ‘means.’” *United States v. Mass. Bay Transp. Auth.*, 614 F.2d 27, 28 (1st Cir. 1980).

Second, Congress provided that the term “sale” includes “*any*” sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition. 29 U.S.C. § 203(k) (emphasis added). “[T]he word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 835-36 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997), in turn quoting WEBSTER’S THIRD INTERNATIONAL DICTIONARY 97 (1976)). Congress thus intended, not only that the items listed in the definition of “sale” are merely illustrative, but also that the examples themselves should be understood to have the broadest possible meaning.

Third, Congress provided that the term “sale” includes, among the illustrative examples, any “*sale*.” 29 U.S.C. § 203(k) (emphasis added).

This confirms that a “sale” as that term might ordinarily be understood is only one small part of the overall definition of “sale” as the term is defined in the statute. And it forecloses any possibility that Congress intended to restrict the meaning of the defined term by requiring whatever formalities or technicalities might be associated with a narrow, dictionary definition of “sale.”

Fourth, Congress provided that the term “sale” includes any “*other disposition*.” 29 U.S.C. § 203(k) (emphasis added). Thus, even after indicating that the definition “includes” but is not limited to “any” sale, exchange, contract to sell, consignment for sale, or shipment for sale, Congress added a catch-all term to fill any conceivable remaining gaps. It is difficult to imagine a broader definition.

Fifth, it is a “cardinal rule” that “statutory language must be read in context,” *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004) (internal quotation marks omitted), and the context of “sale” here is what an outside “salesman” does, 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.500(a). In common usage, the term “salesman” does not connote a particular mode of obtaining sales or specific technical requirements. On the contrary, an outside “salesman” ordinarily does far more than

formally consummate a transaction and engages in many activities that are merely directed toward that end. The context thus provides still more evidence, if any is needed, that Congress did not intend to place limitations on the definition of “sale.”

In sum, although the statutory definition of “sale” is just a single short sentence, its text and context mandate the broadest possible interpretation. Importing technical requirements or other restrictions into the definition would run directly contrary to the statutory language, which is “the most reliable evidence of [Congress’s] intent.” *Holloway v. United States*, 526 U.S. 1, 6 (1999) (internal quotation marks omitted).

2. The Department of Labor’s interpretation of the statutory definition is similarly broad

The FLSA provides that the “outside salesman” exemption may be “defined and delimited from time to time by regulations of the Secretary [of Labor].” 29 U.S.C. § 213(a)(1). The Secretary has incorporated the FLSA’s definition of “sale” into the regulations, 29 C.F.R. § 541.500(a)(1)(i), and has consistently interpreted that concept in a manner consistent with the broad statutory definition.

For example, in the 1940 “Stein Report,” the Department of Labor expressed the view that the regulations should cover activities that are “popularly described” and “commonly known” as “sales.” U.S. Dep’t of Labor, Wage & Hour Div., *“Executive, Administrative, Professional . . . Outside Salesman” Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition* 45 (1940). The report observed that, “*in a practical sense, the[] people [who engage in these activities] are salesmen in that their activities are of the same nature as those of [other] persons making sales.*” *Id.* (emphasis added). The report went on to say that the exemption should apply to an employee who “*in some sense make[s] a sale.*” *Id.* at 46 (emphasis added). Nine years later, in the “Weiss Report,” the Department took the position that an exempt “sale” includes “obtaining a commitment to buy.” U.S. Dep’t of Labor, Wage & Hour and Pub. Contracts Divs., *Defining the Terms “Executive,” “Administrative,” “Professional,” “Local Retailing Capacity,” “Outside Salesman”: Report and Recommendations on Proposed Revisions of Regulations, Part 541* at 83 (1949). These views reflect a pragmatic, flexible, and common-sense interpretation of “sale,”

while eschewing interpretations that are formalistic, rigid, and technical.

The Department of Labor's current (2004) regulations adopt the same broad view. For example, the regulation governing "promotional work" states that an employee engages in "exempt outside sales work" if he or she either "consummate[s] the sale" or "direct[s] efforts toward the consummation of a sale." 29 C.F.R. § 541.503(c). The same regulation indicates that it is sales work to "obtain a commitment for * * * purchases." *Id.*

In the preamble to the regulations, which relies extensively upon the reports discussed above, the Department of Labor adopts a similarly broad view of "sale." Citing the Stein Report, the Department states that an employee engages in "outside sales" work if "the employee, *in some sense*, has made sales." 69 Fed. Reg. at 22162 (emphasis added). And, quoting the Weiss Report, the Department again emphasizes that "obtaining a commitment to buy" is sufficient. *Id.* at 22162-63.

3. The activities of pharmaceutical sales representatives easily fall within the broad statutory definition

Pharmaceutical sales representatives “direct efforts toward the consummation of a sale,” 29 C.F.R. § 541.503(c), by “obtain[ing] a commitment for * * * purchases,” *id.*, and thereby “in some sense * * * ma[k]e sales,” 69 Fed. Reg. at 22162. The unambiguous terms of the regulations thus provide a sufficient basis for reversing the district court’s holding that pharmaceutical sales representatives are not covered by the “outside sales” exemption. But even if the regulations did not compel that result, reversal would still be required, because (a) obtaining commitments from physicians is how one “makes sales” in the pharmaceutical industry, and (b) the activities of pharmaceutical sales representatives bear all the hallmarks of outside “sales.”

a. Obtaining commitments from physicians is how sales are made in the pharmaceutical industry

Because the FLSA applies across industries, its terms must be understood in the context of the particular industry at issue. In urging the passage of the FLSA, President Roosevelt observed that “[m]ost fair labor standards as a practical matter require some differentiation between different industries and localities.” Message from the President

of the United States, H.R. Doc. No. 75-255, at 3 (1937). And this Court has recognized that, “[g]iven the broad scope of the FLSA and its implementing regulations, which reach all employees involved in interstate commerce, the regulations provide only general guidance to accommodate the varying needs of employers and employees in a diverse and varied national economy.” *Havey v. Homebound Mortgage, Inc.*, 547 F.3d 158, 163 (2d Cir. 2008) (citation omitted).

For this reason, and because of the breadth of the definition of “sale,” courts have properly “taken into account the characteristics of the industry in question when determining the applicability of the outside sales exemption.” *Novartis*, 593 F. Supp. 2d at 649. “[T]he precise contours of a ‘sale’ naturally differ across industries * * *.” *Baum*, 605 F. Supp. 2d at 677. And pharmaceutical sales representatives “make sales in the sense that sales are made in the pharmaceutical industry.” *Novartis*, 593 F. Supp. 2d at 650. No fewer than nine cases have held that pharmaceutical sales representatives fall within the “outside sales” exemption on this basis.⁶

⁶ See *Schaefer-LaRose*, No. 1:07-cv-01133, slip op. at 20-22; *Harris*, 2009 WL 3157275, at *25-*27; *Baum*, 605 F. Supp. 2d at 677-82; *Delgado*, 2009 WL 2781525, at *4-*5; *Yacoubian*, No. 8:07-cv-127, slip op. at 6-7;

Federal law prohibits pharmaceutical companies from selling prescription drugs directly to patients. 21 U.S.C. § 353(b)(2). And patients cannot purchase drugs directly from a pharmacist without a prescription. *Id.* Because of these limitations, pharmaceutical sales representatives sell drugs to patients the only way they can—by obtaining commitments from the physicians who write the prescriptions.

A pharmaceutical sales representative “must approach the person with the decision-making power.” *Baum*, 605 F. Supp. 2d at 680. It is “the physicians called upon by [sales representatives who] ultimately control the purchase of [pharmaceutical] products by writing prescriptions.” *Novartis*, 593 F. Supp. 2d at 650. “Because physicians determine whether or not a patient will buy a prescription product, it is they who are appropriately the target for sales efforts.” *Barnick v. Wyeth*, 522 F. Supp. 2d 1257, 1264 (C.D. Cal. 2007). When pharmaceutical sales representatives “direct their sales efforts at doctors,” therefore, they are “attempting to increase sales at the only point where

Novartis, 593 F. Supp. 2d at 649-53; *Rivera*, No. 2:08-cv-1743, slip op. at 4-5; *Brody*, No 2:06-cv-6862, slip op. at 15-16; *Barnick*, 522 F. Supp. 2d at 1264.

they can hope to do so in the sales continuum.” *Schaefer-LaRose v. Eli Lilly Co.*, No. 1:07-cv-01133, slip op. at 21 (S.D. Ind. Sept. 29, 2009).

In the context of prescription pharmaceuticals, the physician essentially operates as an agent of his or her patients, making decisions on their behalf. *See, e.g., Baum*, 605 F. Supp. 2d at 678-80. In this respect, the doctor is just as much the customer as the ultimate consumer. Other courts have recognized this fact in the analogous context of medical devices. *See Medtronic, Inc. v. Benda*, 689 F.2d 645, 648 (7th Cir. 1982) (“the physicians were the ‘real’ purchasers of the [medical devices] even though the formal sale was made * * * to the hospital,” because “it is primarily the physician who influences and even decides which [device] * * * will be purchased by the hospital”); *Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085, 1094 n.3 (D. Minn. 1981) (“the term ‘customers’ must include not only the hospital, which actually pays for the [medical device], but also the physicians and surgeons who recommend which product to purchase”), *aff’d*, 684 F.2d 565 (8th Cir. 1982). Not coincidentally, plaintiffs referred to the physicians they visited as their “customers.” JA 116.

It is “[o]nly the nature of the heavily regulated pharmaceutical industry” that “prevent[s] [pharmaceutical sales representatives] from going beyond receiving * * * commitments” from physicians. *Schaefer-LaRose*, No. 1:07-cv-01133, slip op. at 21. As plaintiff Jones correctly recognized, obtaining commitments is thus “the ultimate goal in pharma.” JA 142. Pharmaceutical sales representatives accordingly track the commitments they obtain and the prescriptions that result from those commitments. JA 161. Those are their sales.

As the Department of Labor has observed, “[e]xempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button.” 69 Fed. Reg. at 22163. In the pharmaceutical industry, it is the physician who “types the order” by writing a prescription for a patient.

This sales paradigm dominates the industry. It is the industry standard to employ a team of pharmaceutical sales representatives and to send them to targeted physicians to obtain commitments. *See Baum*, 605 F. Supp. 2d at 678, 682. This is the way that pharmaceutical companies operate because it “succeeds in inducing physicians to prescribe larger quantities of brand-name drugs.” *IMS Health Inc. v. Ayotte*, 550

F.3d 42, 56 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009). Rather than “arguing about how to apply abstract * * * definitions * * * , such companies simply find and execute the methods that work to increase sales.” *Baum*, 605 F. Supp. 2d at 682. If there were some other way to sell drugs, profit-maximizing companies would find it. Instead, “obtaining a commitment from a physician, in the pharmaceutical sales context, is [what] * * * constitute[s] ‘making sales.’” *Id.* at 687.

b. *The activities of pharmaceutical sales representatives bear all the hallmarks of outside sales*

Although “the unique characteristics of the pharmaceutical industry,” *Schaefer-LaRose*, No. 1:07-cv-01133, slip op. at 17, sufficiently demonstrate that pharmaceutical sales representatives make sales, any doubt on that score is put to rest by the characteristics of the pharmaceutical representatives themselves.

(i) To determine whether an employee makes “sales,” courts have routinely looked to *indicia* of sales. Several such *indicia* have been identified:

- (1) “the job was advertised as a sales position and the employee was recruited based on sales experience and abilities”;
- (2) “[s]pecialized sales training”;

- (3) “[c]ompensation based wholly or in significant part on commissions”;
- (4) “[i]ndependently soliciting new business”;
and
- (5) “receiv[ing] little or no direct or constant supervision in carrying out daily work tasks.”

Nielsen v. DeVry Inc., 302 F. Supp. 2d 747, 756-58 (W.D. Mich. 2003).

“Various federal and state courts have utilized one or more of these indicia in applying the outside salesperson exemption.” *Barnick*, 522 F. Supp. 2d at 1262.⁷

Looking for markers of sales activity makes good sense, both because the definition of “sale” is extremely broad and because the markers track the reasonable expectations of employers and employees. If these hallmarks were ignored, determining what constitutes a “sale” would often devolve into a circular exercise of question-begging. In analogous circumstances, this Court has looked to “indicia of reliability” to determine whether an anonymous tip is reliable and therefore a basis for reasonable suspicion, *United States v. Simmons*, 560 F.3d 98, 104

⁷ In addition to the cases cited in *Barnick*, 522 F. Supp. 2d at 1262, see, e.g., *Baum*, 605 F. Supp. 2d at 682-84; *Delgado*, 2009 WL 2781525, at *6 n.2; *Brody*, No. 2:06-cv-6862, slip op. at 13; *Menes*, 2008 WL 6600518, at *1-*2; *Barnick*, 522 F. Supp. 2d at 1264-65; and *D’Este*, 2007 U.S. Dist. LEXIS 87229, at *13-*16.

(2d Cir. 2009), *petition for cert. filed* (U.S. Sept. 21, 2009) (No. 09-6647); to “indicia of finality” to determine whether a lower court’s ruling is final and therefore appealable, *Somoza v. N.Y. City Dep’t of Educ.*, 538 F.3d 106, 112 (2d Cir. 2008); and to “indicia of * * * voluntariness” to determine whether a guilty plea is voluntary and therefore not subject to withdrawal, *United States v. Doe*, 537 F.3d 204, 213 (2d Cir. 2008). This Court has also looked to “indicia” in several other contexts.⁸ Likewise here, it is appropriate to look to “indicia of sales” to determine whether particular activities constitute “sales” and are therefore exempt.

(ii) Courts that have looked to indicia of sales have unanimously concluded that pharmaceutical sales representatives make sales.⁹ Un-

⁸ See, e.g., *New York v. Nat’l Serv. Indus., Inc.*, 460 F.3d 201, 215 n.5 (2d Cir. 2006) (“indicia of control”); *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 288 (2d Cir. 2006) (“indicia of fiduciary misappropriation”); *Brown v. Cara*, 420 F.3d 148, 159 (2d Cir. 2005) (“indicia of the existence of a joint venture”); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 62 (2d Cir. 2004) (“indicia of sham entities”); see also *In re Sharp Int’l Corp.*, 403 F.3d 43, 56 (2d Cir. 2005) (“badges of fraud”).

⁹ See *Schaefer-LaRose*, No. 1:07-cv-1133, slip op. at 23-24; *Baum*, 605 F. Supp. 2d at 682-85; *Delgado*, 2009 WL 2781525, at *5; *Yacoubian*, No. 8:07-cv-127, slip op. at 10-11; *Brody*, No. 2:06-cv-6862, slip op. at 12-15; *Menes*, 2008 WL 6600518, at *1-*2; *Barnick*, 522 F. Supp. 2d at 1262; *D’Este*, 2007 U.S. Dist. LEXIS 87229, at *14 n.2, *16; see also *No-*

disputed evidence shows that the same is true here. *See supra* pp. 9-16. Indeed, like the others, this is “not * * * a close case.” *Barnick*, 522 F. Supp. 2d at 1264.

First, plaintiffs were hired for sales jobs based on their sales experience and abilities. They responded to job announcements seeking professionals responsible for “maximizing sales” by submitting letters and resumes touting their “sales” credentials. JA 221, 222-27.

Second, plaintiffs received specialized sales training. Indeed, they received three different types of training, which covered both general sales techniques and product-specific approaches. Plaintiffs received initial training upon hiring or reassignment to new territories or products; they completed “home study” training programs; and they had practical training sessions through “ride-alongs” with their district sales managers. *See, e.g.*, JA 30, 34-35, 41, 70, 76-77, 101-02.

Third, plaintiffs were entitled to incentive compensation for achieving sales targets. If they were successful, moreover, those payments could be substantial. For example, Harris earned more than

vartis, 593 F. Supp. 2d at 654 n.7 (deeming it “significant,” and according “some weight,” to the fact that pharmaceutical sales representatives “are hired, trained, paid and incentivized as sales personnel”).

\$12,000 in the fourth quarter of 2005, JA 353, and Kuzinski earned \$4,330 in December 2004, JA 320. Likewise, plaintiffs' periodic evaluations depended in large part on their sales success. JA 282-94.

Fourth, plaintiffs were authorized to solicit new business independently. Although Schering provided a list of targeted physicians, the guidelines for pharmaceutical sales representatives specifically recognized that "[t]here are times when it may be necessary or appropriate to call on prescribers outside of [the] target list." JA 298; *see also* JA 162. Indeed, plaintiffs were encouraged to do so. *See* JA 162, 298.

Fifth, plaintiffs saw their supervisors only a handful of days each quarter. Kuzinski met with his supervisor at most twice a quarter for two-day "ride-alongs," JA 110, while Jones, Harris, and Campano estimated that they saw their managers only two or three days each month, JA 56, 70, 131. Plaintiffs were otherwise unsupervised.

(iii) The district court did not deny that plaintiffs' activities bear all the indicia of sales. Instead, the court thought it inappropriate to consider them, based on its view that use of the indicia "is limited to circumstances where the employee actually makes sales, and the question is whether her consummation of sales * * * is sufficient to deem

sales her ‘primary duty.’” *Kuzinski*, 604 F. Supp. 2d at 394; SPA 22 (internal quotation marks omitted). The court thus refused to accord the indicia even “some weight,” *Novartis*, 593 F. Supp. 2d at 654 n.7, in determining whether plaintiffs made sales. The district court offered no justification for its belief that the indicia bear exclusively on the issue of “primary duty,” and in fact there is none.

An employee’s “primary duty” is the “principal, main, major or most important duty that the employee performs.” 29 C.F.R. § 541.700(a). By its very nature, therefore, determining whether sales work is an employee’s “primary duty” necessitates a *comparative* analysis. The relevant factors that bear on that question are thus the factors identified in the “primary duty” regulation—namely, “the *relative* importance of the exempt duties as *compared* with other types of duties”; “the amount of time spent performing exempt work” as compared with nonexempt work; “the employee’s *relative* freedom from direct supervision”; and “the *relationship* between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.” *Id.* (emphasis added); *see also* 29 C.F.R. § 541.504(b) (factors relevant to whether driver has primary duty of

making sales include “a *comparison* of the driver’s duties with those of other employees engaged as truck drivers and as salespersons” and the “*proportion* of earnings directly attributable to sales” (emphasis added)).

The indicia of *sales*, in contrast, go to whether the employee was engaged in sales in the first place. While some of those factors may also be relevant to the issue of “primary duty,” their principal function—as many courts have recognized, *see supra* note 9—is to distinguish sales from non-sales work. The district court erred in refusing to consider them.

4. The district court’s textual analysis is flawed

Even apart from its refusal to consider the various indicia of sales, the district court’s textual analysis is flawed on multiple levels.

a. One of the principal grounds for the district court’s conclusion that pharmaceutical sales representatives do not make “sales” was its belief that their activities do not fall within any of the items listed in the FLSA’s definition of “sale”—*i.e.*, any “sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” 29 U.S.C. § 203(k). The court reasoned that pharmaceutical sales repre-

sentatives “do not make, or engage in, any of these things.” *Kuzinski*, 604 F. Supp. 2d at 398; SPA 28.

Even if it were correct, that reasoning could not support the court’s conclusion, because the listed activities are merely “include[d],” 29 U.S.C. § 203(k), in the definition of “sale.” *See supra* Point A.1. “When a statute is phrased in this manner, the fact that the statute does not specifically mention a particular [activity] * * * does not imply that the [activity] falls outside of the definition.” *Highway & City Freight Drivers, Dockmen & Helpers, Local Union No. 600 v. Gordon Transports, Inc.*, 576 F.2d 1285, 1289 (8th Cir. 1978). The definition of “sale” is thus not the listed activities but the “general principle,” *Fed. Land Bank*, 314 U.S. at 100, of which they are “examples,” *West*, 527 U.S. at 218. And for the reasons we have already explained, *see supra* Point A.3, the “general principle” embodied in the definition easily encompasses a pharmaceutical sales representative’s act of obtaining a physician’s commitment to prescribe pharmaceuticals.

b. Another of the main justifications for the district court’s conclusion that pharmaceutical sales representatives do not fall within the “outside sales” exemption was that they do not “consummate sales” or

obtain “binding commitments.” *E.g.*, *Kuzinski*, 604 F. Supp. 2d at 393, 395, 398, 399, 401; SPA 21, 23-24, 28-29, 31, 35. But the “the statutory language does not require a final sale, complete and consummated.” *Baum*, 605 F. Supp. 2d at 680. Nor does it require a “binding commitment.” Instead, these narrow, technical, and formalistic concepts seem merely to reflect the district court’s preconceived notion of what a “sale” entails. That of course is not a basis for reading them into the FLSA or its implementing regulations.

A requirement of a “consummated sale” or “binding commitment” is in fact affirmatively inconsistent with the regulations governing the “outside sales” exemption. *See supra* Point A.2. Under the regulations, an employee is covered by the exemption if he or she either “consummate[s] [a] sale” or “direct[s] efforts toward the consummation of a sale.” 29 C.F.R. § 541.503(c). The regulations also indicate that an employee makes sales if he or she “obtain[s] a commitment for * * * purchases”; there is no suggestion that the commitment must be “binding.” *Id.*; *accord* 69 Fed. Reg. at 22162 (“obtain a commitment to buy”); *id.* at 22163 (“obtaining a commitment to buy”). Directing efforts to-

ward the consummation of a sale and obtaining a commitment for chases are precisely what pharmaceutical sales representatives do.

That the exemption does not require the employee to obtain “binding commitments” is not only the view of the Department of Labor; it reflects commercial realities. Truly “binding” commitments are rare in any industry, and conditional commitments are common. Customers routinely cancel orders after they are placed, change their minds and return goods after they are delivered, or invoke express or implied warranties and return products even after using them. *See Baum*, 605 F. Supp. 2d at 681-82. A commitment need not be legally enforceable, moreover, to have a business meaning. “Sometimes lawyers and judges forget that a person’s word means something; * * * many people do not actually need a * * * contract to bind themselves to their word.” *Id.* at 681. Indeed, “one professional’s commitment may be worth *more* in sales volume than a hundred firm orders from a[n] insolvent or dishonest source.” *Id.* (emphasis added).

c. At various points in its decision, the district court purported to rely upon the “plain terms” and “plain meaning” of the statutory text. *Kuzinski*, 604 F. Supp. 2d at 398 n.14, 402 n.21; SPA 29 n.14, 37 n.21.

But the court completely ignored one of the most important “plain terms” of the statute: that a “sale” merely “includes”—and therefore is not limited to—the items listed in the definition. 29 U.S.C. § 203(k). And while the court overlooked one of the statute’s “plain terms” that undermines its interpretation, it relied heavily on concepts—“consummated sales” and “binding commitments”—that are nowhere to be found within the statute’s “plain terms.” The court thus committed the double error of disregarding expansive language that appears in the statute and relying on restrictive language that does not—and, indeed, that is explicitly contradicted by the implementing regulations.

There is yet another flaw in the district court’s atextual interpretation of the FLSA: it “would produce the absurd conclusion that [Schering] does not engage in *any* sales activity regarding its prescription products merely because its efforts are rationally aimed at those determining the product’s purchase rather than the [ultimate] buyers of the product.” *Barnick*, 522 F. Supp. 2d at 1264 (emphasis added). The sweeping statutory language certainly does not compel that result. And it is highly unlikely that Congress intended a definition under which

companies in an industry of this size do not employ any outside salespeople to generate purchases by customers.

B. The District Court’s Interpretation Of The Exemption Undermines The Statutory Purpose

A statute must of course be read “in light of its purpose.” *Sullivan v. Hudson*, 490 U.S. 877, 890 (1989). When interpreting an exemption from the FLSA’s overtime requirements, it is therefore appropriate to “ask what interpretation would best advance the legislative purpose.” *Mechmet*, 825 F.2d at 1175. Consideration of the legislative purpose is particularly important when, as in this case, the relevant statutory definition is extremely broad and merely “includes” items listed in the statute, 29 U.S.C. § 203(k), because Congress’s purpose informs the “general principle,” *Fed. Land Bank*, 314 U.S. at 100, of which the items are examples. *See, e.g., Angelilli*, 660 F.2d at 32-33 (relying on congressional purpose to interpret statutory definition that “includes” listed items). As in a prior case in which this Court reversed a district court’s conclusion that employees were entitled to overtime pay, “the district court’s conclusion is contrary to the purposes of the FLSA.” *Freeman v. Nat’l Broad. Co.*, 80 F.3d 78, 86 (2d Cir. 1996).

1. The purposes of the “outside salesman” exemption have long been understood. They were described by the Tenth Circuit in *Jewel Tea Co. v. Williams*, 118 F.2d 202 (10th Cir. 1941), only a few years after the FLSA was enacted:

The reasons for excluding an outside salesman are fairly apparent. Such salesman, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer’s place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.

Id. at 207-08.

In the preamble to the 2004 amendments to the “white-collar” regulations, the Department of Labor echoes this understanding of Congress’s purposes:

[The] exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and

better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.

69 Fed. Reg. at 22123-24.

In more recent years, numerous courts have approvingly quoted the Tenth Circuit's description of the purposes of the "outside sales" exemption, the Department of Labor's description of them, or both.¹⁰

2. Excluding pharmaceutical sales representatives from the exemption is manifestly inconsistent with the purposes described above. Pharmaceutical sales representatives work individually. They work away from Schering's place of business without supervision. Schering does not control the hours that they work, and it does not have any mechanism for knowing how many hours they work. Their skills and hard

¹⁰ See, e.g., *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 945 n.10 (9th Cir. 2009); *Schaefer-LaRose*, No. 1:07-cv-01133, slip op. at 14 n.7, 24; *Harris*, 2009 WL 3157275, at *25-*26; *Baum*, 605 F. Supp. 2d at 685; *Schmidt v. Eagle Waste & Recycling, Inc.*, 598 F. Supp. 2d 928, 937 (W.D. Wis. 2009); *Delgado*, 2009 WL 2781525, at *3; *Novartis*, 593 F. Supp. 2d at 648-49; *Barnick*, 522 F. Supp. 2d at 1262.

work result in incentive payments in lieu of overtime. And with the incentive payments, they can earn large salaries, orders of magnitude greater than the minimum wage. They are thus precisely the sort of employees that Congress wished to exempt from the FLSA's overtime requirements.

In holding that pharmaceutical sales representatives are eligible for overtime pay, the district court made no effort to explain how its interpretation of the FLSA is consistent with Congress's objectives. On the contrary, the court "refus[ed] to appreciate the * * * goals of the legislation," *Baum*, 605 F. Supp. 2d at 676, and "ignore[d] the Act's * * * purpose," *Novartis*, 593 F. Supp. 2d at 648. The court's narrow, technical, and formalistic interpretation of "making sales"—which, according to the court, requires a "consummated sale" or "binding commitment"—is "entirely divorced from the underlying concerns motivating the exemption." *Barnick*, 522 F. Supp. 2d at 1264.

The district court's approach leaves unanswered a critical question: Why would Congress have wanted to treat a person who *formally* consummates a transaction differently than someone who seeks and obtains a commitment—the most that can be done in the industry—when

the two are identical in all relevant respects? Both work individually; both lack supervision; both control the hours that they work; both earn incentive pay; both earn far more than minimum wage; and both seek to generate sales for their employers. The district court failed to offer any reason why the latter deserves time-and-a-half compensation for hours worked beyond 40 per week while the former does not.

That failure is unsurprising, because there is no such reason. Congress could not have intended to treat them differently. And there is no language in the statute or regulations that requires a court to reach that counterintuitive result. On the contrary, the expansive language of the statute and regulations is entirely consistent with the congressional purpose described above.

The lack of any material difference between these two categories of employees is doubtless a reason why plaintiffs considered themselves salesmen, trumpeted their sales experience in seeking the jobs, and heralded their sales success in completing self-evaluations. It also explains why the industry has uniformly classified its sales representatives as exempt for decades; why plaintiffs never questioned their exempt status while employed by Schering; and why, as far as we are

aware, there had never been a challenge to this classification until the current campaign, in which attorneys solicited pharmaceutical sales representatives on the internet to serve as plaintiffs in class- and collective-action lawsuits, *see* JA 28-29, 95, 122.

C. The District Court’s Interpretation Of The Exemption Cannot Be Justified By The “Narrow Construction” Canon

In holding that pharmaceutical sales representatives are not “outside salesmen,” the district court relied heavily on the canon that exemptions from the FLSA’s overtime requirements should be narrowly construed. *See Kuzinski*, 604 F. Supp. 2d at 393, 395, 397, 398 n.14; SPA 21, 24, 28, 29 n.14. That reliance was misplaced.

The district court not only relied on this interpretive canon; it began its analysis with it. *See id.* at 393. But canons of construction come into play at the *end* of the interpretive process, not at the beginning. *See, e.g., Burgess*, 128 S. Ct. at 1580. They do not “displace[] the other traditional tools of statutory construction,” *Richlin Sec. Serv.*, 128 S. Ct. at 2019, and, indeed, are “subordinated” to them, *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943).

That is true, not only of interpretive canons generally, but of the particular canon at issue here. As Judge Posner has explained, the canon that exemptions from the FLSA’s overtime requirements should be narrowly construed is “at best [a] tie-breaker[.]” *Mechmet*, 825 F.2d at 1177. Consistent with that view, both decisions of this Court that the district court cited for the proposition that such exemptions should be narrowly construed, *see Kuzinski*, 604 F. Supp. 2d at 397; SPA 28, merely adverted to the canon in passing and ultimately concluded that the exemption at issue *applied*, *see Havey*, 547 F.3d at 163-67; *Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 222-29 (2d Cir. 2002).

As in those cases, the Court “do[es] not * * * face a tie” here. *Mechmet*, 825 F.2d at 1178. “There is no need * * * to resort to the * * * canon” of narrow construction, *Richlin Sec. Serv.*, 128 S. Ct. at 2019, because the interpretive question is resolved by “other circumstances evidencing congressional intent,” *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001)—namely, the broad language and clear purpose of the exemption. *See supra* Points A & B. These more “traditional tools of statutory construction,” *Richlin Sec. Serv.*, 128 S. Ct. at 2019, point in only one direction. They compel the conclusion that pharma-

ceutical sales representatives are exempt “outside salesmen,” and “overcome” whatever “force” the canon of narrow construction might otherwise have, *Chickasaw Nation*, 534 U.S. at 94.

Other courts have so held. In concluding that pharmaceutical sales representatives are exempt from the FLSA’s overtime requirements, they have determined that the canon “does not obviate the need for common-sense construction and applications,” *Baum*, 605 F. Supp. 2d at 687, and does not permit courts to “ignore[] the Act’s spirit, purpose, and goals,” *Novartis*, 593 F. Supp. 2d at 648. As a district court in the Fifth Circuit held only two weeks ago, “[w]hile it is [therefore] true that [the] FLSA’s exemptions must be strictly construed, given the historical purpose of the statute, and the unique nature of the pharmaceutical industry, [pharmaceutical sales representatives] make ‘sales’ by securing a physician’s commitment to write a prescription.” *Harris*, 2009 WL 3157275, at *27; cf. *Mechmet*, 825 F.2d at 1178 (finding resort to the canon inappropriate because “the purposes of the [FLSA] and of its exemptions” demonstrate that an exemption different from the one at issue here applies). This Court should so hold as well.

In the end, the district court was able to adopt the narrowest possible reading of the “outside sales” exemption only by overlooking expansive language in the statute; by imposing limitations that cannot be found in the statute and are contradicted by explicit language in the regulations; by disregarding the purposes of the exemption; by ignoring this Court’s admonition that the FLSA’s overtime provisions must be interpreted in a “common sense” manner, *Holzapfel v. Town of Newburgh*, 145 F.3d 516, 523 (2d Cir. 1998); by refusing to “recogniz[e] the realities of the pharmaceutical industry,” *Novartis*, 593 F. Supp. 2d at 653; by “elevati[ng] * * * form over substance,” *Barnick*, 522 F. Supp. 2d at 1264; and by failing to “acknowledge that sometimes, * * * a duck, walking and talking so, [should] simply be treated as one,” *Baum*, 605 F. Supp. 2d at 687. No canon of “narrow construction” can overcome this overwhelming evidence that pharmaceutical sales representatives are exempt outside salespersons.

CONCLUSION

The order of the district court denying Schering’s motion for summary judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a), counsel for Defendant-Appellant Schering Corp. hereby certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,297 words, excluding the parts of the brief exempted by Fed. R. App. R. 32(a)(7)(B)(iii).

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Century Schoolbook.

Dated: October 12, 2009.

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Interim Circuit Rule 25.1(a)(8), that, on October 12, 2009, I caused two copies of this brief to be served by email PDF and overnight delivery upon the following:

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