

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)

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INTRODUCTION

The district court held that Schering’s pharmaceutical sales representatives are not “outside salesm[e]n,” 29 U.S.C. § 213(a)(1), and thus are entitled to overtime pay under the FLSA. Our opening brief demonstrates why this holding is wrong. As we explain there, the district court’s decision (1) is inconsistent with the statutory text, (2) undermines the statutory purpose, and (3) cannot be justified by the canon of “narrow construction.”

Plaintiffs do not directly respond to our second point—that mandating overtime pay for pharmaceutical sales representatives defeats the purpose of the FLSA’s “outside sales” provision, which is to exempt employees who work on their own and earn forms of compensation that are unavailable to most workers. *See* SB 50-55.¹ Like the district court, plaintiffs leave unanswered the question we pose in our opening brief (at 53-54): 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?

¹ We cite Schering’s opening brief as “SB ___” and plaintiffs’ brief as “KB ___.”

As to our third point, plaintiffs do invoke, perfunctorily, the “narrow construction” canon. KB 15, 19, 27. But they do not dispute that it is at best a tie-breaker and has no role to play when the statutory language and purpose point in a single direction. *See* SB 55-58.

That leaves only our first point—that the decision below is inconsistent with the statutory text. On that point, plaintiffs largely repeat the reasoning of the district court. But our opening brief explains in detail why that reasoning is mistaken, and plaintiffs offer no response to our criticism of it.

In large part, plaintiffs’ brief simply asserts, and reasserts, and reasserts again, that pharmaceutical sales representatives are not exempt outside salespersons. Plaintiffs say, for example, that they “d[id] not sell and therefore they are not exempt,” KB 7; that they did not make sales “by any definition of the word,” KB 21; that Schering seeks to “extend[] the definition of sales well beyond the intent of Congress,” *id.*; and that “[w]here, as here, employees do not engage in ‘sales,’ they cannot be construed as exempt outside sales people,” KB 34. But that is the *question* in the case, not the answer; and it does not become the an-

swer by dint of repetition. Some persuasive reasons must be given. Plaintiffs' brief provides none.

This Court should therefore join the majority of courts that have decided the issue and hold that pharmaceutical sales representatives are exempt outside salespersons. *See* SB 24-25 & nn.3-4. As we explain below, (a) the definition of “sale” is broad; (b) the activities of pharmaceutical sales representatives easily fall within the broad definition; and (c) the contrary position set forth by the Department of Labor for the first time—ever—in its *amicus curiae* brief in the *Novartis* case is incorrect and not entitled to deference.

ARGUMENT

A. The Definition Of “Sale” Is Broad

1. As our opening brief explains (at 27-31), 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 listed activities 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 gaps might remain. The context of “sale”

here, moreover, is what an outside “salesman” does, and the activities of a “salesman” are not limited to the formal consummation of transactions.

Plaintiffs barely respond to this point; indeed, they essentially ignore it. For example, in arguing that the statutory definition of “sale” is “[n]ot [b]road,” plaintiffs contend that “[t]he FLSA defines a ‘sale’ (for purposes of the ‘outside sales’ exemption) as ‘any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition.’” KB 18 (emphasis added). But the FLSA manifestly does *not* define sale “as” the listed items; it defines sale to “include[]” the listed items, thereby indicating 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)).

Relying on this misreading of the statute, plaintiffs repeat the district court’s mistaken assertion, *Kuzinski v. Schering Corp.*, 604 F. Supp. 2d 385, 398 (D. Conn. 2009); SPA 28, that pharmaceutical sales representatives do not make sales because they “do not make, or engage in, any of the[] things” listed in the statutory definition. KB 23;

see also KB 21 (what pharmaceutical sales representatives do “is not an exchange, contract, consignment, or shipment for sale”); KB 23-24 (similar). As our opening brief explains (at 46), even if it were true that pharmaceutical sales representatives do not do any of the things specified in the statutory definition, that would not support the conclusion that they do not make sales, because the listed activities are merely “include[d]” in the definition.

Plaintiffs offer no response to this point. Instead, they focus on the final item in the non-exclusive statutory list: “other disposition.” Plaintiffs argue that, under the interpretive canon *ejusdem generis*, these “general words follow[ing] specific words” should be “construed to embrace only objects similar in nature to the objects enumerated by the preceding specific words.” KB 19 (quoting *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)). Plaintiffs’ reliance on *ejusdem generis* is flawed on multiple levels. First, the canon does not apply to a statutory phrase beginning with the word “includes.” *United States v. Migi*, 329 F.3d 1085, 1089 & n.20 (9th Cir. 2003). Second, even if it does, plaintiffs have not identified any “relevant limiting characteristic” of the first several

items, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008), that would serve to narrow the ordinary meaning of “other disposition.” Third, even if the phrase should be construed more narrowly than it might otherwise be, “other disposition” is only one of five indicia of the statute’s breadth, *see* SB 27-31, and the other four, which plaintiffs entirely disregard, by themselves require a broad construction of the statutory definition.

2. The regulatory definition of “sale” is no less broad. As our opening brief explains (at 31-33), from the time of the FLSA’s enactment through the filing of this case, the Department of Labor consistently interpreted the concept of a “sale” broadly, pragmatically, and flexibly. In historically significant reports in the 1940s, for example, the Department expressed the view that the “outside sales” exemption 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) (“Stein Report”); 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); that the exemption should apply to an employee who “*in some sense* make[s] a sale,” *id.* at 46 (emphasis added); and that an exempt “sale” includes “obtaining a commitment to buy” and other “activities directed toward the consummation of * * * sales,” 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).

The Department of Labor’s current regulations adopt the same view. To begin with, they incorporate the statutory definition of “sale,” 29 C.F.R. §§ 541.500(a)(1)(i), 541.501(b), which is broad on its face. The regulations also indicate 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). The preamble to the regulations reiterates that an employee engages in “outside sales” work if “the employee, *in some sense*, has made sales”

and that “obtaining a commitment to buy” is sufficient. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22162-63 (Apr. 23, 2004) (emphasis added).

Plaintiffs argue that their activities “[d]o [n]ot [a]mount to [s]ales [u]nder the [r]egulations,” KB 20, but they make no real effort to grapple with the regulatory language. In the end, they do little more than repeat the district court’s mistaken assertion, *Kuzinski*, 604 F. Supp. 2d at 393, 395, 398, 399, 401; SPA 21, 28-29, 31, 34-35, that pharmaceutical sales representatives are not exempt because they do not “consummate sales” or obtain “binding commitments.” *See, e.g.*, KB 21 (“[a]t best, [p]laintiffs could obtain a *non-binding* commitment”); KB 23 (plaintiffs “do not consummate * * * ‘sales’”); KB 24 (“these commitments are in no way binding”); KB 33 (Schering cannot show that “[p]laintiffs consummate sales”). As our opening brief explains (at 46-48), while the requirement of a “consummated sale” or “binding commitment” may reflect some preconceived notion of what a “sale” entails, neither limitation can be found in the relevant legal texts—the broadly worded statute and regulations. On the contrary, any such

limitation is affirmatively inconsistent with the regulations, which exempt an employee if he or she either “consummate[s] [a] sale” or “direct[s] efforts toward the consummation of a sale,” and which indicate that an employee makes sales if he or she “obtain[s] a commitment for * * * purchases” (without suggesting that the commitment must be “binding”). 29 C.F.R. § 541.503(c). Directing efforts toward the consummation of a sale and obtaining a commitment for purchases are precisely what pharmaceutical sales representatives do.

Plaintiffs offer no response to this point, other than to say that, “[i]n the majority of cases upholding outside sales classifications, the facts plainly demonstrated that the employees in question consummated actual sales.” KB 31. Plaintiffs then discuss three cases, none of which involved pharmaceutical sales representatives, that found the exemption applicable when sales were “consummated.” KB 31-33. But three cases hardly constitute a sufficient sample to justify the claim that sales were “consummated” in “the majority of cases” applying the exemption. More fundamentally, the fact that “consummating actual sales” may be a *sufficient* condition for

application of the “outside sales” exemption does not mean that it is *necessary*. The regulations themselves provide otherwise. That is why, in cases deciding the specific question at issue here (whether pharmaceutical sales representatives are exempt outside salespersons), “the majority of cases uph[e]ld[] sales classifications” *without* requiring the employee to have “consummated actual sales.” *See* SB 24-25 & nn.3-4. Plaintiffs’ contrary position reflects the minority view.²

² Plaintiffs do not dispute that the majority of courts to consider the question have held that pharmaceutical sales representatives are exempt outside salespersons. But they contend that the cases so holding “from the Central District of California” are distinguishable, because “they deal with California law” and “fail to acknowledge that the FLSA’s exemptions must be narrowly construed against employers.” KB 27. Plaintiffs are mistaken. As an initial matter, two of the California decisions applied federal as well as state law. *See* SB 24 n.3. And even the decisions that applied only California law are highly relevant, because “California courts have recognized that California’s wage laws are patterned on federal statutes and that the authorities construing those federal statutes provide persuasive guidance” in interpreting the state laws. *Barnick v. Wyeth*, 522 F. Supp. 2d 1257, 1263 (C.D. Cal. 2007) (internal quotation marks omitted). As under the FLSA, moreover, “under California law, exemptions from statutory mandatory overtime provisions are narrowly construed.” *Ramirez v. Yosemite Water Co.*, 978 P.2d 2, 8 (Cal. 1999). Indeed, insofar as California law differs from the FLSA, it provides “*greater* protection than is provided under federal law.” *Id.* (emphasis added).

B. The Activities Of Pharmaceutical Sales Representatives Easily Fall Within The Broad Definition Of “Sale”

Pharmaceutical sales representatives “mak[e] sales within the meaning of section 3(k) of the Act,” 29 C.F.R. § 541.500(a)(1)(i), because (1) obtaining commitments from physicians is how sales are made in the pharmaceutical industry and (2) the activities of pharmaceutical sales representatives bear all the hallmarks of outside sales. Plaintiffs offer no persuasive arguments to the contrary.

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

As our opening brief explains (at 34-39), patients cannot purchase prescription drugs directly from pharmaceutical companies and they cannot purchase drugs from a pharmacist without a prescription from a physician. It is therefore physicians who ultimately control patients’ purchase of drugs by writing prescriptions. For that reason, physicians are the true customers of a pharmaceutical company and the target of its sales efforts. By seeking a commitment to prescribe the company’s drugs—the most that can be obtained due to ethical constraints—a pharmaceutical sales representative thus “make[s] sales in the sense that sales are made in the pharmaceutical industry.” *In re Novartis*

Wage & Hour Litig., 593 F. Supp. 2d 637, 650 (S.D.N.Y. 2009). No fewer than nine cases have employed this reasoning in holding that pharmaceutical sales representatives are exempt outside salespersons. *See* SB 35 n.6.

Plaintiffs cite a number of other cases, *see* KB 29-31, for the supposed proposition that, to qualify as an exempt outside salesperson, an employee “must complete his own sales,” KB 29 (emphasis omitted). But none of those cases involved pharmaceutical sales representatives, who, because of “the unique characteristics of the pharmaceutical industry,” *Schaefer-LaRose v. Eli Lilly & Co.*, 2009 WL 3242111, at *8 (S.D. Ind. Sept. 29, 2009), can go no further than obtaining a commitment to prescribe. Unlike the employees in the cases cited by plaintiffs, pharmaceutical sales representatives themselves take all permissible steps to bring about a sale; there is no one else who finishes the job. “Only the nature of the heavily regulated pharmaceutical industry prevent[s] [them] from going beyond receiving non-binding commitments.” *Id.* at *9.

This is a complete answer to plaintiffs’ suggestion that pharmaceutical sales representatives are engaged in “promoting” drugs

rather than selling them. KB 8-9, 25. The regulations provide that “promotional” work that is “incidental to sales made, or to be made, by someone else” or “designed to stimulate sales that will be made by someone else” are “not exempt outside sales work.” 29 C.F.R. § 541.503(a)-(b). But plaintiffs “did not merely ‘grease the skids’ in preparing the way for a second wave of [Schering] employees who later would visit those same physicians and close the actual sales.” *Schaefer-LaRose*, 2009 WL 3242111, at *10. “Unlike non-exempt promotional work, [plaintiffs’] efforts were neither incidental to sales made by others nor performed only for the purpose of increasing [Schering’s] sales in general.” *Id.* “[A]ny promotional work [that pharmaceutical sales representatives] undertake is directed towards the consummation of their *own* sales, and therefore exempt.” *Novartis*, 593 F. Supp. 2d at 651 (emphasis added).

Plaintiffs are also mistaken in their contention that pharmaceutical sales representatives merely “provide company-approved information” to physicians about Schering’s products. KB 3; *accord* KB 4, 6-9, 31. That narrow view conflicts squarely with the job descriptions developed for pharmaceutical sales representatives, *see* JA

228-57, the criteria for their performance reviews, *see* JA 282-94, and plaintiffs' own deposition testimony, which emphasized the need to develop relationships of trust with their clients, JA 33, 37, 39, and the importance of securing commitments, JA 90, 142.

Plaintiffs are equally mistaken in their contention that Schering's actual customers are the wholesalers and retailers to which members of Schering's trade group sell pharmaceuticals. KB 4-7, 21, 24-25. In *Novartis*, Judge Crotty correctly rejected, as "ignor[ing] reality," the notion that "the only true sales" are made to distributors that provide drugs to pharmacies. 593 F. Supp. 2d at 650. As he explained, distributors "are not the end-users of [the pharmaceutical] products," and "a sale can[not] take place" before "the physician writes a prescription for the * * * product." *Id.* Until that point, patients are "unable to buy" drugs from pharmacists and distributors that supply pharmacists "have no incentive to make purchases" from the pharmaceutical company. *Id.* Wholesalers and retailers acquire only as much product as is necessary to dispense the medications that are prescribed by physicians. Indeed, Schering itself imposes that limitation. To guarantee that booked income corresponds to filled

prescriptions, Schering enters into inventory management agreements that prohibit wholesalers from exceeding the inventory level dictated by patient demand. R.122, ex.1, at 37. It is therefore physicians—“the dispositive force behind a sale,” *Baum v. Astrazeneca LP*, 605 F. Supp. 2d 669, 682 (W.D. Pa. 2009)—that are “the appropriate target” of pharmaceutical sales representatives’ “sales efforts,” *Novartis*, 593 F. Supp. 2d at 650.

Plaintiffs ultimately do not dispute that courts should “take[] into account the characteristics of the industry in question when determining the applicability of the outside sales exemption.” *Id.* at 649; *see* KB 22. They contend, however, that this “does not indicate that [the] exemption * * * can apply more broadly than [t]he regulations specify.” KB 22-23 (quoting *Kuzinski*, 604 F. Supp. 2d at 397; SPA 21). But the regulations do not “specify” that pharmaceutical sales representatives are not outside salespersons. If they did, none of the courts to consider the question, much less the majority of them, would have held otherwise. It is therefore appropriate to consider the “characteristics of the industry” in interpreting the regulations. And those characteristics, described in our opening brief and above, compel

the conclusion that pharmaceutical sales representatives are exempt outside salespersons.

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

As our opening brief explains (at 39-45), even apart from the unique characteristics of the pharmaceutical industry, it makes sense to look to *indicia* of sales in determining whether a particular employee is *making* sales; all the judicially recognized indicia of sales support the conclusion that pharmaceutical sales representatives make sales, as the courts that have considered the factors have unanimously held; and the district court in this case erred in refusing to consider them.

Plaintiffs repeat the district court's mistaken assertion, *Kuzinski*, 604 F. Supp. 2d at 394; SPA 22, that "it is improper to use the indicia * * * to determine whether an employee is an outside salesperson" and that "the indicia [instead] are factors designed to help courts determine whether an employee who clearly does consummate sales is primarily engaged in making sales." KB 28-29. Like the district court, plaintiffs do not explain why these indicia bear solely on the issue of "primary duty," and in fact they do not. As our opening brief explains (at 43-45),

the indicia of “sales” differ from the indicia of “primary duty.” The latter presume that the employee is engaged in both sales and non-sales work and seek to determine which is primary, whereas the former seek to determine whether an employee is engaged in sales work in the first place. Plaintiffs offer no response to this point.

As our opening brief also explains (at 41-43), plaintiffs’ activities have all the hallmarks of sales because plaintiffs (a) were hired for sales jobs based on their sales experience; (b) received specialized sales training; (c) were entitled to incentive compensation for achieving sales targets; (d) were authorized to solicit new business independently; and (e) saw their supervisors only a handful of days each quarter. Plaintiffs do not dispute factors (a) or (b); on the contrary, they concede that they were hired for “sales’ position[s]” and received “sales training.” KB 34. Nor do they dispute factor (d). But plaintiffs do appear to challenge factors (c) and (e), if only indirectly. As to (c), they contend that pharmaceutical sales representatives do not earn commissions and that Schering cannot attribute sales to a specific pharmaceutical sales representative’s efforts. KB 10-13. As to (e), plaintiffs contend that

pharmaceutical sales representatives are closely supervised. KB 13-14. Both contentions are refuted by the record.

As to incentive compensation: Plaintiffs were eligible for, and sometimes earned, substantial incentive pay in addition to their base salaries. *See* SB 14-16, 42-43. Plaintiffs claim that these incentive payments are somehow irrelevant because “true salespeople” earn a smaller base salary. KB 12. But this *ipse dixit* about how “true salespeople” are compensated has no basis in law or fact. Schering’s willingness to provide larger base salaries and generous benefits, *see* KB 13, does not entitle plaintiffs to an overtime windfall.

The “hallmark of traditional outside sales relationships is the correlation of additional compensation with success in sales efforts.” *Baum*, 605 F. Supp. 2d at 684. Indeed, one of the principal rationales for the exemption is the ability of outside salespersons to “earn as much or as little, within the range of [their] ability, as [their] ambition dictates.” *Jewel Tea Co. v. Williams*, 118 F.2d 202, 207-08 (10th Cir. 1941). Notwithstanding plaintiffs’ substantial base pay and benefits, it is undisputed that they received *additional* compensation when they succeeded in generating sales. And that compensation was significant;

plaintiff Kuzinski, for example, received an additional \$4,330 in a single month. JA 320.

Nor does it matter that the payments were based on a formula. While incentive compensation can be either direct—a fixed payment for each product sold—or indirect, the defining characteristic is the “tying of the bonuses to the performance.” *Baum*, 605 F. Supp. 2d at 684. Whether the metric is “inexact” is “of minimal import,” *id.*; there is “nothing that requires a one-for-one match,” *Novartis*, 593 F. Supp. 2d at 651. Schering’s incentive payments are based on the market share that a pharmaceutical sales representative is able to attain for the assigned drugs in the assigned geographical area. JA 111, 302-81. Although this metric may not precisely identify the number of commitments obtained by a pharmaceutical sales representative, it is undoubtedly “tied to the number of prescriptions written” as a result. *Novartis*, 593 F. Supp. 2d at 651.

As to supervision: The record establishes that plaintiffs saw their supervisors only a few days each month, JA 56, 70, 110, 131, and were authorized to make independent judgments about when and how to tar-

get their customers and when to target customers beyond the target list, JA 162, 298.

Plaintiffs note that Schering provides certain guidelines to its pharmaceutical sales representatives. KB 13. But the level of supervision bears on the “outside sales” inquiry because, when a salesperson “works away from his employer’s place of business [and] is not subject to the personal supervision of his employer, [then] his employer has no way of knowing the number of hours that he works per day.” *Jewel Tea*, 118 F.2d at 208. The existence of guidelines has no bearing on the employer’s ability to monitor the employee’s hours. What matters is that pharmaceutical sales representatives “are not punching a clock and a manager is not looking over their shoulders.” *Novartis*, 593 F. Supp. 2d at 652.

Plaintiffs also note that managers spend most of *their* time managing the pharmaceutical sales representatives. KB 14. But this says nothing about the employees who are being managed. Multiple pharmaceutical sales representatives report to a single manager, so even if a manager spent *all* his or her time supervising them, it would hardly fol-

low that a single pharmaceutical sales representative is under constant managerial oversight.

Towards the end of their brief, plaintiffs make the remarkable assertion that, “if a custodian wore a suit and tie to work and called himself a professional—after years of being told he was one by the school principal—then, according to Defendant’s logic, he would be exempt under the professional exemption.” KB 34. Our “logic” would lead to no such conclusion. To begin with, the “outside sales” and “professional” exemptions are “white collar” exemptions. No one would say that a custodian is a white-collar worker, but most everyone would say that a pharmaceutical sales representative is. More fundamentally, in arguing that pharmaceutical sales representatives bear all the hallmarks of sales, we do not rely solely (or even primarily) on the fact that Schering described plaintiffs, and plaintiffs described themselves, as “salespersons.” We rely on the objective characteristics of their jobs, each and every one of which weighs decisively in favor of the conclusion that plaintiffs were outside salespersons.

C. The Position Of The Department Of Labor In Its *Amicus Curiae* Brief In The *Novartis* Case Is Incorrect And Is Not Entitled to Deference

In the *Novartis* appeal, which will be heard in tandem with this one, the Department of Labor has filed an *amicus curiae* brief that takes the position, for the first time ever, that pharmaceutical sales representatives are not exempt outside salespersons under the FLSA. Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants, *In re Novartis Wage & Hour Litig.*, No. 09-0437 (2d Cir. Oct. 13, 2009) (“DOL Br.”). Plaintiffs contend that the Department of Labor’s position is correct and entitled to deference by this Court. KB 15-18. As we explain below, both contentions are wrong.

1. The Department of Labor’s position is incorrect

In its *amicus* brief in *Novartis*, the Department of Labor relies heavily on the district court’s decision in this case, *see* DOL Br. 10 n.7, 13, 14, 15, and repeats each of its errors. For example, the Department asserts that the FLSA and its implementing regulations “define[] ‘sale’ as ‘any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.’” DOL Br. 8. But of course the Act and regulations do not define sale “as” these things; they define it to “include[]” them. 29 U.S.C. § 203(k); 29 C.F.R. §§ 541.500(a)(1)(i),

541.501(b). The Department also takes the position that pharmaceutical sales representatives “do not sell * * * drugs” because they “can at most obtain from the physicians a non-binding commitment to prescribe [them],” DOL Br. 10, and that “a ‘sale’ for the purposes of the outside sales exemption requires a consummated transaction,” *id.* at 11. But as we have repeatedly observed, the requirement of a “binding commitment” or “consummated transaction” cannot be found in the regulations and in fact is contradicted by them. *See* 29 C.F.R. § 541.503(c) (employee makes sales if he or she “obtain[s] a commitment for * * * purchases” or “direct[s] efforts toward the consummation of a sale”). Finally, the Department contends that its position is dictated by “the plain language” of the regulations. DOL Br. 9. But the Department ignores (and indeed rewrites) critically important “plain language” in the regulations—the word “includes,” a term of enlargement. At the same time, it relies heavily on limiting concepts—“consummated sales” and “binding commitments”—that cannot be found within (and indeed are inconsistent with) the regulations’ “plain language.”

The opinion letters on which the Department of Labor relies, DOL Br. 11-12 & n.8, likewise do not support its position. Two of the letters concluded that solicitors of charitable donations and liaisons between organ donors and non-profit foundations were not exempt because their work is “similar to” the activities of “outside buyers,” who are the “opposite” of outside salespersons. WH Opinion Letter FLSA 2006-16, 2006 WL 1698305 (May 22, 2006); WH Opinion Letter FLSA, 1994 WL 1004855 (Aug. 19, 1994). A pharmaceutical sales representative is not remotely similar to an “outside buyer” in general or to the type of employees addressed in those letters in particular. The third opinion letter does not involve the “outside sales” exemption at all, but to the extent it is relevant it supports *our* position, not the Department’s, because it correctly observes that “the term ‘sale’ [in Section 3(k) of the FLSA] does not always have a fixed or invariable meaning.” WH Opinion Letter FLSA 2005-06, 2005 WL 330605 (Jan. 7, 2005) (internal quotation marks omitted).

The offhand reference to “firm orders” in a 1965 field operations handbook, DOL Br. 12, does not support the Department of Labor’s position either. The section at issue, titled “Soliciting business through

a dealer,” covered employees “whose duty is to convince a dealer of the value of his employer’s service to the dealer’s customers” (as opposed to the dealer itself). Field Operations Handbook § 22e04 (1965). It thus does not cover pharmaceutical sales representatives, whose duties are not at all similar. In any event, the handbook antedates by nearly four decades the current “outside sales” regulations, which make clear that the exemption does not require a “firm order.”

2. The Department of Labor’s position is not entitled to deference

Plaintiffs contend that the Department of Labor’s position is entitled to deference under the Supreme Court’s decision in *Auer v. Robbins*, 519 U.S. 452 (1997). KB 15-16. *Auer* requires courts to accord deference to an agency’s interpretation of its own regulations in certain cases. But not in all cases. Both the Supreme Court and this Court have identified a number of circumstances in which *Auer* deference is unwarranted, and at least four of them are present here. As we explain below, this Court should not defer to the Department of Labor because (a) the regulation it is interpreting merely parrots the statute; (b) its position has not been consistently held; (c) deferring to its position would penalize Schering without fair notice; and (d) its interpretation is

inconsistent with the regulations' express terms. None of these circumstances was present in the cases on which plaintiffs rely. *See id.*

First, Auer deference is unwarranted because “the underlying regulation does little more than restate the terms of the statute.” *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). The issue in this case is whether pharmaceutical sales representatives make “sales.” Section 3(k) of the FLSA 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). Section 541.500 of the regulations, titled “General rule for outside sales employees,” provides that an employee is exempt if his or her primary duty is “making sales within the meaning of section 3(k) of the Act.” 29 C.F.R. § 541.500(a)(1)(i). And Section 541.501 of the regulations, titled “Making sales or obtaining orders,” provides that “Section 541.500 requires that the employee be engaged in * * * [m]aking sales within the meaning of section 3(k) of the Act” and that “Section 3(k) of the Act states that ‘sale’ or ‘sell’ includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” 29 C.F.R. § 541.501(a), (b).

“An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to [repeat] the statutory language.” *Gonzales*, 546 U.S. at 257. The “equivalence of the statute and regulation” thus “belies the * * * argument for *Auer* deference.” *Id.*; see also *Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1156 (2008) (accordng *Auer* deference with respect to one issue but assuming that “*Auer* deference is inapplicable” with respect to another issue when the term in question “is a term Congress used in the underlying statute that has been incorporated in the regulations by the agency”). Like the Supreme Court in the *Gonzales* case, 546 U.S. at 256-57, lower courts have refused to accord *Auer* deference to an agency’s interpretation of a regulation that merely “parrot[s]” the statute, *id.* at 257; see, e.g., *Groff v. United States*, 493 F.3d 1343, 1350 n.2 (Fed. Cir. 2007); *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 345 n.12 (3d Cir. 2006); *Walker v. Eggleston*, 2006 WL 2482619, at *4 (S.D.N.Y. Aug. 29, 2006). This Court should do the same here.

Second, *Auer* deference is unwarranted because the Department of Labor’s interpretation has not been “consistently held.” *INS v. Nat’l*

Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 189-90 (1991). For nearly three quarters of a century, the Department has repeatedly emphasized, in myriad ways, the breadth and flexibility of the concept of a "sale" under the "outside sales" exemption. See SB 31-33. As the Department said in 1940, and as it said again in 2004, the exemption applies to an employee who "in some sense" makes sales. Stein Report 46; 69 Fed. Reg. at 22162. Now, in 2009, for the first time ever, without any input from the public, and without any indication that the agency itself has given the matter careful thought, the Department has decided to take the position that the concept of a "sale" should in fact be interpreted narrowly and inflexibly, and that it does not encompass the activities of pharmaceutical sales representatives. The Department has advanced that position, moreover, "for the first time in a litigation brief," a means of expressing agency views that has historically been treated with "near indifference," *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001), and only after the great majority of courts to consider the question have concluded, consistent with the Department's previously expressed views, that pharmaceutical sales representatives *are* exempt outside salespersons.

The Supreme Court has made clear that *Auer* deference is justified only when “an agency’s course of action indicates that the interpretation of its own regulation reflects its considered views,” as, for example, when the agency has “clearly struggled with the * * * question” for an extended period. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007). There is no indication that the Department of Labor has *ever* “struggled with” the question whether pharmaceutical sales representatives are outside salespersons and no indication that the new position in its *amicus* brief “reflects its considered views.” On the contrary, the Department’s “course of action” since the FLSA’s enactment demonstrates that its current position reflects an abrupt *change* in its views. Compare *AFSCME v. Am. Int’l Group, Inc.*, 462 F.3d 121, 129 (2d Cir. 2006) (declining to accord *Auer* deference to interpretation that “depart[s] from prior interpretations”), with *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 208 (2d Cir. 2009) (accordng *Auer* deference when agency “consisten[t]ly * * * interpret[ed] [the regulation] over time”), and *In re Wal-Mart Stores, Inc.*, 395 F.3d 1177, 1185 (10th Cir. 2005) (accordng *Auer* deference to

Department of Labor's opinion letters that "reflect a consistent view over an extended period of time").

Third, Auer deference is unwarranted because it "would penalize [a company that] has not received fair notice of a regulatory violation." *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996). Plaintiffs ask this Court to defer to the Department of Labor's brand-new interpretation of its regulations in a collective-action lawsuit that seeks untold damages on behalf of themselves and those similarly situated, including "liquidated (double) damages as provided by the FLSA for overtime violations" and "[p]enalties available under applicable law." JA 7. "In penalty cases, courts will not accord substantial deference to an agency's interpretation of an ambiguous rule in circumstances where the rule did not place the individual or firm on notice that the conduct at issue constituted a violation of a rule." Richard J. Pierce, Jr., 1 ADMINISTRATIVE LAW TREATISE § 6.11, at 404 (4th ed. 2002)). That is surely the case here.

The language and purpose of the FLSA's "outside sales" provision, and the Department of Labor's longstanding interpretation of it, all point in the same direction: that pharmaceutical sales representatives

are exempt. It would be unfair in the extreme to allow the Department's unanticipated position that pharmaceutical sales are *not* exempt, announced for the first time last month in an *amicus* brief, to be the difference between a potentially enormous judgment against a company and no judgment at all. That is particularly true in this case, because Schering not only had no notice of the new position from the Department of Labor, but had no notice of it from plaintiffs themselves, who never claimed any entitlement to overtime pay until the idea was suggested to them by the lawyers who solicited them. JA 28-29, 95, 122. *Auer* deference should not be accorded when a "novel" interpretation of a regulation, *KPMG, LLP v. SEC*, 289 F.3d 109, 116 (D.C. Cir. 2002), creates this type of "unfair surprise," *Long Island Care at Home*, 551 U.S. at 170.

Fourth, *Auer* deference is unwarranted because the Department of Labor's interpretation is "inconsistent with the regulation[s]" themselves. *Auer*, 519 U.S. at 461 (internal quotation marks omitted). That is true in at least two respects. The first is that the Department's new interpretation reflects a rewriting of the regulation to define sale "as" the items specifically listed in the definition, DOL Br. 8, whereas

the regulation enacted by the agency after notice and comment defines sale to “include[]” those items, 29 C.F.R. §§ 541.500(a)(1)(i), 541.501(b). Given the actual language, “the fact that the [regulation] 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 Transps., Inc.*, 576 F.2d 1285, 1289 (8th Cir. 1978). The second respect in which the Department’s interpretation conflicts with the regulations is that, whereas the Department now takes the position that a *necessary* condition for a “sale” is a “consummated transaction” or “binding commitment,” DOL Br. 8 n.5, 10, 11, 15, the regulations themselves provide that a *sufficient* condition for a “sale” is “direct[ing] efforts toward the consummation of a sale” or “obtain[ing] a commitment for * * * purchases,” 29 C.F.R. § 541.503(c). Pharmaceutical sales representatives do both of those things. “To defer to the agency’s position [in these circumstances] would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.” *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

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 certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,333 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 Word 2002 in 14-point Century Schoolbook.

Dated: November 25, 2009

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**CERTIFICATE OF COMPLIANCE WITH
INTERIM LOCAL RULE 25.1(a)(6)**

Pursuant to Interim Local Rule 25.1(a)(6), counsel for Defendant-Appellant Schering Corp. hereby certifies that the PDF version of this document has been scanned for viruses using Symantec Antivirus v. 10.1.4.4000, with virus definitions version 11/23/2009 rev. 5, and that no virus has been detected.

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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 November 25, 2009, I caused two copies of this brief to be served by email PDF and overnight delivery upon the following:

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