No. 11-204

IN THE

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER, *et al.*,

Petitioners,

v.

SMITHKLINE BEECHAM CORPORATION
dba GLAZOSMITHKLINE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CERTIFIED CLASS OF PHARMACEUTICAL REPRESENTATIVES FROM JOHNSON & JOHNSON AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

AASHISH Y. DESAI
Counsel of Record
DESAI LAW FIRM, P.C.
8001 Irvine Center Drive
Suite 1450
Irvine, CA 92618
(949) 842-8948
aashish@desai-law.com

240368

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae are a group of Pharmaceutical Representatives ("PR") who were, or are, employed by Johnson & Johnson subsidiary Ortho-McNeil, Inc., Janssen Ortho-McNeil Primary Care, Inc., and Janssen, L.P. ("Ortho-McNeil"). The PRs filed two cases alleging that Ortho-McNeil misclassified them, and a class of similarly situated PRs, as exempt from overtime wages under federal and state law. The District Court certified a nationwide "opt-in" collective action under the Fair Labor Standards Act of 1938 ("FLSA"). The parties thereafter cross-moved for summary judgment of Ortho-McNeil's affirmative defense that the PRs are covered by the outside salesperson exemption under the FLSA. Ortho-McNeil won.

The District Court issued two opinions containing, verbatim, the same analysis of the FLSA outside sales exemption. Delgado v. Ortho-McNeil, United States District Court Case No. 8:07-cv-00263 and Yacoubian v. Ortho-McNeil, United States District Court Case

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[1]Pursuant to Supreme Court Rule 37.6, amicus curiae states no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus, or its counsel, made a monetary contribution intended to fund its preparation or submission. A letter of consent from the parties to the filing of this brief has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

No. 8:07-cv-00127. Upon appeal, the Ninth Circuit consolidated the briefing and arguments in these two related cases with Christopher v. SmithKline Beecham Corp. (11-204). After oral argument, the Ninth Circuit took all three matters under submission. However, the Ninth Circuit only issued an opinion in *Christopher* and withdrew submission of its ruling in both *Delgado* and *Yacoubian* pending a decision from another panel in the Ninth Circuit on a related California state law issue. To date, the Ninth Circuit has yet to issue an opinion in the consolidated *Delgado* and *Yacoubian* matters even though its ruling on the FLSA outside salesperson exemption will surely be the same as that in *Christopher*.

SUMMARY OF ARGUMENT

Promotion work is a massive undertaking for pharmaceutical companies, which spend billions of dollars a year and have hundreds of thousands of pharmaceutical representatives make weekly or monthly one-on-one visits to prescribers nationwide. During their one-on-one visits to prescribers, PRs distribute product samples along with branded promotional materials and pamphlets about the different conditions their particular products can be used to treat. The central objective is to provide medical information to promote brand loyalty. The question before the Court here is whether these employees are "making sales" as defined by the FLSA. They are not. More to the point, the Department of Labor has given its opinion on the issue explaining why PRs are not outside salespersons under the FLSA.

However, the Ninth Circuit declined to give any deference to the DOL.

This brief highlights some of the problems with the Ninth Circuit's rational for eschewing DOL deference because the Secretary had "acquiesced" to the sales practices of the pharmaceutical industry for over 70 years. First, the pharmaceutical companies' arguments -- that indirect sales are good enough for the exemption – have, in fact, been considered and rejected by the DOL in the rules-making process from the beginning. Second, the DOL and District Courts throughout the nation have consistently distinguished between promotion and sales work. And finally, the DOL's position with regard to "outside sales" has always been consistent. The pharmaceutical companies cannot feign ignorance.

In the end, PRs are not employed to sell a product. They are employed to engage in a two-way balanced and objective dialogue between the physician and drug companies about the scientifically-proven benefits and risks of pharmaceutical drugs with the express purpose of enhancing the practice of medicine. That is not sales. Additionally, because PRs do not consummate sales, take orders, or form contracts of any kind, they do not fall within the plain language of the FLSA statute and regulations. The Ninth Circuit is wrong and should be reversed.

I. The Companies' Arguments Have Already Been Considered and Rejected in the Rules-Making Process

A. Promoters and Persuaders Do Not Fall Within the Outside Sales Exemption

Virtually from the inception of the FLSA in 1938, business interests have pressed to include in the outside sales exemption, those employees like PRs who are "missionary men" -- i.e., promoters who do not consummate their own sales. For over seventy years, the DOL has refused these petitions. In the Department of Labor's 1949 Report and Recommendations on Proposed Revisions of Regulations, the DOL specifically considered and rejected the argument that employees engaged in "indirect sales" qualify for the outside sales exemption under section 541.5 of the regulations. The presiding officer rejected these suggestions primarily because these promotion men are not employed for the purpose of making sales. *See* Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor (June 30, 1949) ("Weiss Report") at 82.

B. Strict Definition of Sales

When the FLSA's outside sales employee exemption was first defined and interpreted by the Wage and Hour Division, early questions were raised concerning what qualified as "sales" under this exemption. As described in the 1940 Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition:

> [T]he Division has expressed the opinion that the word "sales" as defined in section 3(k) ***does not cover*** certain activities which are popularly described as sales. Particular reference is made to the selling of time on the radio, the solicitation of advertising for newspapers and other periodicals and the solicitation of freight for railroads and other transportation agencies. … Accordingly, it is deemed desirable to add a further clause which will specifically include within the exemption persons engaged in selling activities of this type. (emphasis added)

However in slightly extending the scope of the term "outside salesman" to include such employees, it was not intended to broadly include persons who in a very loose sense are sometimes described as selling a "service."

C. Promotional Work Does Not Constitute "Sales"

The DOL has squarely rejected the argument that promotional work that assists someone else in making a sale constitutes work that falls within the outside sales exemption. "Executive, Administrative, Professional…Outside Salesman," Redefined, Wage and Hour Division, U.S. Dep't of Labor, Report and Recommendations, by Harold Stein, Presiding Officer (October 10, 1940) ("Stein Report") (emphasis in original).

In the Stein Report, the DOL stated that a manufacturer's "promotion and missionary men," whose job is to convince retailers to buy from wholesalers (jobbers) (who in turn buy from the manufactures), do not fall within the "outside salesman" exemption.

> It should be noted that frequently the promotion man is primarily interested in sales ***by*** the retailer, not ***to*** the retailer. Thus, inasmuch as the promotion man's earnings are normally not directly related to his working time, as is customarily the case with outside salesmen, it is doubtful that the nature of his work requires or justifies an exemption from the provision of the act. In any event it is clear that it would be an unwarrantable extension of the Administrator's authority to describe as a salesman anyone who does not in some sense make a sale.
>
> *See* Stein Report at 46 (emphasis in original).

Over the years, requests have been made to include certain professions within the outside sales exemptions. These requests include employees such as service men, installation men, delivery-men, and collectors.[2] Proponents claim that these employees are engaged in selling their employer's "service" to the

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[2] The pharmaceutical companies have never asked the DOL to include their PRs within the outside salesperson exemption.

person from whom they obtain their goods. All of these requests were rejected as lying outside the scope of the exemption. See "Executive, Administrative, Professional . . . Outside Salesman" Redefined, Wage and Hour Division, U.S. Dep't of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition, at pp. 45-46 (Oct. 10, 1940).

The regulations were again revised in 1949 to include persons engaged in obtaining orders or contracts for "services" in the definition of outside sales, but the remaining underlying concepts were not changed. *See* Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, at pp. 81-82 (June 30, 1949). Accordingly, when applying these principles in response to requests for opinions, the Division has concluded, for example, that soliciting organ and tissue donors by selling the concept of being a donor does not constitute "sales" under the regulations. *See* WH Opinion Letter August 19, 1994.

II. The DOL and Courts Have Consistently Distinguished Between Promotion and Sales

As explained above, the DOL has always distinguished between promotion and sales and has deemed promotion work as non-exempt from the overtime regulations. The Department's regulations define the statutory phrase "outside salesman" as including "any employee . . . [w]hose primary duty is . . . making sales within the meaning of section 3(k) of the Act, or . . . obtaining orders or contracts for

services or for the use of facilities for which a consideration will be paid by the client or customer." 29 C.F.R. § 541.500(a)(1)(i)-(ii).

"Primary duty" means "the principal, main, major, or most important duty that the employee performs," 29 C.F.R. § 541.700(a), and section 3(k) of the FLSA defines "[s]ale" as including "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k); *see* 29 C.F.R. § 541.501. The Department's regulations further explain that "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property," and that "'services' extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order." 29 C.F.R. §§ 541.501(b) and (d).

The regulations explicitly distinguish promotional work from exempt outside sales work, clarifying that:

> [p]romotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it was performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. 29 C.F.R. §541.503(a).

In other words, "[p]romotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made ***by someone else*** are not exempt outside sales work." 29 C.F.R. § 541.503(b) (emphasis added). While the parties agree that a lay-person's understanding of the term "sell" is not relevant to the legal issue, it is incorrect to assert that the legal question is whether PRs were "selling." The term "selling" does not appear in the outside sales exemption, which instead holds that employees must be "making sales." 29 C.F.R. § 541.500(a)(1)(i). The verb "to sell" and the gerund "selling" are colloquial terms that capture a range of persuasive activities, many of which fall outside the exemption. For example, attorneys attempt "to sell" (read: "persuade") the court on their arguments, just as the presidential contenders are "selling" (read: "persuading") their candidacies. But these truisms do not make lawyers or politicians "salespeople" under the FLSA. It is the broad, colloquial use of the word selling that the employers here advocate.

By contrast, the noun "sale," the word actually used in the outside sales exemption regulating, is much narrower. "Sale" is categorically defined in the FLSA as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). A "sale" refers to transactions for value, not the marketing and promotion of those transactions in a general or colloquial sense. Thus, the phrase "making sales"

under the exemption is considerably narrower than the conversational phrase "selling."

Given these clarifying regulations, PRs do not meet the primary duties test for the outside sales exemption. They do not do not sell any drugs or obtain any orders for drugs, and can at most obtain from the physicians a non-binding commitment to prescribe the company's drugs to their patients when medically appropriate. They do not meet the regulations' requirement that their primary duty must be "making sales." 29 C.F.R. § 541.500(a)(1)(i).

If the PRs are not selling drugs, the logical question sometimes turns to "who then is selling pharmaceutical drugs?" The actual sale of a company's drugs usually occurs between the company and distributors -- and then to the pharmacy. Insofar as the PRs' work increases the company's sales, it is non-exempt promotional work "designed to stimulate sales that will be made by someone else." 29 C.F.R. § 541.503(b). As a District Court recently concluded, "[t]he regulations *dictate* that if an employee does not make any sales and does not obtain any orders or contracts, then the outside sales exemption does not apply." *See Jirak v. Abbott Labs., Inc.*, 716 F.Supp.2d 740, (N.D. Ill. 2010) (emphasis added).

To the extent that there is any ambiguity in the Department's regulations, the Department's Preamble to the 2004 final rule ("Preamble"), Wage and Hour Division ("WH") opinion letters, and WH Field Operations Handbook (1965) ("FOH") provide additional guidance. The Preamble emphasizes that the Department "does not intend to change any of the essential elements required for the outside sales

exemption, including the requirement that the ***outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services***." 69 Fed. Reg. at 22,162 (emphasis added).

"Employees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale." *Id.* The Preamble further notes that "[e]xtending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test." *Id.* Indeed, the exemption does not extend to employees engaged in paving the way for salesman or assisting retailers. *Id.* "In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt.'" 69 Fed. Reg. at 22,162–22,163 (quoting Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, Report and Recommendations on Proposed Revisions of Regulations, Part 541, at 83 (June 30, 1949)).

It is undisputed that PRs are unable to obtain any sort of binding "commitment to buy" from the physician; they are in fact prohibited from doing so. *See In re Novartis Wage v. Hour Litigation*, 611 F.3d 141 (2nd Cir. 2010). ("The type of 'commitment' the Reps seek and sometimes receive from physicians is not a commitment 'to buy' and is not even a binding

commitment to prescribe."). Nor can a PR consummate his or her own specific sale. A PR's marketing activities cannot be linked to a patient filling a prescription; thus, PRs cannot be directly credited with the sale.

The Department's Wage and Hour Division has consistently reiterated its position that a "sale" for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought. For example, the Wage and Hour Division rejected the application of the outside sales exemption to individuals soliciting charitable contributions, noting that "[s]oliciting promises of future charitable donations or 'selling the concept' of donating to a charity does not constitute 'sales' for purposes of the outside sales exemption. . . . [These] solicitors do not obtain orders or contracts for services or for use of your client's facilities for which a consideration will be paid." WH Opinion Letter FLSA 2006-16, 2006 WL 1698305 (May 26, 2006); *see also* WH Opinion Letter, 1994 WL 1004855 (Aug. 19, 1994) (concluding that soliciting organ and tissue donors by selling the concept of being a donor does not constitute "sales" under the regulations). Additionally, the Department's FOH states that "[a]n employee whose duty is to convince a dealer of the value of his employer's service to the dealer's customers and who does not in fact obtain firm orders or contracts from either the dealer or his customers is not making sales within the meaning of FLSA Sec. 3(k)." FOH § 22e04.

The distinction between obtaining commitments to buy and promoting sales by other persons has been

respected in areas other than the pharmaceutical industry. *See In Re Novartis*, 611 F.3d 141, 153 (2nd Cir. 2010) (*citing Gregory v. First Title America, Inc.*, 555 F.3d 1300, 1309 (11th Cir. 2009) (employee who obtained commitments to buy her employer's title insurance service and was credited with those sales, and all of whose efforts were directed towards the consummation of her own sales and not towards stimulating sales for the employer in general, was an outside sales employee within the meaning of the FLSA and the regulations)); *Clements v. Serco, Inc.,* 530 F.3d 1224, 1228 (10th Cir. 2008) (civilian military recruiters who did not obtain commitments from recruits were not outside salesmen within the meaning of, *e.g.,* 29 C.F.R. § 541.504); *Wirtz v. Keystone Readers Service Inc.*, 418 F.2d 249, 253, 260 (5th Cir. 1969) ("student salesmen" were not outside sales employees where their promotional activities were incidental to sales made by others).

III. DOL's Position With Regard to "Outside Sales" Has Always Been Consistent

As explained above, the DOL's position has always been that a "sale" for the purpose of the outside exemption requires a consummated transaction involving the employee for whom the exemption is sought. For example, the DOL found that the outside sales exemption did not apply to "enrollment advisors" or college recruiters whose duties included "selling" the school and "inducing" student applicants, which resulted in the advisors personally obtaining a signed enrollment application and a nonrefundable $50.00 application fee. DOL Opinion Letter, 1998 DOLWH LEXIS 17, at *3, 7 (Feb. 19, 1998). The DOL explained

that the activities of the position were more "analogous to sales promotion work" because "like a promotion person who solicits customers for a business," the college recruiter identifies customers and induces their application but does not "make a contractual offer of its educational services to the applicant." *Id.* at *7; *See also* DOL Opinion Letter, FLSA2006-16, 2006 WL 1698305, at *2 (May 22, 2006) (finding that "'selling the concept' of donating to a charity does not constitute 'sales' for purposes of the outside sales exemption" because the solicitors do not obtain orders or contracts and the "exchange of a token gift for the promise of a charitable donation" is not a "sale").

The regulations dictate that if an employee does not make any sales and does not obtain any orders or contracts, then the outside sales exemption does not apply. *See* 29 C.F.R. § 541.500(a). Further, the regulations state that "promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work" and that "promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work." *Id.* at § 541.503(a)-(b). The latter regulation describes promotional activities generally, and does not distinguish between activities that are "incidental" versus "essential" to sales. *Id.* at § 541.503(b).

The DOL has consistently expressed its official opinion that outside sales exemption does not apply to employees who assist in promoting a good or service, but do not sell the good or service. Other recent examples include the following:

1. Tissue Recovery Coordinators who "sell[] the concept of tissue donation" in order to persuade institutions and individuals to "'buy into' the merits and benefits of tissue donation," are not exempt. The "selling of a concept does not constitute 'sales' within the meaning of the regulations." DOL Op. Letter 1994 WL 1004855 (Aug. 19, 1994).

2. Solicitors of Charitable Donations are not engaged in sales because "[s]oliciting promises of future charitable donations or 'selling the concept' of donating to a charity does not constitute 'sales' for the purposes of the outside sales exemption . . . the solicitors do not obtain orders or contracts for services . . . for which a consideration will be paid." DOL Op. Letter 2006 WL 1698305 (May 22, 2006).

The DOL has always made it clear that promotional activity does not constitute "making sales" within the meaning of the statute unless the employee also consummates an exchange of goods or services for value.

CONCLUSION

The typical outside salesman envisioned by the FLSA is an employee who acts independently and who earns commissions in direct proportion to the number of sales he makes – "He's a man way out there in the blue, riding on a smile and a shoeshine." Arthur Miller, Death of a Salesman (New York, 1958). True salespersons, as some Courts have noted, are limited "only by the range of their abilities and the dictates of their ambition." *Jewel Tea Co. v. Williams,* 118 F.2d 202 (10th Cir. 1941). But this model does not fit PRs.

The incentive system is, at best, a profit sharing arrangement designed to make employee compensation contingent on company -- not individual -- performance through periodic bonuses. And PRs do not work in an individualized, unstructured, and unsupervised fashion; just the opposite. Moreover, PRs are allowed to deliver only company-approved and provided materials and techniques and are constrained from utilizing many of the arrows in a prototypical salesperson's quiver: prices, discounts, competitor products, alternatives uses of the products, or even scientific studies of the product's effectiveness. That is a long way from the "smile and a shoeshine" model.

The DOL recognizes this reality and has concluded that PRs do not fall within the plain language of the FLSA statute and regulations because they are engaged in promotion work. The DOL, the sole agency charged with interpreting the FLSA, is entitled to deference. Therefore, the Ninth Circuit was wrong and should be reversed. The Second Circuit is correct.

Respectfully submitted,

Aashish Y. Desai
Counsel of Record
DESAI LAW FIRM, P.C.
8001 Irvine Center Drive
Suite 1450
Irvine, CA 92618
(949) 842-8948
aashish@desai-law.com

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