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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Michael Shane Christopher; Frank  
Buchanan,

No. CV-08-1498-PHX-FJM

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Plaintiffs,

**ORDER**

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vs.

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SmithKlein Beecham Corp.,

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Defendant.

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On November 20, 2009, we entered an order (doc. 93) granting summary judgment in favor of defendant, based on our conclusion that pharmaceutical sales representatives fit within the outside sales exemption of the Fair Labor Standards Act (“FLSA”). 29 U.S.C. § 213(a)(1). We now have before us plaintiffs’ motion to alter or amend the judgment (doc. 96), defendant’s response (doc. 97), and plaintiffs’ reply (doc. 98).

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This case turns on the definition of “sale” under the FLSA. Before we entered our order, plaintiffs submitted an *amicus curiae* brief filed by the Department of Labor (“DOL”) in an action pending in another circuit, in which the DOL took the position that a “sale” for the purpose of the outside sales exemption “requires a consummated transaction directly involving the employee for whom the exemption is sought.” DOL brief at 11. The DOL opined that because pharmaceutical sales representatives do not make “actual sales,” id. at

1 5, 10, the outside sales exemption does not apply. The arguments raised in the DOL brief  
2 were the same arguments presented in plaintiffs’ briefs in the instant action. We have  
3 considered each of those arguments and rejected them. Nevertheless, plaintiffs now contend  
4 that the position taken by the DOL in its *amicus* brief is entitled to controlling deference. We  
5 disagree.

6 Under Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44,  
7 104 S. Ct. 2778, 2782 (1984), a court must give effect to an agency’s regulation containing  
8 a reasonable interpretation of an ambiguous statute. Here, the DOL’s interpretation is  
9 contained in an *amicus* brief and was not subject to the rigors of the Administrative  
10 Procedure Act, or otherwise promulgated in the exercise of the agency’s rulemaking  
11 authority. “[I]nterpretations contained in policy statements, agency manuals, and  
12 enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style  
13 deference.” Christensen v. Harris County, 529 U.S. 576, 587, 120 S. Ct. 1655, 1662 (2000);  
14 see also Martin v. Occupational Safety & Health Review Comm’n, 499 U.S. 144, 157, 111  
15 S. Ct. 1171, 1179 (1991); Gonzales v. Oregon, 546 U.S. 243, 255-56, 126 S. Ct. 904, 915  
16 (2006).

17 Nor is the DOL’s *amicus* brief entitled to deference under Auer v. Robbins, 519 U.S.  
18 452, 461, 117 S. Ct. 905, 911 (1997). While an agency’s interpretation of its own regulations  
19 is generally entitled to substantial deference, id., the regulations at issue here merely restate  
20 the terms of the statute itself. The FLSA defines “sale” as “includ[ing] any sale, exchange,  
21 contract to sell, consignment for sale, shipment for sale, or other disposition.” 29 U.S.C. §  
22 203(k). The regulations, in turn, provide that an employee is exempt as an outside  
23 salesperson if the employee is “making sales within the meaning of [29 U.S.C. § 203(k)].”  
24 29 C.F.R. § 541.500(a)(1)(i). The regulations only marginally expound upon the statutory  
25 definition by providing that “[s]ales within the meaning of section 3(k) of the Act include the  
26 transfer of title to tangible property, and in certain cases, of tangible and valuable evidences  
27 of intangible property.” Id. § 541.501(b). Plaintiffs’ reference to regulations that define  
28 “promotion work,” 29 C.F.R. § 541.503, and “primary duty,” id. § 541.700, do not serve to

1 define or delimit the definition of “sale,” and therefore do not advance their position.  
2 Because the underlying regulations largely repeat the statutory language, they “give[ ] little  
3 or no instruction on a central issue in this case.” Gonzales, 546 U.S. at 257, 126 S. Ct. at  
4 915.

5 The DOL “does not acquire special authority to interpret its own words when, instead  
6 of using its expertise and experience to formulate a regulation, it has elected merely to  
7 paraphrase the statutory language.” Id. 546 U.S. at 257, 126 S. Ct. at 916. Instead, the  
8 DOL’s current interpretation in the *amicus* brief is “entitled to respect” only to the extent it  
9 has the “power to persuade.” Id. at 256, 126 S. Ct. at 915 (quoting Skidmore v. Swift & Co.,  
10 323 .S. 134, 65 S. Ct. 161 (1944)). We find the DOL’s interpretation unpersuasive.

11 According to the DOL, “a ‘sale’ for the purposes of the outside sales exemption  
12 *requires a consummated transaction* directly involving the employee for whom the  
13 exemption is sought.” DOL brief at 11 (emphasis added). This language, however, is  
14 inconsistent with the statutory definition which provides that a “sale” includes not only a  
15 “sale” as that term is traditionally defined, but also “other disposition.” 29 U.S.C. § 203(k).  
16 Moreover, the DOL’s attempt to now constrict and limit the statutory definition to “actual  
17 sales,” DOL brief at 5, 10, is contrary to the DOL’s previous interpretations that broadly  
18 defined the outside sales exemption as requiring a sale “in some sense.” Defining and  
19 Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and  
20 Computer Employees, 69 Fed. Reg. 22122, 22162 (Apr. 23, 2004).

21 Not only is the DOL’s current interpretation inconsistent with the statutory language  
22 and its prior pronouncements, but it also defies common sense. Pharmaceutical sales  
23 representatives are salespeople. They make sales the way that sales are made in the  
24 pharmaceutical industry. Any other construction ignores reality and defeats the spirit and  
25 purpose of the exemption. Under the DOL’s interpretation, there are no salespersons in the  
26 pharmaceutical industry. This would come as a great surprise to the physicians of this  
27 country whose waiting rooms are filled with drug sales reps and the millions of television  
28 viewers who are bombarded with drug advertising every time the set is turned on. But

1 because title under the Uniform Commercial Code passes at the drugstore, under the DOL  
2 view, the drugstore clerk is the salesperson. We reject this absurdity.

3 **IT IS ORDERED DENYING** plaintiffs' motion to alter or amend the judgment  
4 (doc. 96).

5 DATED this 29<sup>th</sup> day of January, 2010.

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*Frederick J. Martone*  
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Frederick J. Martone  
United States District Judge