

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JULIE CAMPANELLI, et al.,)	
)	
Plaintiff(s),)	No. C 08-1862 BZ
)	
v.)	ORDER GRANTING PLAINTIFFS'
)	MOTION FOR PARTIAL SUMMARY
THE HERSHEY COMPANY,)	JUDGMENT
)	
Defendant(s).)	
)	
_____)	

Plaintiffs have moved for partial summary judgment that the outside sales and administrative exemptions do not apply to their job duties.¹ Docket No. 315. Having considered the papers submitted by the parties and the arguments of counsel, the Court **GRANTS** plaintiffs' motion for the reasons explained below.

I. BACKGROUND²

In 2003, defendant The Hershey Company restructured its

¹ The parties have consented to the Court's jurisdiction for all proceedings, including entry of final judgment under 28 U.S.C. § 636(c).

² In this order, the Court will specifically note when material facts are disputed by the parties.

1 domestic sales force to adapt to a changing retail
2 environment. As part of the restructuring, defendant created
3 an entry-level Retail Sales Representative (RSR) position.
4 Defendant classified this position as exempt from overtime
5 under both federal and California law, and never paid hourly
6 compensation to RSRs for any overtime they worked.³

7 Under the new retail strategy, RSRs are part of teams
8 that help defendant sell its products directly to retail
9 outlets of various sizes, ranging from Walmarts to grocery
10 chains to mom-and-pop stores. Each RSR services retail
11 outlets in a designated sales territory. Last year, defendant
12 employed about 500 RSRs nationwide with approximately 37
13 working in California.

14 The parties dispute the scope of the RSRs' job duties.
15 From defendant's perspective, the RSRs are vital to the
16 company's sales. Their job duties include selling defendant's
17 products directly to retail stores, meeting and consulting
18 with key decision makers at retail stores to increase sales,
19 and occasionally assisting retail stores with merchandising⁴

21 ³ RSRs are not eligible to receive commissions on any
22 sales. In addition to their annual salary, RSRs may receive a
23 bonus based on their performance as well as their territory's
24 performance. The target for the bonus is 13% of the RSR's
25 annual salary. Most plaintiffs have annual salaries in the
26 \$40,000 to \$50,000 range. While both parties chose not to
27 submit detailed evidence regarding the RSRs' compensation
28 packages, one declaration from defendant states that one
plaintiff's annual base salary is \$48,564.62, and that she
received a bonus of \$1,367.39 for the first half of 2009. This
first half payment amounts to 2.8% of her annual salary. See
Slotznick Declaration, Ex. A.

⁴ The term "merchandising" is susceptible to different
meanings. This Court's use of the term refers to activities
such as stocking shelves, sorting as well as tagging products,

1 when it is incidental to the sales. Plaintiffs disagree with
2 this description of the RSRs' duties. They contend defendant
3 sells most of its products in bulk at the corporate level
4 through other upper-level company employees, such as Customer
5 Service Executives (CSEs). Rather than selling, the RSRs are
6 primarily responsible for merchandising the previously sold
7 products at the retail stores in their district.

8 In 2008, three former RSRs brought this wage and hour
9 action against defendant. They alleged defendant
10 misclassified them as exempt employees, denying them
11 compensation for the overtime hours they had worked.
12 Defendant denied these allegations, asserting that plaintiffs'
13 employment position satisfies the exemptions from overtime for
14 outside salesmen and administrative employees. In 2010 —
15 after 19 additional RSRs had joined the suit — this Court,
16 over defendant's objection, allowed the case to proceed as a
17 collective action for plaintiffs' federal and pendant
18 California claims.⁵ Docket No. 157. Following notice,⁶ 99
19 RSRs joined the collective action in addition to the 21
20 remaining named plaintiffs.⁷

21 _____
22 and delivering and setting up product displays.

23 ⁵ Although this Court granted plaintiffs' request, both
24 parties were informed that the ultimate decision on whether to
25 proceed as a collective action would turn on whether this
method would be the superior way of resolving the controversy.
See Docket No. 157.

26 ⁶ At the hearing, the parties estimated that about 800
27 former and current RSRs were sent notice about this lawsuit.

28 ⁷ This ruling only applies to the named plaintiffs and
the RSRs that joined this collective action by certifying that
they believed they were not outside salesmen or administrative

1 Because plaintiffs filed their complaint almost three
2 years ago, both parties have had ample time to conduct
3 discovery on the issues presented in the case. The record on
4 this motion is almost two feet thick, and includes
5 declarations from 37 plaintiffs as well as RSRs who did not
6 opt-in.⁸ The parties also took the depositions of 14
7 plaintiffs. Even though the Court is troubled that both
8 parties chose not to submit material portions of the
9 plaintiffs' deposition testimony regarding their actual day-
10 to-day job duties, the totality of the evidence before the
11 Court is voluminous. There is consequently a sufficient
12 record for the Court to determine if a triable issue exists
13 regarding the outside sales and administrative exemptions.

14 **II. LEGAL STANDARD FOR SUMMARY JUDGMENT**

15 Summary judgment is appropriate only when there is no
16

17
18 employees. These named plaintiffs and opt-in plaintiffs are
19 collectively referred to as plaintiffs, although the Court at
20 times uses "RSRs" when generally discussing the employment
position at issue. RSRs who chose not to join this collective
action are not before the Court and the Court expresses no view
on what impact this Order may have on them.

21 ⁸ Many of the declarations defendant submitted were
22 from RSRs who did not opt-in as a plaintiff. While there is
23 some authority for admitting such declarations, see Johnson v.
24 Big Lots Stores, Inc., 2008 WL 2191305 (E.D. La. 2008), in this
25 case declarations from RSRs who, after receiving notice did not
26 certify that they believed that their duties qualified them to
27 be outside salesmen or administrative employees, were not very
28 helpful in determining the rights of these plaintiffs. In
addition, as plaintiffs have pointed out, these declarations
are conclusory and were often taken early in the litigation at
a time when the precise issues before the Court were not fully
defined. Nevertheless, plaintiffs did not move to strike these
declarations or object to this Court considering them. The
Court did consider them especially in trying to understand the
different ways in which the plaintiffs and those RSRs who did
not opt-in perceived their job duties.

1 genuine dispute of material fact, and the moving party is
2 entitled to judgment as a matter of law. Fed. R. Civ. P. 56.
3 The moving party bears both the initial burden of production
4 as well as the ultimate burden of persuasion to demonstrate
5 that no genuine dispute of material fact remains. Nissan Fire
6 & Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d
7 1099, 1102 (9th Cir. 2000). Once the moving party meets its
8 initial burden, the nonmoving party is required "to go beyond
9 the pleadings and by [its] own affidavits, or by the
10 depositions, answers to interrogatories, and admissions on
11 file, designate specific facts showing that there is a genuine
12 issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324
13 (1986) (internal quotations and citations omitted). If the
14 nonmoving party's evidence is not significantly probative,
15 summary judgment may be granted. Anderson v. Liberty Lobby,
16 Inc., 477 U.S. 242, 249-50 (1986). Courts, however, are
17 required to view the evidence in the light most favorable to
18 the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v.
19 Zenith Radio Corp., 475 U.S. 574, 587 (1986). If a reasonable
20 jury could return a verdict in favor of the nonmoving party,
21 summary judgment is inappropriate. Liberty Lobby, 477 U.S. at
22 248.

23 Here, plaintiffs seek summary adjudication on defendant's
24 affirmative defenses asserting the outside sales and
25 administrative exemptions. Defendant does not argue that
26 plaintiffs have not met their initial burden of production.
27 Rather, defendant's position is that it has submitted
28 probative evidence that raises a genuine dispute as to whether

1 the plaintiffs' job duties fall under the exemptions. Having
2 reviewed the evidence most favorably to defendant, defendant
3 fails to raise a triable issue because the undisputed facts,
4 discussed in detail below, demonstrate that plaintiffs are not
5 outside salesmen or administrative employees.

6 **III. THE FLSA**

7 In 1938, Congress enacted the Federal Labor Standards Act
8 (FLSA) to eliminate "labor conditions detrimental to the
9 maintenance of the minimum standard of living necessary for
10 health, efficiency, and general well-being of workers." 29
11 U.S.C. § 202(a). As part of this effort, the FLSA requires
12 employers to pay overtime compensation to employees who work
13 more than 40 hours per week. See 29 U.S.C. § 207(a)(1).
14 Certain employees are exempt from this provision, including
15 outside salesmen and administrative employees. See 29 U.S.C.
16 § 213(a)(1). These exemptions are "narrowly construed against
17 the employers seeking to assert them" and are limited to those
18 employees "plainly and unmistakably" within the exemptions'
19 "terms and spirit." Bothell v. Phase Metrics, Inc., 299 F.3d
20 1120, 1124-25 (9th Cir. 2002) (internal citations and
21 quotations omitted). The employer bears the burden of showing
22 that an exemption applies.⁹ Id.

23 The scope of the FLSA's exemptions is not set forth in
24 the Act, but in the regulations and interpretations of the
25 Department of Labor (DOL). Auer v. Robbins, 519 U.S. 452, 456
26 (1997) ("The FLSA grants the [DOL] broad authority to

27
28 ⁹ As the moving party on summary judgment, plaintiffs still have the ultimate burden of persuasion that there is no genuine issue of material fact. See Nissan, 210 F.3d at 1102.

1 'defin[e] and delimi[t]' the scope of the exemption for
2 executive, administrative, and professional employees" (citing
3 29 U.S.C. § 213(a)(1)). These regulations and
4 interpretations are particularly important to this matter
5 because no other court has evaluated the classification status
6 of employees that have the specific characteristics and job
7 duties of RSRs. DOL's regulations are given controlling
8 weight by courts unless found to be arbitrary, capricious, or
9 contrary to the statute, something that defendant does not
10 argue in its opposition. See Chevron U.S.A., Inc. v. Natural
11 Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984).
12 While DOL's interpretations of its regulations do not have the
13 force and effect of law, courts look to them as persuasive
14 authority. See Christensen v. Harris County, 529 U.S. 576,
15 587 (2000); Skidmore v. Swift & Co., 323 U.S. 134, 140
16 (1944).¹⁰

17 During oral argument, defendant suggested that the Ninth
18 Circuit's recent decision in Christopher v. SmithKline Beecham
19 Corporation required that this Court give less deference to
20 the DOL regulations. See 2011 WL 489708 (9th Cir. 2011).
21 Defendant is incorrect for a number of reasons. First, much

22 ¹⁰ The parties do not dispute that under California law
23 the outside sales and administrative exemptions are similar to
24 those under the FLSA. See Ramirez v. Yosemite Water Co., Inc.,
25 20 Cal.4th 785, 795 (citing Cal. Labor Code § 1171 and
26 Industrial Welfare Commission, Wage Order No. 7-80, 2(I) for
27 the definition of outside salesmen); 8 Cal. Code Regs. §
28 11040(1)(A)(2)(f); Heffelfinger v. Electronic Data Systems
Corp., 580 F.Supp.2d 933, 950 (C.D. Cal. 2008) ("California's
exemption has been construed in the same manner as the
administrative exemption under the [FLSA]"). Accordingly, the
Court finds that California plaintiffs are not outside salesmen
or administrative employees under both federal and California
law.

1 of the Ninth Circuit's analysis in Christopher seems to focus
2 on the degree of deference to be accorded to the
3 interpretation of the statute and regulations made by the DOL
4 in its amicus brief. See, e.g., 2011 WL 489708 at *10.
5 Second, unlike the pharmaceutical industry to which the
6 regulations governing sales did not neatly apply because of
7 the legal prohibitions against sales to doctors, here certain
8 provisions of the DOL regulations, such as 29 C.F.R. §
9 541.503, squarely apply to defendant's RSRs. Plaintiffs'
10 complaint that they do not "sell" to defendant's customers,
11 does not "ignore the structure and realities" of a heavily
12 regulated industry. 2011 WL 489708 at *11. Nor does the
13 Ninth Circuit's concern that the DOL had acquiesced in the
14 drug industry's practices for over 70 years apply here; the
15 RSR position is less than 10 years old. See 2011 WL 489708 at
16 *15.

17 **A. Outside Sales Exemption**

18 Defendant first asserts that RSRs are outside salesmen.
19 For this exemption to apply to plaintiffs, their primary duty
20 must be "making sales"¹¹ or "obtaining orders or contracts for
21 services." 29 C.F.R. § 541.500(a)(1).¹² Primary duty is the
22 "principal, main, major or most important duty" that employees
23 perform. 29 C.F.R. § 541.700. While time alone is not the
24

25 ¹¹ Sales include "any sale, exchange, contract to sell,
26 consignment for sale, shipment for sale, or other disposition."
29 U.S.C. § 203(k).

27 ¹² The parties agree that plaintiffs meet the second
28 requirement for outside salesmen because they regularly perform
their primary duties outside of defendant's place of business.
29 C.F.R. § 541.500(a)(2).

1 sole test for primary duty, most employees meet this
2 requirement if they spend more than 50 percent of their time
3 performing exempt work. Id.

4 Defendant initially argues that the exemption applies
5 because certain RSRs directly sell products to some retailers
6 without the involvement of a CSE. It is undisputed that some
7 plaintiffs have made these types of sales. But defendant's
8 argument misses the point. The outside sales exemption only
9 applies to plaintiffs if direct selling is their primary duty
10 — not just something they do occasionally or even regularly
11 but on a minimal basis. Although 14 plaintiffs have been
12 deposed, defendant has not pointed to a single plaintiff who
13 has testified that her primary duty was making direct sales.
14 Instead, defendant's evidence is limited to conclusory
15 statements from several RSRs that they engage in direct sales.
16 See, e.g., KohSweeney Declaration, Ex. 9 at ¶ 7 (one RSR
17 explains direct selling but does not quantify how frequently
18 it occurs or how much time is spent on it: "In direct sales, I
19 convince my stores to purchase additional Hershey products
20 from me"). Or defendant submits evidence that RSRs have at
21 times made direct sales. See, e.g., KohSweeney Declaration,
22 Ex. 3 at ¶ 15 (RSR, who has worked for defendant for about ten
23 years, cites two examples of direct sales he made). Defendant
24 has therefore failed to submit evidence which raises a genuine
25 dispute that direct selling constitutes the plaintiffs'
26 primary duties.

27 Defendant next contends that RSRs are outside salesmen
28 because they engage in "incremental selling" and "sell

1 through" of Hershey products. Defendant defines these
2 functions, respectively, as "encourag[ing] each customer-store
3 to buy additional product above and beyond any order placed
4 through the CSE" and increasing "the amount of Hershey
5 product[s] sold by a customer-store to its consumers."

6 Opposition at 5. Defendant asserts that this is the primary
7 aspect of the RSR's job. Id. But whether the plaintiffs are
8 exempt depends on "actual day-to-day job duties performed by
9 [them] rather than general descriptions or characterizations
10 of job duties." Reyes v. Texas EZPAWN, L.P., 459 F.Supp.2d
11 546, 553-54 (S.D. Tex. 2006) (citing 29 C.F.R. § 541.2).

12 According to defendant, RSRs who obtain commitments from
13 retailers to replenish Hershey products ("incremental
14 selling") and help retailers market products to increase sales
15 to consumers ("sell through") are "making sales." Defendant
16 contends that it is immaterial when a sale is actually booked,
17 whether the plaintiffs are credited with the sale, or if the
18 plaintiffs receive a commission for the sale. While the FLSA
19 and its regulations do not specifically require these factors
20 to be present for the outside sales exemption to apply, their
21 absence is not the reason for deciding that plaintiffs are
22 not outside salesmen.¹³ Rather, the Court concludes that

24 ¹³ That does not mean these factors are not important.
25 One would think that if employees' primary duties were selling
26 products, their employers would keep track of their sales if
27 the nature of the business permitted it. And courts have
28 remarked on the significant role that sales commissions play
for outside salesmen. See Jewel Tea Co. v. Williams, 118 F.2d
202, 207-08 (10th Cir. 1941); Christopher, 2011 WL 489708 at
*16 (9th Cir. 2011). In any event, the first inquiry under the
outside sales exemption is to determine whether the employee's
primary duty is to actually make sales. See Ruggeri v.

1 defendant did not submit evidence that plaintiffs' primary
2 duties constitute selling under 29 C.F.R. § 541.500(a)(1),
3 particularly because the majority of the time plaintiffs are
4 not the employees who actually sell the product.

5 The DOL's regulations point out the important distinction
6 between individual sales and company sales:

7 (a) Promotion work is one type of activity often
8 performed by persons who make sales, which may or
9 may not be exempt outside sales work, depending upon
10 the circumstances under which it is performed.
11 Promotional work that is actually performed
12 incidental to and in conjunction with an *employee's*
13 *own outside sales or solicitations is exempt work.*
14 On the other hand, promotional work that is
15 incidental to sales made, or to be made, *by someone*
16 *else is not exempt* outside sales work. . .

17 (b) A manufacturer's representative, for example,
18 may perform various types of promotional activities
19 such as putting up displays and posters, removing
20 damaged or spoiled stock from the merchant's shelves
21 or rearranging the merchandise. Such an employee can
22 be considered an exempt outside sales employee if
23 the employee's primary duty is making sales or
24 contracts. Promotion activities directed toward
25 consummation of the *employee's own sales are exempt.*
26 Promotional activities designed to stimulate sales
27 that will be made *by someone else are not exempt*
28 outside sales work.

29 29 C.F.R. § 541.503 (emphasis added). Accordingly, the
30 requirement for sales is not met when employees' efforts are
31 directed "toward stimulating the sales of [their] company
32 generally rather than the consummation of [their] own specific
33 sales." Dep't of Labor, Wage & Hour Div., Defining and

34 _____
35 Boehringer Ingelheim Pharm., Inc., 585 F.Supp.2d 254, 270-71
36 (D.Conn. 2008). Because plaintiffs do not primarily make
37 sales, this Court's ruling does not turn on these factors,
38 including the "sales" factors from Nielsen v. DeVry, Inc., 302
39 F.Supp.2d 747 (W.D. Mich. 2003), that defendant argues applies
40 to RSRs. See Opposition at 15.

1 Delimiting the Exemptions for Executive, Administrative,
2 Professional, Outside Sales and Computer Employees, 69
3 Fed.Reg. 22122, 22162 (Apr. 23, 2004).

4 Here, defendant has not produced evidence that
5 plaintiffs' primary duties are "making sales" as contemplated
6 by the regulations. Defendant concedes that its upper-level
7 salespeople, such as CSEs, negotiate sale agreements —
8 without any involvement from the RSRs — for the company's
9 products with customers' corporate offices (i.e., Walmart,
10 Safeway, Albertson's, etc.). Shein Declaration at ¶ 5; Smuda
11 Declaration at ¶ 10. That is when the sale is recorded, and
12 Hershey products are later shipped to the retailers. See
13 Malloy Declaration, Ex. L. It is undisputed that plaintiffs
14 then help stimulate sales by encouraging retailers to
15 replenish their supply and ensuring that sold products are
16 properly marketed at the retail stores. Smuda Declaration at
17 ¶¶ 10-12. While this facilitates the movement of Hershey
18 products from warehouses and stockrooms to the shelves of
19 retail stores and into the hands of consumers, this does not
20 constitute an additional "sale." The work done by plaintiffs
21 may increase defendant's sales, but it does not affect the
22 plaintiffs' own sales. Since plaintiffs are not the
23 individuals making the actual sale as the exemption requires,
24 this type of "incremental selling" and "sell through," even if
25 they were the plaintiffs' primary duties, does not amount to

26 ///

27 ///

28 ///

1 exempt work.¹⁴

2 The disconnect between what defendant considers to be a
3 sale and what the regulations consider to be a sale is
4 illustrated by one of the examples that defendant cites,
5 exhibit B to the declaration of Steve Wilson. Wilson, a
6 district sales manager, supervises RSRs including plaintiff
7 Michael Bain. Exhibit B is a communication from Bain to
8 Wilson explaining that as Halloween was approaching one of his
9 stores "did not have a candy display. . . all product went to
10 the shelf." Bain therefore convinced the store manager to
11 build a display which "meant that [the store] would be sent a
12 lot of this product." This exhibit supports plaintiffs'
13 characterization of what they do - marketing products that
14 have already been or will be sold by someone else so that
15 products move through the store. This may permit someone else
16 to sell more Hershey products but it does not constitute a
17 direct sale as that term is defined in the regulations.

18 Defendant points out that RSRs sometimes persuade

19 _____
20 ¹⁴ Because other employees have already made the sale,
21 the plaintiffs are similar to the following example of
22 nonexempt workers:

23 Another example is a company representative who
24 visits chain stores, arranges the merchandise on
25 shelves, replenishes stock by replacing old with new
26 merchandise, sets up displays and consults with the
27 store manager when inventory runs low, but does not
28 obtain a commitment for additional purchases. The
29 arrangement of merchandise on the shelves or the
30 replenishing of stock is not exempt work unless it is
31 incidental to and *in conjunction with the employee's*
32 *own outside sales*. Because the employee in this
33 instance does not consummate the sale nor direct
34 efforts toward the consummation of a sale, the work
35 is not exempt outside sales work.

29 C.F.R. § 541.503(c) (emphasis added).

1 retailers to order additional products from allotments at
2 warehouses that have not previously been sold by CSEs. Smuda
3 Declaration at ¶ 18. Defendant also repeatedly references a
4 hypothetical sales scenario where a CSE intentionally sells
5 less to a retailer "for the purpose of creating additional RSR
6 selling opportunities at the store level." See, e.g., Shein
7 Declaration at ¶ 6. According to defendant, under both of
8 these methods the RSRs' selling efforts correspond directly
9 with their own sales. But these arguments from defendant are
10 once again misplaced. While these types of sales may happen
11 at times, the critical issue is whether plaintiffs sell in
12 this manner for the majority of the time. Out of all the
13 declarations and depositions submitted by defendant, both from
14 RSRs and defendant's corporate witnesses, defendant has not
15 pointed to any evidence that this type of selling occurs
16 frequently, let alone that it constitutes the primary aspect
17 of plaintiffs' job duties.

18 The declaration of Thomas Smuda is telling. He is the
19 Vice President of North American Retail and a person in a
20 position to be able to testify that plaintiffs' spend a lot of
21 their time selling products that have not yet been sold by
22 CSEs. But he does not do this. Instead, he first
23 distinguishes "direct selling" from "incremental selling."
24 KohSweeney Declaration, Ex. 1 at ¶ 19-20. He explains that
25 RSRs engage in "direct selling" when there is no CSE assigned
26 to that retailer. Id. at ¶ 19. Smuda does not mention how
27 many RSRs and retailers fit into this category and how much of
28 the RSRs' duties are devoted to this task. Id. He then

1 explains that when a retailer does have an assigned CSE, RSRs
2 engage in "incremental selling," including "convincing the
3 customer-store to fully participate in upcoming promotions"
4 and "convincing the customer-store to allocate more space to
5 Hershey product[s]." Id. at ¶ 20. Smuda does not testify
6 that RSRs' primary "incremental selling" duties include
7 making sales besides those already made by CSEs. Id. In a
8 supplemental declaration, Smuda explains that on some
9 occasions RSRs obtain orders for products in warehouses that
10 have not yet been sold by CSEs, and that defendant's sales
11 fell when RSRs were temporarily removed from retailers. Smuda
12 Declaration at ¶¶ 13-18. Again, he does not testify that the
13 RSRs' primary duties involve making their own sales. The best
14 he can muster is to say "it is not accurate to say that RSRs
15 have no role in sales or merchandising plans that originate at
16 Hershey headquarters." Id. at ¶ 14. Not having no role in
17 sales is a far cry from making sales as a primary duty. Thus,
18 there remains no material evidence that plaintiffs are
19 primarily engaged in making sales rather than promoting
20 products that have already been sold by CSEs. Without such
21 evidence, there is no genuine dispute that the outside sales
22 exemption does not apply to plaintiffs.

23 The policy reasons behind the enactment of the FLSA
24 support the finding that plaintiffs' are not primarily engaged
25 in selling. The Tenth Circuit explained:

26 The reasons for excluding an outside salesman are
27 fairly apparent. Such salesman [sic], to a great
28 extent, work[] individually. There are no
restrictions respecting the time he shall work and
he can earn as much or as little, within the range

1 of his ability, as his ambition dictates. In lieu
2 of overtime, he ordinarily receives commissions as
3 extra compensation. He works away from his
4 employer's place of business, is not subject to the
5 personal supervision of his employer, and his
6 employer has no way of knowing the number of hours
7 he works per day. To apply hourly standards
8 primarily devised for an employee on a fixed hourly
9 wage is incompatible with the individual character
10 of the work of an outside salesman.

11 Jewel Tea Co. v. Williams, 118 F.2d 202, 207-08 (10th Cir.
12 1941); see also Christopher, 2011 WL 489708 at *13. Unlike
13 the salesmen Congress sought to exempt, plaintiffs do not
14 receive commissions. See supra footnote 4. They only earn an
15 entry-level salary and a potential targeted bonus of 13% of
16 their salary, which is also not based on their individual
17 sales. Id. Consequently, plaintiffs are not rewarded for all
18 the overtime they are required to work. Nor do they earn "as
19 much or as little" as "[their] ambition dictates," a common
20 aspect of the typical salesmen. See Jewel Tea, 118 F.2d at
21 207-08.

22 Nor can Hershey argue that plaintiffs are not amenable to
23 supervision and having their hours monitored. While working
24 and performing their duties, plaintiffs are required to carry
25 personal digital assistants, called REX devices, that are
26 issued by defendant. See Harsh Declaration. Defendant
27 expects plaintiffs to use the REX to record the time they
28 spend at each store. See id. at Ex. A. The REX therefore
provides defendant with the ability to keep track of the hours
worked by plaintiffs. See also id. at ¶ 6 ("the REX has a
feature which acts as a digital timeclock or timesheet for
users to track all hours worked, but this feature has never

1 been activitated for RSRs since the rollout of REX in
2 2004").¹⁵ The hours worked by plaintiffs are also not
3 flexible. Defendant expects plaintiffs to visit stores for a
4 certain number of hours per day and provides them with
5 guidelines for how much time to spend at each type of store.
6 See Malloy Declaration, Ex. H at 36; KohSweeney Declaration,
7 Ex. 2 at ¶¶ 20-22 (one RSR testified that defendant expects
8 him to (1) start working by 7:00 a.m.; (2) follow defendant's
9 recommendations of how much time to spend at each store; and
10 (3) make about 7.5 hours of sales calls each day). Although
11 plaintiffs may vary their time at each store to some degree,
12 this is not the same as there being "no restrictions
13 respecting the time [they] shall work." See Jewel Tea, 118
14 F.2d at 207-08. Thus, plaintiffs are distinguishable from the
15 outside salesmen that the FLSA intended to be exempt
16 employees.

17 The Christopher decision also does not help Hershey. In
18 Christopher, the Ninth Circuit disagreed with the Second
19 Circuit and other courts in holding that pharmaceutical sales
20 representatives (PSRs) are outside salesmen, even though they
21 are not permitted by law to make sales directly to consumers
22 and instead focus their efforts on obtaining commitments from
23 physicians to prescribe their company's medications. 2011 WL
24 489708. But the fact-specific rationale of Christopher does
25 not apply to plaintiffs, who are not prohibited from selling

26 ¹⁵ Defendant already monitors the hours worked by
27 nonexempt Retail Service Merchandisers (RSMs), who perform
28 similar functions as RSRs but on a part-time basis. See Malloy
Declaration, Ex. P at 43. This also shows that defendant is
capable of overseeing the hours worked by plaintiffs.

1 Hershey products directly to stores.¹⁶ See id. at *12 ("In
2 most industries, there are no firm legal barriers that
3 prohibit the actual physical exchange of the goods offered for
4 sale. Because such barriers do exist in this industry, the
5 fact that commitments are non-binding is irrelevant. . .").¹⁷

6 Christopher, like this Court, found the Jewel Tea factors
7 instructive as well. See id. at *13. Although defendant is
8 correct that plaintiffs' job duties have some similarities to
9 those of PSRs and the plaintiffs in Jewel Tea (i.e., working
10 in assigned territories, not making deliveries, completing
11 clerical duties at the end of the day, etc.), two important
12 Jewel Tea factors that Christopher turned on are not present
13 in this case. These factors were cited in Christopher at the
14 conclusion of the opinion:

15 PSRs are driven by their own ambition and rewarded
16 with commissions when their efforts generate new
17 sales. They receive their commissions in lieu of
overtime and enjoy a largely autonomous work-life
outside of an office.

18 2011 WL 489708 at *16. As explained earlier, plaintiffs'
19 overtime work is not compensated by any commissions they

20 ///

21 ///

22 ///

23 ///

24
25 ¹⁶ Christopher recognized that an employee's
26 classification status requires a "multi-factor review of an
employee's functions." 2011 WL 489708 at *15.

27 ¹⁷ In this case, plaintiffs do have the capability to
28 sell defendant's products directly to retailers. Instead of
doing this, they chiefly promote products other Hershey
employees have sold.

1 receive.¹⁸ And while plaintiffs work outside of their office,
2 they are more restricted than PSRs.

3 For the foregoing reasons — and consistent with the rule
4 that exemptions are limited to those employees “plainly and
5 unmistakably” within the exemptions’ “terms and spirit” — the
6 outside sales exemption does not apply to plaintiffs. See
7 Christopher, 2011 WL 489708 at *7. Accordingly, plaintiffs’
8 motion for partial summary judgment is granted on the outside
9 sales exemption.

10 **B. Administrative Exemption**

11 Plaintiffs have also met their ultimate burden of
12 persuasion that there is no genuine dispute regarding the
13 administrative exemption applying to them. To be considered
14 administrative employees, plaintiffs’ primary duties must
15 include: (1) nonmanual work “directly related to the
16 management or general business operations of the employer or
17 the employer’s customers,” and (2) the exercise of
18 “discretion and independent judgment” with respect to
19 “matters of significance.” 29 C.F.R. 541.200(a).¹⁹ This is a
20 two-part inquiry that examines the type of work performed by
21

22 ¹⁸ It is important to note that the PSRs in Christopher
23 made around \$75,000 per year, with more than 25% of their
24 salary coming from incentives. 2011 WL 489708 at *3, footnote
25 4 (highlighting that one plaintiff’s incentives over three
26 years consisted of 41%, 32%, and 37% of his gross salary).
27 Defendant, on the other hand, only pays plaintiffs a bonus
28 targeted at 13% of their salary. See supra footnote 4. The
only example in the record of a bonus payment shows that a
plaintiff received 2.8% of her salary during the first half of
the 2009 calendar year. Id.

¹⁹ The parties agree that plaintiffs meet the first
requirement for administrative employees because they earn more
than \$455 per week. 29 C.F.R. § 541.200(a)(1).

1 employees as well as the level or nature of that work.
2 Defining and Delimiting the Exemptions, supra at 22144.

3 The parties dispute the amount of nonmanual work
4 performed by plaintiffs and the discretion they exercise.
5 Plaintiffs present evidence that they are required to perform
6 substantial physical tasks as part of their daily
7 merchandising efforts, such as building promotional displays
8 and carrying as well as opening boxes to restock Hershey
9 products. Defendant contends that this is only true for a
10 minority of plaintiffs; the majority are primarily engaged in
11 nonmanual work because they ensure that the retailers'
12 employees perform the necessary merchandising duties.
13 Likewise, the parties dispute whether the REX is used for
14 supervision and whether certain "RSR guidelines" that
15 defendant developed are meant to be followed, as plaintiffs
16 contend, or are meant to be deviated from, as defendant
17 contends. The contradictory testimony on these issues
18 results in genuine disputes over the amount of nonmanual work
19 performed by plaintiffs and the amount of supervision they
20 receive. But these disputes are immaterial to a
21 determination whether the administrative exemption applies
22 since defendants have not presented evidence to raise a
23 triable issue under the last part of the exemption's second
24 requirement.

25 This second requirement is not satisfied because
26 defendants do not present evidence that plaintiffs exercise
27 discretion with respect to "matters of significance." The
28 regulations explain that "matters of significance" refers to

1 the level of importance of the work at issue or the
2 consequence of that work. 29 C.F.R. § 541.202(a); see also
3 Defining and Delimiting the Exemptions, supra at 22143 ("the
4 work performed by an exempt administrative employee must be
5 significant, substantial, important or of consequence").
6 This is an element that is critical for the exemption to
7 apply. See Defining and Delimiting the Exemptions, supra at
8 22144; see also Christopher, 2011 WL 489708 at *7 ("Because
9 exemptions are 'narrowly construed' against the employer, to
10 meet its burden, an employer must establish that the employee
11 satisfies each of the criteria set forth in the [DOL's]
12 regulations").

13 Under the undisputed facts, plaintiffs' job duties do
14 not rise to the level of importance necessary for them to be
15 exempt employees. A list of non-exclusive factors to
16 consider when evaluating the administrative exemption is
17 provided by the DOL:

- 18 (1) whether the employee has authority to
19 formulate, affect, interpret, or implement
management policies or operating practices;
- 20 (2) whether the employee carries out major assignments
in conducting the operations of the business;
- 21 (3) whether the employee performs work that affects
22 business operations to a substantial degree, even
if the employee's assignments are related to
operation of a particular segment of the business;
- 23 (4) whether the employee has authority to commit the
employer in matters that have significant financial
impact;
- 24 (5) whether the employee has authority to waive or
25 deviate from established policies and procedures
without prior approval;
- 26 (6) whether the employee has authority to negotiate and
bind the company on significant matters;
- 27 (7) whether the employee provides consultation or expert
advice to management;
- 28 (8) whether the employee is involved in planning long —
or short — term business objectives;
- (9) whether the employee investigates and resolves

1 matters of significance on behalf of management;
and;
2 (10) whether the employee represents the company in
handling complaints, arbitrating disputes or
3 resolving grievances.

4 29 C.F.R. § 541.202(a). Plaintiffs have presented deposition
5 testimony that many of these factors do not apply to their
6 job duties as RSRs. Plaintiffs have testified that (1) they
7 have no authority to negotiate or commit defendant to matters
8 that have a significant financial impact (see, e.g., Malloy
9 Declaration, Ex. T at 42; Ex. N at 11) (2) they can not
10 deviate from defendant's established policies and procedures
11 without getting permission from their supervisors (see, e.g.,
12 Malloy Declaration, Ex. T at 42; Ex. N at 11); and (3) they
13 do not carry out major assignments in conducting the
14 operations of the business (see, e.g., Malloy Declaration,
15 Ex. T at 41; Ex. S at 77). Nor do they design advertisements
16 or decide when to reduce prices to stimulate sales, factors
17 deemed important by both the Ninth Circuit in Christopher,
18 2011 WL 489708 at *14, and the Second Circuit in Reiseck v.
19 Universal Communications of Miami, Inc., 591 F.3d 101, 107
20 (2d Cir. 2010). In fact, it is undisputed that plaintiffs
21 lack the capacity to change prices or negotiate discounts.
22 See Joint Statement of Undisputed Facts ¶¶ 5-6.

23 Defendant's opposition did not specifically address any
24 of these factors. More importantly, defendant has not
25 pointed to any evidence that demonstrates that plaintiffs'
26 primary duties as RSRs are related to matters of
27 significance. As an example of the discretion that RSRs
28 exercise, defendant submits evidence that RSRs have

1 flexibility regarding the order in which they visit their
2 retailers, the amount of time they spend at their retailers,
3 and the method and manner of their presentations to the
4 retailers. Opposition at 19-20. Even accepting these as
5 true, the Court finds that deciding the order of stores to
6 visit, how much time to spend in a store, or which of the
7 sales tools defendant provides to use are not matters of
8 sufficient significance to trigger the administrative
9 exemption. See Clark v. J.M. Benson Co., Inc., 789 F.2d 282,
10 287-88 (4th Cir. 1986) ("The regulations recognize that almost
11 every employee exercises some discretion, as for example in
12 selecting the order in which to perform different duties. To
13 demonstrate administrative status, however, the discretion
14 and independent judgment exercised must be real and
15 substantial, that is, they must be exercised with respect to
16 matters of consequence") (internal quotations and citations
17 omitted). Defendant does not point to any other primary
18 duties performed by plaintiffs that would rise to the level
19 of importance required by the exemption.²⁰

20 Based on the above, there is no genuine dispute that

21 ²⁰ At the hearing, defendant contended that plaintiffs
22 are administrative employees because they are similar to the
23 PSRs who have been considered exempt employees by other courts.
24 See Schafer-LaRose v. Eli Lilly and Co., 663 F.Supp.2d 674, 693
25 (S.D. Ind. 2009) (explaining that PSRs exercise discretion on
26 matters of significance because generating prescriptions is key
27 to the overall success of defendant's business). Defendant's
28 argument fails for the same reasons that Christopher does not
govern this case: there is a fundamental difference between
PSRs and RSRs, particularly the importance of their job duties.
PSRs are a vital component in persuading physicians to
prescribe medications, the crux of the pharmaceutical company's
business. Plaintiffs, on the other hand, are entry-level
employees that mainly assist retailers in selling more products
that have already been purchased.

1 plaintiffs do not work on matters of significance.
2 Accordingly, they do not meet the requirements for
3 administrative employees.

4 C. Combination Exemption

5 In its opposition, defendant argues, for the first time,²¹
6 that plaintiffs are exempt employees because they satisfy the
7 requirements for the combination exemption. This exemption
8 allows employees to be classified as exempt if they perform a
9 combination of outside sales and administrative duties, but
10 their primary duty does not fit neatly into either exemption.²²
11 29 C.F.R. § 541.708; see also IntraComm, Inc. v. Bajaj, 492
12 F.3d 285, 294 (4th Cir. 2007) (the exemption is "a mechanism
13 for cobbling together different exempt duties for purposes of
14 meeting the primary-duty test"). Employers, however, cannot
15 "tack various nonexempt duties and hope to create an
16 exemption." Dalheim v. KDFW-TV, 918 F.2d 1220, 1232 (5th Cir.
17 1990).

18 This combination exemption does not save defendant. As
19 explained earlier, defendant has not shown there is a genuine
20 dispute regarding the outside sales or administrative
21 exemptions applying to the plaintiffs. Defendant has not
22 submitted evidence that plaintiffs satisfy the administrative
23

24
25 ²¹ As part of its affirmative defenses in its answer,
26 defendant specifically pled that the plaintiffs were exempt
27 from overtime compensation due to the outside sales and
28 administrative exemptions, but not the combination exemption.
Docket No. 85 at 31.

²² California appears to recognize a similar
"combination" exemption. See Cal. Div. of Labor Standards
Enforcement Opinion Letter at 5 (May 23, 2003).

1 exemption's prerequisite of primarily working on matters of
2 significance. The plaintiffs' primary duties with respect to
3 the outside sales exemption are also not exempt duties.
4 Defendant has not presented specific evidence that plaintiffs
5 primarily performed any combination of exempt duties to
6 satisfy the combination exemption.

7 **IV. CONCLUSION**

8 The FLSA's legislative history corroborates the Court's
9 decision, based on this record, that plaintiffs do not perform
10 exempt duties:

11 the exemptions were premised on the belief that the
12 workers exempted typically earned salaries well
13 above the minimum wage, and they were presumed to
14 enjoy other compensatory privileges such as above
15 average fringe benefits and better opportunities for
16 advancement, setting them apart from the nonexempt
17 workers entitled to overtime pay. Further, the type
18 of work they performed was difficult to standardize
19 to any time frame and could not be easily spread to
20 other workers after 40 hours in a week, making
21 compliance with the overtime provisions difficult
22 and generally precluding the potential job expansion
23 intended by the FLSA's time-and-a-half overtime
24 premium.

19 See Defining and Delimiting the Exemptions, supra at 22123-24.

20 These factors do not apply to the plaintiffs' duties as RSRs.

21 Plaintiffs are entry-level employees that do not enjoy
22 "compensatory privileges" that would set them apart from
23 nonexempt workers who receive pay for their overtime.

24 Particularly troubling, defendant classifies plaintiffs as
25 outside salesmen, but does not record their sales even

26 ///

27 ///

28 ///

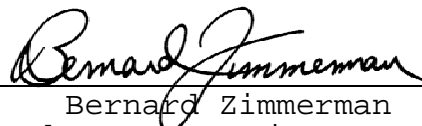
1 though it has the capability to do so. Lastly, the work
2 performed by RSRs is not difficult for the defendant to
3 standardize into general terms, as defendant already does when
4 providing plaintiffs with guidelines regarding model call
5 procedures. See Malloy Declaration, Ex. H at 36; KohSweeney
6 Declaration, Ex. 2 at ¶¶ 20-22. Using these standardized
7 procedures, defendant has the capability to eliminate overtime
8 work or spread it to other employees, such as RSMs.

9 As the Ninth Circuit cautioned in Christopher, exemptions
10 can only apply to persons 'plainly and unmistakably within
11 [the exemption's] terms and spirit.'" 2011 WL 489708 at *7.
12 Construed narrowly against defendant, these plaintiffs are
13 plainly not exempt. Unlike the PSRs in Christopher,
14 plaintiffs do not work in a heavily regulated industry where
15 they are prohibited from making sales. What prohibits
16 plaintiffs from having as their primary duty outside sales or
17 significant administrative tasks is defendant, which chose to
18 assign these tasks to others. Defendant does have employees,
19 such as CSEs, who appear to qualify for exempt status. Unlike
20 PSRs who interact with doctors and discuss with them
21 scientific information and medical research, including
22 information about product benefits and risks, dosage
23 instructions and the types of patients for which certain
24 products should be prescribed, plaintiffs talk to store
25 managers about increasing the movement of candy bars and other
26 Hershey products. Unlike PSRs who earn about \$75,000 a year,
27 of which incentive compensation ranged from 26% to 41% of the
28 PSRs' salary, plaintiffs generally earn less than \$50,000 a

1 year with much smaller bonuses. See Christopher 2011 WL
2 489708 at footnote 4. And while the nature of some of the PSR
3 duties, such as attending conventions on weekends, might not
4 lend themselves to a 40 hour week, defendant has not presented
5 any evidence why plaintiffs could not perform their jobs in 40
6 hours if defendant's guidelines and procedures were altered to
7 permit them during the workday, to check their e-mail,
8 synchronize their REX, review product bulletins and do the
9 other tasks which they testify they now do on evenings or
10 weekends.

11 The issue before the Court is not whether defendant's
12 sales strategy is successful but whether it can execute that
13 strategy without paying plaintiffs, one component of that
14 strategy, overtime. For the reasons stated above, the letter
15 and the spirit of the FLSA require that plaintiffs be paid
16 overtime. Plaintiffs' motion for partial summary judgment is
17 therefore **GRANTED** in its entirety.

18 Dated: February 23, 2011

19 

20 Bernard Zimmerman
21 United States Magistrate Judge

22 g:\bzall\bzcases\Campanelli v. Hershey\Summary Judgment Order (exemptions).after hearing.wpd
23
24
25
26
27
28