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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-4058

DAVINA HURT AND DOMINIC HILL, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

COMMERCE ENERGY, INC., doing business as Just Energy doing business as Commerce Energy of Ohio, Inc.; JUST ENERGY MARKETING CORP.; JUST ENERGY GROUP, INC.,

Defendants-Appellants.

Argued: Oct. 24, 2019
Decided and Filed: Aug. 31, 2020

Before: CLAY, STRANCH, MURPHY, Circuit Judges.

OPINION

JANE B. STRANCH, Circuit Judge. The Fair Labor Standards Act provides minimum wage and overtime protections to a broad range of employees. Davina Hurt and Dominic Hill brought claims for themselves and others alleging that their positions are

covered by the protections of the FLSA and parallel provisions of Ohio law. They challenge their designation by Defendants as "outside salesman," a category that is "exempt" from the FLSA, which means that their position is not covered by the protections of the Act. A trial was held and the jury found that Plaintiffs were not exempt outside salespeople. Just Energy appeals that determination and challenges pre- and post-trial rulings made by the district court, certain instructions given to the jury, and evidentiary rulings made by the court. For the reasons explained below, we **AFFIRM**.

I. BACKGROUND

A. Factual Background

Plaintiffs worked for a group of affiliated energy supply companies that provide electric power and natural gas to residential and commercial customers in the United States and internationally, collectively referred to as Just Energy. Just Energy operates in the U.S. through licensed subsidiaries and is the parent company of a number of businesses, including Defendants Commerce Energy, Inc. and Just Energy Marketing Corp. Commerce Energy, Inc. is the licensed subsidiary in Ohio, California, Georgia, Maryland, Massachusetts, New Jersey, and Pennsylvania, and Just Energy Marketing Corp. hired Plaintiffs to go door-to-door to solicit customers on behalf of Commerce Energy.

Plaintiffs worked as door-to-door solicitors and spent most of their working hours in the field seeking to convince customers to buy electricity and natural gas products. Just Energy paid them exclusively on a commission basis without paying overtime or

minimum wage, and the actual hours and pay for each worker varied. Plaintiffs were not required to have any sales experience or level of education; they were required only to go through an orientation and a sales training course. Plaintiffs also signed Just Energy's independent contractor agreements (the "Agreement") that set out confidentiality, non-disparagement, non-exclusive, and non-compete clauses.

Plaintiffs were typically required to attend daily morning meetings at Just Energy's facility before going into the field. They were driven to the field in teams led by Just Energy supervisors; any work breaks were controlled by those supervisors. The Agreement states that there are no minimum number of hours or minimum number of contracts that must be solicited. Some Plaintiffs testified they were required to work on specific days and hours, and would be reprimanded if they did not work as specified. Plaintiffs could not choose where they worked; they were directed to certain neighborhoods by the supervisors and given maps with highlighted streets showing where they were required to work for the day.

When in the field, Plaintiffs were mandated to adhere to a dress code, including wearing a shirt that properly and prominently displays the company's name and logo, and were subject to rules set out in a contractor compliance matrix, which lists the feedback potential customers might give about their interactions with the workers and the disciplinary consequences for such feedback. For their solicitation, Plaintiffs were instructed to follow a script verbatim. When a potential customer became interested in Just Energy's products, Plaintiffs filled out a "customer

agreement" and obtained the customer's signature. Some Plaintiffs referred to this as an "application"; it was non-binding and did not finalize the transaction.

Plaintiffs were directed to place a verification call from the customer's premises for a third party to confirm that the customer entered into the agreement voluntarily and with full understanding of its terms. Plaintiffs had to initiate the call to the third-party verifier using the customer's telephone and were required to leave the premises before the customer spoke to the verifier. Plaintiffs were not allowed to return or speak to the customer after the call. This was an important requisite of the job: the compliance matrix reserves the most severe consequence of termination for a solicitor who remains present at the consumer's premise during the verification call, uses his or her cell phone to conduct the call, or returns to the customer's premises within seven days after the call. The Ohio Public Utilities Commission (PUCO) requires procedures for door-to-door energy solicitors, including independent third-party verification for 50% of customers, but the universal verification process for Just Energy's customers was required as part of a 2010 settlement agreement between the company and PUCO.

The sale was not final after the third-party verification call. Instead, the customers went through a credit check, and after that, Just Energy could approve the application and finalize the sale or choose to reject the application. The signed customer agreement specifies that the contract is conditional upon Just Energy's acceptance, at its sole discretion. Just Energy had "unfettered discretion to reject any

energy contract submitted" by Plaintiffs. Some applications were rejected for failed credit checks, but Plaintiffs frequently were not told why applications were rejected and their commissions not paid. Plaintiffs had no role in Just Energy's decision-making, and because their contact with the customer ended after they had to leave the premises, they were not allowed to engage in customer service or address any customer concerns—customers were instructed to call a separate customer service line with any questions. Trial testimony indicates that Just Energy exercised its discretion to reject applications frequently. Though a satisfactory third-party verification call and a successful credit check were essential, ultimately approval depended on the exercise of discretion by Just Energy and was required before an application generated by Plaintiffs became final and they could receive and retain their commission.

Plaintiffs submitted documentary evidence of compensation for members of the class. Exhibits in the record include two spreadsheets that summarize the total compensation of Plaintiffs who worked varying lengths of time between 2010 and 2014. Of the 3,840 total individuals with compensation data available in the spreadsheets, 214 made no money at all. 69% of the individuals made under $1,000 in total compensation and 62% of the individuals made under $500.

Individual plaintiffs testified to their earnings. One made only $1,200 over three or four months, while another made only $196 while working 12- to 14-hour days, six to seven days a week for about two months.

Other plaintiffs earned nothing—one never received a commission even after working six to seven days a week for at least a month and turning in three to five signed customer agreements to Just Energy every day, and another earned nothing even after working long days for two weeks, knocking on over 100 doors each day. Yet another worked 11-hour days, six days a week for a month, and testified that he "only made enough really to pay for the uniform" and that he "didn't even get any check stubs or anything" from Just Energy.

B. Procedural History

Plaintiffs filed a complaint in 2012 alleging that Just Energy misclassified its door-to-door solicitors as outside salespeople in order to qualify for an exemption from the Fair Labor Standards Act (FLSA) and the Ohio Minimum Fair Wage Standards Act (OMFWSA). Plaintiffs sought to certify the FLSA claim as a collective action and the OMFWSA claim as a class action. In 2013, the district court granted conditional certification of the FLSA collective action to workers who performed services in the last three years for Commerce Energy, Just Energy's licensed subsidiary operating in Ohio; it granted class certification for the OMFWSA claim to Ohio workers who performed services for Commerce Energy since March 2009. The court denied Just Energy's summary judgment motion, and in September 2014, the case went to a bifurcated jury trial on the question of Just Energy's liability.

Prior to trial, Just Energy filed a motion in limine to exclude evidence of Plaintiff's compensation; the district court denied the motion and admitted compensation evidence over Just Energy's objection.

At trial, over Just Energy's objection, the district court instructed the jury on the law governing the outside sales exemption to the wage and hour requirements of the FLSA. The court asked the jury "to consider the extent to which the employee has the authority to bind the company to the transaction at issue" and whether "the employer retains and/or exercises discretion to accept or reject any transactions for reasons that are unrelated to regulatory requirements applicable to the industry."

The jury found Just Energy liable for minimum wage and overtime pay under the FLSA and the OMFWSA on the basis that Plaintiffs were not exempt outside salespeople. The district court denied Just Energy's motions for directed verdict and judgment as a matter of law. Just Energy now challenges the denial of summary judgment, directed verdict, and judgment as a matter of law, as well as the jury instructions and the admission of compensation evidence at trial. Just Energy contends that Plaintiffs were exempt from the FLSA and the OMFWSA under the outside sales exemption as a matter of law.

II. ANALYSIS

A. Standard of Review for Summary Judgment and Trial Motions

Appeals of summary judgment denials after a full trial on the merits are generally precluded, though the Supreme Court has acknowledged a possible exception for "'purely legal' issues capable of resolution 'with reference only to undisputed facts.'" *Ortiz v. Jordan*, 562 U.S. 180, 188-190 (2011). To determine whether Plaintiffs were outside salespeople, we need to consider not just the statute and regulations, but also

facts such as the details of Plaintiffs' door-to-door soliciting activities and the process of making and finalizing sales.

The dissent bases its review on the premise that the facts here are "largely undisputed" and from that conclusion argues that whether Plaintiffs were outside salespeople is a purely legal question for the district court and not the jury. It is true that how workers spend their working time is a question of fact, and "whether their particular activities exclude[] them from [FLSA protections] is a question of law." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). Whether such a mixed question of law and fact is treated as a legal question or a factual question depends "on whether answering it entails primarily legal or factual work." *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018).

At the summary judgment stage there existed a number of disputed issues of material fact about the relationship between Plaintiffs and Defendants, including the level of supervision and independence Plaintiffs had in the field, the particular requirements on work hours, breaks, assignments, and solicitation locations, and the sales completion procedures of Defendants. Determining whether Plaintiffs were exempt requires findings on these relevant disputed facts and is therefore a question properly before the jury. *See, e.g.*, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991); *Lilley v. BTM Corp.*, 958 F.2d 746, 750 n.1 (6th Cir. 1992). The question presented is not a purely legal issue capable of resolution with reference only to undisputed facts as noted in *Ortiz*.

Review on appeal of the district court's denial of summary judgment is not appropriate.

We review de novo the denial of Just Energy's motions for judgment as a matter of law and directed verdict based on the outside sales exemption. *Finn v. Warren County*, 768 F.3d 441, 450 (6th Cir. 2014). "The motion may be granted only if in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." *Loesel v. City of Frankenmuth*, 692 F.3d 452, 461 (6th Cir. 2012) (quoting *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 614 (6th Cir. 2007)).

B. Outside Sales Exemption

Plaintiffs brought minimum wage and overtime claims under the FLSA and overtime claims only under the OMFWSA. The OMFWSA is a "general law involving the concern of the state for all of its citizens" that requires "major employers in Ohio, public and private," to pay minimum wages and overtime pay for certain types of employees. *Wray v. City of Urbana*, 440 N.E.2d 1382, 1383 (Ohio Ct. App. 1982). For the purposes of this appeal, we need only analyze the FLSA claims because the OMFWSA incorporates the FLSA's exemptions. Ohio Rev. Code § 4111.03. The Ohio law "parallels the FLSA," and courts therefore "approach the issues raised on appeal in a unitary fashion." *Douglas v. Argo-Tech Corp.*, 113 F.3d 67, 69 n.2 (6th Cir. 1997).

The FLSA contains an exemption from its overtime and minimum wage protections for workers "employed . . . in the capacity of outside salesman." 29

U.S.C. § 213(a)(1). To show that workers are exempt from FLSA protections, "the employer bears not only the burden of proof, but also the burden on each element of the claimed exemption." *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 578 (6th Cir. 2004) (citing *Douglas*, 113 F.3d at 70).

Our review of the applicability of this FLSA exemption is governed by the statutory language, Department of Labor (DOL) regulations, caselaw, and particular facts of the case. The Supreme Court has provided guidance on how courts are to evaluate this exemption: "the statute's emphasis on the 'capacity' of the employee counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 161 (2012). Thus, we look to the nature of the industry as well as the particulars of the workplace in which the employees perform their services.

The statute employs but does not specifically define the term "outside salesman" (or salesperson), but courts look to how the term has been "defined and delimited from time to time by regulations of the [Department of Labor]." 29 U.S.C. § 231(a)(1); *see also Christopher*, 567 U.S. at 147. The DOL has issued three regulations relevant to the "outside sales" exemption, 29 C.F.R. § 541.500, 29 C.F.R. § 541.501, and 29 C.F.R. § 541.503. Section 541.500 defines an outside salesperson as someone "customarily and regularly engaged away from the employer's place or places of businesses," whose primary duty is either 1) "making sales" or 2) "obtaining orders or contracts for

services." Section 541.501 further clarifies the definition of "making sales" and "obtaining orders or contracts for services," and Section 541.503 distinguishes exempt promotional work of outside salespeople from non-exempt promotional work incidental to sales made by someone else.

In *Christopher*, the Supreme Court summarized the statute and DOL regulations: "[A]n outside salesman is any employee whose primary duty is making any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 567 U.S. at 148. The definition of "sale" is broad, and the list of transactions defining a "sale" in the regulations represents "an attempt to accommodate industry-by-industry variations in methods of selling commodities." *Id.* at 163-64. The Court considered guidance on the scope of the exemption in DOL reports and the preamble to the latest regulations, cautioning that exempt status should not depend on technicalities, such as "whether it is the sales employee or the customer who types the order into a computer system and hits the return button" or whether the order is filled by a jobber rather than directly by the employer. *Id.* at 149.

1. Making Sales

We begin with whether Plaintiffs' duties constitute "making sales" as defined by 29 C.F.R. § 541.500. The procedures for solicitation that Plaintiffs were required to follow started with offering an application or customer agreement for Just Energy's services and then assisting potential customers to complete the form. A signed agreement did not finalize the transaction for Just Energy

products, but Plaintiffs were mandated to cease all involvement in the process after the application was prepared and the verification call was initiated. Plaintiffs had to leave the customer's premises at the beginning of the call or face the possibility of termination. From the other side, each customer had to successfully complete the verification call and pass a credit check. Even then, Just Energy retained, and frequently exercised, ultimate discretion on whether to finalize or refuse the application.

At trial, the jury found that Just Energy did not satisfy its burden to demonstrate that Plaintiffs were outside salespeople and found Defendants liable for violating the FLSA and the OMFWSA. The district court denied their motions for directed verdict and judgment as a matter of law, finding that there was sufficient evidence to support the jury's determination that the outside sales exemption did not apply to Plaintiffs.

Just Energy argues that because *Christopher*'s detailers were considered outside salespeople when they obtained "non-binding commitments" from physicians to prescribe their drugs, 576 U.S. at 147, "authority to bind" should not be a component of the test for "making sales." But the Court found that the pharmaceutical detailers in *Christopher* were exempt from the FLSA because:

> [o]btaining a nonbinding commitment from a physician to prescribe one of respondent's drugs is the most that [the detailers] were able to do to ensure the eventual disposition of the products that respondent sells. This kind of arrangement, in the *unique regulatory*

> *environment* within which pharmaceutical companies must operate, comfortably [fits under the exemption].

Id. at 165 (footnote omitted and emphasis added). *Christopher* addressed the specific parameters of work in the unique regulatory environment of the pharmaceutical industry. Its conclusion that pharmaceutical detailers who cannot obtain binding commitments are "making sales" does not necessarily apply to other industries.

We, and other circuits, have recognized the unique factual setting and the limitations of *Christopher* in resolving outside sales exemption claims in other industries. In *Killion v. KeHE Distributors, LLC*, we explained the path followed by the Court through the "unique regulatory environment" governing pharmaceutical companies and found *Christopher* to be of "limited import." 761 F.3d 574, 583-84 (6th Cir. 2014). We reversed summary judgment that had applied the exemption to sales representatives of a food distributor because, though the plaintiffs entered orders from individual stores, the account managers controlled the volume and placed restrictions on the orders allowed. *Id.* at 584. Similarly, the Fifth Circuit in *Meza v. Intelligent Mexican Mktg., Inc.* noted that *Christopher* "offers little guidance as to how a court determines if a driver is a deliveryman or a salesman for FLSA purposes" because it dealt with pharmaceutical sales representatives. 720 F.3d 577, 586 (5th Cir. 2013).

The unique regulatory environment of the pharmaceutical industry makes evident why *Christopher*'s holding does not readily transfer to

other industries. Both drug companies and their detailers are prohibited from selling prescription drugs directly to patients: the ultimate discretion to complete a sale rests elsewhere—with a prescribing physician. *Christopher*, 567 U.S. at 150 & n.4. No such regulatory environment prevents direct energy sales. Just Energy sales had requirements of its own making, such as third-party verifications for all potential customers based on its individual settlement agreement with Ohio PUCO, but no regulations prohibited direct sales or required Just Energy itself to retain full discretion to finalize a sale. Plaintiffs' lack of authority to finalize the transactions is significant when reviewing the facts under a "functional, rather than formal, inquiry . . . in the context of the particular industry in which the employee works." *Id.* at 161.

The fact that Just Energy retained discretion to finalize the sale is not merely a technicality immaterial to the analysis. *Id.* at 149. Plaintiffs' customer agreements, sometimes referred to as "applications," were rejected frequently by Just Energy, and Plaintiffs often were not told the reason for the rejection, though it directly impacted if and how much they were paid. Once the verification phone call began, these Ohio Plaintiffs had no ability to personally follow-up, answer questions and assuage concerns, or confirm the transaction with the customer. No regulatory environment prohibited the solicitors from controlling and completing the sale directly to customers. The dissent analogizes the nonbinding agreements here to the nonbinding sales of products that are subject to supply availabilities and customer return policies, or bulk orders that must

be completed by purchasing retailers. Even assuming that the salespeople in these situations qualify for the exemption under the FLSA, they are distinguishable from Plaintiffs here because Just Energy itself, not the purchasers as part of a regulation or policy, controls the finalization of sales. Plaintiffs could not finalize customer agreements and complete sales due to Just Energy's choice to retain ultimate discretion and to require certain solicitation procedures at its Ohio workplace.

In *Killion*, we reversed summary judgment in favor of the distributor because a jury could conclude that the plaintiffs did not actually make sales. 761 F.3d at 584-85. Similarly, Plaintiffs here communicated with potential customers, convinced them to try Just Energy products, and inputted their information onto the agreement. But Just Energy retained discretion over completion of sales, just as the account managers in *Killion* could restrict and control the volume of orders. It was appropriate for the jury and now this court to consider Just Energy's retention of discretion over completion of sales as a factor in determining whether Plaintiffs were making sales.

Our conclusion is supported by *Clements v. Serco, Inc.*, where the Tenth Circuit held that mere soliciting or inducing applications is not making sales, especially if the employer retains discretion and implements other requirements to complete the transaction. 530 F.3d 1224, 1229 (10th Cir. 2008) Though the *Clements* court noted that the "touchstone for making a sale . . . is obtaining a commitment," *id.* at 1227, it found that civilian military recruiters are not outside salespeople because they "could only lay

the groundwork. It was the Army—and only the Army—who could enlist a recruit," *id.* at 1229. Plaintiffs' jobs are comparable to those of the civilian recruiters in *Clements* because they "could only lay the groundwork" but not complete the sale.

Finally, Just Energy argues that this case should be controlled by *Flood v. Just Energy Marketing Corp.*, in which the Second Circuit considered FLSA and state law claims by door-to-door solicitors against the same parent entity, Just Energy, and affirmed summary judgment in favor of Just Energy. 904 F.3d 219 (2d Cir. 2018). Just Energy argues that here too "making sales" must focus on "whether the employee has obtained a commitment to buy the employer's product." *Id.* at 232. But *Flood*'s emphasis on the commitment to buy is grounded in its factual setting, and, as *Christopher* establishes, other factors must also be considered.[1]

Based on *Flood*, our dissenting colleague concludes that our decision is wrong because these cases present an all or nothing proposition: either all employees of the topmost parent corporation, Just Energy, receive FLSA protection or none should. But that ignores the fact-intensive inquiry required by and the employee-protective purpose of the FLSA and the OMFWSA. It also ignores the distinct parties in the cases: here, Commerce Energy of Ohio, Inc.; in *Flood*,

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[1] Appellants also cite as supplemental authority two Department of Labor opinion letters finding the outside sales exemption applicable to two specific factual scenarios. The DOL there applied an analysis that is consistent with our discussion of *Christopher* and other precedent above, which governed our analysis in the factual setting of this case.

Just Energy New York Corp. It is true that both cases share defendants—the same ultimate parent corporation, Just Energy, sits atop the complex structure of subsidiaries—so there will be some overlap in method or procedures. But how the New York subsidiary chooses to operate its worksite does not tell us how the Ohio subsidiary must necessarily operate its worksite. And a suit brought in Ohio against the Ohio subsidiary may find its workplace operation to be covered by FLSA protections without creating a circuit split, even if the workplace operation of the New York subsidiary is exempt. A comparison of these two cases shows that no circuit split exists.

Flood involved a separate group of licensed Just Energy subsidiaries that operated in New York at a worksite that functioned very differently from Plaintiffs' worksite. There, if a solicitor convinced a potential buyer to fill out the customer agreement, the third-party verification call was initiated and the solicitor waited outside the customer's immediate presence. *Id.* at 225. If the verifier provided a confirmation number to the customer, the solicitor reengaged with the customer at this "critical point of the sale," and added the number to the agreement. *Id.* The solicitor was told "to confirm the program details" and "ensure that the customer has no further questions." *Id.* The solicitor then "close[d] the sale by giving the customer all the paperwork." *Id.* He was "the last person to sell a customer," and no one else made sales after him. *Id.*

Here, the evidence at trial shows that the procedures governing the interaction between the door-to-door solicitors and the customers were

significantly different at the Ohio workplace. The Ohio affiliate of Just Energy did not allow Plaintiffs to "close the sale," or provide confirmation and answers to customer questions or concerns at the "critical point of the sale." Plaintiffs' contact with the customers ended upon initiating the verification call, on pain of termination. Customers were instructed to direct any questions or concerns to Just Energy's customer service. Wage issues, which the minimum wages requirements of the FLSA seek to address, also highlight the distinctions between the workplaces. The lead plaintiff in *Flood* earned more than $70,000 in commissions per year, was eligible to earn residual payments, and received incentive awards for travel around the world. *Flood,* 904 F.3d at 226. In contrast, testimony revealed that one Ohio plaintiff made only $1,200 over three or four months, while another made only $196 while working 12- to 14-hour days, six to seven days a week for about two months. And others testified to making nothing at all, even after working 11- to 12- hour days, six to seven days a week for several weeks. Of the 3,840 total individuals with compensation data available in the trial spreadsheets, 69% of the individuals made under $1,000 in total compensation and 62% of the individuals made under $500. In sum, Plaintiffs had significantly less control over their work, sale methods, and compensation than the New York solicitors. *Flood* is distinct both in its procedural posture and in the factual setting that controlled whether solicitors were in fact authorized or allowed to make sales. *Flood* does not control the outcome of this case.

This appeal challenges the determination of the jury following trial that Defendants are liable to

Plaintiffs under the FLSA. Based on the evidence before it, the jury found that Plaintiffs were not "making sales" and were not exempt outside salespeople. This decision accords with the language of the FLSA and the regulations of the DOL. Our precedent and that of our sister circuits also support this conclusion. Viewing the entire record in the light most favorable to Plaintiffs, as we must, we cannot say that reasonable minds could have come to only one conclusion—a decision in favor of Defendants that Plaintiffs were "making sales." Therefore, the district court properly denied Just Energy's motions for judgment as a matter of law and for directed verdict.

2. Obtaining Orders or Contracts for Services

Having determined that Plaintiffs were not "making sales," we turn to whether Plaintiffs were "obtaining orders or contracts for services." 29 C.F.R. § 541.500. Just Energy argues on appeal that we should find Plaintiffs to be outside salespeople as a matter of law because they were obtaining orders or contracts for services. At issue is whether Just Energy's business was selling services. The Agreement between Just Energy and Plaintiffs clearly states that Just Energy "is engaged in the business of selling (or soliciting the sale of) consumer products (natural gas and electricity)," and testimony from Just Energy representatives confirms that gas and electricity are "commodities." We have also held that electricity is a commodity. *Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788, 800 (6th Cir. 2012) (holding that electricity is a commodity for the purposes of the Robinson-Patman Act, which prohibits price

discrimination between different purchasers of commodities for those engaged in commerce). The electricity and natural gas that Just Energy sells to customers are commodities. Plaintiffs were not "obtaining orders or contracts for services."

3. External Indicia and Apparent Purpose of the FLSA Exemption

We turn next to the external indicia of salespeople and the apparent purpose of the FLSA exemption. Just Energy argues that these are not appropriate considerations or are at best a secondary analysis of the outside sales exemption. As already explained, we review Defendants' motions for judgment as a matter of law and for directed verdict de novo, applying "the same deferential standard as the district court: 'The motion may be granted only if in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party.'" *Radvansky*, 496 F.3d at 614 (quoting *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir. 2001)).

In analyzing the outside sales exemption, the Supreme Court has considered the "external indicia of salesmen," which include: whether the workers were hired for their sales experience, whether they were trained to obtain the maximum commitment possible, whether they worked away from the office with minimal supervision, and whether they were rewarded with incentive compensation. *Christopher*, 567 U.S. at 165-66. Even though the Court considered these indicia as part of its conclusion that

pharmaceutical detailers conducted more atypical sales work (qualifying as "other disposition" under the definition of "sale" in the statute, 29 U.S.C. § 203(k)), it did not limit the indicia analysis to exempt salespeople who fall under the catchall sales category of "other disposition." *See id.* at 164-66. We apply these indicia to the practices and procedures of Plaintiffs' Ohio workplace.

Plaintiffs were not hired for their sales experience—*no* experience was required. They were required to report to the office each day before going to work in the field, where they were closely supervised. The supervisors controlled Plaintiffs' daily schedules, including selecting the streets on which they were to work. Just Energy mandated that workers follow a detailed script in their presentations to potential buyers and enforced a compliance matrix that governed discipline and employment itself. The script instructed Plaintiffs to get customers to commit to Just Energy products, but unlike the detailers in *Christopher*, they were not instructed to "obtain[] the maximum commitment possible." *Id.* In the Ohio workplace, Plaintiffs had to end their engagement with the customer and leave the premises after initiating the verification call. They were unable to verify the commitment from the customers, address customer concerns or questions, or provide assurances to the customers. It is true that Plaintiffs were paid exclusively on commission, but unlike the New York solicitors in *Flood*, their commission income was minimal and they were not rewarded with additional benefits such as incentives to travel around the world. *See Flood*, 904 F.3d at 226. The totality of the circumstances in this Ohio workplace did not evidence

the external indicia of salesmen that would support application of the exemption.

In determining whether the workers were "employed . . . in the capacity of outside salesman," 29 U.S.C. § 213(a)(1), the Supreme Court also considered whether a plaintiff's capacity "comports with the apparent purpose of the FLSA's exemption for outside salesmen." *Christopher*, 567 U.S. at 166. The Court explained that "[t]he exemption is premised on the belief that exempt employees 'typically earned salaries well above the minimum wage' and enjoyed other benefits that 'se[t] them apart from the nonexempt workers entitled to overtime pay.' Preamble 22124." *Id.* The pharmaceutical detailers there earned an average of more than $70,000 per year, including both a base salary and incentive pay, which was "well above the minimum wage"; they were "not required to punch a clock or report their hours, and they were subject to only minimal supervision." *Id.* at 151, 166. The pharmaceutical detailers also performed work that "was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week." *Id.* at 166. The Court concluded that pharmaceutical detailers are "hardly the kind of employees that the FLSA was intended to protect." *Id.*

Plaintiffs' jobs do not fit this mold of independent workers managing their hours, territory, and income. Trial evidence showed they received no base pay and apparently made much less than minimum wage—a stark contrast to the lead plaintiff in *Flood* who earned more than $70,000 in commissions per year along with other benefits. *See Flood*, 904 F.3d at 226. Plaintiffs'

pay was entirely dependent on completed sales, over which they had no control, and trial testimony and compensation data in the record showed that wages were both inconsistent and disproportionately low when compared to hours worked. Plaintiffs did not benefit from minimal supervision—their location and schedules were set and controlled by their supervisors and their selling procedures were dictated by the compulsory script and closely monitored via the compliance matrix. Plaintiffs' jobs did not comport with the apparent purpose of the outside sales exemption.

C. Jury Instructions

Just Energy challenges the legal accuracy of the jury instructions, arguing that "authority to bind" should not be a consideration when applying the outside sales exemption. Erroneous jury instructions are generally reviewed for abuse of discretion, but we review the "legal accuracy" of jury instructions de novo. *United States v. Blanchard*, 618 F.3d 562, 571 (6th Cir. 2010).

On appeal, we "review jury instructions as a whole in order to determine whether they adequately inform the jury of relevant considerations and provide a basis in law for aiding the jury to reach its decision." *United States v. Godofsky*, 943 F.3d 1011, 1027-28 (6th Cir. 2019) (quoting *United States v. Theunick*, 651 F.3d 578, 589 (6th Cir. 2011)). "Reversal of a jury verdict based on incorrect jury instructions is warranted only when the instructions, 'viewed as a whole, [are] "confusing, misleading, and prejudicial."'" *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 274 (6th Cir. 2009) (quoting *Romanski v.*

Detroit Entm't, LLC, 428 F.3d 629, 641 (6th Cir. 2005)). The district court instructed the jury:

> In determining whether a particular transaction qualifies as a sale for purposes of the Fair Labor Standards Act, you are required to consider the extent to which the employee has the authority to bind the company to the transaction at issue. However, when governmental regulatory requirements limit an employee's ability to bind his employer, compliance with those governmental regulatory requirements do not disqualify the transaction from constituting a sale for the purposes of the outside salesperson exemption.
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> . . .
>
> On the other hand, if the employer retains and/or exercises discretion to accept or reject any transactions for reasons that are unrelated to regulatory requirements applicable to the industry, the transaction should not be considered a sale for purposes of the Fair Labor Standards Act.

(R. 850, Trial Tr., PageID 15486-87)

The district court emphasized consideration of the *extent* of Plaintiffs' authority to bind, rather than instructing that the authority to bind is a prerequisite or determining factor. The court also clarified the importance of the relevant regulatory requirements applicable to the industry: if such requirements apply, Plaintiffs' authority to bind and Just Energy's discretion to accept or reject transactions will not disqualify the exemption. In this context, we disagree

with our dissenting colleague's conclusion that this question should have been resolved solely on the undisputed fact that Just Energy retained discretion. Instead, it required the jury to evaluate "case-specific factual issues" in the context of the regulatory environment. *U.S. Bank*, 138 S. Ct. at 967. Read as a whole, the jury instructions are an accurate statement of the outside sales exemption as instructed by *Christopher*. The district court did not commit reversible error in its jury instructions.

D. Evidence of Compensation

Just Energy challenges the admission of Plaintiffs' compensation into evidence, arguing that compensation is irrelevant to the outside sales exemption and unnecessary here because it had already stipulated to the fact that it did not pay minimum wage and overtime. Evidentiary rulings by the district court are reviewed for abuse of discretion. *United States v. Jamieson*, 427 F.3d 394, 409 (6th Cir. 2005).

In discussing its decision to admit compensation evidence, the district court noted that Plaintiffs have the burden to show that there is a failure to pay minimum wages and overtime pay. This is because Just Energy stipulated only that "they do not pay overtime for hours worked over 40 hours per week and do not pay minimum wage in situations where the commissions earned during a particular workweek are insufficient to ensure that salespersons' wage rates meet or exceed the minimum wage." (R. 763, Stipulation & Order, PageID 11094) Just Energy did not stipulate that Plaintiffs actually earned less than minimum wage in commissions, or that they were

entitled to overtime pay at all. Compensation information was therefore necessary for Plaintiffs to establish that they had minimum wage and overtime claims to begin with. Indeed, testimonial evidence showed that a number of plaintiffs worked long hours and received little or no pay. And as already noted, documentary evidence of over 3,800 individuals showed that 69% made under $1,000 in total compensation and 62% made under $500.

Compensation information was also relevant to other parts of the outside sales exemption analysis. Both the *Christopher* and *Flood* courts noted the yearly earnings of the plaintiffs; in *Christopher*, the Supreme Court referenced compensation information as part of the analysis of whether the plaintiffs fit the "apparent purpose of the FLSA exemption." *Christopher*, 567 U.S. at 166; *see also Flood*, 904 F.3d at 226. Plaintiffs' compensation evidence, including the size of the checks that individuals received, was also relevant to determine if and how commissions were paid, and by extension the amount of discretion that Just Energy exercised to accept or reject sales. The district court did not abuse its discretion by admitting compensation evidence as part of the analysis of the outside sales exemption.

III. CONCLUSION

For the reasons stated above, we find no error in the challenged jury instructions and evidentiary rulings of the district court and **AFFIRM** the district court's denial of the motions for judgment as a matter of law and directed verdict.

DISSENT

MURPHY, Circuit Judge, dissenting. We must decide whether the plaintiffs are outside salespeople exempt from the requirements of the Fair Labor Standards Act (FLSA). The basic facts are largely undisputed: The plaintiffs go door-to-door convincing residents to buy natural gas or electricity from Just Energy. When a plaintiff convinces residents to do so, the residents sign "customer agreements" stating that they are choosing Just Energy for their energy. Given these facts, how would you describe the plaintiffs' occupation? Most people, I think, would naturally refer to them as "salespeople" who make door-to-door "sales." The plaintiff in a similar suit readily agreed as much. *Flood v. Just Energy Mktg. Corp.*, 904 F.3d 219, 225 (2d Cir. 2018). Here, however, the district court held that a jury could find that the plaintiffs were not outside salespeople. That is so, it said, largely because Just Energy could reject customer agreements after customers signed them.

With respect for my colleagues' contrary views, I would reverse. The district court erred twice over. And our failure to correct its errors creates a clear circuit conflict. *First*, the court wrongly treated the ultimate issue whether the plaintiffs were outside salespeople as a fact question for the jury, not a legal question for the court. Yet whether the "particular activities" of a group of employees "exclude[] them from the overtime benefits of the FLSA is a question of law[.]" *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *see Flood*, 904 F.3d at 227. This case thus raises a legal question: Do the plaintiffs' undisputed day-to-day activities qualify as "making sales" within

the meaning of the outside-sales exemption? 29 C.F.R. § 541.500(a)(1)(i).

Second, the district court interpreted this "making sales" language too narrowly. *Id.* The Supreme Court has given it a broad reach, holding that pharmaceutical sales representatives "make sales" by getting nonbinding commitments from doctors to prescribe (not buy) drugs. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 161-69 (2012). If those efforts qualify as "making sales," the plaintiffs' efforts to convince customers to purchase their energy from Just Energy do too. I see no textual basis for the district court's view that their activities do not qualify as "making sales" simply because Just Energy can still back out of an agreement after a plaintiff convinces a customer to sign it. The Second Circuit rejected the same argument when concluding that a similar Just Energy employee made sales. *Flood*, 904 F.3d at 229-33. So two circuit courts are now holding the same company to conflicting legal mandates. That state of affairs is unsustainable. Either all of these Just Energy employees should receive the FLSA's protections or none should.

I

A

The FLSA requires employers to pay a minimum wage and overtime compensation. 29 U.S.C. § § 206-07. But its protections do "not apply with respect to" "any employee employed . . . in the capacity of outside salesman" as that term is "defined and delimited from time to time by regulations of the Secretary" of Labor. *Id.* § 213(a)(1). (No party challenges this delegation of authority. *Cf. Gundy v. United States*, 139 S. Ct. 2116

(2019).) A regulation defines "outside salesman" to cover employees who (1) primarily engage in "making sales" and (2) typically work away from their employer's business. 29 C.F.R. § 541.500(a). It provides:

> (a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:
>
> (1) Whose primary duty is:
>
> (i) making sales within the meaning of section 3(k) of the Act, or
>
> (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

Id. This case concerns the "making sales" element. That element incorporates the statutory definition of "sale": "'Sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k); 29 C.F.R. § 541.501(b).

In *Christopher*, the Supreme Court interpreted "making sales" broadly because it uses this broad statutory definition. 567 U.S. at 162-64. The Court viewed the definition's list of covered items as "an attempt to accommodate industry-by-industry variations in methods of selling commodities." *Id.* at 164. It thus read "the catchall phrase 'other

disposition'" to reach "those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity." *Id.* Under this definition, the Court found that pharmaceutical sales representatives make sales by persuading doctors to prescribe drugs. *Id.* at 165-67. It held that a "nonbinding commitment" to prescribe a drug is an "other disposition." *Id.* at 165. It gave two additional reasons for this view. First, the representatives bore "external indicia" of salespeople, including that they were "hired for their sales experience," "worked away from the office, with minimal supervision," and "were rewarded for their efforts with incentive compensation." *Id.* at 165-66. Second, the exemption exists because outside salespeople typically make well over the minimum wage and work non-standard schedules. *Id.* at 166. These purposes supported the exemption's application because pharmaceutical sales representatives are paid well and often work irregular hours. *Id.*

B

This case involves the sale of energy rather than drugs. Just Energy Group and two subsidiaries, Commerce Energy and Just Energy Marketing, "sell electricity and natural gas to residential and commercial customers in the United States and Canada." *Hurt v. Commerce Energy, Inc.*, 92 F. Supp. 3d 683, 687 (N.D. Ohio 2015). (I refer to all defendants as "Just Energy" because their corporate distinctions do not matter here.) As part of Just Energy's "selling scheme," the plaintiffs "would go door to door to obtain applications from potential customers" to purchase electricity or natural gas. *Id.* Just Energy hired the

plaintiffs "without regard to their prior sales experience" and "closely controlled [their] work schedules" by driving them to neighborhoods and telling them "how many doors to knock on per day." *Id.* at 689-90. It also gave the plaintiffs "detailed scripts to follow[.]" *Id.* at 691. And it paid them only commissions. *Id.*

As their primary duty, the plaintiffs persuaded residents to sign forms entitled "customer agreements" (what the district court called "applications," *id.* at 687). In an Ohio example of this form, a customer acknowledges: "I CHOOSE Commerce Energy d/b/a Just Energy to be my supplier of natural gas ("Gas") for the Term selected below." Yet the agreement does not *immediately* bind either side of the transaction. It tells customers they have the right to rescind it for a significant period of time. It also is "conditional upon [Just Energy's] acceptance[.]" And Just Energy's "acceptance is at [its] sole discretion," depending in part on whether the customer is "creditworthy" and whether Just Energy can "verify [the customer's] information by recorded phone call[.]" After obtaining an agreement, a plaintiff would initiate this call and leave the customer's home so that the customer could speak with a third-party verifier to protect against fraud. The plaintiffs received a commission only if Just Energy later accepted the agreement.

The plaintiffs sued Just Energy for failing to pay them a minimum wage and overtime compensation. The district court certified a collective action under the FLSA and a class action under Ohio law. (The same standards apply to both claims.) The class

plaintiffs worked for Just Energy in six states: Illinois, Ohio, Pennsylvania, Maryland, California, and New York.

At trial, the parties stipulated that the plaintiffs worked away from Just Energy's business. The trial thus addressed only whether the plaintiffs were "making sales." The court gave lengthy instructions on this element. It read the statutory definition of "sale" and noted that the jury's "decision should be [a] functional rather than formal inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works." Tr., R.850, PageID#15486. The court also stated that the jury must "consider the extent to which the employee has the authority to bind the company to the transaction at issue." *Id.* If an employer could reject a transaction "for reasons that are unrelated to regulatory requirements applicable to the industry," the court said, "the transaction should not be considered a sale[.]" *Id.*, PageID#15486-87. It next turned to *Christopher*'s "external indicia" of salespeople. It told the jury that it may "ask whether under the totality of the circumstances [these factors] suggest the plaintiffs were actually engaged in making sales." *Id.*, PageID#15487. It then ticked through various indicia, including, for example, whether "the employee was recruited based upon sales experience and ability[.]" *Id.*, PageID#15488.

The jury ruled for the plaintiffs. It answered "No" to the following question: "Have Defendants met their burden of demonstrating that Plaintiffs qualify as outside salespeople and are thus exempt from the legal requirement to pay minimum wage and

overtime?" The district court denied Just Energy's motion for judgment as a matter of law for two reasons. *See Hurt*, 92 F. Supp. 3d at 689-93. It held that the "external indicia" "could easily support the jury's verdict." *Id.* at 689. And it held that the plaintiffs "obtained only non-binding applications from customers[.]" *Id.* at 692. After a damages phase, the court entered a judgment against Just Energy for over $4.8 million.

II

The district court committed two errors. It wrongly asked the jury to answer a legal question. And when doing so, it misinterpreted the phrase "making sales."

A

The district court did not decide (one way or the other) whether the plaintiffs were outside salespeople. It instead held that, while the evidence could support a verdict in Just Energy's favor, sufficient contrary evidence existed "for the jury to reach the opposite conclusion[.]" *Hurt*, 92 F. Supp. 3d at 689, 693. The court wrongly viewed this question as one of fact rather than law.

1

This case raises a common problem about how to characterize "the application of a legal standard to settled facts." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068 (2020). That question arises only after one identifies the relevant "legal standard" and the relevant "facts." The correct decisionmakers for those two inquiries are obvious. Courts pick the "legal test" by deciding what a statute means. *U.S. Bank Nat'l*

Ass'n v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 965 (2018). And factfinders find the "'historical' fact[s]" by deciding "who did what, when or where, how or why." *Id.* at 966. Once we know the legal test and the historical facts, a decisionmaker must decide whether those facts satisfy that test—a "mixed question of law and fact." *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (citation omitted). Do these mixed questions raise legal issues for courts or fact issues for juries? It depends. *U.S. Bank*, 138 S. Ct. at 966-67. If answering the question "require[s] courts to expound on the law," courts treat it as legal. *Id.* at 967; *cf. Ornelas v. United States*, 517 U.S. 690, 697 (1996). If answering the question "immerse[s] courts in case-specific factual issues," courts treat it as factual. *U.S. Bank*, 138 S. Ct. at 967; *cf. Monasky v. Taglieri*, 140 S. Ct. 719, 730 (2020).

This analysis leads us to the proper question here: Does deciding whether undisputed job duties fall within an FLSA exemption "entail[] primarily legal or factual work"? *U.S. Bank*, 138 S. Ct. at 967. The Supreme Court has told us it is legal. *Icicle*, 475 U.S. at 714. *Icicle* addressed the exemption for "any employee employed as a seaman[.]" 29 U.S.C. § 213(b)(6). The plaintiffs, engineers on a seafood-processing barge, worked to ensure the barge's continuous operation. *Icicle*, 475 U.S. at 711. After a bench trial, the district court found them exempt. *Id.* The Ninth Circuit reversed on de novo review. *Id.* at 710. The Supreme Court, in turn, reversed because the Ninth Circuit wrongly made "factual findings" about the historical facts. *Id.* at 714. It explained that what the employees did from day to day raised a *question of fact* subject to clear-error review. *Id.* But it then said:

"The question whether their particular activities excluded them from the overtime benefits of the FLSA is a *question of law* which both parties concede is governed by the pertinent regulations[.]" *Id.* (emphasis added). It added that the appellate court could have reversed the district court—even assuming that the "factual findings were unassailable"—if it had found that the "proper rule of law was misapplied to those findings[.]" *Id.*

We have adopted *Icicle*'s dichotomy since. While we review a district court's "findings of fact for clear error," we "review de novo the district court's application to those facts of the legal standards contained in [FLSA] statutes, regulations, and caselaw." *Brock v. City of Cincinnati*, 236 F.3d 793, 800 (6th Cir. 2001); *Ale v. Tenn. Valley Auth.*, 269 F.3d 680, 691 (6th Cir. 2001); *Martin v. W.E. Monks & Co.*, 1993 WL 300332, at *2 (6th Cir. Aug. 3, 1993); *Spencer v. Office of the Auditor of Pub. Accounts*, 1991 WL 32361, at *1 (6th Cir. Mar. 12, 1991).

Other courts agree. "The exemption question under the FLSA is a mixed question of law and fact. The question of how the employees spent their working time is a question of fact. The question of whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law." *Pippins v. KPMG, LLP*, 759 F.3d 235, 239 (2d Cir. 2014) (citation omitted); *Robinson-Smith v. Gov't Emps. Ins. Co.*, 590 F.3d 886, 891-92 (D.C. Cir. 2010); *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 584 (5th Cir. 2006); *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 450 (4th Cir. 2004); *Ackerman v. Coca-Cola Enters., Inc.*, 179 F.3d 1260, 1264 (10th Cir. 1999);

Spinden v. GS Roofing Prods. Co., 94 F.3d 421, 426 (8th Cir. 1996). If the facts are undisputed, courts regularly grant summary judgment to employers (finding that an exemption applies), *Pippins*, 759 F.3d at 240, 252; *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1308-10 (11th Cir. 2009), or employees (finding that an exemption does not apply), *Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 120, 130 (4th Cir. 2015); *Clements v. Serco, Inc.*, 530 F.3d 1224, 1229 (10th Cir. 2008).

2

Now apply this framework here. We must start by identifying the "legal test." *U.S. Bank*, 138 S. Ct. at 965. As noted, the outside-sales exemption has two parts. 29 C.F.R. § 541.500(a). And it is our job to figure out (without the slightest deference to the jury) what the first part means when it says that employees must have a primary duty of "making sales within the meaning of section 3(k) of the Act[.]" *Id.* § 541.500(a)(1)(i). Did the district court correctly hold that "making sales" requires employees to have the authority to bind their employer to a sale? Did it correctly interpret that phrase to depend on the "external indicia" of salespeople? These are purely legal questions. (I think the district court got them wrong, but set that aside for now.)

Next consider the "historical facts." *U.S. Bank*, 138 S. Ct. at 966. If the parties disputed any of the activities that the plaintiffs did on a day-to-day basis, that factual dispute would certainly be for the jury to resolve. Yet I do not see much disagreement on these facts. There is no dispute that the plaintiffs regularly worked away from Just Energy's offices. 29 C.F.R.

§ 541.500(a)(2). And there is no dispute about the plaintiffs' "primary duty": to persuade residents to sign forms agreeing to buy their energy from Just Energy. *Id.* § 541.500(a)(1).

The parties debate only whether these solicitations rise to the level of "making sales." *See id.* § 541.500(a)(1)(i). For this question, too, the historical facts are largely undisputed. The plaintiffs, for example, did not need sales experience and Just Energy closely controlled their work. *Hurt*, 92 F. Supp. 3d at 689-90. Both the customers and Just Energy could later reject agreements that the plaintiffs convinced customers to sign. *Id.* at 692-93. And the plaintiffs were paid only on a commission basis and only if neither party rejected the agreement. *Id.* at 687. All told, this case strikes me as one in which the "tasks performed by" the employees are "essentially agreed by the parties" and they instead dispute only whether those tasks "exclude[] them from the overtime benefits of the FLSA." *Pippins*, 759 F.3d at 240 (quoting *Icicle*, 475 U.S. at 714). The case thus raises "a question of law." *Id.* (quoting *Icicle*, 475 U.S. at 714).

Christopher bolsters my view. That case arose on summary judgment. 567 U.S. at 152. The Court first clarified the meaning of "making sales," a legal question. 567 U.S. at 161-64 (Part II.C.1). It then applied its test to the sales representatives' duties, a mixed question of law and fact. *Id.* at 165-67 (Part II.C.2). When doing so, the Court did not frame this question as whether a reasonable jury could find that the representatives were (or were not) "making sales" under its test. The Court applied the test itself. *Id.* Yet

if *Christopher*'s "application of a legal standard to settled facts" was really for the jury, I find it difficult to see how that case did not at least raise a triable issue. *Guerrero-Lasprilla*, 140 S. Ct. at 1068; *see also Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1140-43 (2018) (finding employees exempt at pleading stage).

The Second Circuit likewise treated this question as for the court in a nearly identical case. *Flood*, 904 F.3d at 228. The plaintiff in *Flood* worked for two of the same Just Energy companies in New York. He had largely the same duties as the plaintiffs here, but the district court found that these duties qualified as "making sales" on summary judgment. *Id.* at 224-26. On appeal, the Second Circuit said: "The question of how an employee spends his or her time working is one of fact, while the question of whether those work activities exempt him or her from the FLSA is one of law." *Id.* at 227. It then explained why the plaintiff made sales as a matter of law. *Id.* at 229.

Frankly, I do not see the need for a trial even under the district court's view of the law. Its instructions read as if the court was asking the jury to answer a question of statutory interpretation. The instructions told the jury to consider the text of the "sales" definition and the purpose-based indicia from *Christopher*. Yet the instructions then added a legal gloss nowhere found in *Christopher*, stating: "[I]f the employer retains and/or exercises discretion to accept and/or reject any transaction for reasons that are unrelated to regulatory requirements applicable to the industry, the transaction should not be considered a sale[.]" Tr., R.850, PageID#15487. There is no dispute

that Just Energy retained the discretion that the instructions prohibited. So the district court's view of the law should have led it to enter judgment as a matter of law for the plaintiffs. Either way, whether the plaintiffs are exempt or non-exempt, this "making sales" question is for the court.

B

Even if this mixed question of law and fact were for the jury, the proper meaning of the outside-sales exemption raises a pure legal question for the court. *U.S. Bank*, 138 S. Ct. at 965. And no reasonable jury could return a verdict for the plaintiffs under a correct view of the law.

1

Like the Second Circuit, I believe that these Just Energy employees were "undoubtedly 'making sales' within the scope of the outside salesman exemption" when they engaged in their door-to-door solicitations. *Flood*, 904 F.3d at 229. I reach this conclusion based on the plain text, the nearby outside-sales regulations, the FLSA as a whole, and the most relevant caselaw.

a. The text's plain meaning shows that the plaintiffs "made sales." The phrase "making sales" has two requirements: there must be a result (a "sale") and an employee's activities must have enough of a connection to that result (the employee must "make" the sale). The Supreme Court recently rejected the once common view "that exemptions to the FLSA should be construed narrowly." *Encino*, 138 S. Ct. at 1142. So we must interpret these words as we would any other text—by giving them a "fair reading," not a restrictive one. *Id.*

When fairly read, both words have a broad meaning. Start with "sales." The regulation incorporates the statutory definition of "sale." Far from covering only the technical "exchange of a commodity for money," 9 *Oxford English Dictionary* 49 (1933), this definition "includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition," 29 U.S.C. § 203(k). By using the verb "include," the definition clarifies that its nonexclusive list does not identify all arrangements that qualify as "sales." *See Christopher*, 567 U.S. at 162. And by using the adjective "any," the definition clarifies that every kind of the listed items qualifies as a "sale." *See id.* To have separate meaning, moreover, the catchall "other disposition" must cover more than "a 'firm agreement' or 'firm commitment' to buy" because those things already fall within the phrase "contract to sell." *Id.* at 163 & n.20 (citation omitted).

The word "making" next identifies the connection an employee must have to a "sale." It has a broad meaning too. In one sense, a person "makes" a sale if the person "cause[s]" the sale or "brings" it "about." *Webster's New International Dictionary* 1485 (2d ed. 1934) (def. 18); 6 *Oxford English Dictionary* at 61 (def. 9). In another sense, the entire phrase ("making sales") can be read simply as "selling." When a sentence uses the verb "make" with an object that can take a verb form ("to make a statement"), the combined phrase can have the same meaning as that verb form ("to state"). *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (citing 6 *Oxford English Dictionary* at 66 (def. 59)). This view does not change things. While "sell" can have a technical meaning ("[t]o transfer (property) for a

consideration"), *Webster's*, *supra*, at 2272 (def. 7), that narrow meaning would not fit the regulation's broad definition of "sell," 29 U.S.C. § 203(k). In this setting, "selling" should cover those who "persuade" customers "to a course of action" (a sale), *Webster's*, *supra*, at 2272 (def. 14), or who "cause or further" the sale, *id.* (def. 8); 9 *Oxford English Dictionary* at 429 (def. 3.c).

This meaning fits the context. *United States v. Hill*, 963 F.3d 528, 533 (6th Cir. 2020). The regulation uses "making sales" to describe those who are "outside salesmen." *Cf. Johnson v. United States*, 559 U.S. 133, 140 (2010). In that context, "making sales" naturally refers to those who persuade people to buy things. Most people, for example, would say that a "car salesman" who convinces a customer to buy a car is the one who "makes" the "sale" even if the customer then reviews the paperwork with the dealership's financial staff. *Christopher*, 567 U.S. at 167.

Turning to this case, the plaintiffs' duty to persuade customers to buy energy from Just Energy fits within this plain meaning of "making sales." Is there a "sale" involved? Yes. Unlike *Christopher*, we need not even concern ourselves with the catchall "other disposition." *See* 567 U.S. at 165. The arrangement here falls within a specific item—"contract to sell." 29 U.S.C. § 203(k). Did the plaintiffs "make" these contracts? Yes, again. I agree that Just Energy could decline to enter a contract after the plaintiffs convinced a customer to sign an agreement. But the plaintiffs were the ones who "brought about" any later finalized contracts by "persuading" customers to enter them. *See Webster's*, *supra*, at 1485, 2272. The text requires nothing more.

In the alternative, the plaintiffs undoubtedly brought about ("made") the customers' offers to purchase by convincing them to sign the agreements memorializing those offers. Does an offer to buy a good qualify as a "sale"? Even if it is not a "contract to sell" because Just Energy could reject the offer, it fits within the "other disposition" catchall. *See Christopher*, 567 U.S. at 163-64. An offer to buy is essentially an "order" for goods. *See id.* (defining "disposition"). And the very next provision clarifies that "orders" "for services" are covered. 29 C.F.R. § 541.500(a)(ii). It would make little sense to read § 541.500(a)(ii) as reaching non-contractual orders for *services* while reading § 541.500(a)(i) as excluding non-contractual orders for *goods*.

b. Nearby outside-sales regulations also show that the plaintiffs were "making sales." These regulations distinguish those who make their *own* solicitations from those who promote the sales of *others*. And the plaintiffs were making their "own" solicitations.

The Department of Labor has traditionally distinguished salespeople from "promotion men" working for manufacturers. U.S. Dep't of Labor, Wage & Hour Div., Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 46 (1940) ("1940 Report"). These promoters would visit retail stores to "put[] up displays and posters, remov[e] damaged or spoiled stock from the merchant's shelves or rearrang[e] the merchandise." U.S. Dep't of Labor, Wage & Hour & Public Contracts Divs., Report and Recommendations on Proposed Revisions of Regulations, Part 541, 82-83 (1949) ("1949 Report"). The Department concluded

that they were not salespeople because their activities were "designed to stimulate sales which will be made by someone else[.]" *Id.* at 83. If, by contrast, an employee was "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," the employee was exempt. *Id.*

A "promotion work" regulation codified this distinction. It says that the exemption reaches promotion work performed "in conjunction with an employee's own outside sales or solicitations[.]" 29 C.F.R. § 541.503(a). But the exemption does not reach promotional work "that is incidental to sales made, or to be made, by someone else[.]" *Id.* The regulation gives as an example of the latter an employee who visits "chain stores" to arrange goods and replenish stock but "does not obtain a commitment for additional purchases." *Id.* *§* 541.503(c). These actions are not "making sales" because the employee "does not consummate the sale nor direct efforts toward the consummation of a sale[.]" *Id.* Another regulation, by comparison, suggests that a delivery driver makes sales if the driver "obtains or solicits orders for the employer's products from persons who have authority to commit the customer for purchases." *Id.* *§* 541.504(c)(2). In the guidance with these regulations, the Department reiterated that "making sales" should cover employees who "'obtain a commitment to buy' from the customer and are credited with the sale." 69 Fed. Reg. 22122, 22162 (Apr. 23, 2004) (quoting 1949 Report, at 83).

This dichotomy likewise shows that the plaintiffs "made sales." They engaged in their own "solicitations" when they went door-to-door to convince customers to buy energy, obtaining their own "orders" and "direct[ing] [their] efforts toward the consummation of" their own sales. 29 C.F.R. § § 541.503(a), (c), 541.504(c)(2). They also sought to "obtain a commitment to buy" (the customer agreements) and were "credited" with finalized contracts (through their commissions). 69 Fed. Reg. at 22162. Conversely, the plaintiffs have identified no other Just Energy employees who "made" these sales. They have not argued that the third-party verifiers did so. For good reason. Those verifiers existed to stop sales, not make them. They ensured that the plaintiffs had disclosed all required information and had not engaged in fraud. *Cf. Flood*, 904 F.3d at 225.

c. A broader view of the FLSA supports this conclusion too. The outside-sales exemption relies on "a general definition" of sale "that applies throughout the FLSA." *Christopher*, 567 U.S. at 164 n.21. We should consider how the statute uses the word "sale" or "sell" elsewhere. After all, courts presume that the same word does not change meanings across a statute. *See Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 60 (2014). That principle has even more force when the word comes with a universal definition. *See* 29 U.S.C. § 203(k).

So I find it noteworthy that Congress broadened the FLSA's reach in 1961 to cover businesses that have "employees handling, *selling*, or otherwise working on goods or materials that have been moved in or produced for commerce by any person[.]" 29 U.S.C.

§ 203(s)(1)(A)(i) (emphasis added); *Sec'y of Labor v. Timberline S., LLC*, 925 F.3d 838, 843-45 (6th Cir. 2019). How does the Secretary of Labor interpret "selling" in this provision? The Secretary broadly defines the word to match the plain meaning I have given to "making sales": "As long as the employee in any way participates in the sale of the goods he will be considered to be 'selling' the goods, whether he physically handles them or not." 29 C.F.R. § 779.241. "Thus, if the employee performs any work that, in a practical sense is an essential part of consummating the 'sale' of the particular goods, he will be considered to be 'selling' the goods." *Id.*

Would anyone challenge that the plaintiffs were "selling" under this definition? They "participate" in obtaining the contracts to sell by discovering one side of those contracts. And they are an "essential part" of completing the contracts that Just Energy finalizes. Without the plaintiffs, there would be no purchasers—and hence no contracts. It does not get more essential than that.

To be sure, the Fifth Circuit fifty years ago rejected reliance on this regulation because it concerns the FLSA's coverage, not an exemption. *Wirtz v. Keystone Readers Serv., Inc.*, 418 F.2d 249, 261 (5th Cir. 1969). But *Wirtz* rests on since-overruled logic. It said: "Given the rule that coverage provisions are to be *liberally* construed while exemptions are to be *narrowly* construed, definitions for one purpose would seem ill suited to the other." *Id.* (emphases added). Not anymore. The Supreme Court recently clarified that the FLSA's exemptions are just as much a part of Congress's legislative compromise as are its coverage

provisions. *Encino*, 138 S. Ct. at 1142. Both are entitled to the same "fair reading," not to an overly broad or overly narrow one. *Id.*

d. Relevant precedent removes all doubt. As noted, the Second Circuit found that a similar Just Energy employee fell within the exemption. *Flood*, 904 F.3d at 229. It reasoned that the plaintiff "was not just promoting these products or advertising them; he was trying to persuade specific customers to sign up then-and-there for an energy plan." *Id.* The court found that he made sales because he "obtain[ed] a commitment to buy from the customer and [was] credited with the sale." *Id.* (citation omitted). It also rejected the claim that the plaintiff did not make sales because Just Energy could reject an agreement. "We do not agree that the outside salesman exemption requires a showing that a selling employee has an unconditional authority to bind the buyer or his employer to complete the sale." *Id.* This case is legally identical to *Flood*.

Apart from *Flood*, the reasoning of all nine Justices in *Christopher* shows that the plaintiffs made sales. The majority held that a "nonbinding commitment" to prescribe a drug qualifies as an "other disposition" and so a "sale." 567 U.S. at 165. A nonbinding agreement to buy energy looks even more like a "sale" than a nonbinding commitment to prescribe a drug. As *Flood* noted, the plaintiffs' duties are "more in the nature of 'making sales' than the primary duties of the representatives at issue in *Christopher*." 904 F.3d at 231. If those representatives are exempt, the plaintiffs must be too. In fact, even the *Christopher* dissent believed that the exemption

covered those who "obtain a firm commitment to buy the product." 567 U.S. at 178 (Breyer, J., dissenting). The signed customer agreements strike me as a firm commitment to buy energy from Just Energy.

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The district court and the majority reach a contrary result for two reasons: The plaintiffs could not bind Just Energy to the contracts and they did not bear all the "external indicia" of salespeople. Neither reason removes the plaintiffs from the outside-sales exemption's reach.

Authority to Bind. The district court held that the plaintiffs do not "make sales" because Just Energy and its customers could both stop a deal after a customer signed an agreement. *See Hurt*, 92 F. Supp. 3d at 692-93, 696-97. I do not understand why this fact should disqualify the plaintiffs. Neither text nor precedent supports the district court's rule.

Start with the text. It does not require the employee to *consummate* or *complete* the sale; it requires the employee to *make* the sale. And the plaintiffs "make" the "contracts to sell" that Just Energy enters with consumers even if the contracts do not get finalized until later and even if some fall apart. The phrase "making sales" naturally captures the employees who "persuade" customers to buy the employer's products, *Webster's*, *supra*, at 2272 (def. 14), even if the actual exchange occurs later in coordination with others, *Christopher*, 567 U.S. at 167-68. Nearby regulations confirm this view. They say employees are covered if they "solicit[] orders" or engage in "solicitations." 29 C.F.R. § § 541.503(a), 541.504(c)(2). Who else at Just Energy undertakes

these acts of persuasion if not the plaintiffs? The plaintiffs certainly identify no one else.

Consider some hypotheticals. The exemption covers those who "'obtain a commitment to buy'" or an "order." 69 Fed. Reg. at 22162 (citation omitted); 29 C.F.R. § 541.504(c)(2). What happens if salespeople are required to say that their employer's filling of any order depends on it having available stock ("while supplies last")? Does that disclaimer disqualify them from making sales because they do not "bind" their employer to sales? I would think not. The exemption requires a commitment to *buy*, not a commitment to *sell*. The exemption likewise covers salespeople who convince a retailer to buy a load of product even if the retailer makes the purchase "through [its] internal computerized purchasing system," not the salespeople themselves. 69 Fed. Reg. at 22162. The retailer obviously could change its mind in between when it gives a commitment to salespeople and when it "types the order into [its] computer system and hits the return button[.]" *Christopher*, 567 U.S. at 149 (quoting 69 Fed. Reg. at 22163). Does that discretion disqualify the salespeople from making sales because they do not get on-the-spot "binding" commitments? Again, I think not. More basically, many retail stores have generous "return" policies that allow customers to return purchased items no questions asked. Does a salesperson who convinces a customer to buy a product "make sales" even though the sale is not "binding" after the customer leaves the store? It would be quite strange to say that the salesperson is not making sales.

Turn to precedent. *Christopher* rebuts any argument that employees must have on-the-spot authority to bind their employers. *Flood*, 904 F.3d at 229-31. The Court "declined to interpret the 'making sales' requirement to mandate a showing that an employee has fully consummated a sales transaction or the transfer of title to property." *Id.* at 229. It instead held that a doctor's "*nonbinding* commitment" sufficed. 567 U.S. at 165 (emphasis added). The sales representatives likewise did not have the ability to bind their companies to sell prescription drugs to patients. The patients instead bought the drugs from separate entities—pharmacies. *See id.* at 167 & n.24.

My colleagues say we may disregard *Christopher* because of the "unique" regulatory environment for prescription drugs. The plaintiff in *Flood* made this argument too. I find it no more persuasive than the Second Circuit did: "*Christopher* does not . . . suggest that its reasoning and interpretation of the statute and regulations lack general applicability to other cases[.]" 904 F.3d at 231. And the plaintiffs point to nothing in the "energy industry that should warrant a more restrictive application of the term 'making sales[.]'" *Id.* They also point to nothing in the text that draws this regulated-nonregulated line. Either nonbinding commitments count or they do not.

The majority also suggests that *Killion v. KeHE Distributors, LLC*, 761 F.3d 574 (6th Cir. 2014), supports its narrow view of *Christopher*. But *Killion* did not address whether employees must have authority to bind employers. It addressed which of two sets of employees made sales. KeHE, a distributor of food to retailers, treated its "sales representatives" as

exempt. 761 F.3d at 577-78. But the historical facts could be read to suggest that it was the "account managers" who "determine[d] which products will be sold in the chain stores and who [were] responsible for growing sales[.]" *Id.* at 584. Those facts also could be read to suggest that the sales representatives merely stocked the shelves of the retailers and ordered new product when the stores depleted their inventories. *Id.* at 578. Under this view of the facts, the representatives were mere "promoters" facilitating the account managers' sales. *See* 1940 Report, at 46; *Killion*, 761 F.3d at 585; *Wirtz*, 418 F.2d at 261. Here, by contrast, no other employees "really" persuaded residents to contract with Just Energy. It was the plaintiffs who did so.

My colleagues also compare this case to the Tenth Circuit's decision in *Clements*. There, the court held that a company's civilian employees who recruited soldiers for the U.S. Army did not "make sales" as a matter of law. 530 F.3d at 1229. *Clements* reasoned that the recruiters did not obtain an "order or contract" to enlist and "merely cultivated 'a list of persons who seem[ed] receptive to the idea' of joining the Army." *Id.* at 1228 (quoting *Wirtz*, 418 F.2d at 260). I agree that *Clements* relied on the fact that the recruiters lacked the authority to "enlist a recruit" into the Army—authority reserved to the Army itself. *Id.* at 1229. But if *Clements* relied on the *nonbinding* nature of any commitment from recruits, its logic does not survive *Christopher*'s holding that a "nonbinding commitment" counts. 567 U.S. at 165. Notably, *Christopher* did not mention this aspect of *Clements* when distinguishing it, explaining that the case "concerned employees who were more analogous to

buyers than to sellers." *Id.* at 168. The "more fundamental reason" recruiters are not salespeople "is that the activity of recruiting employees is not 'sales'"; recruiters help the Army *buy* services. *Clements*, 530 F.3d at 1231 (McConnell, J., concurring). *Clements* also relied on the overruled principle that the exemption should be "narrowly construed." *Id.* at 1227 (majority op.) (citation omitted). Here, the plaintiffs *sell* energy and we must give the exemption a fair reading, not a narrow one. *See Encino*, 138 S. Ct. at 1142.

While mistakenly relying on far-afield decisions, the majority fails to distinguish the case directly on point—*Flood*. My colleagues agree that *Flood* found a similar Just Energy employee covered because he obtained commitments to buy. Maj. Op. 11-12. But they distinguish *Flood* because the plaintiff was less controlled and made more money. *Id.* at 12-13. These differences do not matter. Under *Flood*'s test, the plaintiffs are exempt because they obtain commitments to buy. Indeed, the customer agreements in that case gave Just Energy the same "discretion" to reject agreements that exists in this one. *See* Ex. M, *Flood v. Just Energy Mktg. Corp.*, No. 7:15-cv-02012 (S.D.N.Y. Feb. 8, 2016), ECF No. 66-35. And the outside-sales exemption contains no salary requirement. "[T]he regulations do not indicate that a court should consider a salesman's effective compensation in determining whether the exemption applies." *Meza v. Intelligent Mexican Mktg., Inc.*, 720 F.3d 577, 586 (5th Cir. 2013). From the beginning, the Department of Labor has recognized that there is no "salary qualification" even though outside salespeople

often can earn little in a week. 1940 Report, at 52. In short, we are creating a clear circuit split.

External Indicia. The district court also held that the plaintiffs do not bear all of the "external indicia" of salespeople that *Christopher* used to find pharmaceutical sales representatives exempt. *Hurt*, 92 F. Supp. 3d at 690-92. It wrongly relied on these indicia. The indicia might *qualify* employees for this exemption even if the employees' duties fall outside the ordinary meaning of "sales" work. But they cannot *disqualify* employees like the plaintiffs who have duties falling squarely within that ordinary meaning. Both text and precedent again support my view.

As for the text, "no such listing of indicia appears in the relevant regulation defining what it means for an employee to be 'making sales.'" *Flood*, 904 F.3d at 233. If an employee is indisputably "making sales" (say, for example, by going door-to-door to convince residents to buy a product on the spot), that employee falls within the exemption *without more*. 29 C.F.R. § 541.500(a)(1)(i). It cannot matter that an employee has no sales experience or that the employer supervises this work. To add such implied conditions on top of the express text would "disregard" basic "rules of statutory interpretation." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). In my view, the text instead reserves these "indicia" for atypical sales work. The definition of "sale" contains a vague catchall ("other disposition") and is non-exhaustive because it begins with "includes." *Christopher*, 567 U.S. at 162-64. So the definition can plausibly reach some arrangements that would not ordinarily be understood as "sales." How should courts

go about deciding whether atypical arrangements qualify as "sales" under the broad definition? It seems to me the text permits courts to use these external indicia of outside salespeople to differentiate nontraditional sales that fall within the exemption from those that do not.

As for precedent, both *Christopher* and *Flood* support this distinction. On the one hand, *Flood* shows that plaintiffs cannot use the external indicia to disqualify employees who otherwise fall within the exemption. *Flood*, 904 F.3d at 233-35. It recognized that the plaintiff there (like the plaintiffs here) did not satisfy one external indicia of outside sales work—lack of supervision—because he "had to work prescribed hours," "was driven to and from pre-selected locations by company personnel," "had to abide by a company dress code," and "had to use a company sales script." *Id.* at 234. But this supervision did not change the fact that he made sales under the regulation's plain text. *Id.* And that text did not permit the court "to add a 'subject to supervision' exception to the 'making sales' requirement[.]" *Id.* at 235. The same logic applies here.

On the other hand, *Christopher* shows that the external indicia can be used to cover transactions that would not otherwise be considered "sales." An employee's effort to obtain a "nonbinding commitment from a physician to prescribe" a drug falls well outside the ordinary meaning of "sales." 567 U.S. at 165. So the Court relied on the broad "other disposition" catchall to find that effort covered. *Id.* at 164-65. When doing so, it relied on these "external indicia" to confirm that the pharmaceutical sales representatives were

exempt. *Id.* at 165-66. Here, however, there is no need to rely on the external indicia because the plaintiffs' work falls squarely within "making sales." These "indicia" are irrelevant in this case.

For these reasons, I would reverse the district court's judgment and direct it to enter a judgment for Just Energy on remand. I thus respectfully dissent.

Appendix B

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 18-4058

DAVINA HURT AND DOMINIC HILL, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

COMMERCE ENERGY, INC., doing business as Just Energy doing business as Commerce Energy of Ohio, Inc.; JUST ENERGY MARKETING CORP.; JUST ENERGY GROUP, INC.,

Defendants-Appellants.

Filed: Sept. 30, 2020

Before: CLAY, STRANCH, MURPHY, Circuit Judges.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has

requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Murphy would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

[handwritten: signature]
Deborah S. Hunt, Clerk

Appendix C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

No. 12-cv-00758

DAVINA HURT AND DOMINIC HILL, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

COMMERCE ENERGY, INC., doing business as Just Energy doing business as Commerce Energy of Ohio, Inc.; JUST ENERGY MARKETING CORP.; JUST ENERGY GROUP, INC.,

Defendants.

Filed: Mar. 10, 2015

OPINION & ORDER

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

This is a case about minimum wage and overtime pay under the Fair Labor Standards Act ("FLSA")[1] and overtime pay under the Ohio Minimum Fair Wage Standards Act ("Ohio Wage Act").[2] Plaintiffs are door-

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[1] 29 U.S.C. § 201 *et seq.*

[2] Ohio Rev. Code § 4111.01 *et seq.*

to-door workers who solicited residential customers for the Defendants' energy services.

Following a trial on the merits, a jury found Defendants liable for violations of the FLSA and the Ohio Wage Act.[3] Defendants now renew the motion for judgment as a matter of law they made at trial. In the alternative, Defendants move for a new trial, or to certify an interlocutory appeal of the liability phase of the trial. For the following reasons, the Court **DENIES** the motion for judgment as a matter of law, **DENIES** the motion for a new trial, and **DENIES** the motion to certify an interlocutory appeal.

I. Background

The Court has previously issued an opinion detailing the factual background of this case and incorporates that background by reference.[4] In short, Defendants sell electricity and natural gas to residential and commercial customers in the United States and Canada. Under Defendant's selling scheme, Plaintiffs would go door to door to obtain applications from potential customers. An application could then become final contract after a verification call between the customer and a third-party verifier and after the Defendant found the customer's credit satisfactory. Plaintiffs were paid commission for every finalized contract; if an application was rejected for any reason before the contract became final, the employee would not be paid.

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[3] *See* Doc. 808. Throughout this opinion, citations to the draft trial transcript will be abbreviated as "Tr. [date] at [page]:[line]."

[4] *See* Doc. 89 at 1–6.

Plaintiffs brought suit, alleging this commission-based compensation system deprived them of minimum wage and overtime. Two classes were certified: a nationwide FLSA collective action seeking minimum wage and overtime under federal law, and a Rule 23 class action seeking overtime under Ohio law. Against these claims, Defendants argued that Plaintiffs were exempt from overtime and minimum wage requirements because of the "outside salesperson" exemption.

The Court held a trial on Defendants' liability from September 29, 2014, to October 6, 2014.[5]

At the close of Plaintiffs' case, Defendants moved for judgment as a matter of law[6] on two grounds. First, Defendants argued that the Ohio "Badge Never Used" ("BNU") group of employees—those who attended at least one day of training but never obtained a completed application from a customer—had not established that any member of the group had worked more than forty hours in a week, and thus had failed to prove their claim for overtime wages.[7] Second, Defendants argued that Plaintiffs' evidence

[5] The Court bifurcated the proceedings into a liability phase and a damages phase. Doc. 731.

[6] Defendants styled these oral motion as seeking "directed verdicts." The terminology of the Federal Rules of Civil Procedure regarding "directed verdict" and "judgment notwithstanding the verdict" (also called "j.n.o.v.") was updated in 1991 so that all such motions are now simply called "judgment as a matter of law." *See* 9B Wright & Miller, Federal Practice & Procedure Civil § 2521, at nn. 7, 13–19 & accompanying text (3d ed. 2014) (citing Fed. R. Civ. P. 50(a) Advisory Committee Note to 1991 Amendments).

[7] Tr. 10/1/2014 at 183:24–185:23.

established that Plaintiffs were exempt outside salespeople.[8] The Court denied both motions, finding there was sufficient evidence for both issues to go to the jury.

At the close of Defendants' case, Defendants and Plaintiffs cross-moved for judgment as a matter of law regarding the application of the outside salesperson exemption.[9] The Court denied both motions.

Defendants also raised several objections to the jury instructions. Relevant to this motion, they argued that the Court erred in instructing the jury that it could consider whether the applications obtained by Plaintiffs were binding commitments in deciding whether the transactions were "sales" for purposes of the FLSA.[10]

Finally, Defendants also object to the Court twice instructing the jury during the trial that an employment contract cannot waive FLSA minimum wage and overtime requirements if those requirements would otherwise apply.[11]

II. Judgment as a Matter of Law

Defendants renew their motion for judgment as a matter of law. They raise three issues, which will be addressed in turn. First, that there was insufficient evidence that the Plaintiffs qualified for the outside salesperson exemption. Second, that no evidence

[8] *Id.* at 186:6–186:19.

[9] Tr. 10/6/2014 at 21:10–21:20.

[10] Doc. 804 at 3–7; Tr. 10/2/2014 at 165:25–167:5; Tr. 10/6/2014 at 7:23–9:25.

[11] Doc. 810-1 at 5–6.

supports the inference that any BNU group member worked more than 40 hours in any week. And third, that the Court's instruction to the jury that the minimum wage requirements of the FLSA cannot be waived prejudiced their case. All three arguments lose.

Before moving on to the merits of this motion, the Court pauses to chastise both sides for their complete and utter failure to cite to the trial record or admitted exhibits in their briefing.[12] Judge Easterbrook once wrote, regarding summary judgment, that, "[d]istrict judges are not archaeologists. They need not excavate masses of papers in search of revealing tidbits—not only because the rules of procedure place the burden on litigants, but also because their time is scarce."[13] The same goes for post-trial motions. When the issues all relate to what happened at trial, the parties should point to specific evidence that appears *in the record* to support their positions, rather than relying on generalized statements and their own (occasionally faulty) memories as they did here. In the future, both parties and their counsel would do well to respect the Court's limited resources and not force it to do their jobs for them.

A. Legal Standard

A motion for judgment as a matter of law under Rule 50(a) requires the trial court to decide "whether

[12] In fact, the Court has learned from the court reporter that neither side has ever even bothered to obtain a transcript of the trial, other than of counsel's opening statements.

[13] *Nw. Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662–63 (7th Cir. 1994).

there was sufficient evidence presented to raise a material issue of fact for the jury."[14] The Court "must view the evidence in the light most favorable to the party against whom the motion is made, and give that party the benefit of all reasonable inferences."[15] "'[S]ufficient evidence' will be found unless, when viewed in the light of those inferences most favorable to the nonmovant, there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable persons could differ."[16] The Court neither weighs the evidence, evaluates the credibility of the witnesses, nor substitutes its judgment for that of the jury.[17]

B. Analysis

1. Outside Sales Exemption

Defendants first argue that they should receive judgment as a matter of law because Defendants established, and Plaintiffs failed to rebut, that Plaintiffs meet the definition of outside salespeople.[18] While Defendants' motion largely objects to the contents of the jury instructions themselves, which is discussed in more detail below, Defendants also raise

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[14] *Monette v. AM-7-7 Baking Co.*, 929 F.2d 276, 280 (6th Cir. 1991).

[15] *Wayne v. Village of Sebring*, 36 F.3d 517, 525 (6th Cir. 1994).

[16] *Monette*, 929 F.2d at 280; *see also Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir. 2005) ("Judgment as a matter of law may only be granted if . . . there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion in favor of the moving party.").

[17] *Wayne*, 36 F.3d at 525.

[18] Doc. 810-1 at 2–4.

arguments regarding the sufficiency of the evidence that are properly considered on motion for judgment as a matter of law.[19]

Generally, the FLSA requires employers to pay employees a minimum wage, as well as time-and-a-half overtime pay when the employee works more than forty hours in a week.[20] Not all employees, however, are protected by this requirement. One exception is that "any employee employed . . . in the capacity of outside salesman" is not entitled to minimum wage or overtime.[21] An outside salesperson is "any employee . . . whose primary duty is . . . making sales . . . and . . . who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty."[22] A "sale," in turn, is defined as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."[23] This "include[s] the transfer of title to

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[19] An incorrect jury instruction can provide the basis for a motion for judgment as a matter of law when a pure legal issue is dispositive as to the outcome of the case. *See, e.g.*, *Kladis v. Brezek*, 823 F.2d 1014, 1017 (7th Cir. 1987); *accord Libbey-Owens-Ford Co. v. Ins. Co. of N. Am.*, 9 F.3d 422, 426 (6th Cir. 1993). As the Court will explain, however, the evidence was sufficient for the jury to have found in favor of Plaintiffs on this issue regardless of whether the disputed instruction was included. Thus, it is unnecessary to resolve the correctness of the jury instructions at this point, and the Court instead reserves that discussion for its opinion on the motion for a new trial.

[20] *See* 29 U.S.C. §§ 206, 207.

[21] 29 U.S.C. § 213(a)(1).

[22] 29 C.F.R. § 541.500.

[23] 29 U.S.C. § 203(k).

tangible property . . . ."[24] The parties stipulated that Plaintiffs in this case were customarily and regularly engaged away from the employer's place of business.[25] This left for trial only the question of whether Plaintiffs had the primary duty of making sales.

Defendants say they "presented evidence that showed Plaintiffs were engaged to make sales as defined by the statutes and regulations."[26] But there was still sufficient evidence for the jury to reach the opposite conclusion, even without the disputed instruction regarding the door-to-door workers' ability to enter into a binding contract with a customer. When considering whether Plaintiffs bore the "external indicia" of outside salespeople—a list of non-exhaustive factors that the jury could consider as part of the totality of the circumstances—the evidence could easily support the jury's verdict.[27]

Much of the evidence suggested that Plaintiffs were not actually outside salespeople. Plaintiffs were hired without regard to their prior sales experience.[28]

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[24] 29 C.F.R. § 541.501(b). The parties stipulated that the natural gas and electricity sold by Defendants are tangible property. *See* Doc. 818-1 at 14.

[25] Doc. 763 at 4.

[26] Doc. 810-1 at 2.

[27] *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172–73 (2012); *see also* Doc. 89 at 11–18 (evaluating these indicia in ruling on a motion for summary judgment).

[28] *E.g.*, Tr. 9/29/2014 at 113:1–113:4 ("Q. The company doesn't require that the plaintiffs have any previous sales experience before being hired into these positions, correct? A. That would be correct."); Tr. 10/1/2014 at 149:2–149:19 ("Q. Am I correct that these workers who go door-to-door are hired off the street and there's no requirement whatsoever of any prior skill [to] get this

Plaintiffs also presented evidence that Defendants closely controlled the work schedules and locations of the vast majority of their door-to-door workers.[29] Witnesses testified that workers would be driven to residential neighborhoods by supervisors,[30] told which blocks to canvas,[31] and told how many doors to knock

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job? A. Yes. . . . Q. They're not required to have ever worked doing any sales, correct? A. Correct."); *cf., e.g.*, *Christopher*, 132 S. Ct. at 2176 ("Petitioners were hired for their sales experience.").

[29] *See, e.g.*, *Nielsen v. DeVry, Inc.*, 302 F. Supp. 2d 747, 756 (W.D. Mich. 2003).

[30] *E.g.*, Tr. 9/30/2014 at 130:13–131:4 ("Q. So they would put you in a team, and then what happened? A. Then we got into the van. . . . Q. And did you go out to the neighborhoods at that point? A. Yes. Q. Who decided which neighborhoods you were going to go to? A. The crew leader."); *id.* at 203:12–204:10, 237:18–239:23 (descriptions from crew leaders regarding their responsibilities, including driving door-to-door workers to the field); *id.* at 243:9–243:13 ("Q. Were [sic] there anybody who drove themselves out to the field? A. I can only thin[k] of one person who had a second job, but no, everyone was required to go with the crew leader crew coordinator in the one car."); Tr. 10/1/2014 at 40:2–40:22 (crew coordinator stating that he would "drop [the door-to-door workers] off on their streets and basically pick them up at 9:00 when we were done . . . .").

[31] *E.g.*, Tr. 9/30/2014 at 67:5–67:17 ("Q. And explain what a street sheet is? A. A street sheet is just like a sheet that shows which doors you knocked on."); *id.* at 131:2–131:25 ("Q. Then once you got to the neighborhood did you get to choose which streets you worked on? A. No. . . . Q. Did they tell you what streets you were supposed to work on? A. Yes. Q. Did you ever work on a street that you were not supposed to? A. Yes. Q. And what happened? A. I got in trouble."); *id.* at 204:11–204:24 ("[i]t was the crew coordinator who generally picked the area."); Tr. 10/1/2014 at 40:2–40:22 (crew coordinator would assemble materials for workers, including "contracts, street sheets, maps, and assigned areas for all the people to position on their streets").

on per day.[32] Many workers did not control their own schedules—once a group of door-to-door workers was taken to the field by a supervisor, they were limited in when they could take breaks[33] and had to keep working until the supervisor collected them at the end of the day.[34] And while working in the field, Plaintiffs

[32] *E.g.*, Tr. 9/30/2014 at 66:23–67:4 ("Q. Once you got to the neighborhood where you be knocking on [doors], what were your instructions from the company? A. To [knock] on at least a hundred doors regardless if you got a deal or not . . . ."); *id.* at 132:1–132:9 ("Q. How many houses would you go to in a typical day? A. Anywhere between 150 and 200. Q. Did anybody at Just Energy tell you you had to go to a certain number of houses per day? A. Yes."); *id.* at 243:14–245:21("Q. Did you have a quota for the number of doors you had to knock on? A. Yes. . . . Q. You were supposed to knock on 50 doors an hour? A. Uh-huh. Yes."); Tr. 10/1/2014 at 15:7–16:3 (describing office manager calling door-to-door worker, saying "He wanted me to knock faster because I'm a slow walker and if I don't get deals he would assume I wasn't walking fast enough, and he wanted 200 doors a day"); *id.* at 44:16–44:18 ("Q. How many houses would you typically go to during a day? A. Basically we were told to do roughly between 100 to 200 doors every single day.").

[33] *E.g.*, Tr. 9/30/2014 at 67:22–68:9 ("Q. Could you leave on your own if you wanted to? A. No. Q. What about breaks? Could you take breaks? A. When they told us it was time to, yes."); Tr. 10/1/2014 at 14:12–15:3 ("Q. Was there a policy about breaks when you were out knocking door-to-door? A. .Yes, there was. Q. And what was that policy? A. Dennis said no breaks. He said, take a break when you get a deal at the—we were allowed to go in the customer['s] house, but he would say if the customer invites you in that's your chance to use their bathroom and ask for some water. So that was my break.").

[34] *E.g.*, Tr. 9/30/2014 at 67:18–67:23 ("Q. How long would you stay in the neighborhoods as a general proposition? A. From the time we get there, maybe 10:00, 11:00 from whenever the crew coordinator comes and picks us up. Q. Could you leave on your own if you wanted to? A. No."); *id.* at 132:24–133:3 ("Q. Did you

were required to wear clothing or a pin bearing Defendants' brand name.[35]

Some of the external indicia pointed the other way as well. Notably, Plaintiffs acknowledge that they

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get to decide when you were done knocking on doors for the day? A. No. Q. Who decided that? The team leader . . . ."); *id.* at 203:12–204:24 (crew coordinator describing setting daily schedules); *id.* at 237:18–239:23 (crew coordinator would pick up his workers at 8:00 or 9:00 each evening); Tr. 10/1/2014 at 12:25–13:3 ("Q. What happened after you were done knocking around 9:00? A. I would wait for the van leader to figure out where I was and come pick me up.").

[35] *E.g.*, Tr. 9/29/2014 at 164:14–165:4 (reading clothing regulations from orientation manual (Joint Exhibit 9B)); Tr. 9/30/2014 at 79:5–79:25 ("Q. Were you required to wear any particular type of clothing? A. Yes. Q. What were you required to wear? . . . . A. I was required to wear the polo shirt with the Just Energy logo on it, jackets if needed—well, if it was cold outside you couldn't wear your own coat, you had to wear this, something with the Just Energy logo on it. Hats, badge. That was all part of the uniform."); *id.* at 117:8–117:16 ("Q. Did you have a Just Energy uniform? A. Yes. I had the polo shirt. . . . Q. Did you have any other Just Energy clothing or attire? A. No, just my ID and a pin. That's about it."); *id.* at 140:7–141:1 ("Q. Did Just Energy require you to wear certain clothing when you were out in the field? A. Yes. Q. And what kind of clothing was that? A. A shirt. I had a very heavy jacket, it was November."); *id.* at 184:4–185:23 ("Q. What did you wear in the field? A. I had to wear [all their] clothing, khaki pants, nice shoes, and there was always the . . . button up shirt. The baseball hat. I also had a knitted hay. There was a wind breaker coat and a lanyard with your ID on it, as well."); Tr. 10/1/2014 at 16:9–16:24 ("Q. Did you have to wear certain clothing to go out and go door-to-door? A. Yes. Q. And what was that? A. I had to wear a Just Energy hat, my Just Energy badge, my Just Energy shirt, dark pants or khakis, [cargo] shorts maybe, and some decent shoes, comfortable to walk in, but professional, and when it got cold I had to purchase a Just Energy skully and a Just Energy fleece.").

were paid on a commission basis, a factor that supports Defendant's argument that Plaintiffs were outside salespeople.[36]

In the end, though, most indicia could have supported a verdict for either party. Plaintiffs were given detailed scripts to follow when making a pitch to a potential customer, and practiced those scripts at length.[37] While the jury could also have counted this

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[36] *See, e.g.*, *Christopher*, 132 S. Ct. at 2173 (discussing "incentive compensation"); Doc. 818-1 at 5 (parties stipulated that "Plaintiffs are compensated on a commission basis and [Defendants] do not pay overtime for hours worked over 40 hours per week and do not pay minimum wage in situations where the commission earned during a particular workweek are insufficient to ensure that salespersons' wage rates meet or exceed the minimum wage.").

[37] *E.g.*, Tr. 9/29/2014 at 169:22–170:2 ("Q. There's actually scripts that the company puts together for the plaintiffs on—to walk through all of this stuff with the homeowner, correct? A. Yeah, to provide—it's a guideline, script, but the key points that the salesperson must touch upon when transacting in that sale."); 177:18–188:10 (reading the script regarding "objection handling" (Joint Exhibit 11)); Tr. 9/30/2014 at 11:3–12:12 ("Q. Can you walk us through the steps you would follow on a typical homeowner interaction? A. We would knock on the door. As soon as someone came to the door we would look at our scripts, see what it was we needed to do and say, when we needed to make eye contact, when we had to break eye contact, the way we need to stand, things of that sort. Q. Okay. And again, were those things that you practiced in the morning meetings, as well? A. Yes. Those are the things we practiced daily. Q. And who would have given you instruction that you had to follow the scripts? A. Whoever was in charge of the office, a regional manager, store manager, or crew coordinator."); *id.* at 62:5–62:9 ("Q. And what were you told about those sale scripts? A. That it was verbatim that we follow the script."); *id.* at 68:19–69:23 (describing interactions with homeowners as dictated by the script); *id.* at 93:21–94:6

in Defendants' favor as "specialized sales training" that would support application of the outside sales exemption,[38] this evidence somewhat points both ways, as it also indicates their task was not truly independent selling. Similarly, Plaintiffs were, by the very nature of their jobs, required to solicit new customers, which suggests they could have been outside salespeople.[39] But on the other hand, Plaintiffs did not independently generate their own leads or

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(describing being reprimanded for "not saying the script verbatim"); *id.* at 109:13–109:23 ("Q. Describe what those role playing exercises were like. A. We would read from the script. They wanted you to do everything on the scripte, and you had to read it precise."); *id.* at 134:7–134:21 (describing interactions with homeowners as dictated by the script); *id.* at 147:5–147:24 (recounting that some employees would go off-script when dealing with reluctant customers); *id.* at 170:1–172:4 (identifying that part of the reason for the scripts was to comply with regulations); Tr. 10/1/2014 at 16:25–17:21 (describing interactions with homeowners as dictated by the script); *id.* at 156:2–156:7 ("Q. How did you know what to say at the door? A. They gave us a script to say that we were supposed to follow."); *id.* at 166:7–166:13 (describing orientation process that included group practice "going over the script"); *id.* at 201:16–202:11 ("Q. Do you expect them to follow sales scripts when they make presentations to customers? A. Yeah. We—part of the training process is they do have a presentation script that has been approved that they usually should follow in the very begin[ning] stages just to give them a [guideline] of the order of what to say."); Tr. 10/2/2014 at 11:11–12:6 (office manager expected salespeople to use the script "as a guideline" and eventually commit it to memory); *id.* at 79:4–79:5 ("Q. You follow the sales script verbatim, correct? A. Yes, sir.").

[38] *See, e.g.*, *Nielsen*, 302 F. Supp. 2d at 757.

[39] *See Nielsen*, 302 F. Supp. 2d at 758.

follow up on their sales, which suggests the opposite.[40] Instead, they would knock on the doors of the houses they were assigned to, and were prohibited from returning once the initial and introductory interaction with the customer was complete.[41]

Beyond evaluating these indicia, evidence that Plaintiffs obtained only non-binding applications from customers also supports the jury's decision.[42] Defendants assert that "it is not disputed in the evidentiary record that binding agreements were signed by customers."[43] In fact, this point was very much disputed at trial. Evidence showed that Defendants retained "sole discretion" to accept or

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[40] *See id.*

[41] *E.g.*, Tr. 9/29/2014 at 194:2–194:17 ("Q. And in fact the plaintiffs don't return they're not allwoed to return to the home after they've handed off that phone. A. If—absolutely that's correct. Q. They're done dealing with the homeowner at that point. A. Absolutely. Yes."); Tr. 9/30/2014 at 14:2–14:7 ("Q. Once you left the home at that point did you have any further interaction with the customer? A. None whatsoever. Q. Okay. Did you ever personally follow up with a phone call or make another return visit, or anything of that sort? A. No."); *id.* at 72:8–72:15 ("Q. Once you leave once the phone is passed to the customer, do you ever return to the home? A. No. Q. Do you ever make any personal follow up with that customer? A. No. Q. For any purpose? A. No, not at all."); *id.* at 74:5–74:7 ("Q. While an application was pending were you permitted to return and speak to the homeowner for any reason? A. No, not at all.").

[42] Defendants object that this is an improper factor for the jury to have considered. The Court addresses that objection below in Section III.B.1.

[43] Doc. 810-1 at 3.

reject a customer's application.[44] The applications obtained by Plaintiffs were merely proposals until Defendants accepted them. This factor suggests that Plaintiffs were not actually making sales.[45]

Further, this situation is unlike the hypothetical the Supreme Court offered in *Christopher* of "a manufacturer's representative who takes an order from a retailer but then transfers the order to a jobber's employee to be filled."[46] The Supreme Court said that, in such a situation, it would be the manufacturer's representative, not the jobber, who had made the sale.[47] Here, by contrast, Defendants were not just filling orders obtained by Plaintiffs. Rather, after receiving a completed application, Defendants still had to determine whether or not to accept it. This is far more of an active role in completing the sale than the straightforward task of fulfilling an otherwise finalized order.

In short, there was sufficient evidence for the jury to have found either way on the outside sales

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[44] Tr. 9/29/2014 at 187:11–190:5 (reviewing terms and conditions of contract signed by customers (Joint Exhibit 24)); Tr. 9/30/2014 at 42:1–43:6 (same); Tr. 10/1/2014 at 74:11–75:24 (reviewing terms of Plaintiffs' commission-based compensation agreements, which acknowledge Defendants' "unfettered discretion to reject any energy contract submitted" (Plaintiffs Exhibit 6)); *id.* at 128:14–129:22 (reviewing terms of agreement with customer, which "is conditional upon acceptance by [Defendants]." (Joint Exhibit 15)); *see also* Doc. 89 at 10–11.

[45] *See infra* Section III.B.1.

[46] *Christopher*, 132 S. Ct. at 2173–74.

[47] *Id.*

exemption. Thus, Defendants' motion for judgment as a matter of law on this issue loses.

2. BNU Claims

Defendants' second ground in moving for judgment as a matter of law pertains to one particular group: BNUs (i.e., those employees who attended at least one day of training, but never received a completed application from a customer) who have claims for overtime wages as part of the Rule 23 class.[48] Defendants argue that there is no evidence that anyone from this group worked more than 40 hours in a week, and thus that Plaintiffs failed to prove their case that the BNUs are entitled to overtime wages under Ohio law.[49]

Defendants made this motion at trial, and the Court denied it.[50] Then, as now, there was some evidence from which the jury could infer that some members of this group worked enough days to have racked up 40 hours or more in a week.[51] There was certainly evidence from which the jury could have

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[48] Doc. 810-1 at 4–5.

[49] *Id.*. Similar to the FLSA, Ohio law requires employers to pay employees time-and-a-half pay for all hours worked in excess of forty per week. *See* Ohio Rev. Code § 4111.03.

[50] Tr. 10/1/2014 at 183:24–186:2.

[51] *See* Tr. 9/29/2014 at 119:19–121:16 ("Q. Are you aware that there are individuals who worked weeks without earning any commissions? . . . A. There might be a few."); Tr. 10/1/2014 at 127:24–128:12 ("Q. How long would [BNUs] typically work? A. Well, they tried to make it through that first wave, right, so anywhere from one to three weeks.").

reached the opposite conclusion as well.[52] But either conclusion was reasonable.

Furthermore, the Court has not certified a sub-class of BNUs. Plaintiffs presented sufficient evidence to prove liability on a classwide basis—namely, that Defendants did not pay their door-to-door workers minimum wage or overtime and that Plaintiffs were not exempt outside salespeople. From the time the class was certified, the Court has recognized that while liability can be determined on a classwide basis in this case, damages will more likely need to be done on an individualized basis.[53] Some members of the liability class will likely be unable to establish that they worked enough hours to qualify for overtime. Defendants will have ample opportunities to challenge the individual damages claims of BNUs during the damages phase.

Defendants recognize as much, but argue that because the parties' damages experts considered the BNUs to be a distinct group separate from the rest of the class, the Court should treat them separately and order judgment against them.[54] Defendants' reliance on the damages experts' opinions, however, only supports Plaintiffs' position that sub-class

[52] *See* Tr. 10/2/2014 at 111:23–112:6 (Q. So have you ever observed people come in for a day of orientation and never come back? A. Yes. A lot. . . . Q. And have you ever seen people go out to the field for just a day and never come back? A. Oh, yeah, all the time.").

[53] *See* Doc. 88; Doc. 719 at 7.

[54] Doc. 818 at 9.

certification is an issue for the damages phase of this case, not the liability phase.

3. Prejudice

Defendants also request judgment as a matter of law because the Court instructed the jury that employees cannot waive their rights under the FLSA.[55] The merits of this argument are discussed below as they relate to Defendants' motion for a new trial. For the purposes of Defendants' motion for judgment as a matter of law, it is sufficient to note that Defendants never based their Rule 50(a) motions at trial on this ground.[56] A Rule 50(b) motion for judgment as a matter of law merely renews a prior motion, and thus "can be granted only on grounds advanced in the preverdict [Rule 50(a)] motion."[57] To the extent this argument is even cognizable as part of a Rule 50 motion—which is doubtful, as it does not involve any questions that the jury could have resolved—Defendants have forfeited it.

III. New Trial

In the alternative to judgment as a matter of law, Defendants move for a new trial on two grounds. First, that the jury instructions erred by including language about the authority of a salesperson to create a binding contract. And second, that the Court erred by instructing the jury that the minimum wage and

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[55] Doc. 810-1 at 5–6.

[56] See Tr. 10/1/2014 at 183:20–186:20 and Tr. 10/6/2014 at 19:18–22:5 for Defendants' other grounds in moving for judgment as a matter of law.

[57] Fed. R. Civ. P. 50(b) Advisory Committee Note to 2006 Amendment.

overtime requirements of the FLSA cannot be waived. Both arguments lose.

A. Legal Standard

Under Federal Rule of Civil Procedure 59(a), "[a] new trial may be granted . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."

> Generally courts have interpreted this language to mean that a new trial is warranted when a jury has reached a 'seriously erroneous result' as evidenced by: (1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, i.e., the proceedings being influenced by prejudice or bias.[58]

B. Analysis

1. Binding Sales and State Regulations

Defendants' primary objection in this motion is that the jury instructions regarding what constitutes a "sale" for purposes of the FLSA were incorrect.[59] Jury instructions must "adequately inform the jury of relevant considerations and provide a basis in law for aiding the jury to reach its decision."[60] Jury

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[58] *Holmes v. City of Massillon*, 78 F. 3d 1041, 1045–46 (6th Cir. 1996).

[59] *See* Doc. 818-1 at 14–15.

[60] *King v. Ford Motor Co.*, 209 F.3d 886, 897 (6th Cir. 2000) (quoting *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 166 (6th Cir. 1993)) (internal quotation marks omitted).

instructions that, when "viewed as a whole, were confusing, misleading, or prejudicial" require a new trial.[61] But mere error in the jury instructions does not itself require a new trial if the error is harmless.[62]

At the close of the trial, the Court instructed the jury that Plaintiffs would be exempt outside salespeople if they had a primary duty of making sales. The Court explained:

> Within the meaning of the Fair Labor Standards Act, "sale" or "sell" includes an "sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition," as well as "the transfer of title to tangible property." In this case, both parties agree that natural gas and electricity are tangible property. Your decision should be a functional, rather than formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works.
>
> In determining whether a particular transaction qualifies as a sale for purposes of the Fair Labor Standards Act, you are required to consider the extent to which the employee has the authority to bind the company to the transaction at issue. However, when governmental regulatory

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[61] *See Benaugh v. Ohio Civil Rights Comm'n*, 278 F. App'x 501, 513–14 (6th Cir. 2008).

[62] *Troyer v. T.John.E. Prods., Inc.*, 526 F. App'x 522, 525 (6th Cir. 2013) (citing *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 822 (6th Cir. 2000)).

requirements limit an employee's ability to bind his employer, compliance with those governmental regulatory requirements do not disqualify the transaction from constituting a sale for purposes of the outside salesperson exemption.

The various laws of the states where Plaintiffs worked, among other things, require retail electric and gas services establish reasonable and non-discriminatory creditworthiness standards and allows retail electric and gas services to require a deposit or other reasonable demonstration of creditworthiness from a customer as a condition of providing service. However, none of the laws of any of these states require retail electric and/or gas services to conduct a credit check.

On the other hand, if the employer retains and/or exercises discretion to accept and/or reject any transaction for reasons that are unrelated to regulatory requirements applicable to the industry, the transaction should not be considered a sale for purposes of the Fair Labor Standards Act.

You may, but are not required to, also consider certain factors or indicia that tend to suggest that Plaintiffs were primarily engaged in making sales. The touchstone for making a sale is obtaining and giving a commitment to provide the gas or electricity. No single one of these factors is dispositive, nor is this an exhaustive list of factors you

may consider. You should look at these, or other, factors together and ask whether, under the totality of the circumstances, they suggest Plaintiffs were actually engaged in making sales.

Factors you may consider include:

(1) The extent to which the job was advertised as a sales position and the employee was recruited based on sales experience and abilities.

(2) The extent to which the employee received specialized sales training.

(3) The extent to which the employee is compensated based wholly or in significant part on commissions.

(4) The extent to which the employee has the responsibility of independently soliciting new business.

(5) The extent to which the employee is directly supervised in carrying our his or her job duties.

(6) Other factors that have been discussed in this case as circumstantial evidence that the employees were or were not engaged in making sales.[63]

Specifically, Defendants say the Court erred in telling the jury that, when deciding whether Plaintiffs were making "sales," the jury should consider the extent of the employee's ability to bind the company to the transaction and whether any government

[63] Doc. 818-1 at 14–16.

regulations prohibited the employee from making a final sale.[64] Defendants also say the Court's summary of Ohio law was incorrect, because they view the regulations as requiring credit checks of potential customers before finalizing contracts.[65]

In its summary judgment opinion, the Court explained in detail that the non-binding nature of the applications Plaintiffs obtained from customers is relevant to whether Plaintiffs were making sales within the meaning of the FLSA.[66] The Court also explained at trial its conclusion that Ohio law does not require Defendants to do credit checks that would have prevented Plaintiffs from obtaining binding contracts.[67]

In *Christopher v. SmithKline Beecham Corp.*, the Supreme Court found that pharmaceutical representatives were exempt outside salespeople even though they did not actually accomplish "sales" of drugs to patients.[68] Because Congress meant to define sales broadly to "accommodate industry-by-industry variations in methods of selling commodities,"[69] the

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[64] *See* Doc. 810-1 at 2–4.

[65] Doc. 810-1 at 3; Doc. 818 at 8–9. Defendants have not raised any objection to the Court's instructions with respect to the laws of other states at issue, and in their briefing at trial only directly addressed Ohio's regulations. *See* Doc. 795. Because Defendants have not objected to the Court's instructions on the basis of any other state's laws, the Court will consider only the Ohio regulations in this opinion.

[66] *See* Doc. 89 at 8–11.

[67] Tr. 10/2/2014 at 32:9–44:3.

[68] *Christopher*, 132 S. Ct. at 2159.

[69] *Id.* at 2171.

Supreme Court said that courts should consider the impact of regulatory requirements as to whether certain transactions "are tantamount, in a particular industry, to a paradigmatic sale of a commodity."[70] Thus, because federal regulations prevented the pharmaceutical representatives from engaging in the actual sale of drugs to the patient, the Supreme Court found it was enough that the representatives "promoted" sales to doctors who in turn made "nonbinding commitments" to prescribe the drugs to their patients.[71]

Other courts that have considered situations where employees obtained only non-binding commitments have concluded that the employees were not necessarily making sales. In *Clements v. Serco*, the Tenth Circuit held that Army recruiters were not exempt outside salespeople in part because they lacked the authority to enlist a recruit; instead, they were merely "cultivat[ing] a list of persons who seemed receptive to the idea of joining the Army," and the Army retained discretion as to whether or not to actually accept the applicant.[72] Similarly, in *Wirtz v. Keystone Readers*, the Fifth Circuit held that "student salesmen" who "obtain[ed] orders" for magazine subscriptions by door-to-door solicitation were not making sales because, once again, they effectively only gathered lists of interested customers, and no contract became final until the employer verified the order and

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[70] *Id.* at 2171-72.

[71] *Id.* at 2172.

[72] *Clements v. Serco, Inc.*, 530 F.3d 1224, 1225–28 (10th Cir. 2008) (internal quotation marks and citation omitted).

the customer's qualifications.[73] In *Burling v. Real Stone Source, LLC*, the District of Idaho concluded that even an employee who negotiated and drafted sales proposals with customers, as well as conducting other promotional activities designed to facilitate sales, was not making sales because the employer retained the final discretion to approve or reject any given proposal.[74] And unlike the situation in *Nielsen v. Devry, Inc.*, where the Western District of Michigan found that "field representatives" who guided applicants through the process of being admitted and matriculating to DeVry University were engaged in sales, the interactions between Plaintiffs and potential customers in this case ended before the transaction was "consummated," and Plaintiffs were prohibited from following up with customers to ensure the sales were completed.[75]

The distinguishing characteristic in *Christopher* was that the pharmaceutical representatives were legally prohibited from actually selling drugs to patients. Because of the regulatory scheme, the best the pharmaceutical representatives could do was to promote drugs to doctors, who would in turn prescribe them to patients. Thus, while making a sale for the purposes of the FLSA does not necessarily require a transfer of title, the alleged selling activity must be viewed in the context of the particular industry at issue—including whether the industry is subject to a

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[73] *Wirtz v. Keystone Readers Serv., Inc.*, 418 F.2d 249, 259–61 (5th Cir. 1969).

[74] *Burling v. Real Stone Source, LLC*, No. CV-08-43-E-EJL, 2009 WL 1812785, at *3–7 (D. Idaho June 24, 2009).

[75] *See Neilsen*, 302 F. Supp. 2d at 754–60.

"unique regulatory environment"—and the jury must determine whether within that particular industry, the employee has the job of making "arrangements that are tantamount . . . to a paradigmatic sale of a commodity."[76] Indeed, the Sixth Circuit has recently distinguished *Christopher* on just this issue, finding that *Christopher* is not necessarily controlling outside of a situation where obtaining only a "nonbinding commitment" is the result of a "unique regulatory environment."[77]

Unlike the pharmaceutical representatives in *Christopher*, the Plaintiffs in this case were not prohibited from completing a contract by state or federal regulations. Ohio law did not require Defendants to retain unlimited rejection authority. Ohio regulations also do not *require* an energy supplier to conduct a credit check, only for it to "establish reasonable and nondiscriminatory creditworthiness standards."[78] By contrast, the energy supplier only "*may* require a deposit or other reasonable demonstration of creditworthiness from a customer as a condition of providing service."[79] The

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[76] *Christopher*, 132 S. Ct. at 2171–72; *see also id.* at 2172 n.23 ("[W]hen an entire industry is constrained by law or regulation from selling its products in the ordinary manner, an employee who functions in all relevant respects as an outside salesman should not be excluded from that category based on technicalities.").

[77] *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 583–84 (6th Cir. 2014).

[78] Ohio Admin. Code 4901:1-21-07; Ohio Admin. Code 4901:1-29-07.

[79] Ohio Admin. Code 4901:1-21-07; Ohio Admin. Code 4901:1-29-07 (emphasis added).

regulations contemplate that an energy supplier *could* require a satisfactory credit check before initiating service, but is not *required* to do so. It could use some other method, such as accepting a deposit.

The jury instructions on this point say nothing different. The Court explained to the jury that state laws required Defendants to establish reasonable and non-discriminatory creditworthiness standards, but that they did not require Defendants to conduct a credit check.[80] This instruction is entirely consistent with the statutory language. It was then up to the jury to decide, based on the evidence presented, how this regulatory environment impacted whether Plaintiffs were "making sales."

The instructions did not require the jury to find for either side. The instructions merely listed numerous factors that the jury could consider to decide whether Plaintiffs had the primary duty of making sales, and among those factors were whether Plaintiffs obtained binding contracts and whether any regulatory environment prevented them from doing so. The instructions also specified other factors that the jury could consider in order to reach a conclusion based on the totality of the circumstances.[81] Given the relevant statutes, regulations, and case law, the jury instructions on these issues "adequately inform[ed] the jury of relevant considerations and provide[d] a basis in law for aiding the jury to reach its decision."[82]

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[80] Doc. 818-1 at 15.

[81] *Id.* at 15–16.

[82] *King*, 209 F.3d at 897 (internal quotation marks omitted).

2. Waiver of FLSA Rights

Defendants also request a new trial because the Court instructed the jury that employees cannot waive their rights under the FLSA.[83] "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. . . ."[84] When counsel for either party makes an argument that is improper, the trial judge may step in to ensure the integrity of the proceedings.[85] However, conduct by a judge that shows "outright bias or belittling of counsel," or a trial that is "infected with the appearance of partiality" can require a new trial.[86]

The jury in this case was instructed at the close of trial:

> The right to receive minimum wage and overtime compensation under the [FLSA] cannot be waived. In other words, any agreement between a worker and his employer that the worker shall not be paid minimum wage or overtime is not enforceable if the worker is otherwise entitled to minimum wage or overtime under the law.

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[83] Doc. 818 at 10.

[84] *Quercia v. United States*, 289 U.S. 466, 469 (1933).

[85] *Cf., e.g.*, *United States v. Young*, 470 U.S. 1, 7–10 (1985) (concluding that a trial judge has the responsibility to "maintain decorum" in a proceeding by "deal[ing] promptly" with counsel who make disparaging comments directed at opposing counsel).

[86] *See Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 808 (6th Cir. 1999), *overruled on other grounds*, *Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009) (en banc).

> However, if a worker is an exempt outside salesperson, that worker is not entitled to minimum wage and is not entitled to overtime compensation for hours worked in excess of forty hours.[87]

Defendants admit that this is a correct statement of law.[88] They argue, however, that the Court prejudiced their case by giving the jury this instruction twice during trial as well as at the close.

The two times the Court had to instruct the jury on this issue were prompted by statements by defense counsel. The first time was during Defendants' opening statement. Defense counsel referred to advertisements for Plaintiffs' positions that "fully disclosed and described . . . exactly how [the salespeople] were going to get paid," emphasizing the commission system and that Plaintiffs had entered into contracts agreeing to this method of payment.[89] At side-bar, the Court noted its concern with Defendants' implication that Plaintiffs' knowledge of the commission structure could have some bearing on whether there was an FLSA violation.[90] Finding that Defendants' argument was irrelevant and potentially confusing, at the request of Plaintiffs, the Court

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[87] Doc. 818-1 at 13 (citing *Beck v. City of Cleveland*, 390 F.3d 912, 923 (6th Cir. 2004)).

[88] Doc. 810-1 at 5; Doc. 818 at 10; *see also* Tr. 10/2/2014 at 159:12–160:14.

[89] Tr. 9/29/2014 at 90:4–91:8.

[90] *Id.* at 91:12–92:5.

advised the jury that "an employee cannot waive the rights to FLSA overtime or minimum wage."[91]

Later on the first day of trial, in response to defense counsel's questioning a witness about the terms of the Plaintiffs' employment contracts, the Court once again warned Defendants at a sidebar to avoid implying that Plaintiffs had somehow waived their FLSA rights simply because they had agreed to a commission-based compensation structure.[92] The Court expressed continuing concern that Defendants were introducing irrelevant evidence for this purpose.[93]

The second time the Court instructed the jury on the non-waivability of the FLSA came during the playback of a video deposition. During this playback, the witness—Peter Potje, a door-to-door salesman—testified in response to a question from defense counsel that he understood the lawsuit to be about "whether someone who has [signed independent contractor agreements] might still get paid minimum wage for time spent."[94] Plaintiffs objected to this testimony.[95] Finding Potje's statements to be not only improper testimony on a matter of law, but also an incorrect statement of the law, the Court made a corrective instruction that an employee cannot agree

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[91] *Id.* at 92:6–92:23.

[92] *Id.* at 232:12–234:15.

[93] *Id.*

[94] Tr. 10/1/2014 at 233:18–233:25.

[95] *Id.* at 234:2–235:13.

to waive his rights under the FLSA to minimum wage and overtime pay.[96]

Cases where a trial judge has been found to have engaged in conduct that requires a new trial have typically involved a great number of comments that amount to berating of one party or its counsel.[97] Here, there is no allegation by Defendants that the Court's tone or demeanor expressed bias against Defendants' position. The allegation is that the Court gave correct instructions of law. It did so in order to cure improper or incorrect statements, one made by defense counsel and one made by a witness.[98] The Court finds no support for Defendants' argument that a correct statement of the law can prejudice a party's case. Instead, the cases support the position that the Court may comment to "ensure that the issues [are] not obscured, to ensure that testimony [is] not misunderstood, and to move the case along."[99] In this case, the Court's brief instructions were well within its

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[96] *Id.* at 234:19–235:12, 236:9–236:23.

[97] *E.g.*, *United States v. Hickman*, 592 F.2d 931, 934–36 (6th Cir. 1979) (When the district judge interjected over 250 times during the trial using an anti-defendant tone, and then limited defense cross-examination before taking over cross-examination himself, "the only impression which could have been left in the mind of the jury was that the trial judge was a surrogate prosecutor.").

[98] *See, e.g.*, *United States v. Houston*, 110 F. App'x 536, 542 (6th Cir. 2004) (finding no error when the district judge made statements to the jury to following counsels' statements regarding irrelevant legal issues).

[99] *Johnson v. Philip Morris, Inc.*, 70 F.3d 1272, 1995 WL 704264, at *4–5 (6th Cir. Nov. 29, 1995) (unpublished table opinion).

discretion to determine a question of law, ensure the integrity of the proceedings, avoid confusion of the issues, and keep the trial moving at a reasonable pace.

Defendants also assert that the Court made statements to the jury about the lack of a fraud claim by the Plaintiffs, thereby implanting the term "fraud" in their heads and biasing the jury against Defendants.[100] A review of the record, however, shows that the Court only twice referred to fraud. The first time the Court mentioned fraud was during a side-bar,[101] which could not possibly have caused any prejudice to Defendants as it was done outside the presence of the jury.[102] The second time was in response to Defendants' repeated questioning of door-to-door workers about their knowledge of the commission-based compensation agreements, which the Court had ruled irrelevant and instructed Defendants to stay away from. At this time, the Court instructed the jury that Plaintiffs "[did] not make a claim that the Defendant[s] defrauded the Plaintiffs."[103] The Court's comment was thus in effect invited by Defendant by continuing to delve into matters the Court had ruled irrelevant and possibly confusing to the jury. Further, if anything, this brief curative instruction would have *helped* Defendants, as

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[100] *See* Doc. 810-1 at 5–6; Doc. 818 at 10.

[101] *See* Tr. 9/29/2014 at 234:8–234:15 ("THE COURT: I'm not sure—what do you say I don't understand? They haven't brought a fraud claim and I wouldn't instruct them, I wouldn't instruct on a fraud claim and they haven't brought a fraud claim.").

[102] *See United States v. Middleton*, 246 F.3d 825, 849 (6th Cir. 2001); *United States v. Morrow*, 977 F.2d 222, 225 (6th Cir. 1992).

[103] *See* Tr. 9/30/2014 at 24:17–25:1.

it instructed the jury *not* to believe that Defendants had engaged in fraud. As such, the Court fails to see how this comment could have prejudiced Defendants' case.

IV. Interlocutory Appeal

In the alternative, Defendants seek the Court's leave to take an interlocutory appeal pursuant to 29 U.S.C. § 1292(b) in order to challenge the correctness of the jury instructions regarding the outside sales exemption.[104]

A. Legal Standard

Litigants are generally not entitled to appellate review of court orders prior to a final judgment on the merits.[105] In "exceptional cases," however, district courts may grant parties leave to take interlocutory appeals.[106] To appeal under § 1292(b), a party must show: (1) the issue concerns a controlling question of law; (2) substantial ground for difference of opinion on that issue exist; and (3) immediate appeal would materially advance the ultimate termination of the litigation.[107] "The burden of showing exceptional

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[104] Doc. 810-1 at 7.

[105] *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902–03 (2015); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474–75 (1978).

[106] *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002) (citations omitted); *see also* 28 U.S.C. § 1292(b).

[107] *Negron v. United States*, 553 F.3d 1013, 1015 (6th Cir. 2009); *In re City of Memphis*, 293 F.3d at 350.

circumstances justifying an interlocutory appeal rests with the party seeking review."[108]

B. Analysis

1. Controlling Legal Issue

"A legal issue is controlling if it could materially affect the outcome of the case,"[109] "such as when 'reversal of the District Court's Order would terminate the action.'"[110] Here, Defendants say that the application of *Christopher* to the FLSA's outside salesperson exemption presents a controlling issue of law in this case.[111]

A resolution of an interlocutory appeal in Defendants' favor, however, would not resolve this case. The question of the outside salesperson exemption's applicability is not purely legal and requires factual findings. Further, with this motion Defendants challenge only one of the numerous non-dispositive factors that the jury was able to consider when determining whether the exemption applies. Even if Defendants' appeal were successful, the remedy would likely be a retrial. Thus, this factor weighs against granting the interlocutory appeal.

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[108] *Trimble v. Bobby*, No. 5:10-cv-00149, 2011 WL 1982919, at *1 (N.D. Ohio May 20, 2011) (citing *In re City of Memphis*, 293 F.3d at 350).

[109] *In re City of Memphis*, 293 F.3d at 351.

[110] *United States S.E.C. v. Geswein*, 2 F. Supp.3d 1074, 1086 (N.D. Ohio. 2014) (quoting *Howe v. City of Akron*, 789 F. Supp. 2d 786, 810 (N.D. Ohio 2010)).

[111] Doc. 810-1 at 9–10.

2. Substantial Grounds for Different Opinion

The second factor requires that the Court determine whether substantial grounds exist for different opinion on the issue. Substantial grounds for a difference of opinion exist when "(1) the question is difficult, novel and either a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions; (2) the question is difficult and of first impression; (3) a difference of opinion exists within the controlling circuit; or (4) the circuits are split on the question."[112]

Here, Defendants seek to appeal whether the jury instructions correctly related what factors the jury could consider in determining whether the outside sales exemption applies. The Court recognizes that *Christopher* is a relatively recent decision that has caused some uncertainty in FLSA litigation. Nevertheless, the jury instructions were not written on a blank slate. As already discussed, the Court's instructions were based on and consistent with numerous other cases. And the Sixth Circuit itself has recently distinguished *Christopher* based on its unique facts and circumstances, and determined that it should not necessarily control other FLSA cases.[113]

The legal issues here are not particularly difficult, nor is there a clear split of authority. Some disagreement will almost always exist on any given legal issue, but in this case, the disagreement is not so

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[112] *In re Miedzianowski*, 735 F.3d 383, 384 (6th Cir. 2013) (citing *City of Dearborn v. Comcast of Mich. III, Inc.,* No. 08–10156, 2008 WL 5084203, at *3 (E.D. Mich. Nov. 24, 2008)).

[113] *See Killion*, 761 F.3d 5at 583–84.

substantial as to require an immediate decision from the Sixth Circuit to resolve it. Thus, this factor weighs against granting the interlocutory appeal.

3. Material Advancement of Ultimate Termination of the Litigation

Finally, the Court must consider whether an immediate appeal would materially advance the ultimate termination of the litigation. Such circumstances exist where appellate review could "appreciably shorten the time, effort, and expense exhausted between the filing of a lawsuit and its termination."[114]

The highly fact-intensive nature of the inquiry required to apply the outside salesperson exemption almost guarantees that a ruling from the Sixth Circuit in Defendants' favor would not terminate this case; at most, a new trial on liability would have to be held. The risk that the Court will be reversed at a later date, rather than immediately, is not unique to this case. Nor is it unique to this case that Defendants could possibly win on retrial, thereby making further proceedings in the district court unnecessary.

This factor works somewhat in Defendants' favor, however, since the upcoming damages phase will require some form of individualized proof of the number of under-compensated hours worked by each class member. The Court would not stay the proceedings during the pendency of the appeal. Thus, if the Court were to allow the interlocutory appeal as to the liability phase issues while the damages phase

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[114] *Berry v. Sch. Dist. of City of Benton Harbor*, 467 F. Supp. 721, 727 (W.D. Mich. 1978).

is ongoing, it could somewhat shorten this litigation overall.

Nevertheless, the resolution of the jury instruction issues on appeal would not "substantially alter the course of the district court proceedings."[115] Even if the appeal were granted, the damages phase would continue unabated. The only change to come from an interlocutory appeal would be to require any retrial on liability to be held sooner rather than later. The Court therefore finds that this factor also weighs against granting the interlocutory appeal.

V. Conclusion

For the foregoing reasons, the Court **DENIES** Defendants' motion for judgment as a matter of law, **DENIES** Defendants' motion for a new trial, and **DENIES** Defendant's motion to certify an interlocutory appeal.

IT IS SO ORDERED

Dated: March 10, 2015

s/ *James S. Gwin*
JAMES S. GWIN
UNITED STATES
DISTRICT JUDGE

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[115] *W. Tenn. Chapter of Assoc. Builders & Contractors, Inc. v. City of Memphis*, 138 F. Supp. 2d 1015, 1026 (W.D. Tenn. 2000); *cf. White v. Nix*, 43 F.3d 374, 378–79 (8th Cir. 1994) ("When litigation will be conducted in substantially the same manner regardless of [the court of appeals'] decision, the appeal cannot be said to materially advance the ultimate termination of the litigation.").

Appendix D

RELEVANT STATUTORY PROVISIONS AND REGULATIONS

29 U.S.C. § 203(k)

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 U.S.C. § 213(a)

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to--

> (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub.L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 ⅓ per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub.L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going

to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub.L. 93-259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub.L. 93-259, § 10(a), Apr. 8, 1974, 88 Stat. 63

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub.L. 93-259, §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of Title 5;

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is--

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour; or

(18) any employee who is a border patrol agent, as defined in section 5550(a) of Title 5; or

(19) any employee employed to play baseball who is compensated pursuant to a contract that provides for a weekly salary for services performed during the league's championship season (but not spring training or the off season)

at a rate that is not less than a weekly salary equal to the minimum wage under section 206(a) of this title for a workweek of 40 hours, irrespective of the number of hours the employee devotes to baseball related activities.

29 U.S.C. § 216

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the

employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees

under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the

purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action. The authority and requirements described in this subsection shall apply with respect to a violation of section 203(m)(2)(B) of this title, as appropriate, and the employer shall be liable for the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and an additional equal amount as liquidated damages.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Civil penalties for child labor violations

(1)(A) Any person who violates the provisions of sections1 212 or 213(c) of this title, relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed--

(i) $11,000 for each employee who was the subject of such a violation; or

(ii) $50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term "serious injury" means--

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 206 or 207 of this title, relating to wages, shall be subject to a civil penalty not to exceed $1,100 for each such violation. Any person who violates section 203(m)(2)(B) of this title shall

be subject to a civil penalty not to exceed $1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages, as described in subsection (b).

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be--

(A) deducted from any sums owing by the United States to the person charged;

(B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(C) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made

in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5 and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 9a of this title. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.

29 C.F.R. § 541.500

(a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

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

(b) The term "primary duty" is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and

collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

(c) The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

29 C.F.R. § 541.501

(a) Section 541.500 requires that the employee be engaged in:

(1) Making sales within the meaning of section 3(k) of the Act, or

(2) Obtaining orders or contracts for services or for the use of facilities.

(b) Sales 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. 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.

(c) Exempt outside sales work includes not only the sales of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

(d) The word "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.