

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3 S U M M A R Y O R D E R

4 RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION
5 TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED
6 AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS
7 COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT
8 FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX
9 OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A
10 PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT
11 REPRESENTED BY COUNSEL.

12 At a stated Term of the United States Court of Appeals for the
13 Second Circuit, held at the Daniel Patrick Moynihan United States
14 Courthouse, 500 Pearl Street, in the City of New York, on the
15 6th day of July two thousand ten.

16 Present: AMALYA L. KEARSE,
17 PETER W. HALL,
18 Circuit Judges,
19 JED S. RAKOFF,
20 District Judge*.
21 _____

22 EUGENE KUZINSKI, MARC CAMPANO, JERRY HARRIS, and
23 SHAWN JONES, on behalf of themselves and others
24 similarly situated,

25 Plaintiff-Appellees,

26 - v. -

No. 09-1945-cv

27 SCHERING CORPORATION,

28 Defendant-Appellant.
29 _____

30 For Appellant: DAN HIMMELFARB, Washington, D.C. (Robert P.
31 Davis, Brian D. Netter, Mayer Brown, Washington,
32 D.C.; Diana L. Hoover, Mayer Brown, Houston,
33 Texas, on the briefs).

34 * Honorable Jed S. Rakoff, of the United States District Court for
35 the Southern District of New York, sitting by designation.

1 For Appellees: MATTHEW D. BRINCKERHOFF, Emery Celli Brinckerhoff
2 & Abady, New York, New York (Michael R. DiChiara,
3 Charles Joseph, Joseph & Herzfeld, New York, New
4 York; David A. Slossberg, Andrew W. Skolnick,
5 Hurwitz, Sagarin, Slossberg & Knuff, Milford,
6 Connecticut, on the brief).

7 Appeal from an order of the United States District Court for the
8 District of Connecticut.

9 ON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED,
10 AND DECREED that the order of said district court be and it hereby
11 is AFFIRMED.

12 Defendant Schering Corporation ("Schering") appeals pursuant to
13 28 U.S.C. § 1292(b) from an order of the United States District Court
14 for the District of Connecticut, Janet Bond Arterton, Judge, which
15 denied its motion for summary judgment dismissing the claims of
16 plaintiffs, pharmaceutical sales representatives ("Reps") formerly
17 employed by Schering, for overtime pay under the Fair Labor Standards
18 Act of 1938 ("FLSA"), 29 U.S.C. § 201 et seq. Schering moved for
19 summary judgment, arguing that Reps fall within the FLSA's exemption
20 for "outside salesm[e]n," 29 U.S.C. § 213(a)(1). In a ruling dated
21 March 30, 2009, and reported at 604 F.Supp.2d 385, the district court
22 denied Schering's motion, concluding that, because the Reps
23 undisputedly do not sell or make sales as those terms are defined in
24 the FLSA and the regulations promulgated thereunder by the Secretary
25 of Labor, the Reps fall outside the FLSA's outside sales employee
26 exemption. In an order dated April 17, 2009, the district court
27 certified its order denying summary judgment as worthy of an
28 immediate appeal pursuant to § 1292(b). Schering petitioned this
29 Court, as required by that section, for leave to appeal; we granted
30 the petition and heard Schering's appeal in tandem with the appeal
31 in In re Novartis Wage and Hour Litigation, No. 09-0437-cv. We
32 assume the parties' familiarity with the remaining facts and
33 procedural history of the case.

34 On appeal, Schering contends that the district court erred as a
35 matter of law in determining that the Reps were not exempt outside
36 salesmen. We disagree. The burden of proving that employees fall
37 within an exemption from the FLSA overtime pay requirements is on the
38 employer. See, e.g., Bilyou v. Dutchess Beer Distributors, Inc., 300
39 F.3d 217, 222 (2d Cir. 2002). Reviewing the matter de novo, and
40 taking the record in the light most favorable to the plaintiffs, see,
41 e.g., Dillon v. Morano, 497 F.3d 247, 251 (2d Cir. 2007), we
42 conclude, for the reasons stated in the district court's well-
43 reasoned ruling, see 604 F.Supp.2d at 395-403, that Schering did not
44 meet its burden. Accordingly, we affirm the order denying summary
45 judgment for the reasons stated in the district court's ruling and
46 for the reasons stated in our opinion in In re Novartis Wage & Hour
47 Litigation, No. 09-0437 (2d Cir. July 6, 2010), also issued today.

