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15 **UNITED STATES DISTRICT COURT**

16 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

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18	PHILIP M. CONTRERAS, on)	CASE NO.: CV 09-3405-JF
	behalf of himself and all others)	
19	similarly situated,)	STIPULATION TO STAY ACTION
)	AND ORDER
20	Plaintiffs,)	
21	v.)	
22	PFIZER INC., a Delaware)	
23	corporation, doing business in)	
24	California as PFIZER PRODUCTS,)	
	INC.; and DOES 1 to 50, Inclusive,)	
25)	
	Defendants.)	
26	_____)	

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1 **THE PARTIES HEREBY STIPULATE AS FOLLOWS:**

2 **PLEASE TAKE NOTICE** that all parties desire to stay the proceedings in
3 this action pending the outcome of three appeals that directly implicate the central
4 issue in this case, i.e., whether pharmaceutical sales representatives are properly
5 classified as exempt from Cal. Labor Code overtime requirements under either the
6 outside sales or administrative exemptions. *See D'Este v. Bayer*, 07-56577, *Barnick*
7 *v. Wyeth*, 07-56684, *Menes v. Roche*, 08-55286 (consolidated 9th Circuit appeals); *In*
8 *Re Novartis Wage and Hour Litigation*, No. 09-0437 (2nd Cir.). A stay of this action
9 pending a decision concerning the applicability of the outside sales and/or
10 administrative exemptions under California and federal law will promote efficiency
11 and conserve the resources of the court and the parties.

12 On February 11, 2009, the Ninth Circuit Court of Appeals heard oral argument
13 in the consolidated cases of *Menes v. Roche*, 08-55286, *D'Este v. Bayer*, 07-56577,
14 and *Barnick v. Wyeth*, 07-56684. In all three appeals, the district courts had awarded
15 summary judgment to defendants based on the outside sales exemption under
16 California law.

17 On May 5, 2009, the Ninth Circuit certified two questions to the California
18 Supreme Court, addressing both the outside sales and the administrative exemptions
19 as applied to pharmaceutical representatives. On June 10, 2009, the California
20 Supreme Court denied the Ninth Circuit's request. On July 15, 2009, the Ninth
21 Circuit entered an order withdrawing *Menes v. Roche*, 08-55286, *D'Este v. Bayer*, 07-
22 56577, and *Barnick v. Wyeth*, 07-56684 from submission pending issuance of the
23 mandate in *Harris v. Superior Court*, No. 515655, review granted by 171 P.3d 545
24 (Cal. 2007). The consolidated cases will be resubmitted to the Ninth Circuit within
25 twenty days of the California Supreme Court's decision in *Harris v. Superior Court*.

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1 On July 6, 2010, the Second Circuit Court of Appeals issued an opinion in *In*
2 *Re Novartis Wage and Hour Litigation*, No. 09-0437 (2nd Cir.), 611 F.3d 141 (2010).
3 This case involves the applicability of the outside sales exemption and the
4 administrative exemption to pharmaceutical representatives under the Fair Labor and
5 Standards Act (“FLSA”), New York state law, and California state law. The Ninth
6 Circuit looking at an issue of federal law recently ruled that sales exemption applied
7 to pharmaceutical sales reps *Christopher v. Smith Kline & Beecham* (9th Cir. 2011)
8 635 F.3d 383. Plaintiff are in the process of filing a writ of certiorari to the United
9 States Supreme Court.

10 The Second Circuit held that the pharmaceutical representatives were not
11 exempt under the outside sales exemption or the administrative exemption. The bulk
12 of the Court’s analysis relied on the exemptions under the FLSA. However, the
13 Second Circuit went on to note that the overtime wage requirements of “New York
14 law and California law are not meaningfully different from the requirements of the
15 FLSA.” *In re Novartis Wage & Hour Litigation.*, 09-0437-CV, 2010 WL 2667337
16 *15 (2d Cir. July 6, 2010). The defendant filed a Petition for Review to the United
17 States Supreme Court, which was denied on February 28, 2011. See *Novartis*
18 *Pharmaceuticals Corp. v. Lopes*, 131 S.Ct. 1568 (2011).

19 The decision in *In re Novartis Wage & Hour Litigation*, is obviously not
20 binding on this Court. However, in the interest of providing this Court with a full
21 status report of the state of the law regarding the core issues in this case, Plaintiff felt
22 it was necessary to provide the Court with this information.

23 Other federal district courts have stayed similar cases concerning the
24 classification of pharmaceutical sales representatives pending appeals in related
25 actions. See *Silverman v. GlaxoSmithKline PLC*, 06 cv 7272 DSF (C.D. Cal. Dec. 17,
26 2008) [Dkt. No. 188]; *Thorpe v. Abbott Laboratories, Inc.*, 5:07-cv-05672 RMW

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1 (N.D. Cal. Mar. 5, 2009) [Dkt. No. 54]. *Brody v. Astrazeneca Pharmaceuticals, LP*,
2 08-56120 (9th Cir. Mar. 3, 2009). Moreover, neither party would be prejudiced by a
3 stay in this action.

4 Wherefore, the parties respectfully request that the Court approve this
5 stipulation for a Stay of Proceedings, and continue the Status Conference set for
6 August 19, 2011, pending the resolution of one or both of the aforementioned
7 appeals.

8 **IT IS SO STIPULATED**

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10 DATED: August 12, 2011

11 KINGSLEY & KINGSLEY, APC

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13 By: /s/ Eric B. Kingsley
ERIC B. KINGSLEY
14 Attorney for Plaintiff

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16 DATED: August 12, 2011

17 LITTLER MENDELSON

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19 By: /s/ Kimberly J. Gost
PHILIP A. SIMPKINS
20 KIMBERLY J. GOST
21 (Admitted *pro hac vice*)
22 Attorneys for Defendants

23 IT IS SO ORDERED. The status conference is continued to 2/24/12.

24 DATED: 8/16/11



JEREMY FOGEL
UNITED STATES DISTRICT JUDGE

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