

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION**

KENNETH WONG, individually,
and on behalf of all others similarly
situated who consent to their inclusion;

Plaintiffs,

v.

NOVARTIS PHARMACEUTICALS
CORPORATION,

Defendant.

CASE NO. 0:11-cv-61269

COLLECTIVE ACTION
REPRESENTATION

DATE: June 5, 2011

**COLLECTIVE ACTION COMPLAINT FOR VIOLATION OF THE FLSA
AND DEMAND FOR JURY TRIAL**

INTRODUCTION

1. The Fair Labor Standards Act is our nation's foremost wage law. The overtime requirements of the Fair Labor Standards Act ("FLSA") were meant to apply financial pressure to spread employment to avoid the extra wage and to assure workers additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In re Novartis Wage & Hour Litig., 611 F.3d 141, 150 (2d Cir. N.Y. 2010). It requires minimum wage and overtime pay for certain non-exempt employees. 29 USC Sec. 213

2. On July 6, 2010, the Second Circuit of the United States told Defendant, Novartis, that its Sales Representatives (referred here as "Reps") that worked various times between March 23, 2000 and April 7, 2007 are not exempt from overtime pay under the FLSA. Specifically ruling that Novartis' arguments that Reps fall under the

administrative and outside salesman exemption have “*no merit.*” In re Novartis Wage & Hour Litig., 611 F.3d 141, 157 (2d Cir. N.Y. 2010)

3. Plaintiff, KENNETH WONG (referred here as “Wong” or “Plaintiff”), worked as a Sales Representative / Sales Consultant from November 28, 2007 until December 31, 2010 (his technical termination day, however, is February 7, 2011).

4. He, like his fellow Reps at Novartis and members of this Class, in the past and still to this day:

- a.** had no role in planning Novartis’ marketing strategy
- b.** had no role in formulating the core messages he was to deliver to physicians;
- c.** was required to visit a given physician a certain number of times per trimester as established by Novartis;
- d.** was required to promote a given drug(s) a certain number of times per trimester as established by Novartis;
- e.** was not allowed to deviate from the promotional core message;
- f.** was not supposed to answer any questions for which have not been scripted;

5. Further, Wong, like his fellow Reps at Novartis and members of the Class, in the past and still to this day:

- a.** are required to provide information to doctors in hope that they would prescribe their patients Novartis drugs; yet they
- b.** do not obtain orders from drugs with the doctors or anyone or any entity;
- c.** do not form contracts for drugs with the doctors or anyone or any entity;
- d.** do not engage in any type of sale with the doctors or anyone or any entity for Novartis drugs; and

e. do not transfer title or ownership of Novartis drugs for anything in value.

6. Accordingly, Wong, individually, and on behalf of all others similarly situated who consent to their inclusion in this collective action, sue Defendant, NOVARTIS CORPORATION, (referred to herein as “Novartis”), for violations of the Fair Labor Standards Act for: (1) failing to pay the Plaintiff (and others similarly situated) overtime compensation and (2) failing to maintain and preserve accurate and true records of all hours worked.

7. As explained by the Second Circuit in 2010 and through this Complaint, and under applicable wage law, the Defendant’s employees given the title of “Sales Representative” (or certain related titles) are entitled to overtime compensation but were not paid overtime during the time period proposed in this Collective Action.

8. Said another way, Novartis improperly classified Reps as exempt employees in an attempt to circumvent paying overtime, however, their work duties dictate that they should have been classified, and compensated, as non-exempt employees.

CLASS DEFINITION AND RELIEF SOUGHT

9. This collective action is to recover from Novartis overtime compensation, liquidated damages, prejudgment interest, and the costs and reasonable attorney’s fees under 29 U.S.C. §216(b) on behalf of the Plaintiffs and similarly situated persons composed of:

All Novartis Sales Representatives, Sales Consultants, Senior Sales Consultants, and/or Executive Sales Consultants who worked for the company as employees in the past three years preceding this lawsuit (*i.e.* June 5, 2008) to the day of trial, and elect to opt-in to this action pursuant to FLSA, 29 U.S.C. § 216(b) and who worked in excess of forty (40) hours during one or more work weeks but were not paid overtime compensation for such time.

JURISDICTION AND VENUE

10. This Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331, because this action involves a federal question under the Fair Labor Standards Act, 29 U.S.C., Sections 201-219, inclusive.

11. This Court has personal jurisdiction over this action because the Defendant is engaged in business within the state of Florida.

12. Venue is proper in the Southern District of Florida pursuant to 28 U.S.C. 1391(b) because the acts complained of herein took place in this District and Wong worked in the state of Florida for the Defendant.

THE PARTIES

KENNETH WONG

13. At all times relevant to this action, Representative Plaintiff, Kenneth Wong, resided in Broward County, Florida.

14. At all times relevant to this action, Wong worked for NOVARTIS throughout Florida.

15. At all times relevant to this action, Wong, and all other members of the proposed FLSA collective action, were employees of NOVARTIS within the meaning of 29 U.S.C. § 203(e)(1).

16. Wong worked as a Sales Representative for Novartis from November 28, 2007 until December 31, 2010 (his technical termination day, however, is February 7, 2011).

17. For purposes of the collective action, Wong consents in writing to be a party to this action pursuant to 29 U.S.C. § 216(b).

18. At all times relevant to this action, NOVARTIS employed Wong, and all other members of the proposed FLSA collective action, within the meaning of 29 U.S.C. § 203(g).

NOVARTIS PHARMACEUTICALS CORPORATION

19. Defendant, Novartis Pharmaceuticals Corporation, is a for-profit corporation organized and existing under the laws of Delaware, with its principle place of business at 59 Route 10, East Hanover, New Jersey. Its registered agent for service in Florida is Corporation Service Company, 1201 Hays Street, Tallahassee, Florida 32301.

20. Novartis employs hundreds of Reps in the state of Florida and thousands throughout the United States.

21. Novartis conducts substantial business in the state of Florida and throughout the country subjecting it to enterprise coverage under the FLSA.

22. Novartis had more than \$500,000 in revenues for the year of 2007, 2008, 2009, and 2010.

23. At all relevant times, Novartis has been and continues to be an employer engaged in interstate commerce and/or the production of goods for commerce, within the meaning of FLSA 29 U.S.C. §§ 206(a) and 207(a).

24. Novartis is subject to the FLSA.

GENERAL ALLEGATIONS

25. Plaintiff and members of the Class were/are forced to work overtime hours, every week.

26. Plaintiff and all other members of the proposed collective action, were employees of Novartis within the meaning of 29 U.S.C. § 203(e)(1).

27. Plaintiff and members of the Class were misclassified by Novartis as exempt employees under the title "Sales Representative."

28. Reps were paid on a salary and commission basis, irrespective of the hours actually worked.

DUTIES DICTATE THAT NO EXEMPTION APPLIES HERE

29. FLSA provides that, with certain exceptions, employers must pay employees overtime of at least one and one-half times their regular rate of pay for any hours over forty worked in a week. 29 U.S.C. S 207(a)(1).

30. The Act exempts certain employees from the overtime requirements but it is the employees duties, not job title, that dictate whether he or she is entitled to an exemption.

31. However, an "employer who claims an exemption from the FLSA has the burden of showing that the exemption applies." Donovan v. Nekton, Inc., 703 F.2d 1148, 1151 (9th Cir. 1983).

32. Although the FLSA provides for certain exemptions to the mandates of paying overtime compensation, no exemption applies in the instant matter. In re Novartis Wage & Hour Litig., 611 F.3d 141, 150 (2d Cir. N.Y. 2010)

33. Unless proven to be exempt from the protection of overtime laws, all employees are entitled to premium overtime pay for work in excess of forty (40) hours per week.

34. Due to the nature of the job responsibilities and requirements set forth by the Defendant, Plaintiff and members of the Class were, and continue to be, required to work more than forty (40) hours a week during the course of their employment with Novartis.

WHITE COLLAR EXEMPTIONS DO NOT APPLY

35. Wong, like his fellow Reps at Novartis and members of this Class, in the past and still to this day:

- a. had no role in planning Novartis' marketing strategy
- b. had no role in formulating the core messages he was to deliver to

physicians;

- c. was required to visit a given physician a certain number of times per trimester as established by Novartis;
- d. was required to promote a given drug(s) a certain number of times per trimester as established by Novartis;
- e. was not allowed to deviate from the promotional core message;
- f. was not supposed to answer any questions for which have not been scripted.

36. Despite, what any purported job description for an Novartis Rep might say, Plaintiff, and members of the Class had perform low-level, discretionless marking work, strictly controlled by Novartis.

37. Wong, and members of the Class did not have the authority to hire or fire employees, and they did not have the authority to independently make business decisions.

38. Reps did not exercise the requisite discretion, management, and independent judgment with respect to matters of significance to be considered exempt under the FLSA's white collar exemptions.

OUTSIDE SALES EXEMPTIONS DO NOT APPLY

39. Further, Wong, like his fellow Reps at Novartis and members of the Class, in the past and still to this day:

- a. are required to provide information to doctors in hope that they would prescribe their patients Novartis drugs; yet they

- b. do not obtain orders from drugs with the doctors or anyone or any entity;
- c. do not form contracts for drugs with the doctors or anyone or any entity;
- d. do not engage in any type of sale with the doctors or anyone or any entity for Novartis drugs; and
- e. do not transfer title or ownership of Novartis drugs for anything in value.

40. Wong and members of the Class did not transfer title or ownership of Novartis drugs for anything in value so they cannot be exempt under the Outside Salesman exemption.

ACTIONS WERE WILLFUL

41. The company took these actions willfully, because as early as 2006 the Defendant had been put on notice of the unlawful classification of sales representative by the previous California and New York lawsuits over the same issues facing this Court, yet the company failed to correct its actions.

42. However, to make matters worse, after the Second Circuit had ruled their claims for exemptions had no merit and the Supreme Court denied their writ of *certiorari*, the Company has still not properly paid or classified its Sales Reps.

43. Plaintiff alleges on behalf of the members of the Class that Novartis' failure to pay overtime was knowing and willful. Accordingly, Plaintiff and the Class seek and are entitled to recover all overtime pay due from overtime hours worked for which compensation was not paid, liquidated damages, prejudgment interest, and attorneys' fees under the FLSA's three year statute of limitations.

HOURS NOT PAID FOR OVERTIME AND AVAILABLE RECORDS

44. Evidence reflecting the precise number of overtime hours worked by Plaintiff and every other member of the Class, as well as the applicable compensation rates, is in the possession of Novartis.

45. Wong's records and projections estimates he was not paid for more than 3000 hours of overtime.

46. However, and to the extent records are unavailable, Plaintiff and members of the Class may establish the hours they worked solely by their testimony and the burden of overcoming such testimony shifts to the employer. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

WORKING LUNCHESES

47. Plaintiff and the Class were/are also not paid during working lunches, and even when Plaintiffs did/do not take a lunch.

48. Because the Plaintiff and Class members would often work during lunch, or be engaged in a working lunch (where they would eat while working) both off and on the clock, and not get paid for all of their time, they are entitled to compensation for this time.

49. The regulations provide that if the employee is required to perform any duties--whether active or inactive--while eating, the meal period is not bona fide and the time spent in eating is compensable. See 29 CFR 785.19 and Kohlheim v. Glynn County, 117 Lab. Cas. (CCH) 35413, 915 F. 2d 1473, 29 Wage & Hour Cas. (BNA) 1673 (11th Cir. 1990).

FAILURE TO MAINTAIN TRUE & ACCURATE RECORDS OF HOURS WORKED

50. All employers subject to the Fair Labor Standards Act must maintain and preserve certain records describing the wages, hours and working conditions of their employees.

51. With respect to an employee subject to the minimum wage provisions the following records must be kept:

- a. Personal information, including employee's name, home address, occupation, sex, and birth date if under 19 years of age;
- b. Hour and day when workweek begins;
- c. Regular hourly pay rate for any week when overtime is worked;
- d. Total hours worked each workday and each workweek; Total daily or weekly straight-time earnings;
- e. Total overtime pay for the workweek;
- f. Deductions from or additions to wages;
- g. Total wages paid each pay period;
- h. Date of payment and pay period covered

52. Failure to comply with the recordkeeping requirements is a violation of the FLSA for which criminal or civil sanctions may be imposed, whether or not other statutory violations exist. See 29 U.S.C. § 215(a)(5). See Dunlop v. Gray-Goto, Inc., 528 F.2d 792 (10th Cir. 1976).

53. Accurate records are not only required for regulatory purposes, they are critical to an employer's defense of claims that it violated the Act. An employer that fails to maintain the required records cannot avoid liability in a wage-hour case through argument that there is insufficient evidence of the claimed hours worked. See *Wirtz v.*

First State Abstract Ins. Co., 362 F.2d 83 (8th Cir. 1966); *Boekemeier v. Fourth Universalist Soc'y*, 86 F. Supp. 2d 280 (S.D.N.Y. 2000).

54. An employer's failure to maintain records may create a presumption in the aggrieved employee's favor. See *Myers v. The Copper Cellar Corp.*, 192 F.3d 546, 551 n.9 (7th Cir. 1999) , citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).

55. Novartis has failed to accurately record, report, credit and/or compensate its employees, including Plaintiff and Class members, time records.

56. Novartis has failed to make, keep and preserve records, with respect to each of its' employees, sufficient to determine the wages, hours and other conditions and practices of employment in violation of 29 CFR 516.2 and 29 U.S.C. §§ 211, 216 and related laws.

COLLECTIVE ACTION ALLEGATIONS

57. Plaintiff brings this action on behalf of the Class, as a collective action pursuant to the Fair Labor Standards Act § 216(b).

58. The Southern District of New York said in *Young v. Cooper Cameron Corp* in 2005: "The requirements of Fed. R. Civ. P. 23 do not apply to the approval of a collective action and thus no showing of numerosity, typicality, commonality and representativeness need be made." *Young v. Cooper Cameron Corp.*, 229 F.R.D. 50, 54 (S.D.N.Y. 2005)

59. Still, despite the *Young* Court's ruling, the members of the Class are so numerous that joinder of all members is impracticable. While the exact number of the members of the Class is unknown to the Plaintiff at this time, and can only be

ascertained through appropriate discovery, the Plaintiff believes there are at a minimum, hundreds of individuals in the defined class, if not thousands.

60. Plaintiff will fairly and adequately protect the interests of the Class and has retained counsel that is experienced and competent in class/collective actions and employment litigation. Plaintiff has no interest that is contrary to, or in conflict with, members of the Class.

61. A collective action suit, such as the instant one, is superior to other available means for fair and efficient adjudication of this lawsuit. The damages suffered by individual members of the Class may be relatively small when compared to the expense and burden of litigation, making it virtually impossible for members of the Class to individually seek redress for the wrongs done to them.

62. A collective action is, therefore, superior to other available methods for the fair and efficient adjudication of the controversy. Absent these actions, the members of the Class likely will not obtain redress of their injuries, and Novartis will retain the proceeds of their violations of the FLSA.

63. Furthermore, even if any member of the Class could afford individual litigation against the Company, it would be unduly burdensome to the judicial system. The instant methodology, when compared to voluminous individual actions, has fewer management difficulties and provides the benefits of unitary adjudication, economies of scale, and comprehensive supervision by a single court. Concentrating this litigation in one forum will promote judicial economy and parity among the claims of individual members of the Class, and provide for judicial consistency.

64. There is a well-defined community of interest in the questions of law and fact affecting the Class as a whole. The question of law and fact common to each of the Class predominate over any questions affecting solely individual members of the action.

Among common questions of law and fact are:

- a. Whether Novartis employed members of the Class within the meaning of the applicable provisions of the FLSA;
- b. Whether Reps were uniformly and unlawfully classified by Novartis as exempt from overtime compensation;
- c. Whether Novartis failed to pay Plaintiff and the Class all overtime compensation due to them by virtue of their uniform designation as exempt;
- d. Whether Novartis and members of the Class were expected to, and/or mandated to regularly work hours in excess of forty (40) per week;
- e. Whether Novartis failed to maintain and preserve accurate and true records of all hours worked and wages earned by the Class;
- f. Whether Plaintiff and the Class have sustained damages, and if so, what is the proper measure of damages.

65. Plaintiff knows of no difficulty that will be encountered in the management of this litigation that would preclude its continued maintenance.

66. Pursuant to 20 U.S.C. § 207, Plaintiff seeks to prosecute the FLSA claims as a collective action on behalf of:

All Novartis Sales Representatives, Sales Consultants, Senior Sales Consultants, and/or Executive Sales Consultants who worked for the company as employees in the past three years preceding this lawsuit (*i.e.* June 5, 2008) to the day of trial, and elect to opt-in to this action pursuant to FLSA, 29 U.S.C. § 216(b) and who worked in excess of forty (40) hours

during one or more work weeks but were not paid overtime compensation for such time.

67. Notice of the pendency and any resolution of this action can be provided to Collective Action Members by mail, print, and/or internet publication.

COUNT I – OVERTIME DUE UNDER THE FLSA

68. Paragraphs one (1) through sixty-seven (67) are realleged as if fully set forth herein.

69. At all relevant times, Novartis employed, and/or continues to employ, Plaintiff, and each member of the Class, within the meaning of the FLSA.

70. As stated herein, Plaintiff and others similarly situated were improperly classified by Novartis as exempt; however, their work duties dictate they should have been classified and compensated as non-exempt employees, regardless of their title of “Sales Representative”.

71. Novartis has a policy and practice of refusing to pay overtime compensation to its Reps for the hours worked in excess of forty (40) hours per week.

72. Novartis willfully classified Plaintiff and all other members of the Class as exempt in efforts to circumvent paying earned overtime, however, under applicable employment law, an employee is classified as exempt versus non-exempt according to their job duties, *not their job title*. Non-exempt employees are entitled to overtime compensation regardless of whether they have an exempt title, if their duties do not reflect “exempt job duties” under the FLSA.

73. Novartis’ failure to pay Plaintiff and all other members of the Class overtime compensation at a rate not less than one and one-half times the rate at which they are employed for work performed beyond the forty (40) hour workweek, is a violation of the FLSA, in particular 29 U.S.C. §§ 206 and 207.

74. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a).

75. Due to Novartis' FLSA violations, Plaintiff alleges on behalf of the members of the Class that they have suffered damages and are entitled to recover from Novartis the unpaid overtime compensation, and an additional amount equal as liquidated damages, prejudgment interest, reasonable attorneys' fees, and costs and disbursements of this action, pursuant to 29 U.S.C. §216(b).

PRAYER FOR RELIEF

76. WHEREFORE Plaintiff prays for:

- a. An order designating this action as a collective action and issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated individuals with instructions to permit them to assert timely FLSA claims in this action by filing individual Consents to Sue pursuant to §216(b) and that notice be sent to all past and present employees of Novartis at any time during the three year period immediately preceding the filing of this suit, through and including the date of this Court's issuance of the Court Supervised Notice.
- b. An order awarding attorneys' fees and costs pursuant to § 216 of the FLSA.
- c. That the Court find Novartis in violation of the overtime compensation provisions of the FLSA and that the Court find that Novartis' violation of the FLSA were and are willful.
- d. That the Court award Wong, the putative Class and all similarly situated employees overtime compensation for all the previous hours worked over forty (40) hours, that they did not receive at least one and one-half time compensation for, in any given week during the past three years, AND

liquidated damages of an equal amount of the minimum compensation; in addition interest on said award pursuant to § 216 of the FLSA.

- e. That the Court award Wong a collective action representative fee for his efforts and time dedicated to bringing justice through this action;

AND

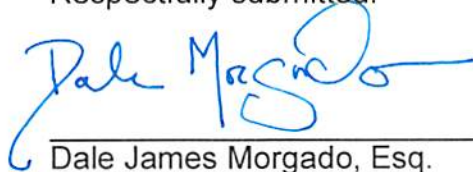
- f. That the Court award any other legal and equitable relief as this Court may deem appropriate.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury on all questions of fact raised by this Complaint and on all other issues so triable.

Dated this 5th day of June, 2011.

Respectfully submitted.



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