IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL ESTRADA, individually and on behalf of others similarly situated, **PLAINTIFF,** **v.** **MAGUIRE INSURANCE AGENCY, INC.,** **DEFENDANT.**	**CIVIL ACTION NO. 12-604** **JURY TRIAL DEMANDED**

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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Plaintiff, Michael Estrada, files this, Plaintiff's Motion for Summary Judgment and Brief in Support.

I.
SUMMARY

Plaintiff argues that he and similarly situated "Fast Track Auto Claims Examiners" were misclassified as salaried employees and not paid overtime wages in violation of the Fair Labor Standards Act of 1938. At issue is whether Plaintiff falls under the "administrative exemption," an affirmative defense pled by Defendant.

Plaintiff contends that the administrative exemption does not apply because his work was limited to routine, simple, "fast tracked" fender benders with no bodily injury. Decisions about how much to pay were not made by Plaintiff, but rather by

damage appraisers who actually inspected the vehicles. Essentially, Plaintiff filled out forms and cut checks in the amount dictated by the appraiser.

The rule for claims adjustors is clear: the lowest level claims adjustors are *not* exempt under the administrative exemption. In 2004, the Department of Labor Wage & Hour Administrator issued regulations stating that claims adjustors are generally exempt if they engage in higher level functions: "interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation." 29 C.F.R. § 541.203. In contrast, lower level claims adjustors who do not engage in these sorts of tasks are not exempt. Indeed, in 2005 the DOL Wage & Hour Administrator clarified that claims adjustors handling simple, routine tasks are not subject to the administrative exemption and must be paid overtime wages. Wage & Hour Div. Op. Ltr., 2005 WL 330610 (Jan. 7, 2005).

Plaintiff and similarly situated Fast Track Auto Claims Examiners are the sort of low level, clerical workers who are not engaged in discretion and independent judgment. Plaintiff did not interview physicians, did not inspect property damage, did not prepare damage estimates, reviewed basic information regarding coverage, determined liability following a rote process, did not determine the total value of a claim, did not negotiate settlements, and did not make

recommendations regarding litigation. Plaintiff and similarly situated Fast Track Auto Claims Examiners are not subject to the administrative exemption.

Plaintiff also argues that the administrative exemption does not apply because Defendant's examiners are engaged in "production" work as opposed to administrative work. Because Defendant is an insurance company, its product is paying claims, covering loss, and otherwise restoring insured vehicle owners to *status quo ante*. This is exactly the work of a claims examiner. As a matter of law, "production" employees are not subject to the administrative exemption. This argument is the subject of a circuit split that the Third Circuit has not resolved. However, the better (and historic) argument is that employees producing a company's marketed goods or services are not a company's administrators.

For these reasons, Plaintiff moves for summary judgment on the issue of liability and that the administrative exemption does not apply.

II.
EVIDENCE SUBMITTED

In support of this motion, Plaintiffs submit the following evidence as exhibits:

1. Statement of Undisputed Material Facts ("SUMF");
2. Excerpts of the Deposition of Michael Estrada ("Estrada Dep.");
3. Excerpts of the Deposition of William Benecke, corporate representative ("Benecke Dep.");
4. Declaration of Michael Estrada ("Decl.");
5. Website, PHLY History ("Website").

III.
STATEMENT OF UNDISPUTED FACTS

Per this Court's rules of procedure, Plaintiff's Statement of Undisputed Material Facts has been included as an Exhibit to this motion.

IV.
SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991).

A party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion, and identifying the aspects of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the party makes this initial showing, the burden shifts to the non-moving party to demonstrate that there is in fact a genuine issue of material fact. *United States v. 107.9 Acre Parcel of Land in Warren Twp.*, 898 F.2d 396, 398 (3d Cir. 1990). The nonmoving party, in meeting its burden, is entitled to all reasonable inferences in its favor. *Pignataro v. Port Auth. of N.Y. & N.J.,* 593 F.3d 265, 268 (3d Cir. 2010). Ultimately, the nonmoving party must present sufficient evidence from which a reasonable jury could return a verdict in the non-moving party's favor. *Id.*

Importantly, a "motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." *Am. Eagle Outfitters v. Lyle & Scott Ltd.,* 584 F.3d 575, 581 (3d Cir. 2009) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505 (1986)). An issue is genuine "only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party and a factual dispute is material only if it might affect the outcome of the suit under governing law." *Kaucher v. County of Bucks,* 455 F.3d 418, 423 (3d Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505 (1986)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson,* 477 U.S. at 248 (*citing* 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93-95 (1983)).

In the present matter, Plaintiff has met its initial burden and Defendant is unable to present a genuine issue of material fact.

V.
ARGUMENT

The Fair Labor Standards Act ("FLSA") provides specific exemptions to the employer's requirement to pay overtime. *See generally* 29 U.S.C. § 213. Only the administrative exemption is at issue in this case. 29 U.S.C. § 213(a)(1) (An employer need not pay overtime where an employee is "employed in a bona fide . . . administrative . . . capacity.").

The administrative exemption requires that an employer prove all of the following:

(1) The employee is compensated on a salary or fee basis at a rate of not less than $455 per week;[1]

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200(a).

First, Plaintiff did not exercise discretion and independent judgment because he held a low level examiner position, limited to easy fast track claims, with no bodily injury, where damages and payment were set by an appraiser.

Second, Plaintiff did not perform work directly related to the management or general business operation of the employer or its customers because he was a "production" employee not an "administrative" employee. In other words, Plaintiff was producing Defendant's product or service as opposed to running the administrative functions of the business generally (e.g., human resources, accounting, IT, etc.).

A. Defendant bears a heavy burden. The administrative exemption is to be "narrowly construed." Defendant not only bears the burden of proof, but in the Third Circuit it must demonstrate that the exemption applies "plainly and unmistakably."

Whether an exemption applies is the employer's burden. *Pignataro v. Port Auth. of N.Y. & N.J.*, 593 F.3d 265, 268 (3d Cir. 2010) (citing *Guthrie v. Lady Jane*

[1] Plaintiff concedes that the first prong relating to salary basis and fee basis rate has been met and is not in dispute.

Collieries, Inc., 722 F.2d 1141, 1143 (3d Cir. 1983)). Further, as the applicability of an exemption is Defendant's burden and because all three parts of the exemption must be met for it to apply, Defendant must establish a genuine issue of material fact for *each* element.

Because Defendant cannot meet this burden, Plaintiff is entitled to summary judgment. The employer's burden is high, as exemptions from the FLSA are to be narrowly construed against the employer. *Id.* In fact, the employer must prove the exemption applies "plainly and unmistakably." *Martin v. Cooper Elec. Supply. Co.*, 940 F.2d 896, 900 (3d Cir. 1991) (citing *Arnold v. Ben Kanowsky, Inc.,* 361 U.S. 388, 392, 80 S.Ct. 453, 456 (1960)). If the record is unclear as to some exemption requirement, the employer will be held not to have satisfied its burden. *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 900 (3d Cir. 1991) (citing *Idaho Sheet Metal Works, Inc. v. Wirtz,* 383 U.S. 190, 206, 86 S.Ct. 737, 747 (1966)).

B. The DOL has specific rules and regulations for when claims adjustors can be subject to the administrative exemption. Plaintiff and similarly situated Fast Track Auto Claims Examiners simply do not meet the test. Rather than engaging in the duties of typical claims adjustors, Plaintiff performed clerical work and did not inspect damage, valuate claims, or negotiate. Pursuant to the DOL's rules and regulations, such work does not involve discretion and independent judgment.

Whether claims adjustors are administratively exempt has been explicitly addressed by the Department of Labor. Low level claims examiners charged with routine, clerical duties are not exempt. Wage & Hour Div. Op. Ltr., 2005 WL 330610 (Jan. 7, 2005). Claims examiners are generally exempt only:

> if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

29 C.F.R. § 541.203(a).

Fast Track claims were the most basic, lowest value, and least complicated claims of all of the claims Defendants handled. (Benecke Dep. 35:4-36:19). Fast Track Auto Claims Examiners are a part of the minority of claims adjusters who rightfully lie outside the administrative exemption. The Department of Labor itself notes that "section 541.203(a) simply provides an illustration of the application of the administrative duties test; it does not provide a blanket exemption for claims adjusters." Wage & Hour Div. Op. Ltr., 2005 WL 330610 (Jan. 7, 2005). "[T]here must be a case-by-case assessment to determine whether the employee's duties meet the requirement for exemption." *Id.* (citing 69 Fed. Reg. at 22,144 and *Robinson-Smith v. GEICO*, 323 F. Supp.2d 12, 26 (D.D.C. 2004)).

Using the factors set forth in 29 C.F.R. § 541.203(a), Plaintiff was clearly not engaged in typical claims adjusting that would invoke the exemption:

29 C.F.R. § 541.203(a) Factor	**Plaintiff's Work**
Interviewing insureds, witnesses and physicians	✔ Plaintiff did conduct phone interviews of insureds and witnesses. ✖ Plaintiff never interviewed physicians, as by definition, the claims Plaintiff handled excluded bodily injury. (Benecke Dep., 146:3-11; Estrada Dep., 54:5-11; 55:7-15).

Inspecting property damage	✖ Plaintiff never personally inspected property damage. (Benecke Dep., 104:8-11).
Reviewing factual information to prepare damage estimates	✖ Plaintiff never prepared damage estimates, but rather Plaintiff always used an appraiser's estimate of damages. (Estrada Dep., 69:25-70:21).
Evaluating and making recommendations regarding coverage of claims	✖ Plaintiff's determination of coverage was limited to checking the dates of the policy and seeing if the vehicle was covered by the policy. Plaintiff did not exercise discretion and independent judgment. (Decl. ¶4(c)).
Determining liability and total value of a claim	✖ Plaintiff followed strict rules in allocating liability. Plaintiff did not exercise discretion and independent judgment. (Estrada Dep., 61:4-25; 63:20-64:5). ✖ Plaintiff did not determine the total value of the claims. (Estrada Dep., 69:25-70:21).
Negotiating settlements	✖ Plaintiff did not negotiate settlements. (Estrada Dep., 110:17-25; 111:9-18; 115:13-23).
Making recommendations regarding litigation	✖ Plaintiff had no involvement in litigation. (Benecke Dep., 54:25-55:8).

Plaintiff's "coverage review" consisted of a routine checking of the VIN number of the damaged vehicle against the written policy to see whether the vehicle was listed in the policy. (Decl. ¶4(c)). If the issue became more complicated because it could not be easily determined that the vehicle was covered by the policy, Plaintiff would seek direction from his supervisor. (Decl. ¶4(c)). Checking to see if a vehicle's

VIN number is included in a policy is by no means independent judgment or discretion. The vehicle is either covered or it is not, and Plaintiff followed a very basic and formulaic procedure in discovering whether coverage was applicable.

When Plaintiff allocated liability, he followed a strict and clear process that bypassed any independent judgment or discretion that might have been involved in such a matter. (*See* Estrada Dep., 61:4-65:5). Plaintiff relied on the admission of fault by the insured, police reports determining liability, or the corroboration of a disputed incident by independent witnesses. (Estrada Dep., 61:4-25; 63:20-64:5). If for any reason, these steps would not easily allocate the liability, Plaintiff would seek direction from his supervisor. (Estrada Dep., 58:14-19).

Further, Plaintiff had no involvement in valuing the damage to vehicles. Appraisers were used in every claim, and Plaintiff would merely use the estimate issued by the appraiser. (Estrada Dep., 60:6-16, 71:11-19).

Because Plaintiff and the similarly situated Fast Track Auto Claims Examiners do not qualify for the administrative exemption under the Department of Labor's rules and regulations specific to claims adjustors, summary judgment should be granted for Plaintiff.

C. Plaintiff also does not meet the administrative exemption under the DOL's long form test. Plaintiff performed mechanical, routine, and repetitive work. Plaintiff had direct oversight. Plaintiff followed established procedures and strict rules.

Plaintiff did not exhibit the type of discretion and independent judgment in performing his job duties contemplated by the Federal Regulations. *See* 29 C.F.R. § 541.200(a)(3). The regulations define what does and does not constitute discretion

and independent judgment. For instance, "the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a). Furthermore, discretion and independent judgment "implies that the employee has authority to make an independent choice, free from immediate direction or supervision." 29 C.F.R. § 541.202(c). To further assist in the evaluation of whether an employee utilizes discretion and independent judgment, the Department of Labor outlined several factors for consideration:

> whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b).

1. *Application of skill and well-established techniques is not discretion and/or independent judgment.*

However, the exercise of discretion and independent judgment "must be more than the use of skill in applying well-established techniques, procedures or specific

standards described in manuals or other sources." 29 C.F.R. § 541.202(e). Consequently, "clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work" is categorically outside the realm of discretion and independent judgment. 29 C.F.R. § 541.202(e). The routine work exception has been specifically recognized in the Third Circuit.[2] Similarly, the mere fact that an employee makes some decisions, does not equate to exhibiting discretion and independent judgment. *See Gusdonovich v. Bus. Info. Co.*, 705 F.Supp. 262 (W.D. Pa. 1985). Further, an employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. 29 C.F.R. § 541.202(f).

2. *Lack of direct oversight is essentially required for discretion and independent judgment.*

While the Third Circuit has not ruled specifically on the applicability of the Administrative Exemption to insurance adjusters or examiners, the existing precedent on the administrative exemption in the Third Circuit demonstrates it does not apply in this case.[3]

[2] *See e.g. Goldstein v. Dabanian*, 291 F.2d 208, 210-11(3d Cir. 1961) ("the scope of discretion here is much too narrow to place the employees in the administrative class."); *Paul v. UPMC Health Sys.*, 2009 WL 699943, *11 (W.D. Pa. March 10, 2009) (citing 29 C.F.R. § 541.202(e)); *Donovon v. Public Pol. C. N.J*, 2006 WL 1373230, *7 (D.N.J May 17, 2006) (citing 29 C.F.R. § 541.202(c) & (e)); *Smith v. Bank of New York Mellon Corp.*, 2011 WL836858 (W.D. Pa. January 20, 2011) (citing 29 C.F.R. § 541.202(e)); *Beamer v. Possum Valley Mun. Auth.*, 2010 WL 1253476, *12 M.D. Pa. March 24, 2010) (citing 29 C.F.R. § 541.202(c) & (e)); *Swartz v. Windstream Comm., Inc.*, 2010 WL 2723213, *4 (W.D. Pa. July 8, 2010) (citing 29 C.F.R. § 541.202(c) & (e)).

[3] Significantly, recent cases from the Western District of Pennsylvania do support that the Third Circuit would recognize that insurance adjusters are entitled to overtime. *See Moss v. Crawford & Co.*, 201 F.R.D. 398 (W.D. Pa. 2000) (denying Defendant's motion for decertification of class of insurance adjusters seeking overtime wages); *Stanislaw v. Erie Indem. Co.*, 2012 WL 517332 (W.D. Pa. February 15, 2012) (denying cross motions for summary judgment related to whether the plaintiff's had sufficiently notified the employer of the overtime hours they had worked claims adjusters' overtime claims).

The Third Circuit emphasizes the important role supervisory oversight serves in determining whether the Administrative Exemption applies. Recently, the Third Circuit considered the Administrative Exemption's applicability to a Senior Professional Sales Representative. *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010). Of particular significance to the Court was the fact that "Smith [the plaintiff] executed nearly all of her duties without direct oversight." *Id*. at 285. The plaintiff, in her deposition, had touted the fact that her position provided her with "freedom and responsibility," and that she was "unsupervised 95% of the time." *Id*. at 282-83. Specifically, Plaintiff noted that her position was not "micromanaged" and she could "work it [the job] the way [she] wanted to work it." *Id*. at 283. In light of the plaintiff's freedom to be "the manager of her own business who could run her own territory as she saw fit," the Court concluded that the plaintiff was subject to the administrative exemption. *Id*. at 285.

Plaintiff's job responsibilities sharply contrast with the plaintiff's in *Smith*. In no way, shape, or form has Plaintiff ever represented that his job had any level of freedom to perform it how he desired or free from supervision. In fact, quite the opposite was true. Plaintiff has consistently expressed that he followed specific rules in allocating liability, by routinely following the police report, the independent witnesses' version of the facts and, if all else failed, by accepting the insured's recitation of the events. (Estrada Dep., 61:4-62:21, 64:13-65:11). Furthermore, Plaintiff exhibited no freedom in valuing claims, as Plaintiff always utilized an

appraiser and always accepted the appraiser's estimate. (Estrada Dep., 60:6-16, 71:11-19).

3. *Plaintiff performed established procedures and followed strict rules without discretion or independent judgment.*

Beyond the Third Circuit, there is ample support to hold that Plaintiff did not exhibit discretion and independent judgment. The Department of Labor, charged with interpreting the employment statutes, has issued several opinion letters relating to the applicability of the Administrative Exemption to insurance adjusters. In a recent opinion letter, the DOL analyzed the job duties of junior-level claims adjusters whose job duties virtually mirror those of the Plaintiff. Wage & Hour Div. Op. Ltr., 2005 WL 330610 (Jan. 7, 2005). The junior-level adjusters were "not involved in determining the overall course or policies of the Office or in running the business of the Office." *Id*. Their work consisted of "conducting telephone interviews and filling out preprinted forms." *Id*. Further, the junior-level adjusters "d[id] not perform investigations in person and never visit[ed] the scene of an accident." *Id*. Whenever a dispute arose, the adjusters consulted their supervisor for direction. *Id*. Further, subrogation issues were handled by the General Counsel or Office of the Attorney General. *Id*. Ultimately, "all discretion . . . is circumscribed by, and in accordance with, established policies." *Id*. Under these circumstances, the Department of Labor concluded the administrative exemption was inapplicable because the adjusters did not exhibit discretion and independent judgment. *See Id*.

The Department of Labor's analysis of the facts translates to an identical holding in the present matter. Like the junior-level claims adjuster, Plaintiff only conducted interviews over the phone, never visiting the scene of an accident or conducting any investigations in person. (Benecke Dep., 104:8-11). Further, whenever a dispute arose, Plaintiff sought direction from his supervisor as to how to proceed. (Estrada Dep., 115:24-116:3). Plaintiff also had no involvement in litigation in his claims. (Benecke Dep., 54:25-55:8).

4. *Plaintiff's duties can be easily distinguished from other exempt claims examiners'.*

In *Roe-Midgett v. CC Services, Inc.*, the Seventh Court of Appeals determined that a claims adjuster with significantly distinguishable job duties from Plaintiff exhibited discretion and independent judgment. *See* 512 F.3d 865 (7th Cir. 2008). The plaintiffs' job duties required them to: "spend much of their time in the field without direct supervision. They conduct on-site investigations of first- and third-party automobile insurance claims; interview claimants, witnesses, and law enforcement personnel; estimate loss, determine whether parts should be repaired or replace; negotiate with mechanics and body shops and draft final repair estimates; settle claims up to the limit of the $12,000 settlement authority." 512 F.3d 865, 867 (7th Cir. 2008).

By contrast, Plaintiff did not spend any of his time in the field. (Benecke Dep., 143:2-8). Further, Plaintiff did not conduct any on-site investigations. (Benecke Dep., 143:9-20) All investigations were conducted from within Plaintiff's cubicle. *Id*. Plaintiff did not make any estimates as to loss, but rather routinely

accepted the estimate made by the appraiser, which was used in all cases. (Estrada Dep., 60:6-16, 71:11-19). Plaintiff did not negotiate with mechanics or body shops either. Instead, if an insured had a dispute with the estimate from a body shop, Plaintiff would bring the matter to his supervisor for resolution. (Estrada Dep., 115:24-116:3). Further, Plaintiff did not draft final repair estimates. (Benecke Dep., 144:16-17).

In *Robinson-Smith v. Government Employees Insurance Company*, the District of Columbia Court of Appeals determined that GEICO's auto damage adjusters exhibited discretion and independent judgment. 590 F.2d 886 (7th Cir. 2010). However, like in *Roe-Midgett*, the facts in *Robinson-Smith* starkly differ from the present matter. In reversing the district court's holding, the Court relied on the fact that the adjusters' jobs required them to "spend a majority of their time appraising damaged vehicles and estimating repair costs," "negotiate and settle claims with body shops over repair costs and with insureds over total loss vehicles," "work[ ] in the field and under less direct supervision," and "decide whether it is economically feasible to repair a damaged vehicle or instead to pay the owner its value." *Robinson-Smith v. Gov't Employees Ins. Co.*, 590 F.2d 886, 888-90 (7th Cir. 2010).

Again, Plaintiff's job duties differ significantly from the plaintiffs' considered by the Court. Unlike the plaintiffs in *Robinson-Smith*, Plaintiff did not spend a majority of his time appraising damaged vehicles and estimating repair costs. (Benecke Dep., 135:12-16). Plaintiff did not negotiate and settle claims with body

shops. (Benecke Dep., 135:17-139:19) (failing to provide a single example of a time in which Plaintiff negotiated or settled claims with a body shop). Further, Plaintiff did not make total loss determinations. (Benecke Dep., 141:19-142:8).

5. *Even if Defendant could establish that Plaintiff exhibited some form of discretion, it is not the type of discretion contemplated by the Code of Federal Regulations.*

It is clear that Plaintiff did not have any discretion or independent judgment in the course of carrying out his job duties. However, even if this Court did find that there was a question of fact as to this issue, the factual issue would be sufficiently narrow to still warrant granting Plaintiff summary judgment. The Third Circuit does not require a record completely devoid of any discretion and independent judgment. *See Goldstein v. Dabanian*, 291 F.2d 208, 210-11 (3d Cir. 1961). Rather, the discretion exercised must be sufficiently broad in scope to place an employee within the administrative class. *Id.*

In *Goldstein v. Dabanian*, the Third Circuit considered whether employees who processed payroll checks could be properly exempt from the FLSA's overtime requirements through the administrative exemption. *Id.* The court analyzed the employee's job duties, which included making estimates of daily cash needs and determining the identity of customers, and in fact held that "It would not be disputed that a certain amount of discretion was involved" in the exercise of the plaintiff's job duties. *Id.* at 211. However, the Court also recognized that "such activity does not place the employees in the administrative group." *Id.* Rather, there is a threshold beyond which the discretion must reach to cause the employee to fall

within the administrative exemption. *See Id*. (recognizing the distinction between a top mechanic's discretion and the discretion of the plaintiffs). Ultimately, given the limited amount of discretion the plaintiffs had, the Court held that "the scope of the discretion here is much too narrow to place the employees in the administrative class." *Id*. at 211.

Similarly, the Western District of Pennsylvania held that the discretion and independent judgment standard is "frequently misapplied" because the exercise of discretion and independent judgment is confused with "the use of skill in applying techniques, procedures, or specific standards." *Gusdonovich v. Bus. Info. Co.*, 705 F.Supp. 262, 265 (W.D. Pa. 1985). In *Gusdonovich*, the plaintiff investigated information and people for insurance companies. *Id*. at 263. The defendant maintained that the plaintiff exhibited discretion and independent judgment because there were no "set procedures." *Id*. at 265. However, the court disagreed and held the administrative exemption did not apply. *Id*. While the court acknowledged the plaintiff inevitably made his own decisions in his job, because the plaintiff could avoid discipline by following the procedures in line with his supervisor's beliefs, the plaintiff was not really exercising any discretion. *Id*. Rather, the plaintiff was merely applying his "knowledge and skill in determining which procedure to follow." Consequently, the administrative exemption did not apply. *Id*.

Plaintiff's job duties did not permit any form of discretion and independent judgment. However, even if this Court did believe a question of fact existed as to

this issue, *Goldstein* and *Gusdonovich* demonstrate that such a question of fact does not alone mean that summary judgment must be denied. Like in *Gusdonovich*, Plaintiff did not have the freedom to handle the cases however he desired. Rather, the procedure, whether official or unofficial, resulted in Plaintiff merely applying skills and knowledge in carrying out his job duties. Further, the limitations to the types of claims Plaintiff handled are akin to the limits in *Goldstein*. Plaintiff handled only the most basic and lowest valued claims, using straightforward rules and procedures that Plaintiff was instructed to follow, so that any such discretion Plaintiff may have had was minimal at best and not enough to subject Plaintiff to the administrative exemption.

D. **The Administrative Exemption does not apply to Plaintiff because Plaintiff's primary duty did not consist of office or non-manual work directly related to management polices or general business operations.**

In order for the Administrative Exemption to apply, Defendant must be able to establish that Plaintiff's primary duty was "directly related to management policies or general business operations." 29 C.F.R. § 541.200(a)(1).

1. *Production employees are not exempt under the Administrative Exemption.*

As the regulations dictate, work "directly related to management policies or general business operations" must involve "the administrative operations of a business as distinguished from 'production.'" 29 C.F.R. § 541.205(a). *See also Wolfslayer v. Ikon Office Solutions, Inc.*, No. 03-6709, 2005 WL 181913 at *8 (E.D. Pa. Jan. 26, 2005) (adopting the "production/administration" dichotomy).

Ultimately an employee who participates in production is covered by the FLSA, whereas an administrative employee is potentially exempt. *See Martin v. Cooper Elec. Supp. Co.,* 940 F.2d 896 (3d Cir. 1991); *Wolfslayer v. Ikon Office Solutions, Inc.*, No. 03-6709, 2005 WL 181913, at *8 (E.D. Pa. Jan. 26, 2005)*;* See also *Renfro v. Ind. Mich. Power Co.*, 370 F.3d 512, 517 (6th Cir. 2004).

Under the administrative/production dichotomy analysis, the job of "production" employees "is to generate (i.e. 'produce') the very product *or service* that the employer's business offers to the public." *Renfro v. Ind. Mich. Power Co.,* 370 F.3d 512, 517 (6th Cir. 2004) (citing *Reich v. John Alden Life Ins. Co.,* 126 F.3d 1, 9 (1st Cir. 1997)) (emphasis added). Employees who engage in work that is "ancillary to an employer's principal production activity" are performing administrative duties. *Martin v. Cooper Elec. Supp. Co.,* 940 F.2d 896, 904 (3d Cir. 1991). Of particular importance in this determination of whether an employee participated in the administrative responsibilities, is whether the employee engaged in advising management. *Neary v. Metro. Prop. & Cas. Ins. Co.*, 517 F.Supp.2d 606, 615 (D. Conn. 2007) (citing *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1069 (9th Cir. 1990)). In fact, this factor is "crucially important" in the determination. *Id*. Such advisement includes "policy determinations, i.e., how a business should be run or run more efficiently, not merely providing information in the course of the [employer's] daily business operation." *Id*. (alteration in original).

2. *Claims Examiners, including Plaintiff, performed production services not administrative duties.*

Defendant's own corporate representative described the primary products and/or services that Defendant provides to be: "putting the customer back in the position where they were before [a] loss." (Benecke Dep., 89:13-17). In fact, Defendant stated this was one of the most important services, which it provided to the marketplace. (*See* Benecke Dep., 89:11-20). According to Defendant, the claims examiners were responsible for carrying out this job duty. (Benecke Dep., 89:11-20). As a Fast Track Auto Claims Examiner, Plaintiff's job responsibility was to perform the exact service that Defendant produced to the public and cannot possibly be considered "administrative." *Id*. Consequently, Plaintiff participated in production and not administrative duties.

Further, at no point has Plaintiff ever engaged in any form of management advisement. (Benecke Dep., 44:17-49:10). Even in the course of Defendant's extensive discussion of Plaintiff's primary job duties, Defendant made no mention of any management role or advisory role that Plaintiff undertook. *Id*.

VI.
CONCLUSION

Plaintiff has demonstrated that the FLSA applies to his overtime hours. Therefore, Plaintiff is entitled to overtime compensation unless an exemption applies. The burden of demonstrating that each element of the narrowly construed Administrative Exemption applies falls on Defendant. Because Defendant will be

unable to meet this heavy burden, Plaintiff respectfully requests that this Court grant its Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2013, I served a copy of this Motion for Summary Judgment and Brief in Support on counsel for Defendants via the Court's CM/ECF system.

/s/ Jessica Cohen