**Nos. 14-2111, 14-2114**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SAMUEL CALDERON, *et al.*,

Plaintiffs-Appellees-Cross-Appellants,

v.

GEICO GENERAL INSURANCE CO., *et al.*,

Defendants-Appellants-Cross-Appellees.

*On Appeal from the United States District Court*
*for the District of Maryland*
*District Court No. 8:10-cv-01958-RWT*

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## CORPORATE DISCLOSURE STATEMENT

GEICO General Insurance Company is a wholly owned subsidiary of Government Employees Insurance Company, which is a wholly owned subsidiary of GEICO Corporation, which in turn is indirectly wholly owned by Berkshire Hathaway, Inc., a publicly traded company. No other publicly traded entity has a financial interest in the outcome of this matter.

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## JURISDICTIONAL STATEMENT

The district court had jurisdiction under 29 U.S.C. § 216(b) and entered final judgment on October 9, 2014. Supp. JA 1. Appellants GEICO General Insurance Company and Government Employees Insurance Company (collectively "GEICO") filed a timely notice of appeal on October 10, 2014. Supp. JA 7. Plaintiffs-Appellees Samuel Calderon, *et al*. filed a notice of cross-appeal on October 10, 2014. Supp. JA 9. This Court has jurisdiction under 28 U.S.C. § 1291.[1]

## STATEMENT OF THE ISSUE

Whether insurance fraud investigators, who independently investigate and make written findings concerning suspected insurance fraud for purposes of claims adjustment, loss control, and legal compliance, are administrative employees exempt from overtime under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(a).

## INTRODUCTION

Plaintiffs are a group of GEICO insurance fraud investigators that have brought a 39-member FLSA collective action headed by Samuel Calderon and a 71-member class action under New York labor law headed by opt-in plaintiff

[1] Prior cross-appeals were dismissed on the ground that the district court had not entered a final judgment because the judgment did not fix the amount of damages. 754 F.3d 201 (4th Cir. 2014). That problem has been corrected.

Thomas Fitzgerald. Although they specialize in investigating and detecting whether insurance claims are fraudulent for purposes of claims adjustment, loss control, and legal compliance, Plaintiffs claim that they fall outside the FLSA's administrative exemption from overtime. That is a question of first impression in this Circuit. The Sixth Circuit, however, has held that insurance fraud investigators materially indistinguishable from Plaintiffs qualify for the administrative exemption. *Foster v. Nationwide Mut. Ins. Co.*, 710 F.3d 640 (6th Cir. 2013).

Whether one accepts the district court's downplayed characterization of the investigators' duties or examines the broader summary judgment record (especially the uncontroverted evidence of Plaintiffs' own reports), GEICO's investigators meet the exemption criteria as a matter of law: (1) their salaries exceed the regulatory threshold; (2) their primary duty involves "administrative work," *i.e.*, "office or non-manual work directly related to the management or general business operations of" GEICO; and (3) that work "includes the exercise of discretion and independent judgment with respect to matters of significance." The only element the district court found lacking was the "matters of significance" portion of the third prong. But no one disputes that fraudulent claims are a matter of significance to GEICO. And there can be no genuine disagreement that GEICO's investigators share all the material duties of the fraud investigators whose work was found to

concern fraudulent claims in *Foster*. Both groups were instructed to make "factual and not opinionated" findings relating to fraud; the purpose of their investigations was to "resolv[e] *** indicators of fraud"; they communicated any conclusion regarding suspected "legitimacy or illegitimacy of suspicious claims"; and the "facts developed *** during their investigations have an undisputed influence on [the company's] decisions to pay or deny insurance claims." 710 F.3d at 648-650.

The undisputed facts in this case compel the conclusion that GEICO investigators are exempt—or, at a minimum, viewing the evidence in the light most favorable to GEICO, require that the district court's grant of summary judgment to Plaintiffs be vacated.

## STATEMENT OF THE CASE

### A. Statutory and Regulatory Framework

The Fair Labor Standards Act exempts from overtime any employee employed in a bona fide administrative capacity, as that term is "defined and delimited from time to time by regulations of the Secretary" of Labor. 29 U.S.C. § 213(a)(1). Congress exempted such administrative employees because "the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week," thus "precluding the potential job expansion intended" by the overtime premium. 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004) (describing legislative history); *see Christopher v.*

*SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162 (2012) (discussing similar purpose for outside-salesman exemption).

The FLSA's administrative exemption requires: (1) that an exempt employee be paid a salary of at least $455 per week, (2) that the employee's primary duty be administrative work, defined as "office or non-manual work directly related to the management or general business operations of the employer," and (3) that the employee's primary duty "includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200; *see also Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 691 (4th Cir. 2009) (describing the regulatory "three-part test").

The regulations go on to describe administrative work as work "directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a). Administrative work "includes, but is not limited to" functional areas such as auditing, insurance, quality control, research, government relations, and legal and regulatory compliance. *Id.* § 541.201(b). The regulations specifically identify adjusting insurance claims as an administrative function. *Id*. § 541.203(a).

The regulations further provide that 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). Factors indicating the requisite exercise of judgment regarding matters of significance include "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," and "whether the employee investigates and resolves matters of significance on behalf of management." *Id.* § 541.202(b).

"The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action." 29 C.F.R. § 541.202(c). Thus, employees "can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level." *Id.*

The activities of insurance adjusters in "interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates"; and "evaluating and making recommendations regarding coverage of claims" satisfy the duties tests for the exemption. 29 C.F.R. § 541.203(a).

The regulations do not require that the exercise of discretion and independent judgment with respect to matters of significance constitute a majority of the employee's work or even be regular and customary. The requirement is

"that the primary duty must 'include' the exercise of discretion and independent judgment—rather than 'customarily and regularly' exercise discretion and independent judgment." 69 Fed. Reg. at 22,142-22,143; *Robinson-Smith v. GEICO*, 590 F.3d 886, 894 (D.C. Cir. 2001) (holding "sporadic" total loss negotiations "20 times per year" satisfied the requirement that claims adjusters' primary duty "include[]" the exercise of discretion, even if "the vast majority of the adjusters' work" did not) (alteration in original); *Clark v. J.M. Benson Co.*, 789 F.2d 282, 285 n.1 (4th Cir. 1986) (employees need not meet the "more stringent" requirement that they "'customarily and regularly' exercise discretion and independent judgment").

That "many employees perform identical work *** does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.202(d).

New York regulations incorporate by reference the federal exemption. N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2 (2013); *see Gorey v. Manheim Servs. Corp.*, 788 F. Supp. 2d 200, 205 (S.D.N.Y. 2011) ("New York law governing overtime pay is defined and applied in the same manner as the FLSA.").

### B. The Fraud Investigation Function

#### *1. The nature of the fraud problem*

Fraud is a major problem in the insurance industry. JA 120 ¶ 2. The Insurance Information Institute estimates that 10% of claims payments are for fraudulent claims, at a cost of $32 billion per year for the industry as a whole. Insurance Information Institute, Insurance Fraud (Oct. 2014), http://www.iii.org/issues_updates/insurance-fraud.html.[2] At GEICO, insurance claim fraud takes many and varied forms, including staged accidents, excessive medical treatment, excessive billing for medical treatment, billing for medical treatment not provided, arson, auto body shops enhancing damage or overbilling, false reports of theft, false reports of the cause of an accident, false reports of the date of an accident, false claims of injury, false claims of lost wages, and false property damage claims. JA 121 ¶ 7, 441, 465, 472-474, 540-541, 575, 860. Organized fraud rings are often involved in staged accidents and fraudulent medical billing. JA 121 ¶ 7.

Twenty-two jurisdictions, including Maryland, require insurance companies "to set up a specific program that identifies insurance fraud." Insurance Information Institute, Insurance Fraud, *supra*. Most insurers have established special investigation units ("SIUs") to address fraud, and those "SIUs dramatically

[2] Permanent link available at http://perma.cc/XPP7-CYRA.

impact the bottom line of many companies" by materially reducing the amount of fraudulent claims paid. *Id.* Forty-three states require insurance companies to report fraudulent claims to fraud bureaus. Coalition Against Insurance Fraud, State Insurance Fraud Statutes, http://www.insurancefraud.org/statutes.htm (last visited Jan. 12, 2015).

***2. GEICO's fraud investigators***

GEICO is "in the business of providing insurance to its policyholders." JA 79 (Op. 2). When GEICO receives a claim, it is handled by the Claims Department, which includes claims adjusters and Special Investigations Unit investigators. JA 79-80 (Op. 2-3). Claims department personnel refer suspicious claims to SIU investigators to determine the veracity of the claims. JA 80-81 (Op. 3-4); *see also* JA 120 ¶ 2.

About half of the SIU investigators are former claims adjusters; the other half consists of former law enforcement officers. JA 121 ¶ 4. Investigators handle approximately 165 investigations annually. JA 121 ¶ 3.

Investigators work in the presence of their supervisors only a few days per year, JA 124 ¶ 24, 834, 1118, and typically work out of their homes. JA 80 (Op. 3), 416, 837. Their hours vary based on the location and logistics of interviewing witnesses in the field. JA 845-846. Because each claim is different, no manual dictates what specific investigative steps to take for any particular claim, the order

in which witnesses should be interviewed, how to approach interviews and formulate follow-up interview questions, how to obtain a withdrawal of a claim, or, most importantly, what finding is warranted in any given situation. JA 123 ¶ 22.

***3. Planning and conducting the investigation***

Many investigations are referred from a claims adjuster or an intake associate in the Claims Department. JA 80-81 (Op. 3-4). Investigators can also initiate an investigation through a self-referral if they identify a claim that, in their judgment, merits further analysis. JA 121 ¶ 6. An investigator might self-refer a case, for example, because it would assist with a broader National Insurance Crime Bureau investigation, Joint Sealed Appendix ("JSA") 95 no. 3, or because the investigator received information from a source that called other claims into question, JA 74 no. 9 (documenting self-referral based on learning that a chiropractor was involved with several suspect clinics).

Once a matter is referred, an investigator "create[s] a plan of action" for the investigation, detailing "'what activities [he] need[s] to perform in order to investigate the particular circumstances of that particular case.'" JA 81 (Op. 4) (first alteration added; citation omitted). As Plaintiff Calderon testified, "[t]here are a lot of ways of proving fraud." JA 472. The investigative plan must be tailored to fit the facts and context of the individual case and the nature of the suspected fraud. JA 450. Investigators adjust those plans as needed as the

investigation progresses, and expand the scope of the investigation when necessary. JA 448, 943-944.

In conducting the investigation, the investigator "interviews witnesses, takes photographs, and reviews property damage, among other evidentiary-gathering procedures." JA 82 (Op. 5). The investigator may also conduct background checks, review medical files, consult with auto damage adjusters, confer with law enforcement officers, and conduct and review surveillance. JA 419-421, 464, 485, 591, 850, 862-863, 884-885, 963, 966-967.

A central part of investigating is interviewing policyholders, claimants, and other witnesses, in person if possible. JA 420-421, 963. As Plaintiff Calderon testified, "[e]very interview is different," and each case requires questions and tactics tailored to the situation. JA 427-428. The investigator must choose which witness to interview first, when and where to approach the witness, what demeanor to present in the interview, whether to ask open-ended or leading questions, and whether to disclose what he has already learned. JA 420-421, 457, 459, 538-539, 895, 948-952. As Plaintiff Fitzgerald testified, an investigator sometimes "might come across [as] Mr. Nice Guy, or maybe there is a time you do an interview you can't be too nice asking questions." JA 952.

Although there are lists of potential interview questions for certain types of fraud, those provide limited guidance because, as Plaintiff Fitzgerald

acknowledged, "sometimes you get cases where you really can't have a format." JA 876-877. They are often just a starting point for an interview because, as Fitzgerald further explained, "[y]ou don't know what they are going to come up with, what they are going to say." JA 878. The investigators formulate on-the-spot follow-up questions based on the answers given to initial questions and analyze body language to evaluate whether the witness is being deceptive. JA 534, 892. As Calderon put it, "[y]ou watch their eyes." JA 486.

Investigators may also decide to "interview an insurance claimant in a more formalized face-to-face interview called an examination under oath," JA 82 (Op. 5), which is similar to a deposition, JA 923. The witness is questioned under oath, and a court reporter is present to create a formal record. JA 195-196. The purpose is to obtain information, "evaluate the insured as a witness," and "preserve testimony." JA 82 (Op. 5). As Calderon described it, these examinations "engage the investigator in a detailed question and answer session that takes a mental toll on the investigator all the while maintaining a professional demeanor." JA 137. The investigator must navigate a careful line between obtaining necessary information and becoming so aggressive as to risk a bad faith claim against GEICO. JA 483.

The investigators decide when their investigations are complete. JA 447. In some cases, an investigator obtains a withdrawal of the claim during the interview

(or examination under oath) by confronting the claimant with the evidence contradicting the claimant's version of events and presenting him with a withdrawal form. JA 135, 430, 452, 968, JSA 26-39.

***4. Determining and reporting findings***

At the close of the investigation, the investigator prepares a closing report setting forth "the investigators findings regarding the suspected insurance fraud and the basis for their findings." JA 81 (Op. 4). The investigator also calls the claims adjuster "to discuss his initial findings," JA 83 (Op. 6), 904, and tells the adjuster if he "verified the facts of the loss, or the facts of the loss don't add up." JA 904. The investigator tells the adjuster whether the claimant "seemed like [he was] telling the truth," was giving the "Partial truth," or was a "Complete liar." JA 956-957.

The guidance given to investigators contains examples of the types of findings that an investigator might including in the written report, such as:

- "[I]t was determined that the vehicle was not stolen but driven to a remote location, by the insured, and intentionally burned, rendering it a total loss." JSA 167.
- "[I]t has been determined that the loss occurred as the insured initially reported. Therefore, it is recommended that the claim be settled on its merits." JSA 180.

Investigators are instructed that, "if [you] include any conclusions or recommendations," they must "be totally substantiated by the information ***

listed in the body of the report." JA 83 (Op. 6), JSA 180. This means that an investigator's "'speculations and things like that are not appropriate,'" and "'that [an Investigator's] conclusions *** and recommendations need to be based on the facts and evidence that allows [the Investigator to] make this conclusion.'" JA 83 (Op. 6) (alterations in original; citation omitted). Investigators are further instructed to "quote any applicable policy language and/or state or local laws that would add credence to your assertions or to any inferences you draw from the investigation." JSA 180.

Consistent with that emphasis on substantiated findings, a manual instructed that reports must be "'based upon objective findings'" and therefore "'free of innuendoes, opinions or rumors.'" JA 83 (Op. 6) (citation omitted). A PowerPoint presentation for investigators concerning report writing defined "fact" as "something that can be proven" and "opinion" as "a personal belief or judgment shared by many." JA 157. An SIU supervisor testified that opinions "should be in [the report] if they are supported by the facts; and no, they should not be in there if they're not supported, if they are just a non-supported opinion." JA 1172. A regional manager for the unit likewise attested that reports should include "not just the facts of what [the investigators] found, but *** what they believe actually took place." JA 783. And another supervisor testified that the investigators' job is "not just to gather information, but *** to analyze it, interpret the data, *** fact-find

this information, and report the facts and their judgments to the claims adjuster." JA 1045.

As Calderon put it in a self-evaluation of his performance, he "detected [the] fraud and was able to prove the fraud." JA 479. Fitzgerald testified that "[t]he only thing I can put down, I found fraud or I didn't find fraud." JA 909-910. Plaintiffs' own investigation reports confirm that investigators make findings regarding fraud. For example:

- Claimant's "description of his daily treatments do not appear to be normal flow of treatments. His time frame is also excessive which does not appear to be reasonable." JSA 53.
- "Investigation revealed that fraud was found in this investigation in that the supplies GEICO was billed for were not received by the claimant." JSA 40.
- "Investigation revealed there are fraud indicators present and this is a caused accident." JSA 46.
- "Investigation revealed that at this time no fraud indicators have been found and the insured appeared credible. I suggest the examiner handle this claim on its merits." JSA 44.

The investigators' determinations are often based on credibility resolutions. JA 714-715. As a management witness testified, investigators are "asked to judge the person's credibility during the interview." *Id.* For example, Plaintiffs Calderon's and Fitzgerald's reports explained:

- "I conducted the [examination under oath] and found _____ less than candid in his responses ***. It was quite evident that _____was unable to provide a more reasonable reason for his injuries." JSA 11.[3]

- Claimant "appeared to be hiding something." JSA 16.

- "I did not find the claimant to be credible and he appeared to be receiving excessive treatment if in fact he is receiving it at all." JSA 21.

- "The insured and the last driver of the vehicle were found NOT credible during the [examinations under oath] that were conducted by me." JSA 23.

Other investigators' reports included similar conclusions with respect to suspected fraud:

- "The second claim *** appears to have been the result of an actual robbery." JA 73 no. 6.

- "After interviewing the insured it appears the loss occurred as reported by the insured." JA 74 no. 15.

- "Based on the information collected to date, it would appear that the insured lost control of the insured vehicle AFTER the alleged phantom vehicle and the resulting crash caused the insured['s] injuries. Thus, [uninsured motorist coverage] would not apply. An underwriting referral was made and this policy has been cancelled." JA 75 no. 19.

- "I believe the facts of the loss may have been manufactured to solicit funds to repair a mechanical breakdown issue." JA 76 no. 27.

- Investigator "determine[d] that insured's vehicle was not involved in this loss" and claimant "misrepresented the facts." JSA 96 no. 9.

- "The totality of the circumstances revealed during our investigation indicates the claim did not occur as alleged." JSA 97 no. 15.

- "The investigation revealed that the claim is a Staged/Caused Accident and the facts of the loss are consistent with a pattern operation." JSA 105 no. 74.

[3] Underlined blank spaces represent names that have been redacted to protect privacy.

Once completed, the investigator often "submits the report to a supervisor for review." JA 83 (Op. 6). Some investigators, however, have self-approval authority over their interim and final reports and need not submit them for approval. *Id*. Beyond grammar and formatting, substantive changes are rare. JA 122 ¶ 14. Only 5 out of 157 closing reports submitted by Calderon (3%) and 3 out of 138 closing reports submitted by Fitzgerald (2%) during a sample year were returned with a substantive suggestion. JSA 1, 2-6.

The record contains two large compilations of quotations from the investigators' closing reports. The first compilation is drawn from a randomly selected sample of 100 closing reports submitted by the opt-in plaintiffs. JA 73-77. The second compilation was drawn from a sample of 676 reports, which contained all reports filed by investigators (including plaintiffs and non-plaintiffs) during a specific week. JSA 95-114. These examples document that the investigators routinely reach conclusions such as "not believable," "misrepresented the facts," "did not occur as alleged," "treated excessively," "recommend that this claim be denied," "no evidence of insurance fraud," "staged accident," "exaggerated soft tissue injury," "valid loss," "reported as a deception," "not credible," "consistent and truthful," and "caught in several lies." *Id*.

### *5. Reliance upon fraud investigators' determinations*

Multiple GEICO components, as well as external organizations, rely upon the investigators' fraud findings in at least three ways.

*First*, the investigator provides the report to the claims adjuster and discusses his or her determinations with the adjuster. The "Claim Adjuster's decision on a claim is 'based on essentially what the [I]nvestigator tells them.'" JA 85 (Op. 8) (alteration in original). Typically, the adjusters do not read the whole report, JA 133 ¶ 27, 781, and the adjusters lack access to the portion of the investigation file where the investigators store evidence, JA 85 (Op. 8), 122 ¶ 18. Accordingly, the report summary must allow claims adjusters "to quickly evaluate the investigator's findings without having to review the entire document." JA 218.

*Second*, where the investigation reveals a problem with the policyholder, the investigator may make a referral to underwriting describing the problem. JA 886-887, 910, 978. Plaintiffs Calderon and Fitzgerald alone made 118 underwriting referrals during sample years. JA 136, JSA 92-94. The referrals included findings regarding fraud and credibility determinations, such as:

- There "would be no way her chest could hit the steering wheel. Both appeared to be unresponsive with their answers and unable to remember simple facts." JSA 88 No. 673120.
- "It appears that the policy was continued by ____ under false pretenses." JSA 91 No. 658511.
- "Insured was found NOT credible during investigation." JSA 92 No. 582057.

- "Insured submitted fraudulent claim and is part of a property damage ring with other false claims." JSA 92 No. 600068.
- "Insured did submit a FALSE claim to GEICO and after an interview has withdrawn the claim." JSA 93 No. 610497.

*Third*, when the investigator concludes that there is sufficient evidence of fraud, he has the authority to refer the claim to the National Insurance Crime Bureau and/or state and local law enforcement authorities. JA 84 (Op. 7), 467, 881. Investigators do not require supervisory approval to make such referrals. JA 84 (Op. 7), 123 ¶ 19. Claims adjusters, however, may not make such referrals and lack input into referral decisions. JA 84 (Op. 7). In many instances, after a referral is made, the investigator will receive a call from the Bureau agent to explain and elaborate upon his findings. JA 882. In addition, investigators call law enforcement officials directly to discuss and develop particular investigations. JA 474-475, 496-497, 886. Plaintiffs Calderon and Fitzgerald made 161 National Insurance Crime Bureau and law enforcement referrals in sample years, JA 123 ¶ 20, 136, providing information like:

- "Claimants receiving excessive treatment." JSA 83.
- "Fraudulent billing for medical supplies not received by claimant." JSA 86.
- "Submitted fraudulent NF 2 [claim under a no-fault policy]." JSA 82
- "Fraudulent property damage claim." JSA 84.

Investigators' coordination with law enforcement is not limited to particular investigations. It involves ongoing efforts to prevent and deter fraud, including

attending meetings with law enforcement agencies and other insurers to exchange intelligence concerning efforts to detect and combat organized fraud rings. JA 80 (Op. 3), 436-437, 843-845.

### C. The District Court's Decisions and Initial Appeal

The parties filed cross-motions for summary judgment on liability, and the district court granted Plaintiffs' motion. The district court agreed with GEICO that Plaintiffs met the first two criteria for the administrative exemption: it found that Plaintiffs' salary qualifies for exempt status, JA 88 (Op. 11), and that the type of work performed by investigators is administrative in nature, JA 88-96 (Op. 11-19). With respect to the third criterion, the district court ruled that investigators exercise discretion and independent judgment, JA 98-99 (Op. 21-22), but determined that the discretion and judgment "does not bear on matters of significance." JA 99-102 (Op. 22-25). Drawing from two district court cases from Minnesota, the district court stated that investigators must "omit all opinions from their written reports." JA 100 (Op. 23). The court concluded that "the fact that Investigators note that certain claims could be fraudulent" does not mean their discretion bears on matters of significance. JA 102 (Op. 25).

The district court later decided cross-motions for summary judgment on four disputed remedy issues, holding that (1) liquidated damages would not be awarded under 29 U.S.C. § 260 and New York law because GEICO acted reasonably and in

good faith; (2) the FLSA statute of limitations is two years under 29 U.S.C. § 255 because there was no willful violation; (3) backpay for the FLSA and New York law claims would be computed under *Overnight Motor Transportation v. Missel*, 316 U.S. 572 (1942); and (4) no pre-judgment interest would be awarded under the FLSA and New York law. JA 105-108 (Remedy Op.).

The parties filed cross-appeals, which this Court dismissed for lack of jurisdiction on the ground that the district court's provision of a formula for calculating backpay damages (rather than the final amount of damages) was insufficient to constitute a final judgment. 754 F.3d 201 (2014). On remand, the district court entered final judgment after a final damages award for each Plaintiff was computed. Supp. JA 1. This appeal followed.

## SUMMARY OF ARGUMENT

The district court agreed that GEICO's investigators met two-and-a-half of the three requirements for exempt status: their salaries exceeded the minimum, they performed administrative work, and their primary duty included the exercise of discretion and independent judgment. JA 87-99 (Op. 10-22). The district court's decision that the investigators are not exempt thus rests entirely on its conclusion that the investigators' work does not bear on matters of significance—apparently because, although they "note that certain claims could be fraudulent," they lack final authority to pay or deny the claim. JA 102 (Op. 25).

But identifying fraudulent claims is a matter of great significance to the company's business operations. The district court's decision to the contrary conflicts with the Sixth Circuit's decision in *Foster v. Nationwide Mutual Insurance Co.*, 710 F.3d 640 (6th Cir. 2013), in which Nationwide's special investigators were found exempt from overtime based on materially indistinguishable facts. The Sixth Circuit unanimously held that the investigators' "primary duty to conduct investigations with the goal of resolving the indicators of fraud," even where they make only recommendations concerning "the legitimacy or illegitimacy of suspicious claims" rather than binding claims decisions, "includes the exercise of discretion and independent judgment with respect to matters of significance." *Id*. at 650. Just as in *Foster*, the adjusters here rely heavily upon the investigators' factual findings regarding fraud, including any recommendations regarding whether a claim is fraudulent. That renders those findings highly significant, even under the district court's constricted characterization of their duties. In cases involving the exempt status of claims adjusters, courts of appeals have repeatedly confirmed that identifying potentially fraudulent claims entails the exercise of discretion with respect to matters of significance.

Because the district court's legal conclusion is wrong even accepting its recitation of the facts, this Court can reverse and direct judgment for GEICO

without resolving whether the investigators determine whether claims are fraudulent. But the summary judgment record decisively favors GEICO on that latter ground as well. Even when the record is viewed in the light most favorable *to Plaintiffs*, it is undisputed that the investigators' reports, including those of the named Plaintiffs, involved determinations regarding the presence or absence of fraud. No reasonable factfinder could conclude that the investigators did not report their independent determinations regarding fraud indicators—to both GEICO claims adjusters and underwriters, as well as to outside regulatory and law enforcement authorities. At the very least, the record—with its uncontroverted examples of report after report in which the investigators reported conclusions regarding fraud—cannot sustain summary judgment for Plaintiffs when viewed in the light most favorable to GEICO.

## STANDARD OF REVIEW

"The determination of whether an employee falls within the scope of a FLSA exemption is ultimately a legal question." *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 450 (4th Cir. 2004); *see Icicle Seafoods Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("The question whether [the employees'] particular activities excluded them from the overtime benefits of the FLSA is a question of law."). The Court of Appeals reviews such questions of law *de novo*. *In re Beach First Nat'l Bancshares, Inc.*, 702 F.3d 772, 776 (4th Cir. 2012). This Court also reviews

*de novo* the district court's grant or denial of summary judgment regarding employees' exempt status. *Desmond*, 564 F.3d at 691.

When an appeal from a denial of summary judgment is raised in tandem with an appeal of an order granting a cross-motion for summary judgment, the court has jurisdiction to review the propriety of the denial of summary judgment. *Monahan v. County of Chesterfield, Va.*, 95 F.3d 1263, 1265 (4th Cir. 1996) (reversing grant of summary judgment to plaintiffs in FLSA case and granting summary judgment for the defendant). That requires this Court to "apply the same test the district court should have utilized initially." *Id.* "[W]here, as here, the facts are uncontroverted," and "the record taken as a whole could not lead a rational trier of fact to find" in favor of Plaintiffs, this Court is "free to enter an order directing summary judgment in favor of the appellant." *Id.*

Where (unlike here) ambiguous, the FLSA's overtime exemptions are to be "narrowly construed." *Desmond*, 564 F.3d at 692; *see Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1177-1178 (7th Cir. 1987) ("[G]eneralizations about interpretation, such as that exemptions from remedial statutes should be narrowly construed, are at best tie-breakers (and not even that, if some offsetting 'canon of construction' is in play, as normally there will be).") (citation omitted). In this Circuit, in cases of disputed facts, the employer bears "the burden of proving, by clear and convincing evidence," that an employee qualifies for an FLSA

exemption. *Desmond*, 564 F.3d at 691. Application of the "clear and convincing" standard in this context is inappropriate and conflicts with the law of every other circuit to consider the question.[4]

It is particularly inapposite here, when applied to questions of law at the summary judgment stage. As a standard of proof, "clear and convincing" "refer[s] to the degree of certainty by which the factfinder must be persuaded of a factual conclusion to find in favor of the party bearing the burden of persuasion." *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245 n.4 (2011). An "evidentiary standard of proof applies to questions of fact and not to questions of law." *Id.* at 2253 (Breyer, J., concurring); *see Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 506 (7th Cir. 2007) ("The plaintiffs' contention that the defendant must prove its entitlement to the exemption by 'clear and affirmative evidence' is therefore irrelevant; for evidence is used to resolve factual disputes, and there are none in this case.").

[4] *See, e.g.*, *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1158 (10th Cir. 2012) ("[T]he ordinary burden of proof—preponderance of the evidence—controls *** whether the facts establish an exemption to the FLSA."); *Foster*, 710 F.3d at 642 ("preponderance of the evidence"); *Meza v. Intelligent Mexican Mktg., Inc.*, 720 F.3d 577, 581 (5th Cir. 2013) (same).

## ARGUMENT

### GEICO FRAUD INVESTIGATORS QUALIFY FOR THE ADMINISTRATIVE EXEMPTION

Based on uncontroverted evidence from the summary judgment record below, GEICO's fraud investigators satisfy all three criteria for the administrative exemption from the FLSA's overtime requirement. The district court's only disagreement is its flawed legal determination that the discretion and independent judgment concededly exercised by GEICO's investigators does not concern "matters of significance." As Plaintiffs' own reports confirm, however, GEICO investigators resolve whether suspicious claims are fraudulent and make independent referrals to outside agencies. That the investigators do not make the final decision whether to pay or deny a claim does not change the conclusion that their investigations concern matters of significance under the settled law of the Department of Labor and other circuits.

### I. The Investigators Satisfy The Salary Requirement.

It is undisputed that Plaintiffs meet the salary test for the administrative exemption because they make more than $455 per week ($23,660 per year). JA 88 (Op. 11). Named Plaintiff Calderon was hired in 2009 at a salary of $45,000 per year. JA 406-407. Class representative Fitzgerald was hired in 2000 at $37,000 per year. JA 823, 828. Although "salary alone is not dispositive under the FLSA," the Court of Appeals has recognized "that the 'FLSA was meant to protect low

paid rank and file employees' and that '[h]igher earning employees *** are more likely to be bona fide managerial employees.'" *Darveau v. Detecon, Inc.*, 515 F.3d 334, 338 (4th Cir. 2008) (alterations in original) (citation omitted).

## II. The Investigators Satisfy The "Administrative Work" Requirement.

The district court correctly held that the investigators' work is administrative in nature because it is part of GEICO's claims function. JA 96 (Op. 19). Administrative work is work "directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line." 29 C.F.R. § 541.201(a). Because "the [Department of Labor] regulations and case law deem claims adjusting to be administrative work, it follows that investigative services performed in direct furtherance of claims adjusting efforts is administrative work, as well." JA 96 (Op. 19) (quoting *Foster v. Nationwide Mut. Ins. Co.*, 695 F. Supp. 2d 748, 758 (S.D. Ohio 2010)).

The regulation expressly denominates claims adjusting as an administrative function. 29 C.F.R. § 541.203(a). The investigators indispensably support that function by investigating claims that the adjusters suspect of being fraudulent and resolving those suspicions. For that reason, performance of those investigative services "satisfies the second element of the administrative exemption." *Foster*, 710 F.3d at 646. GEICO investigators, moreover, perform work that is specifically

described, in the regulations and in federal appellate decisions, as exempt when performed by adjusters. *See* 29 C.F.R. § 541.203(a); *see also, e.g.*, *Robinson-Smith v. GEICO*, 590 F.3d 886, 897 (D.C. Cir. 2010) (exempt adjusters "evaluate and make recommendations regarding evidence of preexisting damage and indicia of fraud"); *Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 874 (7th Cir. 2008) ("evaluate whether the damage is likely preexisting, inconsistent with the alleged cause, or otherwise suspicious" and "be on the lookout for fraud when interviewing the claimant and any witnesses"); *In re Farmers Ins. Exch. Litig.*, 481 F.3d 1119, 1129 (9th Cir. 2007) ("advise FIE regarding any fraud indicators"). The nature of the work and its relationship to GEICO's overall business purpose do not change when the same tasks are assigned to investigators instead of adjusters.

In addition, the investigators' work is similar to some of the functional areas listed in the regulations as examples of administrative work, such as "auditing," "government relations," "quality control," and "legal and regulatory compliance." 29 C.F.R. § 541.201(b); see *Foster*, 710 F.3d at 645 ("[A]n insurance company's investigation of suspicious claims is similar to some of these functional areas."). In particular, the investigators' reports to the National Insurance Crime Bureau and law enforcement are part of GEICO's legal and regulatory compliance function. The investigators' work can also be classified as a loss prevention function, which the Department of Labor has concluded is an administrative function that "directly

relates to the functional areas of accounting, auditing, and quality control." Opinion Letter FLSA2006-30, 2006 WL 2792444, at *3 (Dep't of Labor Sept. 8, 2006).

To the extent the regulatory definition sets up a dichotomy between work relating to "management or general business operations" and that relating to "production," 29 C.F.R. § 541.201(a), fraud investigation falls on the "administrative" side of the line. An "insurance company's product is its policies." *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 585 (5th Cir. 2006). Insurance fraud investigators do not produce, "write or sell insurance policies," and thus they "cannot be fairly characterized as 'production' employees." *Foster*, 710 F.3d at 645 (citation omitted); *see also Ahle v. Veracity Research Co.*, 738 F. Supp. 2d 896, 903 (D. Minn. 2010); 69 Fed. Reg. at 22,145 ("[C]laims adjusters are not production employees because the insurance company is 'in the business of writing and selling automobile insurance,' rather than in the business of producing claims."). Instead, the investigators' role in "claims adjusting work performed for an insurance company is ancillary to an insurance company's primary production activity" and therefore is an administrative function. *Foster*, 710 F.3d at 645.

In this regard, GEICO's fraud investigators are distinct from public sector law enforcement officers and first responders. By regulation, such public sector officers are non-exempt; that is *not* because their duties lack the required discretion

and independent judgment, but "because their primary duty is not the performance of work directly related to the management or general business operations of the employer." 29 C.F.R. § 541.3(b)(3). Rather than helping to administer the affairs of their departments, law enforcement investigators "produce" criminal investigations—the primary product of their employers. *See Reich v. New York*, 3 F.3d 581, 587-589 (2d Cir. 1993), *abrogated on other grounds by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59-66 (1996); *see also* 69 Fed. Reg. at 22,129. By contrast, because "GEICO Investigators do not underwrite or sell policies, they are likely not engaged in production work for GEICO." JA 93 (Op. 16).

## III. The Investigators Exercise Discretion And Independent Judgment With Respect To Matters Of Significance.

GEICO investigators satisfy the third prong of the test for administrative status because they (i) exercise discretion and independent judgment (ii) with respect to matters of significance to GEICO's business.

### A. Investigators Exercise Discretion and Independent Judgment.

The uncontested record shows that investigators (i) "create a plan of action" and conduct each investigation as it develops, (ii) interview claimants and witnesses, involving (*inter alia*) examinations under oath and strategic judgments about how best to ferret out needed information, (iii) make "findings regarding the suspected insurance fraud," and (iv) ensure that the "conclusions or recommendations" in their reports are "totally substantiated." JA 81, 83-85 (Op. 4,

6-8). In light of those discretion-laden activities, it is unsurprising that Plaintiffs conceded—and the district court found—that investigators exercise discretion and independent judgment. JA 98 (Op. 21).

That conclusion is well supported. The Department of Labor has recognized that investigations involve the exercise of discretion. *See* 29 C.F.R. § 541.202(b) ("whether the employees investigates and resolves matters of significance on behalf of management"); *id.* § 541.203(a) (providing that investigating insurance claims, *e.g.*, "interviewing insureds, witnesses and physicians" and "inspecting property damage" is exempt work when performed by claims adjusters); Opinion Letter FLSA2006-30, 2006 WL 2792444, at *4 (loss prevention manager exercised discretion in, among other things, "determining what internal investigations to pursue and when to conduct interviews, in ascertaining prosecutable cases, and in investigating harassment allegations").

Courts have likewise repeatedly recognized that investigations require the exercise of discretion and independent judgment. As the Sixth Circuit concluded in *Foster*, making "factual findings *** necessarily requires judgment and discretion" because it requires the use of "experience and knowledge of fraud to distinguish the relevant from the irrelevant, [and] fact from untruth." 710 F.3d at 648 (internal quotation marks omitted); *see also, e.g.*, *Cheatham*, 465 F.3d at 586 (claims adjusters exercised discretion in "conducting investigations" and

"determining the steps necessary to complete a coverage investigation," along with other tasks); *Mullins v. Target Corp.*, No. 09 C 7573, 2011 WL 1399262, at *7 (N.D. Ill. Apr. 13, 2011) (investigator for several retail stores "exercised independent judgment and discretion *** in planning out strategies and tactics for investigations"); *Jastremski v. Safeco Ins. Cos.*, 243 F. Supp. 2d 743, 757 (N.D. Ohio 2003) (claims adjuster "had discretion in deciding how to conduct the investigation, including gathering facts, interviewing witnesses, using field representatives, and compiling scene diagrams").

Fraud investigations require investigators to make judgment calls that take them beyond the mere "use of skill in applying well-established techniques *** described in manuals or other sources." 29 C.F.R. § 541.202(e). No manual instructs investigators what steps to take in an investigation, what credibility judgment or factual finding to reach in any given claim, or when to make a referral to law enforcement. Their work thus bears little resemblance to "formulaic background investigations into *** facts and records" where only the application of skill is required. *Foster*, 710 F.3d at 649 (distinguishing Department of Labor opinion letter concluding that "background investigators" did not exercise discretion and independent judgment with respect to matters of significance). There is no "well-established, specific and constraining standard in assessing the situations [an investigator] faces in his daily work." *Haywood v. North American*

*Van Lines, Inc.*, 121 F.3d 1066, 1073 (7th Cir. 1997), *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965, 967 n.1 (7th Cir. 2013). The "nature of fraud itself does not lend itself to a simple definition, or a one-size fits all set of parameters" that mechanically constrain investigators' work. *Foster v. Nationwide Mut. Ins. Co.*, No. 2:08-cv-020, 2012 WL 407442, at *27 (S.D. Ohio Jan. 5, 2012).

Additionally, GEICO's investigators exercise discretion and independent judgment in making referrals to law enforcement or to the National Insurance Crime Bureau. JA 84 (Op. 7). *See Foster*, 2012 WL 407442, at *27 ("The Court further holds that the SIs' referral of claims to law enforcement and the [National Insurance Crime Bureau] constitutes the exercise of discretion and judgment with respect to a matter of significance."); *see also Shockley v. City of Newport News*, 997 F.2d 18, 28 (4th Cir. 1993) (officer who investigated complaints against other officers and made recommendations on discipline found exempt); *Dymond v. United States Postal Serv.*, 670 F.2d 93, 95 (8th Cir. 1982) (postal inspectors' determinations "whether an alleged postal violation warrants prosecution or is a minor technical violation which should not be presented to the United States Attorney" required exercise of discretion); *Mullins*, 2011 WL 1399262, at *7 (investigator exercised discretion when she "made an initial determination concerning whether a case was ready to present to law enforcement and where (to which agency) to take the case"); Opinion Letter FLSA2006-30, 2006 WL

2792444, at *4 (retail store's loss prevention managers exercise discretion and independent judgment in "ascertaining prosecutable cases").

### B. The Investigators' Discretion and Independent Judgment Concern Matters of Significance.

The term "'matters of significance' refers to the level of importance or consequence of the work performed." 29 C.F.R. § 541.202(a). The investigators' work—integral to GEICO's adjustment of insurance claims suspected of being fraudulent—is of critical importance to GEICO. No aspect of an insurance claim is more significant than whether or not it is fraudulent. That determination controls not only whether the claim will be paid or denied, but also whether the claimant will be referred to law enforcement for possible prosecution. From a financial standpoint, fraudulent claims are especially significant because they give rise to avoidable, wrongful losses that measurably impact the business. *See Foster*, 710 F.3d at 648 ("Paying insurance claims is central to Nationwide's business, and payment of fraudulent claims would threaten to make the company less competitive in its industry."). The investigators' pivotal role in avoiding those losses demonstrates that their judgments concern a matter of significance. It is equally significant to determine that a suspicious claim is not fraudulent, so that GEICO can satisfy its contractual and statutory obligation to pay valid claims. *See* Opinion letter FLSA2002-11, 2002 WL 32406601 (Dep't of Labor Nov. 19, 2002) (recognizing significance of avoiding liability for bad-faith denial of a claim).

### *1. The district court's description of the investigators' duties establishes GEICO's entitlement to summary judgment.*

*a.* As the district court recognized, GEICO's investigators make "findings regarding the suspected insurance fraud." JA 81 (Op. 4). According to the district court, those findings include, *at the very least*, "find[ing] facts that tend to support or contradict the suspicion identified" and "not[ing] that certain claims could be fraudulent." JA 102 (Op. 25). The adjusters, in turn, rely extensively on those findings, because their "decision on a claim is 'based on essentially what the [I]nvestigator tells them.'" JA 85 (Op. 8) (alteration in original).

In *Foster*, the Sixth Circuit held that the same duties involved the exercise of discretion and independent judgment with respect to matters of significance. The fraud investigators in *Foster*, too, were instructed to hew to "factual and not opinionated" and "objective" conclusions when they made "factual findings." 710 F.3d at 648. They conducted their investigations with the "purpose or goal of resolving indicators of fraud," *id.* at 643, but communicated any conclusions regarding the suspected "legitimacy or illegitimacy of suspicious claims" only "informally." *Id.* at 650. The "facts developed by the [investigators] during their investigations have an undisputed influence on Nationwide's decisions to pay or deny insurance claims." *Id.* at 648. Accordingly, the investigators' "primary duty to conduct investigations with the goal of resolving the indicators of fraud includes

the exercise of discretion and independent judgment with respect to matters of significance." *Id.* at 650.

Other federal appellate courts have repeatedly found, in cases involving claims adjusters, that noting claims as suspicious satisfies the "matters of significance" test. *See, e.g.*, *Robinson-Smith*, 590 F.3d at 897 ("evaluate and make recommendations regarding evidence of preexisting damage and indicia of fraud"); *Roe-Midgett*, 512 F.3d at 874 ("evaluat[ing] whether the damage is likely preexisting, inconsistent with the alleged cause, or otherwise suspicious" and "be[ing] on the lookout for fraud when interviewing the claimant and any witnesses" are "judgment calls with respect to matters of significance"); *In re Farmers*, 481 F.3d at 1129 ("interview the insured and assess his (or others') credibility" and "advise FIE regarding any fraud indicators or the potential for subrogation and underwriting risk").

The judicial decisions are supported by the regulation. The regulation's provision that claims adjusters are generally exempt from overtime, 29 C.F.R. § 541.203(a), means that claims in general are a matter of significance to an insurance company. The investigative tasks listed in the regulation as exempt work when performed by adjusters (interviewing insureds and witnesses and inspecting property damage, *id.*) do not become less significant when a claim is assigned to a fraud investigator for further investigation concerning the validity of

the claim. To the contrary, the need for an in-depth look at the fraud indicators makes the investigative tasks all the more significant.

*b.* The investigators' work involves "matters of significance" in three additional ways. The district court recognized these undisputed responsibilities but ultimately ignored them in its legal analysis.

*First*, an investigator's judgment in the field that a claim is fraudulent may cause the investigator to seek a withdrawal of the claim. JA 101 (Op. 24); *see also* JA 135, 430, 452, 968, JSA 26-39. Withdrawals are often obtained when an investigator conducts an examination under oath, which is an interview similar to a deposition in which the witness gives sworn testimony in front of a court reporter, and confronts the claimant with the evidence contradicting his version of events. JA 82 (Op. 5), 135, 195-196, 430, 452, 923, 968, JSA 26-39. A withdrawal is significant to GEICO's business, of course, because it disposes of the claim.

*Second*, if investigators make findings indicating a policyholder has engaged in fraud, the investigator may make a referral to underwriting. JA 886-887, 910, 978. Underwriting referrals are an important form of loss prevention that allows GEICO to address situations in which the policyholder may have obtained an insurance contract or a lower-than-appropriate premium through fraud. "The decisions made by claims adjusters affect policyholders, because their eligibility for continued coverage may be affected and their premium level may be affected."

Opinion Letter FLSA2002-11, 2002 WL 32406601. The same is true of the investigator's fraud determinations.

*Third*, an investigator may "refer [a] claim to the National Insurance Crime Bureau *** or other state agencies based on a finding of fraud." JA 84 (Op. 7). Investigators do not need input from management to do so. *Id.* "[R]eferral to law enforcement of policy holders and claimants is undoubtedly a matter of significance as it involves potentially subjecting these individuals to criminal prosecution." *Foster*, 2012 WL at 407442, at *27. Outside of the insurance context, courts have generally found analogous referrals to require the exercise of discretion with respect to matters of significance. *See Dymond*, 670 F.2d at 95 (finding employee exempt where duties involved determining whether to present violations to prosecutors); *Shockley*, 997 F.2d at 28 (recommendations on police discipline); *Mullins*, 2011 WL 1399262, at *7 (whether to present a case to law enforcement); *see also* Opinion Letter FLSA2006-30, 2006 WL 2792444, at *4 (retail store's loss prevention managers exercise discretion and independent judgment with respect to matters of significance in "ascertaining prosecutable cases").

*c.* Notwithstanding its own description that the "Claim Adjuster's decision on a claim is 'based on essentially what the [I]nvestigator tells them,'" JA 85 (Op 8) (alteration in original), and the investigators' other acknowledged duties, the

district court concluded that the investigators' exercise discretion did not concern matters of significance. The district court supported its conclusion on the premises that investigators are prohibited from including any form of opinion in their reports, JA 100 (Op. 23), and that investigators merely "note that certain claims could be fraudulent," JA 102 (Op. 25). Even putting aside the factually flawed nature of these premises, that reasoning fails as a matter of law.

i. The district court's chimerical distinction between opinion and fact is no reason to discount the significance of the investigators' discretion. The manual excerpt on which the district court relied warns investigators against including "innuendoes, opinions, or rumors" in their reports as opposed to "objective findings, observations, and physical evidence." JA 83 (Op. 6). As described above, in *Foster*, the investigators were likewise instructed to "provide only factual information and not opinions." 710 F.3d at 648. The Sixth Circuit nevertheless rejected the argument that such direction prevented the investigators from exercising discretion with respect to matters of significance. The Sixth Circuit agreed that terms "such as 'factual findings,' 'relevant,' 'pertinent,' and 'resolve' connote a degree of discretion and judgment inherent in the investigatory process undertaken by the [investigators]," and that this discretion and judgment related to matters of significance to Nationwide. *Id.* at 648, 650.

The regulation makes no distinction between the significance of judgments based on facts and the significance of judgments based on opinions, for good reason. A legal test that attempted to rely on classifying business decisions or recommendations as fact or opinion would be impossible to administer because there is no bright line between fact and opinion. *See Stevens v. Tillman*, 855 F.2d 394, 398 (7th Cir. 1988) ("Every statement of opinion contains or implies some proposition of fact, just as every statement of fact has or implies an evaluative component."). Moreover, all of the administrative functional areas listed in 29 C.F.R. § 541.201(b) (*e.g.*, "tax; finance; accounting; budgeting; auditing") deal with business facts and data. Here, as the district court recited, the investigators were required to "find facts that tend[ed] to support or contradict the suspicion" of fraud. JA 102 (Op. 25). That requires investigators to separate "fact from untruth, [and] to resolve competing versions of events." *Foster*, 710 F.3d at 648.

The duties of GEICO's investigators are distinct from the roles of the investigators in the two district court cases from the District of Minnesota, in which the investigators' function was solely to gather evidence for someone else to analyze. *See* JA 99 (Op. 22) (citing *Ahle*, 738 F. Supp. 2d at 896, and *Fenton v. Farmers Ins. Exch.*, 663 F. Supp. 2d 718, 727 (D. Minn. 2009)). In those cases, the employees not only provided no opinions, they rendered no findings, recommendations, or conclusions whatsoever. *Fenton*, 663 F. Supp. 2d at 727

(employer "concedes that the investigators' subjective opinions and conclusions are excluded from their written reports."); *Ahle*, 738 F. Supp. 2d at 906 (investigators "d[id] not provide opinions and conclusions about their investigative observations").

Here, by contrast, the investigators (like those in *Foster*) analyzed the evidence they gathered and, even by the district court's account, made determinations related to fraud upon which the adjusters relied; indeed, the adjusters could not access the underlying evidence. JA 85 (Op. 8). The connection between the investigators' discretion and the significant matter of resolving fraudulent claims, therefore, is much more direct than in *Ahle* and *Fenton*.

The district court's reliance on the regulation specifying that an "employee does not exercise discretion and independent judgment *** merely because the employer will suffer financial losses if the employee fails to perform the job properly," 29 C.F.R. § 541.202(f), is also misplaced. JA 101 (Op. 24). GEICO fraud investigators bear no resemblance to employees—*e.g.*, a messenger carrying large sums of money or a worker damaging an expensive piece of equipment—whose mistake in the performance of routine low-level duties could have unintended but meaningful financial consequences. 29 C.F.R. § 541.202(f).[5] The

[5] The district court's reliance on *Adams v. United States*, 78 Fed. Cl. 536 (2007), was likewise in error. In *Adams*, the court held that criminal investigators employed by the Department of Housing and Urban Development did not have

investigators' work directly concerns fraudulent claims; it does not affect GEICO's bottom line *by accident*.

ii. The investigators' exercise of discretion is not rendered less than significant because adjusters have final authority to pay or deny a claim. The regulations make clear that an employee need not give a final answer on a subject to exercise discretion with respect to a significant matter. *See* 29 C.F.R. § 541.202(c) (providing that employees "can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level"); *see also Foster*, 710 F.3d at 648 (describing Nationwide's ultimately successful position that investigators "provid[e] recommendations *** to management"). As the district court acknowledged, the summary judgment record confirms that the investigators' recommendations are effective. *See* JA 85 (Op. 8) ("The Claim Adjuster's decision on a claim is 'based on essentially what the [I]nvestigator tells them.'") (alteration in original).

Beyond *Foster*, federal appellate courts have found the work of claims adjusters in identifying potentially fraudulent claims to involve "matters of significance" even when making recommendations only. *See Robinson-Smith*, 590 F.3d at 897 (adjusters "make recommendations regarding evidence of preexisting

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management responsibilities, as required by Office of Personnel Management regulations (but not the FLSA). More pertinent to this case, it found that the investigators' work was of "substantial importance" because of the cost savings that resulted from the investigators' fraud fighting. *Id.* at 551.

damage and indicia of fraud"); *Roe-Midgett*, 512 F.3d at 874 (adjusters "evaluate whether the damage is likely preexisting, inconsistent with the alleged cause, or otherwise suspicious"); *In re Farmers*, 481 F.3d at 1129 (adjusters "advise FIE regarding any fraud indicators"). The result is no different when the function is performed by investigators.

***2. Plaintiffs' own reports confirm that investigators play a significant role in resolving whether claims are fraudulent.***

Even accepting the district court's characterization that the investigators' duty is to "note that certain claims could be fraudulent," JA 102 (Op. 25), their work would satisfy the test for the exemption. To the extent this Court has any doubt that the exemption applies under that limited characterization, however, a *de novo* review of the material undisputed evidence eliminates it because "the record taken as a whole could not lead a rational trier of fact to find" in favor of Plaintiffs. *See Monahan*, 95 F.3d at 1265. Evidence adduced from Plaintiffs themselves establishes that the investigators do more than "note that certain claims could be fraudulent." In undisputed fact, it is the adjusters who note that certain claims *could be* fraudulent. The claims are then referred to the investigators, whose duty is to investigate and resolve the adjusters' suspicions. *See* JA 80-81 (Op. 3-4).

It is undisputed that the investigators are required to, and do, "[w]rit[e] a concise and complete summary of the investigation, including the investigators findings regarding the suspected insurance fraud and the basis for their findings."

JA 81 (Op. 4). Fitzgerald testified that "[t]he only thing I can put down, I found fraud or I didn't find fraud." JA 909-910. Calderon stated that he "detected [the] fraud and was able to prove the fraud." JA 479. The best evidence of what investigators include in their reports is the reports themselves, which the district court failed to mention. The documentary record shows that the investigators are not limited to reporting unanalyzed evidence; rather, they draw inferences, assess credibility, and offer conclusions as to whether claims are valid or invalid. See JA 73-77, JSA 11-25, 35-63, 95-114. The examples in the record include the following determinations of fraud and resulting recommendations: *e.g.*, "fraud was found" (JSA 40); "I recommend that no reimbursements for PIP [personal injury protection] be considered" (JA 75); "the insured was not truthful" (JSA 42); "[policyholder] was not believable" (JSA 95); "injury claim is spurious" (JSA 97); "I recommend *** this claim be denied" (JSA 98); and "this was a staged accident" (JSA 99). Other entries find the absence of fraud and recommend that the claim proceed: *e.g.*, "SIU has found no fraud in this claim" (JA 73); "[i]t is recommended that normal procedures be resumed to settle this claim" (JA 74); there does "not appear to be any evidence of over-treating" (JSA 98); and "no fraud indicators associated with this claim" (JSA 98).

That uncontroverted evidence makes this case different from *Foster* in one limited respect: In *Foster*, the district court found a trial was necessary to resolve

"a factual dispute as to whether Special Investigators' primary duty encompasses providing their opinions and conclusions regarding their investigative findings." *Foster*, 695 F. Supp. 2d at 761. A trial is unnecessary in this case, for two reasons.

First, the Sixth Circuit's ultimate holding made the whole opinion-versus-fact debate legally irrelevant. Even accepting that the investigators in *Foster* were precluded from offering opinions, the Court of Appeals found that their resolution of fraud indicators constituted the exercise of discretion and independent judgment with respect to matters of significance. 710 F.3d at 650.

Second, even viewing the summary judgment record in the light most favorable to Plaintiffs, there can be no genuine dispute that GEICO investigators' primary duty includes offering conclusions that claims are or are not fraudulent. Plaintiffs' own descriptions of their work and random samples of investigator's reports obviate any asserted dispute about the contents of the reports. Plaintiffs "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

In sum, while the investigators are exempt even under the district court's downplayed characterization of their duties, the undisputed summary judgment record—including Plaintiffs' own reports—further establishes that they investigate

and resolve whether claims are fraudulent, a matter that is plainly of significance to GEICO.

### *3. At a minimum, the record, viewed in the light most favorable to GEICO, precludes summary judgment for plaintiffs.*

Although the record establishes that summary judgment should be entered for GEICO, at a minimum this Court should reverse the district court's grant of summary judgment *for Plaintiffs* and remand for further proceedings. When viewed in the light most favorable to GEICO, the evidence—hundreds of reports documenting investigators' conclusions regarding fraud; the instructions to investigators requiring them to make findings and present recommendations regarding whether claims are fraudulent; and the practice that GEICO investigators made referrals to underwriting and law enforcement based on their independent determinations of fraud—is sufficient for a reasonable fact-finder to conclude that Plaintiffs exercised discretion with respect to matters of significance. A contrary result would create a square and unnecessary conflict with the Sixth Circuit's decision in *Foster*.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case should be remanded with instructions to enter judgment for GEICO, or, in the alternative, with instructions to deny Plaintiffs' motion for summary judgment.

Respectfully submitted,

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January 16, 2015

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## CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 10,167 words, and thus complies with the type-volume limitation set forth in Rule 28.1(e)(2)(A) of the Federal Rules of Appellate Procedure.

s/Pratik A. Shah
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January 16, 2015

## CERTIFICATE OF SERVICE

I hereby certify that, on January 16, 2015, I served the foregoing brief upon the following counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system:

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# ADDENDUM

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**United States Code**

**Title 29. Labor**

**Chapter 8. Fair Labor Standards**

**§ 213. Exemptions**

(a) Minimum wage and maximum hour requirements

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 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

* * * * *

**Code of Federal Regulations**

**Title 29. Labor**

**Subtitle B. Regulations Relating to Labor**

**Chapter V. Wage and Hour Division, Department of Labor**

**Subchapter A. Regulations**

**Part 541. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees**

**Subpart C. Administrative Employees**

**§ 541.200. General rule for administrative employees.**

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

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(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.

(b) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

**Code of Federal Regulations**

**Title 29. Labor**

**Subtitle B. Regulations Relating to Labor**

**Chapter V. Wage and Hour Division, Department of Labor**

**Subchapter A. Regulations**

**Part 541. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees**

**Subpart C. Administrative Employees**

**§ 541.201. Directly related to management or general business operations.**

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

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**Chapter V. Wage and Hour Division, Department of Labor**

**Subchapter A. Regulations**

**Part 541. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees**

**Subpart C. Administrative Employees**

**§ 541.202. Discretion and independent judgment.**

(a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, 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. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: 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.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) 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. See also § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(f) 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. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an

employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

**Code of Federal Regulations**

**Title 29. Labor**

**Subtitle B. Regulations Relating to Labor**

**Chapter V. Wage and Hour Division, Department of Labor**

**Subchapter A. Regulations**

**Part 541. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees**

**Subpart C. Administrative Employees**

**§ 541.203. Administrative exemption examples**

(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, 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.

* * * * *