

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil File 07-4864 JRT/FLN

Michael Fenton, individually and
on behalf of others similarly situated,

Plaintiff,

v.

Farmers Insurance Exchange,

Defendant.

**DEFENDANT’S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

Michael Fenton, Debra Silverberg, Neil Coffman, and John Palisoc worked as special investigators in the Special Investigations Unit (“SIU”) for Farmers Insurance Exchange (“FIE”). They contend that they and other special investigators (collectively, “Plaintiffs”) were improperly classified as exempt employees and are owed compensation for unpaid overtime. They are wrong. FIE’s special investigators are properly classified as exempt administrative employees. Their primary duties involve the performance of non-manual work directly related to the general business operations of FIE. Those duties include the exercise of discretion and independent judgment with respect to matters of significance. And, they are paid on a salary basis at a rate well in excess of \$455 per week.

FIE regularly receives potentially fraudulent claims. These include home or automotive arson, fabricated home burglaries or auto thefts, phony or exaggerated claims of damage to homes, property or automobiles, staged automobile accidents, and fraudulent claims of medical treatment. Special investigators root out this fraud. Claims representatives refer suspicious claims to the SIU, and the investigator must re-examine

the files for fraud indicators and discuss them with the claims representative; create and execute an investigative plan tailored to the particular facts and claims asserted; decide which leads to follow; interview insureds, claimants and witnesses and evaluate their credibility; analyze and summarize relevant documents, criminal backgrounds, claims histories, and police and fire investigation reports; decide whether and how to use the information in the course of their investigation; conduct on-site inspections and neighborhood canvasses; select and summarize the pertinent facts and prepare investigative reports, explaining the relevant information; and determine whether to report the claim to the National Insurance Crime Bureau (“NICB”) or state agencies.

Plaintiffs offer essentially two theories in support of their argument that they were nonexempt employees: (1) since closed investigation files are subject to FIE’s Quality Assurance (“QA”) review by management, special investigators must mechanically follow the QA guidelines during their investigations, which deprives them of the ability to exercise any discretion and judgment; and (2) special investigators “just report the facts” and do not make decisions regarding whether a claim is fraudulent or should be paid. (*See* Plaintiffs’ Motion for Conditional Certification)

The first theory, that both before-the-fact guidelines and after-the-fact supervision diminishes an employee’s responsibility to make judgments and exercise discretion, has been expressly rejected by federal courts and by the United States Department of Labor. Plaintiffs’ second theory is repudiated by their deposition testimony and the undisputed evidence, which shows that special investigators must independently exercise judgment to make decision after decision regarding possible fraudulent activity. The undisputed facts establish Plaintiffs’ exempt status as a matter of law. FIE respectfully requests that the Court grant summary judgment to the Defendant.

STATEMENT OF FACTS

I. FIE IS A FULL-SERVICE INSURANCE ENTITY

FIE is a reciprocal or inter-insurance exchange providing insurance in numerous states. *In re Farmers Ins. Exchange, Claims Representatives' Overtime Pay Litig.*, 481 F.3d 1119, 1124 (9th Cir. 2007). FIE is owned by its policyholders, or “subscribers,” who exchange contracts with one another, and by pooling their resources, insure one another against certain losses. *Id.* FIE and its related entities perform all of the functions of a full-service insurance company, including selling policies, contracting with individual agents who sell and service policies, procuring reinsurance and adjusting claims made on its policies. *Id.* FIE’s Claims Department is responsible for, among other things, determining whether claims should be denied, paid, or paid in part. *Id.*

II. SIU IS A KEY ADMINISTRATIVE COMPONENT OF FIE’S OPERATIONS

The SIU was established within FIE’s Claims Department to facilitate full investigation and proper handling of suspicious claims and to ensure compliance with state regulations,¹ which require FIE to determine and report whether claims are fraudulent.² The SIU provides investigative and advisory services when claims fraud is suspected and ensures compliance with state regulatory requirements.³ It protects against

¹ Investigation and reporting of suspect or fraudulent claims is required by law under regulatory standards that differ by state. For example, California law requires all insurers to provide for the “continuous operation of a unit or division to investigate possible fraudulent claims by insureds or by persons making claims for services or repairs against policies held by insureds.” Cal. Ins. Code § 1875.20. California law also requires an insurer that “reasonably believes or knows that a fraudulent claim is being made” shall report it to the government within 60 days. Cal. Ins. Code § 1872.4. Minnesota has a similar statute, Minn. Stat. §60A.954.

² Declaration of Douglas Ashbridge at ¶ 2.

³ Ashbridge Decl. at ¶ 2; Gardner Dep. at 35:14-19, 37:21-23; Palisoc Dep. at 113:6-114:7, Ex. 502; DeCianni Dep. at 7:24-8:12, 19:17-20:1. The relevant pages of the deposition transcripts cited herein are attached as Exhibits 1 through 16 to the Declaration of George Preonas.

fraud by insureds (e.g. arson) and third parties (e.g. staged injuries).⁴ Proper handling of suspicious claims—recognition, investigation, documentation, reporting (internally and to state and other agencies) and proper resolution—is among the most important aspects of the Claims Operation’s mission. Accordingly, support of FIE’s fraud interdiction objectives are topics included in supervisory case reviews, office evaluations, and the individual employee performance reviews of all Claims Department personnel.⁵

III. PLAINTIFFS HAVE CLAIMS HANDLING AND LAW ENFORCEMENT EXPERIENCE

Knowledge of the insurance industry, policy and coverage issues and claims handling is so critical to the SIU that FIE requires SIU investigators to have a claims adjusting background.⁶ Several of the Plaintiffs also have law enforcement backgrounds or concurrently work as reserve police officers while working in the SIU.⁷

⁴ Ashbridge Decl. at ¶ 2.

⁵ Ashbridge Decl. at ¶ 2.

⁶ Ashbridge Decl. at ¶¶ 4-5; Palisoc Dep. at 16:15-18:16; Niblack Dep. at 18:18-19:9, 20:3-18; Thompson Dep. at 108:23-109:4; Raino Dep. at 7:1-11, 8:2-13; Gardner Dep. at 14:2-24; Palisoc Dep. at 6:13-19, 13:2-14:11, 16:15-18:16, 62:25-63-17, 132:5-21; DeCianni Dep. at 9:3-10, 9:22-10:2; Roloff Dep. at 24:13-25:1, 25:20-24; Saucier Dep. at 13:2-10, 13:14-23; Hansen Dep. at 13:25-14:6; Niblack Dep. at 12:13-13:12, 15:8-18, 18:4-11, 65:8-23; Fenton Dep. at 19:16-21, 20:16-22, 21:4-7; Pittman Dep. at 13:24-14:20, 15:19-16:4; Krahenbuhl Dep. at 42:23-43:15; Moberg Dep. at 12:4-9.

State regulations also play a role in the development of the SIU and the training and background special investigators must have. For example, California regulations require that “an SIU shall be composed of employees who have knowledge and/or experience in general claims practices, the analysis of claims for patterns of fraud, and current trends in insurance fraud, education and training in specific red flags, red flag events, and other criteria indicating possible fraud. They shall have the ability to conduct effective investigations of suspected insurance fraud and be familiar with insurance and related law and the use of available insurer related database resources.” Cal. Code Regs., tit. 10, § 2698.32(b).

⁷ Ashbridge Decl. at ¶¶ 4-5; Thompson Dep. at 28:19- 29:8; Roloff Dep. at 20:13-19, 22:10-11; Krahenbuhl Dep. at 39:11-40:1, 41:23-42:9; Moberg Dep. at 15:22-16:11.

Most of the Plaintiffs attended FIE's week-long SIU training school in California.⁸ The SIU school teaches proper investigative techniques and how to sharpen those techniques.⁹ For instance, SIU school provides training on sophisticated interviewing methodologies like the Reid Technique of Interviewing,¹⁰ which is designed to elicit information from a witness and to help the investigator assess the witness's credibility through verbal and non-verbal cues.¹¹

Police officers, firefighters, chiropractors, attorneys and Major Operations special investigators¹² are brought in to train special investigators regarding the cause and origin of fires, examinations under oath, car thefts, the existence of organized crime, injury claims and signs of medical fraud. Simulated claims experiences are conducted in which special investigators learn about different ways to approach a claim, how to investigate claims, how to determine what information they need, and creative ways to obtain it.¹³

IV. PLAINTIFFS' CORE JOB DUTIES

Working independently in the field, at each stage of the investigation, investigators have to make numerous critical decisions. For example:

- **Eliot Hansen**—"Whatever else you determined that you needed to do, you did; whether that be inspect the car and then do a neighborhood canvass, interview witnesses, whatever else you determined after you got the file was all up to you."; after getting a new claims file, "I look at it as a puzzle to see what I need

⁸ Declaration of Tony Slaman at ¶ 2; Raino Dep. at 13:18-14:13, 16:3-20; Gardner Dep. at 15:20-20:25; DeCianni Dep. at 22:11-24:8; Saucier Dep. at 34:7-36:25; Hansen Dep. at 133:18-134:1, 134:16-135:1; Niblack Dep. at 11:14-12:8, 87:17-88:7; Fenton Dep. at 38:24-39:25, 43:2-6; Moberg Dep. at 34:9-21.

⁹ Slaman Decl. at ¶ 2.

¹⁰ Slaman Decl. ¶ 2, Ex. A.

¹¹ Slaman Decl. at ¶ 2.

¹² "Major Operations" special investigators conduct investigations into large fraud rings or complex losses. Both Eliot Hansen and William Thompson worked in the Major Operations unit. Thompson Dep. at 66:6-7; Hansen Dep. at 30:23-31:1.

¹³ Slaman Decl. at ¶ 3.

- to do to answer it.”; ¹⁴
- **Clayton Roloff**—would obtain different reports if he thought about part of the question differently than the claims adjuster did; had discretion to determine the sequencing of reports, which was an “important part” of the investigation to “get something of value”; determined what information was important enough to tell the claims representative during the investigation; ¹⁵
 - **Daniel Raino**—“you do this, you’ve got to be sure that you’re turning over the stones and you’ve got to look, you know.”; fraud indicators could be things that just “smelled wrong”; ¹⁶
 - **Michael Fenton**—after an interview, determines whether additional people need to be interviewed and whether to notify the claims representative; recommended the use of experts to claims representatives; ¹⁷
 - **James Krahenbuhl**—“it’s hard to be black and white in a lot of those [QA] questions because I want to say each claim is a little bit different just in and of its own.”; ¹⁸
 - **Paul Moberg**—advised manager of files that he believed rose to the level of major operations; suggested the use of experts to claims representative; developed a SIU database of special investigators’ contacts; ¹⁹ and
 - **Martin Trujillo**—advised his manager and auditing or corporate security of suspected internal fraud; ²⁰

The job description for the Special Investigator position sets forth FIE’s reasonable expectations of the job. ²¹ Plaintiffs’ deposition testimony confirms that they perform these duties. Special investigators investigate all types of claims, including casualty, property, fire and auto theft and damage; commercial claims; and workers’

¹⁴ Hansen Dep. at 27:5-15, 46:13-18, 86:11-87:11.

¹⁵ Roloff Dep. at 100:8-12, 131:9-132:16, 147:20-148:4, 154:6-155:17, 32:10-14, 98:6-12, 108:20-109:14, 132:17-21, 153:7-11 (“Q. So other than experts and notifying [your manager] about a case, you didn’t need management approval to do anything during the investigation? A. I don’t think so . . .”), 175:23-176:1.

¹⁶ Raino Dep. at 35:4-9, 43:15-44:25.

¹⁷ Fenton Dep. at 115:17-116:9, 124:15-125:4, 82:14-24, 123:17-21, 139:8-141:11.

¹⁸ Krahenbuhl Dep. at 88:4-24, 102:20-103:23, 154:1-14; 154:15-155:21 (special investigators need “instincts” to understand what they are looking at and to figure out know what information they need to get based on that).

¹⁹ Moberg Dep. at 30:3-13, 79:10-21, 58:14-59:1, 108:4-12, 118:12-119:11.

²⁰ Trujillo Dep. at 53:23-54:12; Thompson Dep. at 108:9-15.

²¹ Senechal Decl. at ¶¶ and Exh. _.

compensation claims.²² They provide training to claims representatives on how to identify potentially fraudulent claims.²³ They also regularly review claims files to check for fraud indicators that claims representatives may have missed as part of the Farmers Early Detection Program (“FED Reviews”).²⁴ Further, they assess underwriting risks,²⁵ work with outside private investigators, law enforcement agencies and attorneys.²⁶

When a referral is received, special investigators examine the entire claims file for potential fraud indicators and determine whether SIU involvement is necessary.²⁷ If the special investigator determines the file does not merit SIU involvement, the investigator

²² Ashbridge Decl. at ¶ 14; Raino Dep. at 12:4-6; Gardner Dep. at 39:7-21; Palisoc Dep. at 44:4-12, 64:23-66:5; DeCianni Dep. at 101:20-102:6, 102:7-10, 103:6-105:7; Hansen Dep. at 44:5-8, 96:2-11; Roloff Dep. at 144:10-13; Fenton Dep. at 33:24-34:8, 129:1-19; Krahenbuhl Dep. at 73:18-74:4.

²³ Ashbridge Decl. at ¶ 3; Palisoc Dep. at 60:23-61:12, 137:24-138:2, 153:22-154:6; DeCianni Dep. at 108:17-19, 109:13-111:15, 111:16-112:4; Saucier Dep. at 68:20-69:21, 71:11-72:3, 92:25-93:17 (claims adjusters call him and consult about fraud issues or issues on a file they encounter); Niblack Dep. at 71:1-23, 88:24-89:18, 87:8-16, 88:10-19; Fenton Dep. at 88:4-89:8, 179:5-19; Pittman Dep. at 32:5-12, 94:7-11, 94:12-15, 95:5-10; Krahenbuhl Dep. at 97:8-18; Moberg Dep. at 104:5-22, 105:9-15.

²⁴ Saucier Dep. at 89:21-91:25; Hansen Dep. at 146:9-18, 147:3-6, 148:8-9; Roloff Dep. at 139:13-140:1, 140:10-12; Fenton Dep. at 100:23-101:9, 101:23-25, 102:6-13, 102:20-103:6; Pittman Dep. at 95:11-96:5; Krahenbuhl Dep. at 31:17-32:3, 78:24-79:15; Moberg Dep. at 109:13-110:4; Trujillo Dep. at 77:3-18.

²⁵ DeCianni Dep. at 86:6-25; Pittman Dep. at 50:15-18, 51:10-19

²⁶ Palisoc Dep. at 113:6-8, Ex. 502, 114:15-115:5; Hansen Dep. at 31:3-32:9, 38:25-39:6, 110:7-12, 111:6-17, 137:15-25, 139:10-11, 150:11-151:7, 152:11-22 (worked with Los Angeles County’s TRAP that specialized in auto theft); Moberg Dep. at 76:4-8 (provided information to law enforcement to prosecute a case); Hansen Dep. at 108:21-25, 109:8-11, 21-25; Fenton Dep. at 65:20-67:19; Pittman Dep. at 60:11-22; Krahenbuhl Dep. at 91:8-22; Moberg Dep. at 74:22-75:25, 76:4-8.

²⁷ Ashbridge Decl. at ¶ 18; Raino Dep. at 32:8-12, 34:8-12; Palisoc Dep. at 31:2-11, 32:17-33:8, 33:25-34:7, 59:22-60:22; DeCianni Dep. at 30:16-31:13; Fenton Dep. at 75:22-76:11, 81:19-82:8; Krahenbuhl Dep. at 35:20-36:1, 71:20-72:1 (new claims representatives typically miss indicators a couple of times a week; more experienced representatives miss indicators about once a month); Gardner Dep. at 46:24-47:8; Niblack Dep. at 71:1-23, 88:24-89:18; DeCianni Dep. at 68:8-17; Moberg Dep. at 43:14-22.

will advise the Team Manager.²⁸ If the file does warrant investigation, the special investigator contacts the claims representative handling the claim to discuss the fraud indicators.²⁹

There is no checklist or preset investigation plan.³⁰ The special investigator must prepare an individualized investigation plan.³¹ Each plan is based on the facts and circumstances underlying the submitted claim and the nature of the suspected fraudulent activities.³²

Investigators also review and analyze databases from which they obtain credit reports, criminal background history, claim history, and similar information.³³ They

²⁸ Ashbridge Decl. at ¶ 18; Saucier Dep. at 43:18-44:12 (assesses whether indicators exist; if not, he advised the claims rep or his manager.); Moberg Dep. at 42:11-43:13 (notified his manager if he thought a file was not appropriate for SIU involvement); Hansen Dep. at 47:6-12; 47:19-25; Trujillo Dep. at 59:18-60:6; Fenton Dep. at 107:4-108:6, 222: 23-223:9.

²⁹ Ashbridge Decl. at ¶ 18; Hansen Dep. at 81:15-25; Roloff Dep. at 120:3-13.

³⁰ Ashbridge Decl. at ¶ 19; Roloff Dep. at 112:16-18 (“Those are the kind of issues you go through, and they are not all the same. No claim is ever the same.”); Saucier Dep. at 48:14-21 (He “discuss[es] or strategize[s]” with the claims representative about the investigation plan. “They are all different.”); Raino Dep. at 18:20-25; Hansen Dep. at 192:3-7.

³¹ *Id.*; Hansen Dep. at 45:22-46:5, 82:5-11 (“Q. Do you talk to the claims rep before doing [investigation plans]? A. No. It is all my decision.”); Fenton Dep. at 108:14-19; 109:20-110:13 (notifies the claims representative of additional fraud indicators he identified and suggests an investigative plan); Raino Dep. at 29:13-30:2; Palisoc Dep. at 36:21-23, 37:23-38:4; DeCianni Dep. at 36:25-37:8, 90:22-91:4; Roloff Dep. at 35:18-23, 122:4-7; Saucier Dep. at 33:11-34:6; Niblack Dep. at 62:17-24.

³² Roloff Dep. at 112: 16-18, 126:7-15, 129:11-15 (investigation plans can have one item or fifteen or twenty items), 143: 17-21; Krahenbuhl Dep. at 129:2-6; Moberg Dep. at 79:22-80:23 (“an investigation in a claim is on a case-by-case basis and it’s much more than just the line of business”; factors include type of loss, the loss exposure, the timeliness of the reporting of the claim); Raino Dep. at 18:20-25; Palisoc Dep. at 36:3-20; Saucier Dep. at 40:25-41:10, 42:24-43:7; DeCianni Dep. at 40:1-13; Fenton Dep. at 131:14-132:12.

³³ Ashbridge Decl. at ¶ 19; Roloff Dep. at 121:8-122:3 (“It was just something that I personally had a preference for doing, would be to get all the database stuff in there and

request copies of police reports, incident reports, and fire investigation reports from public agencies.³⁴ The information obtained must be analyzed, assimilated and evaluated.³⁵ Certain areas of concern may be satisfied, yet others uncovered that require additional, unexpected investigation.³⁶ Personal on-site examination, inspection and evaluation of the premises or damaged property is typically required, and the nature and order of the inspection is determined by the nature of the claim.³⁷

look at it before I go out and talk to somebody, so I know maybe what question I want to look at, to focus on in hopes that I hit something right that is of value to the claim.”). Raino Dep. at 50:24-51:25; Palisoc Dep. at 135:11-136:9; DeCianni Dep. at 55:9-21.

³⁴ Ashbridge Decl. at ¶ 19; Fenton Dep. at 112:7-17 (“...it wouldn’t be unusual to have those reports take you – take me an hour, sometimes significantly more . . . there’s a myriad of different issues.”).

³⁵ Fenton Dep. at 111:21-112:6 (“You could pull out a variety of different reports, analyze the information, determine whether it was meaningful or not . . .”); Roloff Dep. at 103:11-13, 104:25-105:4; Krahenbuhl Dep. at 52:20-23 (“Q. So you needed to be able to look through the information and figure out what was relevant and important? A. Right.”).

³⁶ Roloff Dep. at 31:23-32:1 (“You get the database information, see what else I need to follow up on . . .”); Hansen Dep. at 192:3-7; Pittman Dep. at 35:6-11 (background searches include “[p]ulling the information and whatever that gives you and running that next thing, that leads you to another thing. Some of these you can just keep going on.”).

³⁷ Gardner Dep. at 65:15-22 (on vehicle inspections: “Depending on what type of claim it is, you would look for entry points, burn patterns, whatever to support the claim, for any discrepancies.”), 66:1-6 (“You would take photographs of the area; see what makes sense and what doesn’t make sense.”); Saucier Dep. at 52:4-53:4; Pittman Dep. at 44:4-18, 47:14-16; Hansen Dep. at 89:10-12, 90:20-91:6, 91:20-92:15 (inspects each vehicle so “I can read my client – I get a better understanding of the theft if I see the car. I can’t do it through pictures.”), 92:17-21, 93:7-11, 117:24-119:12 (conducts medical clinic inspections); Krahenbuhl Dep. at 118:3-15 (determines the outer perimeter of the fire and works inward; takes a lot of photos towards the center of the fire and few photos outward because fires burn in “V” patterns), 119:14-120:22, 120:23-121:17, 122:25-123:18 (for scene investigations, may look for a video camera and try to get access to it); DeCianni Dep. at 60:5-61:4; Fenton Dep. at 121:20-122:21; Moberg Dep. at 56:20-57:1, 63:24-64:7.

Investigators conduct interviews of the claimant, the insured, and other witnesses.³⁸ Face-to-face interviews are preferred to telephone interviews so the investigator may make determinations of credibility and accuracy from both verbal and non-verbal cues.³⁹ As the Plaintiffs explained:

- “Well, you know, you size up the claimant. You size up the doctor, and you’ve got to make a decision here as to somebody’s not telling the truth.”;⁴⁰
- “Q. What kind of things are you looking for in a witness interview? What kinds of things are you developing? What kinds of information are you trying to get in a witness interview? A. The truth.”;⁴¹
- “...you’re looking for the truth. You’re looking for the facts and if they don’t seem to be consistent with one another, I would layout you’re telling me this thing and now here’s this bit of information, you said you were home, but your sister says you weren’t, can you explain and you wait for a response.”;⁴²
- “I want to be there to see how they react to it, to see what response is physically . . . It’s tough over the phone sometimes. You can get, I don’t know, or somebody being evasive, but you can’t see that they’re getting angry or that kind of stuff or something else. So I would prefer to do those face-to-face, if it was a large-dollar deal, because there are more issues, and that’s what Claims expects of you.”;

³⁸ Ashbridge Decl. at ¶ 19; Fenton Dep. at 115:5-11; Palisoc Dep. at 44:13-45:9, 45:15-46:12; DeCianni Dep. at 40:14-20, 43:5-25, 45:13-47:9, 47:10-12, 52:13-53:8, 53:23-54:25; Niblack Dep. at 58:3-59:8, 64:4-23 (on cause and origin experts: “And if they were going to go interview more witnesses I’d cut them off and say, no, I’m going to do that, I’ll interview these people.”); Roloff Dep. at 106:22-107:4; Pittman Dep. at 48:14-22; Moberg Dep. at 48:20-49:3, 60:3-5, 60:14-61:5, 61:13-16.

³⁹ Ashbridge Decl. at ¶ 19; DeCianni Dep. at 27:1-18; Saucier Dep. at 57:8-24; Roloff Dep. at 105:23-106:2 (“[The claims adjusters] may say, ‘Well, this person is being very evasive with me. We want you to go take an interview with them. Go do that. Talk to the person. Try to get a read of them.’”); Trujillo Dep. at 69:13-16; Gardner Dep. at 60:8-61:10 (puts in the file notable non-verbal behavior or person being evasive); Niblack Dep. at 60:18-61:5, 61:11-25; Fenton Dep. at 112:18-113:5; Pittman Dep. at 36:18-37:21 (prefers to interview witnesses in person to “size up” the situation and get a better read on the witness); Krahenbuhl Dep. at 85:10-22 (face-to-face interviews because a witness was more apt to tell the truth in person); Hansen Dep. at 27:5-11, 85:20-86:23.

⁴⁰ Raino Dep. at 45:1-16.

⁴¹ Palisoc Dep. at 39:25-41:12.

⁴² Fenton Dep. at 119:10-14, 119:15-120:3, 120:4-21.

- “Again, I have to get a baseline when I’m in front of them, so I know just through casual conversation . . . Then I can sort of get an idea of when I can get a rise out of them, when emotionally something is coming out, when they’re starting to perspire, they start to shake a little bit. Is their voice becoming stuttered or something like that? Are they evasive? Is eye contact not being made? You know, what is it? I have to realize, too, is there a medical problem here? Are they intoxicated or on drugs or whatever else? You have to sort of judge that, if you can.”⁴³

Before conducting interviews, the investigator must decide whether he has gathered sufficient background evidence to achieve an effective interview and must formulate the relevant areas of inquiry and, during the interview, develop additional questions.⁴⁴ While these interviews are not under oath, they proceed much like a formal deposition and are usually recorded.⁴⁵ At times, the claimant is represented by counsel who is present while the investigator conducts the examination.⁴⁶

Investigators also will interview law enforcement personnel, fire investigators, and

⁴³ Roloff Dep. at 145:25-146:3, 147:3-19.

⁴⁴ Gardner Dep. at 58:24-59:13; Palisoc Dep. at 41:24-42:25 (“As the interview progresses, you develop other questions.”); DeCianni Dep. at 24:24-26:25; Saucier Dep. at 56:11-57:7; Niblack Dep. at 59:12-60:9, 61:11-25; Roloff Dep. at 107:17-25 (Q. “How did you figure out how to deal with the evasive interviewees? A. Put them at ease is the best way to do it, because you really can’t get down to that core behavior unless you get them a chance to settle down, and then they want you to be a good listener. If it’s a legitimate claim, I would think that that person, you know, they’re going to be calm and tell you frankly about it.”), 114: 6-15 (“I’m just like you, in that I have to ask questions, and that little information that I’ll get back might lead me to another question that will clarify the big picture of what we’re trying to achieve.”), 114:19-115:7 (“I make the decision if, like, say, I’ve got one neighbor that saw something, I don’t stop there. I’m going to go back and see if I can find another one to corroborate it. I’m one of those that was a little more thorough . . .”), 148:8-149:5 (if there is a lot of evidence of fraud, he asked more questions to “place them on the spot, to explore additional validating information” and “hit[] all the buttons.”), 175:3-15; Fenton Dep. at 113:14-23, 119:1-120:21; Krahenbuhl Dep. at 151:18-152:19.

⁴⁵ DeCianni Dep. at 40:17-41:5; Gardner Dep. at 57:15-58:15; Hansen Dep. at 88:16-89:3; Moberg Dep. at 47:22-48:8; Roloff Dep. at 114:6-15.

⁴⁶ Moberg Dep. at 48:20-49:8.

other witnesses.⁴⁷ Many special investigators develop relationships with law enforcement agencies and industry regulators in their geographic areas.⁴⁸ Investigators, in appropriate cases, might decide to conduct a neighborhood canvass as part of their investigation.⁴⁹ They also may suggest surveillance or the use of an expert.⁵⁰

Special investigators provide claims representatives with status updates via FIE's electronic claims management system ("CRN") during the course of the investigation.⁵¹ Sometimes, investigators alter their investigation plans based on the facts uncovered during the investigation.⁵² Once the investigator has determined that all relevant leads have been exhausted,⁵³ the investigator will draft a final report for the referring claims

⁴⁷ Palisoc Dep. at 44:13-45:9, 45:15-46:12; DeCianni Dep. at 40:14-20, 43:5-25, 45:13-47:9, 47:10-12, 52:13-53:8, 53:23-54:25; Hansen Dep. at 93:7-25 (security people), 94:4-12, 94:24-95:3, 95:16-96:1 (fire department); Niblack Dep. at 58:3-59:8; Pittman Dep. at 45:25-46:7, 46:17-19, 48:14-22 (experts); Moberg Dep. at 47:22-48:5, 60:3-5, 60:14-61:5, 61:13-16.

⁴⁸ DeCianni Dep. at 119:11-120:6; Niblack Dep. at 67:14-69:4; Fenton Dep. at 92:4-21.

⁴⁹ Gardner Dep. at 61:16-62:25; Palisoc Dep. at 28:16-30:2, 56:7-23; DeCianni Dep. at 45:13-47:9; Saucier Dep. at 51:8-52:3; Hansen Dep. at 89:10-23; Niblack Dep. at 58:3-59:8; Roloff Dep. at 113:10-20; Fenton Dep. at 116:17-19; Pittman Dep. at 41:12-15; Moberg Dep. at 54:9-11.

⁵⁰ DeCianni Dep. at 48:2-50:4 (may recommend a cause and origin expert), 55:1-5 (may recommend a forensic locksmith), 71:2-19, 106:11-107:9 (surveillance); Hansen Dep. at 103:25-104:6 (has suggested using a cause and origin expert), 107:4-23 (suggested follow-up on a file that he felt needed to go out to EUO); Moberg Dep. at 132:15-20 (suggested using an expert).

⁵¹ Ashbridge Decl. at ¶ 20.

⁵² Gardner Dep. at 52:3-53:4; Trujillo Dep. at 62:6-64:1; Palisoc Dep. at 52:12-24; Saucier Dep. at 47:8-19; Roloff Dep. at 144:21-23; Pittman Dep. at 33:5-9; Raino Dep. at 42:14-19.

⁵³ Hansen Dep. at 96:25-97:18, 192:3-7, 192:8-14 (the effect of QA is that "you can go your own way, but you are under time constraints to do so now"), 108:3-11, 123: 22-25 ("And, you know, if you came across some other information that led to it off the information you had, you stick that in the file, send a note to the claims rep, so they know

representative to use in the evaluation of the claim.⁵⁴ The formal report requires sifting through all of the information obtained, highlighting the key issues and facts and drawing reasonable inferences from the information.⁵⁵ The investigator must determine when the investigation is complete by concluding that the factual issues have been resolved or determining that they cannot be definitively resolved.⁵⁶

Investigators independently decide whether to report each claim as fraudulent to the NICB, their state's Department of Insurance, or other law enforcement agencies.⁵⁷

about it . . .”), 145:25-146:6; Pittman Dep. at 35:6-11; Roloff Dep. at 31:23-32:1; Krahenbuhl Dep. at 83:5-16.

⁵⁴ Ashbridge Decl. at ¶ 20; DeCianni Dep. at 81:9-25; Saucier Dep. at 49:25-50:3, 50:9-15, 60:18-61:8, 63:2-8; Hansen Dep. at 105:17-106:7 (writes a complete final report that summarizes what he has done, including fraud indicators, what needed to be resolved, and the outcome); Pittman Dep. at 43:25-44:3, 56:20-57:1, 58:16-20 (includes the fraud indicators, activities, discrepancies and contradictions in her report); Trujillo Dep. at 73:3-9 (would note any discrepancies in his final report).

⁵⁵ Niblack Dep. at 82:5-20 (“Q. And how would that come up in that particular file? Like how would you know that you had to keep following up on those leads even though—A. Well, because you’d have—maybe I interviewed the insured and they said, well, this neighbor saw this or that or, you know, I was over at my cousin’s or—you know. And some of them, yes, I mean, you’d have to, some of them required it in order to come to some sort of conclusion in your own mind as to whether or not you’re going to—whether you feel—personally whether it’s a potential fraudulent claim. Otherwise, if it’s not you got to get—you need to close it and get on to the next one. You just don’t have time to screw around with it.”); Fenton Dep. at 111:21-112:6 (“You could pull out a variety of different reports, analyze the information, determine whether it was meaningful or not . . .”); Roloff Dep. at 104:25-105:4, 134:4-7; DeCianni Dep. at 75:8-77:1; Saucier Dep. at 58:13-59:2 (would note if a witness was inconsistent with himself, or with a police report, or another document); Roloff Dep. at 104:25-105:4, 134: 4-7; Krahenbuhl Dep. at 52:20-23, 83:5-16.

⁵⁶ Roloff Dep. at 158:4-7; Gardner Dep. at 67:1-8 (“Basically when you feel you have exhausted all avenues or done everything they have requested, you know, feel that there is anything else that would add value to the file, and you put your summary in...you give it to – it goes to your claims manager and then the claims representative.”).

⁵⁷ Silva Decl. at ¶ 7; Niblack Dep. at 63:2-25; Palisoc Dep. at 50:18-51:18 (“Q. So it was just whether or not you thought there was some basis for fraud that you would report? A.

The requirements for reporting fraud vary from state to state, but generally require reporting where there is a reasonable belief that insurance fraud may have occurred.⁵⁸

Despite Plaintiffs' efforts to downplay their job duties as simply "reporting facts," the undisputed material evidence demonstrates that the investigative process requires the investigator not only to determine what facts are important, but to analyze, synthesize and evaluate that information for use by the Claims Department.⁵⁹ Although investigators must provide an objective justification for their conclusions in the final written report, those conclusions are based on the rational inferences and deductions they make from the facts they uncover. Based on this information, the claims representative makes a decision whether to pay, pay in part or deny the claim.

V. QUALITY ASSURANCE REVIEWS

Quality Assurance ("QA") is an after-the-fact review of a small percentage of the closed investigation files for the entire SIU.⁶⁰ The QA process does not involve review of open investigation files.⁶¹ Instead, after an investigation has been closed, the QA manager and the investigators' managers select a random sample of closed files from the entire department for review. They then provide feedback to management and

Yes. Q. Was that determination something you made on your own? A. Yes."), 58:22-59:3, 111:8-112:1, 181:19-182:4; Hansen Dep. at 112:11-21, 113:10-13, 114:21-24 ("For each file, I have to make the determination whether it needs to be reported or not"; decides whether to report a file to NICB based on whether or not he has unresolved issues; reports two or three files a month); Roloff Dep. at 135:7-137:13; Fenton Dep. at 72:1-4, 80:12-23; Krahenbuhl Dep. at 107:9-16, 111:10-15.

⁵⁸ For example, in California, the regulations define "reasonable belief" as a level of belief that an act of insurance fraud may have or might be occurring for which there is an objective justification based on articulable fact(s) and *rational inferences* therefrom. Cal. Code Regs., tit. 10, § 2698.30(l) (emphasis added).

⁵⁹ Gardner Dep. at 37:21-23; DeCianni Dep. at 36:12-18.

⁶⁰ Silva Decl. at ¶¶ 3 and 5; Exh. A to Finch Decl.

⁶¹ Silva Decl. at ¶ 3; Hansen Dep. at 53:17-19; Moberg Dep. at 88:13-25.

investigators regarding the thoroughness and timeliness of the investigations.⁶² The QA requirement is, in part, dictated by state regulations that require insurers to institute and maintain a fraud detection program.⁶³ QA ensures that FIE is adequately investigating and pursuing investigations of fraud claims.⁶⁴

QA only reviews a small percentage of files investigated by each special investigator.⁶⁵ Special investigators typically investigate approximately 10 to 12 claims per month.⁶⁶ For the 2008 production year, 25 closed files were selected by QA per zone for each quarter, for a total of 100 files per quarter. Of the 15,600 investigative files expected to be opened in 2008, QA reviewed approximately 400 field investigation files.⁶⁷ QA attempts to ensure quality standards are met throughout the investigation process by providing objective assessment of SIU work product and evaluating the quality of documentation contained in investigation files.⁶⁸ QA also evaluates the fraud investigations for compliance with state regulations and prepares for external audits.⁶⁹

⁶² Silva Decl. at ¶¶ 3-5.

⁶³ Silva Decl. at ¶ 7; Hansen Dep. at 194:19-195:6; Roloff Dep. at 117:21-25; Fenton Dep. at 57:7-23.

⁶⁴ Silva Decl. at ¶¶ 4-6.

⁶⁵ Silva Decl. at ¶ 3; Palisoc Dep. at 83:25-84:16, 98:14-99:1; Hansen Dep. at 53:2-16; Moberg Dep. at 92:11-19.

⁶⁶ Roloff Dep. at 33:13-18, 35:6-9 (supposed to do 11 ½ claims files a month, sometimes does more, sometimes less); Hansen Dep. at 52:19-25 (12 to 15 a month); Pittman Dep. at 78:7-12 (12 files a month); Krahenbuhl Dep. at 76:6-10 (averaged 15 files); Moberg Dep. at 32:18-24 (11 or 12 files per month), 99:5-19 (13 to 14 files per month).

⁶⁷ Silva Decl. at ¶ 3.

⁶⁸ Finch Decl. at ¶ 2 and Exh. A. filed under seal; Silva Decl. at ¶ 6; Fenton Dep. at 155:2-6 (management tool to evaluate claims files or special investigation files for adherence to quality standards); Pittman Dep. at 69:3-8.

⁶⁹ Silva Decl. at ¶ 2.

Specifically, QA determines whether Plaintiffs identified relevant information, pursued appropriate areas of concern, and properly documented the investigation.⁷⁰

Examples of topics that QA evaluates include the following:

- Was SIU involvement necessary and in accord with established guidelines?
- Was the development and execution of an investigative plan documented?
- Were necessary documents properly gathered and submitted?
- Were investigative tasks that the special investigator contemplated doing completed, or, if not, explained?
- Did the special investigator follow-up on leads or areas of concern developed during the investigation?
- Was a final investigation conclusion or investigation status completed timely?
- Were DOI reporting and underwriting risk analysis addressed in conclusions?
- Did the investigator's documentation of the investigation demonstrate a timely and persistent investigation?
- Did the special investigators' status reports and final conclusions convey an objective evaluation of the information developed that was well written, relevant, and material?⁷¹

QA does not direct special investigators on what steps to take to conduct the investigation.⁷² Instead, QA asks, after the fact, whether a thorough investigation was completed.⁷³

⁷⁰ Silva Decl. at ¶¶ 4-5.

⁷¹ Silva Decl. at ¶ 5.

⁷² Silva Decl. at ¶¶ 5-6; Fenton Dep. at 161:2-4 (“Q. Did QA tell you what steps to do in your investigation? A. I don’t believe it explicitly tells you what to do.”), 163:7-19 (“Q. ...do you believe that QA dictated how you were to perform the investigation? A. ...Did it dictate it? No . . .”); Krahenbuhl Dep. at 123:12-124:5, 125:5-17 (QA guidelines is not what makes up the investigation plan; QA is how to document the investigation properly); Moberg Dep. at 89:9-22; Palisoc Dep. at 92:16-24.

⁷³ Silva Decl. at ¶¶ 4-5; Krahenbuhl Dep. at 127:18-128:1.

VI. PLAINTIFFS MANAGE THEIR OWN WORK AND SET THEIR OWN SCHEDULES

The SIU is divided into four zones: (1) Texas,(2) California, (3) Western States, and (4) Midwest/East.⁷⁴ Each zone is supervised by a Zone Manager.⁷⁵ Within each zone, the Zone Manager supervises three or four Team Managers.⁷⁶ Team Managers in turn supervise five to seven special investigators.⁷⁷ Each special investigator is loosely assigned to a geographic area, but must be flexible and cover other territory when necessary.⁷⁸ Given the structure of the SIU, managers are located miles away from where Plaintiffs perform their job duties and, as such, do not provide immediate and direct oversight or observe their work in person.⁷⁹ Plaintiffs work out of their homes and in the field, conducting investigations.⁸⁰ Although Team Managers conduct periodic reviews of open cases via CRN, cases closed within fourteen days are not normally reviewed.⁸¹

SIU investigators are paid on a salary basis, earning an annual salary between

⁷⁴ Ashbridge Decl. at ¶ 12.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Ashbridge Decl. at ¶ 15; Saucier Dep. at 97:23-98:25 (worked free from direct supervision and directed his own activities from day to day.); Roloff Dep. at 176:20-25 (worked independently of SIU manager, managed his own work flow and completed assignments on his own); Moberg Dep. at 68:11-69:11.

⁸⁰ Raino Dep. at 12:11-14; 55:17-24; 57:5-21; Gardner Dep. at 36:2-15; Palisoc Dep. at 22:13-23:24, 73:20-74:2, 76:20-77:2; 173:16-174:12; Saucier Dep. at 30:13-23; Hansen Dep. at 12:4-9, 28:18-24; Krahenbuhl Dep. at 58:20-22, 138:16-18; Moberg Dep. at 46:25-47:8.

⁸¹ Ashbridge Decl. at ¶ 15.

approximately \$40,000 and \$80,000.⁸² Plaintiffs are not required to account for their time. They have discretion to set their own work hours based on work-related factors and personal needs and take meal and rest breaks throughout their day.⁸³

ARGUMENT

The primary job duties performed by Plaintiffs as special investigators are undisputed.⁸⁴ Whether the duties they admittedly performed are exempt in nature is a question of law for the Court to decide. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

I. THE ELEMENTS OF THE ADMINISTRATIVE EXEMPTION

Employees “employed in a bona fide . . . administrative capacity” are exempt from overtime pay requirements. 29 U.S.C. § 213(a)(1). To qualify for the administrative exemption, an employee must have a primary duty of (1) “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” that (2) “includes the exercise of discretion and independent judgment with respect to matters of significance” and (3) be paid on a salary basis at a rate of not less than \$455 per week. 29 C.F.R. § 541.200 (2004).

The regulations distinguish between work that is “directly related to assisting with the running or servicing of the business” from work “on a manufacturing production line

⁸² Ashbridge Dep. at 99:7-8; *see also*, Finch Decl. at ¶¶ 3-8 filed under seal and the following deposition pages attached thereto: Fenton Dep. at 12:23-24, 37:9-21; Krahenbuhl Dep. at 53:8-19; Palisoc Dep. at 145:21-23, 146:12-15; Pittman Dep. at 28:6-13, 28:23-24; Roloff Dep. at 40:14-19, 40:23-41:1; Saucier Dep. at 11:19-25.

⁸³ Ashbridge Decl. at ¶ 16; Krahenbuhl Decl. at 140:16-141:15 (usually fed his horses at 4:00 p.m.); Saucier Dep. at 85:2-17; Trujillo Dep. at 94:7-17; Hansen Dep. at 123:16-22; Roloff Dep. at 166:13-167:9.

⁸⁴ To determine what constitutes an employee’s primary duty, the regulations dictate that all facts must be considered, with “major emphasis” placed on the “character of the employee’s job as a whole.” 29 C.F.R. § 541.700. The term “exempt work” includes all work and the activities directly and closely related to such work. 29 C.F.R. § 541.702.

or selling a product in a retail or service establishment.” 29 C.F.R. § 541.201(a). The exemption also requires the work to be “of substantial importance to the management or operation of the business of her employer or her employer’s customers.” *Id.* Subsection (b) explains the types of tasks that fall within the exemption, including “the work performed by so-called white-collar employees engaged in ‘servicing’ a business as, for example, advising the management, planning, negotiating, [and] representing the company.” 29 C.F.R. 541.205(b). The exemption “is not limited to persons who participate in the formulation of management policies” but includes employees who carry out those policies. 29 C.F.R. § 541.205(c). Subsection (c) reviews several examples of jobs that do and do not fit the exemption and expressly states in (c)(5) that “claim agents and adjusters” do. Finally, subsection (d) makes clear that the nature of the business is not the determinative factor.⁸⁵

Since there is no question that each of the Plaintiffs was paid more than two to three times the minimum required salary under the regulations and that the undisputed primary job duties of each consisted of non-manual work, the only issues before the Court are whether their duties (1) involve “servicing” FIE’s business; and (2) include the use of discretion and independent judgment with respect to matters of substantial importance.

II. SPECIAL INVESTIGATORS MEET THE DUTIES TEST

An insurance company’s “product” is its policies. *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 585 (5th Cir. 2006); *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 9 (1st Cir. 1997). FIE is in the business of risk transference, that its products are the insurance

⁸⁵ Rather, the exemption applies “regardless of whether the management policies or general business operations to which their work is directly related are those of their employer’s clients or customers or those of their employer.” 29 C.F.R. § 541.205(d).

policies it sells.⁸⁶ Fraud investigation, on the other hand, is not a product that FIE sells to its insureds. Rather, it is an internal function designed to ensure that FIE is not defrauded and that FIE does not pay illegitimate claims. It also ensures that FIE complies with state regulations requiring the existence of fraud detection programs.⁸⁷ Accordingly, there can be no dispute that special investigators perform administrative duties as they perform work directly related to assisting with the running or servicing of FIE's business. *Stout v. Smolar*, 2007 U.S. Dist. LEXIS 69615 (N.D. Ga. Sept. 18, 2007).

Special investigators provide comprehensive professional investigative services to the Claims Department to assist with the proper disposition of the claim. Even if the SIU were considered part of the claims-handling process, an entire body of federal authority establishes beyond argument that adjusting claims is administrative. 29 C.F.R. § 541.203; *In re Farmers Ins. Exchange*, 481 F.3d at 1129; *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578 (5th Cir. 2006); *Roe-Midgett v. C.C. Servs., Inc.*, 512 F.3d 865 (7th Cir. 2008); *McAllister v. Transamerica Occidental Life Ins. Co.*, 325 F.3d 997 (8th Cir. 2003); *Palacio v. Progressive Ins. Co.*, 244 F. Supp. 2d 1040,1050 (C.D. Cal. 2002); *Jastremski v. Safeco Ins. Co.*, 243 F. Supp. 2d 743 (N.D. Ohio 2003); *Robinson-Smith v. Gov't Empl. Ins. Co.*, 323 F. Supp. 2d 12 (D.D.C. 2004); 2002 DOL Opinion Letter (Nov. 20, 2002), 2002 DOLWH LEXIS 1 (DOLWH 2002) (finding adjusters' duties administrative because they involve servicing the insurance company in the same manner that claims adjusters traditionally have done so, as is reflected in the regulatory reference to claims adjusters). Thus, like claims adjusters, the duties Plaintiffs perform are

⁸⁶ The Department of Labor's regulations adopt this view as well: "as the court in *Palacio* emphasized, claims adjusters are not production employees because the insurance company is 'in the business of writing and selling [] insurance,' rather than in the business of producing claims." See 69 Fed. Reg. 22122, 22144-45.

⁸⁷ Administrative work includes "legal and regulatory compliance." 29 C.F.R. § 541.201(b).

“administrative” under the regulations.

The most recent Ninth Circuit decision on this issue, *In re Farmers Ins. Exchange*, 481 F.3d at 1129-30, focused on the particular duties of the position and whether the job duties are the types of duties identified in the federal regulations. The Court held that all of FIE’s claims representatives met the requirements of the administrative exemption. “[T]he district court’s factual findings confirm that FIE’s liability, automobile damage and property adjusters satisfy both prongs of the duties test.” *Id.* at 1132. More specifically, the Ninth Circuit held that the claims representatives were paid on a salary basis, performed office or nonmanual work directly related to management policies or general business operations and performed duties that required the exercise of discretion and independent judgment:

The district court found that all claims adjusters in this case: (i) determine whether the policy covers the loss, (ii) recommend a reserve upon estimating FIE's exposure on the claim, in accordance with state law requirements, (iii) interview the insured and assess his (or others') credibility, (iv) advise FIE regarding any fraud indicators or the potential for subrogation and underwriting risk, (v) negotiate settlements, (vi) seek additional authority from their supervisors, which is granted “75-100 percent of the time,” when the recommended settlement exceeds their established authority and (vii) communicate with opposing counsel and FIE’s counsel.

As far as we are concerned, that says it all. The district court’s findings almost track word for word the language in § 541.203, and thus establish that FIE’s claims adjusters are exempt from the FLSA.

Id. at 1129.

A recent district court decision relied on these same federal regulations covering insurance claims adjusters to find a private investigator to be properly classified as exempt. *Stout v. Smolar*, 2007 U.S. Dist. LEXIS 69615 (N.D. Ga. Sept. 18, 2007). In *Stout*, a private investigator sued his former employer, a law firm, claiming he was misclassified as exempt under the FLSA. The plaintiff interviewed witnesses, inspected automobile accident sites and reviewed information regarding the accidents to decide whether expert witnesses were needed and whether evidence was preserved. The court

cited to the regulations covering insurance claims adjusters and found that the plaintiff investigator's job duties were similar to those of the exempt claims adjusters. The court held that the plaintiff was properly classified as administratively exempt because his job duties were directly related to the business operations of his employer and he exercised independent discretion and judgment in performing those duties.⁸⁸

The controlling regulations make it clear that Plaintiffs perform job duties that are exempt tasks. Section 541.203, which sets forth "illustrations of the application of the administrative duties test to particular occupation[s]" provides that:

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**.

Id. (emphasis added). Like claims adjusters, Plaintiffs interview and interrogate insureds, witnesses and physicians, inspect property damage, review factual information, evaluate and make recommendations regarding suspect claims and assist with litigation. They also conduct investigations and determine the steps necessary to complete those coverage investigations. The investigative duties they perform require knowledge of insurance issues, assessment and selection of a wide range of investigative techniques, and credibility determinations. They have authority to make independent choices regarding investigative matters. Further, they work with outside private investigators,

⁸⁸ Some older cases held that certain investigators or police officers were non-exempt employees. The courts relied on the administrative/production dichotomy and found the employers' products to be the investigations themselves. The investigator's job duties were to produce the employer's product, i.e. the investigations. *Reich v. State of New York*, 3 F.3d 581 (2d. Cir. 1993); *Fleming v. Carpenters/Contractors Cooperation Committee*, 834 F. Supp. 323 (S.D. Cal. 1993); *Gusdonovich v. Business Info. Co.*, 705 F. Supp. 262 (W.D. Pa. 1985). These cases are clearly distinguishable. FIE's product is not criminal investigations or providing fraud reports, but is risk transference.

police and attorneys, if the case results in litigation. And they represent FIE and advise the Claims Department in the process of gathering evidence. Although Plaintiffs only perform some of the tasks typically performed by exempt claims adjusters, these tasks nonetheless have been found to be exempt. An employee may be found to be exempt even if he only performs some of the tasks listed in the regulations. *In re Farmers Ins. Exch.*, 481 F.3d at 1129.

A. Primary Duties Must Include The Use Of Discretion And Judgment

To qualify for the administrative exemption, an employee must have a primary duty that “includes the exercise of discretion and independent judgment with respect to matters of significance.” 29 C.F.R. § 541.200(a)(2). “Discretion and independent judgment” means that the employee at issue engages in “the comparison and evaluation of possible courses of conduct and acting or making a decision after various possibilities have been considered.” 29 C.F.R. § 541.202(a). The employee must have authority to “make an independent choice, free from immediate supervision with regard to matters of significance.” *See* 29 C.F.R. § 541.207(a). The regulations make clear that discretion and independent judgment “may consist of recommendations for action rather than the actual taking of action,” and that “an employee’s decisions may be subject to review” and still qualify under this element. 29 C.F.R. § 541.207 (e)(1); *In re Farmers Ins. Exchange*, 481 F.3d at 1129-1130; *Cheatham*, 465 F.3d at 585-586. As the Ninth Circuit explained, the use of the term “includes” means that not all duties must require discretion and judgment so long as some of the duties do. *In re Farmers Ins. Exch.*, 481 F.3d at 1129.

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:

- (1) whether the employee has the authority to formulate, affect, interpret or implement management policies or operating practices;
- (2) whether the employee carries out major assignments in conducting the operations

of the business; (3) whether the employee performs work that affects business operations to a substantial degree; (4) whether the employee has authority to commit the employer in matters that have significant financial impact; (5) whether the employee has authority to waive or deviate from established policies and procedures without prior approval; (6) whether the employee has authority to negotiate and bind the Company on significant matters; (7) whether the employee provides consultation or expert advice to management; (8) whether the employee is involved in planning long- or short term business objectives; (9) whether the employee investigates and resolves matters of significance on behalf of management; and (10) whether the employee represents the Company in handling complaints, arbitrating disputes, or resolving grievances.

29 C.F.R. § 541.202(b).

The discretion prong can be satisfied even if an employee's duties do not involve all or even most of these factors. In the preamble to the regulations, the DOL points out: "Federal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment, although a case-by-case analysis is required." 69 Fed. Reg. 22122, 22141 (Apr. 23, 2004) (citing cases including *McAllister*, 325 F.3d at 1000-02 (independent investigation and resolution of issues without prior approval; authority to waive or deviate from established policies and procedures without prior approval)). Here, the special investigators satisfy nearly all of the examples.

The DOL also emphasized that the list of factors is not exhaustive and pointed to other factors, including the employee's freedom from direct supervision, and troubleshooting or problem-solving activities on behalf of management. 69 Fed. Reg. 22122, 22141. *Accord Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 628 (11th Cir. 2004); *Stout*, 2007 U.S. Dist. LEXIS at *17 (interviewing witnesses, inspecting automobile accident sites and reviewing information on the accidents to decide whether expert witnesses would need to be called and evidence preserved required independent discretion and judgment).

B. Plaintiffs' Job Duties Include The Exercise of Discretion And Independent Judgment With Respect To Matters of Significance

Notably, Plaintiffs have admitted, in significant detail, that they are responsible for making decisions that are vitally important to FIE and its insureds and claimants, either without any supervision at all or, if supervision was required, through recommendations that were followed most of the time. For example, Plaintiffs admit they:

- Determine whether SIU involvement is necessary at the outset;
- Examine the entire claim file for potential fraud indicators;
- Develop their own investigation plans without review by managers;
- Decide which third parties to interview;
- Decide what questions to ask, how to ask the questions, and on what issues they should focus;
- Evaluate the credibility of claimants and witnesses;
- Decide which documents to obtain and analyze those documents to determine what information is relevant to the claim;
- Decide what areas to inspect and what to photograph during on-site inspections;
- Analyze the relative importance of potential leads and decide whether to follow up or disregard them;
- Alter the course of the investigation based on new information or new leads;
- Decide whether information is relevant or pertinent to include in a report, including status reports and final conclusions;
- Determine when to close an investigation when one or more fraud indicators remain unresolved;
- Decide whether to contact outside agencies and interact with those agencies;
- Decide whether to report claims to the NICB or state agencies;
- Perform FED reviews;
- Train claims representatives to identify suspicious activities;

- Assess underwriting risks;
- Manage the client relationship with claims representatives;
- Manage and prioritize their work flow; and
- Assist law enforcement and prosecution agencies or attorneys in criminal prosecution or lawsuits.

It is thus undisputed that Plaintiffs independently evaluate possible courses of conduct and made significant business decisions after considering various possibilities.

Not surprisingly, courts have held that these are exempt duties because their performance involves discretion and judgment. *In re Farmers Ins. Exch.*, 466 F.3d at 1129. Significantly, the Ninth Circuit also noted that the regulation **does not** require an adjuster to perform each and every activity listed in order to qualify as an exempt employee. *Id.*

Similarly, in *Cheatham*, 465 F.3d at 585-86, the Fifth Circuit Court of Appeals upheld the district court's judgment that the plaintiffs, casualty and property adjusters employed by Allstate, are exempt under the FLSA.

Appellants exercised discretion in determining coverage, conducting investigations, determining liability and assigning percentages of fault to parties, evaluating bodily injuries, negotiating a final settlement, setting and adjusting reserves based upon a preliminary evaluation of the case, investigating issues that relate to coverage and determining the steps necessary to complete a coverage investigation, and determining whether coverage should be approved or denied. The district court correctly determined that Appellants exercised independent judgment as Allstate adjusters.

Id. at 585-86.

Similarly, in *In re Allstate Insurance Company Fair Labor Standards Litigation*, MDL No. 1541, 2007 WL 2274802 (D. Ariz. 2007), the district court found that three casualty adjusters were exempt. The court analyzed the adjusters' duties and found that the regulations require only that the employee's work "include" the use of discretion and independent judgment. *Id.* at 20. Relying on the pertinent DOL regulation, the court pointed out that the required discretion and independent judgment may consist of

recommendations for action as well as the power to make an independent choice with respect to matters of significance free from immediate supervision. *Id.* at 21. Thus, the plaintiffs “made key decisions on key issues that were important to both Allstate and its claimants” mostly without supervisory review and were exempt from the overtime requirements of the FLSA. *Id.*

Like claims adjusters, Plaintiffs perform several tasks enumerated in the regulation and therefore meet the discretion prong. 29 C.F.R. §541.202(b). Plaintiffs investigate matters of significance on behalf of management, including matters with significant monetary stakes. They “interpret or implement management policies;” “carr[y] out major assignments” independently; “provide consultation and expert advice to management.” While they do not directly decide whether to pay or deny a claim, their investigation and analysis of the insured’s and the claimant’s information, conduct and credibility is used to make payment decisions. In this sense, Plaintiffs serve in a consultative role by advising FIE about important aspects of a claimant’s claim and whether there are unresolved issues that would justify the denial of payment. They provide information on claimants that may not have been previously identified and routinely provide updated factual information regarding a claim. They also represent FIE when they are conducting their interviews.

Also like claims adjusters, they exercise the required discretion and judgment by preparing and executing investigation plans; interviewing the insured, claimant(s), witnesses and law enforcement personnel; determining credibility; conducting on-site inspections; analyzing documents; examining and weighing evidence; and preparing reports to enable claims representatives to make coverage decisions. *See Jastremski*, 243 F. Supp. 2d at 753 (exempt claims adjuster exercised judgment and discretion by planning how to investigate the claim, deciding how to conduct the investigation, gathering facts, interviewing witnesses, and compiling scene diagrams).

These duties and responsibilities—which are not in dispute—are virtually

indistinguishable from those discussed in the regulations and case law holding claims adjusters exempt.

C. Quality Assurance Review Does Not Divest Special Investigators Of Judgment And Discretion

Plaintiffs argue that they should be classified as non-exempt because the QA review process severely limits or eliminates their discretion and judgment. This theory is unsupported by the facts, is contradicted by the regulations and has been rejected by courts.

Courts have repeatedly rejected the argument that the existence of, or adherence to, even detailed procedures eliminates an employee's ability to exercise judgment and discretion. *See, e.g., Cheatham*, 465 F.3d at 585-86; *In re Farmers Ins. Exch.*, 481 F.3d at 1129; *Jastremski*, 243 F. Supp. at 756-58; *McAllister*, 325 F.3d at 997; *Roe-Midgett*, 512 F.3d at 875. The fact that an employee's exercise of discretion must be within certain guidelines, may be subject to review, and that, on occasion, the decisions are revised or reversed after review, does not controvert or diminish an employee's exercise of discretion and independent judgment. *See* 29 C.F.R. § 541.202(c); *Murray v. Stuckey's*, 50 F.3d 564, 570 (8th Cir. 1995) ("active supervision and periodic visits" by a supervisor do not eliminate the exercise of discretion); *Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982) (rejecting the notion that exempt employees did not have sufficient discretionary powers because the company had standard operating procedures).

In *McAllister*, 325 F.3d at 997, the plaintiff alleged that her employer's insistence upon strict adherence to detailed claims procedures eliminated her judgment and discretion, rendering her nonexempt. *Id.* at 1001. The Eighth Circuit rejected her argument and concluded that the requirement to follow detailed procedures did not in any way diminish the judgment and discretion she exercised. *Id.* Noting that the procedure manual stated that adjusters had to use "good common sense judgment" in their claims work, the court concluded that plaintiff was exempt because she "independently had to

compare and evaluate possible courses of action, and her decisions or recommendations went to matters of significance for the insurance company.” *Id.*

As was true of the procedure manual in *McAllister*, FIE’s QA specifically and repeatedly makes clear that its procedures are mere guides, to do “as necessary” or “if warranted” and do not and cannot replace the special investigator’s judgment and discretion. The detective work necessary to ferret out fraud requires creativity, flexibility and good judgment. QA does not provide Plaintiffs with a step-by-step process to follow to investigate a claim or to determine how to create and execute an investigation plan. Plaintiffs who use the QA process as a method by which to conduct an investigation are working below the minimum expectations of the job because QA is a framework—not a checklist—and is based on *minimum* standards.⁸⁹ Moreover, QA’s role in evaluating investigations is limited. QA examines claims files only after they have been closed. Even then, QA also reviews only a very small percentage of Plaintiffs’ files.

The undisputed evidence establishes that the nature of the investigations depends upon the nature of the suspected fraudulent activities, and that Plaintiffs have substantial independence in performing their tasks and managing their workflow and have nearly complete freedom from direct supervision. Plaintiffs, who spend virtually all of their time investigating suspicious claims, are therefore primarily engaged in exempt administrative duties.

III. FIE IS ENTITLED TO SUMMARY JUDGMENT ON THE CALIFORNIA CLAIMS

Debra Silverberg, Neil Coffman and John Palisoc (the “California Plaintiffs”) bring separate claims for relief under the California Labor Code. The California Plaintiffs allege they were misclassified as exempt under California law and are entitled to compensation for unpaid overtime and missed meal and rest breaks. They also seek

⁸⁹ Silva Decl. at ¶ 6.

penalties for inaccurate paycheck statements under Labor Code section 226 and waiting time penalties under Labor Code section 203. The California Plaintiffs' claims for unpaid overtime and meal and rest break compensation fail for the same reason that their FLSA claims do—they were properly classified as exempt employees. Their claims for meal and rest break violations fail for the additional reason that the undisputed evidence demonstrates that meal and rest breaks were provided.⁹⁰

A. The California Administrative Exemption Adopts Federal Law

California's Industrial Wage Order 4-2001 not only closely tracks and adopts the language of the FLSA administrative exemption, but even adopts wholesale the regulations⁹¹ issued by the Secretary of Labor:

The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. §§ 541.201-205, 541.207-208, 541.210, and 541.215.

...

Moreover, in adopting the new wage order, the IWC expressly stated its intent to conform with FLSA law.⁹² Thus, after the enactment of Wage Order 4-2001, the federal regulations must be considered when analyzing the California administrative exemption.

To determine whether the employee meets the “primarily engaged” element and spends at least fifty percent of his or her time on work that meets the test of the

⁹⁰ The sixth claim for “Unfair Practice Under the Unfair Competition Act” is derivative of the other claims. Such a claim “requires a violation” of the “borrow[ed]” predicate statute—here Labor Code sections 510, 1194, 1198, 226.7, 203 and 512. A defense to the underlying offense is a defense under the UCL. *Steinhebel v. Los Angeles Times Communications*, 126 Cal. App. 4th 696, 712 (2005). Thus, the UCL claim fails for the same reason that their Labor Code claims fail.

⁹¹ The only difference is the definition of “primary” duty, which includes a “50% of work” time rule. Cal.Code Regs., tit. 8, § 11040(1)(A)(2)(f). Since special investigators spend all of their time at that job, this difference is immaterial.

⁹² See the IWC's “Statements As to the Basis” accompanying Wage Order 4-2001, which sets forth the reasons for its decisions.

exemption, the Court must consider both how the employee actually spends his or her time *and* whether the employee's conduct diverges from the employer's realistic expectations. *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 802, (1999) (discussing a different wage order containing a similar requirement that the employee spend more than fifty percent of his or her time on specified duties). An employee that "falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption." *Id.* The California Plaintiffs investigate potentially fraudulent cases every day. Thus, they spend not only more than 50 percent of their time performing these job duties, they spend one hundred percent of their time on these duties.

Because one of the IWC's explicit goals in promulgating California's new Wage Order was to "promote uniformity of enforcement" under state and federal law, it follows that, for the reasons stated above, the California Plaintiffs also qualify for the administrative exemption under California law.

B. Because The California Plaintiffs Were Exempt Employees, Their Claims Relating to Meal and Rest Periods are Moot

Industrial Welfare Commission ("IWC") Wage Order 4-2001 specifically provides that "Sections 3 through 12" of the applicable Wage Order shall *not* apply to exempt employees. Sections 11 and 12 pertain to meal periods and rest periods, respectively, for nonexempt employees. Accordingly, Plaintiffs' exempt status precludes the California Plaintiffs from recovering on their meal and rest period claims.

C. Special Investigators Were Authorized And Permitted To Take Breaks

Plaintiffs meal and rest break claims also fail as a matter of law based on the undisputed facts. California Labor Code section 512(a) states that "an employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes" Labor Code section 512(a) also provides for a second 30-minute meal period if the employee works ten hours. Labor Code section 226.7 states that employers may not "require" employees to

work through meal or rest periods as specified in the applicable IWC Wage Order.

State and federal case law consistently interprets these requirements to mean that employers must only make meal periods *available* to employees, not actually *require* employees to take their meal periods. Although the California Supreme Court has not yet interpreted the meaning of the word “provide” under Labor Code section 512,⁹³ it has strongly indicated that an employer violates Labor Code section 226.7 only if it forces an employee to forgo a meal break:

- An employer violates the law if an employee is “*forced to forgo his or her meal . . . a benefit to which the law entitles him or her.*” *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1104 (2007) (emphasis added).
- “Under . . . section 226.7, an employee is entitled to the additional hour of pay immediately upon being *forced to miss a rest or meal break.*” *Id.* at 1108 (emphasis added).
- “[B]eing *forced to forgo rest and meal breaks* denies employees time free from employer control that is often needed to be able to accomplish important personal tasks.” *Id.* at 1113 (emphasis added).

Numerous federal decisions concur. *White v. Starbucks*, 497 F. Supp. 2d 1080, 1088-89 (N.D. Cal. 2007); *Brown v. Federal Express Corp.*, 249 F.R.D. 580 (C.D. Cal. 2008); *Kenny v. Supercuts, Inc.*, 252 F.R.D. 641 (N.D. Cal. 2008); *Perez v. Safety-Kleen Sys., Inc.* 253 F.R.D. 508, 514 (N.D. Cal. 2008) ; *Watson-Smith v. Spherion Pac. Workforce, LLC*, 2008 U.S. Dist. LEXIS 106147 (N.D. Cal. 2008).

For example, in *White*, 497 F. Supp. 2d at 1088-89, a former manager argued he did not receive meal and rest breaks and that Starbucks was required to affirmatively enforce its break requirements. *Id.* at 1088. The court disagreed, concluding that, “the California Supreme Court . . . would require only that an employer *offer* meal breaks,

⁹³ The California Supreme Court has granted review of *Brinker Restaurant Corp. v. Sup. Ct.*, 165 Cal. App. 4th 25 (2008), and *Brinkley v. Pub. Storage, Inc.*, 167 Cal. App. 4th 1278 (2008). *Brinker* held, among other things, that the proper interpretation of “provide” means employers must make meal periods available, not force employees to take those meal periods. In *Brinkley*, the Court of Appeal reached the same conclusion.

without forcing employers actively to ensure that workers are taking these breaks.”

Granting defendant’s summary judgment, the court held that “the employee must show that he was *forced to forego* his meal breaks as opposed to merely showing that he did not take them regardless of the reason.” *Id.* (emphasis added)

Similarly, in *Brown*, 249 F.R.D. at 585, the court relied on the statutory language and held that FedEx was only required to provide meal breaks, not require that employees take them. *Brown* involved a putative class of FedEx delivery drivers. Because FedEx was only required to make meal and rest breaks available to plaintiffs, the court held that plaintiffs could prevail only if they demonstrate that FedEx’s policies deprived them of those breaks. *Id.* at 586.

Brown also noted its public policy concerns:

Requiring enforcement of meal breaks would place an undue burden on employers whose employees are numerous or who, as with Plaintiffs, do not appear to remain in contact with the employer during the day. It would also create perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws.

Id. at 585 (emphasis added).

The lack of liability is likewise obvious as to rest breaks, which employers need only “authorize and permit”; the phrase does not require employers to enforce rest breaks. Cal. Code Regs., tit. 8, § 110501(12)(A), *White*, 497 F. Supp. 2d at 1085-87; *Perez*, 253 F.R.D. at 516; *Cornn v. UPS*, 2005 WL 588431, at *2 (N.D. Cal. Mar. 14, 2005).

Thus, an employer is only required to make a meal and rest periods available. As in *Brown*, the nature of the special investigators’ job permits them to control their workday. As such, special investigators can take meal or rest breaks during the day as they choose. Accordingly, the California Plaintiffs lack any evidence that they were ever forced to forego a meal or rest break or that they were ever told not to take breaks and

their claims must be dismissed.⁹⁴

D. The California Plaintiffs Were Not Owed Any Wages At The Time Of Their Terminations

The California Plaintiffs' claim for Labor Code section 203 waiting time penalties is without merit for two reasons. First, as the previous discussion has demonstrated, Silverberg, Coffman and Palisoc, as special investigators, were exempt employees. Thus, at the time their employment ended, they were not owed any unpaid overtime wages. Second, under section 203, an employer is liable for waiting time penalties only if it *willfully* fails to pay wages to an employee when those wages are due. Cal. Code Regs., tit. 8, § 13520.

If a good faith dispute exists that any wages are due, that dispute will preclude a finding that a failure to pay was willful, and thus will preclude imposition of waiting time penalties. *See Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1, 8 (1981) (uncertainty over law constituted good faith dispute regarding wage payments precluding assessment of waiting time penalties). The fact that the defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." Cal. Code Regs., tit. 8, § 13520; *Smith v. Rae-Venter Law Group*, 29 Cal. 4th 345, 353 (2002). Here, FIE at all times applied the administrative exemption to the special investigator positions in good faith.

Moreover, industry tradition is to treat special investigators and claims adjusters as exempt employees and relevant legal authorities reflect the legitimacy of this tradition. Finally, recent federal law (of general guidance for California law) has found claims adjusters who perform many of the same job duties to be exempt. *Monzon v. Schaefer Ambulance Serv., Inc.*, 224 Cal.App.3d 16, 31 (1990) ("California wage laws are

⁹⁴ Palisoc Dep. at 124:24-125:14 (no one told him that he could not take lunch or breaks); Fenton Dep. at 151:22-24; Hansen Dep. at 124:17-22; Krahenbuhl Dep. at 146:22-24; Niblack Dep. at 97:15-19.

patterned on federal statutes and [] the authorities construing those federal statutes provide persuasive guidance to state courts”).

At most, Plaintiffs can only claim there is a good faith dispute as to whether investigators meet the test for the administrative exemption. Thus, even if FIE (and the entire insurance industry) has somehow been mistaken, it has acted in good faith, entitling it to dismissal of the section 203 claim.

E. The Labor Code Section 226 Claim Requires Misclassification

California Labor Code section 226 requires that, along with each wage payment, employers must provide a check stub containing, among other things, gross wages earned, total hours worked by the employee, except for exempt employees; and net wages earned. The California Plaintiffs claim that the wage statements are inaccurate because they do not reflect the overtime hours that Plaintiffs claim to have worked. As the previous discussion has demonstrated, Silverberg, Coffman and Palisoc were exempt employees. Thus, Labor Code section 226 does not require that the number of hours worked be identified on the paycheck stub. Accordingly, summary judgment is appropriate as to this claim.

F. Coffman’s Claim For Inaccurate Paycheck Stubs Is Time Barred

Plaintiff Neil Coffman’s fourth cause of action for “failure to provide accurate itemized wages statements” fails for the additional reason that it is barred by the applicable one year statute of limitations as prescribed by California Code of Civil Procedure section 340(a). Section 340(a) states that the limitations period shall be one year for “[a]n action upon a statute for a *penalty* or forfeiture, if the action is given to an individual, or to an individual and the state, except if the statute imposing it prescribes a different limitation.” Cal. Civ. Proc. Code § 340(a).

Coffman’s employment was terminated on March 8, 2006.⁹⁵ The Amended

⁹⁵ Preonas Decl. at ¶¶ 18 and Exh. 17.

