UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANTHONY MORANGELLI, FRANK ERCOLE, JASON CASTILLO, STEVE MCMAHON, EVENS SAINT JUSTE, JEFFREY GORMAN, TERRY LOETSCHER, JAMES SABAS, FRANK POCZOK, STEVEN HESS, FRITZ JEUDY, ALAN KENNEDY, LAWRENCE RICHARDSON, SHILO CAIN, DINO BRANCO, FREDERICK WIGGINS, DANIEL HODGES, JR., JAMES HARRIS, BRYON E. FRAZIER-SMITH and LEVOID BRADLEY, individually and on behalf of all others similarly situated, Plaintiffs, v. CHEMED CORPORATION and ROTO-ROOTER SERVICES COMPANY, Defendants.	10 Civ. 0876 (BMC) ORAL ARGUMENT REQUESTED

Defendants' Memorandum of Law in Support of their
Motion for Summary Judgment and/or
Decertification of the Class and Collective Actions

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Defendants Chemed Corporation ("Chemed") and Roto-Rooter Services Company ("RRSC") (together, the "defendants") respectfully submit this memorandum of law in support of their motion for an order (i) granting summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure; (ii) decertifying the Fair Labor Standards Act ("FLSA") collective action in accordance with 29 U.S.C. § 216(b); and/or (iii) decertifying the state class actions in accordance with Rule 23(c) of the Federal Rules of Civil Procedure.

Preliminary Statement

Plaintiffs obtained class certification based upon their representations that they could prove liability on a class-wide basis through a "paper case" and a proposed trial plan that would rely almost exclusively on defendants' records. With discovery complete, it is now evident that plaintiffs have bitten off far more than they can chew. Indeed, not only are they unable to present evidence of liability on a class-wide basis – they fail even to present evidence of liability with respect to each of the thirty-nine individuals (the "Discovery Plaintiffs") who participated in representative discovery.

In their responses to defendants' interrogatories, plaintiffs identified every incident of alleged time-shaving, every occasion on which they claim a technician performed turn-in off the clock, and each week in which a technician's compensation allegedly fell below minimum wage due to business expenses. But for many of the thirty-nine Discovery Plaintiffs they could identify *no* such alleged incidents, occasions, or weeks. As such, it is clear that even if they could muster proof of statutory violations as to certain plaintiffs, there would be no basis to extrapolate liability on a nationwide or statewide basis.

Moreover, plaintiffs' trial plan is unrealistic and unworkable. As noted by the Court in granting class certification, "[p]laintiffs have proffered what essentially amounts to a 'paper case.'" But the testimony that will be required goes far beyond that necessary to authenticate

documents, interpret records, fill in gaps, and provide background. For example, extensive testimony is necessary to address each alleged incident of time-shaving. Defendants' analysis – set forth in its entirety in the accompanying declaration of Gary Sander, RRSC's Executive Vice President – shows that many of the incidents alleged by plaintiffs are readily proven as *not* involving any violations of law. Further, many alleged time-shaving incidents must be disregarded because they occurred outside the statute of limitations or occurred in the middle of the technician's workday (and thus did not affect the calculation of his work hours), or because the technician would have worked fewer than forty hours during the week (and thus would not have been entitled to overtime pay) even if he were credited for the allegedly shaved hours.

Once those obviously incorrect allegations of wrongdoing are removed, the real work begins. Each set of time entries must be separately analyzed to ascertain the reasons that the original time entries were changed. A painstaking review of numerous different records reveals a variety of explanations. In some cases where a technician was credited with working just a few minutes on a job that produced significant revenue, it turns out that the technician actually performed the job on a different day when he was credited with significant work time. Other times, the job was initially assigned to the technician but shortly later reassigned to a different technician, often before the first technician had even begun his work day. On other occasions, a special code causes a modification to look like time-shaving when it was nothing of the sort – as when a start time for a particular job was coded at 5:00 a.m., but this time entry is used as a code by dispatchers to indicate that the job is a rush and RRSC's records confirm that the customer did not even call the company until hours later. And on many occasions, it is evident that the technician simply did not properly code out at the end of his work day – a common occurrence –

and that adjustments to time entries were necessary in order to *correct* the records, not to improperly change them, or were made in connection with the technician's audit of his own time.

Notably, plaintiffs have waived any right to present expert testimony and are thus unable to present any statistical evidence supporting their claims (to the extent such evidence would otherwise be admissible). Thus, they are left to an entry-by-entry presentation of the alleged violations, which can be accomplished only through cross-examination of defendants' witnesses. But because there are so many possible explanations for the incidents they claim as violations, the only way plaintiffs can present *prima facie* evidence sufficient to prove any particular alleged incident of time-shaving is by showing that those possible explanations do not apply. This process would require a jury to hear an analysis of each and every entry as well as testimony from defendants' witnesses to explain the changes (including both an employee familiar with RRSC's systems and the employee responsible for the allegedly wrongful modification) and ultimately from the allegedly affected technician, who will have to explain to the jury in each instance why he signed a document confirming the accuracy of the weekly time records on which he was paid but now contends such records are wrong.

Neither plaintiffs' uncompensated hours claims nor their business expense claims can surmount these challenges, and consequently none should be permitted to proceed on a class or collective basis.

Plaintiffs' claims alleging that RRSC made illegal deductions from technicians' pay fails as a matter of law because commissions were considered advances that could be recouped until certain conditions were satisfied. Because this is permissible under the laws of all of the class states, summary judgment should be granted dismissing these claims. Moreover, technicians'

knowledge and acknowledgement of such deductions renders them permissible under the laws of certain class states.

Finally, a series of plaintiffs' claims fail as a matter of law. These include California claims barred by a prior class settlement; claims that simply fail to satisfy applicable statutory requirements or as to which plaintiffs can present no evidence; and claims by those Discovery Plaintiffs who have presented no alleged instances of violations.

Accordingly, defendants respectfully submit that the Court should grant summary judgment dismissing large portions of the claims asserted by plaintiffs and decertify from the collective and class actions the balance of the claims.

Procedural History and Facts Common to All Claims

Defendants discuss below this action's procedural history, including how plaintiffs' class and collective action claims have repeatedly changed through the course of this litigation. Defendants also discuss the nature of plaintiffs' remaining claims and RRSC's lawful policies. Facts specific to the individual claims are addressed in the argument sections below.

I. Plaintiffs' Complaint and Certification of the FLSA Collective Action

Applying the lenient standard applicable to a motion for conditional certification of a class action made shortly after the filing of the complaint, the Court on June 17, 2010 conditionally certified a nationwide collective action comprised of RRSC technicians paid on a commission basis. Docket Entry No. 65 ("Conditional Certification Order"). Of the approximately 2058 current and former technicians who received notice, approximately 432 technicians from approximately 48 branches in 25 states opted to join the collective action. Holtzman Decl. ¶ 3. On January 21, 2011, plaintiffs filed a Third Amended Class Action Complaint (the "Complaint"). Docket Entry No. 187.

The parties identified the thirty-nine Discovery Plaintiffs, including all of the named plaintiffs, to participate in representative discovery. Defendants have produced documents, records and data for each Discovery Plaintiff and the Discovery Plaintiffs have all been deposed.[1] The statute of limitations applicable to each Discovery Plaintiff's FLSA claim begins three years prior to the date his or her consent to sue was filed.[2]

II. Certification of the State Class Actions

On June 17, 2011, the Court granted plaintiffs' motion to certify fourteen separate class actions for purposes of determining liability with respect to three of plaintiffs' claims under the laws of California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Minnesota, Missouri, New York, New Jersey, North Carolina, Ohio, and Washington (the "Class States").[3] Docket Entry No. 203 at 42 (the "Class Certification Order"). The Court certified these classes to determine whether defendants violated plaintiffs' rights under each Class States' laws by (a) imposing business expenses on technicians that in certain weeks had the effect of bringing

[1] The name of each Discovery Plaintiff, the state and branch in which the Discovery Plaintiff worked, their employment dates and the dates on which they filed their consents to assert FLSA claims as part of the collective action are identified in Exhibit 1 to the Sander Declaration. The Discovery Plaintiffs' consents to sue appear at Docket Entry Nos. 75, 92, 93, 97, 99, 100, 104, 105, 106, 107, 108, 110, 114, 116, 121, 127, 128, 129, 130, 132, and 141.

[2] The statute of limitations on a claim for willful violation of the FLSA, as plaintiffs allege here, is three years. *Doucoure v. Matlyn Food, Inc.*, 554 F. Supp. 2d 369, 373 (E.D.N.Y. 2008) (citing 29 U.S.C. § 255(a)). With respect to an opt-in plaintiff who was not named in the complaint, FLSA claims are considered to be commenced on the date the consent to sue was filed. 29 U.S.C § 256(b). Similarly, unless a named plaintiff filed a consent to sue on the same day the complaint was filed, a named plaintiff's FLSA claim is considered to be commenced on the date he filed a consent to sue. *Id*. at § 256(a) & (b); *see also Lee v. Vance Exec. Protection, Inc.*, 7 Fed. App'x. 160, 167 (4th Cir. 2001) ("[U]ntil a plaintiff, even a named plaintiff, has filed a written consent, he has not joined in the class action, at least for statute of limitations purposes.") (quotation omitted).

[3] The Court did not certify any of the classes for purposes of determining damages in the event liability is established. Class Certification Order at 37-38.

their wages below the applicable minimum wage (the "Business Expense Claim"); (b) failing to compensate technicians for time shaved from their actual hours of work, time spent at turn-in[4] and other meetings, and time spent maintaining their vans and work equipment (the "Uncompensated Hours Claim"); and (c) taking deductions from the plaintiffs' wages in violation of State law (the "Illegal Deductions Claim"). *Id* at 42 (collectively, these three claims are referred to herein as the "State Class Claims"). For the North Carolina class, the Court certified only the Illegal Deductions Claim. *Id*. at 3 n.2 The Court did not certify a class action with respect to the Illegal Deduction Claim for the Florida or Hawaii classes. *Id*. at 24. The Court limited participation in the class actions to "[a]ll persons who have worked as commissioned technicians for Defendants" and specified for each Class State a class representative(s) and class period. *Id.* at 42-45. *See* Appendix A.

In certifying the State Class Claims, the Court emphasized that it did so based on plaintiffs' representations that they could prove their State Class Claims through defendants' records alone and individualized inquiries and extensive testimony would be unnecessary. For example, the Court accepted plaintiffs' representation that they could prove their Business Expense Claim through records by "add[ing] all the documented expenses and see[ing] if they were so large as to reduce the technicians' wages below the minimum." *Id*. at 9. Similarly, the Court accepted plaintiffs' representation that they could prove their Uncompensated Hours Claim "us[ing] defendants' records alone" by comparing plaintiffs' electronic time records with time stamps on certain turn-in documents and that their time-shaving claim is based upon alterations in defendants' time-keeping records that demonstrate a "temporal impossibility." *Id.* at 18-19, 21. Likewise, the Court certified plaintiffs' Illegal Deduction Claim based on

[4] Turn-in is the weekly process during which technicians review their time sheets for accuracy and turn-in their expenses, receipts and money orders for the week. Docket Entry No. 189 ¶ 9.

plaintiffs' contention that defendants' records "show when reversals – made pursuant to the defendants' common policy articulated in the handbook – are made." *Id*. at 26.

Indeed, in summarizing the Class Certification Order, the Court stated:

> To reiterate, although plaintiffs have met their burden on the facts presented to me that they meet Rule 23 requirements to establish liability, class certification is, of course, inherently tentative. Plaintiffs have proffered what essentially amounts to a "paper case." I recognize that some testimony will be necessary, not just to authenticate and interpret defendants' records, but to fill occasional gaps and provide relevant background. However, if plaintiffs begin to have second thoughts about their chances at trial without offering more testimony, I will de-certify the class.

Id. at 38 (internal quotation and citation omitted).

Since the Class Certification Order was entered, significant portions of the State Class Claims have been decertified because it became clear that plaintiffs could not prove their claim through the type of "paper case" that they proffered. Specifically, on July 8, 2011, the Court granted defendants' motion for partial reconsideration and amended the definition of plaintiffs' Uncompensated Hours Claim "to exclude a claim for uncompensated hours for maintaining plaintiffs' vans and work equipment." Docket Entry No. 211 at 5 ("Reconsideration Order"). The Court held that plaintiffs' claim for uncompensated hours for van and equipment maintenance time was unsuitable for class certification because the effect of the asserted violations is "different on individual technicians, requiring even the question of liability to be resolved through a highly individualized inquiry." *Id.* at 4.

On July 24, 2011, the Court granted plaintiffs' request to amend the Class Certification Order "to reflect [that] Plaintiffs' [Illegal Deduction Claim] is limited to the following commission reversals which they claim are illegal deductions: (1) bad checks and stop-payments,

(2) call-backs for warranty service,[5] and (3) refunds to customers complaining about service or damages." Docket Entry Nos. 212 & 214 at 3. Plaintiffs later agreed to further pare their Illegal Deduction Claims to address only call-backs for warranty service and to decertify from their Uncompensated Hours Claim in both the class and collective actions the claim that defendants failed to compensate plaintiffs for time spent attending meetings and trainings. Docket Entry No. 228 (the "Decertification Stipulation").

Consequently, through the course of this litigation, plaintiffs' State Class Claims have steadily been narrowed as it became clear that they could not properly be pursued on a class or collective basis. All that remains of plaintiffs' Uncompensated Hours Claims is the allegation that defendants failed to compensate technicians for (i) time shaved from their actual hours of work (the "Time-Shaving Claim") and (ii) time spent at turn-in (the "Turn-in Claim"), and the sole allegation left in plaintiffs' Illegal Deduction Claim is that defendants took deductions from Plaintiffs wages for call backs for warranty service in violation of State law.

Notice of the state class actions was sent to approximately 1,971 commissioned technicians, three of whom have opted not to participate in this litigation. Holtzman Decl. ¶ 4; Docket Entry No. 229.

III. Plaintiffs' Responses to Defendants' Contention Interrogatories

On August 9, 2011, defendants served on each of the Discovery Plaintiffs a set of contention interrogatories. *Id.* ¶ 7 & Ex. 1. Plaintiffs served their responses on November 24, 2011, after the parties had completed their final exchange of discovery. *Id.* ¶ 8 & Ex. 2.

[5] A commission adjustment occurs in connection with a call-back when a technician performs warranty work on a job originally completed by another technician. *See* Holtzman Decl. Ex. 8 at CHEMED/RR 00005699

Plaintiffs produced spreadsheets identified as Exhibits A, A1, A2, B, C and D that respond to certain interrogatories. *Id*. ¶ ¶ 9, 15, 16 & Exs. 2, 3, 4.

With respect to the Time-Shaving Claim, defendants' interrogatories requested that plaintiffs "[i]dentity each time record that [a] plaintiff contends reflects a 'temporal impossibility' that demonstrates that defendants impermissibly altered, manipulated or 'shaved' his time records so that he was not compensated for all the hours he worked." *Id*. ¶ 10 & Ex. 2. In response, plaintiffs produced Exhibit A. *Id*. Plaintiffs subsequently indicated that they would also seek to rely upon instances of alleged time-shaving that do not involve supposed temporal impossibilities and ultimately produced Exhibit A2, which contains 977 additional alleged incidents of time-shaving. *Id*. ¶ 11-17 & Ex. 4. Plaintiffs have explained that the entries identified on Exhibit A2 are either: (a) days on which a technician ended his day on stand-by time where the time records show that the amount of stand-by time was changed on either a Monday, Tuesday or Wednesday to reduce the stand-by time by more than more than 30 minutes and the original (now deleted) entry had the technician ending his day at his scheduled end-of-day time; or (b) days on which the technician started his day on stand-by where the time records show the time was changed on a Monday, Tuesday or Wednesday to reduce the stand-by time and the original (now deleted) entry had the technician starting his day within 10 minutes of his scheduled start-of-day time. *Id*. ¶ 18; *see also id.* Ex. 5. Plaintiffs also explained that they had exercised their own judgment in excluding from Exhibit A2 certain time entries that fell into one of these two categories, but have not identified which entries were excluded or the reasons they chose to exclude them. *Id*. ¶ 19. Plaintiffs have confirmed that Exhibits A and A2 contain all of the time entries upon which they will rely in seeking to prove liability on their time-shaving claim. *Id*. ¶ 20.

Regarding the Turn-In Claim, defendants' interrogatories requested that plaintiffs "[i]dentify the date and time of each instance that [a] plaintiff performed 'turn in' that he contends was not accurately recorded in his time records as working time." *Id.* ¶ 21 & Ex. 2. In response, plaintiffs produced Exhibit B, which they claim "contains all the instance of unrecorded turn-in time that plaintiffs will present as part of their liability case." *Id.* ¶¶ 21-22 & Exs. 2, 3.

Exhibit D, which relates to plaintiffs' Business Expense Claim, was provided by plaintiffs in response to defendants' interrogatory requesting that plaintiffs "[i]dentify each week that [a] plaintiff contends he incurred business-related expenses that had the effect of bringing his wages below the rate that is permitted by federal law and/or the law in the state in which he worked." *Id.* ¶ 23 & Ex. 2. Plaintiffs have confirmed that Exhibit D "contains all of the weeks that plaintiffs will present to show that they incurred business-related expenses that had the effect of bringing wages below the minimum wage for purposes of establishing liability." *Id.* ¶ 25 & Ex. 3.

Defendants have created charts summarizing the data on each of Exhibits A, A2, B and D and providing, with respect to each Discovery Plaintiff, (i) the total number of entries for that Discovery Plaintiff; (ii) the total number of entries that fall within the state statute of limitations applicable to that Discovery Plaintiff; (iii) the total number of entries on the exhibit that fall within the FLSA statute of limitations applicable to that Discovery Plaintiff; (iv) the branch in which the Discovery Plaintiff worked; and (v) the state in which the Discovery Plaintiff worked. Sander Decl. ¶ 5 & Exs. 2, 3, 4, 5. As those charts reflect, on each of Exhibits A, A2, B and D do not include any entries whatsoever for multiple Discovery Plaintiffs (see pp. 23, 24, 41 & 47 below). Moreover, many of the entries on Exhibits A, A2, B and D fall outside of the state

and/or federal statutes of limitations applicable to the relevant Discovery Plaintiff. Once those entries are excluded, there are yet further technicians for whom there are no entries listed on Exhibits A, A2, B and/or D within the applicable statute of limitations (see p. 23, 24, 41 & 47 below).

IV. RRSC'S Policies

RRSC has comprehensive policies regarding time tracking, payment of overtime and premium pay, and reversals of commissions, that are contained in an Employee Handbook.[6] Holtzman Decl. Ex. 8. All technicians are required to review the Employee Handbook and sign a form acknowledging that they have reviewed it and their understanding that it is their responsibility to read and comply with the policies. Docket Entry No. 31 at ¶ 11. Twenty-eight of the thirty-nine Discovery Plaintiffs have signed such acknowledgements. Holtzman Decl. Ex. 7.

The Employee Handbook specifically states that RRSC is legally required to accurately record technicians' time worked to calculate pay and that technicians are responsible for accurately recording and verifying their time. *Id*. Ex. 8 at CHEMED/RR 00005688-9. Thus, the Time Tracking policy describes when a technician's daily work time begins and ends and makes clear that RRSC "may end a technician's shift early if no additional job assignments are foreseeable before the end of his/her scheduled shift." *Id.* at CHEMED/RR 00005690. In this manner, RRSC can adjust the number of technicians working to meet the volume of customer calls received. The Time Tracking policy also explains various classifications of work time that occur during a technician's day and are used to calculate the technician's total number of hours

[6] As explained in greater detail in Sections II. A. 2 & 3, California has its own Employee Handbook (the "California Handbook") that sets forth policies unique to that state. *See* Holtzman Decl. Ex. 9.

worked. For instance, the policies define "stand-by" time, which is considered work time and counts towards overtime hours, as "time spent between jobs waiting to be dispatched." *Id.* Similarly, "administrative time" which also counts toward overtime hours, includes time spent attending mandatory meetings or participating in the weekly turn-in process. *Id.* Thus, where a technician's time files reflect intraday entries for work time, stand-by time, administrative time or transit time, the technician is "on the clock" and those hours are counted towards overtime hours. Sander Decl. ¶ 17.

A technician's total work hours for a particular day are determined by calculating the elapsed time from the technician's start of his work day to the end of his work day and then subtracting out any lunch or personal time. *Id.* ¶ 22. RRSC is aware that time records that occur in the middle of the workday do not have the same level of accuracy as records concerning technicians' start of day and end of day. *Id.* ¶ 17. The intraday records do not have an impact on technician compensation and thus are not legally required and not subject to the same level of focus by RRSC. *Id.*

Technicians have an important role in maintaining the integrity of the time-keeping process. They are required to accurately record their time, most of which occurs outside of supervisors' or co-workers' presence. Sander 10/29/10 Tr. 88**.** More recently, they are given the opportunity to review their daily hours at the end of their workday and are required to confirm whether they are accurate and, if they are not, to address promptly any issues. *Id.* at 200-03. At all times, they have been provided at the end of the week a "Detailed Listing of Time" identifying the credited work hours for the week, which they are required to review before the turn-in process can be completed. They must either confirm that these records are accurate or raise any inaccuracies with branch management. *Id.* at 58-59, 151. Throughout the time-keeping

process, technicians are given multiple opportunities to ensure that their time records are accurate and to correct any errors.

When a commissioned technician works fewer than forty hours in a week, the technician's pay is based upon the commissions he earned in that week. Sander Decl. ¶ 25. When a technician works more than forty hours, a premium of 50% of the regular rate of pay is added for all hours worked over forty hours in a workweek.[7] Holtzman Decl. Ex. 8 at CHEMED/RR 00005696. If his weekly commissions alone would not satisfy the required minimum wage, RRSC's payroll system automatically pays the technician a supplement to ensure he receives at least minimum wage for all hours worked (plus any overtime premiums, if applicable). Sander 10/29/10 Tr. 283-84.

Argument

With the benefit of full discovery, it is now abundantly clear that plaintiffs cannot sustain their claims. Some claims should be dismissed on summary judgment, as they clearly lack legal and/or factual merit. The balance should be decertified from the FLSA collective and state law class actions, as plaintiffs cannot proceed with the "paper case" that was the basis of the Court's certification decision and none of the claims meet the prerequisites necessary for a representative case.

I. The Governing Legal Principles

Mindful that the Court is familiar with the applicable legal standards, defendants cite here only critical principles and recent notable caselaw relevant to this motion.

In considering a post-discovery motion for decertification "the Court, now afforded a much fuller record, must apply a more stringent standard of proof in determining whether

[7] California also requires overtime pay based upon the number of hours worked in a single workday. Holtzman Decl. Ex. 9 at CHEMED/RR 00047565.

plaintiffs are similarly situated for purposes of the FLSA." *Zivali v. AT & T Mobility, LLC*, 784 F. Supp. 2d 456, 460 (S.D.N.Y. 2011) (internal quotations and citations omitted); *see also Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010). In evaluating whether members of a collective action are similarly situated, courts in this circuit look to the (i) disparate factual and employment settings of the individual plaintiffs, (ii) defenses which appear to be individual to each plaintiff, and (iii) fairness and procedural considerations counseling for or against collective treatment. *Zivali*, 784 F. Supp. 2d at 460. At the post-discovery decertification stage, the named plaintiffs continue to carry the burden of proving that the other employees are similarly situated; if they are unable to do so, "the class is decertified, the claims of the opt-in plaintiffs are dismissed without prejudice, and the class representative may proceed on his or her own claims." *Id.* (internal quotation and citation omitted); *see Myers*, 624 F.3d at 555 ("The action may be 'de-certified' if the record reveals that [plaintiffs] are not [similarly situated], and the opt-in plaintiffs' claims may be dismissed without prejudice.")

The *sine qua non* of the collective action is that the claims may be determined for all members of the collective based upon the testimony of a limited number of representative plaintiffs. That condition is absent, however, where "[t]he testimony of the plaintiffs is not representative and cannot fairly be extrapolated to the . . . individuals who have opted into this action." *Zivali,* 784 F. Supp. 2d at 468; *see also Proctor v. Allsups Convenience Stores, Inc.*, 250 F.R.D. 278, 284 (N.D. Tex. 2008) (granting motion for decertification where "there is no consistency among the testimony, there is no consistently applied policy resulting in working off the clock, and the time spent working off the clock is not alleged to be uniform or of a predetermined duration").

Under Rule 23, courts are "'required to reassess their class ruling as the case develops'" and if the Court "later determines that the requirements of Rule 23 are not met, it may decertify the class." *Barone v. Safway Steel Products, Inc.*, No. Cv-03-4258 (FB), 2005 WL 2009882, at *2 (E.D.N.Y. Aug. 23, 2005) (quoting *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) and citing *Sirota v. Solitron Devices*, 673 F.2d 566, 572 (2d Cir. 1982)). Thus, "a district court that has certified a class under Rule 23 can always alter, or indeed revoke, class certification at any time before final judgment is entered should a change in circumstances render a class action no longer appropriate." *J.S. v. Attica Central Schools*, No 00-CV-513S, 2011 WL 4498369, at *4 (W.D.N.Y. Sept. 27, 2011) (internal quotations and citations omitted); *see Monaco v. Stone*, 187 F.R.D. 50, 59 (E.D.N.Y. 1999) (a class action may be decertified "if later events demonstrate that the reasons for granting class certification no longer exist or never existed"). The standard of review on a motion to decertify a class action is the same as on a motion for class certification: whether the Rule 23 requirements are met. *Mendez v. Radec Corp.*, 260 F.R.D. 38, 43 (W.D.N.Y. 2009)

II. Summary Judgment Should Be Granted on Plaintiffs' California, Indiana and Hawaii Claims

A. Claims of California Technicians

Circumstances unique to California make it appropriate to grant summary judgment dismissing all of plaintiffs' California State Class Claims and the FLSA claims of all California technicians who have opted in to this action, except for plaintiffs' Uncompensated Hours Claim for the period after August 6, 2008 (or such earlier date after May 19, 2008 that a technician became employed by RRSC in California).

1. All Members of the California Class Employed on or Before May 19, 2008 Have Released All Claims Arising on or Before August 6, 2008

All claims arising on or before August 6, 2008 in favor of technicians employed by RRSC in California on or before May 19, 2008 fail as a matter of law because the California class representative and all members of the class released all claims against defendants as part of the settlement of a separate class action.

In April 2007, a group of California technicians commenced an action in the Superior Court of the State of California captioned *Ita v. Roto-Rooter Services Company*, asserting class claims virtually identical to the claims asserted here. *See* Holtzman Decl. at Exs. 10, 11. Those plaintiffs alleged that RRSC violated California law when it: (i) "failed to pay Plaintiffs overtime wages for any and all work performed in excess of 8 hours per day and/or for any and all work performed in excess of 40 hours per week"; (ii) "required Plaintiffs to expend their own monies to conduct their employers' business" and to "shoulder . . . business expenditures which should have been borne by their employer"; and (iii) "made various deductions from Plaintiffs' wages for certain items, including but not limited to deductions for . . . customer call-backs . . . ." *Id.* Ex. 10 at ¶¶ 33, 34, 63, 70.

On August 6, 2008, the *Ita* court entered a final order certifying a class action and approving a class settlement. The court certified a class that encompassed

> all persons who are or were employed by [RRSC] as *plumbers*, *sewer and drain technicians* or employees [and] *combination plumbing/sewer and drain technicians* or employees . . . whether hourly- paid or *commissioned*, and with or without expenses, at any time from April 24, 2003 to May 19, 2008, the class period, in the State of California.

Id. Ex. 11 at CHEMED/RR 00054027 (emphasis added). Finding that "[n]o person has requested exclusion (opted-out) from the class or filed an Objection to the Settlement," the court ordered that:

> Upon entry of this Order and Distribution of the Settlement Funds under the terms of the Settlement Agreement, each Class Member shall be deemed to have released Defendants for *any and all* claims regarding the allegations of unpaid reimbursements and wages, interests and penalties through the date of entry of this Order.

Id. at CHEMED/RR 00054027-29 (emphasis added).

Under the Settlement Agreement approved by the court, all members of the *Ita* class released RRSC and its "parent corporations" and "affiliates," among others, from

> all claims, demands, rights, liabilities, and causes of action of every nature and description whatsoever *arising out of, relating to, or in connection with the causes of action asserted in the Complaint*, including, without limitation, any and all claims for alleged *failure to pay overtime*, waiting time, travel time, *call back*, missed meal and rest breaks, on-call time, *charges for replacement of tools and equipment* and time expended in *call back due to customer complaint and other similar deductions from wages*; and, as related to the foregoing, for alleged unlawful, unfair and/or fraudulent business practices under California Business and Professions Code § 17200, et seq.

Id. Ex. 12 at 5 (emphasis added). Mr. Castillo, the California class representative, and John Yasuna, the only other Discovery Plaintiff who worked for RRSC in California, both received monetary payments in exchange for releasing their claims against RRSC in *Ita*. *Id*. Ex. 13 at CHEMED/RR 0054213-15; Castillo Tr. 8; Yasuna Tr. 11; *see also* Yasuna Tr. 98-99 (conceding that the *Ita* lawsuit "specifically dealt with [call backs]" and he does not have any claim for call backs in California because they were resolved in *Ita*).

Given that the *Ita* complaint included claims relating to "failure to pay overtime," "business expenditures which should have been borne by their employer" and "deductions from Plaintiffs' wages for certain items, including . . . deductions for . . . customer call-backs ," Mr. Castillo, Mr. Yasuna, and all members of the California class in this action who were employed by RRSC on or before May 19, 2008 are barred from asserting any claims for any period prior to or including August 6, 2008.

2. Plaintiffs' Business Expense Claim in California Should be Dismissed for Periods After January 14, 2008

Plaintiffs' Business Expense Claims for California technicians for the period after January 14, 2008 must be dismissed because, after that date, RRSC began providing technicians in California with work vans, which RRSC maintained and serviced. Gary Sander, RRSC's Executive Vice President, issued a memorandum on that date regarding "Pay Considerations Unique to California" (the "California Memo") which stated that "[w]e should adhere to the[] requirements [stated herein] immediately." Holtzman Decl. Ex. 14 at CHEMED/RR 00047651. The California Memo states that "in most cases" the Company will provide technicians with a van – and plaintiffs have no evidence that any exceptions to this rule exist. *Id.* at CHEMED/RR 00047653; *see also* Docket Entry No. 189 at ¶ 18 ("In California, Roto-Rooter provides all Technicians with company vans."). Moreover, Mr. Castillo, the California class representative testified that RRSC provided him with a company van and paid for the van's expenses during this period. Castillo Tr. 37-40. Plaintiffs have not identified in their interrogatory responses a single week after January 14, 2008 in which a California technician contends he incurred business-related expenses that had the effect of bringing his wages below the minimum wage. *See* Holtzman Decl. Exs. 2, 6. Accordingly, summary judgment should be granted dismissing plaintiffs' state and federal Business Expense Claims for California technicians for the period after January 14, 2008.

3. Plaintiffs' California Illegal Deduction Claim Should be Dismissed for Periods After January 14, 2008

Plaintiffs' California Illegal Deduction Claim for periods after January 14, 2008 should similarly be dismissed because the record indisputably shows that RRSC did not make commission adjustments for call-backs relating to warranty work after that date.

The California Memo, issued on January 14, 2008, states unequivocally that "[c]ommissioned employees should not be charged for call backs." *Id*. Ex. 14 at CHEMED/RR 00047654. Similarly, in contrast to the policies in the Employee Handbook applicable outside California – which specifically provide for a "negative OPCC adjustment" in the event of a call-back – the California Handbook has no such provision. *Compare id.* Ex. 8 at CHEMED/RR 00005699 *with id.* Ex. 9 at CHEMED/RR 00047568; *see also* Sander 10/4/11 Tr. 62 (technicians do not get charged back for callbacks in California); Sander 10/5/11 Tr. 310-11 (RRSC stopped doing OPCCs for call-backs in California in 2008).

The California class representative confirmed that RRSC stopped making commission adjustments for call backs and began paying technicians at an hourly rate for call-back work they performed. *See* Castillo Tr. at 71-72. And RRSC's electronic records show that Mr. Castillo (the only Discovery Plaintiff employed in California in or after 2008) had no negative commission adjustments associated with a call-back after January 14, 2008. Sander Decl. ¶ 79 & Ex. 24. The record demonstrates that RRSC did not make commission adjustments for call-backs in California after January 14, 2008.

* * *

Accordingly, the Court should grant summary judgment with respect to the following claims in California: (i) all State Class Claims and FLSA claims arising on or before August 6, 2008 for all technicians employed by RRSC in California on or before May 19, 2008; (ii) the state and FLSA Business Expense Claims for the period after January 14, 2008; and (iii) the Illegal Deduction Claim for the period after January 14, 2008.[8]

[8] To the extent any of these claims survive, Mr. Castillo is not an adequate class representative because he has not suffered the same harm as the class he seeks to represent and thus the California class action should be decertified. *See Newman v. RCN Telecom Services Inc*., 238

B. Plaintiffs' Business Expense and Uncompensated Hours Claims are Barred Under Indiana Law

Summary judgment also should be granted dismissing plaintiffs' Business Expense and Uncompensated Hours Claims under Indiana law because defendants are not an "employer" for purposes of that state's minimum wage statutes. The Indiana Minimum Wage Law specifically excludes from the definition of employers covered under the act "any employer who is subject to the minimum wage provisions of the [FLSA]." Ind. Code Ann. § 22-2-2-3; *see also Bailey v. Wal-Mart Stores, Inc.*, No. IP 00-1398-C-B/S, 2001 WL 1155149, at *2 (S.D. Ind. Sept. 29, 2001) ("One of the main effects of this provision in Indiana Law is the exclusion of large employers from the purview of state law."). Moreover, "in Indiana, claims for overtime compensation cannot be raised under the Wage Law." *Parker v. Schilli Transp.*, 686 N.E.2d 845, 851 (Ind. Ct. App. 1997). Because defendants indisputably are subject to the FLSA, plaintiffs' Business Expense and Uncompensated Hours Clams under Indiana law fail. *See id.* at 850 (affirming dismissal where "[defendant] was an employer within the meaning of the [FLSA] and is subject to that statute" and therefore "is not an 'employer' for purposes of the Wage Law").

C. Plaintiffs' Business Expense and Uncompensated Hours Claims are Barred Under Hawaii Law

For similar reasons, plaintiffs are barred from asserting their Business Expense Claim under Hawaii law for any period on or after July 24, 2009 or asserting any claim for

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F.R.D. 57, 64 (S.D.N.Y. 2006) (to satisfy Rule 23(a)(3), plaintiffs must demonstrate that the alleged harm suffered by the class representatives is the "the same harm the proposed class is alleged to have suffered"); *Bentley v. Verizon Business Global, LLC*, No. 07 Civ. 9590 (DC), 2010 WL 1223575, at 4-5 (denying motion for class certification because the named plaintiffs did not incur the fees that allegedly were incurred by members of the class). In addition, the Court should decertify the FLSA collective action to the extent of excluding California employees of RRSC, given the unique circumstances applicable to their employment and claims.

Uncompensated Hours under Hawaii law. Section 387-1 of the Hawaii Wage and Hour Law excludes from the definition of a covered "employee" any employee whose minimum wage and maximum hours of work during a workweek without the payment of overtime are prescribed by the FLSA, unless Hawaii law establishes a higher minimum wage or a shorter maximum workweek without the payment of overtime than that under the FLSA. Haw. Rev. Stat. § 387-1.

The maximum hours of work during a workweek without the payment of overtime under Hawaii law has been the same as that under the FLSA throughout the Hawaii class period. *See Id.* at § 387-3 (setting a maximum workweek of forty hours under Hawaii law); 1998 Haw. Sess. Laws Act 158 593 (same); 29 U.S.C. § 207 (setting maximum workweek of forty hours under federal law); Worker Economic Opportunity Act, Pub. L. No 106-202, 114 Stat. 308 (2000) (same). Consequently, plaintiffs' Uncompensated Hours Claim in Hawaii fails as a matter of law. *See In re Wal-Mart Wage & Hour Employment Practices Litig.*, 490 F. Supp. 2d 1091, 1129 (D. Nev. 2007) (dismissing cause of action for overtime pay under Hawaii law because FLSA applied). Moreover, summary judgment should be granted dismissing plaintiffs' Business Expense Claim for the period commencing July 24, 2009 because the Hawaii minimum wage has been the same as the minimum wage set by the FLSA during this period. *Compare* Haw. Rev. Stat. § 387-2 (minimum wage is $7.25 per hour as of January 1, 2007); 29 U.S.C. § 206 (minimum wage is $7.25 per hour effective July 24, 2009).

III. Plaintiffs' Uncompensated Hours Claim Should be Dismissed or Decertified

As described earlier, plaintiffs' Uncompensated Hours Claim has been limited to the Time-Shaving Claim and the Turn-in Claim. These claims should be decertified because the record establishes that plaintiffs cannot prove these claims on either a nationwide or statewide basis and a trial of these claims would require highly individualized evidence. Alternatively, the

Time-Shaving and Turn-in Claims should be dismissed entirely in some of the Class States because there is absolutely no evidence in the record to support those claims.

A. Plaintiffs Cannot Prove their Time-Shaving Claims on a Nationwide or Statewide Basis

The Court certified plaintiffs' Time-Shaving Claim based on plaintiffs' representation that they could prove the claim through defendants' electronic records alone. As the Court stated:

> According to plaintiffs, their claim focuses only on those alterations "where the records themselves demonstrate that it is more likely than not that no legitimate reason for the alteration exists." A certain job (one that is commonly done by the technicians in the putative class) may, for instance, plaintiffs explain, normally take two hours to complete but the technician would be credited for only two minutes. This discrepancy would reveal a "temporal impossibility" and would conclusively show time-shaving. I may have otherwise been skeptical of plaintiffs' ambitious claim that there would be sufficient instances of "temporal impossibilities" for the jury to conclude that defendants impermissibly altered time-records on a class-wide basis, but there is evidence suggesting that plaintiffs' plan is not only plausible but sufficiently sound that defendants have themselves employed it to investigate fraud.

Class Certification Order at 21.

Plaintiffs' responses to defendants' interrogatories demonstrate that the Court's skepticism of plaintiffs' ability to derive from defendants' time records a sufficient number of instances of "temporal impossibilities" to prove the Time-Shaving Claim on a class-wide basis was well-founded. As shown below, plaintiffs' Time-Shaving Claim should be decertified because the evidence shows that is impossible to make any nationwide or statewide determinations regarding this claim or, failing decertification, dismissed in part.

1. The FLSA Collective Action Should be Decertified Because No Nationwide Conclusions About Liability Can Be Drawn from the Record

Plaintiffs' interrogatory responses show it is impossible to draw any nationwide conclusions about liability. Although defendants dispute that Exhibits A and A2 contain

instances of time-shaving, even assuming they do, those exhibits demonstrate that many Discovery Plaintiffs do not even contend that they ever experienced time-shaving.

Exhibit A purports to identify every "temporal impossibility" plaintiffs claim demonstrate that time-shaving occurred. In it, plaintiffs notably fail to identify any alleged "temporal impossibilities" whatsoever for Messrs. McMahon, Christie, Hess, Drejaj, Smith, Branco, Frazier-Smith, Loetscher and Harris – almost *one quarter* of the Discovery Plaintiffs. Excluding entries on Exhibit A that are outside the FLSA limitations period, Messrs. Hollister, Gorman and Cardwell also allege no incidents of time-shaving. Thus, plaintiffs have failed to identify any alleged "temporal impossibilities" during the FLSA limitations period for more than *thirty percent* of the Discovery Plaintiffs. In addition, plaintiffs have identified only one alleged "temporal impossibility" within the statute of limitations for an additional seven Discovery Plaintiffs. Thus, with respect to their FLSA claim, plaintiffs cannot point to more than one supposed "temporal impossibility" on Exhibit A for nearly *one-half* of the Discovery Plaintiffs. Holtzman Decl. Ex. 2; *see also* Sander Decl. Ex. 2.

Plaintiffs claim Exhibit A2 identifies additional time entries that plaintiffs believe show time shaving. But the trial plan approved in the Class Certification Order authorized plaintiffs to seek to prove their Time-Shaving Claim through alleged instances of "temporal impossibilities" – not other types of alleged time-shaving – and specifically described the type of analysis that plaintiffs proposed to use to prove their Time-Shaving Claim. Class Certification Order at 21; *see also id.* at 23. Moreover, while plaintiffs proposed to prove their Time-Shaving Claim through the same type of search for "temporal impossibilities" that Mr. Sander used in an investigation he conducted in the Hartford branch, *id.* at 21-22, the analysis that plaintiffs conducted for Exhibit A2 is entirely different from that conducted by Mr. Sander. Sander Decl.

¶ 10. In fact, Mr. Sander has never conducted an analysis of this type. *Id.* Accordingly, plaintiffs should not now be permitted to rely on Exhibit A2 to prove their Time-Shaving Claim.[9]

Even if the Court considers Exhibit A2, it does not contain any entries whatsoever for Messrs. Hess, Drejaj, Villatoro, Loetscher, Hodges or Harris, and there are no entries within the FLSA limitations period for Mr. Hollister. Thus, there are no entries on Exhibit A2 during the FLSA limitations period for eighteen percent of the Discovery Plaintiffs. Moreover, Exhibit A2 identifies one or fewer alleged instances of time-shaving during the FLSA limitations period for more than one quarter of the Discovery Plaintiffs. Holtzman Decl. Ex. 4; *see also* Sander Decl. Ex. 3.

Even if the Court were to consider Exhibit A and Exhibit A2 together, there are no entries within the FLSA limitations period on either exhibit for Messrs. Hollister, Hess, Drejaj, Loetscher or Harris, thirteen percent of the Discovery Plaintiffs, and over one quarter of the Discovery Plaintiffs have two or fewer entries on Exhibits A and A2 combined. Holtzman Decl. Exs. 2, 4; *see also* Sander Decl. Exs. 2, 3.

Plaintiffs' evidence – or, more accurately, the lack thereof – reveals that this case is comparable to that presented in *Zivali v. AT & T Mobility, LLC*, 784 F. Supp. 2d 456 (S.D.N.Y. 2011). In *Zivali*, just as here, the defendants' official corporate policies mandated that plaintiffs were to be compensated for all overtime work. *Id.* at 462-63. The plaintiffs complained that defendants' time keeping mechanism failed to properly capture adjustments that plaintiffs made to their time to include otherwise unreported work time. *Id.* at 467. The court granted the defendants' motion to decertify the collective action in large part because the data in that case

[9] It was only after the close of discovery that defendants first learned of plaintiffs' intentions to rely on supposed incidents of time-shaving that do not involve temporal impossibilities. *See* Holtzman Aff. ¶ 8.

demonstrated "a wide range in the frequency of [time] adjustments: *in some stores none of the plaintiffs' time records were edited*, while in other stores greater than 50 percent of the employees/days contained edits to what might otherwise have appeared as a complete series of punches." *Id.* (emphasis added).

Similarly, the evidence in *Lugo v. Farmer's Pride Inc.*, 737 F. Supp. 2d 291, 303 (E.D. Pa. 2010), showed that "there may be some [employees] who have legitimate claims of undercompensation . . . and some who may not; the evidence does not demonstrate, however, that the question of undercompensation can be answered in [a] manner common to all plaintiffs." *Lugo*, 737 F. Supp. 2d at 303. Accordingly, the court in *Lugo*, using language that could have been written for this case, decertified a collective action because it determined if that case was

> tried collectively and a verdict were reached for defendant, this result would be unfair to those plaintiffs who may have been denied pay owed them . . . . [S]imilarly, if a verdict were reached for plaintiffs this would be unfair to defendant, who would be deemed liable as to the entire collective-action class when it may not have undercompensated all individual members of that class.
>
> Thus, this case differs from those where liability can be proven on a classwide basis, and the only material difference among plaintiffs is the amount of damages owed to each of them, which is generally considered insufficient to deny class treatment. Here, in contrast, the liability of defendant depends on whether defendant failed to pay a particular plaintiff for compensable time . . . .

Id.; *see also Burch v. Qwest Communications Int'l, Inc.,* 677 F. Supp. 2d 1101, 1122 (D. Minn. 2009) (rejecting certification where "[t]he claims of uncompensated work during meal times, breaks, or before or after shifts that are unrelated to booting up and shutting down vary enormously among Plaintiffs"); *Proctor v. Allsups Convenience Stores, Inc.*, 250 F.R.D. 278, 283 (N.D. Tex. 2008) (granting motion to decertify collective action where "the evidence shows a large factual variety among the individual Plaintiffs' claims and the times they allege they worked off the clock"); *Johnson v. TGF Precision Haircutters, Inc.*, No. Civ. A. H-03-3641,

2005 WL 1994286, *4 (S.D. Tex. Aug. 17, 2005) (granting motion to decertify collective action because "diverse evidence indicates that some Plaintiffs may have prima facie claims for FLSA violations at different times, in different places, in different way, and to different degrees, but the evidence of varied particular violations is insufficient to show that Defendants implemented a uniform, systematically applied policy of wrongfully denying overtime pay to Plaintiffs").

Since plaintiffs concede that there is no evidence of time-shaving for a significant percentage of the Discovery Plaintiffs, plaintiffs cannot establish that time-shaving occurred on a nationwide basis. Accordingly, plaintiffs' Time-Shaving Claim should be decertified from the FLSA collective action.

2. Similarly, No Statewide Conclusions About Liability on Plaintiffs' Time-Shaving Claim Can Be Drawn in the Class States

The class Time-Shaving Claims should each be decertified because, as plaintiffs' interrogatory responses demonstrate, it is impossible to draw any statewide conclusions about liability with respect to these claims. First, there are numerous Class States for which plaintiffs have not identified any alleged incidents of time-shaving on Exhibits A and A2 for at least one of that state's Discovery Plaintiffs. Even where plaintiffs have identified entries on Exhibits A and A2 within the applicable limitations period for all of the Discovery Plaintiffs in a state, the total number is often too small to support a finding that time-shaving impacts all class members in a Class State. In other instances, the disparity between the Discovery Plaintiffs in the number of entries shows Discovery Plaintiffs in the same Class State are not similarly situated.

Plaintiffs have not identified any "temporal impossibilities" on Exhibit A within the applicable limitations period for Messrs. McMahon, Hollister, Christie, Hess, Drejaj, Smith, Branco or Frazier-Smith and thus have not identified any "temporal impossibilities" for at least one of the Discovery Plaintiffs from Colorado, Connecticut, Florida, Indiana, New York, Ohio,

and Washington. In New York, for example, while plaintiffs claim to have identified "temporal impossibilities" for Mr. Buono, who worked in the Long Island branch, they have not identified any "temporal impossibilities" for either Mr. Smith, who also worked in the Long Island branch, or Leka Drejaj, who worked in the Westchester branch. Similarly, in Florida, where plaintiffs purport to have identified just eight "temporal impossibilities" within the limitations period for Mr. Cruz, who worked in the Ft. Lauderdale branch, they have not identified any for Mr. Christie, who worked in Miami, and have identified just one for Mr. Gorman, who worked in Jacksonville. And in Ohio, Exhibit A contains no entries for Mr. Branco, that state's class representative who worked in Cleveland, while it includes only three entries for Mr. Stanley from Columbus and twenty-two for Shilo Cain, who worked in Columbus. Holtzman Decl. Ex. 2; *see also* Sander Decl. Ex. 2.

Even if the Court were to consider Exhibit A2, it does not contain any entries within the applicable limitations period for Messrs. Hollister, Hess, or Drejaj and therefore it does not include any entries within the state limitations period for at least one of the Discovery Plaintiffs from Connecticut, Indiana, and New York. In Connecticut, for example, plaintiffs have identified nine entries for Mr. Saint Juste, who worked in Bridgeport, but they have not identified a single entry for Mr. Hollister who worked in that same branch. Likewise, in New York, while plaintiffs have included entries for some of the Discovery Plaintiffs from that state, they have not identified any for Mr. Drejaj, who worked in the Westchester branch, and they have identified only one for Mr. Morangelli. Notably, there are no entries on either Exhibit A or A2 within the applicable limitations period for either Mr. Drejaj or Mr. Hollister. Holtzman Decl. Exs. 2, 4; *see also* Sander Decl. Ex. 2, 3.

The large number of Class States for which plaintiffs are simply unable to identify on Exhibit A, Exhibit A2 and Exhibits A and A2 together any entries within the relevant state limitations period for at least one of the state's Discovery Plaintiffs demonstrates that plaintiffs cannot prove their Time-Shaving Claim on a class-wide basis. Indeed, this evidence shows that even the Discovery Plaintiffs from these Class States are not similarly situated with respect to this claim.

In other Class States, plaintiffs simply have not identified a sufficient number of total entries for the Class State to meaningfully infer that time-shaving is widespread and impacts all members of the class.[10] In Missouri, for instance, plaintiffs have identified on Exhibit A a total of two "temporal impossibilities" within the limitations period – one entry for each of the two Discovery Plaintiffs from that state. When considered together, however, the Discovery Plaintiffs from Missouri were employed by RRSC for more than four years during the limitations period. But the existence of just two alleged "temporal impossibilities" over the course of more than four years of employment (equivalent to some 216 work weeks and nearly 1,100 days of work) is insufficient to establish that the Missouri Discovery Plaintiffs were subject to time-shaving, let alone that all technicians who worked in Missouri experienced time-shaving. The same is true with respect to the Discovery Plaintiffs who worked in Hawaii, for whom Exhibit A contains a total of just two entries and Exhibit A2 contains only five entries. Holtzman Decl. Exs. 2, 4; *see also* Sander Decl. Exs. 2, 3.

[10] Plaintiffs have elected not to use an expert witness and therefore do not propose to provide any statistical analysis to support their claims. On that basis, they are incapable of demonstrating that there is any statistical class-wide significance even if they could prove all of the instances of time-shaving they put forward. Of course, it might be difficult to do that in any event. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (2011) ("[I]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that [there is] a company-wide policy.") (internal quotations and citations omitted)).

Finally, Exhibits A and A2 show that even where plaintiffs have been able to identify what they claim are instances of time-shaving for all of the Discovery Plaintiffs in a particular Class State, there are significant differences in the frequency of alleged time-shaving. For instance, in Illinois, Exhibit A contains thirty-eight and eighteen entries within the state limitations period for Mr. Poczok and Mr. Soto, respectively, but just one for Mr. Cardwell. Likewise, in Washington, Exhibit A2 contains forty-two entries within the limitations period for Mr. Mills but only six for Mr. Frazier-Smith. Holtzman Decl. Exs. 2, 4; *see also* Sander Decl. Exs. 2, 3.

Accordingly, plaintiffs' interrogatory responses demonstrate that it is impossible to make any credible inferences regarding state-wide liability on their Time-Shaving Claims and therefore these claims should be decertified from the class actions.

3. Plaintiffs' Time-Shaving Claims Require a Highly Individualized Analysis

Plaintiffs' Time-Shaving Claims also should be decertified from both the class and collective actions because it is impossible to determine whether the entries on Exhibits A and A2 are instances where it is more likely than not that time-shaving occurred without conducting a highly-individualized, entry-by-entry analysis. An extensive, complex and burdensome analysis of a sample of the entries on Exhibits A and A2 shows that many of the alleged incidents of time-shaving identified by plaintiffs are either demonstrably not time-shaving – because the modification is readily explainable – or did not result in any failure by RRSC to pay compensation owed to the technician, either because the modification occurred in the middle of the work day and thus did not result in a decrease in the amount of work time credited, or because even adding the additional time claimed, the technician still would have been under forty hours of work, such that no additional compensation would be due. Sander Decl. ¶ 11.

Throughout this litigation, plaintiffs have focused on deleted time entries in RRSC time files. But the mere fact that a time entry is deleted does not suggest in any respect that the deletion was improper or unfair. *Id.* ¶ 15. Due to its design, the RRSC system contains multiple deleted entries. *Id.* On each work day a technician's time records typically will have at least several – and often many – deleted time entries. *Id.* For example, prior to October 2009, when a technician began "work" time on a particular job – indicating that he had arrived at the work site – an entry was created with that start time. *Id.* When the technician indicated that the job was complete, the system deleted the original start time entry, which was replaced by a new entry that contained both a start time and a stop time. *Id.* Other deletions occur automatically as part of the processing of the time entries by the software system, without involvement of any human being. *Id.*[11]

Other modifications to time entries are necessary for a variety of innocuous reasons. Sometimes a technician forgets to code out at the end of the day and remains logged in until the system automatically ends his day at 11:59 pm. (in earlier periods, the system then logged the technician in at midnight to continue the time into the next day; presently, this practice continues only for technicians on call) or a technician may code out late, hours after he actually stopped working. *Id.* 16; *see also* Weiner Decl. ¶ 5; Brigandi Decl. ¶ 5; Gunning Decl. ¶ 5. Sometimes a job site is out of range of the wireless network and the technician is unable to make the necessary inputs until after he comes back into range. Sander Decl. ¶ 16.; *see also* Sander 10/29/10 Tr. 220; Weiner Decl. ¶ 5; Brigandi Decl. ¶ 5; Gunning Decl. ¶ 5. Other times the software system has crashed and technicians were unable to code time until the system was

[11] While time entries are "deleted" in the system, the deleted entries are retained and never destroyed. *Id.*

fixed. Sander Decl. ¶ 16. In all of these cases, the time entries will not accurately reflect the technician's work and must be adjusted. *Id.*

Further, RRSC is aware that time records that occur in the midst of the workday do not have the same level of accuracy as records concerning technicians' start of day and end of day. *Id*. ¶ 17. These intraday records do not have an impact on the calculation of technician work hours and their compensation, and thus are not legally required and not subject to the same level of focus by RRSC. *Id*. Technician work hours for a particular day are determined by calculating the elapsed time from the technician's start of the work day to the end of the work day and then subtracting out any lunch or personal time. *Id*. As such, whether time entries between a technician's start time and end time are characterized as work time, transit time, administrative time, or standby time has no impact whatsoever on technician compensation, as all of these time types are considered compensable work time. *Id.*

Thus, many modifications to time entries are made in the normal operation of the system or to correct inaccuracies in the records. *Id.* ¶ 18. Consequently, a far more detailed and individualized analysis than searching for deleted entries is required to determine whether improper time-shaving has occurred and whether such time-shaving resulted in a technician being underpaid. *Id.*

(a) Numerous Entries on Exhibit A Do Not Support Plaintiffs' Time-Shaving Claims

Defendants have performed an entry-by-entry analysis on a sample of the entries on Exhibit A that plaintiffs claim represent time-shaving involving temporal impossibilities. *See id*. ¶¶ 27-60. As Mr. Sander's Declaration explains in detail, because some of these entries identify time associated with specific job tickets that plaintiffs contend reflect temporal impossibilities, an analysis of each disputed ticket is required. *Id*. ¶ 27. Other entries on Exhibit A, however, do

not even identify a specific ticket number and instead identify only the day on which plaintiffs contend a temporal impossibility exists. In those cases the analysis is even more burdensome because it requires a review of each and every time entry recorded for that day. *Id.*

Having applied an entry-by-entry analysis, it is apparent that many of the entries on Exhibit A plainly do not support plaintiffs Time-Shaving Claim. First, Exhibit A contains many entries that relate to time in the middle of a Discovery Plaintiff's workday. *Id.* ¶ 22. These entries simply cannot support plaintiffs' Time-Shaving Claim. Since a technician's daily work hours are determined by calculating the elapsed time from the technician's start of the work day to the end of the work day and subtracting any lunch or personal time, whether time entries between a technician's start time and end time are characterized as work time, transit time, or standby time has no impact on technician compensation, as all of these time types are considered compensable work time. *Id.* ¶ 17. Indeed, technicians' time records often have minutes or hours of the work day that are not accounted for – that is, there is no time entry corresponding to these time periods – but that nonetheless were counted as compensable work time because they occurred between the technician's start and end times for that day. *Id.* ¶ 22. Thus, any alleged time-shaving that occurs between a technician's start and end of day that does not increase his lunch or personal time does not affect the technician's calculated work hours and thus cannot have any impact on technician compensation. *Id.*

Many of the entries on Exhibit A cannot support a finding of liability on plaintiffs' Uncompensated Hours Claims because even if the Discovery Plaintiff was credited with the time he contends was shaved, he would still not have worked more than forty hours in the week and thus would not have been entitled to overtime pay. *Id.* ¶ 23. Although technicians who work more than forty hours in a week are entitled to overtime "premium pay," technicians are paid

solely on commission for their first forty hours of work in a week. As long as a technician does not work over forty hours in a week, his compensation is determined solely by his productivity and bears no direct relation to the number of hours worked. *Id.* ¶ 25. Consequently, where the sum of the allegedly shaved time and the technician's credited work hours for the week is less than or equal to forty, the technician cannot have any overtime claim. *See Tran v. Tran*, 860 F. Supp. 91, 96 (S.D.N.Y. 1993), *aff'd in part*, 54 F.3d 115 (2d Cir. 1995) (granting summary judgment on claim for overtime pay where plaintiff "worked only forty hour workweeks" because "[c]laims under § 207 of the FLSA do not apply to employees with workweeks of forty or fewer hours"); *see also Zhong v. August August Corp.*, 498 F. Supp. 2d 625, 630 (S.D.N.Y. 2007) ("Because [plaintiff's] alleged working hours add up to only twenty, they fail to suggest that [plaintiff] is entitled to overtime compensation, which is available only for hours worked in excess of forty per week.").

But this addresses only those entries on Exhibit A that are facially deficient. Many other alleged temporal impossibilities on Exhibit A may be explained in a variety of different ways, and each type of temporal impossibility requires that several different types of records be analyzed for each disputed ticket or day in order to explain the circumstances of each time alteration.[12] Sander Decl. ¶ 27. This is the opposite of the a "paper case." For example, there were several instances in which a Discovery Plaintiff was credited with only one or a few minutes of working time on a particular job that resulted in revenue; a type of entry that on its

[12] It is important to note that the analysis plaintiffs applied to identify entries on Exhibit A differs materially from the search for "temporal impossibilities" that Mr. Sander conducted regarding the Hartford branch. The "temporal impossibilities" that Mr. Sander sought to identify in the Hartford branch involved only time entries that reflected work time occurring on a revenue-producing job before that job was called in by the customer. Sander 10/5/11 Tr. 153-54; Sander Decl. ¶ 10. Exhibit A contains myriad types of alleged "temporal impossibilities" that can, in fact, be readily explained and are therefore not temporally impossible.

face may appear to be indicative of time-shaving because one would not expect that significant revenue could be produced with just a few minutes of work. *Id.* ¶ 28. However, by consulting different types of records, such entries often can be explained. *Id.* Thus, for example, in the small sample of alleged violations he reviewed, Mr. Sander identified eight instances in which the job was actually performed by the technician on a different day, and the ticket appears on the records for the later date only because it was re-audited on that date. *Id.* ¶¶ 44, 46, 57.

Similarly, other time entries reflected short work times on jobs where no revenue was associated with the ticket. *Id.* ¶ 29. But, as described in Mr. Sander's Declaration, a laborious investigation into different types of records for each ticket in question frequently yields an innocent explanation for the alleged temporal impossibility. *Id.* Mr. Sander found, for example, in some cases the job was originally assigned to the Discovery Plaintiff but then was reassigned to another technician who actually performed the work. *Id.*; *see also id.* ¶¶ 40, 43, 52. He also determined that instances in which deleted entries for a ticket indicated that a Discovery Plaintiff worked on a job prior to the beginning of his work day or after the end of his work day, but the official records credited him with work time on that ticket during his work day, *id.* ¶ 30, and instances in which the deleted records indicated that working time on a particular job was longer than the Discovery Plaintiff was credited for, similarly may be explained following a painstaking analysis of a variety of records. *Id.* ¶¶ 30-32.

Mr. Sander's Declaration describes a sample of the types of analyses that must be conducted for each entry and a variety of explanations that may be found for entries alleged by plaintiffs to be instances of time-shaving. *Id.* ¶¶ 35-36. As Mr. Sander's declaration reflects, each set of time entries must be separately analyzed to determine whether any of numerous possible proper explanations for the modification apply to that particular entry. *Id.*

(b) Numerous Entries on Exhibit A2 Do Not Support Plaintiffs Time-Shaving Claim

The entries on Exhibit A2 – which reflect only the technician's name and the date on which plaintiffs contend time-shaving occurred – require an even more highly individualized analysis, which reveals that Exhibit A2 contains numerous entries that, for a variety of reasons, do not support plaintiffs' Time-Shaving Claim. Sander Decl. ¶ 67.

An analysis of 100 alleged incidents of time-shaving identified on Exhibit A2 – comprising all of the alleged incidents for seventeen of the Discovery Plaintiffs: Messrs. Bradley, Branco, Cain, Christie, Cruz, Frazier-Smith, Gorman, Hollister, Jeudy, Jones, McMahon, Morangelli, Richardson, Sabas, Stanley, VanHorn, and Yasuna – shows that many of the entries demonstrably do not involve time-shaving that resulted in underpayment to the technician. *Id.* ¶ 64. For example, in 35 of the 100 entries sampled, the Discovery Plaintiff would have worked fewer than forty hours in the relevant week even if the allegedly shaved time was credited and thus, even if time-shaving occurred, did not receive less compensation that he properly was due. *Id.* ¶ 65. The fact that so many instances of alleged time-shaving are unambiguously unrelated to an effort to avoid overtime pay – as they had no effect on technician compensation – reinforces that changes to time entries occur for a variety of reasons that have nothing to do with time-shaving.

Moreover, with respect to 21 of the 100 sample entries, the time entry at issue was modified on the very next day (*i.e.,* the day after the work date in question). *Id.* ¶ 66. To the extent a particular time entry contains an error, it is unsurprising that the error would be corrected on the next business date, and nothing about the timing of these changes suggests that improper time-shaving occurred. *Id.* Similarly, on another 14 occasions, the modification to the time entry occurred within two days of the original work date. *Id.* This would be expected

where, for example, the technician had a day off on the intervening day – for example, when the technician worked on Monday and had an error with his end of day code out, did not work on Tuesday, and corrected the entry when he returned to work on Wednesday. *Id.* Once again, the timing in these instances does not in any way suggest that any improper time-shaving occurred. *Id.*

An entry-by-entry analysis of each entry on Exhibit A2 is required to determine whether it shows time-shaving because, as demonstrated by the declarations of some of the administrative assistants, general managers and supervisors who were responsible for inputting the relevant changes to Discovery Plaintiffs' time records, those employees would not have modified the time entries unless they believe the modification was necessary to reflect the actual time worked by a technician. Weiner Decl. ¶ 8; Maloney Decl. ¶ 8; Brigandi Decl. ¶ 8; Gunning Decl. ¶ 8. Those same employee affirmed that they have never made any changes to time records for the purpose of reducing a technician's overtime hours or bringing a technician's hours for a week under forty. Weiner Decl. ¶ 8; Maloney Decl. ¶ 8; Brigandi Decl. ¶ 8; Gunning Decl. ¶ 8.

Finally, it is necessary to review other files to explain entries identified on Exhibit A2. For instance, other records frequently show that a technician left work early because of illness, or could not work because his van was broken, or the technician was sent home early because of lack of work. Sander Decl. ¶¶ 68-71. Each entry requires a separate analysis of different records to ascertain the reasons for modifications of time entries.

* * *

Thus, the evidence demonstrates that even supposed "temporal impossibilities" are not necessarily indicative of time-shaving and that a variety of reasons may cause the appearance of such entries on plaintiffs' exhibits when no time-shaving occurred. Plaintiffs' trial plan thus will

not work. First, plaintiffs cannot simply point to the existence of a changed time entry as evidence of time-shaving – this would not establish even prima facie evidence of wrongdoing given the existence of bona fide reasons that time entries are changed. Second, plaintiffs have declined to use an expert to analyze RRSC's records. Accordingly, they will have to resort to submitting those records through cross-examination of RRSC witnesses and will be unable to submit summary evidence of any kind. Third, in response to each of plaintiffs' allegations of time-shaving defendants would need to perform the detailed analyses described above and in Mr. Sander's declaration to demonstrate to the jury the variety of reasons that a particular set of entries do not constitute time-shaving. If a trial on these claims proceeds on a class basis, it will not look anything like the "paper case" the Court required in granting the motion for class certification. *See* Class Certification Order at 38.

Further, with respect to the vast majority of entries that plaintiffs now contend were shaved, the individual technician confirmed the accuracy of his time by signing his weekly Detailed Listing of Time or, in earlier periods, by failing to raise with management any supposed inaccuracies in records provided to him. In their depositions, the Discovery Plaintiffs offered a variety of explanations for why they would do so even where the time summary was inaccurate, but these explanations necessarily vary from branch to branch and individual to individual. *See, e.g.,* Ercole Tr. 78-80; Buono Tr. 99; Najmon Tr. 44-46; Branco Tr. 44-45, 74-76. The only way to test the credibility of these assertions is through individual inquiry of each technician. Relatedly, defendants will be required to present testimony from the RRSC employees who made the changes being attacked to explain the reasons for such changes and representations that they never engaged in improper time-shaving.

Thus, although the Court distinguished *Doyel v. McDonald's Corp.*, No. 4:08-CV-1198 CAS, 2010 WL 3199685 (E.D. Mo. Aug. 12, 2010), in the Class Certification Order as that court determined testimonial evidence was required to resolve the plaintiffs' Time-Shaving Claim (Class Certification Order at 19), the evidence discussed above shows the extent to which an individualized inquiry will be required in connection with plaintiffs' Time-Shaving Claims. Now that the record has been further developed, it is evident that the *Doyel* court's rationale for not certifying a class is particularly applicable here:

> Because there are legitimate reasons to manually edit an employee's computerized time punches . . . merely looking to records of time punches that were edited does not establish that an employee was not paid for hours worked. To make a prima facie showing on the question of whether the class of employees were paid for all time worked, plaintiffs will need to present evidence of why their time punches were altered. This evidence will vary from member to member, and from time punch to time punch.
>
> The Court cannot presume on a classwide basis, as plaintiffs suggest, that every edit that subtracts time from an employee's time punches was 'shaving' off time the employee actually worked. Nothing would distinguish this improper editing of time from a proper editing of time.

Doyel, 2010 WL 3199685 at *4; *see also Baas v. Dollar Tree Stores, Inc.*, No. C 07-03108 JSW, 2008 WL 5273724, at *2 (N.D. Cal. Dec. 19, 2008) (individual issues predominated where each claim required a fact-intensive inquiry into the reasons for and the appropriateness of the time reductions).

For all of these reasons, plaintiffs' federal and state Time-Shaving Claims should be decertified.

4. The Colorado, Florida, Indiana and Washington Time-Shaving Claims and Claims of Certain Individuals Should be Dismissed or Decertified

Regardless of the Court's determination with respect to the decertification of the Time-Shaving Claims, assuming the Court does not consider Exhibit A2, it should grant summary

judgment in defendants' favor on the FLSA Time-Shaving Claims of Messrs. McMahon, Hollister, Christie, Gorman, Cardwell, Hess, Drejaj, Smith, Branco, Frazier-Smith, Loetscher, and Harris and the state Time-Shaving Claims of Messrs. McMahon, Hollister, Christie, Hess, Drejaj, Smith, Branco, and Frazier-Smith because Exhibit A constitutes an acknowledgement that plaintiffs cannot prove their Time-Shaving Claim with respect to these individuals. Holtzman Decl. Ex. 2; *see* also Sander Decl. Ex. 2. If the Court considers Exhibit A2, the FLSA and state Time-Shaving Claims should be dismissed with respect to Messrs. Hollister, Hess, Drejaj, Loetscher and Harris because there are no entries during the FLSA limitations period on either Exhibit A or A2 for these Discovery Plaintiffs. Holtzman Decl. Exs. 2, 4; *see* also Sander Decl. Exs. 2, 3.

To the extent the Court determines that the Time-Shaving Claims remain viable as class claims and the Indiana claims survive the analysis set forth in Section II. B. above, it should still dismiss these claims for the Indiana class because Exhibits A and A2 contain no instances for Steven Hess – the Indiana class representative, who is the only Discovery Plaintiff from that state. *Id*. Because plaintiffs are unable to prove that any time-shaving occurred in Indiana, summary judgment should be granted dismissing this claim.

Similarly, to the extent they would otherwise be permitted to proceed on a class basis, plaintiffs' Time-Shaving Claims in Colorado, Florida, Indiana and Washington should be decertified because plaintiffs have not identified on Exhibit A any "temporal impossibilities" during the limitations period for Messrs. McMahon, Christie, Hess, Branco and Frazier-Smith, the class representatives from those states. Holtzman Decl. Ex. 2; *see also* Sander Decl. Ex. 2. This inability is fatal to the Time-Shaving Claims in those states because class representatives must "suffer the same injury as the class members" to satisfy the typicality and adequacy

requirement of Rule 23(a). *Spann v. AOL Time Warner, Inc.*, 219 F.R.D. 307, 320 (S.D.N.Y. 2003); *see also Newman v. RCN Telecom Services Inc*., 238 F.R.D. 57, 64 (S.D.N.Y. 2006) (to satisfy Rule 23(a)(3), plaintiffs must demonstrate that the harm suffered by the class representatives is the "the same harm the proposed class is alleged to have suffered"). Since plaintiffs cannot show that the class representatives' time was shaved, the Colorado, Florida, Indiana, and Washington Time-Shaving Claims should be decertified. *See Bentley v. Verizon Business Global, LLC*, No. 07 Civ. 9590 (DC), 2010 WL 1223575, at 4-5 (S.D.N.Y. Mar. 31, 2010) (denying motion for class certification because named plaintiffs did not incur fees that were allegedly incurred by members of the class); *Petitt v. Celebrity Cruises, Inc.*, 153 F. Supp. 2d 240, 267 (S.D.N.Y. 2001) ("Because the Court has found against the named plaintiffs on the merits, their motion for class certification must be denied.").

B. Plaintiffs Cannot Prove their Turn-in Claims on Either a Nationwide or Statewide Basis

The Court certified plaintiffs' Turn-in Claims based upon plaintiffs' representation that they could prove these claims by comparing time stamps on certain turn-in-related documents to defendants' electronic time files to see if plaintiffs were on the clock while performing these activities. Class Certification Order at 18. Exhibit B, which purports to identify the date and time of each instance that plaintiffs claim they performed turn-in that was not accurately recorded in their time records as working time, shows that that plaintiffs are unable to prove their Turn-in Claim on either a nationwide or statewide basis.

1. The FLSA Collective Action Should Be Decertified Because No Nationwide Conclusions About Liability on Plaintiffs' Turn-in Claim Can Be Drawn from the Record

Plaintiffs' Turn-in Claim should be decertified from the FLSA collective action because Exhibit B shows that a significant portion of the Discovery Plaintiffs do not even claim they

performed turn-in that was not accurately recorded as working time. Plaintiffs have not identified on Exhibit B any instances whatsoever that they claim supports their Turn-in Claim for Messrs. Castillo, Yasuna, Sabas, Soto and Kennedy. Moreover, none of the entries for Mr. Hollister on Exhibit B are from during the FLSA limitations period. Accordingly, plaintiffs have not identified any entries on Exhibit B during the FLSA limitations period for fifteen percent of the Discovery Plaintiffs. Holtzman Decl. Ex. 2; *see also* Sander Decl. Ex. 4. Since plaintiffs acknowledge that they cannot prove their Turn-in Claim for such a significant percentage of the Discovery Plaintiffs, for the same reasons provided with respect to plaintiffs' Time-Shaving Claim in Section III. A. 1. above, plaintiffs cannot carry their burden of demonstrating that the Discovery Plaintiffs are similarly situated or that this claim is fit for collective treatment. Consequently, plaintiffs' Turn-in Claim should be decertified from the FLSA collective action.

2. Exhibit B Demonstrates that it is Impossible to Draw Any Statewide Conclusions About Liability on Plaintiffs' Turn-in Claims

Exhibit B also demonstrates that plaintiffs' Turn-in Claims should be decertified from the class actions because it is impossible to draw any statewide inference about liability. First, in addition to Hawaii and California, where plaintiffs have not identified any entries on Exhibit B for any of the Discovery Plaintiffs from those states, plaintiffs also have failed to identify any instances on Exhibit B within in the applicable state limitations period for at least one of the Discovery Plaintiffs from Connecticut, Illinois and Minnesota. With respect to Connecticut, although Mr. Saint Juste and Mr. Hollister both worked in the Bridgeport branch, plaintiffs have not included any entries on Exhibit B within the limitations period for Mr. Hollister. Similarly, Exhibit B does not include any entries for Mr. Soto, who worked in Illinois. And, in Minnesota,

while Mr. Kennedy and Mr. Najmon both worked in the Minneapolis branch, there are no entries listed for Mr. Kennedy.[13] Holtzman Decl. Ex. 2; *see also* Sander Decl. Ex. 4.

Moreover, Exhibit B shows an enormous disparity among Discovery Plaintiffs from the same Class State with respect to the number of instances of alleged uncompensated time. In Colorado, as just one example, Exhibit B contains eighty-two and forty entries for David Lawson and Earl York, respectively, but just two for Stephen McMahon. The same is true in Ohio, where Exhibit B has numerous entries for Shilo Cain and Ronald Stanley but only seven within the limitations period for Dino Branco. Holtzman Decl. Ex. 2; *see also* Sander Decl. Ex. 4.

Accordingly, Exhibit B demonstrates that it is impossible reach any conclusions about class-wide liability on plaintiffs' Turn-in Claim and therefore that claim should be decertified.

3. Plaintiffs' Turn-in Claims Require an Individualized Analysis

Although plaintiffs claim that every entry on Exhibit B supports their Turn-in Claims, that is demonstrably untrue. Defendants have identified a variety of significant flaws in the analysis plaintiffs applied to create the exhibit. To demonstrate these flaws and to explain to the jury the reasons why the entries on Exhibit B do not support plaintiffs' Turn-in Claim, defendants will be required to undertake a highly-individualized, entry-by-entry analysis, which is incompatible with the type of "paper case" certified by the Court. As such, plaintiffs' Turn-in Claim should be decertified from the collective and class actions.

Plaintiffs' plan for proving their Turn-in Claim is fundamentally flawed. Although plaintiffs have not explained how they determined which entries they included on Exhibit B, the exhibit contains instances where the print date and time stamp on a technician's Detailed Listing

[13] It is not surprising that there are no entries on Exhibit B for Mr. Kennedy because he testified that his turn-in process consisted of merely driving to the branch and dropping his paperwork in a chute. *See* Kennedy Tr. at 62-63, 70-71.

of Time reflects a time that is outside of the period that the Discovery Plaintiff's time records show he was on the clock. Plaintiffs' approach therefore apparently assumes that the Detailed Listing of Time was actually printed while the technician was in the branch conducting turn-in. However, a technician's Detailed Listing of Time is not necessarily printed while the technicians is actually in the branch conducting turn-in. Sander. Decl. ¶ 73. For instance, particularly when a technician conducts turn-in on Wednesday morning, it is not uncommon for branch personnel to print out the technician's Detailed Listing of Time hours before the technician actually arrives at the branch; this helps to expedite the turn-in process. *Id.* Accordingly, merely reviewing the print time and date stamp on the Detailed Listing of Time does not determine when a Discovery Plaintiff actually performed turn-in. Rather, to prove this claim, each Discovery Plaintiff will have to testify about the dates and times that he performed turn-in each week and defendants will be required to have branch personnel testify to refute such testimony.

A significant number of the entries on Exhibit B demonstrably do not support the Turn-in Claim. First, 252 of the entries on Exhibit B reflect a time when defendants' electronic time records show that the Discovery Plaintiff was actually on the clock. *Id.* ¶ 75. For example, plaintiffs contend in Exhibit B that Mr. Branco performed turn-in at 8:27 a.m. on Wednesday, January 24, 2007. But Mr. Branco's electronic time records show that he was on the clock from 8:00 a.m. until 5:00 pm that day and, in fact, that he attended a meeting from 8:00 a.m. until 9:16 a.m. *Id*. This time entry and the 251 others like it belie plaintiffs' Turn-in Claims and demonstrate that Exhibit B is unreliable.

In addition, 570 of the entries on Exhibit B occurred during a week in which the Discovery Plaintiff worked fewer than thirty-seven hours. *Id*. ¶ 77. Since the record establishes that it does not typically take longer than three hours to complete the turn-in process (and usually

takes much less time than that),[14] *id.*, these entries cannot support plaintiffs' Turn-in Claim. The Discovery Plaintiff would not have been entitled to receive overtime pay even if the allegedly omitted turn-in time had been included. *See Tran*, 860 F. Supp. at 96; *Zhong*, 498 F. Supp. 2d at 630. Even more importantly, these entries demonstrate that an individualized inquiry is necessary with respect to each such entry, as no evidence establishes that turn-in took a standard amount of time. To the contrary, the evidence confirms that turn-in took a different amount of time depending upon branch practices – which varied widely – and the efficiency and preparedness of the individual technician that week.[15] And while the use of thirty-seven hours as a cutoff is convenient, it is not sufficient – for a technician whose supposedly undocumented turn-in took only one hour, the cutoff would be thirty-nine hours. Thus, each entry, for each technician, requires its own analysis.

Lastly, forty of the entries on Exhibit B reflect that plaintiffs claim a Discovery Plaintiff conducted turn-in at 11:59 p.m. The record, demonstrates, however, that turn-in occurred on Tuesday afternoons and evenings and Wednesday mornings, and there is no evidence that

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[14] The Discovery Plaintiffs' testimony regarding how long turn-in takes ranges from 10 to 15 seconds to more than 3 hours. *See, e.g.*, Yasuna Tr. at 35-36; Ercole Tr. at 69.

[15] For example, Mr. Kennedy of the Minneapolis branch testified that his turn-in process consisted of driving to the branch office and dropping his paperwork in a chute. *See* Kennedy Tr. at 62-63, 70-71. He only went to the branch to sign his timesheets once a month when he replenished his parts. *Id*. at 79-80. In contrast, Mr. Najmon, who worked in the same branch, testified that he never dropped his paperwork in a chute and instead dropped his paperwork off at the branch, picked up his paperwork from the previous week, got his parts, signed his timesheets, and met with his manager if necessary during turn-in each week. *See* Najmon Tr. at 31-32, 37. In the St. Louis North branch, Mr. Bradley testified that turn-in took 1 to 1.5 hours, whereas Mr. Van Horn testified that turn-in at the same branch took just 20 minutes. *See* Bradley Tr. at 113-14; Van Horn Tr. at 40. *Compare also* Sabas Tr. at 34, 61 (turn-in took 2 to 3 hours in Honolulu branch including paperwork) *with* Yasuna Tr. at 35-36, 44 (turn-in at the Honolulu branch usually took an hour but could take 10 to 15 seconds if you prepared papers at home, which takes 15 to 30 minutes).

technicians ever performed turn-in the middle of the night, when the branches are closed and no managers are present. Sander Decl. ¶ 76; Docket Entry Nos. 17-3 at ¶ 21; 17-4 at ¶ 19.

Thus, although plaintiffs have included 1,827 entries on Exhibit B, once entries that are time-barred and those that fall into one of the three categories described above are removed, Exhibit B contains only 671 entries within the FLSA limitations periods and 705 within the applicable state limitations periods. Sander Decl. ¶ 78. Analysis of those entries will require a highly-individualized inquiry, however, far from a "paper case," and these claims therefore should be decertified from the collective and class action.

4. The California, Hawaii, and Minnesota Turn-In Claims and Claims of Certain Individuals Should be Dismissed or Decertified

Regardless of the Court's determination with respect to the decertification of the Turn-In Claims, summary judgment should be granted dismissing plaintiffs' Turn-in Claims in Hawaii and California because they do not identify any occasions on which Discovery Plaintiffs in those states performed turn-in that was not accurately recorded as working time. Indeed, plaintiffs have not identified any instances on Exhibit B for Jason Castillo, the California class representative, James Sabas, the Hawaii class representative, or John Yasuna, a Discovery Plaintiff who worked in both California and Hawaii. Holtzman Decl. Ex. 2; *see also* Sander Decl. Ex. 4. Exhibit B thus demonstrates that plaintiffs have no proof to support their Turn-in Claim in Hawaii and California and summary judgment should therefore be granted dismissing this claim in those states.

Similarly, summary judgment should in any event be granted dismissing the state and FLSA Turn-in Claims of Messrs. Castillo, Yasuna, Hollister, Sabas, Soto and Kennedy because plaintiffs assert no claims within the relevant limitations periods with respect to those individuals.

To the extent the Court determines that the Time-Shaving Claims remain viable as class claims and they are not otherwise dismissed, plaintiffs' Turn-in Claims asserted under California, Hawaii, and Minnesota law should be decertified because plaintiffs have failed to identify any entries on Exhibit B for Messrs. Castillo, Sabas and Kennedy, the class representatives for those states. Holtzman Decl. Ex. 2; *see also* Sander Decl. Ex. 4. Accordingly, for the same reasons described on page 40 above, plaintiffs cannot maintain their Turn-in Claims on a class-wide basis with respect to these states because plaintiffs cannot establish that each of these class representatives suffered the same injury as the members of the class he seeks to represent. *See Bentley*, 2010 WL 1223575 at 4-5 (denying motion for class certification because the named plaintiffs did not incur the fees that were allegedly incurred by members of the class).

IV. Plaintiffs' Business Expense Claims Should be Dismissed or Decertified

A. The FLSA Collective Action Should Be Decertified Because Plaintiffs Cannot Prove their Business Expense Claim on a Nationwide Basis

Exhibit D demonstrates that the Discovery Plaintiffs are not similarly situated with respect to plaintiffs' Business Expense Claim. In fact, although Exhibit D identifies each week for which plaintiffs claim there was a minimum wage violation because the technician incurred unreimbursed business expenses, there are no entries whatsoever on the exhibit for Messrs. Hollister, Poczok, Roseme, Buono and Villatoro, and no entries within the FLSA limitations period for Messrs. Castillo, Cardwell, Soto, Najmon, Richardson and Cain. Thus, Exhibit D does not contain any entries during the FLSA limitations period for *more than one quarter* of the Discovery Plaintiffs. Holtzman Decl. Ex. 6; *see also* Sander Decl. Ex. 5. As a result, plaintiffs cannot carry their burden of showing that either the Discovery Plaintiffs or members of the collective action are similarly situated or that a finding of liability with respect to representative

plaintiffs could properly be extended across an entire class of technicians. Thus, this claim should be decertified from the collective action. *See* Cases Cited at pp. 24-26 above.

In addition, summary judgment should be granted dismissing the FLSA Business Expense Claims of Messrs. Castillo, Hollister, Cardwell, Poczok, Soto, Najmon, Roseme, Buono, Richardson, Villatoro and Cain because plaintiffs acknowledge that they cannot prove this claim for those individuals.

B. Plaintiffs Cannot Prove their Business Expense Claims on a Statewide Basis

Exhibit D similarly shows that plaintiffs cannot prove their Business Expense Claims on a statewide basis.

Plaintiffs have not included any entries on Exhibit D for one of the Discovery Plaintiffs from Connecticut (Mr. Hollister), Illinois (Mr. Poczok), New Jersey (Mr. Roseme) and New York (Mr. Buono).[16] Holtzman Decl. Ex. 6; *see also* Sander Decl. Ex. 5. Thus, there is no basis on which to find that the technicians in the these classes are similarly situated or upon which class-wide liability could be found. Because as many as fifty percent of the Discovery Plaintiffs in these classes indisputably have no claim, the Business Expense Claims for Connecticut, Illinois, New Jersey and New York should be decertified.

In other Class States, there are plainly too few entries to draw any statewide conclusions about liability. For example, although the three Discovery Plaintiffs from Ohio each worked for RRSC for well over two years during the state limitations period, Exhibit D includes a total of just four entries during the state limitations period for these three individuals (one entry each for two of those Discovery Plaintiffs and two entries for the third). Similarly, Exhibit D contains

[16] Separately, for the reasons provided in pages 39-40 above, since Mr. Poczok does not claim to have suffered from the injury alleged in plaintiffs' Business Expense Claim, he may not serve as a class representative and therefore the Illinois class should be decertified.

just one entry during the applicable statute of limitations period for each the two Discovery Plaintiffs who worked in California.[17] Holtzman Decl. Ex. 6; *see also* Sander Decl. Ex. 5. This dearth of evidence provides no basis on which a fact finder could determine liability on a class-wide basis.

Exhibit D also reflects a tremendous disparity in the number of entries that plaintiffs claim support their Business Expense Claims among the Discovery Plaintiffs from some of Class States. With respect to Minnesota, for instance, Exhibit D contains sixteen entries within the limitations period for Mr. Kennedy but only one for Mr. Najmon. Likewise, in Washington, Exhibit D includes thirty-five entries within the limitations period for Mr. Mills but just six for Mr. Frazier-Smith. Holtzman Decl. Ex. 6; *see also* Sander Decl. Ex. 5.

Accordingly, when all of the data on Exhibit D is considered, it is clear that it is simply impossible to draw any credible inferences across each class about liability on plaintiffs' Business Expense Claims. These claims should therefore be decertified from the state class actions.

In addition, and in any event, summary judgment should be granted dismissing the state law Business Expense Claims of Messrs. Hollister, Poczok, Roseme and Buono because plaintiffs have not identified on Exhibit D any entries within the applicable limitations period for any of these individuals.

C. Plaintiffs' Business Expense Claims Should Be Decertified Because They Require an Individualized Inquiry

Plaintiffs have not explained the method they used to identify the entries included on Exhibit D, but from their proposed trial plan it appears they are attempting to prove their

[17] As discussed above in Section II. A. 1, claims based upon these two entries are barred by the release in the *Ita* case.

Business Expense Claim by "add[ing] all [of] the documented expenses [for a Discovery Plaintiff] and [determining] if they were so large as to reduce the [Discovery Plaintiffs'] wages below the minimum" in a particular week. Class Certification Order at 9. But plaintiffs cannot prove their Business Expense Claims so formulaically. Rather, the record demonstrates that their claim can only be proven – and defended against – through a highly-individualized inquiry.

Curiously, in their class certification reply brief, plaintiffs contended that their Business Expense Claim "does not focus on the particular expenses incurred by each Technician but on whether the total amount of business expenses incurred by Technicians in any given week was so large as to reduce their wages below the minimum" and that the "particular business expenses incurred by an individual would only be relevant if Roto-Rooter were [sic] arguing that some of them were not actually business expenses." Docket Entry No. 198 at 3. But that is precisely what defendants contend: Some of the expenses that plaintiffs are aggregating to calculate their Business Expense Claims may not properly be considered business expenses of RRSC, and thus it is necessary to examine each plaintiffs' business expenses. Indeed, the very reason that plaintiffs' Business Expense Claims are not fit for class or collective treatment is that these claims requires an individualized inquiry to determine how much, if any, of each plaintiffs' weekly expenses may be considered to be business expenses for which RRSC is responsible and thus must be accounted for in determining compliance with minimum wage requirements.

Plaintiffs' Business Expense Claims are based almost entirely on expenses relating to the purchase and maintenance of their vans. Plaintiffs appear to take the position that every expense associated with owning and operating their van should be considered for purposes of determining whether they were paid the minimum wage. But the law is to the contrary: Only expenses plaintiffs incurred *on RRSC's behalf* should be considered for this analysis. 29 C.F.R. § 778.217.

And even with respect to the vehicle-related expenses that plaintiffs incurred on RRSC's behalf, the law does not require that plaintiffs be reimbursed for their actual expenses. Rather, an employer is permitted to "approximate reasonably the amount of an employee's vehicle expenses without affecting the amount of the employee's wages for purposes of the federal minimum wage law." *Wass v. NPC Int'l., Inc.*, 688 F. Supp. 2d 1282, 1286 (D. Kan. 2010); *see also Darrow v. WKRP Management, LLC,* No. 90-cv-01613-CMA-BNB, 2011 WL 2174496, *5 (D. Colo. June 3, 2011) ("Defendants correctly argue that they did not have to reimburse Plaintiff for his actual expenses, but could approximate Plaintiff's vehicle-related expenses in setting the reimbursement rate.").

Moreover, plaintiffs appear to take position that every van-related expense is incurred by the technician in the week he actually pays for the expense. While this might be true for expenses such as parking and fuel, it simply is not true for expenses relating to owning, leasing or maintaining the van. For instance, plaintiffs seem to contend that defendants have violated the applicable minimum wage laws in weeks where a technician pays a periodic financing or lease payment and the full amount of the payment, when subtracted from the technician's wages for that week, would result in the technician being paid less than the minimum wage. But just because a monthly financing or lease payment is made in a particular week does not mean that entire expense must be accounted for in the week the payment is actually made. Rather, an employer may properly approximate the expense incurred by the technician by amortizing the expense over an appropriate period – thus, for example, a monthly lease payment could reasonably be spread across a one-month period. The same is true for expenses associated with performing significant maintenance on a van. For example, the expense of replacing tires properly may be amortized over the life of the tires. Consequently, each van-related expense

must be analyzed to evaluate whether RRSC's method of reimbursement provides a fair approximation, and plaintiffs therefore cannot prove their Business Expense Claim by simply adding all the documented expenses for a given week to see if they were so large as to reduce the technician's wages below the minimum wage.

In addition, an individualized analysis is required to determine how much of plaintiffs' weekly van-related expenses were actually incurred on RRSC's behalf. This analysis will vary from plaintiff to plaintiff for many reasons. The Discovery Plaintiffs' deposition testimony shows that among those who do own a van, some used their vans for personal reasons while they were employed by RRSC.[18] To the extent a Discovery Plaintiff used his vehicle for personal endeavors during a given week, RRSC need not account for expenses, such as gas, depreciation, and maintenance, related to the technician's personal usage. *See* 29 C.F.R. § 778.217. Similarly, since plaintiffs' commuting expenses are not incurred on RRSC's behalf, the length and expense of each technician's daily commute must separately be considered because it will affect plaintiffs' overall van expenses differently. *See* 29 C.F.R. § 531.32; *see also Rivera v. Brickman Group, Ltd.*, Civ. No. 05-1518, 2008 WL 81570, at *9 (E.D. Pa. Jan. 7, 2008) ("[O]rdinary commuting is not primarily for the benefit of the employer for FLSA purposes.").[19]

For the foregoing reasons, the Business Expense Claims should be decertified.

V. Plaintiffs' Illegal Deduction Claims Should be Dismissed

As discussed above, plaintiffs' Illegal Deduction Claims have been pared to the allegation that commission adjustments for call-backs relating to warranty service made pursuant

[18] *See* Bradley Tr. at 172; Cardwell Tr. at 56-57; Christie Tr. at 50-51; Ercole Tr. at 166-67; Poczok Tr. at 148; Yasuna Tr. at 88-89.

[19] Note that this is not solely an issue of damages. Until the amount of "business expenses" incurred by a technician in a particular week can be calculated, it cannot be determined whether he was paid below the minimum wage.

to RRSC's Reversal of Commission policy are illegal *per se* under all of the Class States' laws (except for Hawaii and Florida). These claims thus present three distinct issues. First, was the commission adjustment made to an "advance" of commissions – in which event plaintiffs concede they have no valid claims[20] – or a deduction from wages previously earned under applicable law? Second, if such adjustments are deemed to be deductions from wages, are such deductions permissible under applicable law? And third, if local law requires a written authorization for the deduction, does the written authorization provided by the technicians in this case satisfy the legal requirements.

Due to the limited scope of plaintiffs' claim, the Court made clear that it "fully expect[ed] that [the Illegal Deduction Claim], at least with respect to states where contemporaneous authorizations do not come into to play, will be resolved on summary judgment." Class Certification Order at 28. Importantly, the Court also warned plaintiffs that "if even one ground for reversal that defendants have employed is permissible, the action would devolve into individual adjudications of each reversal that would be anything but *'de minimis' or 'simple'"* and therefore "if plaintiffs' argument proves too ambitious – if they begin to move away from the sweeping claim that any kind of reversal without an authorization is impermissible – they will not maintain the class with respect to this claim." *Id.* at 27, 28.

As the Court anticipated might be the case, it is now apparent that summary judgment should be granted dismissing plaintiffs' Illegal Deduction Claims. *First*, with respect to certain Class States, plaintiffs base their Illegal Deduction Claim on facially inapplicable statutes. *Second*, under the Class States' laws, commission adjustments for call-backs relating to warranty

[20] As noted by the Court, plaintiffs concede that "[i]f the reversals are found to be part of the calculation of the final wage, then no class member has a claim because, by definition, there has been no 'wage deduction.'" Class Certification Order at 25.

service cannot constitute illegal deductions because plaintiffs' wages are not earned until the warranty period expires and the customer pays – payments made before these two events occur are merely advances, and the adjustment of these advances, as plaintiffs concede, is not a violation of any law. *Third*, even if the Court were to determine that commissions were earned before the warranty period expired, the adjustments are permissible in certain states because they were authorized by the technicians.

A. Defendants Have Not Made Illegal Deductions from Wages Because Plaintiffs' Commission Payments are Advances, Not Earned Wages, or the Claims Are Otherwise Not Viable

Plaintiffs' Illegal Deduction Claims fail under the laws of all Class States and should be dismissed because the commission payments received by plaintiffs are advances that do not become earned wages until certain subsequent conditions are satisfied. As plaintiffs acknowledge, commission adjustments for call-backs relating to warranty work do not constitute an illegal deduction from wages if the commission was not "earned" when the adjustment was made, such that the adjustment is part of the calculation of the final wage rather than a deduction from a wage that previously was earned. Docket Entry No. 198 at 18.

RRSC's Reversal of Commission Policy, which has appeared in the Employee Handbook since February 2008, unambiguously states that technicians' commission payments are advances and that their wages are not earned until the warranty period expires and the invoice is paid:

> Because commissions are subject to adjustments under the OPCC system, *all commissions are considered advances until the invoice is paid and the warranty period expires*.
>
> The Company provides a listing of OPCC adjustments in each technician's Weekly Driver's Report. When a technician signs his weekly Detailed Listing of Time Sheets, he also acknowledges this OPCC system and approves the OPCC adjustments on his most recent driver's report, including any reductions in commissions resulting from a negative OPCC adjustment. Accordingly, if a technician has any question about any commission adjustment, he/she should raise it immediately with his supervisor or the General Manager.

Holtzman Decl. Ex. 8 at CHEMED/RR 00005699 (emphasis added); *see also* Stewart Tr. 29 (technicians' pay is "considered an advance until the job is paid for or the guarantee is exhausted"). Twenty-eight of the thirty-nine Discovery Plaintiffs have signed acknowledgements stating that they "understand that it is my responsibility to read and comply with the policies contained in the Handbook" and that they have "full access to the Handbook, which is readily available . . . in a public place at my work location." Holtzman Decl. Ex. 7; Stewart Tr. 39 (ten copies of the Handbook are available at each branch for technicians' review).

In addition, technicians are provided with a Detailed Listing of Time and a Preliminary Drivers' Report each week in connection with their turn-in, which they are required to review for accuracy. Sander 10/29/10 Tr. 58-59, 151; *see also* Holtzman Decl. Exs. 15, 16, 17. If a technician agrees with the information provided on these documents, he is ask asked to sign an authorization that appears on the Detailed Listing of Time. Sander 10/29/10 Tr. 58-59, 151; *see also* Holtzman Decl. Exs. 15, 16, 17. The authorization has, since February 2008, specifically stated:

> I agree to the terms of Roto-Rooter's OPCC adjustment system. I agree to adjustments indicated on my Preliminary Drivers' Report for [that week]. *I authorize any commission reduction caused by negative OPCC adjustments*.

All of the Discovery Plaintiffs employed after February 2008 have signed these authorizations. Holtzman Decl. Ex. 18.

The February 2008 documentation merely memorialized RRSC's consistent and ongoing practice with respect to OPCCs and callbacks. Two years earlier, RRSC distributed to each branch instructions regarding documentation of OPCCs, which specifically noted that "[i]f a job is a callback (recall), the system will generate an OPCC that will credit the driver(s) that completed the job and charge the driver(s) that received the revenue originally." Sander Decl.

¶ 85 & Ex. 25. But even before that time, callbacks were assessed in this manner and disclosed to technicians on a weekly basis. *Id.* ¶ 86; *see also* Holtzman Decl. Ex. 19. This documentation reflects RRSC's consistent policies and practices throughout the relevant period.

Under these circumstances, the commission adjustments for call-backs do not constitute deductions from earned wages that can properly form the basis for the Illegal Deduction Claims. As set forth below, the core inquiry under the laws of each Class States is whether there was an understanding between RRSC and plaintiffs that commission payments were advances. Given that the relevant policies, practices, and documentation clearly provide that "all commissions are considered advances until the invoice is paid and the warranty period expires," the record establishes that the commission payments received by plaintiffs were advances subject to adjustment. Accordingly, each of the Illegal Deductions Claims fails.

- California: Plaintiffs claim that adjustments for call-backs violate Section 2802 of the California Labor Code Section. Cmplt. ¶ 343. But Section 2802 relates to reimbursements of an employee's business expenses, not allegedly illegal deductions, and thus is not a proper basis for the Illegal Deductions Claim. Cal. Lab. Code § 2802 (requiring that an employer "indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer").

Plaintiffs also assert this claim under Section 221, pursuant to which employers are not permitted to "to collect or receive from an employee any part of wages theretofore paid by said employer to said employee." Cal. Lab. Code § 221. "Wages" are "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." *Id.* at § 200.

Although commission payments may be considered wages under section 221, "[t]he right of a salesperson or any other person to a commission depends on the terms of the contract for compensation." *Koehl v. Verio, Inc.*, 48 Cal. Rptr. 3d 749, 761 (Cal. Ct. App. 2006) ("[C]ases have long recognized, and enforced, commission plans agreed to between employer and employee, applying fundamental contract principles to determine whether a salesperson has, or has not, earned a commission."); *see Steinhebel v. Los Angeles Times Commc'ns*, 24 Cal. Rptr. 3d 351, 356 (Cal. Ct. App. 2005) ("[C]ontractual terms must be met before an employee is entitled to a commission."); *Kemp v. Int'l Bus. Machines Corp.*, C-09-4683 MHP, 2010 WL 4698490 (N.D. Cal. Nov. 8, 2010) (employee had not "earned" wages under employer's Incentive Plan and thus there was no section 221 violation). Consequently, where, as here, an employer's commission policy provides for commission advances to an employee, California courts hold that there can be no violation of section 221 because

> [t]he essence of [a commission] advance is that at the time of payment the employer cannot determine whether the commission will eventually be earned because a condition to the employee's right to the commission has yet to occur or its occurrence as yet is otherwise unascertainable. An *advance*, therefore, by definition is not a *wage* because all conditions for performance have not been satisfied.

Steinhebel, 24 Cal. Rptr. 3d at 357 (no violation of section 221 where employer charged-back commission advances if customer cancelled subscription within 28 days). Thus, under California law, it is "permissible for an employer to have a commission policy which provide[s] that in the event that an account was not paid, the commissions paid on that account would be recovered from future commissions paid to the salesperson," *Koehl*, 48 Cal. Rptr. 3d at 765 (quoting Division of Labor Standards Enforcement Opinion Letter No. 2002.06.13-2, p.2.), and an employer is permitted to advance commissions before all conditions for payment are met and then later "charge back any excess advance over commissions earned against any future advance

should the conditions not be satisfied." *Steinhebel*, 24 Cal. Rptr. 3d at 356. Because call-backs are assessed against advances on commissions rather than earned wages, this claim fails.

- Connecticut: To prove liability on their Illegal Deduction Claim under Connecticut law, plaintiffs must establish that "the amount sought to be recovered qualifies as a wage under § 31-71a(3)." *Henwood v. Unisource Worldwide, Inc.*, No. 3:01CV0996 (AWT), 2006 WL 2799589, at *18 (D. Conn. Sept. 29, 2006) *aff'd,* 282 F. App'x 26 (2d Cir. 2008). Because "[t]he statute does not purport to define the wages due [and] merely requires that those wages *agreed to* will not be withheld for any reason," Connecticut courts look to the understanding between the employee and employer to determine whether compensation qualifies as a wage and whether a wage has actually been earned in the context of illegal deduction claims. *Mytych v. May Dept. Stores Co.*, 793 A.2d 1068, 1072, 1074 (Conn. 2002) (emphasis added) (statutory definition of wages "leaves the determination of the wage to the employer-employee agreement, assuming some specific conditions, such as a minimum hourly wage, are met"). Where a payment is considered an advance under the employer's payment plan or policy, there can be no illegal deduction from a "wage." *Id.* at 1075 (defendant did not illegally deduct wages because "plaintiffs were paid all the wages they had earned as calculated according to the formula to which they specifically had agreed"); *see also Karavish v. Ceridian Corp.*, 3:09-CV-935 JCH, 2011 WL 3924182, at *3 (D. Conn. Sept. 7, 2011) (company had not illegally deducted wages because under its incentive plan it had discretion to award the entire commission to another employee involved in the sale and thus the wage at issue was not earned); *Kelley v. Sun Microsystems, Inc.*, 520 F. Supp. 2d 388, 406 (D. Conn. 2007) (plaintiff was not owed "wages" since defendants were not obligated to pay commissions unless certain conditions were met).

- Colorado: Under the Colorado Wage Claim Act ("CWCA"), "No amount is considered to be wages or compensation until such amount is earned, vested, and determinable, at which time such amount shall be payable to the employee pursuant to this article." Colo. Rev. Stat. § 8-4-101(8)(a)(I); *see also* § 8-4-101(8)(a)(II) (definition of wage includes "commissions earned for labor or services performed in accordance with the terms of any agreement between an employer and employee"). Thus, the CWCA is inapplicable where commissions are not fully earned pursuant to an agreement between the employer and the employee. *Barnes v. Van Schaack Mortg.,* 787 P.2d 207, 210 (Colo. App. 1990). To determine whether compensation, including a commission, is fully earned, courts consider the employer's compensation policies or plans. *See In re Citigroup, Inc., Capital Accumulation Plan Litig.*, 652 F.3d 88, 91 (1st Cir. 2011) (employer did not violate the CWCA where plan provided that rights to deferred compensation had not vested and thus the disputed compensation, which included commissions, had not been "earned"); *Gray v. Empire Gas, Inc.,* 679 P.2d 610, 611 (Colo. App. 1984) (employer plan determines whether plaintiff's wage was earned).

- Illinois: Under the Illinois Wage Payment and Collection Act ("IWPCA") "wages" are "any compensation owed an employee by an employer pursuant to an employment contract or agreement between the 2 parties, whether the amount is determined on a time, task, piece, or any other basis of calculation." 820 Ill. Comp. Stat. 115/2. Thus, "[a] prerequisite to maintaining a claim under the IWPCA is proof that the employee had a contract or agreement which entitled the employee to compensation." *Hull v. Paige Temporary, Inc.*, No. 04 C 5129, 2005 WL 3095527, at *17 (N.D. Ill. Nov. 16, 2005). Consequently, to recover under the IWPCA, a plaintiff must show "mutual assent to terms that support the recovery." *Rudolph v. Int'l Bus.*

Machines Corp., No. 09 C 428, 2009 WL 2632195, at *5 (N.D. Ill. Aug. 21, 2009) (quoting *Landers-Scelfo v. Corporate Office Sys., Inc.*, 827 N.E.2d 1051, 1059 (Ill. App. Ct. 2005).

- Indiana: Plaintiffs can prevail on their Illegal Deduction Claim under Indiana law only if the payments they seek are wages to which they are entitled. *See Gress v. Fabcon*, Inc., 826 N.E.2d 1, 3 (Ind. Ct. App. 2005) (unearned commissions not wages). In evaluating whether a commission is a wage, courts applying Indiana law consider an employer's commission policy. *See id.* at 4 (relying on employer's "commission program" in determining that the commissions sought were not wages); *Helmuth v. Distance Learning Sys. Ind.*, 837 N.E. 2d 1085, 1091 (Ind. Ct. App. 2005) (affirming finding that wages were not earned where the employer "informed its employees when they were hired of the chargeback policy").

- Minnesota: Plaintiffs incorrectly assert their Minnesota Illegal Deduction Claim under Minn. Stat. § 177.24 and Minn. R. 5200.0090. Compl. ¶ 437. By their terms, however, section 177.24 and Rule 5200.0090, which is promulgated under section 177.24, apply only to deductions "which when subtracted from wages would reduce the wages below the minimum wage." Minn. Stat. § 177.24. Because the Illegal Deductions Claim is based on plaintiffs' contention that adjustments for call-backs are illegal without regard to whether they result in payments below the minimum wage, Section 177.24 is inapplicable. Consequently, summary judgment should be granted dismissing plaintiffs' Illegal Deduction Claim to the extent based upon Minn. Stat. § 177.24 and Rule 5200.0090.

Plaintiffs also cite Minn. Stat. § 181.79 to support their Minnesota Illegal Deduction Claim but, by its terms, that section applies only to "wages due or earned by any employee." Minn. Stat. Ann. § 181.79. Accordingly, Section 181.79 is "only applicable to deductions taken from *earned* wages or commissions." *Glass v. IDS Fin. Serv., Inc.*, 778 F. Supp. 1029, 1068 (D.

Minn. 1991) (citing *Stiff v. Assoc. Sewing Supply Co.*, 436 N.W.2d 777, 780 (Minn. 1989)) (emphasis added). "Since the statute does not define the term 'earned,' [courts] look to the applicable employment contract or policy to determine what, if any, 'earned' wages or commissions" to which an employee may be entitled. *O'Neal v. Niscayah, Inc*., No. Civ. 10-4434 (RHK/JJG), 2011 WL 381768, at 4 (D. Minn. Feb. 01, 2011) (employer did not violate section 181.13 because commissions were not yet earned under the employer's compensation plan); *see also Martin v. Clear Channel Television, Inc*., No. Civ. 00-753 MJDJGL, 2001 WL 1636488, at *2 (D. Minn. July 16, 2001) ("In the absence of the statutory definition of when a commission is 'earned,' a trial court may consider the policy as it existed between the instant parties."). Thus, courts rely on language in an employer's compensation or commission plan to determine that a wage is not yet due or earned under Minnesota law. *See Glass*, 778 F. Supp. at 1068-69 (granting summary judgment dismissing claim because, pursuant to the employer's compensation system, commissions were not "due and earned" until after the employer adjusted the gross commission "by adding or subtracting any rental chargebacks, PVS chargebacks or bonuses, and any other chargebacks or additions"); *Oja v. Dayton Hudson Corp*., 458 N.W.2d 169, 170 (Minn. Ct. App. 1990) (employer's policy of calculating commissions on net sales precluded commissions from becoming due or earned until merchandise that was eventually returned was included in the calculation).

Missouri: The sole basis alleged by plaintiffs for liability under Missouri law is the Missouri Minimum Wage and Overtime Rule, 8 C.S.R. 30-4.050(3). Compl. ¶ 446. That rule, however, has no application to plaintiffs' Illegal Deduction Claim because it merely provides a list "of goods and services which are not considered to be for the private benefit of the employee and *whose fair market value many not be deducted by the employer as a credit toward the*

payment of the minimum wage to the employee." Mo. Code Regs. Ann. tit. 8 § 30-4.05(3) (emphasis added). In contrast to plaintiffs' Business Expense Claim, which addresses whether certain expenses should be considered in determining whether plaintiffs were paid the minimum wage, the minimum wage has nothing to do with plaintiffs' Illegal Deduction Claim. Rather, the Illegal Deduction Claim asserts that commission adjustments for call-backs are unlawful, *irrespective* of whether those adjustments cause a plaintiffs' wages to fall below the minimum wage. The Minimum Wage and Overtime Rule does not prohibit deductions from wages. Moreover, adjustments for call-backs are not identified among the types of goods and services excluded from the calculation of minimum wage in Rule 30-3.050(3). *Id.* Accordingly, summary judgment should be granted dismissing plaintiffs' Illegal Deduction Claim under Missouri law.

- New Jersey: The New Jersey Wage Payment Law ("NJWPL") provides that "[n]o employer may withhold or divert any portion of an employee's wages" except under certain enumerated circumstances. N.J. Stat. Ann. § 34:11-4.4. Since an "employer's policies are deemed to be unilateral contracts which an [at-will] employee accepts by continuing his employment" and "[a]ny policy set forth by an employer, including compensation terms, is presumed accepted by the employee if the employee becomes aware of the policy and chooses to continue working," New Jersey courts rely on employers' compensation policies to determine whether a commission constitutes an earned wage. *Neal v. E. Controls, Inc.*, No. A-4304-06T1, 2008 WL 706853, *4,7 (N.J. Super. Ct. App. Div. Mar. 18, 2008) (although employee had not signed an acknowledgement of commission policy, nonetheless relying on policy to find that "no statutory mandate was violated because . . . commissions were not wages due").

- New York: Under New York law, an employer may not make "any deduction from the wages of an employee" except under certain circumstances. N.Y. Lab. Law § 193(1). However, an employer does not violate section 193 if the relevant compensation does not qualify as a wage. *See Pachter v. Bernard Hodes Group Inc.,* 10 N.Y.3d 609, 617, 891 N.E.2d 279, 284 (2008) (legality of deductions depends on when commission was earned and became a wage subject to the restrictions of section 193); *Jankousky v. N. Fork Bancorporation, Inc.*, 08 CIV. 1858 PAC, 2011 WL 1118602, at *4 (S.D.N.Y. Mar. 23, 2011) ("Until the wages are agreed upon, there can be no deduction within the meaning of the NYLL."). Courts look to the parties' agreement and course of dealing to determine when a commission becomes an earned "wage." *See, e.g.*, *Pachter*, 10 N.Y.3d at 617, 891 N.E.2d at 284 (in the absence of a written agreement, relying on parties' course of dealing and periodic commission statements to find implied contract regarding when commission would be deemed earned); *Dreyfuss v. eTelecare Global Solutions-US, Inc.*, No. 08 CIV.1115 (RJS), 2010 WL 4058143, at *8 (S.D.N.Y. Sept. 30, 2010) (no violation of Labor Law where employer's plan "clearly provides that commissions are earned based upon the receipt of revenue and that commissions are paid after an employee's termination only at Defendant's discretion"); *Graff v. Enodis Corp.*, No. 02 CIV. 5922 (JSR), 2003 WL 1702026, at *2 (S.D.N.Y. Mar. 28, 2003) (considering an employer's "policy bulletin" to determine when commissions were earned and granting summary judgment to employer on claim that employer failed to pay wages due).

- North Carolina: Under the North Carolina Wage and Hour Act, a "wage is defined to include such wage-related benefits as "sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a *policy or a practice* of making such payments." N.C. Gen. Stat. § 95-25.2(16) (emphasis added). Thus, under the statute, "the

employer is free to offer the employee any wage he desires" as long it complies with the state's minimum wage and overtime laws. *Narron v. Hardee Food Sys., Inc.*, 75 N.C. App. 579, 582 (N.C. Ct. App. 1985). Moreover, "[a]n employer may provide for loss or forfeiture of wages and benefits, or change the wages and benefits offered at any time," as long as the employer notifies the employee of any such change in writing and the change has only prospective application. *Id.* at 583; *see also Leone v. Tyco Electronics Corp.*, 407 Fed. App'x 749 (4th Cir. 2011) (affirming summary judgment for employer on claim under the Wage and Hour Act because employer's policy did not provide for the benefits employee sought); *McKeithan v. Novant Health, Inc.*, No. 1:08CV374, 2008 WL 5083804 at *3 (M.D.N.C. 2008) (where employer's written policy precluded the type of payment employee sought, holding that the "so-called withheld payments Plaintiff now seeks to recover are not, in fact, accrued wages of the type that fall under the ambit of section 95.25.6").

- Ohio: With respect to the Ohio Illegal Deduction Claim, plaintiffs rely upon only Ohio Rev. Code Ann. Sections 4113.15, 4113.19 and 4113.20. Compl. ¶ 464. But the Court did not certify class claims under sections 4113.15 or 4113.20. Class Certification Order at 44. Putting that aside, none of these sections can possibly apply to plaintiffs' Illegal Deduction Claim. Sections 4113.19 and 4113.20 address only deductions "for wares, tools, or machinery destroyed or damaged." Ohio Rev. Code Ann. §§ 4113.19 & 4113.20. These statutes do not prohibit adjustments for call-backs relating to warranty service.

Section 4113.15 is irrelevant to plaintiffs' Illegal Deductions Claim because it merely provides certain timelines by which earned wages must be paid. *See Id.* § 4113.15. Indeed, section 4113.15 is inapplicable where, as here, an employee claims entitlement to a disputed wage as opposed to simply the untimely payment of undisputed wages. *See Haines & Co., Inc.*

v. Stewart, No. 200 DCA 00138, 2001 WL 166465, at *4 (Ohio App. 5 Dist. Feb. 5 2001) ("[A] contest or dispute of [an employee's] wage claim takes the claim outside the scope of R.C. 4113.15."); *Lower v. Elec. Data Sys. Corp*., 494 F. Supp. 2d 770, 775 (S.D. Ohio 2007) (holding that "§ 4113.15 expressly applies only to wages that are not in dispute"). Moreover, section 4113.15 does not apply to claims for the payment of commissions. *Haines*, 2001 WL 166465 at *3 ("[The] trial court was correct in holding the definition of the word wage as used in Section 4113.15 does not include commissions."). Accordingly, summary judgment should be granted in defendants' favor dismissing plaintiffs' Illegal Deduction Claim under Ohio law.

In any event, Ohio courts look to formal and informal manifestations of an agreement between the employer and employee to determine whether a commission is earned and owed. *See Nichols v. Waterfield Fin. Corp.* 62 Ohio App. 3d 717, 719 (1989) (relying on letter that employee signed to determine that employee was not entitled to the commission he sought); *International Total Serv., Inc. v. Glubiak,* No. 71927, 1998 WL 57123 (Ohio Ct. App. Feb. 12, 1998) (letter that outlined terms of employment demonstrated that employee's right to commissions had not vested). Thus, to the extent otherwise viable, plaintiffs' Ohio claim fails because RRSC's documentation shows that commissions are considered advances.

- Washington: Under Washington law, a "'wage' means compensation due to an employee by reason of employment . . . subject to such deduction, charges or allowances as may be permitted . . . ." Wash. Rev. Code § 49.46.010. To determine whether a wage is due and earned, courts applying Washington law look to agreements between the employer and employee concerning compensation. *See McBroom v. Winthrop Res. Corp.*, 41 Fed. App'x 118, 121-22 (9th Cir. 2002) (looking to agreement to determine that "a commission becomes due 'at the time the gross margin is generated'"); *Backman v. Northwest Publ'g Center*, 147 Wash. App. 791

(Wash. Ct. App. 2008) (commission not earned because agreement provided that salesman's commissions were not earned until the advertisements actually appeared in magazine).

* * *

Plaintiffs' Illegal Deduction Claims fails under the law of each Class State because the commission payments they seek were advances that did not become earned wages until after the warranty period expired and the customer paid; until such time, they were subject to deduction in accordance with RRSC's commission policy. Accordingly, summary judgment should be granted dismissing plaintiffs' Illegal Deduction Claims.

B. The Commission Adjustments for Call-Backs are Permissible Under Connecticut, Illinois, Minnesota, and North Carolina Law Because Plaintiffs Authorized them in Writing

Even if the Court were to determine that plaintiffs' commissions constituted an earned wage before RRSC made adjustments for call-backs, summary judgment should be granted in defendants' favor on plaintiffs' Illegal Deduction Claims arising under Connecticut, Illinois, Minnesota, and North Carolina law. Commission adjustments of earned wages are legal in these states because they were voluntarily authorized by plaintiffs.

As described earlier, the Detailed Listing of Time, which technicians typically sign during turn-in at the end of each week, has since February 2008 contained an authorization that specifically states:

> I agree to the terms of Roto-Rooter's OPCC adjustment system. I agree to adjustments indicated on my Preliminary Drivers' Report for [that week]**.** *I authorize any commission reduction caused by negative OPCC adjustments*.

Holtzman Decl. Ex. 18 (emphasis added).[21]

[21] The Reversal of Commission Policy states:

> The Company provides a listing of OPCC adjustments in each technician's Weekly Driver's Report. When a technician signs his weekly Detailed Listing of

The Preliminary Drivers' Report, to which the authorization on the Detailed Listing of Time refers, also is provided to technicians during turn-in at the end of each week. Sander 10/29/10 Tr. 61-63. The Preliminary Drivers' Report details the amount of each commission adjustment for that week and provides the reason the adjustment was made.[22] Holtzman Decl. Exs. 15, 16, 17.

Accordingly, before commission adjustments for call-backs are processed and are reflected in plaintiffs' pay checks, the amount of and reason for the commission adjustment is known to and authorized by the technician in writing. As described below, under these circumstances, plaintiffs cannot sustain a claim of illegal deductions from plaintiffs' wages under the laws of Connecticut, Illinois, Minnesota, and North Carolina.

- Connecticut**:** Under Connecticut General Statutes Section 31-71, an employer may withhold or divert an employee's wages if "the employer has written authorization from the employee for deductions on a form approved by the commissioner [of the Department of Labor]." Conn. Gen. Stat. § 31-71e(2). The Connecticut Supreme Court has recently held, however, that the portion of the statute that appears to require that the employee's authorization be on a "form approved by the commissioner" is merely "directory" and thus and employer's

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> Time Sheets, he also acknowledges this OPCC system and approves the OPCC adjustments on his most recent driver's report, including any reductions in commissions resulting from a negative OPCC adjustment. Accordingly, if a technician has any question about any commission adjustment, he/she should raise it immediately with his supervisor or the General Manager.

Holtzman Decl. Ex. 8 at CHEMED/RR 00005699.

[22] In fact, after reviewing the Preliminary Drivers' Report, it is not uncommon for technicians to try to negotiate their commissions adjustments for call-backs. *See* Buono Tr. at 164-66; Cardwell Tr. at 126-27; Drejaj Tr. at 80; Frazier-Smith Tr. at 62-63; Hess Tr. at 157-59; Hollister Tr. at 112-14; Richardson Tr. at 136, 138-39; Villatoro Tr. at 43. And branch managers exercise discretion in allocating commissions for call-backs. *See, e.g.,* Richardson Tr. 137-38 (mangers address call-backs "case-to-case . . . depend[ing] on the situation.").

"failure to receive the department's approval of the form does not invalidate the deductions or provide a right of action for the employees." *Weems v. Citigroup, Inc.*, 289 Conn. 769, 778, 787 (2008).

- Illinois: Under the IWPCA, employers are permitted to make deductions from wages if the deduction is "made with the express written consent of the employee, given freely at the time the deduction is made." 820 Ill. Comp. Stat. 115/9; *see Franks v. MKM Oil, Inc.*, No. 10 C 13, 2010 WL 3613983 (N.D. Ill. Sept. 8, 2010) (deductions for '"drive aways' . . . and 'charge backs'" would have been permissible if they were made with the employee's written consent); *Kim v. Citigroup, Inc.*, 856 N.E.2d 639, 646 (Ill. App. Ct. 2006) (denying employees' motion for summary judgment because deductions made under employer's capital accumulation plan were made "pursuant to a valid wage deduction order with plaintiff's express written consent, which was voluntarily given").

- Minnesota: Commission adjustments for call-backs are permitted under two separate provisions of Minn. Stat. § 181.79, which governs deductions for faulty workmanship, loss, theft or damages. First, Section 181.79(c)(2) expressly states that the statute's prohibition on wage deductions does not apply to "any rules established by an employer for employees who are *commissioned* salespeople, where the rules are used for purposes of discipline, by fine or otherwise, *in cases where errors or omissions in performing their duties exist*." § 181.79(c)(2) (emphasis added). Thus, deductions from commissioned employees' wages are entirely permissible where, as here, "unsatisfactory performance [is] the motivating factor behind the deduction." *Sparrow v. Mills Auto Enterprises, Inc.*, No. A11-18, 2011 WL 3557850, at *3 (Minn. App. Aug. 15, 2011) (deduction was permitted under section 181.79(c)(2) because "the

pay plan establishes a rule for disciplinary purposes and permits deductions from commission pay where performance is lacking").

In addition, Section 181.79(c)(1) specifically allows an employer to make a deduction from wages for losses caused by the employee if the employee authorizes the deduction in writing:

> No employer shall make any deduction, directly or indirectly, from the wages due or earned by any employee, who is not an independent contractor, for lost or stolen property, damage to property, or to recover any other claimed indebtedness running from employee to employer, *unless the employee, after the loss has occurred or the claimed indebtedness has arisen, voluntarily authorizes the employer in writing to make the deduction* . . . .

Id. § 181.79(1) (emphasis added); *see Kahnke Bros., Inc. v. Darnall*, 346 N.W.2d 194, 196 (Minn. App. 1984) (deduction for damaged equipment would have been permissible had the document the employee signed stated that the employee authorized the deduction).

- North Carolina: North Carolina law specifically permits an employer to "withhold or divert" an employee's wages when

> the amount or rate of the proposed deduction is known and agreed upon in advance [and] the employer [has] written authorization from the employee which (i) is signed on or before the payday(s) for the pay period(s) from which the deduction is to be made; (ii) indicates the reason for the deduction; and (iii) states the actual dollar amount or percentage of wages which shall be deducted from one or more paycheck.

N.C. Gen. Stat. § 95-25.8(1)(2); *see Whitehead v. Sparrow Enter., Inc.*, 605 S.E.2d 234, 238-39 (N.C. Ct. App. 2004) (authorization form complied with North Carolina law where it provided the amount of the deduction, was in writing, was signed by the class members on or before the deduction is made, included the date signed and provided the reason for the deduction).

* * *

RRSC's policies relating to call-backs therefore are permissible under the laws of Connecticut, Illinois, Minnesota, and North Carolina. Accordingly, summary judgment should be granted dismissing plaintiffs' Illegal Deduction Claims under the laws of these states.

C. If the Illegal Deduction Claims Are Not Dismissed, They Should be Decertified

If the Court does not grant summary judgment on plaintiffs' Illegal Deduction Claims, it should decertify them because they cannot be resolved without conducting a highly individualized inquiry, analyzing the circumstances under which each technician signed the handbook acknowledgement and the weekly Detailed Listing of Time. Defendants would present individualized evidence showing each plaintiff understood his commissions were advances and, with respect to certain states, the circumstances of each callback.

VI. The FLSA Collective Action Should be Decertified to Conform with the Scope of the State Class Claims

In the event the Court declines to decertify in its entirety the collective treatment of plaintiffs' Uncompensated Hours Claim asserted under the FLSA, the collective action should be decertified to conform with what remains of the corresponding class claims. As plaintiffs acknowledge, their State Class Claims "mirror" their FLSA claims. Docket Entry No. 198 at 7. But plaintiffs' Uncompensated Hours Claim in the collective action still technically includes plaintiffs' claim that defendants failed to compensate plaintiffs for the time they spent maintaining their vans and work equipment, notwithstanding that the Uncompensated Hours Claims in the Class States have been narrowed to include only the Time-Shaving Claim and the Turn-in Claim.

The Court's rationale in determining that plaintiffs' state claims for van and equipment maintenance time were unfit for class treatment applies with equal, if not greater, force to plaintiffs' identical claims under the FLSA. The Court should therefore decertify that claim

from the collective action. As the Court recognized in the Reconsideration Order, the only way plaintiffs could possibly attempt to prove this claim is through technician-specific testimony and thus "as a practical matter, establishing liability for uncompensated hours of maintenance work would require separate adjudication of each plaintiff to ascertain whether he was able to perform that work on stand-by time." Reconsideration Order at 4, 5. In contrast to the deficient State Class Claims, plaintiffs' FLSA claim applies to technicians not just in one state but in RRSC's branches across the country. Consequently, the need for technician-specific testimony is even greater with respect to the collective action and thus the inquiry with respect to this claim will necessarily be even more "highly individualized" than that required for plaintiffs' corresponding State Class Claims.[23] *See id.* at 4. Because plaintiffs cannot demonstrate that the members of the FLSA collective action are similarly situated in this regard, the collective action should be decertified so as to exclude plaintiffs' Uncompensated Hours Claim premised on time spent maintaining their work vans and equipment.

[23] As if to emphasize the highly individualized nature of the inquiry, plaintiffs, in their interrogatory responses, were unable to identify any instances on which they claim a Discovery Plaintiff performed van, tool and/or machine maintenance that was not accurately recorded in his time records as working time. *See* Holtzman Aff. Ex. 2 at p. 4-5. Instead, plaintiffs simply cited to excerpts of each Discovery Plaintiffs' deposition transcript, *id*., and plaintiffs have confirmed that they "do not intend to use specific occasions for liability purposes *other than those provided in testimony*." *Id.* Ex. 20 (emphasis added). But relying on testimony in this manner is directly at odds with the type of "paper case" described in the Class Certification Order. In any event, the Discovery Plaintiffs' deposition testimony show that some technicians maintained their vans and equipment while they were on the clock, *see, e.g.,* Bradley Tr. at 92-94, 97-98, 109-10; Castillo Tr. at 53, 55, 119-20; Cruz Tr. at 30, 87-88, 90, 93-95; Drejaj Tr. at 35-36; Frazier-Smith Tr. at 33; Hess Tr. at 130; Lawson Tr. at 23, 58-59; McMahon Tr. at 29-30, 107-08; Roseme Tr. at 55-56; Soto Tr. at 179-80; York Tr. at 27-28, 32, while others claim they did not, s*ee, e.g.,* Cardwell Tr. at 41, 43; Christie Tr. at 61-62; Hollister Tr. at 35-36, 117; Mills Tr. at 23, 24, 79; Morangelli Tr. at 47-48; Poczok Tr. at 151-53; Saint Juste Tr. at 64-66; Smith Tr. at 73; Van Horn Tr. at 65-66.

VII. Summary Judgment Should be Granted Dismissing All Claims Against Chemed Because it was and is Not Plaintiffs' Employer

Summary judgment should be granted dismissing all claims to the extent they are asserted against Chemed because it is not, and never was, plaintiffs' employer under the FLSA or the Class States' laws.

To be held liable under the FLSA, an entity must be an "employer." *Herman v. RSR Security Serv. Ltds.*, 172 F.3d 132, 139 (2d Cir. 1999); *Jean-Louis v. Metropolitan Cable Comm., Inc.*, No. 09 Civ. 6831 (RJH), 2011 WL 4530334, at 5 (S.D.N.Y. Sept. 30, 2011). The FLSA defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." *Herman*, 172 F.3d at 139 (quoting 29 U.S.C. § 230(d)). "Because the statute defines employer in such broad terms" and thus "offers little guidance on whether a given individual is or is not an employer," *Jean Louis*, 2011 WL 4530334 at 5 (citations omitted), courts apply an "economic reality" test to determine whether the "alleged employer possessed the power to control the worker in question." *Herman*, 172 F.3d at 139. Under the economic reality test, courts consider whether the entity (1) had the power to hire and fire the employees; (2) controlled work schedules or employment conditions; (3) determined the rate or method of payment; and (4) maintained employment records. *Gorey v. Manheim Serv. Corp.*, 788 F. Supp. 2d 200, 210 (S.D.N.Y. 2011) (dismissing claims against parent companies). This same analysis applies to the determination of whether Chemed is plaintiffs' employer under the Class States' laws.[24]

[24] *See, e.g., Hart v. Rick's Cabaret Int'l Inc.*, No. 09 Civ. 3043 (JGK), 2010 WL 5297221, at *2 (S.D.N.Y. Dec. 20, 2010) ("[T]he standards by which a court determines whether an entity is an 'employer' under the FLSA also govern that determination under the New York Labor Law."). *See also Davis v. Four Seasons Hotel Ltd.*, No. 08-00525 HG-BMK, 2011 WL 3841075 (D. Haw. Aug. 26, 2011); *Radford v. Telekenex, Inc.*, No. C10-812RAJ, 2011 WL 3563383, at *2 (W.D. Wash. Aug. 15, 2011); *Knapp v. City of Markham*, No. 10 C 03450, 2011 WL 3489788, at *9 (N.D. Ill. Aug. 9, 2011); *Arnold v. DirecTV, Inc.*, No. 4:10CV00352 AGF, 2011 WL 839636,

Chemed is RRSC's indirect parent corporation. Williams Tr. 17. Plaintiffs can muster no evidence sufficient to satisfy even one of the elements of the economic realities test with respect to Chemed – *i.e.,* that it had the power to hire and fire technicians, controlled their work schedules or employment conditions, determined the rate or method of their compensation, or maintained employment records regarding technicians. Moreover, there is no evidence that Chemed was involved in any of the supposed violations of law alleged by plaintiffs in the Complaint.

To the contrary, the record confirms that Chemed is not involved in RRSC's day-to day business operations. Sander Decl. ¶ 81. Moreover, Chemed is not directly responsible for setting RRSC's employment, compensation or time-keeping policies. Williams Tr. 18; Sander Decl. ¶ 81. For instance, although certain of Chemed's officers were consulted when RRSC changed its payroll and time tracking policies in 2001, RRSC's management team made the "ultimate decision" to implement the changes. Williams Tr. 30-31. RRSC, not Chemed, is responsible for making employment decisions about technicians and their supervisors. Sander Decl. ¶ 82; *see* Arquilla Tr. 58 (stating that he went to a branch to terminate a general manager). Indeed, Chemed's Director of Internal Audit testified that it was not within his responsibility, or that of Chemed's Chief Financial Officer, to even suggest that a RRSC employee should be terminated, even if implicated in wrongdoing in connection with an investigation by Internal Audit. Eaton Tr. 286; *see also id*. at 277 ("[I]t is not my responsibility to hire or fire people or

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at *6 (E.D. Mo. Mar. 7, 2011); *Bates v. Smuggler's Enterprises, Inc.*, No. 2:10-CV-136-FTM-29DNF, 2010 WL 3293347, at *2 (M.D. Fla. Aug. 19, 2010); *Zajkowski v. RCI Entertainment (Minnesota), Inc.*, No. 27 CV 07-26436, 2009 WL 3815377 (D. Minn. Jul. 31, 2009); *Ortiz v. Paramo*, No. 06-3062, 2008 WL 4378373, at *4 (D.N.J. Sept. 19, 2008); *Mitchell v. Abercrombie & Fitch, Co.*, 428 F. Supp. 2d 725, 732, 744-45 (S.D. Ohio 2006), *aff'd*, 225 F. App'x 362 (6th Cir. 2007); *Miller v. Colorcraft Printing Co., Inc.*, No. 3:03 CV 51-T, 2003 WL 22717592, at *3 (W.D.N.C. Oct. 16, 2003).

even call for their termination."), 267 (Chemed's internal auditor left "it up to [RRSC's officers] to make the employment decision" about implicated employees).

Under these circumstances, Chemed, as RRSC's indirect parent corporation, is not plaintiffs' employer and thus not properly a defendant in this action. *See Gorey*, 788 F. Supp. 2d at 210 (parent corporations not employers because there was no evidence that they hired or fired any of the plaintiffs or controlled plaintiffs' work schedules or employment conditions); *Gonzalez v. HCA, Inc.*, No. 3:10-00577, 2011 WL 3793651, at *13-14 (M.D. Tenn. Aug. 25, 2011) (even though parent provided some administrative functions for subsidiaries, holding that parent corporation was not an employer because subsidiaries decided and implemented pay and scheduling policies, maintained their own bank accounts, financial records and payroll records); *Luna v. Del Monte Fresh Produce (Southeast)*, 1:06CV-2000-JEC, 2008 WL 754452 (N.D. Ga. Mar. 19, 2008) (granting summary judgment for parent corporation where subsidiary conducted its business independently and parent's involvement was limited);

Conclusion

For the foregoing reasons, defendants respectfully request that the Court grant defendants' motion for summary judgment and/or that it decertify the class and/or the collective actions.

Dated: New York, New York
February 10, 2012

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Appendix A

Certified Class States, Representatives, and Periods

Class State	Class Representative(s)	State Class Period[1]
California	Jason Castillo	2/25/06 to present
Colorado	Steve McMahon	2/25/07 to present
Connecticut	Evens St. Juste	2/25/08 to present
Florida	Jeffery Gorman	2/25/05 to present
Hawaii	James Sabas	2/25/04 to present
Illinois	Frank Poczok	2/25/05 to present[2]
Indiana	Steven Hess	2/25/07 to present
Minnesota	Alan Kennedy	2/25/04 to present
Missouri	Levoid Bradley	2/25/08 to present
New York	Anthony Morangelli and Frank Ercole	2/25/04 to present[3]
New Jersey	Frank Ercole	2/25/04 to present
North Carolina	Lawrence Richardson	2/25/07 to present
Ohio	Shilo Cain and Dino Branco	2/25/07 to present
Washington	Bryon Frazier-Smith	2/25/04 to present

[1] The class period for each Class State corresponds to the applicable statute of limitations. Accordingly, claims arising before the applicable class period are time-barred.

[2] The Class Certification Order stated that the class period was February 25, 2000 to the present. This was later amended to February 25, 2005 to the present. Minute Order dated August 10, 2011.

[3] The Class Certification Order stated that the class period was February 25, 2006 to the present. This was later amended to February 25, 2004 to the present. Minute Order dated June 28, 2011.