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

TABLE OF CONTENTS

Page

Table of Authorities ii

Argument 1

I. Plaintiffs' Trial Plan is Fatally Flawed 1

II. Plaintiffs Should Be Barred From Revising Their Interrogatory Responses 3

III. Plaintiffs' Admissions that Many Technicians Suffered No Harm Makes Class Treatment Improper 5

IV. Plaintiffs' Uncompensated Hours Claims Should be Dismissed or Decertified 8

A. The Time-Shaving Claims Require Individualized Inquiries 8

B. The Turn-in Claims Require Individualized Inquiries 10

C. Van Maintenance Time Claims 10

V. Plaintiffs' Business Expense Claims 11

VI. Plaintiffs' Illegal Deduction Claims Should be Dismissed 14

VII. Summary Judgment Should be Granted in California, Indiana and Hawaii 16

A. California 16

B. Hawaii and Indiana 18

VIII. Chemed is Not Plaintiffs' Employer 19

Conclusion 20

TABLE OF AUTHORITIES

Page(s)

CASES

Armbruster v. Quinn,
711 F.2d 1332 (6th Cir. 1983) 19

Barone v. Safway Steel Products, Inc.,
No. CV-03-4258 (FB), 2005 WL 2009882 (E.D.N.Y. Aug. 23, 2005).....8 n.4

Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.,
855 P.2d 1263 (Cal. 1993).....17

Black v. Blackmun,
No. 11 Civ. 2372 (BMC)(ALC), 2011 WL 6019394 (E.D.N.Y. Dec. 1, 2011) 18

Brown v. Family Dollar Stores of Indiana, LP,
534 F.3d 593 (7th Cir. 2008) 18, 19

Chamberlin v. Principi,
No. 02 Civ. 8357 (NRB), 2005 WL 1963942 (S.D.N.Y. Aug. 16, 2005) 2

Darrow v. WKRP Mgmt.,
No. 90-cv-01613-CMA-BNB, 2011 WL 2174496 (D. Colo. June 3, 2011) 13

Duff v. Lobdell-Emery Mfg. Co.,
926 F. Supp. 799 (N.D. Ind. 1996) 1

Duffy v. Drake Beam Morin,
No. 96 Civ. 5606, 1998 WL 252063 (S.D.N.Y. May 19, 1998).....20 n.11

E.E.O.C. v. Grace Episcopal Church of Whitestone, Inc.,
No. 06-CV-5302 (ERK)(WDW), 2007 WL 6831007 (E.D.N.Y. July 3, 2007).....19

Erchonia Corp. v. Bissoon, M.D.,
No. 07 Civ. 8696 (DLC), 2011 WL 3904600 (S.D.N.Y. Aug. 26, 2011).....4

Franks v. MKM Oil, Inc.,
No. 10 C 13, 2010 WL 3613983 (N.D. Ill. Sept. 8, 2010).....15

Garcia v. Frog Island Seafood, Inc.,
644 F. Supp. 2d 696 (E.D.N.C. 2009).....12

Garnica v. Verizon Wireless Telecom, Inc.,
No. A128577, 2011 WL 2937236 (Cal. Ct. App. July 21, 2011).....17 n.9

Gilmore v. Macy's Retail Holdings,
Civ. No. 06-3020 (JBS), 2009 WL 140518 (D.N.J. Jan. 20, 2009) 1

Hughes v. Winco Foods,
No. ED CV11-00644 JAK (OPx), 2012 WL 34483 (C.D. Cal. Jan. 4, 2012) 6

Kellett v. Glaxo Enterprises, Inc.,
No. 91 Civ. 6237, 1994 WL 669975 (S.D.N.Y. Nov. 30, 1994) 20 n.11

Lugo v. Farmer's Pride Inc.,
737 F. Supp. 2d 291 (E.D. Pa. 2010) 7

Med. Educ. Dev. Servs. Inc. v. Reed Elsevier Group, PLC,
No. 05 Civ. 8665 (GEL), 2008 WL 4449412 (S.D.N.Y. Sept. 30, 2008) 4

Meng v. Ipanema Shoe Corp.,
73 F. Supp. 2d 392 (S.D.N.Y. 1999) 20 n.11

Oakley v. Verizon Commc'ns Inc.,
No. 09 Civ. 9175 (CM), 2012 WL 335657 (S.D.N.Y. Feb. 1, 2012) 6, 9

S.E.C. v. Norton,
21 F. Supp. 2d. 361 (S.D.N.Y. 1998) 18 n.10

Tran v. Tran,
860 F. Supp. 91 (S.D.N.Y. 1993) 10

Villacres v. ABM Indus. Inc.,
189 Cal. App. 4th 562 (Cal. Ct. App. 2011) 17

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 6

Wass v. NPC Int'l,
688 F. Supp. 2d 1282 (D. Kan. 2010) 13

Weems v. Citigroup, Inc.,
289 Conn. 769 (2008) 15

Williams v. Bank of Leumi Trust Co. of N.Y.,
No. 96 Civ. 6695 (LMM), 2000 WL 343897 (S.D.N.Y. Mar. 31, 2000) 18 n.10

Woodland v. Viacom, Inc.,
569 F. Supp. 2d 83 (D.D.C. 2008) 19

Zivali v. AT&T Mobility, LLC,
784 F. Supp. 2d 456 (S.D.N.Y. 2011) 6

STATUTES

820 Ill. Comp. Stat. 115/9 15

Haw. Rev. Stat. § 387-2 18

Haw. Rev. Stat. § 387-3 18

Haw. Rev. Stat. § 388-2 18

Ind. Code Ann. § 22-2-5-1 18

OTHER AUTHORITIES

29 C.F.R. § 531.35 13

29 C.F.R. § 778.217 13

Defendants respectfully submit this reply memorandum of law in further support of their motion for Summary Judgment and/or Decertification of the Class and Collective Actions.[1]

Argument

I. Plaintiffs' Trial Plan is Fatally Flawed

Having obtained class certification by assuring the Court they would prove their claims through a "paper case," plaintiffs now run away from that promise. Plaintiffs' submissions show that they are entirely unable to comply with the trial plan approved by the Court.

Plaintiffs seek to prove their Uncompensated Hours and Business Expense Claims through their interrogatory responses and an explanation of the queries they used to identify the instances included in those responses. *See, e.g.,* Plt. Opp. Br. at 24 ("Under Plaintiffs' proposed trial plan the jury will be asked whether the records identified by each of these six queries more likely than not represent intentional hours shaving."). A party may not rely upon its own answers to interrogatories as part of its affirmative case. *See Gilmore v. Macy's Retail Holdings*, Civ. No. 06-3020 (JBS), 2009 WL 140518, at *9 (D.N.J. Jan. 20, 2009) (a party may not introduce as evidence its own answers to interrogatories); *Duff v. Lobdell-Emery Mfg. Co.*, 926 F. Supp. 799, 803 (N.D. Ind. 1996) (same) (citing Charles A. Wright, Arthur R. Miller & Richard L. Marcus, 8A Federal Practice and Procedure § 2180, at 340 (1994)).

More fundamentally, plaintiffs have no way of putting before a jury the analysis underlying their interrogatory answers. Plaintiffs devote three pages of their opposition brief to "explaining" the many different queries they used to identify the instances of supposed time-shaving that they offer to prove their Time-Shaving Claims. Plt. Opp. Br. at 22-24. This

[1] Terms defined in Defendants' Memorandum of Law in Support of their Motion for Summary Judgment and/or Decertification of the Class and Collective Actions ("defendants' moving brief") and Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment ("defendants' opposition brief") have the same meaning herein.

"explanation" is not supported by an affidavit or a declaration, let alone any evidence that could properly be admissible. *See Chamberlin v. Principi*, No. 02 Civ. 8357 (NRB), 2005 WL 1963942, at *10 (S.D.N.Y. Aug. 16, 2005) ("Affidavits submitted to defeat summary judgment must be admissible themselves or must contain evidence that will be presented in an admissible form at trial.") (quotations and citations omitted). While such an explanation might ordinarily be the subject of expert testimony, plaintiffs have elected not to use an expert witness to prove their claims. Holtzman Reply Decl. Ex. A at 16. Plaintiffs' decision to forgo use of an expert also forecloses them from offering any statistical analysis to show that their claims may be applied across the fourteen separate state law classes as well as the collective, and they are thus unable to prove any statistical significance to the entries identified in their interrogatory responses.[2]

Moreover, with the exception of one entry on Exhibit D that relates to the Business Expenses Claim for one Discovery Plaintiff during one week of his employment, plaintiffs have not submitted any evidence supporting any of the entries on any of their interrogatory responses. *See* Def. Opp. Br. at 4. Accordingly, plaintiffs' interrogatory responses are nothing more than inadmissible self-serving lists of instances that plaintiffs would like this Court to believe constitute violations of the FLSA and the applicable state laws.

Finally, notwithstanding their representation to the Court that they would prove their claims without resort to individualized testimony and branch-specific evidence, plaintiffs intend to do just that. Claiming that they "will be able to support their [Time-Shaving Claims] with substantial circumstantial evidence," plaintiffs refer to particular investigations in specific branches, declarations submitted by technicians describing instances where the technician

[2] Plaintiffs repeatedly suggest they will seek to prove their case through the testimony of Gary Sander, RRSC's Executive Vice President. But Mr. Sander will not be able to testify regarding plaintiffs' "queries," the data in plaintiffs' interrogatory answers, or the statistical meaning – if any could be found – of any alleged violations.

contends his time was altered and declarations submitted by branch personnel in specific branches. Plt. Opp. Br. at 24 n.19. This tactic is clearly incompatible with the Court's trial plan: "[I]f plaintiffs begin to have second thoughts about their chances at trial without offering more testimony, I will de-certify the class." Class Certification Order at 38. And yet, whether or not plaintiffs rely on such individualized branch-specific evidence, defendants will be required to call their own witnesses to establish their defenses and demonstrate that no violations occurred and liability cannot be found on a classwide basis.

II. Plaintiffs Should Be Barred From Revising Their Interrogatory Responses

Clearly appreciating that the light defendants shed on their contention interrogatory responses reveals the abject deficiencies in both their trial plan and their claims, plaintiffs now seek what can only be called a "do-over," requesting permission to file new interrogatory responses to attempt to cure the multitude of flaws that defendants have identified. Plaintiffs' extraordinary request, at this late stage of this case, should be denied.

As demonstrated in defendants' moving brief (at pp. 31-36, 43-45) and the Declaration of Gary Sander, through a laborious analysis of plaintiffs' interrogatory responses defendants have shown that many of the entries identified in plaintiffs' responses indisputably do not support their claims. Indeed, plaintiffs admit that 252 of the entries on Exhibit B do not support their Turn-in Claims and, based on defendants' analysis of only a small sample of the entries on Exhibit A (Sander Decl. ¶ 27) – the process was too individualized and time-consuming to even try to complete the analysis on all of the entries – acknowledge that many of the entries on that exhibit do not support their Time-Shaving Claims. Plt. Opp. Br. at 26-27, 32. This showing refutes any suggestion that plaintiffs are able to accurately, reliably or credibly identify from defendants' records instances upon which a finding of classwide liability could be justified.

Now, plaintiffs wish to correct the proven flaws in their response by developing a new approach, "adjusting the Quer[ies]" and serving revised interrogatory responses. *Id.* at 27, 32. They ignore that the purpose of contention interrogatories is "to assist parties in narrowing and clarifying the disputed issues *in advance of summary judgment practice* or trial." *Erchonia Corp. v. Bissoon, M.D.*, No. 07 Civ. 8696 (DLC), 2011 WL 3904600, at *8 (S.D.N.Y. Aug. 26, 2011) (emphasis added; internal quotation and citation omitted). Consequently, "in this Circuit, contention interrogatories are treated as judicial admissions 'that generally stop the answering party from later seeking to assert positions omitted from, or otherwise at variance with those responses.'" *Med. Educ. Dev. Servs. Inc. v. Reed Elsevier Group, PLC*, No. 05 Civ. 8665 (GEL), 2008 WL 4449412, at 11 (S.D.N.Y. Sept. 30, 2008) (quoting *Wechsler v. Hunt Health Sys. Ltd.*, No. 94 Civ. 8294, 1999 WL 672902, at *2 (S.D.N.Y. Aug. 27, 1999)).

Granting plaintiffs' request would cause defendants prejudice that is obvious and severe. Defendants have spent extensive time and resources analyzing and attacking plaintiffs' interrogatory responses in the context of a motion for summary judgment and decertification of the class and collective actions following the close of discovery. Defendants built their strategy around the case plaintiffs presented – indeed, the briefing schedule for these motions was specifically tied to the service of the interrogatory answers. If plaintiffs are permitted to serve revised interrogatory responses, defendants will be forced to conduct the same analysis again on additional entries at significant additional cost, and then will undoubtedly seek to file another motion addressing the deficiencies they are certain to find in plaintiffs' new responses . . . after which plaintiffs would presumably seek yet another bite at the apple. Plaintiffs should not be permitted to go back to the drawing board and "try again" at this late stage of the case to avoid decertification and summary judgment.

III. Plaintiffs' Admissions that Many Technicians Suffered No Harm Makes Class Treatment Improper

Even if plaintiffs could show that their interrogatory responses are wholly accurate, plaintiffs admit that they cannot identify:

- any alleged "temporal impossibilities" for almost *one quarter* of the Discovery Plaintiffs (Plt. 56.1 Response ¶¶ 4, 6-7);
- any alleged "temporal impossibilities" within the FLSA limitations period for more than *thirty percent* of the Discovery Plaintiffs (*id.*);
- any alleged "temporal impossibilities" within the applicable state limitations period for at least one of the Discovery Plaintiffs from each of Colorado, Connecticut, Florida, Indiana, New York, Ohio and Washington (*id.*);
- any other type of alleged time-shaving[3] for *fifteen percent* of the Discovery Plaintiffs (*id.* ¶¶ 5, 8-9);
- any other type of alleged time-shaving within in the FLSA limitations period for *eighteen percent* of the Discovery Plaintiffs (*id.*);
- any other type of alleged time-shaving within the applicable state limitations period for at least one of the Discovery Plaintiffs from Connecticut, Indiana and New York (*id.*);
- any alleged "temporal impossibilities" or any other type of alleged time-shaving within the FLSA limitations period for *thirteen percent* of the Discovery Plaintiffs (*id.* ¶¶ 4-9);
- any alleged instances to support their Turn-in Claims for *thirteen percent* of the Discovery Plaintiffs (*id.* ¶¶ 10-12);
- any alleged instances to support their Turn-in Claims from within the FLSA limitation period for *fifteen percent* of the Discovery Plaintiffs (*id.*);
- any alleged instances to support their Turn-in Claims from within the applicable state limitations period for all of the Discovery Plaintiffs from Hawaii and California and at least one of the Discovery Plaintiffs from Connecticut, Illinois and Minnesota (*id.*);
- any alleged violations of minimum wage requirements to support their Business Expense Claims for *thirteen percent* of the Discovery Plaintiffs (*id.* ¶¶ 14-16);
- any alleged violations of minimum wage requirements to support their Business Expense Claims within the FLSA limitations period for *more than one quarter* of the

[3] Notably, plaintiffs have not even attempted to explain why they believe such alleged instances, which are identified in Exhibit A2, fall within the scope of the Court's certification order. For the reasons explained in in defendants' moving brief (at p. 23-24), plaintiffs should be prohibited from relying on the entries identified in Exhibit A2.

Discovery Plaintiffs (*id.*); and

- any alleged violations of minimum wage requirements to support their Business Expense Claims from within the applicable state limitations period for one of the Discovery Plaintiffs from Connecticut, Illinois, New Jersey and New York (*id.*).

These admissions are fatal to plaintiffs' ability to continue to pursue their Uncompensated Hours and Business Expense Claims on a class and collective basis because they show that plaintiffs cannot satisfy either Rule 23's commonality requirement or the FLSA's requirement the members of a collective action be similarly situated.

As the Supreme Court made clear in *Wal-Mart Stores, Inc. v. Dukes*, to satisfy Rule 23 the requisite common issue "must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 131 S. Ct. 2541, 2551 (2011). Applying the standard articulated in *Wal-Mart,* the court in *Hughes v. Winco Foods* found that commonality had not been satisfied with respect to a putative class, which claimed their employer had failed to provide required meal breaks, because the evidence showed that "20% of the employees considered never took a late meal period" and thus the proposed class would "include[] persons who never took a late meal period and, therefore, suffered no corresponding injury." No. ED CV11-00644 JAK (OPx), 2012 WL 34483, at *6 (C.D. Cal. Jan. 4, 2012); *see also Oakley v. Verizon Commc'ns Inc.*, No. 09 Civ. 9175 (CM), 2012 WL 335657, at *14 (S.D.N.Y. Feb. 1, 2012) (denying class certification because plaintiffs' claims did not "impair[] every class member"). Similarly, in *Zivali v. AT&T Mobility, LLC,* the court decertified a collective action because the evidence showed "a wide range in the frequency of [time] adjustments: in some stores none of the plaintiffs' time records was edited, while in other stores greater than 50 percent of the employees/days contained edits." 784 F. Supp. 2d 456, 467 (S.D.N.Y. 2011).

The same situation is presented here. According to plaintiffs' own interrogatory responses, many of the Discovery Technicians have not suffered the injury plaintiffs allege. Plaintiffs' flawed analysis itself therefore fails to establish that all members of the classes share common claims and that the members of the collective action are similarly situated. Consequently, class and collective treatment of these claims are inappropriate because "if a verdict were reached for plaintiffs, this would be unfair to defendant, who would be deemed liable as to the entire [class] when it may not have undercompensated all individual members of that class." *Lugo v. Farmer's Pride Inc.*, 737 F. Supp. 2d 291, 303 (E.D. Pa. 2010).

Throughout their opposition brief, plaintiffs suggest that the Court granted class certification with the understanding that plaintiffs would not be able to show that the Discovery Plaintiffs suffered the injuries alleged. *See, e.g.*, Plt. Opp. Br. at 2 ("[T]he fact that only some of the discovery plaintiffs had damages and others did not is exactly what the trial plan anticipated."). Plaintiffs misinterpret both the Class Certification Order and their burden of proof. In granting class certification, the Court simply determined, based plaintiffs' representations, that the paper case they had proffered appeared to be a reasonable method for plaintiffs to attempt to establish classwide liability on their claims. For instance, with respect to plaintiffs' Time-Shaving Claims, the Court specifically stated:

> 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 . . . .

Class Certification Order at 21 (emphasis added).

The Court never suggested, however, that class treatment would continue to be appropriate even if it later became clear that plaintiffs could not prove their claims on a

classwide basis through the paper case they proposed. To the contrary, anticipating that plaintiffs might ultimately be unable to prove their paper case, the Court recognized that class certification is "inherently tentative."[4] *Id.* at 38. Now the day of reckoning has arrived: Plaintiffs have conducted extensive discovery, analyzed defendants' records and served their interrogatory responses, and it has become clear that plaintiffs cannot prove their Uncompensated Hours and Business Expense Claims on a nationwide or statewide basis.

IV. Plaintiffs' Uncompensated Hours Claims Should be Dismissed or Decertified

A. The Time-Shaving Claims Require Individualized Inquiries

Plaintiffs' contention that their Time-Shaving Claims do not require individualized analyses is completely contradicted by their own brief and their flawed interrogatory responses. The description plaintiffs now provide of the queries upon which they rely to prove this claim, although inadmissible for that purpose, demonstrates the individualized nature of the inquiry. Notably, only one of the six different queries that plaintiffs describe actually purports to replicate the query that Mr. Sander testified he had applied in the context of his investigation of the Hartford branch. Plt. Opp. Br. at 22. The other five queries are merely ones plaintiffs "believe a jury will conclude identify circumstances that are more likely than not the result" of time shaving. *Id.* For purposes of creating those five queries, plaintiffs acknowledge that they relied on "the testimony of Technicians as to how and when hours shaving occurred," although they nowhere explain or cite to whatever testimony they reference. *Id.* They also say they relied on statements from an office administrator who worked in the Atlanta branch. *Id.* at 23.

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[4] Indeed, under Rule 23, courts are "'required to reassess their class rulings 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)).

At their very core, the queries plaintiffs used are based on individualized and branch-specific input. Discovery Plaintiffs' testimony and statements from branch personnel are by their very nature specific to the branch in which those individuals worked at the time they worked there and not common to all members of the classes during the entire class period. *See Oakley*, 2012 WL 335657 at *14 ("That many different . . . employees were denied FMLA leave, for a variety of reasons under a variety of policies in a variety of locations, does not [] make the questions in each class member's case common to the others."). The fact that an office administrator in Atlanta claims to have shaved time is irrelevant to whether time shaving ever occurred in Minneapolis or Bridgeport or Denver. Yet plaintiffs can attempt to justify their methodology only through testimony from such disparate sources. Moreover, to refute plaintiffs' methodology, defendants will introduce evidence from technicians, managers and branch personnel from branches around the country showing that time was never improperly altered.[5]

Plaintiffs misconstrue their burden in asserting that "[t]he fact that there may be legitimate reasons for correcting records doesn't mean that the circumstances identified by Sander and Plaintiffs' other Queries are legitimate." Plt. Opp. Br. at 25. That many legitimate reasons for correcting records exist demonstrates that only through an individualized inquiry can the propriety of any particular change be assessed. Mr. Sander's declaration, which picked apart many of the entries identified in Exhibits A and A2 by identifying innocent explanations for the alleged temporal impossibilities, shows that every entry on those exhibits must be individually

[5] Given that the time entries identify the specific RRSC employee who made the allegedly improper adjustment, plaintiffs essentially accuse many dozens of Roto-Rooter employees in dozens of different locations of improper time shaving. Contrary to plaintiffs' contention in their opposition brief (at p. 28), a denial by such individuals that they ever engaged in improper time shaving – even if they cannot recall the particular instances in dispute – is directly relevant and responsive to plaintiffs' allegations of wrongdoing. *See, e.g.,* Weiner Decl. ¶ 8; Maloney Decl. ¶ 8, Brigandi Decl. ¶ 8, Gunning Decl. ¶ 8.

analyzed in detail. There is therefore no efficient way to present this evidence or defendants' defenses to a jury, or a basis upon which a jury could find classwide liability.

B. The Turn-in Claims Require Individualized Inquiries

Even while admitting that defendants' entry-by-entry analysis identified hundreds of entries that could not possibly support their Turn-in Claim, plaintiffs continue to contend that their claims do not require individualized inquiries. Plaintiffs' concession demonstrates how critical these individualized inquiries are to the resolution of their claims.

Moreover, even if it were admissible and accurate, Exhibit B would not provide any basis for a finding of class liability. It identifies only the times plaintiffs claim a Discovery Plaintiff was not credited with the time he spent attending turn-in. But that is only half of the analysis required. To prove liability on their Turn-in Claims, Plaintiff also must show that they worked more than forty hours in the weeks the turn-in time was not recorded. *See Tran v. Tran*, 860 F. Supp. 91, 96 (S.D.N.Y. 1993). That second part of the analysis – which plaintiffs do not even try to complete – necessarily requires a highly individualized inquiry. As set forth in defendants' moving brief (at p. 43-44), turn-in does not take a uniform amount of time. To the contrary, it varies greatly from week to week, branch to branch and technician to technician. Plaintiffs' proposal to estimate the length of turn-in across the classes is not a solution because there is record evidence showing the extensive variance from technician to technician.

C. Van Maintenance Time Claims

Plaintiffs oppose defendants' request to conform the scope of the FLSA collective action to the Court's Reconsideration Order, which decertified plaintiffs' State Class Claims that defendants failed to compensate plaintiffs for the time they spent maintaining their vans, and

further request that the Court recertify the van maintenance claims.[6] Plaintiffs' request is an untimely and improper motion for reconsideration that should be denied. Plaintiffs misleadingly suggest that their request to treat the van maintenance claims differently from the equipment maintenance claims is based on new evidence that was not available when the Court entered the Reconsideration Order. *See* Plt. Opp. Br. at 15-18. But the request is based exclusively on testimony from depositions of the Discovery Plaintiffs and Mr. Sander that were conducted many months before the Reconsideration Order was briefed and entered. *See id.* at 16-17 & n.17.

The Reconsideration Order was well-reasoned and consistent with the evidence. As the Court recognized and plaintiffs acknowledge, the evidence shows that technicians performed significant van maintenance tasks while they were on-the-clock. Reconsideration Order at 3 n.2. Plaintiffs now claim that their van maintenance claims is limited only to "major maintenance," but they do not even try to explain what maintenance tasks that might include. Moreover, plaintiffs have not offered any evidence showing how often, if at all, technicians perform "major maintenance" or how long such tasks take to complete, let alone evidence showing that any failure to record such time caused overtime violations. Thus, they fail to demonstrate commonality such that these claims may be resolved on a classwide basis.

V. Plaintiffs' Business Expense Claims

Erroneously claiming that the "only question that remains is whether the passive class members who incurred the same type of expenses as the 39 discovery plaintiffs failed to receive minimum wage in particular weeks" and that is a "damages question," plaintiffs once again seek to oversimplify the issues and ignore their burden of proof on the Business Expense Claims. Plt. Opp. Br. at 3. As described in defendants' opposition brief (at p. 2-4), to establish *liability* on

[6] Plaintiffs concede that the equipment maintenance claim should not be part of the class or collective actions. *See* Plt. Opp. Br. at 16, 18.

their Business Expense Claims, plaintiffs must prove both that they incurred expenses that under applicable law constitute expenses of RRSC *and* that such expenses caused their weekly wages to fall below the minimum wage. Thus, even if all of the expenses at issues are properly attributable to RRSC, plaintiffs' claims fail unless they also establish that they caused their wages to fall below the minimum wage. *See Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 708 (E.D.N.C. 2009) (denying employees' motion for summary judgment because they failed to establish that expenses at issue reduced their wages below the minimum wage). Plaintiffs have failed to submit any evidence supporting this required element. Moreover, plaintiffs' acknowledgment that they cannot identify any basis for liability on their Business Expense Claims for a significant portion of the Discovery Plaintiffs constitutes an admission that they cannot prove a violation of law for a large percentage of Discovery Plaintiffs, thus rendering class treatment improper.

Plaintiffs also assert that their Business Expense Claims do not require an individualized analysis. But technician-specific issues exist because not all class members incurred such expenses. As detailed in defendants' opposition brief (at p. 10-11), many members of the collective and class actions are provided work vans by RRSC and therefore do not incur any costs related to the purchase or maintenance of a vehicle. The same is true with respect to equipment, which many technicians are not required to purchase. Accordingly, a classwide determination regarding liability related to the purchase and maintenance of vans and other equipment would illogically and improperly apply to class members who do not own their own van or equipment or incur any van-related expenses.

Moreover, plaintiffs contend that there are no individualized issues because a jury would not need to consider whether RRSC reasonably approximated technicians' van-related expenses.

But their claim that *Wass v. NPC Int'l,* 688 F. Supp. 2d 1282 (D. Kan. 2010) and *Darrow v. WKRP Mgmt.*, No. 90-cv-01613-CMA-BNB, 2011 WL 2174496 (D. Colo. June 3, 2011) are inapplicable because those cases address 29 C.F.R. § 778.217, which governs calculation of the regular rate for purposes of overtime and not minimum wage payments, is simply wrong. The court in *Wass* considered Section 778.217 for guidance in addressing the plaintiffs' claim that the defendant had "*failed to pay . . . the applicable minimum wage* under the [FLSA]" because it "failed to reimburse them sufficiently for vehicle-related expenses" – the precise claim asserted by plaintiffs here – and concluded that "the applicable regulations also permit an employer 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,* 688 F. Supp. 2d at 1283, 1286 (emphasis added). The court in *Darrow* relied upon *Wass* to reach the same conclusion. *Darrow*, 2011 WL 2174496 at 3. Relatedly, plaintiffs claim there is no need to consider whether RRSC reasonably approximated van-related expenses because technicians submit their actual van-related expense each week but, as set out in defendants' opposition brief (at p. 12-13), many Discovery Plaintiffs never submitted expenses for reimbursement and others submitted expenses only sometimes and not for all types of expenses.

Since an expense does not have to be accounted for until it is incurred, 29 C.F.R. § 531.35, to the extent a technician provides a van, individualized issues also exist about when he actually incurs costs associated with its purchase. Many Discovery Plaintiffs finance the purchase of their van over a period of time and thus do not incur the full cost of purchasing their van in the week that it is acquired. Def. Opp. Br. at 9. Because determining the date the expense was actually incurred is critical to analyzing whether the technician fell below minimum wage in

a given week – a necessary element of this claim that plaintiffs want to ignore – the existence of these individualized issues precludes class or collective treatment.

VI. Plaintiffs' Illegal Deduction Claims Should be Dismissed

As plaintiffs acknowledge and as set forth in defendants' moving (at p. 53-65) and opposition (at p. 14-20) briefs, plaintiffs' Illegal Deductions Claims fail if plaintiffs' commission payments are advances of commissions.[7] Docket Entry No. 198 at 18; Class Certification Order at 25; *see* Plt. Br. at 20. Plaintiffs' argument that commission payments are not advances and that commissions are instead earned when technicians are paid is based entirely on an erroneous interpretation of the Compensation Form, which they contend "govern[s] when Technicians' commissions are earned." Plt. Opp. Br. at 9. But, as explained in defendants' opposition brief (at p. 15-16), the Commission Form does not say anything whatsoever about when technicians' commissions are earned and therefore cannot support plaintiffs' claim that the parties agreed that technicians' commissions are earned when they are paid each week. And, in any event, 40% of the Discovery Plaintiffs do not have a signed Commission Form. Stewart Decl. at ¶ 16.

Plaintiffs mistakenly claim that defendants "attempt to graft language from its handbook onto" the Commission Form. Plt. Opp. Br. at 9. Plaintiffs miss the point again – defendants do not suggest that provisions of its Employee Handbook should be read into the Commission Form. Rather, particularly since the Commission Form is silent on the issue and does not purport to be a fully-integrated agreement, the Employee Handbook – which unambiguously states that "*all commissions are considered advances until the invoice is paid and the warranty period*

[7] Plaintiffs' contention that the California Commissioner of Labor found that call-backs are wage deductions is both inaccurate (*see* Def. 56.1 Counter Stmt. ¶ 135) and irrelevant. Even if the Labor Commissioner had made such a finding in one claim, it would be relevant only to whether commission adjustments are permitted in California. But plaintiffs concede that they are barred from asserting their California Illegal Deductions Claim. Plt. Opp. Br. at 11 n.5.

expires" – demonstrates that the parties understood that commissions were advances subject to adjustment. Holtzman Decl. Ex. 8 at CHEMED/RR 00005699 (emphasis added). Most technicians have signed an acknowledgment stating that they have reviewed and understand the policies in the Employee Handbook, and technicians sign an acknowledgement on a weekly basis stating that they agree to the policy that describes commission as advances – points plaintiffs tellingly do not address in their opposition. *Id.* Exs. 7 & 18.

Commission adjustments for call-backs are not illegal wage deductions under Connecticut, Illinois, Minnesota and North Carolina law. Plaintiffs are wrong in claiming that Illinois and Connecticut law prohibit all wage deductions not made for the employee's benefit. The applicable Illinois statute permits deductions that are *either* "to the benefit of the employee" *or* "made with the express written consent of the employee, given freely at the time the deduction is made." 820 Ill. Comp. Stat. 115/9 (emphasis added); *see also 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). With respect to Connecticut, although *Weems v. Citigroup, Inc.*, 289 Conn. 769, 788, 789 (2008) held that the "form approved by the commissioner" is merely "directory," plaintiffs contend that form makes clear that deductions must be for the employee's benefit. But the form says no such thing, and they cite to only one of the several forms the Connecticut Department of Labor offers as examples, one of which permits deductions for charges for uniform rental and laundering that cannot be said to be for the employee's benefit. *Compare* Pl. Opp. at 14 n.10 *with* http://www.ctdol.state.ct.us/wgwkstnd/MinWageGuide/deduction-print.pdf.

Plaintiffs also claim that the Preliminary Drivers' Report does not sufficiently identify the amount of the deduction. The Preliminary Drivers' Report in fact details the amount of each

commission adjustment for that week and identifies the reason the adjustment was made. Holtzman Decl. Exs. 15, 16, 17. Accordingly, before commission adjustments for call-backs are processed and reflected in a technician's paycheck, the amount of and reason for each adjustment is known to and authorized in writing by the technician. Since plaintiffs know their own commission rates, they understand precisely how such adjustments affect their commissions payouts, satisfying the statutory requirements. Moreover, any assertion that technicians do not freely or voluntarily sign the authorization on the Detailed Listing of Time raises a technician-specific issue that requires an individualized inquiry into the circumstances surrounding each technician's signed authorization that would make class treatment of this claim inappropriate.

VII. Summary Judgment Should be Granted in California, Indiana and Hawaii

A. California

Plaintiffs' only response to defendants' motion for summary judgment dismissing the California claims is that although members of the California class have released defendants from "all claims . . . of every nature and description whatsoever arising out of, relating to, or in connection with the *causes of action* asserted in the Complaint" filed in *Ita* (Holtzman Decl. Ex. 12 at 5) (emphasis added), they have not released their Uncompensated Hours and Business Expense Claims because they are asserted under different statutory provisions than the claims in *Ita*.[8] *See* Plt. Opp. Br. 41-42. Plaintiffs' position relies upon a fundamental misunderstanding of the meaning of the term "cause of action." Under California law, a "cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory

[8] Plaintiffs concede that their California Illegal Deduction is barred entirely by the release in *Ita* and because RRSC does not make commission adjustment for call-backs in that state. Plt. Opp. Br. at 42 & n.5. Moreover, plaintiffs offer no response whatsoever to defendants' request for summary judgment dismissing their state and federal Business Expense Claims for California technicians for the period after January 14, 2008. *See* Def. Br. at 18.

(common law or statutory) advanced . . . . The cause of action is based upon the harm suffered, as opposed to the particular theory asserted by the litigant." *Villacres v. ABM Indus. Inc.*, 189 Cal. App. 4th 562, 576 (Cal. Ct. App. 2011); *see also Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 855 P.2d 1263, 1266 (Cal. 1993) ("The cause of action is based upon the harm suffered, as opposed to the particular theory asserted by the litigant . . . . Even where there are multiple legal theories upon which recovery might be predicated, *one injury* gives rise to only one claim for relief.") (internal quotation and citation omitted).[9] Accordingly, it is of no moment that plaintiffs here seek relief under different statutes than those relied upon in *Ita*.

Plaintiffs' Uncompensated Hours and Business Expense Claims unquestionably seek to recover damages based upon the same harm alleged in the *Ita* complaint. The *Ita* complaint alleged that defendants "failed to pay Plaintiffs overtime wages for any and all work performed" and "failed to pay Plaintiffs for hours actually worked, including . . . time spent maintaining company vehicles . . . time spent attending company meetings . . . and time spent doing other company business for [RRSC]." Holtzman Decl. Ex. 10 at ¶ 23. Moreover, just like plaintiffs' claims here, the complaint in *Ita* alleged that RRSC "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." *Id.* at ¶ 63; *see* Plt. Sum. Judg. Moving Br. at 4 (RRSC "requires Technicians to bear certain expenses of performing their jobs"); Plt. 56.1 Stmt. ¶ 30 ("Technicians working on a commission basis are required to shoulder expenses required to do their jobs."). Accordingly, defendants' request for summary judgment dismissing the California claims should be granted.

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[9] *Garnica v. Verizon Wireless Telecom, Inc.*, No. A128577, 2011 WL 2937236 (Cal. Ct. App. July 21, 2011), upon which plaintiffs rely, stands for the unremarkable proposition that courts must look to the causes of action asserted to determine whether particular claims were released and does not suggest that a release is confined to the statutes cited in the relevant complaint.

B. Hawaii and Indiana

Acknowledging that Section 387 of the Hawaii Wage and Hour Law entirely bars their Uncompensated Hours Claims and bars their Business Expense Claims for any period on or after July 24, 2009, plaintiffs now seek to pursue those claims under Section 388. Plaintiffs have no authority to support that proposition. The plain language of Section 388-2, entitled "Semimonthly payday," governs how frequently employers are required to pay their employees. It does not address overtime pay and minimum wages; those claims fall squarely under Section 387, which governs "Minimum wages" and "Maximum hours." Haw. Rev. Stat. §§ 387-2 & 3, 388-2. Section 388-2 addresses only *when* wages are payable, not *whether* they are payable. Accordingly, plaintiffs cannot assert their claims under either Section 387 or Section 388 and summary judgment should be granted dismissing these claims.

For similar reasons, plaintiffs' request for permission to amend their complaint to assert a claim under Section 22-2-5 of the Indiana Code should be denied as futile.[10] *See Black v. Blackmun*, No. 11 Civ. 2372 (BMC)(ALC), 2011 WL 6019394, at *5 (E.D.N.Y. Dec. 1, 2011) (Cogan, J.). Unlike Section 22-2-2, which plaintiffs now concede does not support their claims, Section 22-2-5 does not govern claims relating to overtime pay and the minimum wage. Section 22-2-5 simply governs the frequency with which employers must pay their employees. Ind. Code. Ann. § 22-2-5-1. Contrary to plaintiffs' contention, *Brown v. Family Dollar Stores of Indiana, LP*, 534 F.3d 593 (7th Cir. 2008), did not "recognize[]overtime claims brought under the wage payment statute." Plt. Opp. Br. at 43. While the court noted that Brown had asserted a

[10] "A motion to amend a complaint is particularly disfavored where the amendment is proposed in response to a summary judgment motion." *Williams v. Bank of Leumi Trust Co. of N.Y.*, No. 96 Civ. 6695 (LMM), 2000 WL 343897, at *2 (S.D.N.Y. Mar. 31, 2000). This is particularly so, where, as here, the amendment is sought "solely to avoid an adverse ruling on [a] summary judgment motion." *S.E.C. v. Norton*, 21 F. Supp. 2d. 361, 363 (S.D.N.Y. 1998).

claim under Section 22-2-5-1, it discussed only her FLSA claim and said nothing about the viability of Brown's claim under state law. *Brown*, 534 F.3d at 594-98. Accordingly, plaintiffs' Indiana Uncompensated Hours and Business Expense Claims should be dismissed.

VIII. Chemed is Not Plaintiffs' Employer

While plaintiffs note the existence of the "joint employer" theory of liability, they do not contend that they can satisfy this test. *See* Pl. Opp. Br. at 35-36. Although it is not pled in their complaint and therefore should not be considered (*see* Docket Entry No. 187 at ¶ 118), plaintiffs now argue Chemed is liable under the "single integrated employer" theory of liability. Plaintiffs have abjectly failed to make the "substantial showing" necessary to establish it. *See Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir. 1983); *Woodland v. Viacom, Inc.*, 569 F. Supp. 2d 83, 87 (D.D.C. 2008) (internal quotation and citation omitted).

The integrated enterprise analysis focuses on "whether the parent corporation was a final decision-maker in connection with the employment matters *underlying the litigation.*" *E.E.O.C. v. Grace Episcopal Church of Whitestone, Inc.*, No. 06-CV-5302 (ERK)(WDW), 2007 WL 6831007, at *3 (E.D.N.Y. July 3, 2007) (emphasis added) (citation omitted). As detailed in defendants' moving brief (at p. 72-73), the record indisputably shows that Chemed is not involved in RRSC's day-to-day business operations, not responsible for making employment decisions about RRSC's technicians or their supervisors and not responsible for RRSC's employment, compensation or time-keeping policies, which are, of course, the focus of plaintiffs' claims.[11] Consequently, Chemed is not plaintiffs' employer and summary judgment should be granted dismissing all claims against it.

[11] Plaintiffs misstate a number of facts that, while irrelevant to this analysis, warrant correction. Chemed and RRSC do not "share corporate offices." While Chemed and RRSC have their corporate offices in the same office building (Def. 56.1 Counter Stmt. ¶¶ 1, 2), they are located on different floors and are entirely separate. Moreover, Chemed's main business purpose is not

Conclusion

For the foregoing reasons and those set forth in defendants' moving and opposition briefs, defendants respectfully request that the Court grant defendants' motion for summary judgment and/or decertification of the class and collective actions.

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March 23, 2012

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the same as RRSC's. As the document upon which plaintiffs rely shows, Chemed's business is to own its subsidiaries, which include RRSC (the smaller portion of its portfolio) and a healthcare company. *See* PX 80. Moreover, the "mere existence of common management and ownership are not sufficient to justify treating a parent corporation and its subsidiary as a single employer." *Meng v. Ipanema Shoe Corp.*, 73 F. Supp. 2d 392, 402-403 (S.D.N.Y. 1999). The sharing of savings, retirement and stock plans, information services and business ethics policies also does not support a finding that the entities are integrated employers. *See Duffy v. Drake Beam Morin*, No. 96 Civ. 5606, 1998 WL 252063, at *5 (S.D.N.Y. May 19, 1998) ("[T]hat [parent] administers the pension and benefit plans for its subsidiaries . . . is hardly uncommon, nor is it proof that [parent] made the employment decisions at issue here."); *Kellett v. Glaxo Enterprises, Inc.*, 91 Civ. 6237, 1994 WL 669975, at *5 (S.D.N.Y. Nov. 30, 1994) ("[A] common benefits package speaks only to economies of scale . . . and not to centralized control of labor relations."). Moreover, that Chemed conducts audits of RRSC and monitors a fraud hotline does not change the analysis because Chemed, as a publicly traded company, is required under the Sarbanes-Oxley Act to do so. PX 81 at 16, 40-41. And, in any event, the record is clear that Chemed's audit department plays no role in RRSC employment decisions. Eaton Tr. 267, 277, 286.