IN THE UNITED STATES DISTRICT COURT
FOR THE 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, and BRYON E. FRAZIER-SMITH, AND LEVOID BRADLEY, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **CHEMED CORPORATION and ROTO-ROOTER SERVICES COMPANY,** **Defendants.**	**1:10-CV-00876 (BMC)**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Respectfully submitted on February 10, 2012,

By: */s/ Michael J.D. Sweeney*

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Plaintiffs ask the Court to find as a matter of law: (1) that Roto-Rooter's policy of shifting its business expenses onto Plaintiffs is a violation of the Fair Labor Standards Act ("FLSA") and state minimum wage laws when such expenses have the effect of bringing class members' earnings below the established minimum wage; (2) that Roto-Rooter violated its record-keeping obligations; (3) that Roto-Rooter's call-backs for the cost of warranty work constitute deductions from wages and violate state laws regulating wage deductions; and (4) that Plaintiffs are entitled to the full measure of liquidated damages under the FLSA for Roto-Rooter's minimum wage violations.

Roto-Rooter[1] employs a pay scheme designed to shift its business expenses onto employees without concern as to its wage-and-hour obligations. It requires Technicians[2] to pay out-of-pocket for their work vans, tools, and equipment without regard to whether those expenses drive wages below the minimum wage. Roto-Rooter also shifts its warranty expenses onto Technicians by deducting the cost of warranty work from their wages despite state law restrictions on such deductions.

Not surprisingly, Roto-Rooter's pay scheme results in regular wage-and-hour law violations. The result of this creative business model is that Roto-Rooter reaps hundreds of millions of dollars each year while illegally cheating its workers out of pay.

[1] The Defendants are collectively referred to as Roto-Rooter in this brief.

[2] The term Technician in this brief refers to the members of the classes certified by the Court in its class certification order, *Morangelli, et al., v. Roto-Rooter Servs. Corp. and Chemed Corp.*, 1:10-cv-00876-BMC, Doc. No. 203 (E.D.N.Y. June 17, 2011), and those commissioned Service Technicians who opted into the FLSA action pursuant to 29 U.S.C.A. § 216(b) (Westlaw 2012 through Pub. L. No. 112-86).

I. Facts

Technician Job Duties

A Technician's job is to visit customers assigned by Roto-Rooter, provide an estimate for drain cleaning and/or plumbing work, perform the work upon the customer's approval, bill the customer and collect payment, maintain his work van and equipment, and turn in paperwork and receipts from his work each week to the branch. PSMF ¶ 5. Technicians are also required to perform administrative tasks as part of their jobs such as "turn in", i.e., when a Technician turns paper work in to his branch office and reconciles his weekly receipts. PSMF ¶ 5. As explained below, Technicians' compensation is almost exclusively based on commissions.

Technicians' Work Time

Technicians are assigned a regular schedule and are required to work additional time outside their schedule when necessary. For example, if a Technician is working on a job and his shift ends, he is expected to complete the job. PSMF ¶ 8.[3] Roto-Rooter also requires Technicians to log into its dispatching system 45 minutes before their scheduled shift begins each day and respond if jobs are assigned before the shift starts. PSMF ¶ 9. During their shifts, Technicians are expected to remain by their work vans, in uniform, prepared to respond to calls. PSMF ¶ 10. Roto-Rooter also requires Technicians to be on-call during certain periods outside their scheduled shifts, typically over the weekend. PSMF ¶ 11. While on-call, a Technician is required to respond to any calls assigned to him but receives credit only for the time he is traveling to or from a job or performing the job itself. PSMF ¶ 11.

Roto-Rooter assigns work to Technicians from dispatch centers in Baltimore, MD and Chicago, IL. PSMF ¶ 12. Customer calls are routed to dispatchers who use a computer program

[3] PSMF refers to Plaintiffs Statement of Material Facts submitted pursuant to Local Rule 56.1.

to identify the appropriate Technician to do the job. PSMF ¶ 13. Once identified, the Technician is assigned the job through a handheld device such as a Blackberry. PSMF ¶ 13. When the Technician completes the job he is available to be assigned to another job so long as he remains on shift. PSMF ¶ 13.

Wage-and-Hour Records

Roto-Rooter maintains extraordinarily detailed records of Technicians' time using its proprietary database program, the SMS system. PSMF ¶¶ 14, 17, 22 & 23. Much of the information is entered into SMS electronically by the Technicians themselves through handheld devices ("handhelds") but branch office personnel and dispatch have the ability to manipulate the information manually. PSMF ¶¶ 15 & 16.

Technicians make an entry on their handhelds 45 minutes before their shift begins, when they accept a job assignment, when they arrive at a job, when they finish the job, when they take lunch,[4] and when they end their work day. PSMF ¶¶ 17 & 20. Roto-Rooter's time tracking system records the time between accepting a job assignment and arriving at the job as "in-transit time" ("TS"); it records the time between arriving at the job and the end of the job as "work time" ("WK"); it records lunch time as "LU"; and it records any residual time when a Technician is waiting for an assignment as "standby time" ("SB"). Roto-Rooter's time tracking system also keeps track of time Technicians spend doing administrative work, such as turn-in time and meeting time (recorded as "MT" time) and personal time ("PR"), but Technicians cannot enter MT or PR time. PSMF ¶¶ 22-24. Only dispatch or branch management has the ability to enter

[4] Prior to March 26, 2008, Technicians did not record their lunch time. Dispatch made entries for lunch breaks. PSMF ¶ 18.

MT and PR time.[5] PSMF ¶ 24.

SMS stores a wealth of other information about time entries, including any changes made to the time records, who made the change, and when it was made. PSMF ¶ 26. The SMS system also maintains information on the jobs Technicians perform. It records dispatching information, including when a customer call is received, when the job is dispatched, and who dispatches it. PSMF ¶ 27. It also stores the information Technicians enter directly into their handheld devices about each job, including the ticket number, the billing and costs for a job, the parts used, and the method of payment. PSMF ¶ 28.

At the end of each week, time records from the SMS system are transferred to Roto-Rooter's payroll software, a JD Edwards product. PSMF ¶ 29. Technicians' commissions are calculated based on those records. PSMF ¶ 29.

Work-Related Expenses Borne By Technicians

Roto-Rooter requires Technicians to bear certain expenses of performing their jobs. PSMF ¶ 30. These expenses include (i) the cost of acquiring the work van, (ii) its operation (e.g., gas, insurance, registration, tolls, and parking), (iii) van maintenance (e.g., oil and fluids, brake adjustments, tire rotations, etc.), and repair (e.g., mechanical and body damage), (iv) tools used on the job (hand and electric tools, lights, ladders, etc.), (v) equipment (e.g., the cables and blades used in Roto-Rooters drain cleaning machines) and (vi) parts (e.g., Technicians are required to purchase the parts that they carry on their trucks). PSMF ¶¶ 31, 32, 36 & 40.

One of the biggest expenses most Technicians bear is the cost of acquiring the work van.[6] Roto-Rooter imposes strict requirements as to the type of van that Technicians can use. PSMF ¶

[5] Roto-Rooter recently made changes to the time tracking system to have Technicians enter administrative time spent at the branch office via a computer terminal in the office. PSMF ¶ 25.
[6] Roto-Rooter requires most Technicians to provide their work van. PSMF ¶ XX.

41. The van must be a ½ or ¾ ton white van no more than three years old, in good mechanical condition and good appearance; it must have a barrier between the driver and equipment bay, an operating alarm system, and a roof rack; and the equipment bay must have bins and cabinets for storing parts, tools, and equipment. PSMF ¶¶ 43, 44 & 47. Roto-Rooter inspects Technicians' vans regularly and can refuse to provide work to a Technician if his van does not meet standards. PSMF ¶ 51. Technicians also must purchase and maintain at least $500,000 of commercial automobile insurance on their van. PSMF ¶ 55.

Roto-Rooter severely restricts Technicians' use of the van outside of work. The van must be "painted, marked and maintained" with Roto-Rooter signage. PSMF ¶ 45. More than 10% of the people calling Roto-Rooter do so because they saw a Roto-Rooter van. PSMF ¶ 46. Technicians are required to work exclusively for Roto-Rooter so they cannot use the van to perform other work. PSMF ¶ 57. Use of the van is further limited by the requirement that the back of the van be used for transportation and storage of plumbing equipment, meaning the only seats in the van are the driver and front passenger seats. PSMF ¶¶ 58 & 59. Moreover, the noxious smell from the sewage cleaning equipment stored in the van makes its use for non-work purposes impractical. PSMF ¶ 60. And Roto-Rooter holds Technicians responsible for theft of Roto-Rooter equipment from their vans, further limiting how vans can be used. PSMF ¶ 48.

Technicians bear all of these business expenses. Most items are purchased from third parties, such as the van, gas, repairs, tolls, and tools, etc. PSMF ¶ 81. Some items such as equipment used in Roto-Rooter's drain cleaning machines and parts carried on the truck can be purchased from Roto-Rooter. PSMF ¶ 82.

Technician's Compensation

After an initial training period, Technicians' compensation is commission based.[7] PSMF ¶ 63. Commissions are based on a percentage of the amount collected or billed by a Technician. PSMF ¶ 66. The Service Technicians Compensation Agreement ("TCA") signed by Technicians upon hire describes the commission as follows:

> "Roto-Rooter pays service technicians commissions ... based upon the amounts collected or billed (authorized) depending on the type of work done, LESS any sales, excise or other taxes; any special job costs such as permits, helpers, and outside labor; and any special charges for each job such as insurance surcharges that the company may deem necessary and may impose from time to time.

TCA, PX 30[8].

The TCA also provides the following explanation of when commissions will not be paid: "No commissions will be paid on jobs where there is a damage claim and insurance settlement. Commissions will not be paid for jobs on which the customer stops payment of check." *TCA*, PX 30. While there are three levels of Technician, they are all compensated on this same commission plan; only the individual commission rates vary. PSMF ¶ 6. In theory, the commission percentage paid to each Technician takes into account the fact that Technicians are paying all of business expenses associated with their work, but Roto-Rooter makes no effort to ensure that the commission does in fact cover the expenses incurred by Technicians.[9] PSMF ¶¶

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[7] The classes in this action are limited to technicians that were paid by commission. *See Morangelli, et al., v. Roto-Rooter Servs. Corp. and Chemed Corp.*, 1:10-cv-00876-BMC, Doc. Nos. 65 & 203. Roto-Rooter may pay a Technician an hourly wage for administrative work or training of a certain duration or for other work in special circumstances. But hourly pay is uncommon for Technicians, and their compensation is made up wholly of commissions in most weeks. PSMF ¶ 4.

[8] Roto-Rooter Services Company Service Technician Compensation (rev. 10/1/02), PX 30, CHEMED/RR 270 ("*TCA*").

[9] Roto-Rooter does not reimburse Technicians for their work-related expenses. Instead, in calculating the total commission paid to a Technician, Roto-Rooter adds 15% of the amount collected or billed to cover work-related expenses. PSMF ¶¶ 66, 105 & 105.

104-06. Nevertheless, Roto-Rooter intends that the commissions satisfy its minimum wage obligations. PSMF ¶¶ 67-69.

Accounting for Commission Earnings

Although Technicians are paid solely by commission, Roto-Rooter has a policy of allowing Technicians to divide their weekly commissions into "wages" and "expense reimbursements." PSMF ¶¶ 70 & 71. This is simply an accounting gimmick done for tax purposes because allowing Technicians to attribute a portion of their commission earnings to "expense reimbursements" permits Roto-Rooter and the Technician to avoid paying employment taxes on that portion of their commission earnings. PSMF ¶¶ 72 & 73. In order to take advantage of this accounting gimmick, a Technician submits receipts for expenses he has incurred and the dollar amount of these "substantiated expenses" is then shifted from commission earnings to "expense reimbursements" on the worker's paycheck. Roto-Rooter's policy documents explain this accounting gimmick as follows:

> All earnings show as 'commissioned wages', on a technicians paycheck stub, until the technician submits, or has, expenses that are substantiated. The dollar amount of these substantiated expenses are then shown as 'substantiated expenses' instead of 'commissioned wages' and they are excluded from taxable wages". [sic]

It is important to stress that this accounting gimmick does not affect how much a Technician is paid. PSMF ¶¶ 104-06. He is paid his commissions as calculated under the TCA regardless of whether he reports expenses or how much he reports. PSMF ¶ 104. Nor does the accounting change the amount of expenses a Technician must bear. PSMF ¶ 106. Submitting expense receipts only changes how commission pay is labeled on the paycheck, not the amount. PSMF ¶ 105.

Technicians are not required to report all their work-related expenses to Roto-Rooter. Technicians must report work-related expenses only if they want the tax advantage that comes from participating in the accounting gimmick described above. PSMF ¶ 85. Of the 39 representative plaintiffs, at least 20 did not report their expenses for all or a significant part of their employment. PSMF ¶ 91. In some branches, reporting expenses is the exception to the rule. PSMF ¶ 87. In at least one case, the Representative Plaintiff could not report his expenses to the branch. PSMF ¶ 92. Even when Technicians report their expenses Roto-Rooter does not allow them to report their purchase or financing payments as work-related expenses. PSMF ¶ 79.[10] For both these reasons, recorded "substantiated expenses" are not exhaustive of the work-related expenses Technicians incur.

The only limit that Roto-Rooter places on a Technician's ability to shift commission earnings to the non-taxable "substantiated expense" category is that enough must be left in the "wages" category to give the appearance that the worker earned minimum wage. PSMF ¶ 99. Even if a Technician submits receipts for expenses incurred during the week that equaled his total commission earnings (in other words, even if he just broke even for the week after accounting for his expenses), Roto-Rooter will not allow him to place all of his commissions in the "expense reimbursement" category. PSMF ¶ 99. He must leave enough in the "wage" category to show he earned minimum wage (even though he did not). PSMF ¶ 99. Expenses that cannot be shifted to the "expense" category because of this rule are carried over by Roto-Rooter until a later pay period when they can be reported without giving the appearance of a minimum wage violation. PSMF ¶ 99. This accounting gimmick is all about appearances: Under NO circumstances does Roto-Rooter ever increase a Technician's commission earnings up to the

[10] Roto-Rooter allows Technicians to report the purchase price and financing terms of their vans so the Company can calculate a depreciation expense. PSMF ¶ 79.

minimum wage level when his expenses (whether reported or unreported) bring his earnings below that level. PSMF ¶ 99. Roto-Rooter simply ignores the actual effect that expenses have on a worker's ability to earn the minimum wage.

For example, in the week ending April 21, 2009, Plaintiff LeVoid Bradley was paid $516.20 in wages but incurred $1,098.35 in business-related expenses. He worked 36 hours and 23 minutes and should have been paid $1,361.02 ($1,098.35 in business-related expenses that he incurred and an additional $267.67 to bring his earnings up to the minimum wage level for the hours he worked). Instead, Roto-Rooter deferred the work-related expenses that would show a minimum wage violation into a later pay period, ignoring the fact that Bradley actually paid the expenses in the week of April 21, 2009. PSMF ¶ 100. In effect, Bradley paid $582.15 to work for Roto-Rooter that week. This is hardly an isolated example. When work- related expenses are properly accounted for, the Class Representatives on average received less than the minimum wage in 5.0% of the weeks they worked. PSMF ¶ 102.

Call-backs

Roto-Rooter avoids the expense of its warranty policy by deducting the cost of work done under a warranty from a Technician's wages. Roto-Rooter gives its customers a warranty on the work that Technicians perform. PSMF ¶ 107. Although the term of the warranty can vary, it is typically six months for residential services and three months for commercial accounts. PSMF ¶ 108. If the warrantied work needs to be redone during the warranty period, Roto-Rooter does not charge the customer for work done to fix the problem. PSMF ¶ 110. Instead, it holds the Technician who did the original work responsible for the cost of the warranty work. PSMF ¶ 115.

When a customer calls for warranty work, Roto-Rooter does not necessarily send the

same Technician who performed the original work. PSMF ¶ 114. When a different Technician is sent, the commission paid to the original Technician is deducted from his earnings and the commission is then paid to the Technician who performed the warranty work. PSMF ¶ 115. This transferring of wages from one Technician to another for warranty work is known as a "call-back".[11] PSMF ¶ 117.

Roto-Rooter's call-back policy applies companywide with the exceptions of California and Hawaii.[12] PSMF ¶ 134. Although the "call-back" practice predates the February 2008 Company Handbook, that Handbook for the first time explained that commissions can be taken back in this way because "all commissions are considered advances until the warranty period runs." PSMF ¶ XX. The Company tracks call-backs for all its Technicians. PSMF ¶¶ 120 & 138. The accounting for each call-back is recorded in Roto-Rooter's database, with call-backs represented by an adjustment code.. PSMF ¶ 130.

Call-backs are imposed on Technicians. Once management determines a call-back is appropriate, Roto-Rooter deducts it from the Technician's wages. PSMF ¶ 126. Moreover, Roto Rooter can and does take call-backs for any type of wage payment, not just commissions. PSMF ¶ 141. For example, during the week of 10/12/10, Plaintiff Andy Smith only earned hourly wages because an injury kept him from doing commissioned work. Roto-Rooter took a $99.20 call back against his hourly pay. PSMF ¶ 142.

Good Faith Issues

Roto-Rooter has a history of violating wage-and-hour laws with respect to its

[11] When the same Technician that did the original work performs the warranty work, he receives no commission pay for the warranty work.

[12] Call-backs are not taken in California because they were found to be illegal by the California Labor Commissioner. *See* Order, Decision or Award of the Labor Commissioner of the State of California, Case No. 12-62273 RG (April 4, 2006), PX 46, CHEMED/RR 5047-52.

Technicians. Prior to 2001, Roto-Rooter did not pay Technicians overtime wages at all, claiming they were exempt employees pursuant to 29 U.S.C. § 207(i). PSMF ¶ 143. From 1997 through the end of 2001, the U.S. Department of Labor repeatedly found Technicians were non-exempt employees. PSMF ¶ 144. By the end of 2001, Roto-Rooter had paid at least $2,415,200 in back wage penalties to Technicians resulting from U.S. Department of Labor investigations. PSMF ¶ 144. To avoid further investigations and litigation, Roto-Rooter negotiated an agreement with the U.S. DOL in 2001. As a result, a U.S. District Court issued an order on October 23, 2001, enjoining Roto-Rooter from failing to pay overtime wages for every hour over 40 worked in a workweek and from failing to keep and preserve wage-and-hour records of its employees as required by law. PX 59, *10/23/01 Judgment* [13].

After the injunction, Roto-Rooter received complaints that branch management was fraudulently manipulating Technicians' time sheets to avoid overtime liability. PSMF ¶ 147. The Company also received complaints that call-backs are illegal. PSMF ¶ 148. While Roto-Rooter stopped using call-backs in California after they were found to be illegal, the Company offered no evidence that it reviewed the legality of call-backs under any other state's laws. PSMF ¶ 151.

In 2007, the Defendants' Internal Audit department conducted an investigation of allegations of fraudulent manipulation of time sheets in Roto-Rooter's Columbus, Ohio branch. PSMF ¶ 152. Investigators interviewed 46 of the 49 Technicians working at the branch and the branch office personnel and management. Investigators also analyzed wage-and-hour records. PX 60[14], *Internal Audits*, at CHEMED/RR 4807. The Director of Internal Audit, Eric Eaton, found that there "was compelling testimony from a significant number of employees" who

[13] 10/23/01 United States District Court Amended Judgment, Case No. c-1-01-573, PX 59, PLT 14973-75, ("*10/23/01 Judgment*").
[14] Roto-Rooter Internal Audit Cases, PX 60, ("*Internal Audits*").

believed that their time records had been intentionally manipulated. *Id*. When the branch's management team resigned, Internal Audit closed the investigation. *Id*.

In 2008, Roto-Rooter's Executive VP/CFO Gary Sander responded to claims that time records were being fraudulently manipulated in the Hartford, Connecticut branch. PSMF ¶ 154. He was able to document the fraud through examining Roto-Rooter's detailed electronic records. PSMF ¶ 154. Sander informed Roto-Rooter's President, Rick Arquilla, of the evidence. PSMF ¶ 155. Based on Sander's analysis, Arquilla offered the Hartford branch manager a choice: either resign or be subject to a full investigation. PSMF ¶ 155. When the manager resigned, Arquilla decided not to conduct a full investigation of the matter. PSMF ¶ 155. Roto-Rooter's Internal Audit department was never informed of the investigation or Roto-Rooter's ability to identify fraud through an analysis of electronic records and Roto-Rooter did not use Sander's analysis to check for fraud in any other office. PSMF ¶¶ 156-157.

In March 2009, Roto-Rooter received allegations of fraudulent manipulation of time records in the Atlanta, Georgia office from a temporary employee who was instructed by management to carry out the fraud. PSMF ¶ 158. In May, Internal Audit circulated a memo about the investigation, explaining that it had acquired

- Examples of written instructions from management to staff employees to reduce specific technicians' hours;
- "a hand written and signed statement from a member of the [Atlanta] management team admitting to unethically changing technicians' time"
- "a hand written and signed statement from an office employee who admits to fraudulently reducing technician time ... per the direction of the current GM, Keith Austin" and two other managers, Dave Harris and Mike Morrison.

Internal Audits, PX 60, at CHEMED/RR 4785.. The Internal Audit team had also interviewed 48 of the 50 Technicians working in the office and found a "common theme [of] fear of challenging management on errors on time sheets, fear of punishment if they refused to sign the

inaccurate [time cards and], belief that anyone who complained to HR would be terminated." *Id.*

Eaton reported this information to Roto-Rooter's upper management, including Sander, Arquilla, and D.P. Williams, Chemed's CFO. PSMF ¶ 159. In his written report, Eaton concluded that the allegations were substantiated and not an isolated situation, that "no controls or processes are planned to identify or prevent intentional and fraudulent manipulation of time records", and that the Atlanta office and others were manipulating time sheets. *Internal Audits*, PX 60, at CHEMED/RR 4785..

Despite Eaton's report about Atlanta, Roto-Rooter's upper management did not tell Eaton about the Hartford investigation nor did they tell him of the analysis of electronic records they had performed in Hartford. PSMF ¶ 160. As a result, a similar analysis was never performed in the Atlanta investigation, or in any other investigation, even though it would have been of great help to the auditing work and would have provided further proof that fraud was occurring. PSMF ¶¶ 157 & 160. None of the managers at the Atlanta branch were fired or even disciplined based on Eaton's investigation. PSMF ¶ 161 & 162. Keith Austin remains the General Manager of the Atlanta branch and Dave Harris is now a manager in the Denver, CO branch. PSMF ¶ 161 & 162. The only person to lose his/her job as a result of the Atlanta investigation were the temporary employee who originally reported the fraud and the office staff person who gave a written statement about the fraud. PSMF ¶ 163. Roto-Rooter continues to receive complaints about their wage and hour practices with respect to Service Technicians. PSMF ¶ 164.

Although Roto-Rooter raised an affirmative defense that it acted in good faith, it offered no evidence that it had legal counsel review its pay plan at any time. PSMF ¶ 165. The only allegation that the pay practices were reviewed by an outside authority was testimony that Roto-Rooter presented the pay plan to the New Jersey Department of Labor. PSMF ¶ 166. But Roto-

Rooter admitted that what it submitted to the New Jersey DOL for approval in 2001 did not include a description of call-backs or an explanation of how Roto-Rooter accounted for work-related expenses in its minimum wage calculation.[15] PSMF ¶ 166. In fact, what it submitted was a misrepresentation. It claimed that the pay plan includes a minimum wage guarantee: "Ensure employee weekly commissions are equal to or greater than the minimum wage for the state. If not, wages are increased to minimum wage time hours worked." [sic] PSMF ¶ 167. Roto-Rooter did not reveal that it regularly pays Technicians wages below the minimum wage by disregarding the effect of work-related expenses. PSMF ¶ 168.

II. Legal Argument

A. Expense Claim

Minimum wage laws require that minimum wages must be paid free and clear. "Free and clear" means that an employer may not deduct its costs of doing business from an employee's wages if the deductions drive wages below the minimum wage. *Ramos-Barrientos v. Bland*, 661 F.3d 587, 594-95 (11th Cir. 2011); *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1236 (11th Cir. 2002); *Mayhue's Super Liquor Stores, Inc., v. Hodgson*, 464 F.2d 1196, 1199 (5th Cir. 1972); *Cuzco v. Orion Builders, Inc.*, 262 F.R.D. 325, 332 (S.D.N.Y. 2009); 29 C.F.R. § 531.35 (2012 through Feb. 2); 29 C.F.R. § 531.36 (2012 through Feb. 2).

The free-and-clear nature of minimum wages is fundamental to the public policy behind minimum wage laws, whether state or federal. The purpose of minimum wage legislation is to enable workers to maintain a minimum standard of living necessary for health, efficiency, and

[15] Roto-Rooter also claimed that the New York DOL approved the pay plan's provision that employees pay for their initial parts inventory for their work van, but it could provide no proof of approval or even a review. Stewart 68:10-71:14.

general well-being.[16] Accordingly, while deductions for food, lodging and similar items may cut into the minimum wage, an employer may not reduce a worker's wage below the minimum by taking deductions for items that are "primarily for the benefit or convenience of the employer" such as "tools of the trade and other materials and services incidental to carrying on the employer's business." 29 C.F.R. § 531.3(d)(2) (2012 through Feb. 2). *See also* 29 C.F.R. § 531.32(c) (2012 through Feb. 2) (listing examples of items that primarily benefit the employer). As this Court noted in its class certification decision, "it is implicit in the adoption of minimum wage laws that deduction of work-related expenses is prohibited if it has the effect of bringing the earnings below the established minimum wage." *Morangelli, et al., v. Roto-Rooter Servs. Corp. and Chemed Corp.*, 1:10-cv-00876-BMC, Doc. No. 203 at 14 (E.D.N.Y. June 17, 2011).

The prohibition on taking deductions from the minimum wage for work-related expenses applies whether the expenses are deducted from wages or are shifted onto the employee to bear in the first instance. "[T]here is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear. An employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage." *Arriaga*, 305 F.3d at 1236; *Marshall v. Root's Restaurant, Inc.*, 667 F.2d 559, 560 (6th Cir. 1982); *Guan Ming Lin v. Benihana Nat'l Corp.*, 755 F. Supp. 2d 504, 511 (S.D.N.Y. 2010); *Cuzco*, 262 F.R.D. at 332; *Yu*

[16] *See, e.g.*, 29 U.S.C.A. § 202 (Westaw 2012 through Pub. L. No. 112-86) (the purpose of minimum wage legislation is to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers"); Colo. Rev. Stat. Ann. § 8-6-101 (West 2011) (same); Fla. Const. art. 10 § 24 (same); 820 Ill. Comp. Stat. Ann. § 105/2 (West 2011) (same); Ind. Code Ann. § 22-2-2-2 (West 2011) (same); Md. Code Ann., Lab. & Empl. § 3-402 (West 2011) (same); Minn. Stat. Ann. § 177.22 (West 2011) (same); N.C. Gen. Stat. Ann. § 95-25.1 (West) (same); N.J. Stat. Ann. 34:11-56a (West 2011) (same); N.Y. Lab. Law § 650 (McKinney 2011) (same); Ohio Const. art. II, § 34 (same); 43 Pa. Cons. Stat. Ann. § 333.101 (West 2011) (same); Wash. Rev. Code Ann. § 49.46.005 (West 2011) (same).

G. Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 257 (S.D.N.Y. 2008). *See also* 29 C.F.R. § 531.35 (2012 through Feb. 2) ("[I]f it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act.").

Given this well-established legal principle, the only question on summary judgment is which of the many expenses that Roto-Rooter requires its Technicians to bear are properly considered to be "primarily for the benefit or convenience of the employer." Roto-Rooter admits that the costs of operating, maintaining, and repairing work vans and purchasing tools and equipment are work-related expenses and it represents them as such to the IRS for tax purposes. Indeed, the only expense borne by Technicians that Roto-Rooter does not report as a work-related expense is the cost of the vans that Technicians are required to purchase. However, Roto-Rooter admits that the purchase of the van is a "substantiated expense" and that "substantiated expenses" are work-related expenses. PSMF ¶¶ 38, 70, 76 & 78. It also records van depreciation as a "substantiated expense". PSMF ¶¶ 39 & 75. Even apart from those admissions the undisputed facts clearly establish that the vans are "tools of the trade" that primarily, if not exclusively, benefit Roto-Rooter. Roto-Rooter requires a Technician to purchase a particular kind of van for use on the job and to equip it in ways that render it useless for anything other than plumbing work. The van is of little or no use to Technicians outside their work for Roto-Rooter. Technicians are forbidden to work for anyone other than Roto-Rooter and the smell, the lack of seats, and the financial risk of theft of the Roto-Rooter equipment stored in the van make its use as a non-commercial vehicle impractical. Roto-Rooter uses the vans for its own

marketing purposes by requiring them to display the Roto-Rooter trademark and contact information so that the vans operate as a billboard for the Company. Roto-Rooter receives 10% of its calls from potential customer because they see Technicians' vans. It tracks Technicians' use of the van by requiring the installation of a GPS tracking device.

In these circumstances the vans are clearly "tools of the trade" that primarily benefit Roto-Rooter. *See Benihana Nat'l Corp.*, 755 F.Supp.2d at 511 (vehicles such as bicycles, motorcycles, and mopeds are considered "tools of the trade" if employees are required to possess and utilize them in the course of their employment.); *Brennan v. Modern Chevrolet Co.*, 363 F.Supp. 327, 333 (N.D.Tex.1973), *aff'd*, 491 F.2d 1271 (5th Cir.1974) (demonstrator automobiles that employer required sales employees to drive even on personal errands are tools of the trade); *Saigon Grill, Inc.*, 595 F.Supp.2d at 258 ("[T]here is substantial legal authority for the proposition that mechanisms for transportation-typically motor vehicles-can be tools of the trade.") As Technicians' vans are tools of the trade, the expense of acquiring them is a business-related expense that must be considered in the minimum wage analysis. *Saigon Grill, Inc.*, 595 F.Supp.2d at 257-58; *Benihana Nat'l Corp.*, 755 F.Supp.2d at 511 -512 ("employers can require employees to bear the costs of acquiring and maintaining [vehicles that are] tools of the trade so long as those costs, when deducted from the employees' weekly wages, do not reduce their wage to below the required minimum."). Technicians are entitled to "the difference between the minimum wage and their actual 'net' wage" in workweeks in which they incur the expense of acquiring the van and any other expenses for tools of the trade. *Cuzco v. Orion Builders, Inc.*, 262 F.R.D. 325, 332 (S.D.N.Y. 2009).

Despite requiring Technicians to shoulder its business expenses, Roto-Rooter does not account for them when calculating the minimum wage. Technicians' wages do not change based

on the amount they incur in expenses. Roto-Rooter's accounting for the expenses Technicians incur is unrelated to whether the Technician received the minimum wage or not. Where expenses result in a Technician not receiving the minimum wage in a work week, Roto-Rooter masks the violation by accounting for the expenses in a period later than they were actually incurred or by not recording them at all.

Roto-Rooter's policy of shifting work-related expenses, including the cost of acquiring the work van, onto the Plaintiffs and then ignoring the effect of those expenses on its minimum wage obligations violates state and federal minimum wage laws. Plaintiffs are entitled to summary judgment that Roto-Rooter's policy of shifting its business expenses, including the cost of the van itself, onto Plaintiffs is a violation of the FLSA and state minimum wage laws where the expenses have the effect of bringing the earnings below the established minimum wage in a workweek. *Ramos-Barrientos*, 661 F.3d at 595-96; *Arriaga*, 305 F.3d at 1236; *Cuzco*, 262 F.R.D. at 332; *Benihana Nat'l Corp.*, 755 F. Supp. 2d at 511; *Saigon Grill, Inc.*, 595 F. Supp. 2d at 257; 29 C.F.R. § 531.35 (2012 through Feb. 2); 29 C.F.R. § 531.36 (2012 through Feb. 2).

B. Roto-Rooter Violated its Record-Keeping Obligations

Plaintiffs seek summary judgment that Roto-Rooter has violated its record keeping obligations under the FLSA. Establishing this violation is important because it shifts the evidentiary burden of proof for establishing damages arising from Roto-Rooter's Defendants' shifting business expenses onto Technicians.

The FLSA requires employers to maintain wage-and-hour records, including "the dates, amounts, and nature of" any deductions from an employee's wages each pay period. 29 C.F.R. § 516.2(a)(10) (2012 through Feb. 2). The recording requirement includes employee out-pocket expenses made for the employer's benefit. *Hodgson v. Newport Motel, Inc.*, No. 71-1007-Civ,

1979 WL 1975, at *4 (S.D. Fla. May 30, 1979); *see also Arriaga*, 305 F.3d at 1236 ("[T]here is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear.") Where an employer fails to keep the required records "an employee ... may 'submit sufficient evidence from which violations of the Act and the amount of an award may be reasonably inferred.'" *Reich v. SNET Corp.*, 121 F.3d 58, 66 (2d Cir. 1997) *citing Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88 (1946).

There is no question that Roto-Rooter failed to keep records of all the work-related expenses that it requires Technicians to pay out of pocket. Roto-Rooter only required expenses to be recorded if the Technician wanted an immediate tax deduction. Many Technicians do not report their work-related expenses to Roto-Rooter, and some are unable to report them even if they want to. And in every case, Technicians are not allowed to report their van purchase and finance payments as work-related expenses.

Accordingly, Plaintiffs are entitled to a finding that Roto-Rooter violated the record-keeping requirements of the FLSA by not keeping records of the work-related expenses that Technicians bear each week, and Plaintiffs can establish those expenses "as a matter of just and reasonable inference". *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 362 (2d Cir. 2011); *see also Chao v. Videotape, Inc.*, 196 F. Supp. 2d 281, 293 (E.D.N.Y. 2002) (burden shifting applies to wage records); *Solis v. Cindy's Total Care, Inc.*, No. 10 Civ. 7242 (PAE), 2012 WL 28141, at *17 (S.D.N.Y. Jan. 5, 2012) (same).

C. Illegal Deductions Claim

Roto-Rooter's call-back policy is well documented. When a Technician performs work under a warranty, the commission paid for the original work is "called back" to compensate for the warranty work. Where the Technician who performs the warranty work is different from the

one who performed the original work, as is frequently the case, the original Technician's commission is taken back and used to pay the commission on the warranty work. Roto-Rooter maintains records of the call-backs it takes against Technicians' pay.

Plaintiffs claim that these call-backs constitute "wage deductions" that violate state law restrictions on deductions. There is no question that restrictions on wage deductions apply to wages earned on a commission basis.[17] However, Roto-Rooter claims that call-backs are not *deductions* from wages because, in its view, commissions are advances and are not final until the warranty period is over. Under its theory, the call-back is simply the last step in the calculation of the final commission so that state wage deduction statutes have no application to the practice. Thus, the first issue to be decided with respect to this claim is whether the call-back process of reversing a previously paid commission constitutes a wage deduction or is simply the calculation of the final commission. If the practice is a wage deduction, the state law restrictions apply. *Morangelli*, 1:10-cv-00876-BMC, Doc. No. 203 at 28. *See, e.g., Pachter v. Bernard Hodes Group, Inc.*, 10 N.Y.3d 609, 891 N.E.2d 279, 871 N.Y.S.2d 246 (2008) (holding that wage deduction statutes apply to reductions in earned commissions but not to adjustments made in calculating commission).

[17] Ark. Code Ann. § 11-4-203 (West 2011); Cal. Lab. Code § 200 (a) (West 2011); Colo. Rev. Stat. Ann. § 8-4-101 (8)(a) (West 2011); Conn. Gen. Stat. Ann. § 31-71a (West 2011); Del. Code Ann. tit. 19, § 1101 (2011); Haw. Rev. Stat. Ann. §388-1 (2011); Ind. Code Ann. § 22-2-9-1 (West 2011); Ky. Rev. Stat. Ann. § 337.010 (West 2011); *Lorentz v. Coblentz*, 600 So. 2d 1376, 1378 (La. Ct. App. 1992) (commissions are considered wages for the purpose of the Louisiana wage payment statutes); Md. Code Ann., Lab. & Empl. § 3-501 (West 2011); Minn. Stat. Ann. § 177.23 (4) (West 2011); Mo. Ann. Stat. § 290.500 (West 2011); Nev. Rev. Stat. Ann. § 608.012 (West 2010); N.J. Stat. Ann. § 34:11-4.1 (West 2011); N.Y. Lab. Law § 190 (McKinney 2011); Ohio Rev. Code Ann. § 4111.01 (West 2011); 43 Pa. Cons. Stat. Ann. § 260.2a (West 2011); S.C. Code Ann. § 41-10-10(2) (2011); Wash. Rev. Code Ann. § 49.46.010 (West 2011); W. Va. Code Ann. § 21-5-1 (West 2011).
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1. Call-Backs Are Deductions from Wages

The undisputed evidence establishes that call-backs are wage deductions as a matter of law. Where the parties have a contract governing the commission compensation, the contract determines when a commission is earned. *See, e.g.*, *Pachter*, 10 N.Y.3d at 617-18, 891 N.E.2d at 284, 861 N.Y.S.2d at 251; *see also Meder v. Rapid Sports Center Inc.*, 773 N.W.2d 341, 343 (Minn. Ct. App. 2009). Where no contract exists, common law governs. *See, e.g.*, *Pachter*, 10 N.Y.3d at 617-18 (under common law, commissions are typically earned when the employee "produces a person ready and willing to enter into a contact upon his employer's terms.").

In this case, the parties have a written contract that provides that Technicians' commissions are earned when they are paid each week. Each Technician enters into a Service Technicians Compensation Agreement ("TCA") with Roto-Rooter upon hiring. The TCA provides that,

> Roto-Rooter pays service technicians commissions ... based upon the amounts collected or billed (authorized) depending on the type of work done, LESS any sales, excise or other taxes; any special job costs such as permits, helpers, and outside labor; and any special charges for each job such as insurance surcharges that the company may deem necessary and may impose from time to time.

TCA, PX 30. The express language of this contract provides that commissions are calculated based on the amounts collected and billed less certain items like taxes. All of these "amounts" are known to Roto-Rooter by the end of each workweek and Roto-Rooter "pays" the commission to the Technician at that time. The contract says nothing about the paid "commissions" being advances until some future date and it certainly says nothing about call-backs as an element in the calculation of the commission. Rather the TCA makes clear that commissions are calculated and earned each week when they are paid to the Technicians. 11 *Williston on Contracts* § 31:1

(4th ed.) (a contract should be given "that meaning which, from an objective point of view, has been set forth in the express language of the contract.")

The parties' intent that commissions are earned and final each workweek when they are paid to Technicians is further supported by the fact that Roto-Rooter pays the commission wages in satisfaction of its minimum wage obligations, which require Roto-Rooter to pay at least the minimum wage free and clear each work week. *Ramos-Barrientos*, 661 F.3d at 594-95; *Arriaga*, 305 F.3d at 1236; *Cuzco*, 262 F.R.D. at 332; 29 C.F.R. § 531.35 (2012 through Feb. 2); 29 C.F.R. § 531.36 (2012 through Feb. 2). If commissions were merely advances and wages were not finally calculated until after the warranty period, as Defendant now claims, Defendant could not rely upon the commissions paid each week to satisfy its minimum wage obligations, at least not for the first several months of a Technician's employment as a commission Technician.[18]

Roto-Rooter will no doubt point to provisions in Roto-Rooter's employee handbook which since February 2008 has described the call-back process and asserted that "all commissions are considered advances until the warranty period runs." Roto-Rooter's reliance on this provision is misplaced for several reasons. As an initial matter, the handbook has no application to call-backs taken prior to February 2008. Second, even after the handbook included a description of the practice, it did not alter the parties' written contract. The Roto-Rooter handbook includes the disclaimer "This handbook is neither a contract of employment nor a legal document" on its cover. Such disclaimer is sufficiently clear to establish that the

[18] According to Defendant's theory, none of the work a Technician performs when he begins working on a commission basis would constitute free and clear wages. With an average warranty period of 165 days, PSMF ¶ 108, a Technician would have to wait more than five months before he would begin to earn any wages free and clear. In the meantime, Roto-Rooter would be in violation of both federal and state minimum wage laws.

parties did not intend the handbook to be contractually binding. 19 *Williston on Contracts* § 54:12 (4th Ed.) (Even in jurisdictions where an employee handbook might be considered a contract, an explicit and conspicuous disclaimer that the handbook is not a contract prevents it from acting as one.). Thus the Handbook cannot be read to amend or alter the TCA contract which makes commissions final when paid even with respect to commissions paid after February 2008.

Third, Roto-Rooter's handbook provision does not even accurately describe its practices. While the provision tries to characterize call-backs as affecting only previously earned commissions, Roto-Rooter's policy allows call-backs from non-commission, hourly wages. The practice is simply one of taking back previously earned wages, whether hourly or commission, from one Technician and paying them to another Technician for warranty work for a Roto-Rooter customer.

Fourth, Roto-Rooter's claim that commissions are advances until the end of the warranty period would be void as a matter of law even if it were included in the parties' employment contract. A contract term is unenforceable "if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Restatement (Second) of Contracts § 178 (2011). State and federal minimum wage laws prohibit paying employees less than the established minimum wage. These laws reflect the strong and important public policy of ensuring that workers enjoy a minimum standard of living necessary for health, efficiency, and general well-being. *Morangelli*, 1:10-cv-00876-BMC, Doc. No. 203 at 14. The call-backs violate the axiom that "wages cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or 'free and clear.'" *Ramos-Barrientos*, 661 F.3d at 594-95

quoting 29 C.F.R. § 531.35 (minimum wages must be paid free and clear each week). The very theory behind the call-backs, that all commissions are advances until the warranty period runs and subject to being taken back, means that Technicians are not paid minimum wages free and clear each week.

Fifth, and perhaps most importantly, whatever fiction Roto-Rooter's lawyers may have placed in the non-binding employee handbook in February 2008, even Roto-Rooter recognizes that in actual practice, commissions are final each work week when paid and that call-backs are simply a taking back of those previously earned commissions. Roto-Rooter's CFO testified on behalf of the Company "the original tech may have done the work, invoiced it, collected the money, given the money to the branch at turn in, *had his commission calculated and received his commission*. And then, at some later date, that money is taken back." (emphasis added). PSMF ¶ 116. In short, commissions are calculated and final each work week when they are paid and the call-back is, as a matter of law, a subsequent deduction from that earned wage. As such, the call-backs are subject to state law prohibitions on deductions.

2. Call-Backs Are Illegal Under State Laws

Having established that call-backs are deductions from wages the next question is whether such deductions violate State law. State wage deduction laws fall into two basic categories: (1) States that categorically prohibit deductions such as call-backs; and (2) States that allow wage deductions only with the employee's authorization. As set forth below Plaintiffs are entitled to summary judgment with respect to the first group of States, and Roto-Rooter will have the burden of coming forward with voluntary authorizations and notices for "call-backs" occurring in the second group of States.

(1) Call-Backs Are Categorically Prohibited.

Roto-Rooter's call-backs are wage deductions categorically prohibited in 13 states. California,[19] Connecticut,[20] Delaware,[21] Indiana,[22] Kentucky,[23] New Jersey,[24] New York,[25] Ohio,[26] Washington,[27] and West Virginia[28] limit permissible wage deductions to those either mandated by law or for the employee's benefit. Roto-Rooter can make no claim that call-backs are mandated by law and the undisputed facts show that call-backs are deductions for Roto-

[19] Cal. Lab. Code § 224 (West 2011) limits wage deductions to those either required by law or for the employee's benefit unless the deduction is for gross negligence, willful misconduct or dishonesty. *Pease v. Roto-Rooter Service Company*, Order of the Labor Commissioner, Case No. 12-62273 RG, copy attached BSN 5048-52 at 5050; 3 Ops. Cal. Atty Gen. 178 attached as PX. 71. Cal. Lab. Code § 221 (West 2011) also forbids an employer taking back wages as a condition of employment.

[20] Conn. Gen. Stat. Ann. § 31-71e (West 2011) limits wage deductions to those authorized on a form approved by the commissioner. The approved authorization form, available at http://www.ctdol.state.ct.us/wgwkstnd/forms/paydeduct1.htm, allows deductions only for the benefit of the employee. Conn. Gen. Stat. Ann. § 31-71e § 31-73 (West 2011) also prohibits requiring an employee to refund wages as a condition of employment.

[21] Del. Code Ann. tit. 19, §§ 1101, 1107 (2011) limits wage deductions to those either required by law or for the employee's benefit.

[22] Ind. Code Ann. §§ 22-2-6-2(b) (West 2011) limits wage reductions to enumerated types, all of which are for the benefit of the employee. *See Mathews v. Bronger Masonry, Inc.*, 772 F. Supp. 2d 1004, 1015 (S.D. Ind. 2011) (all wage deductions must be made for one of purposes described in IC 22–2–6–2(b)).

[23] Ky. Rev. Stat. Ann. § 337.060 (West 2011) limits wage deductions to those either required by law or for the employee's benefit. It also specifically prohibits wage reductions for business losses such as unintentional defective or faulty workmanship.

[24] N.J. Stat. Ann. § 34:11-4.4 (West 2011) limits wage deductions to those either allowed by law or for the employees' benefit.

[25] NY Lab. Law § 193 (McKinney 2011) limits wage deductions to those for the benefit of the employee. Section § 198-b also prohibits requiring a return of wages as a condition of employment.

[26] Ohio Rev. Code Ann. § 4113.15 (West 2011) limits wage deductions to "employee authorized deductions", and defines the term with examples of deductions for the employee's benefit.

[27] Wash. Rev. Code Ann. § 49.52.050 and Wash. Rev. Code Ann § 49.52.60 (West 2011) limits wage deductions to those for the benefit of the employee and from which the employer derives no financial benefit.

[28] W.Va. Code Ann. § 21-5-1 (West 2011) limits authorized wage deductions to those mandated by law or for the employee's benefit; § 21-5-3 (West 2011) requires that all wages less authorized deductions must be paid on payday.

Rooter's benefit, not the employee's. 29 C.F.R. § 531.3 (2012 through Feb. 2) ("materials and services incidental to carrying on the employer's business" are for the benefit and convenience of the employer.) The purpose of a call-back is to shift the expense of Roto-Rooter's warranty policy onto Technicians. Technicians gain no benefit from the call-backs. To the contrary, they lose a substantial amount of income from the policy as they are forced to absorb the expense of Roto-Rooter's warranty program. Accordingly, call-backs violate state law prohibitions on deductions from wages not for the benefit of the employee.

Call-backs also violate wage deduction laws in Colorado[29] and Pennsylvania.[30] Both states limit permissible wage deductions to those that fall within narrow exceptions listed by statute. None of the exceptions permit Roto-Rooter's call-backs. Finally, Hawaii[31] prohibits call-backs by specifically prohibiting wage deductions for losses due to unintentional defective or faulty workmanship. Warranty work is additional work performed because the original work is deemed somehow defective or faulty. As call-backs are wage deductions for warranty work, Hawaii prohibits them.

As call-backs are deductions to wages, Plaintiffs are due summary judgment that the call-backs violate these state laws prohibiting such wage deductions.

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[29] Colo. Rev. Stat. Ann. § 8-4-105 (West 2011) prohibits wage deductions unless they fall within narrow exceptions that do not apply in this case. *See Hartman v. Community Responsibility Center, Inc.*, 87 P.3d 202, 207 (Colo. Ct. App. 2003)("The Wage Act provides that an employer may not withhold an employee's wages except under those narrow circumstances specified in the act.").

[30] 34 Pa. Cons. Stat. Ann. § 9.1 (West 2012) prohibits wage deductions not specifically listed. The list does not include deductions for warranty work. Where a wage deduction is not within those enumerated in the ADC, it is "unlawful absent a showing of Department of Labor and Industry approval and written authorizations by employees." *Ressler v. Jones Motor Co., Inc.*, 487 A.2d 424, 429 (Pa. Super. Ct. 1985).

[31] Haw. Rev. Stat. Ann. § 388-6 (2011) specifically prohibits wage deductions for business losses due to defective or faulty workmanship.

(2) Written Notice and Consent

Illinois,[32] Maryland,[33] Minnesota,[34] Nevada,[35] and North Carolina[36] require an employer to obtain prior written consent for any wage deduction, and South Carolina[37] requires that employees are given written notice of deductions. As call-backs are wage deductions, Roto-Rooter bears the burden of showing that it obtained the required consent or provided the required notice in each case. The Court may well be able to rule as a matter of law whether the consents and notices produced by Roto-Rooter meet State requirements. If the validity of consents presents a factual question, the jury will be able to review the purported authorization or notice and determine if it meets the legal standard.

D. Roto-Rooter Is Liable for Liquidated Damages under the FLSA

An employer found to have violated 29 U.S.C. § 207 "shall be liable" to the employee for unpaid overtime and "an additional equal amount as liquidated damages." 29 U.S.C.A. § 216(b) (Westlaw 2012 through Pub. L. No. 112-86). Consistent with the statute's plain language, there is a strong presumption that where an employer violates the FLSA, it is liable for double damages, *i.e.*, liquidated damages in an amount equal to the back pay owed. *Reich*, 121 F.3d at 71; *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 947-48 (2d Cir. 1959).

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[32] 820 Ill. Comp. Stat. Ann. § 115/9 (West 2011) requires contemporaneous written authorization freely given for any wage deduction that is not required by law or for the benefit of the employee.

[33] Md. Code Ann., Lab. & Empl. § 3-503 (West 2011) requires an employee's written authorization for any wage deduction not ordered by a court, allowed by the labor commissioner, or mandated by law.

[34] Minn. Stat. Ann. § 181.79 (West 2011) requires an employee's written authorization for any wage deduction taken for business loss.

[35] Nev. Rev. Stat. Ann. § 608.110 (West 2010) requires an employee's written authorization for any wage deduction not for the benefit of the employee.

[36] N.C. Gen. Stat. Ann. § 95-25.8 (West) requires an employee's written authorization for wage deductions.

[37] S.C. Code Ann. § 41-10-40 (2011) requires written notice to an employee for any wage deduction not required by law.

A defendant may only be relieved from the FLSA's liquidated damages when it can prove that its failure to pay wages was "in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict." 29 U.S.C.A. § 260 (Westlaw 2012 through Pub. L. No. 112-86); *see Caserta*, 273 F.2d 943. Because the purpose of liquidated damages is compensatory, not punitive, *Caserta*, 273 F.2d at 948, the employer's burden of proof is "a difficult one to meet." *Brock v. Wilamowsky*, 833 F.2d 11, 19 (2d Cir. 1987). Good faith in this context requires more than ignorance of the prevailing law or uncertainty about its development. It requires that an employer first take "active steps to ascertain the dictates of the FLSA and then move to comply with them." *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 150 (2d Cir. 2008) *citing Herman v. RSR Sec. Services Ltd.* 172 F.3d 132, 142 (2d Cir 1999) and *Reich*, 121 F.3d at 71. Good faith generally requires that an employer consult with informed counsel as to whether the pay policy complies with the FLSA. *Reich*, 121 F.3d at 72; *Young v. Cooper Cameron Corp.*, 04 Civ. 5968, 2006 WL 1562377, at *9 (S.D.N.Y. June 6, 2006); *Bowrin v. Catholic Guardian Soc.*, 417 F. Supp. 2d 449, 474 (S.D.N.Y. 2006).

As set forth above, Roto-Rooter's policy of allowing Technicians' wages to fall below the minimum as a result of the business expenses they were required to bear clearly violated the FLSA and State minimum wage laws. Roto-Rooter cannot show that it acted in good faith in violating the FLSA. Despite more than a decade of litigation over its pay policies and having paid millions of dollars in back overtime pay, Roto-Rooter has not offered any evidence that it sought advice of counsel on whether the FLSA allowed it to deduct its business expenses from Technicians' pay to the extent that wages were below the minimum wage or whether state law prohibited call-backs. The failure to consult with counsel demonstrates a lack of good faith.

Reich, 121 F.3d at 72 ("Moreover, nowhere in their briefs does SNET contend that it was relying on the advice of informed counsel. Thus, SNET's inquiry was insufficient, in itself, to compel a finding of good faith and, indeed, supported a finding to the contrary."); *see also Young*, 2006 WL 1562377 at *9; *Bowrin*, 417 F. Supp. 2d at 474.

The only evidence Roto-Rooter offered of active steps to determine if it was complying with the FLSA was a request to the New Jersey Department of Labor ("NJ DOL") to review its pay policy. Even if a review by a state agency were sufficient to show good faith for FLSA purposes, this review is lacking. In seeking the review, Roto-Rooter did not present its substantiated expense and call-back policies to the NJ DOL for review. For a state agency review to act as evidence of good faith, the policies in question must be part of the review. *Reich*, 121 F.3d at 72; *Bowrin*, 417 F. Supp. 2d at 474. Roto-Rooter not only did not include the policies in question in its submission to the NJ DOL, it actively misrepresented its pay policies, claiming that if wages fell below the minimum wage, it augmented them to meet their minimum wage obligation.

Similarly, Roto-Rooter has offered no evidence that its policy of deducting its business expenses from Technicians' pay to the extent that wages were below the minimum wage could reasonably be considered to be in compliance with the FLSA. Legal authority on the issue is abundant and to the contrary. *Ramos-Barrientos*, 661 F.3d at 594-95; *Arriaga*, 305 F.3d at 1236; *Benihana Nat'l Corp.*, 755 F. Supp. 2d at 511; *Cuzco*, 262 F.R.D. at 332; *Saigon Grill, Inc.*, 595 F. Supp. 2d at 257; 29 C.F.R. § 531.35 (2012 through Feb. 2); 29 C.F.R. § 531.36 (2012 through Feb. 2). Roto-Rooter has offered no evidence of advice or authorities to the contrary.

While Plaintiffs do not seek a ruling on liquidated damages for the fraudulent manipulation of time records at this juncture, Roto-Rooter's actions with respect to the fraud is

evidence of its lack of good faith. The record shows that Roto-Rooter corporate management was aware that its agents across the country were fraudulently manipulating Technician time records to avoid overtime liability. Despite the knowledge and a U.S. District Court Order enjoining the company from denying overtime wages and keeping inaccurate records, Roto-Rooter's President and its Chief Financial Officer not only turned a blind eye to wage-and-hour violations, they actively conspired to prevent investigations of illegal practices.

Liquidated damages are mandatory under the FLSA. The only exception to the rule is narrow and Roto-Rooter has not presented sufficient evidence to meet it. Accordingly, Plaintiffs are due summary judgment that Roto-Rooter is liable for liquidated damages under the FLSA. *Reich*, 121 F.3d at 72; *Young*, 2006 WL 1562377 at *9; *Bowrin*, 417 F. Supp. 2d at 474.

III. Conclusion

The undisputed facts show that Roto-Rooter's expense-shifting policies result in regular violations of state and federal minimum wage laws and systematic violations of state law prohibitions on wage deductions. The extent of the violations is exacerbated by Roto-Rooter's failing to record the business expenses, another violation of state and federal laws. The Company has offered no facts even suggesting that it acted in good faith. Indeed the facts show that its upper management knew of wage-and-hour violations and turned a blind eye.

Accordingly, Plaintiffs respectfully request that the Court find (1) that Roto-Rooter's policy of shifting its business expenses onto Plaintiffs is a violation of the Fair Labor Standards Act ("FLSA") and state minimum wage laws where it has the effect of bringing the earnings below the established minimum wage; (2) that Roto-Rooter violated its record-keeping obligations; (3) that Roto-Rooter's call backs for the cost of warranty work are deductions from wages and a violation of state law prohibitions against wage deductions; and (4) that Roto-

Rooter is liable for the full measure of liquidated damages under the FLSA for its illegal pay policies.