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, 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)**

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO ROTO-ROOTER'S MOTION FOR SUMMARY JUDGMENT AND/OR DECERTIFICATION OF THE CLASS AND COLLECTIVE ACTIONS

Respectfully submitted on March 9, 2012,

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INTRODUCTION

The Court certified three class claims in this action: the business expense claim, the illegal deduction claim, and the uncompensated hours claim. The class certification was based on a trial plan offered by the Plaintiffs that relies on records and not on individual testimony by class members. Plaintiffs carried out the plan showing that liability for the 39 class and discovery representatives can be established through a record analysis and Roto-Rooter's admissions. The analysis shows 325 business expense claim violations and 3,267 instances of uncompensated hours. Roto-Rooter does not contest that if its call-backs for illegal deductions are found to be wage deductions, all the call-backs can be determined from its database.

Roto-Rooter's motion for decertification of the class claims should be denied because it does not demonstrate that the trial plan the Court certified will not work. The Court has already certified the class claims, and in the absence of materially changed or clarified circumstances, it should not overturn the initial certification. *William B. Rubenstein, Alba Conte & Herbert B. Newberg, Newberg on Class Actions*, vol. 3, § 7:47 (4th ed. 2011).

Roto-Rooter's motion for summary judgment that its call-backs for warranty work are not illegal wage deductions should also be denied. The dispositive issue for the illegal deduction claim is whether Roto-Rooter's call-backs are taken from earned wages or are part of calculating the final wage. Roto-Rooter does not dispute that when wages are earned is governed by the parties' contract, and the parties have a contract that establishes Technicians' commissions are wages when they are paid, before the call-backs are taken. As the call-backs are wage deductions, they are categorically prohibited in some states, and in others they require an authorization by the employee that Roto-Rooter cannot show.

I. The Business Expense Claim

A. Roto-Rooter's Claim That Plaintiffs Cannot Prove Their Business Expense Claim on a National or Statewide Basis Misconstrues the Nature of the Claim

Roto-Rooter argues that the Business Expense claim should be decertified because not every one of the discovery plaintiffs was injured by its practice of shifting business expenses on to the Technicians. According to Roto-Rooter only about 25% of the discovery plaintiffs suffered damages as a result of this practice. In fact 34 of the 39 discovery plaintiffs have demonstrated that the business expenses they incurred resulted in minimum wage violations. In any event, Roto-Rooter's argument is without basis.

As the district court recognized in its class order, proof that Roto-Rooter's policy of paying Technicians without regard to whether their business expenses caused minimum wage violations is individualized in the sense that the expenses incurred by each individual Technician and the commissions they received will have to be compared. *Morangelli v. Chemed Corp.*, 275 F.R.D. 99, 107-108 (E.D.N.Y. 2011). Implicit in that is the recognition that some individuals' expenses will show a violation and others will not. So the fact that only some of the discovery plaintiffs had damages and others did not is exactly what the trial plan anticipated. What was important for class certification (and certification of the collective action) was the fact that all Technicians were subject to the same policy of paying wages without regard to whether business expenses brought wages below minimum wage; the question of whether particular types of expenses were business related is common to the class; and the individualized comparison necessary to identify the members of the class who actually suffered minimum wage violations can be made efficiently through Roto-Rooter's records.

The court limited discovery to 39 plaintiffs so, of course, at this stage Plaintiffs can only prove the extent of the injury suffered by those 39. However, the evidence with regard to those

39 is more than sufficient to allow the Court to determine the common question of which types of expenses incurred by Technicians are business expenses and to find that Roto-Rooter's policy of paying Technicians without regard to the business expenses they incurred violated the FLSA. At that point, the only question that remains is whether the passive class members who incurred the same types of expenses as the 39 discovery plaintiffs failed to receive minimum wage in particular weeks. That is a damages question which can be resolved in the second phase through the same individualized, but efficient, examination of expense records and commission payments. Thus, this argument presents no reason for decertifying the class.

B. Plaintiffs' Business Expense Claims Do Not Require Individual Inquiry

There is no merit to Roto-Rooter's assertion that the business expense claim will require individual inquiries. This assertion is based on Roto-Rooter's claim that "some of the expenses that Plaintiffs are aggregating to calculate their Business Expense Claims may not properly be considered business expenses of [RotoRooter]." Doc 243 at 49. Roto-Rooter does not identify any particular expenses that they challenge as improper. Even if it could, the question of whether a particular type of expense is properly considered a business expense of Roto-Rooter is a classic example of a common question that can be determined through generalized evidence on behalf of the class. By allowing the vast majority of expenses at issue to be categorized as "substantiated expenses" free from employment taxes, Roto-Rooter has conceded on a class-wide basis, that all of those expenses are its business expenses. *Morangelli,* 275 F.R.D. at 109 ("Defendants seem to concede that 'substantiated business expenses' as they will be gleaned from their own records or plaintiffs' tax returns, necessarily mean work-related expenses."). The only other category of expense at issue is the expense of the van purchase itself. Whether the van is primarily for the benefit of Roto-Rooter or of Plaintiffs is clearly a common question that

can be decided on behalf of the class through representative testimony. *See Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment*, Doc 234 at 16-17.

Roto-Rooter also cites two cases, *Wass v. NPC Int'l.,* 688 F.Supp.2d 1282, 1286 (D. Kan. 2010) and *Darrow v. WKRP Management LLC,* 2011 WL 2174496, *5 (D. Colo. June 3, 2011). *Wass* and *Darrow* are based on an FLSA overtime regulation, 29 C.F.R. §778.217, which provides that an employer can disregard amounts it pays workers to reimburse expenses, whether actual or reasonable approximations, in calculating the regular rate for purposes of overtime. Those cases have no relevance here because Roto-Rooter has specifically disavowed use of that regulation. In its employee handbook it provides that the regular rate for purposes of overtime is based on the entire amount of the commissions that are received; no part of the commission amount is disregarded as a "reasonable approximation" of the expenses that Technicians incur. PX 89. Since Roto-Rooter does not make use of the "reasonable approximation" provision in §778.217, the cases it cites relying on that provision have no application here. *See Cuzco v. Orion Builders, Inc.,* 262 F.R.D. 325 (S.D.N.Y. 2009) (because there was no evidence that the amounts paid to workers were anything other than a regular hourly wage, defendant could not claim that the regular rate contained reimbursement for tools). Moreover, because Roto-Rooter allowed Technicians to submit their actual expenses each week as part of its "substantiated expense" procedure, Roto-Rooter knew the actual amounts submitted and had no need to rely on "reasonable approximations" under §778.217. It also knew as a result of those submissions that the commissions were insufficient to ensure Technicians earned the minimum wage each week. Each time Roto-Rooter carried over "substantiated expenses" to a subsequent week in order to preserve the *appearance* of paying the minimum wage, it knew that a violation had occurred.

Even if §778.217 applied to this case, nothing about that regulation or the cases cited by Roto-Rooter requires consideration of individual issues. The only issue raised by the regulation and the cases cited by Roto-Rooter is whether an employer has made a reasonable approximation of expenses. For example, in *Wass,* "Defendant paid plaintiffs 'an hourly wage of approximately the applicable federal or state minimum wage plus a set amount for each delivery as partial reimbursement for automobile expenses.'" *Id.* at 1284. The court dismissed the plaintiffs' claim because there was no allegation that the per-delivery amount "did not reasonably approximate their vehicle expenses." *Id.* at 1287. *Darrow* presented a similar claim except the claim was upheld because the plaintiffs alleged that the per-delivery reimbursement rate was unreasonable. Plainly whether an employer has made a reasonable effort to calculate the approximate expenses incurred by its workers is a question about the employers' actions that is common to all of its employees. Indeed, in *Darrow,* the court certified the claim that the defendant's estimates were not reasonable for collective action treatment. 2011 WL 2174496 at *6. Here, there is no evidence that Roto-Rooter made an effort to establish a reasonable approximation of the Technicians expenses, but even if they had the reasonableness of that estimate would present a common question. For example evidence common to the class shows that Roto-Rooter treated the largest expense incurred by Technicians, the cost of the van, as a non-reimbursable expense so that any estimate, even if one had been made, could not have been reasonable. Roto-Rooter also ignored the fact that the actual expenses that it did allow to be reported were causing minimum wage violations rendering any estimate unreasonable. For all of these reasons, §778.217 is irrelevant to this case and even if it were relevant it raises questions common to the class that in no way affect the propriety of the Court's collective action and class certification orders.

Roto-Rooter also argues that the expense claim raises individual questions because expenses should be amortized over a period of time – e.g., the cost of new tires should be amortized over the life of the tires – with the appropriate time being an individual question. Doc 243 at 50. Roto-Rooter cites no authority for the proposition that employee incurred business expenses should be amortized over time nor can they. DOL regulations make clear that business expenses incurred by workers that cause a minimum wage violation <u>must be reimbursed in the work week in which they are incurred</u>. 29 C.F.R. §531.35 ("For example, if 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 under the Act."). Case law unanimously supports this view. *See Arriaga v. Fla. Pacific Farms,* 305 F.3d 1228, 1237 (11th Cir. 2002) ("If an expense is determined to be primarily for the benefit of the employer, the employer must reimburse the employee during the workweek in which the expense arose."); *Cuzco v. Orion Builders Inc.,* 262 F.R.D. at 332 (awarding damages for the specific week in which expenses were incurred); *Marshall v. Al-Charles, Inc*., 1986 WL 32743 at *4 (D.Conn. 1986) (cost of uniforms must be reimbursed in the work week in which the expense was incurred). *See also, Marshall v. Root's Restaurant, Inc.,* 667 F.2d 559, 560 (6th Cir. 1982) (uniforms purchased as a condition of hiring had to be reimbursed in the first work week). Requiring employer business expenses to be reimbursed up to the minimum wage level in the week in which they are incurred is mandated by the legislative purpose behind minimum wage requirements. The point of a minimum wage is to ensure that workers receive, free and clear each work week, a minimum amount sufficient to maintain health and well-being. 29 U.S.C. §

202. To achieve that purpose an employee must be reimbursed in the work week in which he incurs an expense on behalf of his employer regardless of the useful life of the item purchased. For example, the fact that an employer may benefit over a period of months from $400 worth of tires purchased by an employee does not change the fact that the employee is $400 in the hole the moment he buys the tires and unless he receives reimbursement that week, he will not earn the minimum wage free and clear as guaranteed by law.[1]

Finally, Roto-Rooter argues that there will need to be individual testimony regarding what portion of expenses were for the benefit of the employer and what portion were for the benefit of the employee. Again, this argument simply reflects a misunderstanding of the law. Expenses incurred by an employee that primarily benefit the employer must be reimbursed up to the minimum wage level. 29 C.F.R. §531.35. Such expenses are not subdivided with only the portion of the expense equal to the benefit received by the employer being reimbursed.[2] Moreover, the only expense that Roto-Rooter mentions as requiring apportionment are commuting expenses. Yet Roto-Rooter allows Technicians to report their fuel costs as

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[1] The fact that an employee may quit before an employer has gotten the full use of an item it reimbursed is a policy argument that simply runs counter to the FLSA. If an employer wants to protect itself from such an occurrence, it should purchase the items itself. Then when the employee quits, the employer can retain the item and use it for its full life time. *See Arriaga*, 305 F.3d at 1236 n. 8 (rejecting policy argument that employer would be harmed by a worker who quits before employer gets full value of an expense).

[2] *Brennan v. Modern Chevrolet Co.,* 363 F.Supp 327 (N.D. Tex. 1973), *aff'd* 491 F.2d 1271 (5th Cir. 1974), provides an example of this. In that case the employer, a car dealership, provided demonstration cars free of charge to employees which the employees used for personal use 90% of the time. When the employer was charged with minimum wage violations it tried to claim the value of the car as wages paid. The court held that the demo cars were primarily for the benefit of the employer and gave no credit at all for the use of the cars. The court did not try to apportion the benefit between the employer and employee and give the employer credit for the portion that benefited the employee. *See Marshall v. Sam Dell's Dodge Corp.,* 451 F.Supp. 294, 304 (N.D.N.Y. 1978) (same). Similarly, where the employee incurs an expense that primarily benefits the employer, the full expense must be reimbursed, not just the portion of the expense that benefits the employer.

'substantiated expenses' without demanding that Technicians back out the portion of their fuel expenses incurred in commuting. Having treated this fuel cost as a business expense for its own benefit, Roto-Rooter cannot now disavow this position.[3]

For all of the above reasons, Roto-Rooter has failed to come forward with arguments that would justify decertification of the business expense claim.

II. Illegal Deduction Claim

As the Court contemplated in its class certification order, much of the illegal deductions claim can be determined on summary judgment. The parties have filed cross motions for summary judgment with respect to liability for that issue. Because those dispositive issues can be resolved on a class basis and the individual claims can be established through the records, the claim remains appropriate for certification.

A. The Illegal Deduction Claims Should Be Denied

Plaintiffs claim that Roto-Rooter's call-backs are taken after Technicians' commissions are earned and are, therefore, wage deductions subject to state law restrictions. Roto-Rooter is liable for such deductions in states that prohibit them outright and in those states that permit such deductions under specified conditions that Roto-Rooter has not met. Accordingly, Plaintiffs are entitled to summary judgment that Roto-Rooter's call-backs are illegal in many of the states at issue.

1. Roto-Rooter's Call-backs Are Wage Deductions

Roto-Rooter does not contest that Technicians' commissions are wages once they are earned. Nor does it contest that that state law prohibitions on deductions from wages apply to

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[3] Indeed, much of the "commuting" time that Roto-Rooter claims is during stand-by time and therefore work. *See* February 2009 Roto-Rooter Employee Handbook – Time Tracking, PX 76, CHEMED/RR 1251-52 ("*Handbook – Time Tracking*").

earned commissions. The dispositive question is when Technicians' commissions are earned. If the call-backs are made from earned wages, they violate the deduction prohibitions. State law is consistent that where parties have a contract governing commission compensation, the contract determines when a commission is earned.

As Plaintiffs have shown in their Memorandum in Support of Summary Judgment, Roto-Rooter's call-backs are wage deductions.[4] Indeed, the California Commissioner of Labor found exactly that in *Pease v. Roto-Rooter Services Company*. PX 46.

The parties have a written contract governing when Technicians' commissions are earned. Roto-Rooter's attempt to graft language from its handbook onto the written contract has already been rejected by this Court. Earlier in the case, Roto-Rooter urged the Court to force Technicians into arbitration by reading a handbook provision into a written arbitration agreement. It made the same argument then as it does now, i.e., that the language supporting Roto-Rooter's reading of the agreement is in the handbook and Technicians have full access to the handbook. The Court rejected Roto-Rooter's argument. In its decision, the Court noted that the law creates a "heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties, and a correspondingly high order of evidence is required to overcome that presumption." Doc. 103 at 4 (internal citations omitted). In finding that Roto-Rooter could not graft handbook language onto the written arbitration agreement, the Court explained:

> Despite Roto-Rooter' assertions, the act of signing the Employee Handbook Acknowledgement Form is not "clear, positive and convincing evidence" that plaintiffs intended to arbitrate their claims arising out of their employment. For one, the Acknowledgement Form is only an Acknowledgment that the employee "ha[s] full access to the Handbook," not that he has read it. Furthermore, the

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[4] Rather than repeat their argument in the summary judgment brief, Plaintiffs incorporate it by reference.

> Acknowledgement Form itself disclaims that the Handbook "is neither a contract of employment nor a legal document." In any event, plaintiffs are more likely to have read the one paragraph Dispute Resolution Agreement before signing it, than the far more voluminous Employee Handbook.

Doc. 103 at 5-6.

For the same reasons that the Court refused to change the written arbitration agreement, the Court should reject Roto-Rooter's attempt to change the written compensation agreement. The parties have a written agreement that explains how commissions are earned. All Technicians are required to sign it when they begin employment, and any changes to compensation must be indicated on a signed TCA. Plaintiffs' Local Rule 56.1 Statement of Material Facts Not in Dispute in Support of Plaintiffs' Motion for Partial Summary Judgment ("PSMF") ¶¶ 65, 123. The agreement includes nothing about commissions being advances until the warranty period runs. PSMF ¶ 124. The only language Roto-Rooter can offer for its advance theory is buried in its handbook, a copy of which it does not provide to Technicians. Even that language was not included in the handbook until February 2008. Roto-Rooter cannot overcome "the presumption that the signed, unambiguous agreement reflects the true intent of the parties." Doc. 103 at 6.

Roto-Rooter's only other argument, that prior to February 2008 it had a practice of assessing call backs, proves nothing. No one disputes that Roto-Rooter assessed call backs when warranty work was done, but the mere practice of assessing call backs doesn't prove one way or another whether they were adjustments to advances or deductions from wages. Plaintiffs believe the contract and Roto-Rooter's claim that commissions satisfy its minimum wage obligations compels the conclusion that the call backs were deductions from wages. *See, e.g.*, *Chenensky v. New York Life Ins. Co.*, 07-11504, 2009 WL 4975237, at *7 (S.D.N.Y. Dec. 22, 2009) ("[W]hen the deductions are made after the employee earns his commission, [N.Y. Labor

Law] Section 193 bars them.") (citations omitted). The fact that Roto-Rooter engaged in illegal activity for years does not make the call-backs legal, nor can it make them part of the compensation agreement. *See, e.g.*, N.J. Stat. Ann. 34:11-4.7 ("It shall be unlawful for any employer to enter into or make any agreement with any employee for the payment of wages of any such employee otherwise than as provided in this act."). To accept Roto-Rooter's argument would be to emasculate state law prohibitions on deductions from wages.

2. Call Backs Are Per Se Illegal in New York, New Jersey, Colorado, Connecticut, Indiana, and Washington[5]

Because Roto-Rooter's call-backs are wage deductions, they are categorically prohibited in Colorado,[6] New Jersey,[7] New York,[8] and Washington.[9] Roto-Rooter does not contest that these states prohibit wage deductions other than those specifically allowed. Thus the dispositive issue for these state claims is whether call-backs are deductions from earned wages or commission adjustments. As Plaintiffs have shown the call-backs are wage deductions and Roto-Rooter has not alleged that the deductions fall within the narrow exceptions to wage deductions under the laws of these states, the call backs are prohibited in these four states.

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[5] Plaintiffs concede that the revised illegal deduction claim is not viable under Ohio or Missouri state laws, and that the settlement in *Ita v. Roto-Rooter Services Company* and subsequent change in practices bars the California illegal deduction claim.

[6] 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.")

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

[8] N.Y. 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.

[9] Wash. Rev. Code Ann. § 49.52.050 (West 2011) 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.

Accordingly, Roto-Rooter's motion for summary judgment cannot succeed in those States. To the contrary, Plaintiffs are entitled to summary judgment.

Likewise, "under Indiana law, "all deductions from wages constitute an assignment, which must meet specified statutory requirements.") *Mathews v. Bronger Masonry, Inc.*, 772 F.Supp.2d 1004, 1015 (S.D.Ind. 2011) (citations omitted). The two cases that Roto-Rooter cites for the proposition that commissions are not wages do not change the analysis. *Gress v. Fabcon, Inc.* 826 N.E.2d 1, 4 (Ind. Ct. App. 2005), is not only a minority view in Indiana, but the court in *Prime Mortg. USA, Inc. v. Nichols*, 885 N.E.2d 628, 664-665 (Ind. Ct. App. 2008) distinguished it in finding that where commissions are contractual, the only form of regular payment, and the commissions can be determined immediately, the commissions are wages for purposes of § 22.5.5.1. The other case that Roto-Rooter relies upon, *Helmuth v. Distance Learning Systems Indiana, Inc.*, stands for the unremarkable proposition that where a written contract does not exist, the parties' practice can establish a compensation agreement. 837 N.E.2d 1085, 1090 (Ind. Ct. App. 2005). Such is not the case here, where the parties have a written agreement, the TCA.

3. Roto-Rooter Cannot Show that its Written Authorizations for Deductions Comply with Connecticut, Illinois, Minnesota, and North Carolina State Laws.

As Roto-Rooter's call-backs are deductions from wages, Roto-Rooter has the burden to show written authorizations for the deductions in Connecticut, Illinois, Minnesota, and North Carolina. As an initial matter, Roto-Rooter admits that it began requiring such written authorizations only in February 2008. Doc. 243 at 65. Moreover, discovery shows that Roto-Rooter did not obtain written authorization from all Technicians even after February 2008. *See*, PSMF ¶ 140. Finally, even where Roto-Rooter sought authorization at turn-in it did not give notice of the amount of the deduction. Neither of the documents presented at turn-in, the DLTS nor the PDR, included the amount of the deduction. Plaintiffs' Response to Defendants' Local

Rule 56.1 Statement and Plaintiffs' Additional Material Facts Not in Dispute ("PSMF2") ¶¶ 53, 54. Accordingly, even where Roto-Rooter claims a written authorization, it cannot show that the authorization meets state law requirements:

North Carolina: N.C. Gen. Stat. Ann. § 95-25.8 (West) requires notice of the exact amount of deductions prior to taking them. By its own admission, the authorizations Roto-Rooter obtained are for "any commission reduction", not a specific amount. Doc. 243 at 65. Notice of the amount of the deduction was only given a week after the authorization was sought.

Minnesota: Minnesota also requires the dollar amount of the deduction on the authorization itself. Minn. Stat. Ann. § 181.79 (West 2011). Because Roto-Rooter's authorization does not include the dollar amount of the deduction, it cannot meet the Minnesota standard.

Illinois: Illinois law requires that wage deductions are freely given and for the benefit of the employee. *Kim v. Citigroup, Inc.*, 856 N.E.2d 639, 646-647 (Ill. App. Ct. 2006). Under Illinois law, mandatory deductions are not freely given. *See, Lewis v. Giordano's Enterprises, Inc.*, 921 N.E.2d 740, 751 (Ill. App. Ct. 2009) (distinguishing between voluntary and mandatory deductions for purposes of 820 Ill. Comp. Stat. Ann. § 115/9). Moreover, Roto-Rooter's deductions are neither for the benefit of the employee nor voluntary.

Connecticut: Connecticut's wage collection statutes are remedial in nature and should be construed liberally in the employees' favor. *Weems v. Citigroup, Inc.*, 961 A.2d 349, 364 (Conn. 2008). The statutes require any deductions to wages to be authorized using a form approved by the Labor Commissioner. Conn. Gen. Stat. Ann. § 31-71e(2) (West 2011). The approved form

provides only for deductions that benefit the employee.[10] Moreover, the written authorization must be "informed and voluntary". *Weems*, 961 A.2d at 359-360.

Roto-Rooter's argument that its deductions from wages cannot be found invalid because it did not follow Conn. Gen. Stat. Ann. § 31-71e(2) is misguided. It did not and could not use the Labor Commissioner's form because call-back deductions are not for the benefit of employees and it did not seek approval of a different form. Its call-back deductions are invalid because they are not for the employee's benefit and Connecticut law prohibits such wage deductions. Not only does the Labor Commissioner's form only include deductions for the employee's benefit, but the wage collection statutes prohibit an employer from taking back wages through deductions as a requirement of employment. Conn. Gen. Stat. Ann. § 31-73 (West 2011). The Labor Commissioner's form simply reflects Connecticut's strong public policy against forfeiture of wages.

The *Weems* case is not to the contrary. In *Weems*, the Court found that an informed and voluntary authorization of a deduction for the benefit of the employee would not be invalidated only because the employer did not use a form approved by the Labor Commissioner.[11] Roto-Rooter's call-back deductions have none of these characteristics. Not only are Roto-Rooter's call-back deductions for its benefit alone, but the authorization is not voluntary because Technicians must execute them to continue employment. *See*, Conn. Gen. Stat. Ann. § 31-73 (West 2011) (prohibiting wage deductions as a condition of employment). Neither is the

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[10] 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.

[11] The Weems Court declined on procedural grounds to address the issue of whether "Connecticut's strong public policy against the forfeiture of earned compensation and benefits, which would benefit the employer at the employee's expense" prohibited the deductions. *Weems v. Citigroup, Inc.*, 289 Conn. 769, 783, 961 A.2d 349, 357 (Conn. 2008)

authorization informed because it does not reveal the actual deduction but requires Technicians to agree to "any commission reduction caused by negative OPCC adjustments". The Court's approval of the authorization in *Weems* is inapplicable here.

B. The Court's Certification of the Illegal Deduction Claim Is Appropriate

As the Court recognized in its Certification Order, Plaintiffs' illegal deduction claim does not require individual testimony. *Morangelli v. Chemed Corp.*, 275 F.R.D. at 115-16. The claim depends on the contract issue of whether Technician's commissions were earned wages or advances. The parties have a written contract governing the commissions, the TCA. The legal interpretation of that contract requires no individual testimony. The scope of the class claim for illegal deductions has been narrowed to challenge only Roto-Rooter's deductions for warranty service "call-backs." If call-backs are wage deductions, Roto-Rooter's records show when and from whom it took each call-back.

III. The Van Maintenance Claim Is Appropriate for Collective Action Certification

Relying entirely on the Court's Reconsideration Order, Doc. No. 211, Roto-Rooter moves to decertify the FLSA claims for van and tool maintenance. Now that discovery is complete, however, it is apparent not only that the van maintenance claim should continue as part of the FLSA collective action, but should be certified as a Rule 23 claim as well.[12]

In its Reconsideration Order, the Court noted that "if a job includes tasks that, as a practical matter, cannot always be performed at the office and is not compensated otherwise" common questions would predominate because "representational testimony and defendant's Rule 30(b)(6) witness may be all that would be needed." *Id.* at 2-3. However, the Court noted that *tool*

[12] Indeed, the evidence now shows that the van maintenance claim is appropriate for class treatment under Rule 23. Plaintiffs intend to file a separate motion asking the Court to amend its class certification under Rule 23(c)(1)(C).

maintenance could be recorded as stand-by time and that plaintiffs did not provide testimony to refute Roto-Rooter's claim that some technicians could perform maintenance on the clock. In that situation "the issue is not just about damages but about liability." *Id*. at 4. In these circumstances the Court characterized the issue as "how the policy of not providing an easy way to receive compensation for time spent on maintaining technician's vans and tools leads to the practice of not compensating for this work." *Id*.

While the Court's analysis accurately describes the facts regarding *tool maintenance,* the evidence developed during discovery shows conclusively that the analysis does not apply to *van maintenance.* To the contrary, the evidence is now clear that van maintenance is exactly like the claim the Court stated would be appropriate for certification: it is a required task which "as a practical matter cannot always be performed at the office and is not compensated otherwise" as a matter of policy.[13] *Id*. at 2-3.

The undisputed evidence is that Roto-Rooter has a nationwide policy that time Technicians spend maintaining their vans is not considered work time in its own right. As Sander explained, Roto-Rooter considers the van to be the Technicians' responsibility and therefore any time he spends maintaining it is his own. PX 90 at 148:2-150:16. Every Plaintiff deposed about Roto-Rooter's policy testified that van maintenance outside scheduled hours cannot be recorded as work time. *See* Plaintiffs' Exhibit C.[14] The evidence is also clear that, while some van maintenance could be performed during compensated "stand-by" time, as a practical matter, all of the maintenance required by Roto Rooter could not be performed during

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[13] The distinction between van maintenance and tool maintenance is confirmed by the fact that the parties treated the two claims separately for discovery purposes. *See* Plaintiffs Exhibit C in Response (showing separate deposition testimony on van and equipment and tool maintenance).
[14] All references to Plaintiffs' Exhibits A, A-2, B, C and D refer to Plaintiff's Response to Defendants' Second Set of Interrogatories, which are found at Holtzman Decl. Exs. 2 & 4.

regular work time. Roto-Rooter requires Technicians to perform major maintenance on their vans as needed and to renovate the van to Company standards as part of their jobs. PX 25. It admitted that any significant van maintenance has to be done off-the-clock and only minor maintenance could be done during standby. PX 90 at 148:2-149:8. All the Plaintiffs testified that they could not do significant van maintenance on standby because they were required to be prepared to respond to calls quickly during their scheduled hours and if they were involved in maintaining the van, they could not respond.[15] Only Cruz and Lawson did not specifically testify that they could not perform all their maintenance on the clock. Cruz did not testify to the policy because he used a Roto-Rooter jetting truck that stayed at the Roto-Rooter yard when not on a job and did not maintain a van. Cruz, PX 91-H, 86-88. Lawson testified that he performed most of his van maintenance during standby but that he did some maintenance work off-the-clock. Lawson, PX 91-S, 80. In any case, the most substantial maintenance Lawson testified to doing on standby was an oil change. *Id.* 58-59. The uncontroverted testimony is that some van maintenance had to be conducted off-the-clock.[16]

The evidence cited in the Reconsideration Order is not to the contrary. The testimony from Sander to the effect that Technicians could request maintenance time to be recorded as

[15] Bradley, PX 91-A, 98-100; Branco, PX 91-B, 71; Buono, PX 91-C, 67-68; Cain, PX 91-D, 76-78; Cardwell, PX 91-E, 41-43; Castillo, PX 91-F, 43; Christie, PX 91-G, 21-22; Drejaj, PX 91-I, 127-129; Ercole, PX 91-J, 39-40; Frazier-Smith, PX 91-K, 99-100; Gorman, PX 91-L, 30; Harris, PX 91-M, 27-28; Hess, PX 91-N, 41-42; Hodges, PX 91-O, 23-25; Hollister, PX 91-P, 115-116; Jeudy, PX 91-Q, 36-37; Jones, PX 91-R, 49-50; Kennedy, PX 91-T, 50; Loetscher, PX 91-U, 23; McMahon, PX 91-V, 145-146; Mills, PX 91-W, 23-24; Morangelli, PX 91-X, 47-48; Morris, PX 91-Y, 52-55; Najmon, PX 91-Z, 106-107; Poczok, PX 91-AA, 63; Richardson, PX 91-BB, 59-63; Roseme, PX 91-CC, 58-59; Sabas, PX 91-DD, 29; St Juste, PX 91-EE, 65-66; Severino, PX 91-FF, 30-31; Smith, PX 91-GG, 72-73; Soto, PX 91-HH, 62-64; Stanley, PX 91-II, 86-88; Van Horn, PX 91-JJ, 65-66; Villatoro, PX 91-KK, 32-33, 69; Yasuna, PX 91-LL, 31-32; York, PX 91-MM, 26-27.

[16] The depositions cited in Defendants' decertification brief, Doc 243 at 81 n. 23 are not to the contrary. While the cited Technicians were able to perform some minor van maintenance while on stand-by time, they had to perform more extensive maintenance off-the-clock.

"standby time" was a reference to tool maintenance time. Doc 211 at 3. But when Sander testified about van maintenance, he was clear that van maintenance is a Technician's personal responsibility and that van maintenance time cannot be claimed as stand-by time. The testimony of Plaintiffs Cruz and Lawson cited by the Court in its reconsideration order is also consistent with the distinction between tool maintenance and van maintenance. As noted above, Lawson testified that he did some maintenance off-the-clock. Cruz simply did not use a van.

Thus, now that discovery is complete and a full factual picture is available, it is clear that nothing in the reconsideration of class certification requires decertification of the FLSA collective action claims relating to van maintenance. The Court can and should maintain the van maintenance claim for the FLSA class. *See*, *Alvarez v. City of Chicago*, 605 F.3d 445, 450 (7th Cir. 2010) (subclasses should be used in FLSA certification).

The evidence cited above demonstrates that Plaintiffs will be able to put on evidence sufficient to create a jury question that (1) Technicians could not, as a practical matter, perform all their van maintenance on their shifts and that (2) Roto-Rooter, as a matter of policy, refused to pay for van maintenance done outside of a Technician's shift. Plaintiffs can prove the former through the testimony of Roto-Rooter and the Class Representatives and the latter through Roto-Rooter's testimony and policy documents. If a jury finds in favor of Plaintiffs on those two points, then liability will have been established for the class and the amount of time that individual Technicians expended in maintaining their vans will be a matter of damages. As the Court recognized, under these circumstances, common questions predominate with respect to the liability for the van maintenance time. Doc 211 at 2-3. Accordingly it would be far more efficient to litigate these issues on behalf of the class as a whole than it would be to force each Technician to bring an individual case or even a second collective action. Accordingly the Court

should maintain certification of the FLSA collective action for the van maintenance claim even if it decertifies the tool and equipment claim.

IV. Uncompensated Hours Claim

A. The Fact That Some Technicians Do Not Show Hours Shaving Under Plaintiffs Analysis Does Not Preclude Continued Certification

As with the business expense claim, Roto-Rooter argues that the uncompensated hours claim should be decertified because Plaintiffs' evidence does not identify instances of hours shaving for every one of the discovery plaintiffs. Based on this fact, Roto-Rooter argues that no uniform conclusions applicable to all class members can be applied on a nationwide or statewide basis. This argument simply rehashes arguments that Defendants made at the class certification stage and that the Court rejected. In certifying this claim, the Court recognized that "the inquiry is individual in part, requiring individualized proof to show when a class member was off-the-clock." *Morangelli*, 275 F.R.D. at 111. Implicit in the fact that individualized proof of off-the-clock time would be necessary is the recognition that not all members of the class would necessarily be able to show that such incidents occurred to them. The Court certified the class, despite the need for individualized proof, because the case could be tried as a "paper claim" based on an analysis of the payroll records in order to find instances where changes made in the reported hours are more likely than not to be the product of intentional hours shaving as opposed to some other innocent explanation. Plaintiffs presented evidence that Roto-Rooter itself, through its Executive Vice President Gary Sander, had performed such a "paper" analysis and concluded that it showed hours shaving by the Hartford Branch office. Sander did not apply his analysis to any office other than Hartford, but as the Court succinctly put it, class certification allows "Plaintiffs [] to do that now." 275 F.R.D. at 113. Sander's analysis, like Plaintiffs', did not claim to show that every single person in Harford was the subject of hours shaving. Rather,

his analysis identified a certain set of circumstances when time was changed on the records which Sander believed was more likely than not to have resulted from time shaving. Having identified those circumstances he then wrote a program to pick out instances in the payroll when those circumstances occurred.

Specifically Sander wrote a program ("query") to identify those instances where a Technician's records were changed to show a job being performed before it had actually been called into Roto-Rooter's dispatch, and the change resulted in a shortening of the Technician's work day. PX 92 at 161:6-19. For example, the query would pick out an instance where a job was called into Roto-Rooter dispatch at 4:00 p.m., the job was performed between 5 and 8:00 p.m. the same day, and the time records were subsequently changed to show the work performed from 12:00 p.m. to 3:00 p.m. with the Technician's work day ending at 5, shaving three hours from the time records. The analysis did not require a review of hard copies of records. PX 90 at 161:5-162:10. Roto-Rooter was so confident that the query showed incidents of time shaving that it relied on the analysis in terminating the general manager of the Hartford branch. PX 90 at 158:9-159:8, 162:7-10; PX 92 at 163:19-23. As noted above Sander's analysis of the payroll records did not purport to prove that everyone in the Hartford office had his hours shaved, only that those members of the group he looked at suffered shaving in the instances identified by his "query." Plaintiffs' trial plan, both at the class certification stage and now, is the same as Sander's approach. Plaintiffs have applied Sander's query and several other "queries" to identify 1,440 instances of time shaving which are set forth on Ex. A and A-2. These queries are described in more detail below, but the fact that they do not pick out instances of time shaving for every single discovery plaintiff, or even in every single office, is no different from Sander's

analysis which demonstrated time shaving but did not purport to prove that every single Technician in the Hartford branch office had had his time shaved.

Roto-Rooter's reliance on *Zivali v. AT&T Mobility, LLC,* 784 F. Supp.2d 456 (S.D.N.Y. 2011) and *Lugo v. Farmers Pride*, 737 F.Supp.2d 291, 303 (E.D. Pa. 2010), only highlights Roto-Rooter's misunderstanding of the claim that was certified in this case. The plaintiffs in *Zivali* claimed that they performed work during lunch and after hours that was not recorded on their employer's time keeping system – the "MyTime system." While the MyTime system did not automatically record the time at issue, supervisors were authorized to manually add such time upon request and the evidence showed that many employees did, in fact, have time added on to their records. In these circumstances, the court determined that whether a particular worker's supervisor refused to enter after hours or working lunch time was an individual question requiring testimony from each worker claiming to uncompensated hours. Plainly, *Zivali* is completely different from this case. Rather than a paper case involving the analysis of pay records, *Zivali* involved a situation where there were no records at all of the disputed time and each individual would have to testify to his particular circumstances.

Lugo v. Farmers Pride, Inc., is even less on point. That case involved claims for donning and doffing time in a chicken processing plant. The court decertified the collective action because it determined that the members of the proposed collective action spent varying amounts of time putting on different kinds of equipment; that defendant had a policy designed to compensate for the donning and doffing time which appeared to be adequate for some if not all class members; and that the allegations that the defendant did not follow its policy on a class wide basis were not supported. The case did not involve payroll record analysis and or any other mechanism to avoid individual determinations. None of the other cases cited by Defendant

involve payroll record analysis claims and they offer no support for Roto-Rooter's motion.

B. Plaintiffs' Time Shaving Claims Do Not Require Individual Analysis

Roto-Rooter's second argument in support of decertification is that the particular incidents of time-shaving identified by Sander's query and the other queries used by Plaintiffs will require individual analysis. There are several responses to this argument, but before turning to those responses, it may be useful to explain in more detail the six queries that Plaintiff has run against the payroll records.

Plaintiffs applied Sander's query to the time records of each of the 39 discovery plaintiffs (referred to by Plaintiffs as "Query 4"). In addition, Plaintiffs used the testimony of Technicians as to how and when hours shaving occurred to develop five other queries which, along with Sander's query, they believe a jury will conclude identify circumstances that are more likely than not the result of intentional hours shaving:

Queries 1, 2, and 3 focus on instances where the records show the Technician did a job involving $100 or more in revenue in less than 10 minutes. These queries are based on the evidence that it is extremely unlikely, if not impossible, for a Technician to perform $100 worth of services in less than 10 minutes. PX 90 at 239:16 - 241:10 (admitting that records showing a few minutes of work generating substantial revenues could indicate shaving).
To further ensure that these queries pick up intentional time shaving, queries 1, 2, and 3 add additional suspicious criteria to the query. Thus, in Query 1 not only must a $100+ job have been performed in less than 10 minutes, but the time for the job must have been manually changed on a turn-in day (Tuesday or Wednesday) subsequent to the day the job was done and the records must show a reduction in the total compensable time for the Technician for that day.

Queries 2 and 3 are variations based on testimony which indicated that one way shaving occurred was to substitute non-compensable personal time ("PR") for work time.[17] In order to identify these instances, Query 2 searches for records showing $100+ jobs performed in less than 10 minutes on the same day as an entry for PR time (non-compensable time) of 60 minutes or more and the PR time entry is the last entry of the day.[18] The third query is like the second except that it isolates records with $100+ jobs in less than 10 minutes on days when at least 60 minutes of PR time appears in the middle of the day, the PR time entry was added to the records on a turn-in day (a Tuesday or Wednesday) subsequent to the work day; and the records showed a reduction of work time from the original entry records. Again this scenario is consistent with the testimony that Technicians would do jobs on personal time.

The fourth query applies the Sander Query described above. Plaintiffs' Exhibit A lists the records identified by Queries 1-4 pertaining to the 39 discovery plaintiffs.

The last two queries, Queries 5 and 6, search for instances where stand-by time at the beginning or end of the day is shaved. An office administrator described this type of shaving in a written statement to Internal Audit as part of the Atlanta investigation. PX 93 ("I would cut standby time if they had a lot of standby time."). The queries identify this type of shaving by identifying incidents when a Technician ended or began his day on standby at his scheduled time only to have Roto-Rooter change the record later in the week (on a Monday, Tuesday, or Wednesday) to show a later start or earlier stop time, thereby reducing the total hours of work for the day. Query 5 identifies instances where the change was made to standby time in the

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[17] For example, Sander testified that where records were changed to show just one minute of work followed by hours of personal time, further record analysis would be warranted. PX 90 at 222-227.

[18] PR time as the last entry of the day is significant in these circumstances because it was used to avoid recording overtime hours when Technicians performed a job after their scheduled hours.

morning and Query 6 identified instances where the change was made to standby time at the end of the day. These queries are grounded on the assumption that a Technician would be highly unlikely to have "accidentally" clocked in or out exactly when his shift began or ended especially where the changes to those original entry times were made on a Monday, Tuesday, or Wednesday. This latter provision as to when the changes were made is based on the written description of the shaving process from the Atlanta investigation which indicated that hours shaving for a work week (which always ended on Wednesday) could begin on Monday. PX 94 (indicating that shaving could begin on Monday). Plaintiffs Exhibit A-2 lists the records identified by Queries 5 and 6 for the 39 discovery plaintiffs.

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.[19] If the jury answers yes to a particular query, then the records identified by that query would be the basis for each class member's damage claims.

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[19] Of course, Plaintiffs will be able to support their case with substantial circumstantial evidence that Roto-Rooter had a history of shaving Technicians' time records. Roto-Rooter's own investigations document shaving in Columbus, Atlanta, and Hartford. PSMF ¶¶ 152-55, 158-59. Former Roto-Rooter office personnel have testified to manipulating time records in Westchester, Atlanta, and Columbus. *See* Docs. No. 174 Technicians testified to alteration of time records in OH, CA, NJ, WA, FL, IN, CO, IL, CT and NY. *See* Docs. 160 at ¶ 31; 161 at ¶ 29; 162 at ¶ 30; 163 at ¶ 30; 164 at ¶ 31; 165 at ¶ 29; 167 at ¶ 31; 168 at ¶ 31; 171 at ¶ 32; and 172 at ¶ 32 respectively. There is also substantial evidence that manipulating time records was more than just a branch-level practice. A Westchester, NY branch office administrator testified to shaving hours at the direction of General Manager Anthony D'Alessandro, who at the time managed three NY branches, and the administrator understood that the directions to change time sheets came from at least the regional level. See Doc. No. 174. A manager's assistant in the Columbus, OH branch office charged with altering time sheets also understood that the Regional Manager of the Central Region was aware of the practice. *See* Doc. 173. And corporate management's inaction strongly suggests a broad practice. Despite being aware of fraud, it took no affirmative steps to stop it. PX 60 at CHEMED/RR 4785. Not only did it elect not to apply the Sander Query to identify shaving in other offices, it withheld the analysis from Internal Audit during its shaving investigations. PSMF ¶¶156-57, 160. In Atlanta where written employee statements provided direct evidence of management involvement in shaving, no managers were disciplined. PSMF ¶¶ 161-63.

With that background, Plaintiffs will now turn to Roto-Rooter's argument that each record identified by the queries will have to be analyzed individually. Defendants make several different arguments each of which will be addressed in turn.

First, Roto-Rooter argues that the number of records identified by Plaintiffs' Queries is too small to draw the conclusion that hours shaving impacts all class members in a State or even within an office. Again this argument reflects misunderstanding of the trial plan. The trial plan calls for showing violations through the records. It is not surprising that different Plaintiffs would have suffered different amounts of violations or even that some would have no violations at all.[20] The Court certified the trial plan precisely because it provides a way to identify the violations for each Plaintiff without individual testimony. Under the plan, how many violations any individual Plaintiff has is relevant only to damages.

Second, Roto-Rooter argues that "the mere fact that a time entry is deleted does not suggest . . . that the deletion was improper." Doc 243 at 30. Roto-Rooter also points out that some changes to the records are automatic and that "modifications to time entries are made in the normal operation of the system or to correct inaccuracies in the records. Doc 243 at 31. Be that as it may, Plaintiffs' case is not based on the mere fact of a deletion or alteration to the time records. Plaintiffs' are well aware that not all time record alterations represent shaving and so, like Sander, they have developed very specific queries designed to identify those circumstances where record changes do indicate shaving. The 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.

[20] For example, Roto-Rooter points to a difference in the number of violations shown for Hollister and St. Juste who both worked in Bridgeport, Connecticut offices, but Hollister only worked for approximately 114 weeks during the analysis time period while St. Juste was employed for approximately 142 weeks. PX 95.

Third, Roto-Rooter argues that some of the identified records involve deletions of time during the middle of the day which Defendant claims could not have any impact on the number of compensable hours worked by Plaintiffs. In making this argument Roto-Rooter does not offer an explanation for the seemingly impossible time entries, they simply suggest that it could not be shaving because it does not reduce work time. But where time is changed in the middle of the day from compensable time to non-compensable time, such as personal time, the Technician's compensable hours are reduced and the reduction can affect overtime. This type of shaving was the subject of testimony and the Query 3 is designed to detect it. PX 90 at 224:10 – 227:12. While Roto-Rooter is free to contest whether Query 3 shows shaving, the jury will decide.

Fourth, Roto-Rooter claims that in some cases even if a worker were credited with the hours identified by a particular Query, the Technician would still not have worked more than 40 hours in the week. Doc. 243 at 32-33 (A) and 35 (A-2). Here too, Roto-Rooter offers no explanation for the seemingly impossible time entries, it simply claims the entry can't be explained as hours shaving if the change did not prevent workers from going into overtime. That isn't necessarily true as there may have been multiple ways hours were shaved in a week. While restoration of one shaved record may not bring the worker over 40 hours, restoration of all may very well. Plaintiffs have been very conservative in formulating their Queries so it is entirely possible that additional hours of shaving occurred that were not picked up by Plaintiffs. Again, however, this criticism goes to whether a Query shows shaving, it does not involve individual testimony about individual entries and in no way undermines class certification.

Fifth, Roto-Rooter asserts that with respect to 19 specific records on Exhibit A it can provide an explanation for the suspicious time entry. Ten of those 19 involve cases where a Technician had only a few minutes of work on a job that involved a substantial commission.

However, on closer examination, it turns out that the rest of the work time on the job was entered on the following day or was entered for a different Technician because the job was reassigned. This criticism simply suggests that Plaintiffs Queries 1-3 were not 100% successful in isolating instances where ten minutes or less was spent on a job with $100 or more in revenue. The problem is easily fixed however by adjusting the Query to look to see if jobs of 10 minutes or less were reassigned or credited on a following day and, if so, eliminating them from the Query. Roto-Rooter challenges an additional four entries because the scheduling database includes what it alleges are explanations for the shaving. This problem is also easily addressed by adjusting the Query to see if explanations exist. Now that Defendants have pointed out these problems, Plaintiffs will make the adjustment and supplement their interrogatory responses (*see infra* at p. 34). Another entry involves Roto-Rooter's claim that Plaintiffs should not have relied upon 5:00 a.m. time entries in its analysis because they are not time entries at all but codes entered by the call center. This is also a challenge to what is included in Plaintiffs analysis, not to a unique circumstance that requires testimony. Three of the instances simply reflect a difference of what the parties believe the analysis shows. That, however, is an issue for a jury to decide.[21] Roto-Rooter is free to point to individual records in an effort to prove that a particular query does not identify shaving. Presumably if it can raise enough questions as to the accuracy of a particular query, even Sander's Query, a jury will find that the records identified by the query are not more likely than not to be shaving. But such a process doesn't mean that each record identified by Plaintiffs Queries will have to be individually tried. Sander's analysis attached to Roto-Rooter's motion for decertification only raises questions about a very limited number of individual records identified by the Queries. More importantly, the questions are raised based on

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[21] The 19th entry Sander challenges is for St. Juste on March 24, 2008, Sander Decl. ¶ 44. That record was listed on Exhibit A in error.

information in the records themselves. His criticisms are not based on individual testimony by the Technicians and supervisors involved with an entry. He merely claims that, based on his analysis of the information contained in the time records themselves, the Queries do not show hours shaving. He is more than welcome to make that argument to the jury and is welcome to cite individual records that he believes cast doubt on the accuracy of the Queries in identifying hours shaving. (Presumably he won't try to cast doubt on his own Query though he may if he wishes to). The point is, however, that whether he testifies about his findings with respect to one, or fifty, or 150 individual records that he thinks undermine the Queries, only one witness, Sanders, will be presenting the evidence and the jury will still be ruling on whether the six Queries isolate shaving, not on individual records.

To be sure, reviewing and analyzing the records requires a substantial effort, but that is not a reason to decertify the claim. The records to be reviewed are electronic, allowing for an automated review. While designing the review is time-intensive, "clockwatching is not very helpful in ascertaining whether class-action treatment would be desirable." *Morangelli*, 275 F.R.D. at 113 (citations omitted). What is critical to the decertification analysis is that the jury is able to evaluate the claim by considering whether the circumstances isolated by Plaintiffs' analysis show shaving.

Finally, Roto-Rooter attempts to inject incompetent individual testimony into the trial as a basis for decertification. Roto-Rooter offers declarations from four current employees in three branches, Staten Island, NY, St. Louis North, and Bridgeport, CT. None of these witnesses can testify regarding specific instances identified through Plaintiffs' analysis. They simply claim that they did not act illegally. Such testimony would seem to be of little or no value since no current employee is likely to confess to shaving hours. But even if such testimony were to be admitted,

it does not in any way undercut the fact that common questions predominate and that class certification is, therefore, appropriate. Similarly, Defendant may offer testimony that Plaintiffs signed their time sheet and did not raise inaccuracies with management. Again it is hard to see how such testimony adds much to Defendants' case. Wage-and-hour claims are not waived because an employee fails to object precisely because employees are not in a position to stand up to their employers. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945). But if Defendants want to make that point for the jury, they can do so through a single witness. Such proof does not involve multiple witnesses and certainly does not require each technician to testify so it in no way affects the continued viability of class certification.

In sum, Plaintiffs have abided by the trial plan outlined in the order certifying the class. While Roto-Rooter has raised some criticisms of the specific queries that Plaintiffs used to identify hours shaving, those criticisms will either be addressed by refining the Queries or are simply disputed fact questions that the jury can consider in determining the ultimate question, whether the queries identify records that more likely than not are the result of hours shaving. Nothing in Roto-Rooter's motion calls into question the continued viability of class certification, necessitates individual testimony, or undermines the trial plan on which class certification was based. Accordingly Roto-Rooter's motion to decertify the hours shaving claim should be denied.

C. The Court's Certification of the Turn-In Time Claim Remains Appropriate

Roto-Rooter's arguments for decertifying the turn-in time claim mirror the arguments that it makes against the hours-shaving claim and those arguments fail for the same reasons. Roto-Rooter first argues that because Plaintiffs' analysis did not identify unpaid turn-in meetings for each of the 39 discovery plaintiffs no nationwide conclusions applicable to the class as a whole can be drawn. But, as with the hours shaving claim, that result is exactly what one would

expect from the trial plan outlined in the Court's certification order. The Court noted that pursuant to that plan, "the inquiry is individual in part, requiring individualized proof to show when a class member was off-the-clock," *Morangelli*, 275 F.R.D. at 111, and the Court also recognized that there would be "variations as to who was compensated and who was not, who participated in meetings and who did not; but under plaintiff's trial plan, these differences are overshadowed by the commonalities." *Id.* In other words, the trial plan never contemplated that the evidence as to the 39 would allow the Court to make sweeping conclusions about the number of hours of uncompensated turn-in meetings the entire nationwide (or statewide) class experienced. But what the evidence for the 39 does show is that Roto-Rooter did not compensate Technicians for a significant number of turn-ins and that those turn-ins can be identified from the records through a Query designed to identify such meetings. If a jury concludes that the record query used for the 39 more likely than not identifies uncompensated turn-ins, then the turn-ins identified through a similar record analysis for the class as a whole were not compensated either.

Roto-Rooter goes a step further and argues that the variation in the number of uncompensated turn-ins for some Technicians compared to others in the same branch suggests that Plaintiffs' methodology is flawed. *See* Doc 243 at 42 (noting disparity between the number identified for Plaintiff Lawson as compared to Plaintiff McMahon). Such disparities are readily explainable: Technicians who had the good fortune to be scheduled for work when turn-in occurred would never have an uncompensated turn-in; only those who did turn-in on a day off or after their shift would be uncompensated and which group a technician falls in will vary within a branch and may vary over time. In addition, the number of uncompensated turn-ins within limitations will clearly vary depending upon how many months a Technician worked within the

statute of limitations. Those with only a short time within limitations will obviously have fewer uncompensated turn-ins than those who worked longer within limitations. More importantly, Roto-Rooter's argument about disparities is really just an attack on the validity of Plaintiffs' methodology for identifying uncompensated turn in meetings. It is evidence, based on the records, that Roto-Rooter is free to argue to the jury as reasons why the jury should not find the Plaintiffs' methodology more likely than not identifies uncompensated meetings, but that does not justify decertifying the class. The case remains a paper case where the jury will simply decide whether the paper shows what Plaintiffs contend (uncompensated turn-ins) or what Roto-Rooter contends (a meaningless list of turn-ins from which no conclusions regarding compensation can be drawn).

Roto-Rooter's other criticisms of Plaintiffs' analysis also go to the ultimate jury question, whether Plaintiffs' analysis more likely than not shows uncompensated meetings, and do not cast doubt on the viability of the trial plan as certified by the Court. Those criticisms are based on analyses of the records that can be presented by a single witness (such as Sander) rather than testimony by each Technician and manager testifying about what they remember about each meeting. For example, Roto-Rooter argues that Plaintiffs' analysis does not establish when turn-ins took place, but there is ample evidence for the jury to decide that issue in Plaintiffs' favor. As an initial matter, there are two types of records produced for turn-in that are date and time stamped, the Preliminary Drivers Report ("PDR") and the DLTS. Roto-Rooter's written policy calls for both to be printed at turn-in. PSMF2 ¶ 60. Roto-Rooter contests whether DLTSs were printed at turn-in, but it raises no such claim as to the PDR. And whether Roto-Rooter's policy shows that it is more likely than not that DLTS are printed during turn-in or at some other time is a question for the jury to decide. Further, the DLTS time-stamps establish when some turn-ins

took place off-the-clock even if they are not printed at turn-in. For example, because DLTS must be printed after the Technician's workweek ends, where the Technician's time records show that he was not on the clock during the turn-in times (Tuesday afternoons and Wednesday mornings, PSMF2 ¶ 64), the logical conclusion is that he performed turn-in off the clock. Roto-Rooter also argues that Plaintiffs' analysis is unreliable because it shows 40 instances where turn-in took place at 11:59 p.m. and that is not possible because the offices are closed. Again, the issue is not one of individual analysis; rather it is a challenge to the assumption in Plaintiffs' analysis that the time stamps on Roto-Rooter's records are correct, as Roto-Rooter has testified.

As for the 252 entries that Roto-Rooter says do not show off the clock work, Plaintiffs admit an error in their analysis. Roto-Rooter produced two versions of time records. One was produced as time records ("Revised Time Files"), the other was produced in response to a demand for the same type of database that Sander used in the Hartford investigation ("SMPTM2"). Plaintiffs used the SMPTM2 time records in their turn-in analysis. However, the SMPTM2 records did not cover the full period of the turn-in analysis. Unaware of the discrepancy, Plaintiffs' analysis identified the missing records as time that the Technicians were not working. The problem is easily addressed by re-running the analysis using the correct Revised Time Files and supplementing their discovery response.[22] While the use of the wrong database is an error that Plaintiffs can and will fix, it is not a criticism of the methodology or of the trial plan on which class certification is based. Finally, Roto-Rooter argues that 570 of the entries on Exhibit B occurred during a week in which the technician worked fewer than 37 hours, and because turn-in took less than three hours these instances cannot support an overtime violation. Here Roto-Rooter simply misconstrues what Plaintiffs' analysis was intended to do.

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[22] Plaintiffs have revised and rerun their analysis and found that 252 of the entries on Exhibit B do not show off-the-clock turn-in.

The analysis of the records identifies uncompensated meetings – i.e. work time that was unrecorded in violation of the FLSA. By Roto-Rooter's own count, Plaintiffs' analysis of the payroll records for the 39 discovery plaintiffs identifies at least 671 instances of meetings that did cause FLSA overtime violations and 705 that caused state overtime violations. If the jury agrees that those instances are overtime violations, that is more than sufficient to establish Roto-Rooter's liability for its policy of not regularly compensating workers for meetings. After that liability has been established, the rest is a question of damages. It should be noted, however, that it is premature to say whether the 570 incidents identified by Roto-Rooter did or did not result in overtime damages because that will turn on whether the jury finds that Roto-Rooter shaved hours in other respects. As for the 570, only after the full extent of the hours shaving and uncompensated meetings has been identified will it be possible to say whether those incidents contributed to overtime damages or not.[23]

Plaintiffs' uncompensated hours claims should remain certified. As the Court noted in its Certification Order, the claims are appropriately certified for class treatment because Plaintiffs establish them through Roto-Rooter's records thus avoiding the need for testimonial evidence. Plaintiffs have stuck to that plan by using an analysis of the records to show violations. Roto-Rooter's challenge to whether Plaintiffs' record analysis shows off-the-clock work is a matter for the jury, not a reason to decertify the claims.

[23] Roto-Rooter's argument that how long turn-in took is an individualized issue is more of the same. While the amount of time may be different from office to office, Plaintiffs can meet their burden through an analysis of the records. For example, Roto-Rooter has been electronically recording how long turn-in takes in each office since June 2010. Those records can provide the basis for a reasonable estimate as to how long turn-in took in the past. See, *Reich v. SNET Corp.*, 121 F.3d 58, 66 (2d Cir. 1997) (where employer has not kept accurate records, employee can rely on a reasonable estimate).

D. Plaintiffs Should Be Permitted to Supplement their Interrogatory Responses

As set forth above, Roto-Rooter's motion to decertify Plaintiffs' hours shaving and turn-in time claims is based on the lists of those violations produced by Plaintiff in response to Roto-Rooter's second set of interrogatories. Plaintiffs produced two lists, Exhibits A and A-2, of the instances of shaving they allege are shown by their analysis of Roto-Rooter's records and a list, Exhibit B, of dates on which Plaintiffs were not credited with time for turn-in. However, based on information Roto-Rooter has set forth for the first time in its decertification briefing, Plaintiffs intend to supplement their lists to reflect that additional information.

Rule 26(e) of the Federal Rules of Civil Procedure not only allows for a timely supplementation of a prior response to an interrogatory, but requires it where "the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or as ordered by the court." In its briefing, Roto-Rooter revealed several new facts about its record-keeping system that affect Plaintiffs' analyses, and specified ways in which the analysis was incomplete. For example, Roto-Rooter had not previously revealed that one minute entries can be the result of an inability to completely remove a record from the active file, nor had it revealed that in some instances an entry at 5:00 a.m. is not a time entry at all but a dispatch code. The briefing also revealed that the time files Plaintiffs used in their turn-in analysis were incomplete and that the scheduling database contains certain codes that may clarify the shaving analysis in Queries 5 and 6. As contemplated by F.R.C.P. 26(e), Plaintiffs will revise their analysis to incorporate these facts. The revision requires no new discovery, only running the revised analysis against the databases already in discovery. Allowing Plaintiffs to incorporate this new information into their analysis will facilitate the jury

trial by removing issues where there is agreement. Moreover, the revision will not prejudice Roto-Rooter. Supplementation to incorporate the new facts Plaintiffs have learned will only reduce the number of previously specified instances of alleged off-the-clock work; it will not identify new instances. There will be no delay as a trial has not been scheduled and the revisions can be done promptly.

V. Chemed Is Plaintiffs' Employer for FLSA Purposes

Applying the joint employer and integrated employer tests, looking at the totality of the circumstances, and keeping in mind the expansiveness of the FLSA's definition of employer, Chemed is Plaintiffs' employer. FLSA defines "employer" broadly as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The Supreme Court has emphasized the expansiveness of the FLSA's definition of employer, *Herman v. RSR Sec. Servs. LTD.*, 172 F.3d 132, 139 (2d Cir. 1999), *citing Falk v. Brennan*, 414 U.S. 190, 195, 94 S. Ct. 427, 38 L.Ed.2d 406 (1973), and the remedial nature of the statute further warrants an expansive interpretation of its provisions so that they will have "the widest possible impact in the national economy." *Id.*, *quoting Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984).

One test courts apply to determine who is an employer is the joint employer test. The overarching concern is whether the alleged employer possessed the power to control the workers in question ... with an eye to the 'economic reality' presented by the facts of each case. *Id.* (internal citations omitted). Employer status does not require continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control of one's employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control

"do[ ] not diminish the significance of its existence." *Boyke v. Superior Credit Corp.*, 2006 WL 3833544 at *6 (N.D.N.Y. Dec. 28, 2006), *citing Donovan v. Janitorial Services, Inc.,* 672 F.2d 528, 531 (5th Cir. 1982); *Brock v. Superior Care, Inc,* 840 F.2d 1054, 1060 (2d Cir. 1988); *Carter v. Dutchess Community College*, 735 F.2d 8, 12-13 (2d Cir. 1984).

Courts in the Second Circuit also use the integrated employer test, or single employer doctrine, to determine whether a particular person or entity is an employer and therefore liable pursuant to various worker protection laws. *Addison v. Reitman Blacktop, Inc.*, --- F.R.D. ----, 2011 WL 4336693 (E.D.N.Y. Sept. 9, 2011) (applying in the FLSA context); s*ee*, *also Parker v. Columbia Pictures Industries*, 204 F.3d 326, 341 (2d Cir. 2000) (Americans with Disabilities Act and the New York State Human Rights Law); *Murray v. Miner*, 74 F.3d 402, 404-5 (2d Cir. 1996) (breach of employment contracts); *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240-41 (2d Cir. 1995) (Title VII). The Second Circuit summarized the "single employer" doctrine as follows:

> "A 'single employer' situation exists 'where two nominally separate entities are actually part of a single integrated enterprise....' " In such circumstances, of which examples may be parent and wholly-owned subsidiary corporations, or separate corporations under common ownership and management, the nominally distinct entities can be deemed to constitute a single enterprise. There is well-established authority under this theory that, in appropriate circumstances, an employee, who is technically employed on the books of one entity, which is deemed to be part of a larger "single-employer" entity, may impose liability for certain violations of employment law not only on the nominal employer but also on another entity comprising part of the single integrated employer.

Arculeo v. On–Site Sales & Marketing, LLC, 425 F.3d 193, 198 (2d Cir.2005) (citations omitted). In determining whether multiple defendants constitute a single employer, courts consider the following factors: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control. *Addison*, 2011 WL 4336693 at *10 (citations omitted*).*

Here, keeping in mind the expansiveness of the FLSA's definition of employer and looking at the totality of the circumstances, Chemed and Roto-Rooter Service Company ("RRSC") are two nominally separate entities that are actually part of a single integrated enterprise. Their operations are interrelated. Roto-Rooter Service Company ("RRSC") is wholly owned by Chemed. PSMF2 ¶ 65. Chemed's main business purpose is RRSC's—to provide plumbing and drain cleaning repair and maintenance services to residential and commercial markets through RRSC. PSMF2 ¶ 66. The two entities share corporate offices. PSMF ¶¶ 1 & 2. Chemed's Internal Audit department is responsible for auditing RRSC, including field audits of RRSC branches for wage-and-hour issues. PSMF2 ¶¶ 67, 68. Chemed's Internal Audit department manages RRSC's customers and employee complaints. PSMF2 ¶¶ 69, 70. The entities share common management. For example, Spencer Lee is an Executive Vice President of Chemed and the Chairman and Chief Executive Officer of RRSC. PSMF2 ¶ 71. Naomi Dallob is general legal counsel for both Chemed and RRSC. PSMF2 ¶ 72. Paula Kittner, Chemed's Assistant Treasurer, directs RRSC's funds. PSMF2 ¶ 73. Chemed and RRSC have shared control of labor relations. Chemed and Roto-Rooter share common labor policies. For example, all RRSC employees are required to abide by Chemed Policies on Business Ethics and pledge their undivided loyalty to Chemed. PSMF2 ¶¶ 74, 75. Chemed and RRSC share a common Savings and Retirement Plan. RRSC employees participate in the Chemed Employee Stock Ownership Plan II. PSMF2 ¶ 76. RRSC employees are governed by Chemed's Information Systems Security Employee Compliance Statement. PSMF2 ¶¶ 77, 78. Chemed is directly involved with RRSC's wage-and-hour litigation. For example, its General Counsel signed the judgment in *Chao v. Roto-Rooter Services Company*, Case No. c-1-01-573. PSMF2 ¶ 79. Chemed personnel accepted notice for RRSC in the *Pease v. Roto-Rooter Services Company*

case before the California Labor Commissioner. PSMF2 ¶ 80. When RRSC was found liable, Chemed issued the damages check. PSMF2 ¶ 81.

As Chemed and RRSC share operations and offices, many aspects of labor relations, and common management, they are part of a single integrated entity for FLSA purposes. As such, Chemed is liable for RRSC's wage-and-hour violations, and Plaintiffs' claims against Chemed should not be dismissed.

VI. The Court Should Not Decertify Any Classes or Dismiss Any Claims Merely Because the Representative Plaintiffs May No Longer Be Suitable

The classes in this proceeding have a legal status separate from the named Plaintiffs for those classes. Therefore, substitution of suitable representatives is appropriate to protect the interests of the classes, not decertification of the classes or dismissal of the claims. All of the cases cited by Roto-Rooter supporting its argument that the Colorado, Florida, Indiana and Washington time-shaving claims and the California, Hawaii and Minnesota turn-in claims should be dismissed or decertified are cases dealing with classes that had not yet been certified, and are therefore inapposite.

It is settled law that once a class has been certified, the entire action is not mooted simply because the class representative's claim is mooted. *Bowens v. Atlantic Maintenance Corp.*, 546 F.Supp.2d 55, 76 (E.D.N.Y. 2008), *citing County of Riverside v. McLaughlin,* 500 U.S. 44, 51-52, 111 S. Ct. 1661, 1667, 114 L.Ed.2d 49 (1991) ("'the termination of a class representative's claim does not moot the claims of the unnamed members of the class'") citations omitted. The Second Circuit has noted that, following certification of a class, "whenever it later appears that the named plaintiffs ... [are] otherwise inappropriate class representatives," "a district court *may"* but "need not" decertify a class "if it appears that the requirements of Rule 23 are not in fact met." *McAnaney v. Astoria Financial Corp.*, 2007 WL 2702348 at *13 (E.D.N.Y. Sept.

12, 2007) (emphasis in original), *citing Sirota v. Solitron Devices, Inc.,* 673 F.2d 566, 572 (2d Cir. 1982). Instead, the Second Circuit has directed, in accord with Supreme Court precedent, that, "'provided the initial certification was proper[,] ... the claims of the class members would not need to be mooted or destroyed because subsequent events ... had undermined the named plaintiffs' individual claims.'" *Id.*, *citing Sirota*, 673 F.2d at 572 (addition internal citation omitted). Rather, an opportunity to substitute a new named plaintiff should be provided. *In re MetLife Demutualization Litigation*, 689 F.Supp.2d 297, 339 (E.D.N.Y. 2010) (citations omitted).

In the instant action, the fact that the named Plaintiffs' claims may no longer viable does not make the suit moot or necessarily undermine the claims of the remaining class members. *See McAnaney,* 2007 WL 2702348 at *13. Therefore, this Court should abide by the procedure favored by the Second Circuit where the named plaintiff is no longer an adequate representative of the class, *see id.*, *citing Norman v. Conn. State Bd. of Parole,* 458 F.2d 497, 499 (2d Cir. 1972). Rather than decertifying the instant class on the ground that the named Plaintiffs may no longer be adequate representatives of the class, the Court should afford Plaintiffs' counsel a reasonable period of time to substitute new class representatives. *Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, 659 F.3d 234, 253 (2d Cir. 2011). Substitution is particularly appropriate in this case because many of the deficiencies that Roto-Rooter claims to exist can easily be remedied by substituting a Discovery Plaintiff for the Named Plaintiff if necessary.

Because the classes have a legal status separate from the named Plaintiffs for those classes, rather than decertify or dismiss class claims, the Court should allow substitution of suitable representatives to protect the interests of the classes.

VII. HI, CA, and IN Dismissal Claims

A. Plaintiffs' Claims Are Not Barred Under Hawaii Law

Roto-Rooter's claim that Hawaii law's definition of employee in Haw. Rev. Stat. § 387-1 forecloses Plaintiffs' business expense and uncompensated hours claims under Hawaii law is misplaced. Plaintiffs did not bring their business expense and uncompensated hours claims under § 387-1 alone. Plaintiffs also brought their business expense and uncompensated hours claims under Chapter 388 of the Hawaii Statutes which requires all wages due to be paid on the regular pay day.[24] By imposing business expenses on Plaintiffs that drive their wages below the amount required by law and by failing to compensate Plaintiffs for all the hours they worked, Roto-Rooter violated Haw. Rev. Stat. § 388-2 by not timely paying Plaintiffs all wages due to them. *See* Third Amended Class Action Complaint, Doc. 187, ¶¶ 382-84 (pleading the claims under Haw. Rev. Stat. § 388-1 *et seq*.) Application of chapter 388 is not limited by Haw. Rev. Stat. § 387-1's definition of employee, which expressly limits its definition to that chapter. For purposes of chapter 388, the term "Employee" includes "any person suffered or permitted to work." Haw. Rev. Stat. § 388-1 (2011). Thus, for the purposes of chapter 388, Plaintiffs are employees. As Plaintiffs' business expense and uncompensated hours claims arise under Haw. Rev. Stat. § 388-2, they are not barred.

B. California Plaintiffs' Claims Should Not Be Dismissed

California Plaintiffs who were class members in *Ita v. Roto-Rooter Services Company* did not release their FLSA, business expense, or uncompensated hours claims. In California, a release or settlement agreement is interpreted in the same manner as any other contract. "The

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[24] Haw. Rev. Stat. § 388-2 (2011) states in relevant part that "[e]very employer shall pay all wages due to the employer's employees at least twice during each calendar month, on regular paydays designated in advance by the employer…" and that "[t]he earned wages of all employees shall be due and payable within seven days after the end of each pay period."

parties' intent is ascertained from the language of the contract alone, 'if the language is clear and explicit, and does not involve an absurdity.'" "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." *Tidgewell v. Gentry*, 2012 WL 676729 (Cal. Ct. App. Feb. 29, 2012) (citations omitted).

In *Ita v. Roto-Rooter Services Company*, all members of the *Ita* class released Roto-Rooter from

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

Holtzman Declaration, Ex. 12 at p. 5, ¶ 3 (emphasis added).

In *Garnica v. Verizon Wireless Telecom, Inc.*, 2011 WL 2937236 (Cal. Ct. App. July 21, 2011), the California Court of Appeals interpreted just such a release. In doing so, the *Garnica* court emphasized that the scope of a release limited to claims "based on, arising out of, or related to the Lawsuit and causes of action alleged therein" does not include "claims that are not based on, do not arise out of, or are not related to the specific causes of action alleged" in the complaint. *Garnica*, 2011 WL 2937236 at *6. The Court went on to find that when such language is "followed by the word "including" and a list of various included matters" the list is limited to claims "based on, arising out of, or related to the Lawsuit and causes of action alleged therein." *Id.*

Like the *Garnica* release, the *Ita* settlement released Roto-Rooter only from those claims arising out of, relating to, or in connection with the causes of action asserted in the *Ita* complaint.

The *Ita* settlement also uses the word "including" followed by a list of various included matters. As in *Garnica*, that list is limited to claims arising out of, relating to, or in connection with the causes of action asserted in the *Ita* complaint. *See* Holtzman Declaration, Ex. 12 at p. 5, ¶ 3.

The *Ita* complaint does not raise claims under the FLSA claims or the business expense or uncompensated hours claims raised here. Holtzman Declaration, Ex. 10. It alleged very specific violations pursuant to California law and no FLSA claims at all. The claims arising out of California law in the instant proceeding are 1) the imposition of business expenses on Plaintiffs that had the effect of bringing their wages below the minimum wage in violation of the California Labor Code; 2) failure to compensate Plaintiffs for time shaved from their work hours and for time spent at turn-in in violation of the California Labor Code; and 3) the taking of illegal deductions from Plaintiffs wages in violation of the California Labor Code. The *Ita* complaint did not allege that Roto-Rooter violated the minimum wage provisions of the California Labor Code at all. Nor did it allege that Roto-Rooter failed to compensate technicians for time shaved from their work hours or spent at turn-in. Thus, none of these claims have been released. *Garnica*, 2011 WL 2937236 at *6. The only state claim in the instant proceeding that overlaps with those asserted and thus released in *Ita* is for illegal deductions.[25]

The Court should not read into the *Ita* release that claims such as the FLSA claims are released even though not alleged in the complaint. Nor should the Court extend the *Ita* release to California state law claims that were not raised in the complaint. *Levi Strauss & Co. v. Aetna Casualty & Surety Co.*, 184 Cal.App.3d 1479, 1486, 237 Cal.Rptr. 473, 477 (Ct. App. 1986) (citation omitted); *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC,* 185 Cal.App.4th 1050, 1063, 111 Cal.Rptr.3d 173, 183 (Ct. App. 2010) (citation omitted). California Plaintiffs who

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[25] Any claims released under the California Business and Professions Code are likewise limited to those raised in the *Ita* complaint.

were class members in *Ita* did not release their FLSA, business expense, or uncompensated hours claims against Roto-Rooter and the Court should not dismiss them.

C. Plaintiffs Should Be Permitted to Amend the Complaint to Allow Their Business Expense and Uncompensated Hours Claims Under Alternate Sections of Indiana Law

Indiana Plaintiffs' business expense and uncompensated hours should not be dismissed. Indiana has two statutes that protect worker's right to their pay—a minimum wage statute that requires employees be paid a minimum wage, Ind. Code Ann. § 22-2-2-1 (West 2011) *et seq.*, and a wage payment statute law that requires employees be paid the wages they are due, Ind. Code Ann. § 22-2-5-1 *et seq.* (West 2011). *St. Vincent Hosp. and Health Care Center, Inc. v. Steele*, 766 N.E.2d 699, 702-04 (Ind. 2002) (explaining that the wage payment statute governs both the frequency and amount an employer must pay employees). The wage payment statute includes employers such as Roto-Rooter.[26] Plaintiffs' business expense and uncompensated hours claims are for wages owed and can brought under the wage payment statute. *See, e.g.*, *Brown v. Family Dollar Stores of IN, LP*, 534 F.3d 593, 594 (7th Cir. 2008) (recognizing overtime claims brought under the wage payment statute).

Plaintiffs should be allowed to amend their complaint to include the business expense and uncompensated hours claims under Ind. Code Ann. § 22-2-5-1. The claims under Ind. Code Ann. § 22-2-5-1 arise out of the exact same conduct, transactions, and occurrences set forth in the original pleading, indeed, they are mere variations of the claims previously pled under Ind. Code Ann. § 2-2-2-1 *et seq.* They require no additional discovery and all the facts necessary to

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[26] Ind. Code Ann. § 22-2-5-1 states in relevant part that "[e]very person, firm, corporation, limited liability company, or association, their trustees, lessees, or receivers appointed by any court, doing business in Indiana, shall pay each employee at least semimonthly or biweekly, if requested, the amount due the employee… " and that "[p]ayment shall be made for all wages earned to a date not more than ten (10) business days prior to the date of payment..."

evaluate the claims have been presented, and the Court can consider the amendment in the context of the summary judgment motion. *See Rogen v. Scheer*, 1991 WL 33294 at *3 (S.D.N.Y. Feb. 22, 1991), *citing Marbury Management Inc., v. Kohn*, 629 F.2d 705, 711–12 (2d Cir. 1980), *cert denied sub nom. Wood Walker & Co. v. Marbury Management Inc.*, 449 U.S. 1011 (1980) (other citations omitted) ("[W]here plaintiff's motion to amend the complaint and defendants' motion for summary judgment are presented together, it is proper for the Court to treat motion for summary judgment as addressed to the complaint in the form in which it is sought to be amended."). Roto-Rooter is not prejudiced by the addition of these new claims because Roto-Rooter has had full discovery on all of the conduct, transactions, and occurrences that Plaintiffs are alleging violate Ind. Code Ann. § 22-2-5-1.

In the interest of efficiency and fairness this Court should exercise its discretion to allow an amendment to the Complaint to plead business expense and uncompensated hours under the wage payment statute. The wage payment statute was designed to address these claims. All the facts and issues regarding the claims are before the Court and it is adjudicating those facts and the issues with respect to other states' laws that are very similar. Roto-Rooter suffers no prejudice from the amendment. Dismissing the Indiana Plaintiffs only forces the Indiana class to file another lawsuit to adjudicate the same claims at issue here. The efficient and fair course is to allow Plaintiffs' business expense and uncompensated hours claims to proceed in this action.

CONCLUSION

For the reasons stated above, Roto-Rooter's motion to decertify class claims and its motion to dismiss Plaintiffs' illegal deduction claims should be denied.