IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ANTHONY MORANGELLI, FRANK ERCOLE, JASON CASTILLO, STEVE MCMAHON, EVENS SAINT JUSTE, JEFFREY GORMAN, TERRY LOETSCHER, JAMES SABAS, FRANK POCZOK, STEVEN HESS, FRITZ JEUDY, ALAN KENNEDY, LAWRENCE RICHARDSON, SHILO CAIN, DINO BRANCO, FREDERICK WIGGINS, DANIEL HODGES, JR., JAMES HARRIS, and BRYON E. FRAZIER-SMITH, AND LEVOID BRADLEY, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **CHEMED CORPORATION and ROTO-ROOTER SERVICES COMPANY,** **Defendants.**	**1:10-CV-00876 (BMC)**

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

Respectfully submitted on March 23, 2012

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

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INTRODUCTION

Roto-Rooter's opposition to summary judgment makes clear that there is no genuine dispute that Roto-Rooter's pay policies shift its business expenses onto Technicians and how those policies operate. Nor is there a dispute as to whether those policies result in Technicians receiving less than the minimum wage in some weeks. Similarly, there is no dispute that Roto-Rooter required each Technician to sign a commission compensation agreement when they were hired and there is no dispute as to what that contract says. There is also no dispute that Roto-Rooter has offered no evidence that would support a defense to the FLSA's mandatory liquidated damages.

With the facts undisputed, Roto-Rooter resorts to arguments that are contrary to basic legal principles. It argues that it did not have to pay actual minimum wages in each week because it could estimate and amortize the expenses it shifts onto Technicians. But that argument is contrary to the fundamental principle that employees must be paid the minimum wage each week free and clear. Similarly, Roto-Rooter's argument that the Court should read the compensation contract to mean something other than what it says is contrary to fundamental contract principles. Having drafted the contract setting out the conditions under which Technicians earn their commissions, Roto-Rooter cannot now add other conditions that are not in the contract.

Based on the undisputed facts, Plaintiffs are due summary judgment that Roto-Rooter's pay policies violated state and federal wage-and-hour laws and Roto-Rooter is liable for liquidated damages for those violations.

ARGUMENT

I. Expense Claim

Roto-Rooter misconstrues what Plaintiffs seek on summary judgment. As stated in their motion and supporting memorandum of law, Plaintiffs seek summary judgment "that Roto-Rooter's policy of shifting its business expenses, including the cost of the van itself, onto Plaintiffs is a violation of the FLSA and state minimum wage laws where the expenses have the effect of bringing the earnings below the established minimum wage in a workweek." Seeking summary judgment on this issue is clearly within Fed. R. Civ. P. Rule 56, which allows parties to move for summary judgment on all or part of a claim or defense. The purpose of the rule is to "to secure the just, speedy and inexpensive determination of every action" by avoiding a trial where facts are not in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). If there are no genuine issues of material fact, Fed. R. Civ. P. 56(a) requires the Court to grant summary judgment if appropriate.

There is no dispute that Roto-Rooter's policy of shifting business expenses applies to commissioned Technicians across the country in the same way. The policy is set out in Roto-Rooter documents Policy 475.[1] How the policy violates minimum wage laws is also the same throughout the country—in some weeks the expenses that Roto-Rooter shifts onto Technicians bring earnings below the established minimum wage. Although Plaintiffs provide one example of the policy resulting in a minimum wage violation, it is the same analysis for every Technician in every week—subtract the business expenses incurred from the wages paid to determine if the

[1] Technicians may shoulder varying types of expenses and in recent years Roto-Rooter has not shifted van expenses onto Technicians in California. Nevertheless, the difference in how much in expenses any Technician incurred in any given week does not affect the legality of the policy when it creates minimum wage violations.

Technician was paid the minimum wage. By resolving whether shifted expenses that bring the wage below the minimum wage are a violation of minimum wage laws in the one instance, the Court resolves it for the entire class. The only issue left to litigate is damages, i.e., when do work-related expenses bring earnings below the established minimum wage.

A. Plaintiffs' Substantiated Expenses Were Undisputedly for Roto-Rooter's Benefit and Must Be Accounted for in Their Entirety and in the Workweek When They Were Incurred

Roto-Rooter has conceded that the substantiated expenses Technicians incur are expenses incurred carrying out Roto-Rooter's business. Plaintiffs Statement of Material Facts ("PSMF") ¶ 70. It also admits that it represents these substantiated expenses as business-related expenses to the Internal Revenue Services to avoid paying payroll taxes on them. PSMF ¶ 73. The law provides that such expenses are primarily for Roto-Rooter's benefit and may not be included in computing wages. 29 C.F.R. § 531.3 (2011).

Roto-Rooter incorrectly argues that Plaintiffs' van–related expenses do not have to be reimbursed up to the minimum wage each week because some Plaintiffs used their vans for personal reasons. Roto-Rooter cites no authority for this assertion, and the law is to the contrary. Expenses incurred primarily for the employer's benefit, i.e., for tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, cannot cut into the minimum wage. 29 C.F.R. § 531.35 (2011). Tools of the trade, e.g., carpentry tools, butcher knives, haircutting scissors, are typically of some incidental benefit to employees, but the fact that the employee gets incidental benefits does not mean that the employer can claim some apportioned credit for the benefit. An expense is either primarily for the benefit of the employer or not. If it is, the expense cannot take the wage below the minimum no matter how much incidental benefit the employee gets. *Brennan v. Modern Chevrolet Co.*, 363 F. Supp. 327 (N.D.

Tex. 1973), *aff'd* 491 F.2d 1251 (5th Cir. 1974) (denying credit to employer for a demonstration car where 90% of the car's use benefited the employee); *Marshall v. Sam Dell's Dodge Corp.*, 451 F. Supp. 294 (N.D.N.Y. 1978) (rejecting crediting an employer for the incidental benefit to employees of an expense that primarily benefits the employer). Roto-Rooter acknowledged this principle in reporting substantiated expenses to the IRS. It did not attempt to pro-rate substantiated expenses that had some incidental benefit for the Technicians personally; rather it took the tax benefit on the entire expense. *Modern Chevrolet Co.*, 363 F. Supp. at 333 (tax treatment of an expense is relevant to issue of who benefits from it). Moreover, the evidence is that Technicians benefited very little, if at all, from the van expenses they incurred. *See, e.g.*, PSMF ¶¶ 56-60. Accordingly, the full van expense must be accounted for in the minimum wage analysis.

Roto-Rooter does not ensure that each Technician receives the minimum wage each week because it does not include all the business expenses the Technician bears that week in its minimum wage analysis. Instead, it argues that it is allowed to approximate the amount of Technicians' vehicle expenses instead of accounting for the actual expenses each week for purposes of meeting its minimum wage obligations. Roto-Rooter relies on two cases in support of this assertion, namely, *Wass v. NPC Int'l.*, 688 F. Supp. 2d 1282 (D. Kan. 2010) and D*arrow v. WKRP Management, LLC*, No. 09–cv–01613, 2011 WL 2174496 (D. Colo. June 3, 2011), both of which are based on an FLSA overtime regulation, 29 C.F.R. §778.217, which provides that an employer can disregard amounts it pays to workers to reimburse expenses, whether actual or reasonable approximations, in calculating the regular rate for purposes of *overtime*. Those cases are irrelevant here because Roto-Rooter does not make use of the "reasonable approximation" provision in § 778.217 in determining technicians' regular rate for purposes of

overtime. In its employee handbook Roto-Rooter provides that the regular rate for purposes of overtime is based on the total amount of commissions that are received without excluding the amount attributed to expenses. Moreover, because Roto-Rooter allowed Technicians to submit their actual expenses each week as substantiated expenses, Roto-Rooter had no need to rely on "reasonable approximations."

Furthermore, Roto-Rooter has not provided any evidence that it tried to reasonably approximate Plaintiffs' expenses or that its approximation was sufficient to cover the expenses. Roto-Rooter "reimburses" Technicians by claiming that part of their commissions, specifically 15% of total revenues, is intended to cover all work related expenses. But Roto-Rooter requires Technicians to purchase a van during training while being paid hourly and before they receive any commissions at all. Moreover, Roto-Rooter does not explain how it determined that this 15% is a reasonable approximation of Technicians' expenses. It clearly did not consider the actual expenses Technicians incurred because it knew that the substantiated expenses Technicians submitted regularly exceeded the 15% and sometimes exceeded the total amount of the entire commission. For example, Plaintiff Bradley reported $1,098.35 in business-related expenses in one week but was paid only $516.20 in wages. PSMF ¶ 100; *see also*, Doc. No. 17-1 at 8 (example of Plaintiff Ercole reporting $1,289.03 in paid expenses but earning only $1,063.87 in wages).

Finally, Roto-Rooter incorrectly argues that Plaintiffs' van expenses do not have to be accounted for in the week they are incurred, but rather can be amortized over some other period. Roto-Rooter has not and cannot cite any authority for this assertion. Department of Labor regulations make clear that business expenses incurred by workers that cause a minimum wage violation must be reimbursed up to the minimum wage in the work week in which they are

incurred. 29 C.F.R. § 531.35 (2011). Case law unanimously supports this view. *See Arriaga v. Fla. Pacific Farms*, 305 F.3d 1228, 1237 (11th Cir. 2002); *Cuzco v. Orion Builders Inc.*, 262 F.R.D. 325, 332 (S.D.N.Y. 2009); *Marshall v. Al-Charles, Inc.*, No. N79–377, 1986 WL 32743 at *4 (D. Conn. Dec. 22, 1986); *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).

Roto-Rooter's amortization argument is contrary to the fundamental public policy behind state and federal minimum wage laws. The purpose of minimum wage legislation is to enable workers to maintain a minimum standard of living necessary for health, efficiency, and general well-being. To achieve that purpose, an employee must be reimbursed up to the minimum wage in the workweek in which he incurs an expense on behalf of his employer regardless of the useful life of the expense. 29 C.F.R. § 531.35 (2011). In other words, even if a particular expense benefits Roto-Rooter for some time after the expense is incurred, this does not change the fact that the Technician has expended a sum certain when he paid for it. If the expense brings his wages below the minimum wage, unless he receives reimbursement in that week, he will not earn the minimum wage free and clear as guaranteed by law, leaving him with insufficient money to maintain a minimum standard of living.

Substantiated expenses were undisputedly incurred by Plaintiffs primarily for Roto-Rooter's benefit. Therefore, where the expenses bring wages below the minimum required, Roto-Rooter has violated federal and state minimum wage laws. *Morangelli v. Chemed Corp.*, 275 F.R.D. 99, 109 (E.D.N.Y. 2011) ("I agree with plaintiffs that it is implicit in the adoption of minimum wage laws that deduction of work-related expenses is prohibited if it has the effect of bringing the earnings below the established minimum wage.")

B. Record-Keeping Violations

Whether Roto-Rooter violated its FLSA record keeping requirements is an issue ripe for summary judgment. Fed. R. Civ. P. Rule 56 allows parties to move for summary judgment on all or part of a claim or defense. If there are no genuine issues of material fact, summary judgment is appropriate.

There is no question that Roto-Rooter shifted its business expenses onto Technicians and knew that Technicians incurred them each week. Nor is it disputed that the Company failed to keep records of the expenses Technicians were required to pay. The only issue that Roto-Rooter raises is whether it has an obligation to keep records of the out-of-pocket expenses.

The law is clear that "[i]t is the employer who has the duty under [the FLSA] to keep proper records of wages, hours and other conditions and practices of employment" and that duty cannot be shifted to the employee. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). The recording obligation extends to wage-and-hour information that the employer knows or has reason to know of. *Holzapfel v. Town of Newburgh, N.Y.*, 145 F.3d 516, 524 (2d Cir. 1998). An employer cannot discharge its wage obligations under the FLSA "by attempting to transfer his statutory burdens of accurate record keeping ... and of appropriate payment, to the employee." *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959). In this case, Roto-Rooter has done precisely what the FLSA prohibits. It shifted its record keeping duties onto Technicians and when Technicians did not keep the records, Roto-Rooter simply ignored widespread minimum wage violations.

It makes no difference that the unrecorded wage deductions were out-of-pocket expenses. The recordkeeping requirement applies to "deductions for wages." 29 C.F.R. § 516.2(a)(10) (2011). Courts are clear that "there is no legal difference between deducting a cost directly from

the worker's wages and shifting a cost, which they could not deduct, for the employee to bear." *Arriaga*, 305 F.3d at 1236; *see Hodgson v. Newport Motel, Inc.*, No. 71-1007-Civ, 1979 WL 1975 at *4 (S.D. Fla. May 30, 1979) (not maintaining records of employees' out-of-pocket expenses is a violation of 29 C.F.R. § 516.2). This is not the case where an employee incurred expenses of his own accord without his employer's knowledge. Roto-Rooter *required* Technicians to pay the expenses and knew that Technicians were incurring the expenses. Roto-Rooter's claim that it had no way to record the expenses rings hollow. It has a statutory obligation to record them. It cannot argue that Technicians failed in fulfilling Roto Rooter's burden. *Mt. Clemens Pottery Co.*, 328 U.S. at 687; *Caserta*, 273 F.2d at 946.

II. Illegal Deductions Argument

Roto-Rooter attracts people to work as Technicians with an agreement to pay certain commissions as wages. That agreement is expressed in the Service Technician Compensation agreement, the TCA. The Technician signs the TCA upon being hired and then goes through a training period, typically for 13 weeks, before earning any commissions. During the training period Roto-Rooter requires most Technicians to acquire a van, tools, and equipment, and outfit the van for plumbing work. Once the Technician has made a substantial financial investment in the job and begins working on commission, he learns that his commissions can be taken back to pay for warranty work (a "call-back"). Although Roto-Rooter claims that the call-backs are justified because the commissions it paid Technicians were only advances until the warranty period has run, it has provided no evidence that Technicians were aware of the advance theory when they signed the TCA.

Roto-Rooter's argument that its call-backs for warranty work are not wage deductions depends on grafting the Handbook provision that commissions are advances until the warranty

period runs into the TCA. Roto-Rooter makes two arguments for grafting the term into the TCA and both fail. First, it argues that the TCA is ambiguous and therefore the Court should look to the Handbook to resolve the ambiguity. But Roto-Rooter has not and cannot point to any ambiguity in the TCA about whether commissions are advances until a warranty period runs. There simply is no language in the TCA that would create such ambiguity. Roto-Rooter's second argument is that the full contract is not the TCA, but the TCA and prior or contemporaneous agreements reflected in the Handbook. Not only does the evidence not support Roto-Rooter's claim, but the Court has already rejected that argument.

Roto-Rooter's argument that because the TCA does not use the term "earned" it is ambiguous as to whether commissions are advances is simply wrong. Commissions are earned when the employee has met the conditions required to earn them. *See Powers v. Centennial Communications Corp.*, 679 F. Supp. 2d 918, 924-26 (N.D. Ind. 2009) (discussing the definition of "earn"). Once those conditions are set, an employer cannot unilaterally change them. If the law were otherwise, employers could manipulate those terms to avoid their wage-and-hour obligations. *Id.* at 925 (internal citations omitted).

There is no question that the parties in this case have a written contract that sets the conditions Technicians have to meet to earn their commissions. The TCA provides that to be paid commissions Technicians must perform the work and collect and turn in the job receipts to Roto-Rooter. The TCA lists two circumstances in which commissions will not be paid but includes nothing about call-backs or commissions being advances until a warranty period runs and it does not incorporate any other documents. Roto-Rooter admits that every Technician in

this case, i.e., those paid by commission, was required to sign a TCA upon hiring.[2] Doc. 31 at ¶ 31; Policy 230, Plaintiffs Exhibit ("PX") 17 at CHEMED/RR 2193-94 (listing the documents needed to be completed in order to process a new employee, including Exhibit 230G which is the TCA, *see* Doc. No. 31-3, Exhibit E). All the TCAs have the same language preprinted on a form written by Roto-Rooter. The only relevant aspects that vary from TCA to TCA are the individual commission rates. Thus, all Technicians have earned their commissions when they have met the conditions specified in the TCA. *Powers*, 679 F. Supp. 2d at 924 -926.

Despite a clear, written agreement as to the conditions under which commissions are earned, Roto-Rooter is asking the Court to read additional terms into the contract—that commissions are advances until the warranty period has run—to change the conditions under which the commission is earned.[3] It makes the request even though the source of the language, the Handbook, clearly states it is not contractual. Contract law in each state prohibits the Court from doing that.[4]

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[2] Roto-Rooter's claim that there is no evidence that all the Discovery Plaintiffs signed the TCA is contrary to its admission that all Technicians were required to sign the TCA upon hire. Doc. 31 at ¶ 31.

[3] Roto-Rooter does not and cannot argue that it modified the TCA subsequent to its execution. Any such modification would require notice and Roto-Rooter has produced no evidence that it provided notice of such a change to Technicians. 19 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 54:13 (4th ed. 2011) ("[To] manifest consent to a modification of the employment contract, an employee must first have legally adequate notice of the modification, which consists of more than the employee's awareness of or receipt of a new handbook; the employee must be informed of any new term, be made aware of its impact on the preexisting contract, and affirmatively consent to it to accept the offered modification").

[4] Williston, *supra* at § 54:9 ("[A] court may neither make a contract for the parties nor revise the contract the parties have made for themselves"); *In re Marriage of Hall*, 681 P.2d 543, 544 (Colo. Ct. App. 1984); *Pesino v. Atlantic Bank of New York*, 709 A.2d 540, 546 (Conn. 1998); *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 928 fn2 (Del. 1982); *Old v. Hunter Engineering Co.*, 81 P.3d 1228 (Table) (Haw. Ct. App. 2003); *Gallagher v. Lenart*, 854 N.E.2d

To show that the TCA is ambiguous, Roto-Rooter has to show that there are different reasonable interpretations of the TCA. *See, e.g.*, *Graff. v. Enodis Corp.*, No. 02 Civ. 5922, 2003 WL 1702026 at *2 (S.D.N.Y. Mar. 28, 2003) ("Because plaintiff would thereby read a contradiction into the contract that is not apparent on its face, his interpretation is not reasonable, and defendant is entitled to summary judgment on the meaning of the contract") (citations omitted).[5] Roto-Rooter has not done so. It is not enough for Roto-Rooter to claim that there are questions the TCA does not answer. If that were the standard, every contract would be

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800, 807 (Ill. App. Ct. 2006); *Zukerman v. Montgomery*, 945 N.E.2d 813, 819 (Ind. Ct. App. 2011); *Little v. Page*, 810 S.W.2d 339, 343 (Ky. 1991); *Smith v. Smith*, 558 A.2d 798, 802 (Md. Ct. Spec. App. 1989); *Knudsen v. Transport Leasing/Contract, Inc.*, 672 N.W.2d 221, 223-24 (Minn. Ct. App. 2003); *Canfora v. Coast Hotels and Casinos, Inc.*, 776, 121 P.3d 599, 603 (Nev. 2005); *Midland Funding, L.L.C. v. Giambanco*, 28 A.3d 831, 839 (N.J. Super. Ct. App. Div. 2011); *Dysal, Inc. v. Hub Properties Trust*, 938 N.Y.S.2d 642, 644 (2d Dep't 2012); *Wachovia Mortg. Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 249 S.E.2d 727, 731 (N.C. Ct. App. 1978); *Vaccarello v. Vaccarello*, 757 A.2d 909, 914 (Pa. 2000); *Harris-Jenkins v. Nissan Car Mart, Inc.*, 557 S.E.2d 708, 711 (S.C. Ct. App. 2001); *Wheeler v. East Valley School Dist. No. 361*, 796 P.2d 1298, 1301 (Wash. Ct. App. 1990); *Haynes v. DaimlerChrysler Corp.*, 720 S.E.2d 564, 569 (W. Va. 2011).

[5] *See also Hamill v. Cheley Colorado Camps, Inc.*, 262 P.3d 945, 950 (Colo. Ct. App. 2011); *Murtha v. City of Hartford*, 35 A.3d 177, 183 (Conn. 2011); *Parks v. John Petroleum, Inc.*, 16 A.3d 938, *2 (Table) (Del. 2011); *Wittig v. Allianz, A.G.*, 201-02, 145 P.3d 738, 744-45 (Haw. Ct. App. 2006); *Richard W. McCarthy Trust v. Illinois Casualty Co.*, 946 N.E.2d 895, 903 (Ill. App. Ct. 2011); *Haire v. Parker*, 957 N.E.2d 190, 196 (Ind. Ct. App. 2011); *Cadleway Properties, Inc. v. Bayview Loan Servicing, LLC*, 338 S.W.3d 280 286 (Ky. Ct. App. 2010); *Baltimore County, Maryland v. Aecom Services, Inc.*, 28 A.3d 11, 23 (Md. Ct. Spec. App. 2011); *Nelson v. Nelson*, 806 N.W.2d 870, 872 (Minn. Ct. App. 2011); *State ex rel. Masto v. Second Judicial Dist. Court ex rel. County*, 199 P.3d 828, 832 (Nev. 2009); *Township of White v. Castle Ridge Development Corp.*, 16 A.3d 399, 403 (N.J. Super. Ct. App. Div. 2011); *Gilpin v. Oswego Builders, Inc.*, 930 N.Y.S.2d 120, 122 (4th Dep't 2011); *Wachovia Bank Nat. Ass'n v. Superior Const. Corp.*, 718 S.E.2d 160, 165 (N.C. Ct. App. 2011); *Missett v. Hub Intern. Pennsylvania, LLC*, 6 A.3d 530, 541 (Pa. Super. Ct. 2010); *Crystal Pines Homeowners Ass'n, Inc. v. Phillips*, 716 S.E.2d 682, 685 (S.C. Ct. App. 2011); *Marshall v. Thurston County*, 267 P.3d 491, 494 (Wash. Ct. App. 2011); *Lee v. Lee*, 721 S.E.2d 53, 56 (W. Va. 2011).

ambiguous. Roto-Rooter's claim that the TCA can be read to mean that commissions are advances until a warranty period runs is simply not reasonable. It can point to nothing to support a reading of the TCA that supports its advance theory. The TCA does not have any language incorporating the Handbook and it does not say anything about commissions being advances until a warranty period has run or call-backs for warranty work. If Roto-Rooter had intended the TCA to include the advance theory it could have included the term, after all it authored the contract. But it did not include the term, and it cannot now create some ambiguity to allow it to include the term after the fact.

Roto-Rooter's other argument, that the TCA is not a "fully integrated agreement", does not support incorporating the Handbook language into the agreement. As an initial matter, the TCA is an integrated agreement as it contains the complete agreement as to what a Technician has to do to earn his commission. Restatement (Second) of Contracts § 209 (1981) (a written agreement that reasonably appears to be complete is presumed to be an integrated agreement). Even if the TCA was not fully integrated, there is no evidence of a different contemporaneous or prior agreement. The fully integrated agreement doctrine is an exception to the parol evidence rule. They both concern evidence of agreements *prior to or contemporaneous with* the contract at issue. 19 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 33:1 (4th ed. 2011). Here, Technicians hired prior to February 2008 could not have read the Handbook language relied upon by Roto-Rooter prior to or contemporaneously with the signing of their TCA agreements because the language was not in the Handbook. PSMF ¶ 137. Even with respect to Technicians hired after February 2008, the evidence is that they signed the TCA and Handbook acknowledgment at the same time, on the day they were hired but before they

read the Handbook. The Court previously rejected the idea of incorporating Handbook language into the dispute resolution agreement because

> 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 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 pp. 5-6. The same analysis the Court applied in rejecting Roto-Rooter's attempt to graft Handbook language onto the dispute resolution agreement applies here. The TCA is part of the initial hire paperwork and signed at the same time as the dispute resolution agreement. PX 17 CHEMED/RR 2193-95 (listing the TCA, Handbook Acknowledgment, and Dispute Resolution forms as among the documents needed to be completed in order to process a new employee). Therefore it cannot incorporate language in the Handbook because there is no evidence that Technicians were aware of the Handbook provision when they signed the TCA. Doc. 103.

Roto-Rooter's argument that language on the DLTS reflects an understanding that should be incorporated into the TCA fails for the same reasons. Technicians sign the TCA when they are hired, before they receive any wages or even see a DLTS. Moreover, they are not paid by commission and do not receive a DLTS until after they complete their training program. There is no evidence that when Technicians signed the TCA they knew of the DLTS language. Nor can Roto-Rooter's practice of taking call-backs support making the advance language part of the TCA. The mere practice of imposing the call-backs is consistent with their being deductions to wages and so would not have put Technicians on notice that Roto-Rooter considered the call-backs adjustments to advances. Indeed, the evidence suggests that both Roto-Rooter and the

Technicians understood the call-backs to be deductions from previously paid commissions. PSMF ¶¶ 118 & 119.

Roto-Rooter cites a series of cases for the proposition that the Handbook "is strong evidence that the parties understood that commissions were advances subject to adjustment." But those cases are inapplicable because in each case the policy at issue was either in the contract or the court found some ambiguity or prior agreement that allowed it to incorporate the policy into the contract. In this case the TCA does not include Roto-Rooter's advance theory or refer to the Handbook, Roto-Rooter has not pointed to any ambiguity in the TCA as to whether commissions are only advances until the warranty period runs, and there is no evidence that Technicians knew of any such condition when they signed the TCA. Hence, none of the cases are applicable. For example, the *Graf* court found a written contract unambiguous and enforced it according to its terms. The court rejected the very argument that Roto-Rooter makes here, that it can create ambiguity with an unreasonable reading of the contract. *Graff*, 2003 WL 1702026 at *2. The issue in *Neal* was whether a written document that the plaintiff received but refused to sign constituted a contract. Upon finding that the document was a contract, the court enforced its terms. *Neal v. Eastern Controls, Inc.*, No. A-4304-06T1, 2008 WL 706853 at *3 (N.J. Super. Ct. App. Div. Mar. 18, 2008). Here, Roto-Rooter admits that the TCA is a contract and the Handbook is not, so *Neal* is not applicable. In *Martin*, the Court ruled it had to hear evidence to resolve a contradiction between a negotiated oral contract and a subsequent written contract regarding the same compensation. *Martin v. Clear Channel Television Inc.*, No. CIV. 00-753MJDJGL, 2001 WL 1636488 (D. Minn. July 16, 2001). In this case, there is no evidence of any understanding that commissions were only advances until the warranty period runs when the TCA was signed. In *Kaplan*, the Court dealt with the issue of ambiguity regarding whether a

bonus was discretionary. Because there was ambiguity, the court considered the fact that the plaintiff "was clearly apprised of, and acknowledged in writing that he understood, the company policy that [bonuses were discretionary]" in determining the contract terms. *Kaplan v. Capital Co. of Am.*, 747 N.Y.S. 2d 504 (1st Dep't 2002). Here there is no ambiguity in the contract regarding commissions being contingent upon a warranty period running, there simply is no such provision. Moreover, there is no evidence that Technicians were informed of such a policy when they signed the TCA. In *Helmuth*, there was no written compensation agreement and the Court relied on the trial court's finding that the employer informed the plaintiff at the time of hiring that being employed was a condition precedent to a commission vesting and therefore found the term part of the oral contract. *Helmuth v. Distance Learning Sys. Ind.*, 837 N.E. 2d 1085, 1091 (Ind. Ct. App. 2005). Here, there is no evidence that Roto-Rooter informed Technicians that the running of a warranty period was a condition precedent to earning their commissions.

As importantly, Roto-Rooter's "advance" theory cannot be incorporated into the parties' contract because it violates the requirement that minimum wages be paid free-and-clear. It is fundamental to minimum wage legislation that "wages cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or 'free and clear.'" *Ramos-Barrientos v. Bland*, 661 F.3d 587, 594-95 (11th Cir. 2011), *quoting* 29 C.F.R. § 531.35. Minimum wages are intended to secure a minimum living standard. Subjecting them to reclamation is contrary to that goal. Roto-Rooter's reliance on the regulation at 29 C.F.R. § 778.121 for the proposition that minimum wages can be simultaneously free-and-clear and also be construed as advances is misplaced. The regulation addresses when *overtime* for commission payments must be paid. It does not address the minimum wage at all. The case Roto-Rooter cites to support its argument, *Powers*, does not help because it simply applies 29

C.F.R. §778.121. The minimum wage was not at issue because the employer paid a base salary each week. *Powers*, 679 F. Supp. 2d at 919. The FLSA's minimum wage and overtime requirements address two very different policies. *Missel v. Overnight Motor Transport*, 316 U.S. 572 (1942). A regulation such as 29 C.F.R. §778.121 that addresses a purely overtime issue does not apply to a minimum wage analysis.

The Department of Labor Opinion Letter that Roto-Rooter cites is also inapplicable. It allows an employer to recoup a minimum wage subsidy in later weeks *so long as the employees are guaranteed to receive the minimum wage each week.* While Roto-Rooter purports to have a minimum wage guarantee, it does not. Rather than guarantee minimum wages, Roto-Rooter's pay policy causes minimum wage violations. As explained in the business expense claim section, Roto-Rooter's pay policy shifts business expenses onto Technicians without regard to the minimum wage. The result is regular minimum wage violations among Technicians. Call-backs also shift expenses, warranty expenses, onto Technicians, and they too play a part in the minimum wage violations. For example, the minimum wage violation that Plaintiff Bradley experienced in the week ending May 5, 2009 was a result of both substantiated expenses he had to incur on Roto-Rooter's behalf (PX 38-E at CHEMED/RR 42069) and a shifting of warranty expense through a call-back (PX 38-E at CHEMED/RR 42067).

Rather than support Roto-Rooter's claim that minimum wages can be both free-and-clear and only an advance, the Opinion Letter makes clear that minimum wages must be paid as earned wages each week, either as commissions or as a minimum wage subsidy. That is the gravamen of Plaintiffs' argument: that in paying the Technicians' commissions in satisfaction of

its minimum wage obligation, Roto-Rooter has admitted that the commissions are earned.[6] Taking back those wages in the form of call-backs is a wage deduction.

A. Written Authorizations

As discussed in Plaintiffs' opposition to Roto-Rooter's motion for summary judgment, Roto-Rooter's "written authorization" on the DLTS does not meet the state law requirements because the authorizations (1) do not include the amount of the call back; (2) are not voluntary because they are a condition of employment; or (3) are not knowing because the amount of the call-back is not listed. Roto-Rooter's claim that the callbacks are disclosed to Technicians in the Preliminary Driver Report and DTLS is simply wrong. The DLTS is a time record and does not list any pay information. While the DLTS refers to the Preliminary Drivers Report, that document only lists the revenue the Technician generated, not his commissions on it. Determining the commission on the revenue requires further calculation.[7] The only place the actual call-back deduction is listed is on the Weekly Drivers Report, a document that Technicians receive after the deduction has been taken. PX 14, Policy 475 at CHEMD/RR 21635 (explaining that the Weekly Drivers Report shows Technicians' final gross pay).

Because the wage-deduction authorization form that Roto-Rooter offers does not include the amount of the deduction and is not informed and voluntary, Plaintiffs are due summary

[6] The Opinion Letter does not address the legality of subsequent deductions because the FLSA does not regulate wage deductions. Plaintiffs raise the illegal deduction claims under state laws.

[7] Where a Technician suffers a call-back, the Preliminary Driver Report shows a reduction in the revenue credited to the Technician in the amount of the revenue covered by the warranty. *See* Plaintiffs' Additional Material Facts Not in Dispute ("PSMF2") at ¶ 53. To determine the actual pay deduction taken, Roto-Rooter has to perform further calculations on the revenue, including adjustments to the revenue figures and application of the commission rate for that type of job.

judgment that Roto-Rooter cannot meet the state law requirements for authorization of a wage deduction.

III. Summary Judgment on Liquidated Damages Is Appropriate

Roto-Rooter does not contest that courts can and do grant summary judgment on the issue of liquidated damages. *See, e.g., Young v. Cooper Cameron Corp.*, No. 04 Civ. 5968, 2007 WL 2809871 at *1 (S.D.N.Y. Sept. 26, 2007) (granting summary judgment on the issue of liquidated damages). Its only argument is that Plaintiffs have not yet established liability. But Plaintiffs have shown both that Roto-Rooter's policy of shifting its business expenses, including the cost of the van itself, onto Plaintiffs without regard to the effect on the minimum wage is a violation of the FLSA and that its call-backs are illegal wage deductions. Roto-Rooter has offered no evidence that its violations were in good faith and based on a reasonable interpretation of the law. Therefore, Plaintiffs are due summary judgment on the issue of liquidated damages with respect to those claims. Fed. R. Civ. P. 56; *see also* 29 U.S.C. § 260 (2012) (relief from mandatory liquidated damages is an issue for the Court to decide).

IV. Plaintiffs Are Due Summary Judgment With Respect to Non-Class States

Roto-Rooter does not offer any reason why the Court cannot render summary judgment on the issue of illegal deductions for opt-in Plaintiffs from non-class states. The only issue Roto-Rooter raises is with respect to Kentucky, South Carolina, and West Virginia, claiming that it operates no offices in those states. But even if Roto-Rooter does not have an office in a state, it does not follow that its Technicians do not perform work in that state. For example, Technicians from the Cincinnati, Ohio office performed work in nearby Kentucky, and Technicians from the Raleigh, North Carolina office performed work in nearby South Carolina. Nevertheless,

Plaintiffs are content with Roto-Rooter's concession that the Court's determination as to whether call-backs are wage deductions or not applies with equal force in the non-class jurisdictions.

CONCLUSION[8]

Roto-Rooter's opposition does not raise any disputed material facts about its pay policies or their affects, nor has it raised any facts showing that it acted in good faith in developing and implementing these pay policies. Unable to contest the facts, Roto-Rooter offers legal arguments that are contrary to basic legal principles and cannot prevail. Because the undisputed facts show regular violations of state and federal minimum wage laws and systematic violations of state law prohibitions on wage deductions, Plaintiffs are due summary judgment that Roto-Rooter's policies are illegal and that Roto-Rooter is liable for liquidated damages for any back wages owed.

[8] Plaintiffs incorporate the arguments made in their opposition to Roto-Rooter's moving brief, Doc. No. 251, in reply to Roto-Rooter's points III (Circumstances Unique to California, Hawaii, and Indiana) and V. (Chemed as an Employer).