UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| 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,<br>Plaintiffs,<br><br>v.<br><br>CHEMED CORPORATION and ROTO-ROOTER SERVICES COMPANY,<br><br>Defendants. | 10 Civ. 0876 (BMC)<br><br>ORAL ARGUMENT REQUESTED |

Defendants' Memorandum of Law in
Opposition to Plaintiffs' Motion for Summary Judgment

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Defendants Chemed Corporation ("Chemed") and Roto-Rooter Services Company ("RRSC") (together, the "defendants") respectfully submit this memorandum of law in opposition to plaintiffs' motion for summary judgment.[1]

Preliminary Statement

Plaintiffs' remarkable failure to submit evidence sufficient to support their claims requires denial of their motion for summary judgment. In seeking summary judgment with respect to federal claims asserted on behalf of 432 opt-in plaintiffs and state claims asserted on behalf of 1,855 class members from fourteen different states, plaintiffs submit far less than the minimum required of a party seeking summary judgment.

For example, in seeking summary judgment on their claims that defendants caused them to cover expenses properly attributable to RRSC with the result that they earned less than the required minimum wage in certain weeks (the "Business Expense Claim"), plaintiffs submit evidence regarding only a single alleged incident regarding a single technician in a single branch in a single week. Seemingly, they expect the Court to extrapolate this one alleged incident – which itself is subject to attack – across the perhaps one hundred thousand or more weeks at issue with respect to the collective and class members. Plaintiffs' failure to submit sufficient evidence is not cured by their "Exhibit D" – a document they produced in response to defendants' interrogatories – because it is inadmissible and unsupported by any evidence of supposed violations.

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[1] Terms defined in Defendants' Memorandum of Law in Support of their Motion for Summary Judgment and/or Decertification of the Class and Collective Actions ("defendants' moving brief") have the same meaning herein. The declarations of Robert N. Holtzman and Gary Sander submitted in support of Defendants' Motion for Summary Judgment and/or Decertification of the Class and Collective Actions are referred to herein as the "Holtzman Decl." and the "Sander Decl."

Plaintiffs similarly fail to carry their burden to prove the principles of law upon which they purport to base their claims, ignoring that they seek summary judgment under the laws of fifteen separate jurisdictions. Their failure to present the law governing their claims or apply such law to the record evidence in this case mandates rejection of their motion.

Finally, plaintiffs seek summary judgment with respect to certain claims that are barred as a matter of law or with respect to which there are literally no collective or class members.

Wrapped in the trappings of summary judgment, plaintiffs' motion in reality seeks an advisory opinion from the Court regarding how the law might be applied if they could present evidence sufficient to support their claims. In so doing, plaintiffs seek to turn on their head the requirements of Rule 56. It is their burden, as movants, to demonstrate both the absence of genuine disputes of material fact *and* that they are entitled to judgment as a matter of law. This they have abjectly failed to do. Accordingly, plaintiffs' motion should be denied in its entirety.

## Argument[2]

### I. Plaintiffs Have Failed to Carry Their Burden of Establishing that Summary Judgment Should be Granted on Their Business Expense Claims

Oversimplifying the issues and seeking to disclaim their burden of proof on their Business Expense Claims, plaintiffs erroneously contend that the "only" relevant question is which, if any, of the expenses incurred by technicians are primarily for RRSC's benefit. Plt. Br. at 16. But, as even the cases upon which plaintiffs rely make clear, requiring an employee to pay for business-related expenses does not violate the FLSA or similar state wage and hour laws. Rather, a violation occurs when an employee is required to pay for tools of the trade *only if* the costs of those tools, when deducted from the employee's weekly wages, cause the employee's

[2] As the Court is familiar with the facts underlying this action and the instant motion, defendants do not submit a separate statement of facts, but rather reference relevant facts in the argument sections below.

wage to fall below the minimum wage. *See Guan Ming Lin v. Benihana Nat'l Corp.*, 755 F. Supp. 2d 504, 511-12 (S.D.N.Y. 2010) ("[E]mployer can require employees to bear the cost of acquiring and maintaining tools of the trade so long as those costs, when deducted from the employees' weekly wages, do not reduce their wage to below the required minimum."); *see also* 29 C.F.R. § 531.35 ("[I]f it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the costs of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act."). Accordingly, plaintiffs cannot establish liability on their Business Expense Claims without proving both that they incurred business expenses that under applicable law constitute expenses of RRSC *and* that that such expenses caused their weekly wages to fall below the minimum wage. *See Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 708 (E.D.N.C. 2009) (denying employees' motion for summary judgment because they failed to establish that expenses at issue reduced their wages below the minimum wage); *see also Benihana*, 755 F. Supp. 2d at 512 (denying motion for conditional certification of a collective action because plaintiffs "do not state the amount of money they expend on purchasing and maintaining their vehicles, nor do they state whether these costs infringe on their wages so as to reduce them below the minimum threshold"); *Ramos-Barrientos v. Bland*, 661 F.3d 587, 595 (11th Cir. 2011) (in the context of determining whether an employer properly imposed expenses on employee, recognizing that employee carries the initial burden of "prov[ing] that the wages received were less than the statutory minimum").

Plaintiffs' motion for summary judgment on their Business Expense Claims should be denied because (i) plaintiffs have failed to carry their burden of proving that the expenses they

incurred caused their wages to fall below the minimum wage and (ii) there are multiple questions of fact about the extent to which plaintiffs' expenses were for RRSC's benefit and when those expenses were actually incurred.

A. Even Assuming That All of the Alleged Expenses Were for RRSC's Benefit, Plaintiffs Fail to Prove That Those Expenses Caused Minimum Wage Violations

Assuming that all of the expenses plaintiffs claim to have incurred were actually for RRSC's benefit and that they were incurred during the weeks plaintiffs contend, plaintiffs have nonetheless abjectly failed to assert proof sufficient to establish on either a collective- or class-wide basis that those expenses caused plaintiffs' wages to fall below the minimum wage. This is fatal to plaintiffs' motion for summary judgment on their Business Expense Claims. *See Garcia,* 644 F. Supp. 2d at 708 (denying employees' motion for summary judgment because they failed to establish that their expenses reduced their wages below the minimum wage).

Remarkably, plaintiffs present evidence supporting just *one* alleged violation with respect to *one* Discovery Plaintiff in *one* week of his employment. Plaintiffs contend that they have submitted documentation showing that the expenses LeVoid Bradley (who worked in Missouri) incurred during the work week ending April 21, 2009 caused his wages to fall below the minimum wage. Plt. Br. at 9; Plt. 56.1 Stmt. ¶ 100. With respect to this alleged violation, plaintiffs submit documentary evidence regarding Mr. Bradley's weekly wages, hours of work, and alleged expenses. On this motion for summary judgment, plaintiffs do not rely upon – or even submit – similar evidence with respect to any other supposed violation.

In support of their assertion that this one instance is "hardly an isolated example," plaintiffs rely solely upon Exhibit D of their own interrogatory responses. Plt. Br. at 9; Plt. 56.1 Stmt. ¶ 102. This effort fails because a party is prohibited from relying upon its own interrogatories responses to support its motion for summary judgment. *Duff v. Lobdell-Emery*

*Mfg. Co.*, 926 F. Supp. 799, 803 (N.D. Ind. 1996) ("If a party relies upon an opposing party's answer to interrogatories, the answers are admissible as statements of a party opponent . . . but a party's own answers to interrogatories are not so admissible.") (citing Charles A. Wright, Arthur R. Miller & Richard L. Marcus, 8A Federal Practice and Procedure § 2180, at 340 (1994)); *Gilmore v. Macy's Retail Holdings*, Civ. No. 06-3020 (JBS), 2009 WL 140518, at *9 (D.N.J. Jan. 20, 2009) (a party may not introduce as evidence its own answers to interrogatories).

Moreover, Exhibit D is simply a list of the weeks in which plaintiffs contend a minimum wage violation occurred because the Discovery Plaintiffs incurred unreimbursed expenses – it consists of nothing more than names of Discovery Plaintiffs and dates, with no indication of what hours the technicians worked during such weeks, what they were paid, the amount of expenses they allegedly incurred, or to what such expenses related. Plaintiffs have not submitted any documentation to support the entries on Exhibit D, such as wage statements or documentation of claimed expenses. Exhibit D is nothing more than an inadmissible self-serving list of instances that plaintiffs would like to claim constitute violations of the minimum wage laws. Thus, plaintiffs have failed to sustain the burden placed on a proponent of summary judgment to come forward with evidence upon which liability may be found.

This is particularly crucial because plaintiffs seek a finding of liability on behalf of a collective and fourteen separate classes – given that the employment of the thirty-nine Discovery Plaintiffs extends over at least 6,359 weeks (Plt. 56.1 Stmt. ¶ 101), the number of weeks at issue with respect to the nearly 2,000 members of the collective and the classes must be well in excess of 100,000. Plaintiffs elected not to use an expert witness and therefore do not propose to provide any statistical analysis to support their claims. As a consequence, they are incapable of

demonstrating that there is any statistical significance to the single incident they offer, or even (should they be credited) the instances alleged on Exhibit D.

Moreover, Exhibit D reveals that summary judgment on a collective- or class-wide basis cannot be justified because many of the Discovery Plaintiffs do not contend that they *ever* incurred expenses that caused their weekly wages to fall below the minimum wage. There are no entries whatsoever on Exhibit D with respect to Messrs. Hollister, Poczok, Roseme, Buono and Villatoro, and no entries within the FLSA limitations period for Messrs. Castillo, Cardwell, Soto, Najmon, Richardson and Cain. Thus, Exhibit D does not contain any entries during the FLSA limitations period for *more than one quarter* of the Discovery Plaintiffs. Holtzman Decl. Ex. 6; *see also* Sander Decl. Ex. 5. Similarly, plaintiffs have not included any entries on Exhibit D for one of the Discovery Plaintiffs from Connecticut (Mr. Hollister), Illinois (Mr. Poczok), New Jersey (Mr. Roseme) and New York (Mr. Buono). Holtzman Decl. Ex. 6; *see also* Sander Decl. Ex. 5. Since plaintiffs acknowledge that such a large percentage of the Discovery Plaintiffs cannot prove their Business Expenses Claims, plaintiffs cannot carry their burden of demonstrating that summary judgment on a nationwide or statewide basis is warranted.[3]

The deficiencies in plaintiffs' proof do not relate solely to damages but rather go to the core of liability – if plaintiffs cannot demonstrate that their weekly wages were reduced below the minimum wage requirements because of expenses properly attributable to defendants, there is no minimum wage violation and no liability. Indeed, if this were treated as an element of the

[3] To the contrary, as discussed in defendants' moving brief (at 46-48), the Court should grant summary judgment dismissing the FLSA Business Expense Claims of Messrs. Castillo, Hollister, Cardwell, Poczok, Soto, Najmon, Roseme, Buono, Richardson, Villatoro and Cain, and the state law Business Expense Claims of Messrs. Hollister, Poczok, Roseme and Buono because plaintiffs' interrogatory responses constitute an acknowledgement that they cannot prove these claims for those individuals, and the Court accordingly should decertify the collective and class actions with respect to these claims.

damages case rather than an issue of liability, an award of summary judgment to plaintiffs would amount to nothing more than a declaration that defendants are liable to the extent expenses properly attributable to them as employers caused a technician's wages to fall below the required minimum wage in any week – that is, a mere recitation of the law without any application to the facts at issue in the case. Such a declaration would do nothing to advance the case and be meaningless in terms of resolving plaintiffs' claims.

B. Questions of Fact Exist About Both the Extent to Which Plaintiffs' Expenses Were For RRSC's Benefit and When Expenses Were Incurred

Plaintiffs' motion also should be denied because questions of fact exist as to which expenses were for RRSC's benefit and when technicians actually incurred those expenses. As plaintiffs' memorandum of law confirms, their Business Expense Claims are based in large part on expenses relating to the purchase and maintenance of their vans. Plaintiffs claim that technicians' vans are tools of the trade and thus they are "entitled to the difference between the minimum wage and their actual net wage in workweeks in which they incur the expense of acquiring the van" and other expenses relating to the van. Plt. Br. at 17 (internal quotation and citation omitted).

Plaintiffs' contention that RRSC must reimburse technicians for all of their van-related expenses misstates the law. As they acknowledge (Plt. Br. at 16-17), only expenses plaintiffs incurred on RRSC's behalf should be considered as part of their Business Expense Claims. *See* 29 C.F.R. § 778.217. There are questions of fact about how much of plaintiffs' weekly van-related expenses were actually incurred on RRSC's behalf. Some of the Discovery Plaintiffs used their vans for personal reasons while they were employed by RRSC.[4] Indeed, LeVoid

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

Bradley, the sole technician with respect to whom plaintiffs submit evidence of expenses, admitted that he used his vehicle for personal reasons not related to his work for RRSC. Bradley Tr. at 172. To the extent a Discovery Plaintiff used his vehicle for personal endeavors during a given week, expenses, such as gas, depreciation, and maintenance, related to the technician's personal usage would not be considered in determining the proper minimum wage payment payable to the technician. *See* 29 C.F.R. § 778.217. Similarly, since plaintiffs' commuting expenses are by law not RRSC's responsibility, the length and expense of each technician's daily commute must be accounted for, and a mere assertion of expenses does not suffice to establish that such expenses are properly attributable to RRSC. *See* 29 C.F.R. § 531.32; *see also Rivera v. Brickman Group, Ltd.*, Civ. No. 05-1518, 2008 WL 81570, at *9 (E.D. Pa. Jan. 7, 2008) ("[O]rdinary commuting is not primarily for the benefit of the employer for FLSA purposes."). Moreover, such expenses must be separately considered for each plaintiff for each week because the allocation of overall van expenses will differ from individual to individual, as will the concomitant effect on the minimum wage calculations.

In addition, even expenses that properly are attributable to an employer are not necessarily accounted for in the week they are incurred. An employer is permitted to "approximate reasonably the amount of an employee's vehicle expenses without affecting the amount of the employee's wages for purposes of the federal minimum wage law." *Wass v. NPC Int'l., Inc.*, 688 F. Supp. 2d 1282, 1286 (D. Kan. 2010); *see also Darrow v. WKRP Management, LLC,* No. 09-cv-01613-CMA-BNB, 2011 WL 2174496, *5 (D. Colo. June 3, 2011) ("Defendants correctly argue that they did not have to reimburse Plaintiff for his actual expenses, but could approximate Plaintiff's vehicle-related expenses in setting the reimbursement rate."). Because technicians' commission rates include a component – 15% of the total revenues and as much or

more than 50% of the total commission – that is intended to cover all work-related expenses, including those related to the operation of their vehicle, Sander 10/29/10 Tr. at 248-49; PX 30, there is a question of fact as to whether this amount constitutes a reasonable approximation of technicians' expenses, an analysis that will necessarily differ by technician, branch and state.

Further, plaintiffs mistakenly suggest they incur the entire cost of purchasing their van during the week in which it is acquired. As the record reflects, however, many Discovery Plaintiffs finance the purchase of their van over a period of time and thus they do not incur the full cost of purchasing their van in the week that it is acquired. *See, e.g.,* Gorman Tr. at 74; Harris Tr. at 89; Kennedy Tr. at 135-137; Morris Tr. at 122; Sabas Tr. at 78; Severino Tr. at 126; Soto Tr. at 157-158; Van Horn Tr. at 135-139. In fact, even where a technician makes monthly finance or lease payments, the entire van-related expense for that month is not incurred in the week the payment is made. Rather, the expense of the monthly payment is reasonably spread across a one-month period, and RRSC accounts for such expenses in this manner.

While certain van-related expenses such as parking and tolls are properly accounted for during the week in which those expenses are incurred, an employer may satisfy the reasonable approximation requirement by spreading out the accounting over a period of time. Thus, for example, the expense of replacing tires, routine maintenance such as oil changes, or significant engine work may properly be accounted for over the life of those repairs. With respect to the one alleged FLSA violation for which plaintiffs have submitted any evidence, plaintiffs claim that Mr. Bradley was paid $516.20 in wages for the week ending April 21, 2009 but that he incurred $1,098.35 in business-related expense. Plt. Br. at 9; Plt. 56.1 Stmt. ¶ 100. The documents upon which plaintiffs rely show that $970.66 of the $1,098.35 of expenses Mr. Bradley submitted for that week related to significant van repairs, replacing his van's fuel

pump. PX 38-C at CHEMED/RR 00041762. Although Mr. Bradley might have paid for this service during the week ending April 21, 2009 (in fact, the evidence does not reveal whether or not he actually paid for the expense during that week), the cost of his fuel pump properly may be amortized over its life.

Moreover, because these claims are asserted on behalf of all commissioned technicians of RRSC employed during the relevant limitations period, summary judgment can be awarded only if plaintiffs demonstrate that they have established liability on a class basis. The record evidence unequivocally demonstrates that many members of the collective and class actions are provided work vans by RRSC and therefore they do not incur costs related to the purchase or maintenance of a vehicle.[5] Sander 10/29/10 Tr. at 45, 47. Technicians who drive company vans are generally not required to pay for gas, insurance, or van maintenance, all of which are covered by Roto-Rooter. Sander 10/29/10 Tr. at 249-50; 292; *see also* Castillo Tr. at 39-40, 47-48, 94-95. A determination of liability regarding the purchase and maintenance of vans would illogically and improperly apply to class members who do not own their own van or incur any van-related expenses. The same is true with respect to equipment, which many technicians are not required to purchase. *See, e.g.,* Docket Entry No. 189 ¶ 18; Sander 10/29/10 Tr. 293; Holtzman Decl. Ex. 8 at CHEMED/RR 00005700; Roseme Tr. at 148. And, as discussed with respect to Mr. Bradley

[5] For example, in California, Roto-Rooter provides all Technicians with company vans. Docket Entry No. 189 at ¶ 18; Sander 10/29/10 Tr. at 293; Castillo Tr. at 37-40. Licensed plumbers are provided company-owned vans in some branches, while other types of technicians in those same branches are not. *See* Poczok Tr. at 141-42; Cardwell Tr. at 141, 143. In the Bridgeport, Connecticut branch, Mr. Hollister was given a company van while Mr. Saint Juste was required to purchase his own van. *See* Hollister Tr. at 85, 104; Saint Juste Tr. at 144-45. Moreover, technicians who handle certain types of work are generally not required to purchase or maintain their own vehicles and instead are provided company vehicles. *See* Buono Tr. at 139; Cain Tr. at 139-40; Cruz Tr. at 84-86; Drejaj Tr. at 89; Gorman Tr. at 73; Hess Tr. at 118-19; McMahon Tr. at 104; Morangelli Tr. at 128-29; Smith Tr. at 144-45; Stanley Tr. at 79-80.

above (at pp. 7-8), expenses associated with technicians' commuting and other personal use of vehicles are not properly attributable to defendants.[6]

For these reasons, plaintiffs' request for summary judgment on their Business Expense Claims should be denied.

C. RRSC Has Not Violated Its Record-Keeping Obligations

Plaintiffs imply that their failure to prove class-wide liability on their Business Expense Claim is due to RRSC's supposedly inadequate record-keeping. They request that the Court find as a matter of law that RRSC has violated its FLSA record-keeping obligations on a class-wide basis.

This request is premature because, as plaintiffs themselves acknowledge, the sufficiency of RRSC's records is relevant only to plaintiffs' burden of proof for establishing damages. Plt. Br. at 18 ("Establishing [a record keeping violation] is important because it shifts the evidentiary burden of proof for establishing damages."); *see Chao v. Vidtape, Inc.*, 196 F. Supp. 2d 281, 293 (E.D.N.Y. 2002) ("When an employer fails to keep records in conformity with his statutory duty, the Supreme Court has set forth a burden shifting analysis for calculating the amount of uncompensated work."). The Court, however, has certified the class actions only with respect to liability and the damages phase of this lawsuit, to the extent it may ultimately become necessary, has been severed. Class Certification Order at 38, 41. Any determination about the applicable burden of proof for proving damages should be deferred until the damages stage of this litigation.

Plaintiffs have in any event failed to demonstrate that RRSC violated any of its record-keeping obligations. Plaintiffs' record-keeping claim concerns only the sufficiency of RRSC's

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

records relating to out-of-pocket expenses technicians claim to have incurred.[7] But the plain language of 29 C.F.R. § 516.2(a)(10), upon which plaintiffs rely, does not impose on employers an obligation to maintain records relating to out-of-pocket expenses incurred by employees. Rather, it provides that an employer must maintain records relating to deductions from pay:

> Total additions to or *deductions* from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and *deductions*.

29 C.F.R. § 516.2(a)(10) (emphasis added). The out-of-pocket expenses that plaintiffs allegedly incurred are thus not a subject of this regulation.[8]

It makes perfect sense that the regulation would not impose upon employers the responsibility of keeping records for such expenses. To the extent a technician spent his own money for RRSC's benefit, only the technician would actually know how much he spent. As a consequence, if the technician did not report those expenses to RRSC – as plaintiffs concede, many Discovery Plaintiffs never submitted expenses for reimbursement[9] and others submitted expenses only sometimes and not for all types of

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[7] Indeed, plaintiffs acknowledge that RRSC maintains "extraordinarily detailed" time records that contain a "wealth of . . . information." Plt. Br. at 3, 4.

[8] The only support plaintiffs cite for their contention that 29 C.F.R. § 516.2(a)(10) applies to an employee's out-of-pocket expenses is *Hodgson v. Newport Motel, Inc.*, No. 71-1007-Civ, 1979 WL 1975, at *4 (S.D. Fla. May 30, 1979). But the court in *Hodgson* concluded only that the employer maintained "incomplete and possibly inaccurate" time records and kept no records of deductions the employer made from employees' wages and said nothing about an employer's supposed obligation to maintain records concerning out-of-pocket expenses of employees that are not submitted to or charged by the employer. *Id.* (employer deducted from waitresses' and bartenders' wages shortages for walkouts and spills). As such, this case says nothing about an employer's obligation to maintain records of employees' out-of-pocket expenses. *Arriaga v. Florida Pacific Farms, Inc.*, 305 F.3d 1228 (11th Cir. 2002), also cited by plaintiffs, does not address record-keeping requirements in any respect.

[9] *See* Branco Tr. at 119-20; Buono Tr. at 132, 140, 156, 158; Hess Tr. at 88, 90, 92; Kennedy Tr. at 102-03, 105; McMahon Tr. at 102-03, 108.

expenses[10] – RRSC would have no way of recording the technicians' expenses. And plaintiffs acknowledge that RRSC does maintain records of the expenses that technicians report. *See* Plt. 56.1 Stmt. ¶¶ 88-91.

Accordingly, although it is premature to consider whether RRSC has satisfied its record keeping obligations, RRSC is not obligated to maintain the types of records about which plaintiffs complain.

II. Plaintiffs Have Failed to Carry Their Burden of Establishing that Summary Judgment Should be Granted With Respect to Their Illegal Deduction Claims

As plaintiffs acknowledge, adjustments to commissions for call-backs relating to warranty work do not constitute an illegal deduction from wages if the commission did not become "earned" before the adjustment was made, such that the adjustment is part of the calculation of the final wage rather than a deduction from a wage that previously was earned. Docket Entry No. 198 at 18; Class Certification Order at 25; *see* Plt. Br. at 20. Accordingly, the parties agree that the Court must first decide whether commission adjustments for call-backs are made to an "advance" of commissions – in which event plaintiffs concede they have no valid claims – or are deductions from wages previously earned. Only if the Court determines that the commission adjustments were not made to advances must it then consider whether the deductions were legal.

Plaintiffs' request for summary judgment should be denied because the record establishes the parties understood that technicians' commission payments were advances until the warranty period expired and the invoice was paid. Even if the Court were to determine that the

[10] *See* Cain Tr. at 116, 120; Cardwell Tr. at 56-57, 72, 75-76; Lawson Tr. at 60-61; Mills Tr. at 76, 87, 141-42; Najmon Tr. at 66-67, 126-27; Roseme Tr. at 155-57, 164; Smith Tr. at 145-46; Stanley Tr. 109-11; Yasuna Tr. at 69-70.

commission adjustments constituted deductions from wages, the deductions are not illegal under many of the Class States' laws because technicians authorized them in writing.

A. Defendants Have Not Made Illegal Deductions from Wages Because Commission Payments are Advances, Not Earned Wages

Ignoring that they purport to seek summary judgment on their Illegal Deduction Claims under the laws of the twelve states for which that claim has been certified for class treatment, plaintiffs cite only two cases to support their contention that adjustments made in connection with warranty call-backs are made to wages rather than advances of commissions. Plaintiffs cite those two cases (one each from New York and Minnesota) for the very general proposition that the Court should consider whether the parties have a written agreement describing when commissions become earned. *See* Plt. Br. at 21. As set forth in defendants' moving brief (at p. 55-65), however, the core inquiry under each of the Class States' laws is whether there was an understanding between RRSC and plaintiffs that commission payments were advances. As the state-by-state discussion in defendants' moving brief shows, while a binding agreement that describes when a commission becomes earned certainly would be relevant to this determination, courts in the Class States also routinely look to the employer's policies, practices and other documentation as evidence of the parties' understanding. *See id.*

Here, the record demonstrates that the parties understood that commission payments received by plaintiffs were advances subject to adjustment because: (i) the parties have not entered into a written agreement addressing when technicians' commissions are earned; (ii) RRSC's Employee Handbook specifically provides that "all commissions are considered advances until the invoice is paid and the warranty period expires;" (iii) most technicians have signed an acknowledgement stating that they have reviewed and understand the policies in the Employee Handbook; (iv) technicians sign an acknowledgment on a weekly basis stating that

they agree to policy that describes commissions as advances; (v) technicians have for many years been aware of the call-back policy and associated adjustments to commissions; and (vi) technicians acquiesce to RRSC call-back policy through their continued employment.

Focusing solely on the Service Technician Commission form (the "Compensation Form"), plaintiffs claim that "the parties have a written contract that provides that Technicians' commissions are earned when they are paid each week." Plt. Br. at 21. As an initial matter, plaintiffs have not offered proof that all of the Discovery Plaintiffs signed a Commission Form. In fact, there is no evidence that seventeen of the thirty-nine Discovery Plaintiffs have signed a Commission Form. Declaration of Chana Stewart-Blalark dated March 9, 2012 ("Stewart Decl.") at ¶ 6. Thus, more than 40% of the Discovery Plaintiffs cannot rely on the document that forms the basis of plaintiffs' argument.

Plaintiffs' contention that the Commission Form "makes clear that commissions are . . . earned each week when they are paid to the technician" is simply untrue. Plt. Br. at 21. That document does not in any way reference when technicians' commissions are earned. The Commission Form merely states:

> [C]ommissions are based upon the amounts collected or billed (authorized) depending on the type of work done, LESS any sales, excise or other taxes; any special jobs costs such as permits, helpers, and outside labor, and any special charges for each job such as insurance surcharges that the company may deem necessary and may impose from time to time.

PX 30. The Commission Form simply describes certain items relating to technicians' commission, such as their commission rate. It is not, however, a fully integrated agreement and does not identify all details relating to the calculation of technicians' commissions – indeed, it says nothing whatsoever about when a commission is considered to be earned. The Commission

Form does not support plaintiffs claim that the parties agreed that technicians' commissions are "earned when they are paid each week."

RRSC's Reversal of Commission Policy, which has appeared in the Employee Handbook since February 2008, demonstrates that the parties understood that the technicians received commission advances that were subject to adjustment. The Employee Handbook unambiguously states that technicians' commission payments are advances and that their wages are not earned until the warranty period expires and the invoice is paid:

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

Holtzman Decl. Ex. 8 at CHEMED/RR 00005699 (emphasis added); *see also* Stewart Tr. 29 (technicians' pay is "considered an advance until the job is paid for or the guarantee is exhausted").[11] Twenty-eight of the thirty-nine Discovery Plaintiffs have signed acknowledgements stating that they "understand that it is my responsibility to read and comply with the policies contained in the Handbook" and that they have "full access to the Handbook, which is readily available . . . in a public place at my work location." Holtzman Decl. Ex. 7; Stewart Tr. 39 (ten copies of the Handbook are available at each branch for technicians' review).

[11] Plaintiffs rely upon Mr. Sander's response "[i]t's possible" to a question at deposition of whether money could be "taken back" after the technician "had his commission calculated and received his commission." *See* Sander PX 3 at 263. But Mr. Sander's ambiguous answer to this question – which said nothing about advances or when commissions are earned – in no way establishes that call-backs are assessed against earned commissions.

Plaintiffs attempt to distance themselves from the Employee Handbook's unequivocal language by claiming that it is not "contractually binding" because it includes a disclaimer. Plt. Br. at 22-23. But here, plaintiffs miss the point – defendants do not claim that the Employee Handbook is a contract. Rather, as the Class States' laws recognize, the Employee Handbook (and technicians' acknowledgements stating that they "understand that it is my responsibility to read and comply with the policies contained in the Handbook") is strong evidence that the parties understood that commissions were advances subject to adjustment. *See, e.g., Graff v. Enodis Corp.*, No. 02 CIV. 5922 (JSR), 2003 WL 1702026, at *2 (S.D.N.Y. Mar. 28, 2003) (considering an employer's "policy bulletin" to determine when commissions were earned and granting summary judgment to employer on claim that employer failed to pay wages due); *Neal v. E. Controls, Inc.*, No. A-4304-06T1, 2008 WL 706853, at *7 (N.J. Super. Ct. App. Div. Mar. 18, 2008) (although employee had not signed an acknowledgement of commission policy, nonetheless relying on policy to find that "no statutory mandate was violated because . . . commissions were not wages due"); *Martin v. Clear Channel Television, Inc.*, No. Civ. 00-753 MJDJGL, 2001 WL 1636488, at *2 (D. Minn. July 16, 2001) ("In the absence of the statutory definition of when a commission is 'earned,' a trial court may consider the policy as it existed between the instant parties."); *Helmuth v. Distance Learning Sys. Ind.*, 837 N.E. 2d 1085, 1091 (Ind. Ct. App. 2005) (wages were not earned where the employer "informed its employees when they were hired of the chargeback policy"). Moreover, the fact that the Employee Handbook contains a disclaimer does not render it meaningless or diminish its value as evidence of an employer's policies. *See Kaplan v. Capital Co. of Am. LLC*, 298 A.D.2d 110, 111, 747 N.Y.S.2d 504, 505 (1st Dep't 2002) ("Although the handbook asserted that the policies and benefits

contained therein were not intended to be contractual . . . this provision was plainly not intended to render the handbook wholly nugatory.").

The Detailed Listing of Time technicians are provided each week further confirms the parties' understanding that technicians' commissions were advances. The Detailed Listing of Time has, since February 2008, contained an authorization that specifically states:

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

*See* Holtzman Decl. Ex. 18. All of the Discovery Plaintiffs employed after February 2008 have signed these authorizations. *Id.* The OPCC adjustment system to which the authorization refers is, of course, the same policy that states "all commissions are considered advances until the invoice is paid and the warranty period expires." *Id.* at Ex. 8 at CHEMED/RR 00005699.

Moreover, as plaintiffs acknowledge, RRSC's practice of making commission adjustments for call-backs has been in place since well before February 2008. Plt. 56.1 Stmt. ¶¶ 132, 138; Sander Decl. ¶¶ 85-86. Indeed, adjustments for callbacks have been made and disclosed to technicians on a weekly basis in the Preliminary Driver Report and Weekly Driver Report throughout the statute of limitations period. *See* Holtzman Decl. Ex. 19. Since technicians were aware of RRSC's call-back policy, accepted commission adjustments for call-backs that are in their favor and have elected to continue working for RRSC, they have accepted the terms of the policy. *See Neal*, 2008 WL 706853 at *4 (an "employer's policies are deemed to be unilateral contracts which an [at-will] employee accepts by continuing his employment" and "[a]ny policy set forth by an employer, including compensation terms, is presumed accepted by the employee if the employee becomes aware of the policy and chooses to continue working"); *Helmuth*, 837 N.E. 2d at 1091 ("[T]here is evidence showing that [defendant] informed its

employees when they were hired of the chargeback policy . . . . Thus, [plaintiff's] subsequent conduct in accepting employment . . . indicates that he acquiesced in those terms of employment."); *Kosta v. Ohio Outdoor Advertising Corp.*, No. 92-A-1704, 1992 WL 367027, at *1 (Ohio App. Ct. Dec. 11, 1992) ("[A]ppellant's acceptance of the amount of money that exceeded his first month's draw convinces us that he was aware of the industry's practice and agreed to be bound by it.").

Finally, plaintiffs argue without any authority that commissions cannot be considered advances because, if they are, the potential for subsequent adjustment precludes them from satisfying RRSC's obligation to pay the minimum wage. Plt. Br. at 22, 23-24. Plaintiffs' contention, however, is contrary to the regulatory structure established under the FLSA, caselaw, and guidance from the Department of Labor, all of which confirm that subsequent adjustments to commission advances do not result in violations of the FLSA. In *Powers v. Centennial Communications Corp.*, the court considered whether an employer's policy of "tak[ing] money out of its salespersons' paychecks in order to make up for earlier paid commission 'advances' that are now too high" because a customer subsequently canceled or downgraded the service sold was a violation of the FLSA because it had the effect of reducing the regular rate of pay used to calculate overtime premium pay. 679 F. Supp. 2d 918, 927 (N.D. Ind. 2009). Relying on 29 C.F.R. § 778.121,[12] the court held that the employer's "system of applying charge backs for

[12] In relevant part, 29 C.F.R. § 778.121 provides:

> If there are delays in crediting sales or debiting returns or allowances which affect the computation of commissions, the amounts paid to the employee for the computation period will be accepted as the total commission earnings of the employee during such period, and the commission may be allocated over the period from the last commission computation date to the present commission computation date, *even though there may be credits or debits resulting from work which actually occurred during a previous period.*

customer cancellations on sales made months previously is authorized by [the FLSA]. According to § 778.121, a commission paid in Month 6 for sales made in Month 6 may incorporate credits and debits associated with sales made in Month 1." *Id.*

Similarly, in an opinion letter issued under the FLSA, the DOL ruled that an employer did not fail to satisfy the "free and clear" requirement where amounts advanced to employees, in that case supplemental wages necessary for the employee to receive minimum wages in a given week, were recoverable from future compensation earned by the employee. Dep't of Labor Op. Letter Fair Labor Standards Act WH 506, 1981 WL 179034 (March 3, 1981). The key to that determination was that the employer's method ensured that the employee always received at least the minimum wage in each week of employment. *Id.* So too, here, RRSC's policies do not violate the "free and clear" requirement because the advance of commissions ensures that the technician receives cash payment of at least the required minimum wage and call-backs are not assessed to the extent doing so would reduce the technician's earnings below minimum wage.

Plaintiffs have failed to carry their burden of demonstrating that technicians' commission payments were anything other than advances subject to adjustment until the warranty period expired and the invoice was paid. Accordingly, their motion for summary judgment on these claims should be denied.

B. Even if the Court Determines that Plaintiffs' Commission Payments are Not Advances, Call-Backs are Permissible Under Connecticut, Illinois, Minnesota, and North Carolina Law Because Plaintiffs Authorized them in Writing

Even if the Court were to determine that plaintiffs' commissions constituted earned wages before RRSC made adjustments for call-backs and that they therefore effected deductions

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29 C.F.R. § 778.121 (emphasis added). Thus, the regulations promulgated under the FLSA specifically anticipate and authorize the existence of advances that are subject to subsequent adjustment.

from wages, the Court should nonetheless deny plaintiffs' motion for summary judgment with respect to their Illegal Deduction Claims under Connecticut, Illinois, Minnesota, and North Carolina law because plaintiffs have failed to establish that the deductions were made without plaintiffs' written authorization.[13] As plaintiffs concede (at p. 27) and as set forth in defendants' moving brief (at pp. 65-69), wage deductions are permitted under Illinois, Minnesota and North Carolina law if an employer obtains the employee's written consent before making the deduction. Plaintiffs ignore binding authority in erroneously contending that wage deductions are "categorically" prohibited under Connecticut law unless they are authorized on a form approved by the commissioner of that state's Department of Labor. Plt. Br. at 25 & n.20. The Connecticut Supreme Court has held that the portion of the statute that calls for an employee's authorization for a wage deduction to appear on a "form approved by the commissioner" is merely "directory" and an employer's "failure to receive the department's approval of the form does not invalidate the deductions or provide a right of action for the employees." *Weems v. Citigroup, Inc.*, 289 Conn. 769, 778, 789 (2008).

In an effort to overcome the laws of these states, plaintiffs improperly attempt to shift their burden of proof to defendants. They incorrectly assert that RRSC "bears the burden of showing that it obtained the required consent or provided the required notice in each case." Plt.

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[13] Notably, plaintiffs do not contend that commission adjustments for call-backs are either prohibited entirely or permitted only with written notice and consent in Missouri, *see* Plt. Br. at 25-27, and thus it appears plaintiffs are not moving for summary judgment with respect to their Illegal Deduction claim in that state. This does not come as a surprise since, as discussed in defendants' moving brief (at pp. 60-61), the Missouri statute upon which plaintiffs base their claim does not prohibit deductions from wages.

Moreover, plaintiffs rely on Ohio Rev. Code Ann. Section 4113.15 to support their claim that wage deductions for call-backs relating to warranty work would be "categorically" prohibited under Ohio law. Plt. Br. at 25 & n.26. But, as set forth in defendants' moving brief (at p. 63-64), claims under section 4113.15 have not been certified for class treatment and that statute is inapplicable to plaintiffs' Illegal Deduction Claim.

Br. at 27. They can cite no authority for this novel proposition. Indeed, summary judgment is appropriate only where the "'*movant* shows that there is no genuine dispute as to any material fact.'" *Cavelli v. New York City Dist. Council of Carpenters*, 10 CIV. 3708 (BMC), 2011 WL 4073462, at *4 (E.D.N.Y. Sept. 13, 2011) (Cogan, J.) (emphasis added). Plaintiffs have not even attempted to submit evidence showing that commission adjustments for call-backs are made in these states without written authorizations, or that the written authorizations used do not suffice under applicable law. *See* Plt. Br. at 27. Their motion should be denied for this reason alone.

Had plaintiffs attempted to offer such proof, they could not have carried their burden. As discussed above and in defendants' moving brief (at pp. 65-66), technicians in Connecticut, Illinois, Minnesota and North Carolina have signed Detailed Listing of Time sheets at the end of each week that specifically reaffirm their "agree[ment] to the terms of Roto-Rooter's OPCC adjustment system" and "authorize any commission reduction caused by negative OPCC adjustments." Declaration of Robert N. Holtzman dated March 9, 2012 ("Holtzman Opp. Decl.") at Exs. 3-10.

The Preliminary Drivers' Report, to which the authorization on the Detailed Listing of Time refers, also is provided to technicians during turn-in at the end of each week. Sander 10/29/10 Tr. 61-63. The Preliminary Drivers' Report details the amount of each commission adjustment for that week and identifies the reason the adjustment was made. Holtzman Decl. Exs. 15, 16, 17. Accordingly, before commission adjustments for call-backs are processed and reflected in technicians' pay checks, the amount of and reason for the commission adjustment is known to and authorized in writing by the technician.

Consequently, plaintiffs are not entitled to summary judgment on their Illegal Deduction Claims under Connecticut, Illinois, Minnesota and North Carolina law because technicians authorized call-back adjustments in writing.

C. To the Extent Plaintiffs' Motion Seeks Summary Judgment With Respect to Claims from Non-Class States, the Motion Should be Denied

Although plaintiffs do not delineate the states with respect to which they seek summary judgment, they cite authority and potentially may be moving for summary judgment on Illegal Deductions Claims arising from states that do not have certified classes. *See* Plt. Br. at 27. This is particularly confusing with respect to Kentucky, South Carolina and West Virginia because none of the named plaintiffs worked for RRSC in any of these states and no technicians from those states have opted-in to this lawsuit. In fact, RRSC does not even operate branches in Kentucky, South Carolina or West Virginia. Holtzman Opp. Decl. Ex. 11.

Plaintiffs concede that if commission payments are advances until after the expiration of the warranty period, then RRSC's call-back process is permissible in all jurisdictions. And they concede that deductions from wages are permissible in Maryland and Nevada to the extent they are authorized by technicians, and in South Carolina as long as technicians receive written notice of such deductions. Plt. Br. at 27 & nn.33, 35, 37. Accordingly, the arguments set forth above with respect to the Class States apply with equal force to these jurisdictions.

III. Circumstances Unique to California, Hawaii and Indiana Preclude Summary Judgment

To the extent the Court determines that summary judgment should be granted to plaintiffs in any respect, circumstances and laws unique to California, Hawaii and Indiana nonetheless require that plaintiffs' motion for summary judgment be denied with respect to claims based on the laws of the states.

In California, plaintiffs are not entitled to summary judgment on their Business Expense and Illegal Deduction Claims arising on or before August 6, 2008 asserted by technicians employed by RRSC on or before May 19, 2008 because, as set forth in defendants' moving brief (at pp.16-18), the California class representative and all members of the class released all claims against defendants as part of the settlement of a separate class action. Plaintiffs cannot carry their burden of demonstrating that summary judgment should be granted on their California Business Expense Claim because, as explained in defendants' moving brief (at p. 18), the record establishes that after January 14, 2008 RRSC began providing technicians with work vans it maintained and serviced. RRSC also provides technicians in California with tools and equipment necessary to perform their jobs. Docket Entry No. 189 ¶ 18; Sander 10/29/10 Tr. 293; *see also* Castillo Tr. at 133-34. Accordingly, there is no evidence that any California technician's wages were reduced below the minimum wage after January 14, 2008 by technician expenses. Similarly, plaintiffs have failed to carry their burden of proving liability on their California Illegal Deduction Claim because, as plaintiffs acknowledge and as is set forth in defendants' moving brief (at pp. 18-19), RRSC did not make commission adjustments for call-backs relating to warranty work after that January 14, 2008. *See* Plt. 56.1 Stmt. ¶ 134.

Summary judgment on plaintiffs' Hawaii Business Expense Claim should be denied with respect to claims arising on or after July 24, 2009 because, as explained in defendants' moving brief (at pp. 20-21), after July 24, 2009, plaintiffs were not "employees" covered by that state's minimum wage laws. Technicians in Hawaii are not required to purchase equipment or tools. Sander 10/29/10 Tr. at 293. Likewise, plaintiffs cannot prevail on their Hawaii Illegal Deduction Claim because they admit that RRSC does not make commission adjustments for call-backs

relating to warranty work in that state. Plt. 56.1 Stmt. at ¶ 134; *see also* Docket Entry No. 189 at ¶ 22; Sander 10/4/11 Tr. at 62; Yasuna Tr. at 99.

Finally, as set forth in defendants moving brief (at p. 20), plaintiff cannot prove that they are entitled to summary judgment on their Business Expense Claim under Indiana law because defendants are not "employers" for purposes of that state's minimum wage statutes.

IV. Plaintiffs' Request for a Finding that Defendants Are Liable for Liquidated Damages is Premature

As plaintiffs acknowledge, "under the FLSA, liability is a predicate . . . to a finding of liquidated damages." *Carlson v. C.H. Robinson Worldwide, Inc.*, No. Civ. 02-3780 JNE/JGL, 2005 WL 758601, at *15 (D. Minn. Mar. 30, 2005); *see* Plt. Br. at 27 ("[a]n employer *found* to have violated [the FLSA]" shall be liable for liquidated damages) (emphasis added). Consequently, in the context of motions for summary judgment, courts around the country routinely hold it premature to address whether plaintiffs are entitled to liquidated damages where liability under the FLSA has not been established. *See, e.g.*, *Wong v. HSBC Mortgage Corp.*, 749 F. Supp. 2d 1009, 1020-21 (N.D. Cal. 2010) (determining on a motion for summary judgment that the "question of entitlement to an award of liquidated damages is premature" because plaintiffs had not carried their burden of establishing a FLSA violation); *Lemieux v. City of Holyoke*, 740 F. Supp. 2d 246, 258 (D. Mass. 2010) (since "the very question of liquidated damages presupposes a stipulated or adjudicated violation of the act," denying plaintiffs' motion for summary judgment as premature because "[d]efendants' violation of the FLSA has yet to be determined"); *Turner v. Aldo U.S., Inc.*, No. 8:08-cv-1062-T-30 MAP, 2009 WL 2489267, at *4 (M.D. Fla. Aug. 10, 2009) ("A determination of Defendant's good faith for purposes of deciding liquidated damages as to Plaintiffs' overtime claims is premature insofar as the issue of Defendant's violation of the FLSA has yet to be determined.").

Accordingly, plaintiffs' request for summary judgment on the issue of liquated damages should be denied as premature because, for the reasons set forth above, they have yet to establish that defendants have violated the FLSA.

V. Summary Judgment May Not be Granted With Respect to Chemed Because Plaintiffs Have Failed to Demonstrate it was Their Employer

Plaintiffs have failed to proffer any evidence – let alone evidence sufficient to sustain their burden on a motion for summary judgment – that Chemed was an employer of the technicians who are members of the collective and the state-law classes. To the contrary, as set forth in defendants' moving brief (at pp. 71-73), the record demonstrates that Chemed, as RRSC's indirect parent corporation, is not plaintiffs' employer under the FLSA or the Class States' laws. Accordingly, plaintiffs' motion should be denied to the extent it seeks summary judgment against Chemed.

## Conclusion

For the foregoing reasons, defendants respectfully request that the Court deny plaintiffs' motion for summary judgment.

Dated: New York, New York
March 9, 2012

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