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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

KIMBERLEY SMITH and MICHAEL B.
HINKLEY, individually and on behalf of
those similarly situated,

Plaintiffs,

vs.

MICRON ELECTRONICS, INC., a
Minnesota corporation,

Defendant.

) Case No. CIV 01-0244-S-BLW
)
)
) DEFENDANT'S REPLY BRIEF IN
) SUPPORT OF MOTION TO STRIKE
) CONSENTS AND DISMISS POTENTIAL
) OPT-IN CLAIMANTS: Stefanie Bistline,
) Bland Ballard, Michael Moser, Rory Kip
) DeRouen, Jeffrey Parrish, Michael Jordan,
) Michelle Milliken, Isaac Moffett, Christopher
) McCullough, Eric Fillmore, Matthew Flynn,
) Jeffery Clevcnger, Tim Hedding, John Seale,
) Mathew Jarame Ell, Chris Wing and Ken Ford
)

Defendant Micron Electronics, Inc. ("Defendant"), by and through its attorneys, Stoel Rives LLP, respectfully submits this Reply Brief in support of its Motion to Dismiss Opt-In Claimants: Stefanie Bistline, Bland Ballard, Michael Moser, Rory Kip DeRouen, Jeffrey Parrish, Michael Jordan, Michelle Milliken, Isaac Moffett, Christopher McCullough, Eric Fillmore,

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Matthew Flynn, Jeffery Clevenger, Tim Hedding, John Seale, Mathew Jarame Ell, Chris Wing and Ken Ford (Docket No. 65).

I. INTRODUCTION

On January 22, 2002, "Plaintiffs Opposition to Motion to Strike and Motion to Dismiss" (the "Opposition brief") (Docket No. 71) was filed.

The Opposition brief essentially ignores the fact that not one of the persons subject to Defendant's motion ever timely produced documents in response to their subpoenas. Instead, the Opposition brief takes a "smoke and mirrors" approach by referencing other, irrelevant issues (for example, that other claimants did comply with their subpoenas, that responses to other discovery requests were purportedly served by Plaintiffs on behalf of all claimants, that other discovery has taken place, etc.). The Opposition brief also conveniently ignores the patient and long-standing attempts by Defendant to resolve the issue, as well as Plaintiffs' complete lack of response to Defendant's many inquiries before filing the motion.

By this motion, as modified by ensuing events, Defendant seeks the following relief:

- (1) Dismissal with prejudice of those claimants who have not provided any response to the subpoenas;
- (2) An order from the Court confirming that those claimants who have voluntarily withdrawn their consents are dismissed from the case with prejudice;
- (3) Sanctions and/or orders to compel with regard to subject claimants who did eventually produce some documents, although belatedly, on the day of their depositions.

II. ARGUMENT

A. Ten Claimants Remain in Complete Contempt of Their Subpoenas.

Despite the Opposition brief's attempts to distract the Court's attention elsewhere, the undisputed fact remains that the following claimants still have not provided any response to the subpoenas issued in August 2001:

Stefanie Bistline
Rory Kip DeRouen
Michael Jordan
Christopher McCullough
Eric Fillmore
Tim Hedding
John Seale
Mathew Jarame Ell
Chris Wing
Ken Ford

With regard to these claimants, Defendant request that each be dismissed from the lawsuit with prejudice. These individuals have, for many months now, been in contempt of their subpoenas. Their failure to participate in the lawsuit warrants their dismissal, whether as a sanction under Federal Rule of Civil Procedure 45, Rule 37 and/or Rule 41(b).

Defendant at this time also requests the dismissal with prejudice of John Caprai, Shelly Dyer and John Kurtin. Plaintiffs initially represented that these individuals had no documents. (*See Dockstader Aff.*, at Ex. E.) However, despite the fact that Defendant sent over affidavits for signatures attesting to this representation (*See Dockstader Aff.*, at Ex. F), no response was received. The affidavit request has been outstanding since September 2001. These individuals, Mr. Caprai, Ms. Dyer and Mr. Kurtin, should be dismissed for failure to certify their compliance

with the subpoenas.

Similarly, any belated proposal by Plaintiffs to supply similar affidavits now for the other non-complying claimants should be rejected by the Court. Defendants began proposing back in early September 2001 that any claimant who did not have responsive documents provide an affidavit attesting to such (Dockstader Aff., ¶ 4, Ex. D; see also *Id.*, at Ex. F.) Plaintiffs obviously rejected such proposal and cannot now be heard to offer such a possibility. Notably, the Opposition brief did not include even a single affidavit or any type of certification of compliance by the subject claimants. Such omission is conspicuous by its absence.

B. Several Claimants have Withdrawn from the Lawsuit.

Three of the subject claimants actually withdrew from the lawsuit, rather than participate and have their depositions taken. Claimants Bland Ballard and Matthew Flynn filed with the court documents entitled "Notice of Withdrawal of Consent to Join Collective Action."¹ Claimant Michelle Milliken's January 15, 2002, deposition was cancelled upon counsel's representation that Ms. Milliken was withdrawing from the lawsuit, but the Notice of Withdrawal has yet to be filed.

Defendant requests that the Court enter an order confirming that these three claimants are dismissed from the lawsuit with prejudice, pursuant to their withdrawal of consent and Federal Rule of Civil Procedure 41(b).

¹ Mr. Ballard's Notice was filed January 22, 2002 (Docket No. 70). Mr. Flynn's Notice was filed January 2, 2002 (Docket No. 68). Ms. Milliken's Notice has not yet been filed.

C. **A Few Claimants Eventually Produced Some Documents, but not until the Day of their Deposition.**

The Opposition brief notes that some of the subject claimants had in fact produced documents at their depositions (referencing specifically: Michael Moser, Jeffrey Clevenger,² Jeffrey Parrish and Isaac Moffett).³ This argument misses the point completely. These four people were each required by their August 2001 subpoenas to produce documents. Defendant served the subpoenas so that it would receive the documents well in advance of scheduling or taking any the claimants' depositions--in order to prepare for the depositions and to make properly-informed decisions about which claimants to depose. Instead, with reference to Mr. Moser, Mr. Parrish and Mr. Moffett, these individuals did not produce any documents until

² Mr. Clevenger did not actually produce any documents at his January 17, 2002 deposition in San Diego. Instead, Mr. Clevenger claimed at the deposition that all of his responsive documents had been previously destroyed in the rain. No such disclosure had previously been made by Mr. Clevenger or the Plaintiffs.

Of course, Defendant had been requesting for months that an affidavit be submitted by any claimant who claimed not to have documents responsive to the subpoenas. (*See* Dockstader Aff., ¶ 4, Ex. D, Ex. F.)

³ The Opposition brief also makes the following incredible, unsupported statement: "In these depositions Defendant discovered that every single Potential Class Member [sic] had searched for documents in August but had not been successful, it [sic] at all, until a much later date when they were, for example, packing their entire household to move to a new location." (Opposition brief at ¶ 2, p. 3.) No citation is provided for this bizarre assertion, and Defendant is not aware of any basis or support for such a statement. Certainly, no such revelation occurred during the four depositions.

they actually appeared for their respective depositions. This is not compliance with their subpoenas.⁴

Therefore, with respect to Mr. Moser, Mr. Parrish, Mr. Moffett and Mr. Clevenger, Defendant now seeks sanctions lesser than dismissal. The decisions of these four to ignore their subpoenas cannot be countenanced by this Court. Their production of documents at their deposition in response to a deposition notice does not save them from contempt sanctions.

III. CONCLUSION

In summary, for the reasons set forth herein, and in its opening Memorandum and Supporting Affidavit of Kim J Dockstader, Defendant requests the following relief:

- (1) An order dismissing from the lawsuit with prejudice the following claimants:
Stefanie Bistline, Rory Kip DeRouen, Michael Jordan, Christopher McCullough, Eric Fillmore, Tim Hedding, John Seale, Mathew Jarame Ell, Chris Wing, Ken Ford, John Caprai, Shelly Dyer and John Kurtin.
- (2) With respect to Bland Ballard, Matthew Flynn and Michelle Milliken, an order confirming that these three individuals are dismissed from the case with prejudice.
- (3) With respect to Michael Moser, Jeffrey Parrish, Isaac Moffett and Jeffrey Clevenger, Defendant seeks sanctions other than dismissal, such as costs, attorneys fees or contempt penalties for failure to timely respond to subpoenas.

Defendant also asks that Plaintiffs and/or the subject claimants pay Defendant's

⁴ Notably also, these individuals never did comply with their subpoenas, instead a scant few documents were produced belatedly in response to their deposition notices.

reasonable expenses, including attorney's fees, caused by the need to move for relief on the instant issues of non-compliance with the subpoenas. This need was brought about by Plaintiffs' continual ignoring of Defendant's repeated requests for information regarding non-compliance with the subpoenas.

Plaintiffs cannot be heard to complain that because some other discovery has occurred, that their contempt of Defendant's subpoenas, and that of the subject claimants, should be overlooked by the Court. It must be noted the vast majority of the subject claimants have refused to comply in any manner with their subpoenas. These claimants cannot be allowed to continue to remain in the lawsuit if they are not interested enough to participate and respond in accordance with lawful process.

Dated this 4th day of February, 2002.

STOEL RIVES LLP


Kim J Deckstader

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2002, a true and correct copy of the foregoing DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE CONSENTS AND DISMISS POTENTIAL OPT-IN CLAIMANTS was served on the following individuals by the manner indicated:

William H. Thomas	<input checked="" type="checkbox"/>	By Hand Delivery
Daniel E. Williams	<input type="checkbox"/>	By Facsimile
Christopher F. Huntley	<input type="checkbox"/>	By U.S. Mail
HUNTLEY, PARK, THOMAS, BURKETT, OLSEN & WILLIAMS 250 S. Fifth Street, Suite 660 Boise, Idaho 83701-2188	<input type="checkbox"/>	By Overnight Delivery



Kim J Dockstader