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U.S. DISTRICT &
BANKRUPTCY COURTS

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Cameron L. B. Bard, Clerk

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

KIMBERLEY SMITH, MICHAEL)
B. HINCKLEY, JACQUELINE T.)
HLADUN, MARILYN J. CRAIG,)
JEFFERY P. CLEVINGER, and)
TIMOTHY C. KAUFMANN,)
individually and on behalf)
of those similarly situated,)

Plaintiffs,)

vs.)

MICRON ELECTRONICS, INC., a)
Minnesota corporation,)

Defendant.)

Case No. CIV 01-0244-S-BLW

MEMORANDUM IN SUPPORT
OF PLAINTIFFS' MOTION FOR
PROTECTIVE ORDER

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
FOR PROTECTIVE ORDER, P. 1

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Plaintiffs, by and through their undersigned counsel of record, pursuant to Rule 26(c), F.R.C.P. and D.Id.L.Civ.R. 7.1, hereby submit their Memorandum in Support of Plaintiffs' Motion for Protective Order.

INTRODUCTION

This case is primarily a collective action for unpaid overtime under the Fair Labor Standards Act, 29. U.S.C. § 216(b), *et seq.*, ("FLSA"). Plaintiffs contend that Defendant Micron Electronics, Inc. ("MEI"), violated the FLSA by, among other things, inducing or at least permitting Plaintiffs and those similarly situated to work off the clock. On 9/27/02 (Docket No. 109), the District Court conditionally certified a class of inside sales representatives who worked for Defendant Micron Electronics, Inc., ("MEI") between May, 1998 and May, 2001. After Plaintiffs caused Notices of Right to Join Collective Action to issue, approximately 86 class members opted in to this lawsuit. The number of class members now stands at 74.¹ Thus far, Defendant has deposed approximately 37 of these individuals.

On or about May 21, 2003, Mr. David Metcalf of the District Court's office conducted a telephone conference call with counsel for both parties. During that call, Defendant's counsel insisted that they could not possibly be ready for trial in 2004 and, over Plaintiffs' counsel's objection, trial was set for July of 2005, according to the Scheduling Order of May 23, 2003. From May 23, 2003, until March 19, 2004, Defendant requested exactly zero depositions. After

¹ Since the total number of individuals filed consents were filed, approximately 12 have withdrawn from the lawsuit or are likely to be dismissed due to non-cooperation in the scheduling of depositions. See, Defendant's Motion to Strike Consents and Dismiss Plaintiffs of 6/14/04 (docket # 189) and Plaintiffs' Response to Defendant's Motion to Strike Consents and Dismiss Plaintiffs of 7/7/04 (docket # 206).

writing to Defendant's counsel on March 19, 2004, requesting deposition dates, Plaintiffs' counsel received Defendants' counsel's letter of March 19, 2004, in which Defendant sought 59 depositions all to take place in April, 2004. After adjusting the discovery deadline, Plaintiffs agreed to make these 59 individuals available to Defendant. As Defendant began to take these depositions and as the deadline neared submission of final certification materials, the parties agreed to try a second mediation of the case. As part of the agreement to mediate, on May 21, 2004, the parties filed a Stipulated Motion to Stay (Docket #188), and the parties suspended the remaining pending depositions and asked the District Court to postpone the deadline for submission of final certification materials and the hearing on final certification. The parties agreed that, should their mediation efforts fail, they would reschedule the pending depositions. When the parties filed their Stipulated Motion to Stay on May 21, 2004, the original deadline for filing motions regarding final certification was only a week away – May 28, 2004.

The parties attended a mediation on June 16, 2004, with Mr. Merlyn Clark acting as mediator, but the mediation was not successful. After the mediation, for the very first time Defendant requested deposition dates not just for the pending depositions that had been vacated, but for eighteen (18) additional new class members who had never before been identified or requested by Defendant.² Plaintiffs' counsel communicated its objection to the sudden addition of these 18 class members, but the parties have been unable to come to an agreement on the

² These individuals are listed on Exhibit A to the Affidavit of Daniel E. Williams, filed concurrently.

issue.³

By this motion, Plaintiffs ask this Court to issue its Order prohibiting Defendant from deposing the additional 17 class members at issue. In addition, Plaintiffs continue to object to Defendant's insistence on a third deposition of Plaintiff Kim Smith, since they have exceeded the seven hour limitation set forth at D.Id.L.Civ.R. 30.1. Finally, Plaintiffs seek the Court's order requiring Defendant to take certain depositions by telephone.

ARGUMENT

I. Defendants should be prohibited from taking the deposition testimony of the additional 17 class members at issue.

Plaintiffs submit that there are several closely-related grounds upon which this Court should prohibit Defendant from deposing the additional 17 class members at issue. First, these additional depositions violate the concept of proportionality that is now clearly part of Rule 26(b)(2) to prevent excessive discovery. Second, these additional depositions are unnecessarily cumulative and duplicative under Rule 26(b)(2)(I) and the burden or expense of the proposed discovery outweighs its likely benefit under Rule 26(b)(2)(iii).

A. The addition of the 17 new class members violates the concept of proportionality.

In 1983 Rule 26(b), F.R.C.P., was amended and a new provision was added to Rule 26(b)(1) directing courts to limit "[t]he frequency or extent of use of discovery methods" based

³ Plaintiffs agreed to make one of the eighteen available, Michael Hazen, who resides in Minnesota and was available to be deposed during the same time frame as those individuals previously identified were rescheduled in Minnesota.

on certain criteria. In 1993, these provisions were moved to Rule 26(b)(2). Then in 1998, the Supreme court signaled the importance of the proportionality concept by citing Rule 26(b)(2) and observing that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery." *Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 1597, 140 L.Ed.2d 759 (1998). As noted by commentators, this provision can cause practical difficulties for the Court:

The difficult problem courts face in implementing the proportionality concept is that it requires great familiarity with the case at hand. As recognized at the outset by experienced judges, it can be quite difficult for a judge to determine whether discovery is disproportionate because a confident conclusion about what the case warrants depends on a fairly intimate familiarity with the particulars of the case and the parties' strategy. Courts invoking the 1983 amendment appear to take a common-sense approach to both the importance of the case and the propriety of undertaking the expense of requested discovery without treating the factors spelled out in the amendment as talismans.

Wright, Miller & Marcus, *Federal Practice and Procedure*, Civil 2d § 2008.1, p. 122 (1994).

Plaintiffs submit that the Court does not face these same challenges in dealing with the current issue. When Defendant originally identified the 59 people it wished to depose, Plaintiffs accommodated this request, even at the late date at which Defendant made the request.

Defendant had the opportunity to select a very sizeable sample of the opt-in class to depose. Defendant made its selection and gave every sign that it was satisfied with its selection as the original deadline neared for final certification. Only after that deadline was extended and the parties were unable to settle this case did Defendant suddenly add the 17 new class members at issue. Plaintiffs suggest that the Court need not become intimately familiar with this case in order to rule that Defendant should be limited to the 59 individuals they had earlier designated.

There is nothing about the issues at stake at final certification that requires Defendant to obtain deposition testimony of more than those whom they had already designated.

B. The depositions of the additional 17 class members would be unnecessarily cumulative and duplicative and add unnecessary cost.

The class in this action consists of inside sales representatives of Defendant who worked in its sales subsidiaries between May, 1998 and May, 2001. Plaintiffs have acknowledged that Defendant is entitled to the depositions of a sufficient sample of the opt-in class to try to make its argument that the class is not sufficiently similarly situated to sustain a proper FLSA class. Plaintiffs submit, however, that Defendant long ago reached that number of depositions. The depositions currently taking place fit Winston Churchill's description of the overkill associated with the nuclear arms race – at some point additional weapons serve only to make “the rubble bounce.” Depositions of further class members are now contributing nothing to the parties' understanding of the issues at stake for final certification.

As set forth in the Affidavit of Daniel E. Williams filed concurrently, Defendant just obtained the deposition testimony of three opt-in class members, Julie Gardner, Tom Robertson and Jeffery Clevenger. In order to take these three depositions of approximately 1 ½ hours each, Mr. Thomas spent five days on the road and incurred approximately \$3,000 in expenses. Plaintiffs' counsel have already advanced approximately \$65,000 in litigation expenses of behalf of the class in this action, most of which is associated with deposition expense. While counsel are prepared to incur legitimate expenses as part of their duties as class counsel, this case presents precisely the situation in which the Court must intervene to see that the financial advantage of corporate defendants is not misused to run up unnecessary costs of litigation. It is

clear that the financial burden on both parties outweighs whatever very slight value that additional cookie-cutter depositions of class members would convey.

Although Plaintiffs strongly urge the Court to prohibit these additional depositions completely under Rule 26(c)(1), in the alternative Plaintiffs suggest that, at the very least, the Court require Defendant to incur the cost of providing Plaintiffs with a copy of any such depositions.

II. Defendants have already exceeded the seven (7) hours limitation with Plaintiff Kim Smith and should be prohibited from a third deposition of her.

On February 15, 2002, Defendant deposed Kim Smith for approximately 7 hours. On February 18, 2002, Defendant deposed Kim Smith for approximately 3.5 hours. The parties specifically did not waive the seven-hour limitation set forth in D.Id.L.Civ.R. 30.1 in any Litigation Plan and the District Court did not alter it in any Scheduling Order. For these reasons, and as set forth more fully in the Affidavit of Daniel E. Williams of May 3, 2004 (Docket #177), Plaintiffs renew their motion that Defendant be prohibited from deposing Plaintiff Kim Smith for a third time and in excess of the seven (7) hours limitation.

III. Defendant refuses to take any depositions by phone and should be required to do so regarding far-flung deponents.

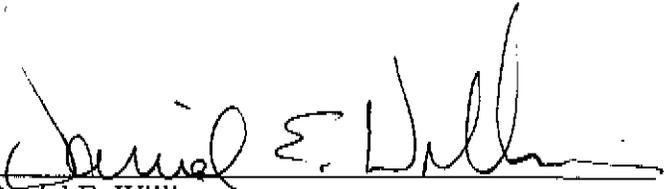
Defendant has indicated that it refuses to take any depositions by phone.⁴ Plaintiffs submit that, especially in light of the foregoing discussion, Defendant should be required to take the following opt-in claimants' depositions by telephone: Robert McCarter of Towson, Maryland, and William Brinkerhoff of Shoreview, Minnesota. Moreover, should the Court deny

⁴ See, Exhibit B to the Affidavit of Daniel E. Williams, filed concurrently.

Plaintiffs' Motion for Protective Order regarding the 17 new opt-in claimants, Plaintiffs further request that Defendant be required to depose Kevin Engle of Japan by telephone.

DATED this 23rd day of July, 2004.

HUNTLEY PARK, LLP

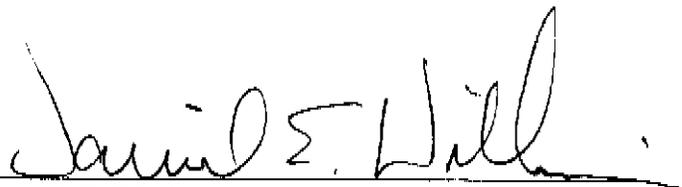

Daniel E. Williams
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2004, a true and correct copy of the foregoing instrument was served upon opposing counsel as indicated below:

Kim J. Dockstader
Gregory C. Tollefson
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Via Hand Delivery
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Daniel E. Williams