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U.S. DISTRICT COURT _____
U.S. BANKRUPTCY COURT _____
DISTRICT OF IDAHO _____

MAY - 4 2004

W. REED _____
LODGED _____ FILED _____

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
MICRON ELECTRONICS, INC.'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT RE PAYMENT OF
COMMISSION PREMIUMS FOR
OVERTIME**

**MEMORANDUM IN SUPPORT OF MICRON ELECTRONICS, INC.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT RE PAYMENT OF COMMISSION PREMIUMS
FOR OVERTIME**

Boise-134221.3 0026493-00046

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I. INTRODUCTION

Micron Electronics, Inc. ("MEI") is entitled to partial summary judgment on the claim asserted by Plaintiffs that MEI violated the Fair Labor Standards Act (the "FLSA") by allegedly failing to account for Plaintiffs' commissions when calculating overtime payments. Summary judgment is proper based upon the uncontroverted evidence that MEI did include Plaintiffs' commissions in its overtime calculations, and that MEI is, and at all times relevant to this lawsuit has been, in compliance with the overtime requirements imposed by the FLSA.

II. BACKGROUND

Plaintiffs and eligible claimants (collectively, "Plaintiffs") are former inside sales representatives employed by MEI and its sales subsidiaries at various times between June 1, 1998 and May 31, 2001. Plaintiffs allege that overtime wages were calculated improperly by MEI in violation of the FLSA. Specifically, Plaintiffs allege that MEI failed to account for commissions when calculating overtime premiums.

While employed by an MEI sales subsidiary,¹ Plaintiffs generally were paid a base hourly wage rate, plus commissions earned on sales. Plaintiffs also were paid an overtime rate of pay

¹ During the relevant time period of June 1, 1998 through May 31, 2001, there were three MEI wholly-owned sales subsidiaries and/or divisions who each employed inside sales representatives: Micron PC, Inc., which historically related to consumer and small business sales ("MPC"); Micron Commercial Computer Systems, Inc., which primarily related to commercial or mid- to larger-sized business sales ("MCCS"); and Micron Government Computer Systems, Inc., which exclusively related to federal, state, local and educational sales ("MGCS"). (Statement of Undisputed Facts in Support of Micron Electronics, Inc.'s Motion for Partial Summary Judgment re Payment of Commission Premiums for Overtime ("SOF") ¶ 3, filed contemporaneously herewith; Third Affidavit of Robert L. Griffard in Support of MEI's Motion for Partial Summary Judgment re Payment of Commission Premiums for Overtime (Filed Under Seal) ("Third Griffard Aff.") ¶ 4, filed contemporaneously herewith.) Each of these sales subsidiaries or divisions had their own sales plans, hourly pay rates or scales, and commission

(continued...)

equal to one and one-half times the employee's regular hourly rate for all hours worked in a given week exceeding 40 hours. MEI calculated each employee's regular hourly rate for a particular week by combining the employee's base salary *and* all commissions earned by the employee for that week. (See SOF ¶¶ 1-2; Affidavit of Robert Griffard ("Griffard Aff."), filed August 21, 2002 (Docket No. 128), ¶¶ 12-13; Affidavit of Gabe Weske ("Weske Aff."), filed August 21, 2002 (Docket No. 127), ¶¶ 4-6; Third Griffard Aff. ¶ 4; and Affidavit of Farrah Pippenger ("Pippenger Aff."), filed August 21, 2002 (Docket No. 126) ¶ 6.) Therefore, contrary to Plaintiffs' bald assertion, the overtime payments made by MEI to its inside sales representatives did include premiums for commissions.² (See *infra*, Section III.C.2.)

The methodology used by MEI to calculate and pay overtime to Plaintiffs was, at all times relevant to this litigation, in strict compliance with the overtime requirements of the FLSA. (See Griffard Aff. ¶¶ 3, 27; Weske Aff. ¶ 15.)

III. ARGUMENT

A. Standard for Summary Judgment.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

(...continued)

pay plans for their respective inside sales representatives. (SOF ¶ 3.) The various plans and pay rates differed from time to time among MPC, MCCS and MGCS. (SOF ¶ 3.)

² Although inside sales representatives may have worked for different sales subsidiaries (*i.e.*, MPC, MCCS and MGCS) under varying sales plans, hourly pay rates and commission plans, MEI consistently used the same methodology, consistent with its obligations under the FLSA, to calculate and include premiums for commissions in the overtime payments to the sales representatives. (SOF ¶¶ 1-3.)

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matter of law.” FED. R. CIV. P. 56(c). An issue is “genuine” only if there is a sufficient evidentiary basis on which a reasonable jury could find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A factual dispute is “material” only if it might affect the outcome of the suit under governing law. *Id.* at 248.

On a motion for summary judgment, the movant bears the initial burden of identifying for the court those portions of the record that it believes demonstrate the absence of dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To defeat summary judgment, the nonmoving party “may not rest upon the mere allegations or denials of [its] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e).

Specifically, the nonmoving party must produce evidence such that a reasonable juror could find for that party. *Anderson*, 477 U.S. at 248. When considering how a reasonable juror would rule, the court should apply the substantive evidentiary standard that the factfinder would be required to use at trial. *Id.* at 252. A mere scintilla of evidence will not require the court to send the question to the factfinder. *Id.* at 251. Moreover, the court need not draw all possible inferences in Plaintiffs’ favor—only reasonable ones. *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1466-67 (9th Cir. 1986) (“We scrutinize the evidence and reasonable inferences to determine whether there is sufficient probative evidence to permit ‘a finding in favor of the opposing party based on more than mere speculation, conjecture, or fantasy.’” (Citations omitted)).

Affidavits that “contain[] only a scintilla of evidence or evidence that is merely colorable or not significantly probative . . . is not sufficient to present a genuine issue of material fact.”

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Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1142 (9th Cir. 2000). “Affidavits that contain inadmissible evidence, are internally inconsistent, or contradict the affiant’s sworn testimony, and similar items of evidence, may create a scintilla or doubt, but still be insufficient to withstand a motion for summary judgment.” *Florez v. Sargeant*, 917 F.2d 250, 256 (D. Ariz. 1996) (internal quotation marks and citation omitted). Finally and most importantly, “[c]onclusory allegations unsupported by factual data will not create a triable issue of fact.” *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978).

Summary judgment shall be granted when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c). Once the moving party meets its burden of demonstrating the absence of a genuine issue of material fact, summary judgment will be mandated if the nonmoving party fails to make a showing sufficient to establish the existence of an element that is essential to the nonmoving party’s case and upon which the nonmoving party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322 (1986).

B. MEI Included Plaintiffs’ Commissions in Its Overtime Calculations.

The sole allegation advanced by Plaintiffs in their complaint regarding overtime payments is that MEI did not “include the commissions earned by Plaintiffs and other sales representatives in some overtime calculations.” (Second Amended Complaint (Docket No. 94), ¶ 39; *see also id.* at ¶¶ 45, 52(G).) This argument is factually and legally different from an allegation that MEI factored the commissions earned by Plaintiffs into its overtime calculations but failed to do so in a manner compliant with the FLSA. The disparate implications of each

argument require this Court to refrain from converting *sua sponte* the former argument, which was asserted by Plaintiffs, into the latter, which was not specifically pled.

MEI included Plaintiffs' commissions in its calculations of overtime payments. This conclusion is supported by the uncontested statements contained in the affidavits submitted by MEI and the sample computations attached to those affidavits. (*See generally* Weske Aff. ¶¶ 5-16, Exs. A-B; Griffard Aff. ¶¶ 5-28, Exs. A-H; Pippenger Aff. ¶¶ 6-16; Second Affidavit of Robert L. Griffard (Docket No. 158) ¶¶ 2, 11 ("Second Griffard Aff."), filed October 2, 2002; and Third Griffard Aff. ¶¶ 8-12, Exs. 5-24.) Moreover, Plaintiffs have failed to set forth a single specific fact supporting their baseless allegation that MEI did not include commissions in its overtime calculations. The allegations contained in Plaintiffs' complaint, standing alone, are insufficient to defeat MEI's summary judgment motion. Plaintiffs' failure to present facts showing that there is a genuine issue for trial, coupled with the affidavits submitted by MEI representing that Plaintiffs' commissions were included in its overtime calculations, requires that partial summary judgment be entered in favor of MEI on this issue.

C. MEI Was in Compliance with the Overtime Requirements Imposed by the FLSA at All Pertinent Times.

Even if this Court finds that Plaintiffs have affirmatively alleged with sufficient particularity that MEI attempted to include commissions in its overtime calculations, but that those computations did not conform with the requirements imposed by the FLSA, MEI is entitled to summary judgment. The undisputed evidence in the record proves that MEI has at all times been in compliance with the overtime requirements of the FLSA. To demonstrate MEI's compliance with the FLSA, it is necessary to first review the FLSA's overtime requirements.

1. **Overtime Requirements Imposed by the FLSA.**

Section 7(a) of the FLSA addresses overtime compensation for employees who fall within its general coverage and who are not exempt from its overtime pay requirements. 29 C.F.R. § 778.100.³ It prescribes a general overtime rate of pay that is not less than one and one-half times the employee's "regular rate," which must be paid to the employee for all hours worked in excess of 40 hours per workweek.⁴ *Id.* at §§ 778.101, 778.107.

The FLSA applies on a workweek basis. *Id.* at § 778.100. The FLSA defines an employee's workweek as a "fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods" that "need not coincide with the calendar week but may begin on any day and at any hour of the day." *Id.* at § 778.105. If ascertainable, overtime pay earned in a particular workweek must be paid on the regular payday for the pay period in which the wages were earned. *Id.* at § 778.106. "When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act *will be satisfied* if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable." *Id.* (emphasis added).

³ For purposes of this motion, MEI assumes the Plaintiffs are not exempt from the FLSA's overtime pay requirements. This assumption is made for purposes of this argument only and without prejudice to any argument MEI may make that some or all of the Plaintiffs may properly be characterized as exempt from the FLSA's overtime pay requirements under potentially applicable circumstances and law. MEI expressly reserves its rights to assert that some or all of the Plaintiffs are exempt under the FLSA's overtime pay requirements.

⁴ The FLSA provides that "[a]s a general standard, section 7(a) of the Act provides 40 hours as the maximum number that an employee subject to its provisions may work for an employer in a workweek without receiving additional compensation . . ." 29 C.F.R. § 778.101.

a. Ascertaining the "Regular Rate."

(i) In General.

Because the FLSA requires overtime compensation to be paid at a rate of not less than one and one-half times the "regular rate" at which the employee is paid, computation of the "regular rate" is the first step in computing overtime pay. 5 EMPLOYMENT COORDINATOR ¶ C-16,075 (2001). The regular rate is "the hourly rate actually paid to the employee for the normal, nonovertime workweek for which he is employed." 20 C.F.R. § 778.108. The regular rate includes all remuneration for employment, except certain payments specifically excluded by the FLSA.⁵

The regular rate must be expressed as an hourly rate. This is because the FLSA imposes its overtime requirements in terms of hourly wages. Thus, an employer must convert an employee's wages to an hourly rate in order to determine compliance with the statute. 20 C.F.R. § 778.109. The regular hourly rate is determined by dividing the employee's total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked in that workweek for which such compensation was paid. *Id.*

(ii) Calculating the "Regular Rate" for Employees Receiving Commissions.

Commissions, which are payments to employees contingent on the provision of services or the sale of goods, are included in the total compensation paid to the employee for purposes of

⁵ Payments excluded from the regular rate include pay for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays, discretionary bonuses, gifts and payments in the nature of gifts on special occasions, and payments for occasional periods when no work is performed due to vacation, holidays, or illness. See FLSA § 7(c)(1)-(7).

calculating the "regular rate." *Id.* at § 778.117. Commissions must be included in the regular rate regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed hourly rate, and irrespective of the method, frequency, or regularity of computing, allocating and paying the commission. *Id.* Moreover, it is immaterial whether the commission earnings are computed daily, weekly, biweekly, semimonthly, or at some other interval. The fact that the commission is paid on a basis other than weekly and that the payment is made after the employee's normal payday does not excuse the employer from including the commission in the employee's regular rate.

"Frequently, the commission cannot be calculated on a weekly basis due to the difficulty in ascertaining the amount of the commission." *The Basic/Intermediate Payroll Training Course from the American Payroll Association: 2-5*; FLSA § 10.II.B.2.f.ii ("Commission payments are frequently deferred."). If it is not possible or practicable to calculate the commission weekly, "the employer may disregard the commission in computing the regular hourly rate until the amount of commission can be ascertained." 29 C.F.R. § 778.119. Until the amount of commission is determined, the employer must pay overtime to the employee at a rate of one and one-half times the employee's regular rate of pay, exclusive of the commission. *Id.*

Once the commission can be determined, it must be apportioned back over the workweeks of the period during which it was earned, thereby increasing the employee's "regular rate" upon which overtime payments must be calculated. Any additional overtime pay due as a result of this increase in the "regular rate" must be computed by the employer and paid accordingly. *Id.* When it is impossible or impracticable for the employer to apportion the commission back over each workweek in the commission computation period in proportion to

the amount of the commission *actually* earned each week, the regulations require that "some other reasonable and equitable method . . . be adopted." *Id.* at § 778.120. The regulations provide two acceptable alternatives to a proportionate allocation of the commission: (1) the allocation of equal amounts of the deferred commission payments to each week within a commission computation period, regardless of what percentage of the commission was actually earned during each week, and (2) allocation of equal amounts to each hour worked during the commission computation period. *Id.* Most employers use the former method in calculating overtime payments. 1 WAGE AND HOUR LAW § 9:18 (1995) ("Generally an employer will wish to allocate equal amounts of a commission to each week."). Like most employers, MEI also used this method for its sales subsidiaries, including MPC, MCCS and MGCS. (SOF ¶ 9; Griffard Aff. ¶ 21; Weske Aff. ¶ 13; Pippenger Aff. ¶ 10.)

Under the method used by most employers, including MEI, the employee is treated as having earned an equal amount of the commission in each week of the commission computation period. Any additional overtime compensation owed to an employee for a given workweek, therefore, is computed using this amount. 29 C.F.R. § 778.120(a). The manner in which a commission is divided equally amongst various workweeks in a commission computation period varies in relation to the type of commission computation period used by the employer. The regulations reference three types of commission computation periods that may be used by employers: (1) one month, (2) semimonthly, and (3) a specific number of weeks. *Id.* MEI utilized the third alternative for its sales subsidiaries, which is explained below.

The regulations provide that when an employer uses a commission computation period of a specific number of workweeks, such as every four weeks (as distinguished from every month),

the total amount of the employee's commission must be divided by the number of weeks in the commission computation period to calculate the amount of the commission allocable to each week. *Id.* at § 778.120(a)(i). After determining the amount of the commission allocable to a given workweek, the employer must divide that amount by the total number of hours worked in that week to determine the increase in the hourly "regular rate." Additional overtime due as a result of the commission is then computed by multiplying one-half of the increase in the "regular rate" by the number of overtime hours worked in the week. *Id.* at § 778.120(a)(ii).

The foregoing method of calculating overtime is explained by example in *The Basic/Intermediate Payroll Training Course*:

Example: Following is the calculation of a commission for a nonexempt employee who is paid both an hourly rate and a commission. The employee is paid an hourly rate of \$9.50 per hour and receives a commission of 4% on net sales orders in his accounts. Sales commissions are paid with the first payroll of the month for the prior month. Sales amounts cannot be determined on a weekly basis – only monthly. The employee's sales for the prior month are \$10,000. The employee worked the following hours in the four weeks in the prior month.

Week 1 – 42 hours
 Week 2 – 40 hours
 Week 3 – 45 hours
 Week 4 – 50 hours

The employee has been paid for all hours worked in the prior month. During the first week of the current month the employee works 40 hours. The employee's pay for the first week of the month will be calculated as follows:

Pay for hours worked (40 hours × \$9.50)	\$380.00
Commission for the prior month (\$10,000 × 4%)	\$400.00
Overtime premium recalculated for the prior month	

Week 1	
Overtime Premium Paid	\$9.50
(2 hours × \$9.50 × 50%)	
Overtime Premium Recalculated	\$399.00
Regular Pay (42 × \$9.50)	

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Commission ($\$10,000 \times 4\% \times 25\%$)	<u>\$100.00</u>	
Regular Pay		\$499.00
Regular Rate of Pay ($\$499 \div 42$)	\$11.88	
Overtime Premium ($\$11.88 \times 2 \times 50\%$)	\$11.88	
Additional Overtime Premium Due	\$2.38	
Week 3		
Overtime Premium Paid	\$23.75	
(5 hours \times $\$9.50 \times 50\%$)		
Overtime Premium Recalculated	\$427.50	
Regular Pay (45 \times $\$9.50$)		
Commission ($\$10,000 \times 4\% \times 25\%$)	<u>\$100.00</u>	
Regular Pay		\$527.50
Regular Rate of Pay ($\$527.50 \div 45$)	\$11.72	
Overtime Premium ($\$11.72 \times 5 \times 50\%$)	\$29.30	
Additional Overtime Premium Due	\$5.55	
Week 4		
Overtime premium Paid	\$47.50	
(10 hours \times $\$9.50 \times 50\%$)		
Overtime Premium Recalculated	\$475.00	
Regular Pay (50 \times $\$9.50$)		
Commission ($\$10,000 \times 4\% \times 25\%$)	<u>\$100.00</u>	
Regular Pay		\$575.00
Regular Rate of Pay ($\$575 \div 50$)	\$11.50	
Overtime Premium ($\$11.50 \times 10 \times 50\%$)	\$57.50	
Additional Overtime Premium Due	\$10.00	
Total Pay for Pay Period		\$797.93

The Basic/Intermediate Payroll Training Course from the American Payroll Association: 2-5.

2. MEI Has Satisfied the Foregoing Overtime Requirements Imposed by the FLSA.

MEI (on behalf of its sales subsidiaries) caused each Plaintiff to be paid an hourly rate, plus commissions. MEI was unable to calculate Plaintiffs' commissions on a weekly basis, which precluded the sales subsidiaries from paying Plaintiffs their commissions on each payday for the corresponding workweek. (SOF ¶ 4; Griffard Aff. ¶ 15; Weske Aff. ¶ 7; Pippenger Aff. ¶ 8.) Accordingly, it was necessary to pay Plaintiffs their commissions in deferred, lump-sum

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payments. (SOF ¶ 5; Griffard Aff. ¶ 16; Weske Aff. ¶ 8; Pippenger Aff. ¶ 8.) These payments were made at the end of each commission computation period, which lasted either four or five weeks. (SOF ¶¶ 7-8; Griffard Aff. ¶ 17; Weske Aff. ¶ 9; Pippenger Aff. ¶ 10.) Because the amount of commissions earned by Plaintiffs could not be determined until the end of each commission computation period, MEI was unable to ascertain Plaintiffs' actual "regular rate" for purposes of making overtime payments until the end of each commission computation period. (Griffard Aff. ¶ 18; Weske Aff. ¶ 10; Pippenger Aff. ¶ 9.)

Rather than deferring all overtime payments until it was able to establish Plaintiffs' actual "regular rates," MEI initially had the sales subsidiaries make partial overtime payments to Plaintiffs every two weeks at a rate of one and one-half times their hourly rate. (SOF ¶ 6; Griffard Aff. ¶ 19; Weske Aff. ¶ 11; Pippenger Aff. ¶ 9. Thereafter, MEI ascertained the amount of commissions earned by Plaintiffs, MEI apportioned those commissions back over the workweeks of the period during which they were earned to determine Plaintiffs' actual "regular rate" for those weeks, and the additional overtime payments (if any) due to Plaintiffs. (SOF ¶ 8; Griffard Aff. ¶ 20; Weske Aff. ¶ 12; Pippenger Aff. ¶ 10.)

In apportioning Plaintiffs' commissions back over the workweeks of the commission computation period to determine Plaintiffs' actual "regular rate," it was not practicable for MEI to allocate the commissions in proportion to the amount of commissions earned during each week. (SOF ¶ 9; Griffard Aff. ¶ 21; Second Griffard Aff. ¶ 3; Weske Aff. ¶ 13; Pippenger Aff. ¶ 10.) MEI therefore apportioned an *equal* amount of the total commissions earned by Plaintiffs during a commission computation period to each week within that period, irrespective of the percentage of the commission actually earned during each week. Because the commission

computation period used by MEI was composed of a specific number of weeks (rather than a monthly or semimonthly computation period), MEI was able to allocate commissions equally among the workweeks in that period by dividing the total amount of commissions earned by Plaintiffs during the commission computation period by the number of weeks contained in that period. (Griffard Aff. ¶ 21; Weske Aff. ¶ 13; Pippenger Aff. ¶ 10.) This calculation provided MEI with the amounts of the commissions allocable to each week in the commission computation period for the purpose of calculating overtime. (SOF ¶¶ 9-10; Griffard Aff. ¶ 21; Weske Aff. ¶ 13; Pippenger Aff. ¶ 10-11.)

Once it computed the amount of commission allocable to each workweek in the commission computation period, MEI divided the commission for that week by the total number of hours worked in that week, to determine the increase in the hourly rate. MEI then computed additional overtime owing to Plaintiffs by multiplying one-half of the increase in the hourly rate by the number of overtime hours worked in the week. (Griffard Aff. ¶ 23; Weske Aff. ¶ 14; Pippenger Aff. ¶ 12. The method used by MEI is approved by the FLSA. Griffard Aff. ¶ 27; Weske Aff. ¶ 15; Pippenger Aff. ¶ 12.)

Proof that MEI actually adhered to this method when calculating overtime payments is provided in the Weske Affidavit, the Pippenger Affidavit, the Griffard Affidavit, the Second Griffard Affidavit, and the Third Griffard Affidavit. Each affidavit explains in detail the method by which MEI calculated overtime payments for inside sales representatives during the relevant time frame and proves that the representatives were paid overtime premiums for commissions.

Given the conditional certification and opt-in of approximately 91 class members in this litigation, coupled with a time frame spanning three years, it would be overly burdensome for

MEI to recalculate each of the thousands of payments made to Plaintiffs (including claimants) between 1998 and 2001 in order to disprove Plaintiffs' bald assertion that they did not receive overtime premiums for commissions with respect to "some overtime calculations." Accordingly, MEI has submitted calculations of various overtime payments made to the six named Plaintiffs (who purportedly represent the entire class). Specifically, MEI has provided an analysis of the payments actually made to Kimberley Smith (*see* Third Griffard Aff. ¶ 8, Exs. 5-8), Michael B. Hinckley (*see id.* ¶ 9, Exs. 9-12), Jacqueline T. Hladun (*see id.* ¶ 10, Exs. 13-16), Marilyn J. Craig (*see id.* ¶ 11, Exs. 17-20), Jeffery P. Clevenger (*see id.* ¶ 12, Exs. 21-24), and Timothy C. Kaufmann (*see* Griffard Aff., ¶ 26, Exs. E-H). This analysis conclusively proves that, contrary to Plaintiffs' allegations, *each of the named Plaintiffs was correctly paid an overtime premium for commissions.* Plaintiffs cannot refute this evidence.

Plaintiffs have failed to present a single specific fact demonstrating that MEI did not adhere to the FLSA when providing for payment of overtime based on commissions. The unsupported allegations contained in Plaintiffs' complaint are insufficient to create a genuine issue of material fact, and therefore are insufficient to defeat MEI's motion for partial summary judgment.

IV. CONCLUSION

Plaintiffs' complaint asserts only that MEI did not include commissions in its calculations of some overtime payments. This assertion is contradicted by the incontrovertible evidence in the record. Even if Plaintiffs are found to have alleged that MEI included commissions in its overtime calculations but did not comply with the overtime requirements imposed by the FLSA, MEI is entitled to summary judgment. The only evidence in the record relevant to this issue

proves that the methodology used by MEI to pay commission premiums for overtime complies with the FLSA. Accordingly, MEI is entitled to partial summary judgment on the issue of whether it properly included the commissions earned by Plaintiffs and claimants in its overtime calculations.

Dated this 4th day of May, 2004.

STOEL RIVES LLP



Kim J. Dockstader
Attorneys for Defendant

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PARTIAL SUMMARY JUDGMENT RE PAYMENT OF COMMISSION PREMIUMS
FOR OVERTIME – 15**

Boise-134221.3 0026493-00046

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of May, 2004, I caused to be served a true copy of the foregoing **MEMORANDUM IN SUPPORT OF MICRON ELECTRONICS, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE PAYMENT OF COMMISSION PREMIUMS FOR OVERTIME** by the method indicated below, addressed to the following:

William H. Thomas
Daniel E. Williams
Christopher F. Huntley
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- Via U. S. Mail
- Via Hand-Delivery
- Via Overnight Delivery
- Via Facsimile



Kim J Dockstader