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Kim Dockstader, ISB No. 4207
Gregory C. Tollefson, ISB No. 5643
STOEL RIVES LLP
101 South Capitol Boulevard, Suite 1900
Boise, ID 83702-5958
Telephone: (208) 389-9000
Facsimile: (208) 389-9040
kdockstader@stoel.com
gctollefson@stoel.com

Attorneys for Defendant Micron Electronics, Inc.

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

**DEFENDANT MICRON ELECTRONICS,
INC.'S OPPOSITION TO PLAINTIFFS'
MOTION FOR PROTECTIVE ORDER
FILED ON JULY 23, 2004**

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Defendant Micron Electronics, Inc. ("MEI" or "Defendant"), by and through its counsel of record, pursuant to Local Civil Rule 7.1(c), hereby submits its opposition to Plaintiffs' Motion for Protective Order filed on July 23, 2004 ("Plaintiffs' Motion"). (Docket No. 231). This opposition is supported by the Affidavit of Gregory C. Tollefson ("Tollefson Aff.") filed concurrently herewith.

I. INTRODUCTION

Plaintiffs are attempting to thwart Defendant's efforts to conduct discovery in this case and the reason is clear: With each deposition Defendant takes, additional disparate testimony is revealed (*i.e.*, no two deponents' testimony is the same).

Plaintiffs' counsel also does not to provide the Court with a complete historical context for this dispute, including with regard to Defendant's attempts to confer with Plaintiffs' counsel in an effort to resolve the disputes without necessitating the Court's intervention.

A key point which is overlooked in Plaintiffs' Motion is that although Plaintiffs object to what they characterize as an "additional" eighteen depositions, in fact, given developments that have and continue to winnow the class size, Defendant (if permitted to proceed with the disputed depositions, will actually be taking *less* depositions than the fifty-nine depositions Plaintiffs' counsel agreed to allow months ago.

Good cause for issuance of a protective order has not been demonstrated and the Court should deny Plaintiffs' motion in its entirety.

II. PROCEDURAL POSTURE

A. The 2001 Discovery Plan for Pre-Conditional Certification Discovery

On August 23, 2001, the parties submitted a Joint Litigation Plan Form and Report

("Joint Litigation Plan"). (Docket No. 53.) The parties agreed to an early discovery plan, which included provisions for written discovery and oral depositions. The Joint Litigation Plan stated: "Because of the potential number of individuals involved and the complexity of potential issues, the parties wish to initially waive the limitation on the number of depositions set forth in Local Civil Rule 30.1." (Joint Litigation Plan, ¶ 10(b).) The parties were well aware that numerous depositions would be required in order to conduct a thorough investigation of the issues. Therefore, the parties opted to waive the limitation in its entirety rather than restrict the number of depositions to ten per party, as set forth in Local Civil Rule 30.1, or even marginally increase that number to better suit the nature of the litigation.

B. Judge Winmill Grants Conditional Certification, Noting that Further and More Rigorous Discovery Would Proceed for the Next Phase of the Case

When the Court issued its Memorandum Decision and Order on September 27, 2002 (docket no. 155), the Court granted Plaintiffs' motion for conditional certification. Defendant questioned the application of the lenient standard since discovery had taken place, but the Court stated: "the discovery that has been done appears relatively narrow in scope. The Court's Scheduling Order in this case *set up a discovery schedule for 'conditional certification' issues only.*" (Memorandum Decision and Order at 4 (emphasis added).) Therefore, "the Court will apply the lenient standard, and allow the parties to conduct further discovery to prepare for the more rigorous second phase." (*Id.* at p.5.)

C. The Parties' Discovery Plan for the Second Phase of the Case

On May 14, 2003, the parties submitted a Joint Discovery Plan and Report ("Joint Discovery Plan"). (Docket No. 165.) Pursuant to the Court's instructions, the parties met to agree on a discovery schedule for the remainder of the case (decertification and/or final

certification and trial).

With regard to discovery deadlines, Defendant's position was that "[i]n order to adequately prepare for a trial in this action, Defendant anticipates that substantial depositions may need to be taken, including continuation of previous depositions with regard to merits discovery (as opposed to depositions targeted to conditional certification)." (Joint Discovery Plan at p.3.)

Under Section 5(b) of the Joint Discovery Plan, the parties agreed to the following with regard to oral depositions: "For deponents who have not been previously deposed, the parties agree to initially abide by the *length* of deposition requirement set forth in Local Civil Rule 30.1, following Fed.R.Civ.P. 30(d)(2)." (Joint Discovery Plan at p.4.) (Emphasis in original.)

The parties did not agree as to the *number* of depositions. Plaintiffs wanted to limit the number of depositions to ten per party. Defendant sought to continue the agreement the parties made in the August 23, 2001 Joint Litigation Plan, where the parties agreed to waive the limitation on the number of depositions. Defendant preferred this approach in light of the large number of opt-in claimants and the Court's holding that the discovery conducted prior to the conditional certification stage was narrow and limited in scope.

Defendant also took the position that "time spent in depositions previously conducted in the conditional certification stage do not count toward the length of deposition requirement set forth in Local Civil Rule 30.1, following Fed.R.Civ.P. 30(d)(2)." (Joint Discovery Plan at p.5.)

Judge Winmill issued a Scheduling Order on May 23, 2003, but the issue of the number of depositions was not addressed. (Docket No. 166).

D. Plaintiffs and Defendant both Begin Requesting Depositions on March 19, 2004

Despite the fact that Plaintiffs had previously requested to limit the number of depositions to ten per party, on March 19, 2004, Plaintiffs sent a letter to Defendant requesting the depositions of fourteen individuals.¹ (Tollefson Aff. ¶ 2 and Ex. A.) In addition, Plaintiffs' letter stated: "[w]e have tried to be as inclusive as possible, however, there may be other witnesses who we will also want to depose. As soon as we identify those people, we will let you know. Also, we recognize that some of these depositions may require travel and we will do our best to accommodate your schedules." (Tollefson Aff. Ex. A.)

The same day, Defendant sent a letter to Plaintiffs' counsel requesting the depositions of fifty-eight class members and a former manager and non-class member, Tawni Weaver. (Tollefson Aff. ¶ 3 and Ex. B.) Defendant's letter stated: "[l]ike you, we have tried to be as inclusive as possible; however, there likely will be other persons whom we will want to depose. We are in the process of identifying those individuals and will let you know." (Tollefson Aff. Ex. B.) It is important to note that Plaintiffs did not refuse to produce any witnesses for the fifty-nine anticipated depositions. In fact, as mentioned in Plaintiffs' Memo, "Plaintiffs agreed to make these 59 individuals available to Defendant." (Plaintiffs' Memo at p.3.)

E. Defendant Requests Discovery Information from Plaintiffs

In addition to scheduling depositions as part of Defendant's efforts to gather the necessary facts and information related to this case, Defendant was in need of outstanding

¹ Plaintiffs' make a point of mentioning in their Memorandum in Support of Plaintiffs' Motion for Protective Order ("Plaintiffs' Memo") (docket no. 232) that "[f]rom May 23, 2003, until March 19, 2004, Defendant requested exactly zero depositions." (Plaintiffs' Memo at 2.) It should be noted for the record that Plaintiffs also did not request a single deposition until March 19, 2004. (Tollefson Aff. ¶ 2 and Ex. A.)

discovery responses that Plaintiffs had long neglected to provide or supplement. On March 24, 2004, Defendant sent a letter to Plaintiffs' counsel requesting supplementation of all outstanding discovery responses, "particularly discovery responses that relate to newly added claimants for whom no materials have been produced." (Tollefson Aff. ¶ 4 and Ex. C.)

F. Efforts to Begin the Deposition Process

When Defendant received Plaintiffs' March 19, 2004 correspondence requesting fourteen depositions, it immediately started contacting the fourteen individuals to determine when they would be available to have their depositions taken.

1. Plaintiffs agree to allow Defendant to proceed with the Fifty-nine Requested Depositions

On April 2, 2004, Defendant provided Plaintiff with a calendar for the month of April, with availability each week day (except April 23, 2004) for one or more of the individuals Plaintiff requested for deposition. (Tollefson Aff. ¶ 5 and Ex. D.) Plaintiffs had not yet provided any available dates for the depositions Defendant requested, so Defendant required available dates by April 7, 2004 or it would move forward with noticing the depositions. (*Id.* at Ex. D) Plaintiffs responded on April 5, 2004, suggesting the parties agree to extend the discovery deadline for class certification issues beyond May 3, 2004, so the months of May and June could be used to schedule depositions. (Tollefson Aff. ¶ 6 and Ex. E.) Plaintiffs stated that "we are willing to make these [59] witnesses available to you over time..." (*Id.* at Ex. E.)

Defendant responded to Plaintiffs' correspondence on April 6, 2004 and agreed to stipulate to extend the discovery deadline for class certification issues beyond May 3, 2004, solely for the taking of depositions. (Tollefson Aff. ¶ 7 and Ex. F.) Defendant also agreed "for the time being" to retract eleven of the fifty-nine individuals it had requested for deposition. (*Id.*

at Ex. F.)² Despite the alleged burden on Plaintiffs, notwithstanding the fact that Defendant had reduced the number of depositions it requested, Plaintiffs again stated in their letter of April 7, 2004 that "we are willing to work with you to get these [depositions] set, based on your agreement to keep them short." (Tollefson Aff. ¶ 8 and Ex. G.)

2. Defendant Renews its Request for Discovery on the Claimants

As of April 8, 2004, Plaintiffs had not provided any response to Defendant's March 24, 2004 letter requesting supplementation of all outstanding discovery responses. Defendant needed this information in preparation for the upcoming depositions, in addition to having the information for other class members who were not yet noticed for deposition. Thus, Defendant sent another letter to Plaintiffs on April 8, 2004, requesting supplementation of all outstanding discovery responses, particularly responses that relate to new claimants for whom no responses had been provided. (Tollefson Aff. ¶ 9 and Ex. H.)

3. The Parties' Dispute Begins with Regard to Plaintiff Smith's Deposition

One of the depositions Defendant requested on March 19, 2004 was that of Plaintiff Kimberley Smith. Ms. Smith's deposition was noticed for May 7, 2004. On May 3, 2004, Plaintiffs filed a Motion for Protective Order (docket no. 176), seeking to bar Defendant from taking another deposition of Ms. Smith on the grounds that Defendant had already exceeded the seven hour limitation. In response, Defendant sent a letter to Plaintiffs on May 5, 2004, asking Plaintiffs to withdraw their motion. (Tollefson Aff. ¶ 10 and Ex. I.) Plaintiffs' Motion for Protective Order did not meet the requirements of Civil Rule 37.1 and as previously set forth in

² Defendant further noted: "However, our agreement to retract these 11 people must be without prejudice to change our determination and request their deposition later." (*Id.* at p.2.)

the Joint Discovery Plan (docket no. 165, at p.5), Defendant's position is that time spent in depositions previously conducted in the conditional certification stage do not count toward the length of deposition requirement. Before this issue could be heard, the parties suspended discovery to try another attempt at mediation.

4. The Case is Temporarily Stayed Pending Mediation

On May 21, 2004, the parties filed a Stipulated Motion to Stay Certain Litigation Proceedings Pending June 16, 2004 Mediation and to Establish New Briefing Schedule on Final Class Certification ("Stipulated Motion to Stay"). (Docket No. 188.) The parties agreed to suspend all discovery and litigation proceedings in this matter, other than certain discovery responses and certain motions, until completion of the June 16, 2004 mediation. As a result, all of the depositions that had been noticed were vacated and Plaintiffs' Motion for Protective Order concerning the deposition of Kimberley Smith was withdrawn.³

5. Defendant Moves to Shrink the Class

On June 14, 2004, Defendant filed its Motion to Strike Consents and Dismiss Claimants ("Defendant's Motion to Strike"). (Docket No. 189.) Defendant's Motion to Strike sought to strike the consents and dismiss twenty-one⁴ class members due to the following factors:

³ On June 17, 2004, Judge Williams entered an Order (docket no. 192) concerning the various pending motions, including Plaintiffs' Motion for Protective Order. (Docket No. 176.) The Order stated, "[g]iven the parties have agreed to suspend currently set or requested depositions pending the outcome of mediation, the Court will treat Plaintiffs' motion for protective order was withdrawn without prejudice to re-file." (Docket No. 192 at p.2.)

⁴ Plaintiffs' Response to Defendant's Motion to Strike Consents and Dismiss Claimants (docket no. 206) objected to the dismissal of Julie Gardner, but did not object to the relief sought by Defendant's Motion to Strike with regard to the rest of the twenty class members. Defendant's Reply Brief Re: Defendant's Motion to Strike Consents and Dismiss Claimants (docket no. 238) agreed to withdraw its request for relief with regard to Julie Gardner.

(1) Plaintiffs' representation that certain class members were opting out of the lawsuit; (2) certain class members failed to appear at their depositions; (3) certain class members failed to cooperate in litigation; and (4) certain class members erroneously filed opt-in notices. Of the twenty class members pending dismissal from this case, fourteen had been requested for deposition in Defendant's correspondence of March 19, 2004. (Tollefson Aff. Ex. B.)

6. The Case does Not Settle and Discovery Proceeds

The mediation on June 16, 2004 did not provide a resolution in this case. Therefore, on June 21, 2004, Defendant sent a letter to Plaintiffs requesting depositions of the twenty-five individuals in Defendant's March 19, 2004 correspondence that had not yet been deposed (not including the eleven class members Defendant withdrew) and the depositions of eighteen additional class members. (Tollefson Aff. ¶ 11 and Ex. J.) Defendant followed up with another letter on June 22, 2004, which attached a proposed deposition schedule for the requested depositions. (Tollefson Aff. ¶ 12 and Ex. K.)

Plaintiffs responded on June 23, 2004, objecting to eighteen of the individuals requested for deposition. (Tollefson Aff. ¶ 13 and Ex. L.) Plaintiffs proposed moving the eighteen depositions to the end of the scheduling period, so the Court would not have to consider the matter on an emergency basis. (*Id.* at Ex. L.)

Defendant responded to Plaintiffs' letter on June 23, 2004. (Tollefson Aff. ¶ 14 and Ex. M.) Defendant was unable to agree to move the eighteen depositions for several reasons, including the fact that Plaintiffs had not disclosed the names of the individuals they objected to. (*Id.* at Ex. M.)

Plaintiffs responded on June 29, 2004, listing the names of the eighteen individuals they

objected to and their reasons for the objections. (Affidavit of Daniel E. Williams in Support of Plaintiffs' Motion for Protective Order ("Williams Aff.") (Docket No. 233) ¶ 2 and Ex. A.)

7. Defendant Offers to Compromise with regard to Plaintiff Smith's Deposition

One of the depositions Defendant requested on June 21, 2004 was that of Plaintiff Kimberley Smith. Ms. Smith's deposition was noticed for July 1, 2004. On June 30, 2004, Plaintiffs sent a letter to Defendant objecting to Ms. Smith's deposition and putting Defendant on notice that Plaintiffs would not produce Ms. Smith on July 1, 2004. (Tollefson Aff. ¶ 15 and Ex. N.) Defendant responded on June 30, 2004, temporarily agreeing to vacate the deposition of Ms. Smith. (Tollefson Aff. ¶ 16 and Ex. O.) Defendant proposed limiting the deposition to two hours in addition to not going over the same questions covered at Ms. Smith's prior deposition and working with Plaintiffs on scheduling the deposition at a mutually agreeable time. (*Id.*) Plaintiffs' only apparent response was to file Plaintiffs' Motion for Protective Order.

8. Defendant Tries to Convince Plaintiffs to Not Oppose the Depositions

On July 2, 2004, Defendant responded to Plaintiffs' correspondence of June 29, 2004, concerning the eighteen claimants for which Plaintiffs believed it was inappropriate for Defendant to depose. (Tollefson Aff. ¶ 17 and Ex. P.) Defendant maintained its right to depose each of the claimants who have joined the lawsuit and provided several reasons as to why the depositions were necessary including: (1) Plaintiffs produced little or no documents pursuant to subpoenas for John Paul Kurtin, Shelly Dyer, Christopher McCullough, John Seale, April Rinehart and Cheryl L. Sanderson; (2) Plaintiffs produced little or no documents pursuant to a request for production for Anthony Limani, Collin Reynolds and Nanci Uli; (3) Plaintiffs have not supplemented their discovery responses in accordance with Rule 26(e) of the Federal Rules

of Civil Procedure and Local Civil Rule 26.2 for Michael Browning, Alan Claflin, Kevin Engle, Michael Hazen, Jay Madison, Don McMurrin, Janice Nitz, Patrick Revels and Steven Tom; and (4) Plaintiffs have not adequately or fully responded to Defendant's April 2, 2004 discovery requests with regard to all eighteen claimants. (*Id.* at Ex. P.)

9. Defendant Continues to Renew its Requests for Discovery on the Claimants

By July 8, 2004, Plaintiffs had not responded to Defendant's letters of March 24, 2004 and April 8, 2004 concerning supplementation of all outstanding discovery responses. Thus, on July 8, 2004, Defendant sent a letter to Plaintiffs requesting a meet and confer to discuss the outstanding discovery issues. (Tollefson Aff. ¶ 18 and Ex. Q.) Defendant's letter requested supplementation of Plaintiffs' Initial Disclosures, document production in response to subpoena requests, supplementation and compliance with written discovery requests, legible and/or complete copies of documents, and documents requested before, during and after depositions duccs tecum of Plaintiffs and claimants. (*Id.* at Ex. Q.)

10. The Parties Seek to Move out the Case Schedule to Accommodate the Dispute

Due to Plaintiffs' objections to the eighteen depositions requested by Defendant and in order to allow the Court time to resolve these discovery disputes, on July 13, 2004, the parties filed a Second Amended Stipulated Motion to Establish New Briefing Schedule on Final Class Certification ("Second Amended Stipulated Motion"). (Docket No. 218.) In order to accommodate the proposed deposition schedule, the deadlines for briefing on final conditional certification were moved, as well as the hearing date for final class certification.

Pursuant to the agreement between the parties to extend the deposition period, on July 13, 2004, Defendant sent a letter to Plaintiffs attaching a proposed deposition calendar, which moved

seventeen of the eighteen disputed deponents to the end of the deposition schedule. (Tollefson Aff. ¶ 19 and Ex. R.) Although several of the depositions on the July 13, 2004 calendar have been moved around since then to accommodate the schedules of individuals and counsel, all of the depositions have been noticed and are in the process of being taken. However, the first deposition of one of the disputed deponents subject to Plaintiffs' Motion is scheduled for August 16, 2004. (Tollefson Aff. ¶ 20 and Ex. S.)

11. Plaintiffs' Belated Response to Defendant's Overdue Discovery

On July 26, 2004, Plaintiffs finally responded, in part, to Defendant's letter of July 8, 2004 concerning outstanding discovery issues. (Tollefson Aff. ¶ 21 and Ex. T.) With regard to Defendant's request for supplementation, Plaintiffs indicated the following: (1) Plaintiffs were in the process of contacting and updating initial disclosure information for certain class members; (2) Plaintiffs were in the process of contacting class members to determine if there are any outstanding records or information in response to previous subpoena requests; (3) with regard to written discovery requests, Plaintiffs referred Defendant to a letter from Chris Huntley dated July 27, 2004, which apparently was to be sent under separate cover;⁵ (4) Plaintiffs produced legible and/or complete copies of requested documents; and (5) Plaintiffs have indicated they will produce documents in response to requests before, during and after depositions duces tecum once Plaintiffs have contacted each of the class members. (*Id.* at Ex. T.) In short, Plaintiffs have taken the same approach in written discovery as they have with respect

⁵ Although Plaintiffs indicated the issue of written discovery would be addressed in a letter under separate cover, Defendant never received a letter from Chris Huntley on July 27, 2004 (or any date thereafter) addressing this issue. Defendant's letters of March 24, 2004, April 8, 2004 and July 8, 2004 requesting supplementation of written discovery have never been addressed by Plaintiffs.

to their objections to depositions subject to Plaintiffs' Motion—they make promises they do not keep and employ dilatory tactics to keep Defendant from discovering relevant information.

III. ARGUMENT

A. Defendant is Entitled to Depose Each and Every Individual That Files a Consent to Join the Collective Action

When Defendant requested the depositions of fifty-nine class members on March 19, 2004, it intended to take those initial depositions based on a variety of factors such as location, subsidiary and duration of employment with respect to the individuals selected. But with each deposition, Defendant has found that the testimony is so vastly different between the class members, Defendant cannot adequately represent the interests of its client without deposing each of the subject individuals (bearing in mind that the size of the conditionally certified class is relatively small and decreasing).⁶ Further, it would violate due process to preclude Defendant from presenting evidence necessary to demonstrate that the remaining claimants are not similarly situated.

1. Defendant is Not Requesting Any More Depositions than Plaintiffs Have Already Agreed to Allow

The deposition discovery is not unduly burdensome. Between the eleven depositions Defendant withdrew from its March 19, 2004 request for depositions and the fourteen class members pending dismissal from its March 19, 2004 request for depositions, the request for

⁶ Between the original Plaintiffs/claimants who filed Consents to Join the Collective Action and the claimants who joined during the first and second notice periods, there were ninety-one class members involved in this lawsuit. Taking into account the pending motions to dismiss, offers of judgment and opt-out claimants as described more fully *infra*, the class will soon be reduced to sixty-one Plaintiffs/claimants. As of the date of Defendant's Opposition, there are only twenty-four depositions yet to be taken.

cighteen additional depositions is not a burden on Plaintiffs. In fact, when adding the sixteen depositions that have already been taken pursuant to Defendant's March 19, 2004 request for depositions, *the total number of depositions requested by Defendant is still fifty-nine; the same exact number of depositions as Defendant's original request on March 19, 2004.* Plaintiffs have stated repeatedly that they were willing to make the fifty-nine witnesses available to Defendant. (Plaintiffs' Memo at p.3; Tollefson Aff. at Exs. E and G.) The fact that some of the names of deponents have changed is of no relevant consequence; the total number of deponents is unchanged. On this basis alone, the fallacy of Plaintiffs' purported objection to this deposition discovery as "burdensome" is apparent.

Furthermore, as of the date of this opposition, eight additional class members whom Defendant had requested for deposition in its June 21, 2004 correspondence are subject to unopposed motions on other proceedings pending dismissal from this lawsuit. Three are subject to Defendant Micron Electronics, Inc.'s Motion to Strike Consents and Dismiss Claimants Destiny J. Baxter, Don Hopkins and Camille Woodworth (docket no. 229), one is subject to the Notice of Acceptance of Offer of Judgment to Conditionally Certified Claimant Stephen Miller (docket no. 215) and more recently, Plaintiffs have indicated that four additional class members are opting out of the lawsuit (Stefanie Bistline, Susan Pierce, Rose Thies and Deborah Harris).

As class members continue to opt out and/or be dismissed from this case for various reasons, the sampling of depositions required by Defendant is reduced and less apt to provide evidence of any patterns. As Plaintiffs suggest, Defendant was satisfied with its original selection of deponents, but the "sizeable sample" has been reduced in number due to class members opting out and/or being dismissed. Therefore, Defendant should be allowed to take as

many depositions as it needs in order to have a clear understanding of the many varied and disparate allegations which remain for those individuals still in the case.

With regard to the eighteen deponents in dispute, Defendant has clearly outlined for Plaintiffs the reasons it needs to depose these class members: (1) Plaintiffs produced little or no documents pursuant to subpoenas for John Paul Kurtin, Shelly Dyer, Christopher McCullough, John Seale, April Rinehart and Cheryl L. Sanderson; (2) Plaintiffs produced little or no documents pursuant to a request for production for Anthony Limani, Collin Reynolds and Nanci Uli; (3) Plaintiffs have not supplemented their discovery responses in accordance with Rule 26(e) of the Federal Rules of Civil Procedure and Local Civil Rule 26.2 for Michael Browning, Alan Claflin, Kevin Engle, Michael Hazen, Jay Madison, Don McMurrian, Janice Nitz, Patrick Revels and Steven Tom; and (4) Plaintiffs have not adequately or fully responded to Defendant's April 2, 2004 discovery requests with regard to all eighteen claimants. (Tollefson Aff. at Ex. P.) For these and other reasons relating to its ability to defend this case, Defendant must depose the remaining class members.

B. Kimberley Smith Has Not Been Deposed Since the Conditional Certification Stage

As previously mentioned, on May 14, 2003, the parties submitted a Joint Discovery Plan. Defendant took the position that "time spent in depositions previously conducted in the conditional certification stage do not count toward the length of deposition requirement set forth in Local Civil Rule 30.1, following Fed.R.Civ.P. 30(d)(2)." (Joint Discovery Plan at p.5.)

Ms. Smith has been a named Plaintiff since the commencement of this lawsuit. Federal Rule of Civil Procedure 30(d)(2) directs the Court to allow additional time where consistent with Rule 26(b)(2) if needed for a fair examination of the deponent. Since the February 2002

deposition was taken *prior* to the conditional certification stage, the eight hours and thirty-three minutes⁷ Ms. Smith spent in deposition at that time to should not count toward the length of deposition requirement.

As the Court stated in its September 27, 2002 Memorandum Decision and Order, "the discovery that has been done appears relatively narrow in scope. The Court's Scheduling Order in this case set up a discovery schedule for 'conditional certification' issues only." (Memorandum Decision and Order at p.4.) Therefore, "the Court will apply the lenient standard, and allow the parties to conduct further discovery to prepare for the more rigorous second phase." (*Id.* at p.5.)

Although Defendant has a legitimate argument for an additional seven hours of deposition time with Ms. Smith, Defendant proposed limiting the deposition to two hours, in addition to not going over the same questions covered at Ms. Smith's prior deposition, and

⁷ Ms. Smith was deposed on Friday, February 15, 2002 from 9:40 a.m. until 5:00 p.m. (Second Affidavit of Gregory C. Tollefson in Support of Defendant's Response to Plaintiffs' Motion for Conditional Certification ("Second Tollefson Affidavit") (Docket No. 124) Ex. M (Deposition of Kimberley Smith ("Smith Depo.") at 5:2-8; 262:11. At approximately 11:46 a.m., the parties returned from a seventeen minute break. (Smith Depo. at 84:15-21.) For the lunch hour, the parties agreed to break for lunch at noon and resume the deposition at 1:30 p.m. (Smith Depo. at 84:24-85:3.) The deposition did not actually resume until 1:45 p.m. (Smith Depo. at 101:19-21.) There was an afternoon break for an undisclosed period of time. (Smith Depo. at 230:19-20.) Assuming the afternoon break lasted approximately ten minutes, Ms. Smith was deposed a total of five hours and eight minutes on February 15, 2002. The following Monday, February 18, 2002, Ms. Smith was deposed from 9:10 a.m. to 12:50 p.m. (Smith Depo. at 263:2; 440:12.) There were two breaks during the deposition. (Smith Depo. at 298:13-16; 354:1-3.) Assuming the two breaks amounted to approximately fifteen minutes, Ms. Smith was deposed a total of three hours and twenty-five minutes on February 18, 2002, bringing the total deposition time to eight hours and thirty-three minutes, a mere hour and a half over the purported seven hour limitation.

working with Plaintiffs on scheduling the deposition at a mutually agreeable time. (Tollefson Aff. Ex. O.)

Plaintiffs have shown no good cause for a protective order to be granted preventing Ms. Smith's deposition.

C. Defendant Has the Right to Demand Live Testimony of All Individuals Who File Consents to Join the Collective Action

Defendant should not be prevented from taking live depositions if it elects to do so. Claimants who have filed consents to join the collective action are subject to the same form of examination as the named Plaintiffs.

Defendant originally scheduled all of the out-of-state depositions during the same week (July 19 through 23, 2004) so the parties would incur less travel expenses. When Plaintiffs belatedly informed Defendant that certain deponents would not be available during that week, Defendant had no choice but to split up the out-of-state travel. In addition, Defendant continues to find out on a rolling basis that certain class members, who were believed to be located in Idaho, are now apparently living in different states. For example, the depositions of Steven Tom on August 16, 2004 and Patrick Revels on August 20, 2004 have been noticed since July 16, 2004. It wasn't until July 29, 2004 that we received notification that Steven Tom lives in San Marcos, California and Patrick Revels lives in Asotin, Washington. (Tollefson Aff. ¶ 22 and Ex. U.)

Furthermore, Plaintiffs' have never informed Defendant, either verbally or in writing, that conditionally certified claimant Kevin Engle resides in Japan. (Tollefson Aff. ¶ 23.) Defendant is not unreasonable and is more than willing to take Mr. Engle's deposition via telephone or videoconference. However, Defendant was not allowed to discuss this issue with Plaintiffs

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because, until Plaintiffs' Motion was filed, Plaintiffs had failed to disclose that Mr. Engle lived in Japan, preferring instead to keep Defendant in the dark.

Plaintiffs indicate Mr. Thomas "spent five days on the road" for the depositions of Julie Gardner, Tom Robertson and Jeff Clevenger.⁸ (*Id.*) Mr. Tollefson, counsel for Defendant took these depositions and his itinerary involved only three days and two nights of travel. (Tollefson Aff. ¶ 24.) In contrast, Mr. Tollefson traveled the morning of July 20, 2004 to Minnesota for the afternoon deposition of Julie Gardner, and then traveled the morning of July 22, 2004 to Michigan for the afternoon deposition of Jeff Clevenger. (*Id.*) After Mr. Clevenger's deposition, he flew back to Boise that very evening. (*Id.*)

D. Good Cause For Issuance of the Protective Order has not been Demonstrated

"[A]n examining party may set the place for the deposition of another party wherever he wishes subject to the power of the court to grant a protective order under Rule 26(c)(2) designating a different place." *United States v. \$160,066.98 from Bank of America*, 202 F.R.D. 624, 627 (S.D.Cal. 2001) (internal citations omitted). The standard for entry of a protective order is "good cause;" that is, Plaintiffs must show that they will be subject to "annoyance, embarrassment, oppression, or undue burden or expense" if the out-of-town depositions proceed as set. *See, e.g., Sears v. American Entertainment Group, Inc.*, No. 94 C 0165, 1995 WL 66411, at *1 (N.D.Ill. Feb. 13, 1995).

Certainly, it is less cumbersome and more illuminating to conduct a face-to-face

⁸ In Plaintiffs' Memo, Plaintiffs erroneously refer to Jeffery Clevenger as an opt-in class member. (Plaintiffs' Memo at 6.) Mr. Clevenger is a named Plaintiff in this case and prior to his July 22, 2004 deposition, had been deposed on only one occasion, on January 17, 2002. This was more than two and a half years ago and prior to completion of the conditional certification period.

deposition. *Daly v. Delta Airlines*, No. 90 Civ. 5700(MEL)(MHD), 1991 WL 33392, at *1 (S.D.N.Y. Mar. 7, 1991). In *Daly*, the Court set forth a cogent analysis of the possible disadvantages of a telephonic deposition:

Generally it may be assumed that most deposing counsel would prefer to see the witness whom they are deposing. First, the witness's demeanor may be a significant consideration in assessing how effective a witness he will be at trial. Second, the witness's demeanor can also guide an attorney in probing for areas in which the witness may be less confident or sure of himself. Third, although an attorney preparing for a deposition will presumably segregate and identify for himself in advance the documents that he intends to use at the deposition, there will inevitably be occasions on which he decides on the spot to use additional documents as deposition exhibits. This procedure may be somewhat constrained by the use of a telephone deposition since the deposition exhibits must be forwarded to the witness in advance.[] Moreover, the use of a telephone deposition lessens the ability of the examining attorney to obtain a spontaneous reaction from the witness, since he will presumably have access to the documents before he is questioned about them.

Daly, 1991 WL 33392 at *1 (internal footnote omitted).

In addition, Plaintiffs have not made any showing of substantial hardship. The only complaint is that Plaintiffs' counsel wish to avoid limited travel costs associated with their representation of the conditionally-certified class. "This hardly constitutes a showing of inordinate hardship, economic or otherwise." *Daly*, 1991 WL 33392 at *1, citing, *Seuthe v. Renwal Products, Inc.*, 38 F.R.D. 323, 325 (S.D.N.Y. 1965); *Rifkin v. United States Lines, Co.*, 177 F.Supp. 875, 876 (S.D.N.Y. 1959).

Finally, if there is a trial in this matter, most likely Plaintiffs will be calling their witnesses to testify in person at the trial. Prohibiting Defendant from taking a deposition in person is unfair and unjustified: "In any event, a live appearance by a witness at trial is usually

advantageous for the party calling the witness and there is no reason why [defendant] should be disadvantaged in this manner." *Daly*, 1991 WL 33392 at *2, n.3.

Defendant is not requesting that any of the deponents travel out of state, and Defendant has attempted to minimize inconvenience and cost to Plaintiffs' counsel. There has been no showing sufficient to meet the high threshold required for "good cause" to grant the protective order.

IV. CONCLUSION

Plaintiffs' Motion for Protective Order does not fully comply with Local Civil Rule 37.1. Plaintiffs have not made a reasonable effort to reach agreement with Defendant on the matters set forth in Plaintiffs' Motion. Furthermore, Plaintiffs cannot be allowed to impede Defendant's efforts to conduct full and complete discovery in this case. Plaintiffs will be taking the position at the upcoming certification hearing (docket no. 216) that the conditionally certified class is "similarly situated" for purposes of final certification under the FLSA. Certainly then, it is potentially helpful for Plaintiffs to preclude deposition discovery by Defendant into the specifics of each remaining claimant's allegations and situation, particularly where the claimants each have different things to say.

Additionally, if Defendant is permitted to depose the eighteen class members in dispute, Defendant will actually have deposed less class members than its original request for fifty-nine depositions--*which Plaintiffs agreed to*. The briefing schedule and hearing date on final class certification have been moved to accommodate these depositions.

Defendant should also be allowed to take the deposition of named Plaintiff Kimberley Smith. Ms. Smith's first deposition, taken over two and a half years ago, was prior to the

conditional certification stage and should not count toward the length of deposition requirement at this subsequent stage. Moreover, there have been new and further developments in the case, as well as with regard to Ms. Smith's situation, which have not been subject to deposition discovery.

Plaintiffs have not provided any facts of record sufficient to meet the high threshold required for "good cause" to grant their request for telephonic depositions. Prohibiting Defendant from taking a deposition in person is unfair and unjustified. Defendant has attempted to minimize inconvenience and cost to the parties, although certain class members' alleged inability to appear for depositions has resulted in more frequent out-of-state trips and therefore increased costs.

Defendant should be allowed to depose the eighteen class members in dispute, as well as named Plaintiff Kimberley Smith, and take the few remaining out-of-state depositions via live testimony (except for the Japan deposition).

DATED this 6th day of August, 2004.

STOEL RIVES LLP

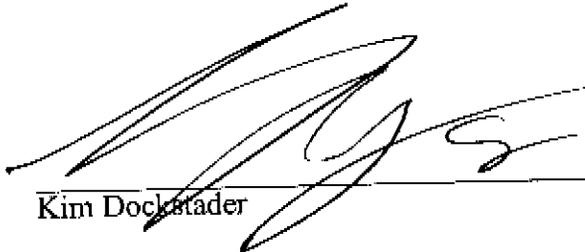

Kim Dockstader

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of August, 2004, I caused to be served a true copy of the foregoing **DEFENDANT MICRON ELECTRONICS, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER FILED ON JULY 23, 2004** by the method indicated below, addressed to the following:

William H. Thomas
Daniel E. Williams
Christopher F. Huntley
HUNTLEY PARK LLP
250 South Fifth Street
PO Box 2188
Boise, Idaho 83701-2188
Fax: 208 345 7894

- Via U. S. Mail
- Via Hand-Delivery
- Via Overnight Delivery
- Via Facsimile



Kim Dockstader