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Attorneys for Defendant

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  
 DEFENDANT'S MOTION TO STRIKE  
 PORTIONS OF AFFIDAVITS FILED IN  
 SUPPORT OF CONDITIONAL  
 CERTIFICATION**

**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE  
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 CERTIFICATION - 1**

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 ORIGINAL

Plaintiffs have moved for an order conditionally certifying a class in this action. *See* Docket No. 75. In support of their Motion for Conditional Certification, Plaintiffs filed several affidavits. *See* Docket No. 78. Defendant moves to strike those portions of certain affidavits submitted by Plaintiffs that include statements contrary to statements made by the affiants under oath during depositions.

Defendant submits this Memorandum in support of their Motion to Strike Portions of Affidavits Filed in Support of Conditional Certification. This Memorandum is supported by the concurrently filed Affidavit of Teresa A. Hill.

## I. ARGUMENT

### A. The Court Should Strike Portions of the Affidavits Filed in Support of Conditional Certification That Are Contrary to Affiants' Deposition Testimony.

Plaintiffs should not be permitted to rely on affidavits in support of conditional certification that are in direct conflict with sworn deposition testimony. The parties in this case have conducted considerable discovery and have collectively taken thirty-four depositions to date. Because of the amount of discovery completed, Plaintiffs should be held to an "intermediate" standard for conditional certification and should be required to demonstrate proper and competent factual support for their allegations. Otherwise, conditional certification as a class is inappropriate. *See, e.g., Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 406 (D.N.J. 1988) *aff'd*, 493 U.S. 165 (1989) (finding sufficient record to conditionally certify class where Plaintiffs made "detailed allegations... and have supported those allegations with

affidavits which successfully engage defendant's affidavits to the contrary.”). Plaintiffs' affidavits are wholly inadequate. The affidavits are directly contradicted in the affiants' own deposition testimony.<sup>1</sup> Moreover, this deposition testimony is contrary to the allegations in Plaintiffs' complaint. The unsupported assertions and bald allegations contained in the affidavits filed by Plaintiffs, which are directly contradicted by deposition testimony, do not provide the factual basis necessary to support conditional certification. *See, e.g., Haynes v. Singer Co.*, 696 F.2d 884, 886 (11<sup>th</sup> Cir. 1983) (holding district court properly refused notice where only evidence was counsel's unsupported assertions).

In the summary judgment context, the Ninth Circuit clearly holds that a party cannot create an issue of fact by filing an affidavit contradicting prior deposition testimony. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9<sup>th</sup> Cir. 1991)(citing *Foster v. Arcata Assoc.*, 772 F.2d 1453, 1462 (9<sup>th</sup> Cir. 1985); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543-44(9<sup>th</sup> Cir. 1975). “[I]f a party who has been examined at length on deposition could raise an

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<sup>1</sup> Of the eighteen individuals who filed affidavits in support of Plaintiffs' motion for conditional certification, two are named plaintiffs and fifteen have filed consents to join the collective action. Seven of these claimants have been deposed. The claimants' depositions (affiants and non-affiants) have numerous inconsistencies both among the claimants and with respect to Plaintiffs' class allegations. This Memorandum does not address all of these inconsistencies, nor does it address all of the variations between the sworn affidavits and deposition testimony. Instead, this Memorandum focuses solely on individuals who have filed affidavits that are directly contradicted by deposition testimony.

issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.” *Foster*, 772 F.2d at 1462 (citations omitted). Similarly, Plaintiffs should not be allowed to establish a factual basis for conditional certification based on affidavits that have been contradicted by deposition testimony. Allowing Plaintiffs to use affidavits that conflict with deposition testimony to support conditional certification undermines the value of the Court’s inquiry to determine whether notice is appropriate and does not promote the orderly and expeditious resolution of the case. *See Hoffmann-LaRoche Inc. v. Sperling*, 493 U.S. 165 (1989) (upholding district court involvement in the notice process as part of courts’ authority to manage its affairs and achieve the “orderly and expeditious disposition of cases.”). The Court should therefore strike the following portions of the affidavits filed by Plaintiffs and should not consider them in its determination on conditional certification.

1. *Laura Anderson.*

In her affidavit, paragraph 16, Ms. Anderson asserts:

My supervisors made it clear that we were not to record more than 40 hours of work in a week, but that we were expected to complete our work no matter how long it took. I understood that I would be reprimanded if I reported more than 40 hours in a work week.

Affidavit of Laura Anderson (“Anderson Aff.”) at ¶ 16. However, this statement is in direct conflict with statements made at Ms. Anderson’s deposition. First, during the deposition,

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which was taken only five weeks after Ms. Anderson signed her affidavit, she could not recall being reprimanded for recording her overtime hours.

Q. But on the occasions when you did submit overtime, were you ever reprimanded by Mr. Brandon or Mr. Church for turning in overtime hours?

A. It was discouraged.

Q. But specifically did either of them ever come to you and say, you know, don't turn in overtime hours or you turned in too many overtime hours?

A. I don't recall.

*See* Affidavit of Teresa A. Hill ("Hill Aff."), Exhibit A, Deposition of Laura Anderson ("Anderson Depo.") at 39:6-14. In addition, when asked specifically about the directions given by her supervisors regarding recording time, Ms. Anderson could not remember being told not to record her hours.

Q. Did Mr. Brandon tell you not to write down all the hours that you were working?

A. No, I don't believe so.

...

Q. Did Mr. Brandon ever tell you -- did Mr. Church ever tell you not to write down all the time that you had worked?

A. Not that I remember.

Q. And Mr. Brandon didn't tell you that either?

A. I am not sure about that.

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Q. Do you remember any specific occasion where Mr. Brandon told you or anyone on your team not to submit all of the hours that you were working?

A. I don't remember any specific occasion.

*Id.* at 40:24-41:1; 51:21-52:7.

In her affidavit, paragraph 16, Ms. Anderson also states that:

During the course of my employment, I came to work before my regularly scheduled work time several times per week. In order to meet the demands of the job, I often worked through my lunch hour or stayed after my regular shift. I did not record these off-the-clock hours.

Anderson Aff. at ¶ 16. However, in her deposition Ms. Anderson acknowledges that she typically arrived at the time of her scheduled shift.

Q. Did you have a typical time that you would arrive at work, or did that vary?

A. It was approximately be there at nine, you know, when the shift started, whenever the shift started approximately.

Anderson Depo. at 57:17-21.

These statements are not only inconsistent with Ms. Anderson's own affidavit, they are also inconsistent with the allegations in the complaint, which Plaintiffs argue are "typical of the claims of the class." *See* Second Amended Complaint and Demand For Jury Trial (docket no. 94) ("Complaint") at ¶¶ 53, 54. Specifically, Ms. Anderson's deposition testimony contradicts Plaintiffs' claim that Defendant "engaged in a pattern or practice of encouraging Plaintiffs and the class not to report, and discouraging them from reporting, all time worked." Complaint at ¶ 53(C).

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Because statements made by Ms. Anderson in paragraph 16 of her affidavit are in direct conflict to statements made during her deposition under oath, we respectfully request that the Court strike these portions of her affidavit.

2. *Alan Garcia.*

In his affidavit, paragraph 9, Mr. Garcia states in part that:

When overtime was authorized, I recorded my overtime hours.  
When it was not authorized, I did not record the hours, but would still work the hours to perform my job.

Affidavit of Alan Garcia at ¶ 9. Contrary to his affidavit, in his deposition Mr. Garcia says there was no time that he worked that was not recorded.

Q. So if I understand your last answer correctly -- let me ask you a question this way: Is there any time that you worked -- whether at home, on a business trip, or any Micron facility, or a customer's facility -- where you did not record and get paid for the time that you worked?

A. I'm not certain.

Q. Can you elaborate on your answer a little bit more?

A. Yes. There is no time that I worked which was not recorded.

Q. Okay.

A. What I was paid, I'm not certain.

Q. Okay. So all of the occasions that you worked at home, you accurately recorded those hours on your timesheet?

A. Yes.

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Q. All of the occasions that you were traveling for business or working at remote locations, you accurately recorded those hours on your timesheet?

A. Yes.

Q. All of the occasions that you worked in the Meridian facility, you accurately recorded those hours on your timesheet?

A. Yes.

Q. All of the occasions that you worked in the Boise Eagle Flight Way facility, you accurately recorded those hours on your timesheet?

A. Yes.

Q. And you said earlier that what you were paid you're not certain. What did you mean by that?

A. To clarify that statement, I never took the time to reconcile my hours versus the dollars paid by paycheck period, year, etc.

Hill Aff., Exhibit B, Deposition of Alan Garcia ("Garcia Depo.") at 65:22-67:7. Mr. Garcia's affidavit, which claims that he did not record his overtime, is in direct conflict with statements made in his depositions; therefore, we request the Court strike this statement.

Furthermore, Mr. Garcia's deposition testimony, like Ms. Anderson's deposition testimony, contradicts Plaintiffs' allegation that employees were encouraged not to report all time worked. Complaint at ¶ 53(C). Mr. Garcia obviously did not feel discouraged from reporting the time he worked, and he clearly states that "[t]here is no time that I worked which was not recorded." Garcia Depo. 66:4-7.

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3. *Deborah Monahan.*

In her affidavit, paragraph 7, Ms. Monahan states:

I often came to work before my scheduled start time and, depending on whether we were allowed to record overtime, I would sometimes record it and at other times would not.

Affidavit of Deborah Monahan ("Monahan Aff.") at ¶ 7. However, in her deposition Ms. Monahan provides two reasons that she did not record her overtime, because she submitted her time early on Friday mornings, or would just neglect to record the time. According to her deposition testimony, decision not to record overtime was not based on whether she was "allowed" to record the time.

Q. Okay. And did you accurately record all the time that you worked?

A. No.

Q. And tell me why you didn't accurately record all the time that you did work?

A. Many times I would have my timesheet done for the week, and I would put in extra time and not account for it. And because it was already submitted, there could be no changes made to it.

...

Q. And I'm trying to understand why you didn't record all the time that you worked, aside from the reason you already gave me about you would submit your time Friday mornings. What other reasons did you not record all the time that you worked?

A. Sometimes I just didn't, you know, think about it. Like I say, a lot of times when you're in a fast-paced world, you know, it's easier just to say, okay, I worked 40 hours this week even though you may have put in 45 or 50 hours.

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Q. Any other reasons why you did not record all the time that you worked?

A. Not to my knowledge, no.

Hill Aff., Exhibit C, Deposition of Deborah Monahan (“Monahan Depo.”) at 42:2-10, 45:14-46:2. Ms. Monahan also acknowledges that she was never told not to record the time she was working.

Q. Okay. Did anyone ever tell you not to record all the time that you were working?

A. No.

Monahan Depo. at 53:19-21. Once again, this deposition testimony not only contradicts the affidavit filed in support of conditional certification but directly undermines Plaintiffs’ claim that Defendant encouraged the class not to report all time worked. *See* Complaint at ¶ 53(C).

Monahan’s affidavit further states that: “[m]y supervisors were aware that I worked off the clock because they were there most of the time.” Monahan Aff. at ¶ 8. However, in her deposition she states that she had no reason to believe her supervisors knew she was working off the clock.

Q. Do you have any reason to believe that your supervisors knew that you weren't recording all of the overtime that you were working?

A. No.

Monahan Depo. at 56:11-14. This deposition testimony contradicts Ms. Monahan’s affidavit and undermines Plaintiffs’ class allegation that Defendant “engaged in a pattern or practice of

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permitting Plaintiffs and the class to work without paying for all time worked....” Complaint at ¶ 53(D). The Court should strike the portions of paragraphs 7 and 8 of Ms. Monahan’s affidavit that are in conflict with her deposition testimony.

4. *Tracy Scott Wells.*

Mr. Wells states in his affidavit that: “I was informed on several occasions that I could not record more than 40 hours in a given work week and had been verbally reprimanded for recording too much overtime.” Affidavit of Tracy Scott Wells (“Wells Aff.”) at ¶ 13. However, in his deposition, Mr. Wells states that he does not recall any of his supervisors or managers reprimanding him for recording too much overtime.

Q. Tawni Weaver never reprimanded you for recording too much overtime, did she?

A. I don't think so.

Q. Dan Robinson never reprimanded you for recording too much overtime?

A. I don't know a Dan Robinson.

Q. Excuse me. Tony Robinson.

A. I don't think so.

Q. And Dominic Casey never reprimanded you for recording too much overtime?

A. No, I don't think so.

Q. And David McCauley never reprimanded you for recording too much overtime?

A. No.

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Q. In fact, there was never a supervisor or manager that reprimanded you for recording too much overtime. Isn't that right?

A. Not that I can recall

Hill Aff., Exhibit E, Deposition of Tracy Scott Wells ("Wells Depo.") at 289:24-290:16.

Once again, this testimony, taken under oath, contradicts Mr. Wells' affidavit and is counter to Plaintiffs' class allegations that Defendant discouraged sales representatives from recording their time. Complaint at ¶ 53(C).

In addition, in his affidavit, Mr. Wells states that:

It is my belief based on personal observations that people who did work off the clock were favored with call lists, contests, treatment and dividing up accounts. It was not a fair place to work. It was clear to me that others who were working off the clock would move up the sales curve more quickly. Employees who worked the unauthorized overtime clearly had an advantage.

Wells Aff. at ¶ 14. Although Mr. Wells' affidavit indicates that he has knowledge of multiple employees who benefited from off the clock work, in his deposition Mr. Wells can only recall one inside sales representative who he believes benefited from off the clock work. Wells Depo at 175:24-181:21. However, Mr. Wells' example, of an individual whose name he cannot recall, provides no specific facts. *Id.* We request that the Court strike those portions of Mr. Wells' affidavit that are unsupported, conclusory and contrary to his deposition testimony.

The portions of the affidavits identified above are in direct conflict with statements made by the affiants during their depositions. Presumably, Plaintiffs had these individuals file

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affidavits because their claims are typical of the punitive class. However, the deposition testimony of these individuals do not support Plaintiffs' class allegations. Specifically, the depositions contradict Plaintiffs' allegation that Defendant discouraged Plaintiffs and the class from accurately reporting all time worked. *See* Complaint at ¶ 53(C).

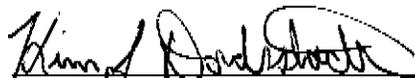
Plaintiffs cannot rely on affidavits to support their class allegations and motion for conditional certification where the affiants have given deposition testimony under oath that contradicts their own affidavits. These affidavits, therefore, do not provide factual support for conditional certification and should not be considered by the Court in ruling on Plaintiffs' Motion for Conditional Certification.

### III. CONCLUSION

For the foregoing reasons, Defendant's respectfully request the Court strike the portions of the affidavits identified above.

Dated this 15th day of August, 2002.

STOEL RIVES LLP

  
Kim J Dockstader

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2002, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE PORTIONS OF AFFIDAVITS FILED IN SUPPORT OF CONDITIONAL CERTIFICATION** as served on the following individuals by the manner indicated:

William H. Thomas	<input type="checkbox"/>	By U.S. Mail
Daniel E. Williams	<input checked="" type="checkbox"/>	Hand Delivery
HUNTLEY, PARK, THOMAS,	<input type="checkbox"/>	By Facsimile
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