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U.S. DISTRICT &
BANKRUPTCY COURTS

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FILED BY: JUDY WOOD
Clerk of Court

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

**REPLY TO PLAINTIFFS' NOTICE OF
NON-OPPOSITION TO MOTION FOR
PARTIAL SUMMARY JUDGMENT ON
PAYMENT OF PREMIUM ON
COMMISSION STATEMENTS**

I. INTRODUCTION

Plaintiffs have conceded defeat on Micron Electronics, Inc.'s Motion for Partial Summary Judgment Re Payment of Commission Premiums for Overtime (the "Motion"). (Docket No. 179.) Unfortunately, *Plaintiffs have not done so gracefully*. Although stating

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unambiguously that "Plaintiffs do not oppose Defendant's Motion for Partial Summary Judgment re Payment of Commission Premiums for Overtime," Plaintiffs include in their non-opposition brief superfluous, inflammatory and unfounded allegations against Micron Electronics, Inc. ("MEI") and its former employees. Because this litigation is ongoing, these attacks by Plaintiffs must be addressed.

II. ARGUMENT

A. MEI's Motion for Partial Summary Judgment is Not Opposed by Plaintiffs

This brief is not intended to rehash arguments raised in the Motion. That Motion, including all arguments contained therein, is unopposed by Plaintiffs. MEI therefore has prevailed on its Motion and is entitled to the relief sought.

B. Plaintiffs Make Inaccurate and Irrelevant Representations in Their Non-Opposition Brief

In an apparent effort to pad their fall, Plaintiffs have leveled inaccurate and personal allegations against MEI and its former employees regarding the calculation of overtime premiums. Specifically, Plaintiffs allege that (1) a former MEI employee may have given false testimony about the start date for fiscal months; (2) MEI has misrepresented its use of an Access database to calculate overtime premiums; (3) Timothy Kaufmann was never paid overtime premiums on commissions from June 1998 through May 1999; and (4) the Affidavit of Robert Griffard "ignores the fact that the fiscal weeks begin on Friday and the weeks used for overtime calculations begin on Sunday." (Plaintiffs' Non-Opposition to Motion for Partial Summary Judgment on Payment of Premium on Commission Statements ("Plaintiffs' Non-Opposition Brief") (Docket No. 222) at 4.)

Tellingly, Plaintiffs did not deem any of these baseless allegations sufficient to support an opposition to MEI's Motion.

1. Plaintiffs Have Misrepresented Testimony From Former MEI Employees Regarding the Start of Fiscal Months

Plaintiffs represent to this Court in their non-opposition brief that a former MEI employee, Farrah Zumhoff, apparently provided false testimony during her deposition by stating that a fiscal month at MEI would not begin more than five days into a calendar month. (*See* Plaintiffs' Non-Opposition Brief at 2-3.) This personal attack by Plaintiffs on Ms. Zumhoff is out of line.

Plaintiffs fail to accurately portray the testimony given by Ms. Zumhoff at her deposition. First, Plaintiffs neglect to mention that Ms. Zumhoff was being asked by Plaintiffs' counsel to recall the start dates of fiscal months that dated back approximately five years. Second, Plaintiffs fail to reveal that Ms. Zumhoff specifically clarified during her deposition that, besides dating back approximately five years, the start dates for specific fiscal months were difficult if not impossible to recall because those dates varied from month to month:

Q: And how many days into the beginning of a calendar month might a fiscal month start?

...

A: I can't say. There was a – it varied.

Q: Would it be more than five?

A: Typically, no.

Q: Might it be five?

A: Yes.

(*Id.* at Ex. 3 (Deposition of Farrah Zumhoff) at 89:7-17 (emphasis added).)

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Third, Plaintiffs ignore the significance of Ms. Zumhoff's above statement (when pressed further by Plaintiffs' counsel during the deposition) that a fiscal month "typically" would not start more than five days into a calendar month. At no time did the witness purport to give an unequivocal answer; indeed, she specifically stated that she could not. (*Id.*)

Despite these hurdles, Ms. Zumhoff endeavored to provide Plaintiffs' counsel with as much information as she could remember about the start dates of fiscal months.

Rather than praising Ms. Zumhoff for her candor and for her best efforts to provide Plaintiffs with the relevant information, Plaintiffs inexcusably represent to this Court that her testimony "appears to be false" because two fiscal months started on the sixth day of a calendar month and one started on the seventh day of a calendar month (rather than starting on the fifth day of the calendar month). (Plaintiffs' Non-Opposition Brief at 2-3.) This attack on Ms. Zumhoff is nonsense. The fact that a fiscal month dating back approximately five years started a few days later into the calendar month than when Ms. Zumhoff had recollected at her deposition does not, in any way, suggest that the testimony of Ms. Zumhoff is false —especially in light of her statement to Plaintiffs' counsel that she could not recall with certainty when each of the months started.

Moreover, the start of a few fiscal months after the fifth day of a calendar month does not render false the recollection by Ms. Zumhoff that fiscal months "typically" started less than five days after the start of a given calendar month; indeed the majority of fiscal months did start before the fifth day of the calendar month.¹

¹ For the thirty-six (36) fiscal months during the relevant three-year time period, twenty-three (23) of the fiscal months begin prior to the fifth day of the calendar month. Only thirteen (13) of the fiscal months begin after the fifth day of the calendar month.

Finally, and most importantly, this entire line of argument is a red herring because it has *no impact whatsoever* on the conclusion that MEI paid overtime premiums for commissions in accordance with the FLSA—which, of course, was the unsubstantiated issue raised by Plaintiffs' in their Complaint and throughout these proceedings. Stated alternatively, even if every fiscal month started after the fifth day of the calendar month, Plaintiffs still could not support their claim that MEI failed to pay overtime premiums in compliance with the FLSA.

2. Beginning in 1998, MEI Did Use an Access Database to Calculate Premiums on Commissions

Plaintiffs argue that Exhibit 4 to Plaintiffs' Non-Opposition Brief disproves the assertion by MEI that it used an Access database to calculate commission premiums for overtime. Specifically, Plaintiffs argue that because Exhibit 4, which is an Excel spreadsheet, was produced in May 1999, MEI did not begin using the Access database in 1998 to calculate commission premiums for overtime. Once again, Plaintiffs are incorrect and offer speculation without factual support.

Although Exhibit 4 is an Excel spreadsheet, Plaintiffs fail to realize that it is a printout of information *calculated and stored in the Access database* that MEI began using in 1998. Exhibit 4, therefore, does not support Plaintiffs' accusation. It is merely the method by which the data was exported and printed for review.

Moreover, even if MEI had used an Excel spreadsheet to calculate overtime premiums after 1998, such use would not put MEI in violation of the FLSA. The FLSA, obviously, does not require employers to use a specific type of software to calculate overtime premiums.

3. Mr. Kaufmann Was Paid an Overtime Premium on Commissions

Plaintiffs use Exhibit 4 to Plaintiffs' Non-Opposition Brief to conclude that MEI did not pay commission premiums to Timothy Kaufmann between June 1998 and May 1999. This conclusion is incorrect.

Mr. Kaufmann was employed by MEI from February 1996 to July 1999 (the "First Employment Period"), and was then employed by Micron Government Computer Systems, Inc. from July 2000 to October 2000 (the "Second Employment Period"). During the First Employment Period, Mr. Kaufmann was assigned the employee identification number of "10592". During the Second Employment Period, Mr. Kaufmann was assigned a new employee identification number of "501378". Exhibit 4 to Plaintiffs' Non-Opposition Brief does not show any commission premiums having been paid to Mr. Kaufmann between June 1998 and May 1999 because the Access database retrieved information based on the employee identification number assigned to Mr. Kaufmann during the Second Employment Period (that is, #501378), rather than the employee identification number used by Mr. Kaufmann between June 1998 and May 1999 during the First Employment Period (that is, #10592).

4. The Griffard Affidavit Does Not Ignore the Fact that Fiscal Weeks Begin on a Different Day than the Weeks Used to Calculate Overtime Payments

The final assertion raised by Plaintiffs in their purported non-opposition brief is that "the Griffard Affidavit ignores the fact that the fiscal weeks begin on Friday and the weeks used for overtime calculations begin on Sunday." (Plaintiffs' Non-Opposition Brief at 4.) Plaintiffs do not explain (1) the reason for this belief, or (2) the significance, if any, of this argument.

Contrary to Plaintiff's unsubstantiated assertion, the Griffard Affidavit does not ignore the

difference between the start of a fiscal week and the start of a calendar week used to calculate overtime; Mr. Griffard is well aware of this distinction.

Furthermore, the fact that fiscal weeks start on days different than the start of calendar weeks is irrelevant to whether MEI paid overtime premiums for commissions in accordance with the FLSA.

III. CONCLUSION

MEI has prevailed on its motion for partial summary judgment on this issue, notwithstanding the spurious statement of non-opposition filed by Plaintiffs in an attempt to pad their fall while retreating from their unsubstantiated claim. A proposed order and statement of findings on the motion is submitted contemporaneously with this reply.

DATED this 4th day of August, 2004.

STOEL RIVES LLP



Kim Dockstader

Attorneys for Defendant Micron Electronics, Inc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of August, 2004, I caused to be served a true copy of the foregoing **REPLY TO PLAINTIFFS' NOTICE OF NON-OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT ON PAYMENT OF PREMIUM ON COMMISSION STATEMENTS** by the method indicated below, addressed to the following:

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Kim Dockstader

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