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U.S. DISTRICT &
BANKRUPTCY COURTS

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FILED US DISTRICT COURT
Cameron Clarke, Clerk

Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

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

Case No. CIV 01-0244-S-BLW

**PLAINTIFFS' STATEMENT
OF UNDISPUTED FACTS**

Plaintiffs,)

vs.)

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

Defendant.)

During the course of discovery in this matter depositions were taken of 44 individuals.

Of these, Defendant Micron Electronics, Inc. (MEI) took the depositions of 28 named Plaintiffs

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and former employees. The employees had been employed at MEI's Meridian, Idaho, and Roseville, Minnesota, call center locations. These depositions provided undisputed evidence that MEI supervisors knew their sales representatives were working off the clock and it, therefore, did not act in good faith. The facts also demonstrate that MEI has no substantial basis to argue that it had reasonable grounds to believe that no Fair Labor Standards Act (FLSA) violations occurred. Finally, all the facts lead to the indisputable conclusion that MEI's violations were, in fact, willful.

The most egregious example of MEI's willful violation of overtime practices came from the testimony of Marvin Masteller an inside sales rep in the Roseville, Minnesota, office. Mr. Masteller was paid for approximately one year on a salary basis performing the same sales functions as hourly sales representatives. Without explanation, Mr. Masteller was converted to an hourly pay plan and told that he could work all the hours he wanted to, but would not be paid overtime. His supervisors permitted him to work side-by-side with hourly employees who performed the same functions. Within a short time he quit because the change had drastically reduced his income (Deposition, **Marvin Masteller**, P. 21, ln.1 - P.24, ln. 21; see Exhibit 1 of the Affidavit of William H. Thomas).

While Mr. Masteller's testimony exemplifies MEI's wanton disregard for compliance with the Fair Labor Standards Act, the testimony from other depositions reveals several other undisputed factual patterns. The employees uniformly testified that in one fashion or another they worked off the clock and were not paid for that time. The off-the-clock work occurred under various scenarios. For instance, during especially heavy calling periods, supervisors would not let sales representatives leave for lunch. Instead, lunch would be brought to the sales

representatives and they would continue to work at their duty stations while they ate. (For example, see the following: Deposition, **Jeffery P. Clevenger**, P.105, ln. 8-14; see Exhibit 2 of the Affidavit of William H. Thomas), "I remember a time when they wouldn't let us leave for lunch and they would bring pizzas in for -- every day for, I don't know how long, where we actually got sick of eating pizza. And that's -- those times just added up more. Those days were really long."); (Deposition, **Marilyn J. Craig**, P. 142, ln 5 - 9; see Exhibit 3 of the Affidavit of William H. Thomas), "I worked through many of my lunches, but also they were continually bringing foods in, be it pasta, pizza. So we worked through our lunch. But basically they expected you to go back to your desk and just sit there and eat and also work."); (Deposition, **Alan Garcia**, P. 71, ln. 25 - P. 72, ln 1, " Yes. The company would bring in lunch and require eating in and working through lunch." See Exhibit 4 of the Affidavit of William H. Thomas); (Deposition, **Michael B. Hinckley**, P.165, ln 3-7, " Q. Did you take lunch breaks? A. Rarely. I did. Q. What do you mean by rarely? A. Maybe once a week, possibly twice a week." See Exhibit 5 of the Affidavit of William H. Thomas); (Deposition, **Jacqueline T. Hladin**, P.97, ln 25 - P.98, ln 5, "Q. Did you typically take a lunch? A. We rarely took lunches because we had to take care of our customers to achieve the quotas. Q. Did you record the time that you worked during lunch? A. There was no time recording of such for that." See Exhibit 6 of the Affidavit of William H. Thomas); (Deposition, **Timothy C. Kaufmann**, P.81, ln. 4 - 13, "MEI Government would say, "This week if you're scheduled 8:00 to 5:00, you're not going to lunch. You have to stay here. We're bringing in lunch on Monday, Tuesday, and Thursday, bringing our own lunch on Wednesday and Friday." Q. And how does that impact what time you record and whether you choose to record it or not? A. They would tell you whether or not that one hour you

were going to work overtime would be recorded or not." See Exhibit 7 of the Affidavit of William H. Thomas); (Deposition, **Ryan Keen**, P.93, ln. 19 - 22. "You couldn't -- if you were on a 7 to 4 schedule or 8 to 5, you couldn't work through lunch to cut your shift an hour short, and working through lunch didn't count as overtime." See Exhibit 7 of the Affidavit of William H. Thomas); (Deposition, **Linda Lee**, P.93, 13 - 16, "Q. During those times when MEI paid for the lunch did you ever record the time that you spent working for any of those lunches? A. No." See Exhibit 9 of the Affidavit of William H. Thomas); (Deposition, **Isaac Moffett**, P.176, ln 3 - 8, " Q. The time periods you were working for Ms. Boschee or Ms. Ingalls and you worked through lunch, did you typically record that time? A. When I worked through lunch? Just depends. Usually not. It just depends on how strong they were about no overtime." See Exhibit 10 of the Affidavit of William H. Thomas); (Deposition, **Jeffrey Parrish**, P. 50, ln. 1n. 1 - 7, " Q. In what respect did you fail to comply with the policy by recording your time off for meals? What do you mean by that? A. I would eat lunch at my desk and work. Q. Did you eat your lunch at your desk every day? A. The majority." See Exhibit 12 of the Affidavit of William H. Thomas); (Deposition, **Michele Saari**, P.88, ln 23 - P.89, ln. 6, " Q Okay. So in the years from '99 to 2000 the company also brought in lunch? A. Yes. During that time period it was most of the winter. Q. Okay. And typically what kind of lunches would they bring in? A. Davanni's pizza, Eddington's soup. Very high fat, greasy food so you could sit at your desk all day." See Exhibit 12 of the Affidavit of William H. Thomas); (Deposition, **David Kestner**, P. 38, ln. 24 - P.39, ln. 8, "It would -- It would be kind of a hit and miss thing. Getting closer to the holidays you get busier, and when the call volume is up and they knew the call volume would be up, or right after the running of an ad, they knew the call volume would be up, the company would

actually buy lunch, pizza, stuff like that. Eat at your desk today 'cause we're going to have a lot of calls. So it wasn't like every day, but I know as you got closer to the holidays and such that would happen." See Exhibit 13 of the Affidavit of William H. Thomas); and, (Deposition, **Rickey Farrara**, P.28, ln. 23 - P. 29, ln. 3, "Not really, no. I did question him one time when they made us stay through and eat pizza all the time for lunch, if that was something we had to do or something we could do arbitrarily. He said, no, that's why they're bringing the pizza in; they want you to work through lunch. And I did." See Exhibit 14 of the Affidavit of William H. Thomas).

It also became clear from the depositions, that MEI supervisors both implicitly and explicitly told employees that they would not be paid for off-the-clock work, despite policies to the contrary. *See, for example:* (Deposition, **Laura Anderson**, P. 33, ln. 12 - 16, "Yes. I was concerned that I was working some overtime and, on one hand I was being told by my supervisor to get the job done, and on the other hand they didn't want us working overtime. So mixed messages from management." See Exhibit 15 of the Affidavit of William H. Thomas); (Deposition, **Jeffery P. Clevenger**, P. 65, ln. 8 - 12, "Just in general. The whole time. It would fluctuate, I remember. Sometimes they would be approving overtime and then sometimes they wouldn't be approving overtime, but everyone was working overtime regardless of the fact." And, P. 65, ln. 20 - 24, "They knew we were working, but we didn't tell -- they never asked us what they were recording for our time. They just told us we never could go over a certain amount of hours, although they were there just like the rest of us were, however long." See Exhibit 2 of the Affidavit of William H. Thomas); (Deposition, **Marilyn J. Craig**, P. 61, ln. 3 - 18, "... Even though it says this, my supervisor Lori Chitwood would come around and say you have to get this

done. You know, she would not approve the overtime, yet she would say you have to get this done. I also worked with an outside rep, Jeff Holds who would come in around 4:00 every day, after visiting with customers and leave me with tons of work to do, which I would have to stay and get done or come in early the next day or work my lunch hour to get all this work done. But we were never reprimanded, you know, for working overtime. My supervisor Lori Chitwood -- another hand would come around when -- you know, it would start to bother her and say, "You guys know I'm going to be going to jail for this if you work overtime and are not getting paid for it." And she knew better because ZEOS -- by the time I came to ZEOS they were sued for not paying wages, people working overtime and not getting paid for it." See Exhibit 3 of the Affidavit of William H. Thomas); (Deposition, **Michael Hinckley**, P.106, ln. 2 - 7, "There was a time that we were told not to put in all of our time because we wouldn't get paid for it. And we were told that at that time we were only allowed six hours per pay period of overtime and that if we worked over six hours of overtime, we were not to put it on our time card, that we wouldn't be paid for it, it would not be approved, and that if we did it would benefit us in the future anyway because we'd be getting commissions from it." See Exhibit 5 of the Affidavit of William H. Thomas); (Deposition, **Ryan Keen**, P. 161, ln. 4 - 14, "A. Mark [supervisor] would say, "I don't care how many hours it takes you to get your job done. You're going to get your talk time in. You're going to get your contacts in, blah, blah, blah." But we couldn't work overtime, so we all -- "You have a job to do. If you can't meet those numbers, you're gone. So if you need to work extra 11 hours, you need to work extra hours, but you can't work overtime." That's not consistent with company policy. Thank goodness I could get mine in a normal day." See Exhibit 8 of the Affidavit of William H. Thomas); (Deposition, **Michele Saari**, P.56, ln. 21 - P.57, ln. 1,

“He [supervisor] always had a lot of catch phrases, and one of them was take it for the team. And I don't remember him specifically saying, do not record your overtime, but it was understood that you were taking it for the team and for the betterment of the company, to increase production.” See Exhibit 12 of the Affidavit of William H. Thomas); (Deposition, **David Thom**, P.52, ln. 20 - P.53, ln 10, “Well, it was my choice [not to record overtime], although management -- everybody was doing it. Management allowed everybody --there was guys there - - sometimes I even stayed there until 9, 10 o'clock at night. There was a lot of people who worked a lot of extra hours, and there was sometimes when we could actually record that. But then they started cutting back on that, you know. I don't know about the other managers, but my manager at the time said, hey -- I told him, hey, I'm here -- it's like my own business. I'm just here for the commission. And basically they said, well, if you want to work extra to get some more leads to call for tomorrow, whatever, go ahead. But we're only allowed to work, you know, 45 hours or whatever right now. But that didn't matter to me because, again, we were there for the commission, not for the hourly wage.” See Exhibit 16 of the Affidavit of William H. Thomas). (Deposition, **Kevin Henderson**, P. 28, ln. 3 - P.29, ln.13, “Well, there were periods of time when we weren't allowed to work any overtime. But the job required that we put in more time to get everything completed.. Q. But you could choose to accurately record your time or not. Correct? A. No. Because we weren't supposed to be working any overtime. Q. But you went ahead and worked it anyway? A. That's correct.” See Exhibit 17 of the Affidavit of William H. Thomas) and; (Deposition, **Rory Kip DeRouen**, P. 62, ln. 16 - 23, “ I consistently worked a lot of hours per week, and when overtime was passed down that it wasn't being paid through the company, my immediate supervisor, being Jay Ellis, knew I needed to get more hours

in. And he would tell me how many hours of overtime he could pay me. And if I couldn't get the job done in those amount of hours, it was pretty much insinuated that that's all I can sign in for you." See Exhibit 6 of the Affidavit of William H. Thomas).

Another factual pattern that arose during the depositions was that supervisors knew the sales representatives were working long hours and knew that they were working off the clock. *See, for example:* (Deposition, **Jeffery P. Clevenger**, P.92, ln. 20 - 25, "Q. You told me earlier that you thought your supervisors should have known you were working more time than you recorded because you -- is it accurate to say that they'd see you there early and late and that time wasn't always recorded on your timesheet? A. Correct." See Exhibit 2 of the Affidavit of William H. Thomas); (Deposition, **Timothy C. Kaufmann**, P. 117, ln. 8 - 19, "Q. Well, what did Mr. Cox tell you specifically about working overtime and not recording it? A. He specifically said, "We need you guys to be -- we need you employees to be here between your normal hours, and you need to work an extra hour but not put it down. We can't put it down right now. Stay through your lunch but not record it," or he'd say, "Stay through your lunch and record it." He actually went back and forth during that tenure, or, "You need to stay after hours and record it," or "not record it." See Exhibit 7 of the Affidavit of William H. Thomas); and, (Deposition, **Kimberly Smith**, P. 293, ln. 1 - 15, " If he knew that I was working through my lunches, that's pretty obvious to see. In the evenings, working late, he could, if he really wanted to, go in and run a call log report and find out how late I had worked. There was a number of ways he could have very easily figured it out. Q. What other ways? You say there's a number of ways. A. When I logged on and off of my computer, if it was turned off or on; the timesheet itself; a call log report would be a fairly good indicator; a batch scan for the week, although that

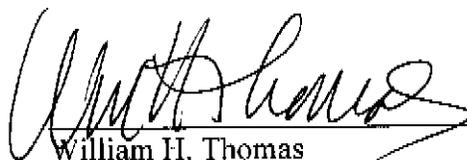
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is questionable just because of people herding in and herding out you don't always get a batch scan." See Exhibit 19 of the Affidavit of William H. Thomas)

In summary, there is more than ample undisputed evidence of MEI's lack of good faith in its following the overtime requirements of the Fair Labor Standards Act and there is an abundance of evidence proving that it had no reasonable grounds to believe that it was not complying with the FLSA. Finally, taken as a whole, the employees' testimony clearly demonstrates that MEI's violations of the FLSA were willful.

DATED this 16th day of July, 2004.

HUNTLEY PARK, LLP



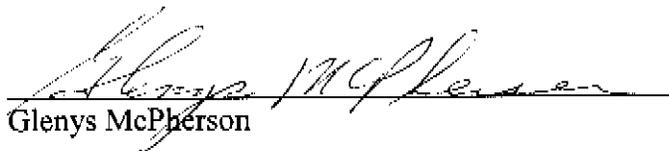
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2004, a true and correct copy of the foregoing instrument was served upon opposing counsel as indicated below:

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