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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

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| KIMBERLEY SMITH and MICHAEL B. HINCKLEY, individually and on behalf of those similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>MICRON ELECTRONICS, INC., a Minnesota corporation,<br><br>Defendant. | Case No. CIV 01-0244-S-BLW<br><br>PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR CONDITIONAL CERTIFICATION |

Plaintiffs, by and through their counsel of record, pursuant to the Court's Scheduling Order of September 4, 2001, hereby submit this Brief in support of their motion for conditional certification.

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## INTRODUCTION

Plaintiffs bring this action against Defendant Micron Electronics, Inc., ("MEI") under the Fair Labor Standards Act ("FLSA") and applicable state wage and hour laws. An additional 44 employees of MEI from Idaho and Minnesota have filed "Consents to Join Collective Action" with the Court. Plaintiffs have also filed with the Court the Affidavits of 18 employees, in addition to the deposition testimony of others, in support of the instant motion. This action arises from MEI's longstanding practice of working its inside computer sales representatives "off-the-clock" and related violations of the FLSA.

According to a recent press release, MEI (Nasdaq: MUEI) is a

> leading Internet-centric computing company, providing award-winning computer products and services, Internet offerings, Web hosting and business-to-business e-commerce applications for the small- and medium-size business, government, education, and consumer markets. In addition to its direct business-to-business sales channel, Micron products are sold in partnership with leading retailers nationwide. Micron Electronics and its subsidiaries have $1.6 billion in fiscal 2000 revenues. The company is based in Nampa, Idaho.[1]

Discovery has begun in this action, but it is far from complete. Defendant has deposed named Plaintiff Michael Hinckley and is scheduled to depose named Plaintiff Kim Smith this Friday, February 15, 2002. Defendant has also deposed 12 employees who worked for MEI in Idaho and Minnesota and who have filed consents. Plaintiffs have deposed a few of MEI's supervisors.

Pursuant to the Court's direction at the telephonic scheduling conference of August 31, 2001, and the Court's resulting Scheduling Order, Plaintiffs are now moving to certify

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[1] Press Release of March 23, 2001, "Micron Electronics moves to complete transformation with acquisition of Interland and plans to sell non-hosting businesses," page 3, attached as Exhibit 34 to the Affidavit of Christopher F. Huntley, filed concurrently.

conditionally a class consisting of MEI's inside computer sales representatives from June 1, 1998 and to require Defendant to produce names, addresses and other information for all potentially similarly-situated employees of Defendant, so that they may receive notice and have an opportunity to "opt-in" to this litigation.

## ARGUMENT

### A. THE FLSA STANDARD FOR CONDITIONAL CERTIFICATION

Class actions are specifically provided for by the FLSA. Such actions are governed by 29 U.S.C. Sec. 216(b), which states:

> An action to recover . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Pursuant to this language of Section 216(b) the FLSA contemplates an "opt-in" class action requiring the filing of consents, in contrast to the case under Rule 23, F.R.C.P., which provides for an "opt-out" action. It is crucial under the FLSA that potential class members learn of the pendency of the claim at an early stage so that they may avail themselves of the opportunity to join. According to certain authority - authority which Plaintiffs believe is erroneous - the statute of limitations is tolled on an individual basis as each individual files his or her own consent. Without a general tolling of the statute of limitations, more and more employees' individual actions may therefore be barred, while other employees' rights of recovery may be reduced. Partly because of these facts, courts require that only a preliminary showing be made for conditional certification so that Plaintiffs may discover the names and addresses of potential class members and send notice to them.

1. **<u>With conditional certification this Court has the authority to order discovery of the potential class members and to approve notice to them.</u>**

The Supreme Court established that in class litigation under 29 U.S.C. 216(b) it is within the discretion of the district court to facilitate the notification of potential class members by ordering discovery of and notice to potential class members. *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed. 2d 480 (1989). The Court held that "district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b) . . . by facilitating notice to potential plaintiffs." 107 L.Ed.2d at 486. *See also, Does I Thru XXII v. Advanced Textile Corp.*, 214 F. 3d 1058, 1064 (9th Cir. 2000)(stating "To facilitate this process, a district court may authorize the named plaintiffs in a FLSA collective action to send notice to all potential plaintiffs, . ."). The Supreme Court reasoned:

> Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure. . . . It follows that, once [an action has been filed under 216(b)], the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task in accomplished in an efficient and proper way.

*Hoffman-LaRoche* at 486 (internal citations omitted). The Court went on to explain:

> Because trial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute, it lies with the discretion of the district court to begin its involvement early, at the point of the initial notice, rather than at some later time.

*Id.* at 487 (internal cites omitted). Here, Plaintiffs ask that this Court exercise this same discretion and conditionally certify a class for purposes of sending notice.

### 2. Potential FLSA class members need only be "similarly situated," unlike Federal Civil Rule 23.

The FLSA states that members of a collective action under the statute should be "similarly situated." 29 U.S.C. §216(b). Although the FLSA itself does not define the term "similarly situated," it is clear that this requirement of Section 216(b) is considerably less stringent than the requirement of Rule 23(b)(3), Fed. R. Civ. P., that "common questions predominate." *Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294, 305 (N.D. Cal. 1991) (emphasis added). Likewise, courts in the Ninth Circuit have held consistently that the standards of Rule 23 do not apply in the context of a claim brought under 216(b). *Church*, at 305 (N.D. Cal.); *Aguirre v. Bustos*, 89 F.R.D. 645 (D.N.M. 1981); *Frosberg v. Pacific Northwest Bell Tele. Co.*, 623 F. Supp. 117 (D. Or. 1985); *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129 (D. Nev. 1999). In addition, the Ninth Circuit Court of Appeals itself held that the clear weight of authority holds that Rule 23 procedures are inappropriate for the prosecution of class actions under 216(b). *Kinney Shoe Corp v. Vorhes*, 564 F. 2d 859, 862 (9th Cir. 1977), *abrogated on other grounds, Hoffman-La Roche, Inc. v Sperling, supra.*[2]

The Ninth Circuit has not defined the standard for "similarly situated." Courts agree, however, that it is unnecessary to show that the putative class members share identical positions, only that they are similar. *See, e.g., Schwed v. Geberal Elec. Co.*, 159 F.R.D. 373, 375

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[2] As noted by the court in *Bonilla v. Las Vegas*, 61 F. Supp. 2d 1129, 1134-35 (D. Nev. 1999), some courts outside the Ninth Circuit have analogized 216(b) collective actions with Rule 23 class actions. *See, e.g.* , *Shushan v. University of Colorado*, 132 F.R.D. 263 (D.Col. 1990) (denying discovery of names and addresses of potential class members because plaintiffs failed to show compliance with numerosity, typicality and adequacy requirements under Rule 23); *Compare with Vaszlavik v. Storage Technology Corp.*, 175 F.R.D. 672 (D. Col. 1997)(seven years later the same court applies a less stringent initial certification test for notice purposes).

(N.D.N.Y. 1995); *Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 443 (N.D. Ill. E.D. 1982). In addition, other courts have held that within the context of the FLSA, similarly situated means that there are "substantial allegations that the putative class members were together the victims of a single decision, policy or plan . . ." *Church* at 305 (quoting *Sperling v. Hoffman-LaRoche, Inc.*, 118 F.R.D. 392 (D.N.J. 1988) *affirmed Hoffman-La Roche, Inc. v. Sperling*, 110 S. Ct. 482 (1989)).

In *Heagney v. European Amer. Bank,* 122 F.R.D. 125, 128 (E.D.N.Y. 1988), for example, the court found that workers making a claim under the same standard in an ADEA case were similarly situated even though they had performed a variety of jobs in different departments and locations. The court held that "[t]he workers may have left their jobs at different times via different procedural mechanisms, but the alleged unity of the discriminatory scheme they faced overwhelms those differences." 122 F.R.D. at 128 (internal citation deleted). The court further explained:

> To deny class treatment would be tantamount to declaring that any employer can escape . . . class liability so long as it discriminates against a diverse group of people over a wide geographic range in a number of ways, such as termination, salary, promotions and working conditions.

*Id.* (internal citation deleted).

### 3. **The FLSA requires, at most, a minimal factual showing that the class is similarly situated to certify conditionally so as to discover names and authorize notice.**

Courts have allowed discovery of names and addresses and notice based simply on an allegation that a group of similarly-situated employees exist. *See, e.g., Tucker v. Labor Leasing,* 155 F.R.D. 687, 689-90 (M.D.Fla. 1994) ("to impose a strict standard of proof on the plaintiffs at

this stage would unnecessarily hinder the development of collective actions and would undermine the broad remedial goals of the FLSA"); *Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 442-45 (N.D.Ill. 1982); *Heagney v. European Amer. Bank*, 122 F.R.D. 125, 128 (E.D.N.Y. 1988). Other courts, however, require "minimal evidence," a showing of a "factual nexus," or a "reasonable basis" for the class-wide claims. *See, e.g., Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264, 267 (D.Minn. 1991) (minimal evidence required of some factual basis for existence of group of similarly-situated potential plaintiffs). This minimal requirement can be satisfied by some combination of allegations, affidavits or other substantive documentation. *See, e.g. Harrison v. Enterprise Rent-A-Car*, 1998 U.S. Dist. Lexis 13131, 5-6 (M.D.Fla.1998) (relying on allegations and affidavits submitted); *Schwed v. General Elec. Co.*, 159 F.R.D. 373, 375-6 (N.D.N.Y. 1995) (relying on allegations in complaint and two affidavits).

In *Church v. Consolidated Freight Ways, Inc.*, 137 F.R.D. 294 (N.D.Cal. 1991), the court found that the plaintiffs had made a sufficient showing that potential class members were similarly situated where the pleadings were detailed and the plaintiffs had produced affidavits supporting their allegations that the putative class had been subjected to termination and demotion based in part on age. Similarly, in *Realite v. Ark Restaurants Corp.*, 7 F.Supp. 303 (S.D.N.Y. 1998), the plaintiffs submitted affidavits showing that employees at fifteen restaurants were not paid overtime even though the employees were expected to work in excess of 40 hours weekly and that the violations were not limited to one location or one single employee position. The court certified the class for purposes of notice to all hourly employees.

In *Belcher v. Shoney's, Inc.*, 927 F. Supp. 249 (M.D. Tenn. 1996), the court ordered notice to potential class members who worked in defendant Shoney's Restaurants in 22 states

where the plaintiffs, through affidavits, testified that defendant's overtime practices in 10 states violated the FLSA. The court ordered that all hourly workers were to be notified. Likewise, in *Harrison v. Enterprise Rent-A-Car*, 1998 U.S. Dist. Lexis 13131 (M.D.Fla. 1998), the court approved and ordered notice to be given to all employees nationwide where plaintiffs submitted affidavit evidence that the defendant engaged in practices violative of the FLSA in 13 states.

### 4. Most courts employ a two-step process leading to final certification of a class.

A lesser initial standard usually results in a two-step process for full certification under the FLSA. Under this two-step process, sometimes called the "*ad hoc* method," the first step consists of the lenient initial showing that potential class members are similarly situated for initial or conditional certification so as to allow discovery of the class and provide notice to them. This showing is made early in the litigation process prior to completion of merits discovery. As the court explains in *Vaszlavik v. Storage Technology Corp.*, 175 F.R.D. 672, 678 (D.Col. 1997),

> At the notice stage, courts following the *ad hoc* method require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan. The court then makes a second determination after the discovery has been completed and the case is ready for trial. At this second stage, although not specifically deemed, the 'similarly situated' standard is higher.

"Even where later discovery proves the putative class members to be dissimilarly situated, notice . . . prior to full discovery is appropriate as it may further the remedial purpose of the [FLSA]." *Harrison v. Enterprise Rent-A-Car*, 1998 U.S. Dist. Lexis 13131 (M.D. Fla. 1998)(quoting *Krueger v. N.Y. Telephone Co.*, 1993 U.S. Dist. Lexis 9988 (S.D.N.Y. 1993). The second step consists of the court's later consideration of class certification, whether on motion for full

certification or a defendant's motion to de-certify. If, after discovery is completed, a court deems that certain class members are not similarly situated, the court may order certification of subclasses or decertify those deemed not similarly situated. *Schwed, supra,* at 377.

Authority in the Federal District of Idaho is consistent with the two-step or *ad hoc* approach. In the case of *Bristow v. Fleetwood* (Case No. CV00-82-S-EJL) U.S. Magistrate Mikel H. Williams recently adopted the two-tiered approach discussed above:

> Although the Ninth Circuit has not had the opportunity to set forth the appropriate standard for determining whether Plaintiffs are similarly situated, several district courts have utilized a two-tiered approach to class certification under 29 U.S.C. § 216(b). *See, e.g., Harrison [v. Enterprise Rent-A-Car*, 1998 U.S. Dist. Lexis 13131 (M.D. Fla. 1998)]; *Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 678-79 (D. Colo. 1997). Under this two-tiered analysis, the trial court must first determine whether notice of the action should be given to potential class members. *See Thiessen v. General Elec. Capital Corp.*, 996 F.Supp. 1071, 1080 (D. Kan. 1998). This preliminary determination is 'usually based only on the pleadings and any affidavits that have been submitted" during the initial stages of litigation. *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995). Because the court has minimal evidence at this point, the initial determination 'is made using a fairly lenient standard, and typically results in 'conditional certification' of a representative class. *Id.*[3]

In *Fleetwood* Defendant appealed Judge Williams' grant of conditional certification to U.S. District Judge Edward J. Lodge. Affirming Judge Williams, the District Court also endorsed the two-tiered approach and discussed the requisite standard:

> Under this [the two-tiered] approach, the court makes a preliminary 'notice stage' determination as to 'whether notice of the action should be given to potential class members.' Mooney v. Aramco Services Co., 54 F.3d 1207, 1214 (5th Cir. 1995). The 'notice stage' determination typically results in a 'conditional certification' of a representative class. Id. After discovery is complete, a second determination is 'typically precipitated by a motion for 'decertification.' At this stage, the court 'has much more information on which to base its decision, and makes a factual

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[3] *Order* of February 20, 2001, pp.11-12, attached as Exhibit 55 to the Affidavit of Christopher F. Huntley.

> determination on the similarly situated question. Id. 'If the claimants are similarly situated, the district court allows the representative action to proceed to trial.' Id. 'If the claimants are not similarly situated, the district decertifies the class, and the opt-in plaintiffs are dismissed without prejudice.' Id. The magistrate judge did not err by employment this two-tiered approach. See, e.g., id.
>
> In the Order of February 20, 2001, Magistrate Judge Williams only addressed class certification at the notice stage. The notice stage determination is made 'using a fairly lenient standard.' Id. Indeed, 'courts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan.' Id. at 1214 n.8 (quoting Sperling v. Hoffman-La Roche, Inc., 118 F.R.D. 392, 407 (D.N.J. 1988).[4]
> (emphasis in original)

Accordingly, there is persuasive authority in this District and throughout the federal courts that this Court should employ the two-tiered method for certification, with conditional certification now and final certification later. At this point Plaintiffs need only show "substantial allegations" or at most a "factual nexus" pertaining to their claims that the class they seek to certify were all victims of common policies violating the FLSA.

### B. PLAINTIFFS HAVE MADE THE REQUISITE MINIMAL FACTUAL SHOWING REGARDING THEIR CLAIMS UNDER THE FLSA.

Plaintiffs easily meet the standard described by Judge Lodge. Plaintiffs also meet any more rigorous standard requiring the showing of a "factual nexus" or a "reasonable basis" for their claims regarding the putative class. Through the detailed allegations of Plaintiffs' Complaint and those Affidavits filed with the Court, including the Affidavits setting forth deposition testimony, Plaintiffs sustain their burden for conditional certification of the class for purposes of providing notice to potentially similarly-situated employees. Below, Plaintiffs

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[4] *Order on Report and Recommendation* of April 6, 2001, pp. 2-3, attached as Exhibit 56 to the Affidavit of Christopher F. Huntley.

review their claims and the factual showing made.

### 1. Throughout its computer sales operations MEI worked its hourly sales representatives "off the clock."

MEI sold computers to various markets employing hourly sales representatives. Although their precise titles varied over time and market sectors, the class that Plaintiffs seek to certify is one composed of hourly employees whose function it was to sell MEI's computers and related equipment from June 1, 1998. These employees sold computers to individual consumers, small business, large business and various government entities. At certain points, MEI recombined its sales efforts into different wholly-owned subsidiaries or "teams" aimed a different markets, sometimes for competitive and sales tax reasons.[5] Throughout the time period, however, MEI employed this class of employees as a sales force to move computers.

As detailed in the accompanying Affidavits, as well as the deposition testimony included with the Affidavit of Christopher F. Huntley, MEI had an unstated, *de facto* policy of accepting off-the-clock work by its sales force. Of course, MEI said all the right things in its written policy manual, but when it came to its actual practices, MEI did just the opposite. Sales representatives were told that they could not work more than a certain amount of overtime, except during high sales periods for their markets. Yet at the same time, sales representatives regularly worked more than the allowed amount of overtime with the knowledge and acquiescence of MEI supervisory personnel. Even MEI's supervisors testified in deposition that when they were formerly working as sales representatives they worked more time than was recorded (Morrison:

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[5] See, Deposition of Jarrod A. Morrison of December 12, 2001, pp. 81-82, attached as Exhibit 42 to the Affidavit of Christopher F. Huntley. Subsequent references to deposition testimony are cited to last name of deponent and page number.

62-63). Supervisor Mark Cox explained this *de facto* policy in an e-mail to sales representative Tim Kaufman of August 8, 2000:

> If you are going to work a big chunk of overtime because you have to then that is when you need approval. If you decide to work an extra ½ to an hour a day or off and on because you are trying to drive your sales numbers then that is up to you and doesn't require approval/inclusion on your time sheet.[6]
> (emphasis added)

Not surprisingly, many sales representatives worked substantially more hours than they were allowed to log and be paid for by MEI. Sales Representative Marilyn Craig of MEI's operations in Roseville, Minnesota, explained:

> There were other times where she [supervisor] would say overtime was allowed if you got it approved in advance, but there were also times throughout that period where she would say, no, you can't work overtime. But then she would come to you and say you have to get this project done. We're going to lose this account if you don't get the customization done. There were time when they said no overtime, period. But even during those times she would come to us and say – she knew we were working off the clock.[7]

Asked about MEI's written policy forbidding off-the-clock work, Ms. Craig testified:

> . . . it did apply to me, although the supervisors did not enforce or get after anybody during the time. In fact, they expected you to do whatever it took they never reprimanded you for working overtime and they expected you to work overtime to get the job done.

(Craig: 69).

According to named Plaintiff Michael Hinckley, the policy they were told was that "if you do not have the time to get your job done during the day, that you work overtime, but you're

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[6] Exhibit 7 to the Affidavit of William H. Thomas, filed concurrently.

[7] Deposition of Marilyn Craig of January 30, 2002, p. 82, Exhibit 45 to the Affidavit of Christopher F. Huntley. Subsequent references to Ms Craig's deposition are cited to "Craig" by page number.

not going to paid for it."[8] Sales Representative Jeffrey Parrish was told not to record any overtime, but was not told "don't work overtime."[9] Jacqueline Hladun, who also worked in Roseville, Minnesota testified that "[w]e did not record the time in commercial sales. And we had to work overtime to achieve the quotas. And we rarely saw any overtime payment past 45 hours."[10]

Jeffrey Clevenger testified similarly:

> A but we weren't – we weren't supposed to submit all of them [hours]. We couldn't go over a certain amount of time.
>
> Q. And are you talking about when you Mr. Church was your supervisor or are you talking about the whole term
>
> A. Just in general. The whole time. It would fluctuate, I remember. Sometimes they would be approving overtime and then sometimes they would be approving overtime, but everyone was working overtime regardless of the fact.
>
> Q. When you say 'everyone,' are you talking about your team?
>
> A. I'm talking about the people -- yeah, most of my time – the ones that were there that were competitive that were - that were there to make money and keep their job.[11]

The record provided herewith is replete with similar instances of sales representatives performing necessary work, but not getting paid for it.

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[8] Deposition of Michael Hinckley of January 8, 2002, p. 269, Exhibit 46 to the Affidavit of Christopher F. Huntley.

[9] Deposition of Jeffrey Parrish of January 9, 2002, p. 62, Exhibit 53 to the Affidavit of Christopher F. Huntley.

[10] Deposition of Jacqueline Hladun of January 31, 2002, p. 63, Exhibit 47 to the Affidavit of Christopher F. Huntley.

[11] Deposition of Jeffrey Clevenger of January 17, 2002, p. 65, Exhibit 44 to the Affidavit of Christopher F. Huntley.

At least one other supervisor did not realize that sales representatives were required by law to be paid for all the time they actually worked. After a meeting in May, 2001, at which the requirements of the FLSA were discussed with supervisors from across MEI's operations, Supervisor Tawni Weaver became concerned about her team's compliance with the FLSA.[12] When Ms. Weaver commented to another supervisor, Mark Auchampach, that they were not following the FLSA, Mr. Auchampach said "I know," but went on to say "don't worry about it, we're not going to have to do anything about this. . . It's like sexual harassment training" (Weaver Aff: ¶ 7). When Ms. Weaver later suggested that employees be offered to be paid for the time they had worked off-the-clock, her supervisor and an MEI H.R. representative became angry with her. Her supervisor, Dominic Casey told her that sales representatives were highly paid and that MEI did not need to highlight this problem (Weaver Aff: ¶ 7). Ms. Weaver undertook to look into the extent of MEI's problem and concluded that off-the-clock work was widespread amongst the sales force (Weaver Aff: ¶ 8). She turned this information over to David McCauley, Vice President of MEI in charge of its inside sales operations for small business and commercial efforts (Weaver Aff: ¶ 9; M004751). Despite the fact that she had been assured on numerous occasions by David McCauley that she would be retained in her position, Ms. Weaver was subsequently criticized for looking into MEI's FLSA problem (Weaver Aff: ¶ 13) and fired (Weaver Aff: ¶ 14).

Further evidence of MEI's actual policy is found in MEI's practice of praising and rewarding those sales representatives who worked substantial time off-the-clock. According to

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[12] Affidavit of Tawni Weaver, ¶¶ 5-6, Exhibit 18 to the Affidavit of Williams H. Thomas. Subsequent references to Ms. Weaver's Affidavit are cited to "Weaver Aff" by paragraph number.

sales representative Tracy "Scott" Wells,[13] people who worked off the clock were favored with call lists, contests, treatment and dividing up accounts. Those who worked off the clock would move up more quickly.

### 2. MEI tolerated the alteration of employee time.

In addition, on several occasions where sales representatives recorded more than the allowed amount of overtime, a supervisor actually reduced the representatives' time on MEI's computer timekeeping program. Named Plaintiff Kimberley Smith recalls two occasions upon which her supervisor altered her time.[14] Ryan Keen also had overtime hours reduced.[15] Michael Moser also testified that his time was altered.[16]

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[13] Affidavit of Tracy Scott Wells, Exhibit 16 to the Affidavit of William H. Thomas.

[14] Affidavit of Kimberley Smith, ¶ 12, Exhibit 13 to the Affidavit of William H. Thomas.

[15] Deposition of Ryan Keen of January 25, 2002, pp. 110-111, Exhibit 48 to the Affidavit of Christopher F. Huntley.

[16] Deposition of Michael Moser of January 10, 2002, p. 117, Exhibit 52 to the Affidavit of Christopher F. Huntley.

### C. MEI HAS NOT DEMONSTRATED THAT IT INCLUDED COMMISSIONS IN THE CALCULATION OF THE OVERTIME PREMIUM RATE.

According to many sales representatives who have filed consents in this action, MEI failed to include their sales commissions in the calculation of the overtime premium rate as required by 29 C.F.R. § 778.117.[17] MEI's pay stubs do not demonstrate that MEI included the commission in the calculation of the premium rate. No other single document demonstrates it either. MEI insists, however, that even though the pay stubs do not show it, by comparing a series of documents they can demonstrate that they did include a sales representatives' commission in the calculation. Plaintiffs have set a deposition pursuant to Rule 30(b)(6) to determine if MEI's contention is correct.

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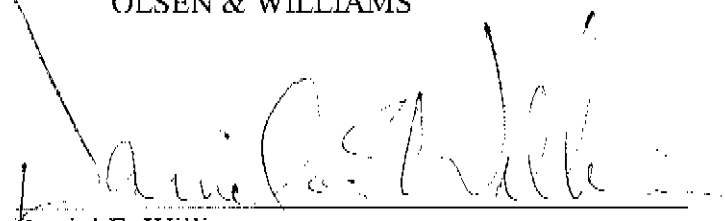
[17] See, Deposition of Ryan Keen of January 25, 2002, page 76-77, Exhibit 48 to the Affidavit of Christopher F. Huntley.

## CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court enter an order conditionally certifying a class and requiring Micron Electronics, Inc., to identify, by name and current address, or if unknown, by last known address, by telephone number and by social security number, each employee who has held any of the positions or similar positions indicated above. Plaintiffs further ask the court to authorize counsel to send Court-approved notice to these prospective class members a form to be submitted to the Court for subsequent approval.

DATED this 13 day of February, 2002.

HUNTLEY, PARK, THOMAS, BURKETT,
OLSEN & WILLIAMS



Daniel E. Williams
Attorneys for Plaintiffs

## CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2002, a true and correct copy of the foregoing instrument was served upon opposing counsel as indicated below:

Kim J. Dockstader
Gregory C. Tollefson
STOEL RIVES LLP
101 S. Capitol Blvd., Suite 1900
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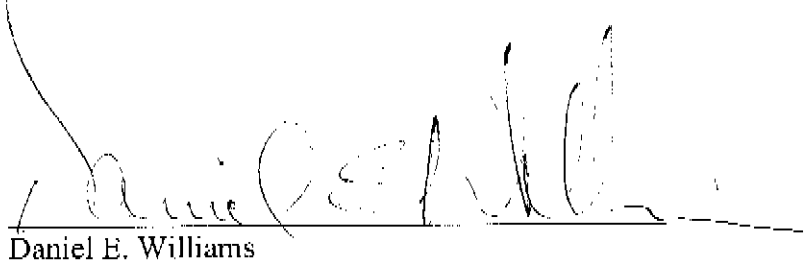
___ Via Facsimile 389-9040
___ Via U. S. Mail



Daniel E. Williams