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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF IDAHO

<p>KIMBERLEY SMITH and MICHAEL B. HINKLEY, individually and on behalf of those similarly situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>MICRON ELECTRONICS, INC., a Minnesota corporation,</p> <p style="text-align: center;">Defendant.</p> <hr style="width: 30%; margin-left: 0;"/>	<p>) Case No. CIV 01-0244-S-BLW))) DEFENDANT'S MEMORANDUM IN) SUPPORT OF MOTION TO STRIKE) CONSENTS AND DISMISS POTENTIAL) OPT-IN CLAIMANTS: Stefanie Bistline,) Bland Ballard, Michael Moser, Rory Kip) DeRouen, Jeffrey Parrish, Michael Jordan,) Michelle Milliken, Isaac Moffett, Christopher) McCullough, Eric Fillmore, Matthew Flynn,) Jeffery Clevenger, Tim Hedding, John Seale,) Mathew Jarame Ell, Chris Wing and Ken Ford)</p>
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Defendant Micron Electronics, Inc. ("Defendant"), by and through its attorneys, Stoel Rives LLP, respectfully submits this Memorandum in support of its Motion to Dismiss Opt-In Claimants: Stefanie Bistline, Bland Ballard, Michael Moser, Rory Kip DeRouen, Jeffrey Parrish, Michael Jordan, Michelle Milliken, Isaac Moffett, Christopher McCullough, Eric Fillmore,

Matthew Flynn, Jeffery Clevenger, Tim Hedding, John Seale, Mathew Jarame Ell, Chris Wing and Ken Ford.

I. INTRODUCTION

Plaintiffs Kimberly Smith and Michael B. Hinckley filed a lawsuit alleging that Defendant violated the overtime provisions of the Fair Labor Standards Act ("FLSA") and Idaho wage laws. Plaintiffs' Amended Complaint lists two named plaintiffs, Kimberly Smith and Michael B. Hinckley, who purport to file the lawsuit "individually and on behalf of those similarly situated." Since the filing of Plaintiffs' Amended Complaint, forty-six additional individuals ("Claimants") have filed consents seeking to join in the lawsuit (they have apparently done so with Plaintiffs' assistance and under their assumption the case will be conditionally certified as a collective action, which has yet to be determined).

Defendant served subpoenas duces tecum for documents ("Subpoenas") on thirty-nine of these potential opt-in Claimants in August of 2001. However, despite repeated written and verbal requests to Plaintiffs' counsel (who also assert to represent all such Claimants), seventeen of these Claimants continue, over four months later, to completely ignore the Subpoenas. This contempt for the Subpoenas and failure to participate in the prosecution of their alleged claims cannot be countenanced.

Pursuant to Federal Rules of Civil Procedure 37(d) and 45(e), as well as the Court's inherent powers, Defendant therefore respectfully requests that all of the consents for the following individuals be stricken, and such individuals be dismissed as potential or actual Claimants in this action: Stefanie Bistline, Bland Ballard, Michael Moser, Rory Kip DeRouen,

Jeffrey Parrish, Michael Jordan, Michelle Milliken, Isaac Moffett, Christopher McCullough, Eric Fillmore, Matthew Flynn, Jeffery Clevenger, Tim Hedding, John Scale, Mathew Jarame Ell, Chris Wing and Ken Ford.

II. BACKGROUND

From August 16 to August 24, 2001, the Subpoenas were served on the subject Claimants or delivered to Plaintiffs' counsel. The Subpoenas requested document production from a total of thirty-nine persons: the two named plaintiffs and thirty-seven of the potential "opt-in" Claimants who have filed consents with the Court in this action.¹

At the August 31, 2001 Court-ordered telephonic scheduling conference it was set forth by the Court and agreed upon by counsel that Defendant's counsel would coordinate with all issues regarding compliance with the Subpoenas with Plaintiffs' counsel. Plaintiffs' counsel also represented that they would accept, on behalf of the Claimants, future service of any documents, and that all documents responsive to the Subpocnas would be produced by the Claimants, but through Plaintiffs' counsel. Consequently, defense counsel was not allowed or authorized to contact Claimants, nor to serve any additional documents directly on Claimants. Plaintiff's counsel sent a letter to this effect on the same day.

On September 5, 2001, when Plaintiffs' counsel arrived at Defendant's counsel's office for a scheduled meeting to address discovery planning, Defendant's counsel hand delivered a

¹ The concurrently-filed Affidavit of Kim J Dockstader sets forth the basis for the facts referenced herein and also provides the corresponding documents.

letter to Plaintiffs' counsel. This letter clarified that defense counsel had agreed to allow the Claimants who had been subpoenaed to produce their documents through Plaintiffs' counsel's office. At this time, defense counsel discussed the letter with Plaintiffs' counsel, reiterating the documents should be segregated by person and that an affidavit was requested from any Claimants who purported not to have any responsive documents in their possession.

On September 14, 2001, Defendant received Plaintiffs' "First Response to Request for Production of Documents," and the corresponding documents with respect to the subpoenas duces tecum. In this pleading, Plaintiffs' counsel responded to the Subpoenas on behalf of twenty-two persons (the two named Plaintiffs and twenty of the Claimants). Three of the Claimants purported to have no documents.

On September 25, 2001, Defendant's counsel sent a letter by hand delivery to Plaintiffs' counsel. This letter addressed many of the deficiencies in Plaintiffs' recent document production and specifically noted that there were seventeen subpoenas duces tecum still outstanding and past due. It further requested from Plaintiffs' counsel information on how soon production of documents responsive to the Subpoenas could be expected. No response was received.

On November 9, 2001, Defendant's counsel attended a meeting at Plaintiffs' counsel's office for the purpose of addressing various discovery issues. One of the issues addressed at this meeting was the fact that there had been no response with regard to seventeen of the Subpoenas. Defense counsel directed Plaintiffs' counsel to the September 25, 2001 correspondence where the name of each person who had not responded to the Subpoenas was set forth. Plaintiffs'

counsel expressed difficulty in contacting all of the Claimants. Defense counsel asserted that the responses to the Subpoenas were quite overdue.

On November 14, 2001, another letter was sent to Plaintiffs' counsel to follow up on the issues raised at the November 9 meeting. This letter again reminded Plaintiffs' counsel that responses had not been received for seventeen of the Subpoenas and that the overdue discovery made it very difficult for defense counsel to plan for upcoming depositions.

Further correspondence was directed to Plaintiffs' counsel on November 21, 2001. This letter addressed discovery and deposition issues, including once more raising the fact that the seventeen individuals, Stefanie Bistline, Bland Ballard, Michael Moser, Rory Kip DeRouen, Jeffrey Parrish, Michael Jordan, Michelle Milliken, Isaac Moffett, Christopher McCullough, Eric Fillmore, Matthew Flynn, Jeffery Clevenger, Tim Hedding, John Seale, Mathew Jarame Ell, Chris Wing and Ken Ford had not produced any documents or responded at all to the Subpoenas.

III. ARGUMENT

For months now, the seventeen Claimants have continued to ignore and defy subpoenas duces tecum, validly served by Defendant. Yet, by virtue of their consents, these same persons apparently intend to participate in this case. This contempt of the Subpoenas and failure to participate in the prosecution of the claims cannot be countenanced. Whether under Federal Rule of Civil Procedure 37, Rule 45 or the Court's inherent powers, these Claimants should be dismissed from the case with prejudice.

The specific authority for such action could depend on whether the Claimants are classified as parties or non-parties. No class has yet been conditionally certified in this case, and

there are only two named Plaintiffs. However, each of the Claimants has filed a "Consent to Join Collective Action" which states:

By my signature below, I represent to the Court that I was employed by Micron Electronics, Inc., as an inside sales representative between June 1, 1998 and May 31, 2001, and I hereby give my consent to the filing and prosecution of an action under the Fair Labor Standards Act in my name and on my behalf by the above-named Plaintiffs and designate the named Plaintiffs as my agents to make decisions on my behalf concerning the litigation, the method and manner of conducting this litigation, the entering of an agreement with counsel for the named Plaintiffs concerning attorney fees and costs, and all other matters pertaining to this lawsuit.

Thus, the Claimants have designated the parties, Smith and Hinckley, to act on their behalf, notwithstanding the fact that Claimants are not parties, have not been ruled "similarly-situated" to the named Plaintiffs (or each other), and have not been granted permission to participate collectively in this case.²

Anticipating this potential ambiguity, Defendant initially effected personal service on the Claimants as non-parties with subpoenas duces tecum and notices to Plaintiffs' counsel, but was later told by the Court that all contact was to take place through Plaintiffs' counsel.

² A "Collective Action" under FLSA is governed by 29 U.S.C. 216(b), which provides that such claims: "may be maintained against any employer (including a public agency) 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." 29 U.S.C. § 216(b). Since this section permits employees to proceed on behalf of those who are alleged to be similarly-situated, the United States Supreme Court has ruled that trial courts have "the requisite procedural authority to manage the process of joining" additional parties. *Hoffmann-La Roche*

A party who fails to respond at all to interrogatories or a request for inspection, is subject to sanctions even in the absence of a prior order. FRCP Rule 37(d); *Hilao v. Estate of Marcos*, 103 F.3d 762, 764-765 (9th Cir. 1996). Federal Rule 37 provides for dismissal where there has been no response:

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails . . . (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

FRCP 37(d). Rule 37(b)(2)(C) further provides that the Court may make: "An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

Plaintiffs' and Claimants' counsel has stated that they "will treat [the] subpoenas to the various opt-ins as requests for production . . ." (Dockstader Aff. ¶ 3.) Moreover, it cannot be reasonably disputed that all seventeen of the subject Claimants have failed to respond or comply with these requests. Therefore, in accordance with Rule 37(d), the seventeen Claimants should have their consents stricken and they should be dismissed from the case with prejudice.

Inc. v. Sperling, 493 U.S. 165, 169 (1989) (case brought under the Age Discrimination in Employment Act – which is also governed by 29 U.S.C. § 216(b)).

In the alternative, notwithstanding the admission that the subpoenas can be treated as requests for production (which can only be served on parties), each Claimant was served with a subpoena. There is clear authority for a sanction of a contempt citation against nonparties for failure to comply with subpoenas duces tecum. FRCP 45(e) ("Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.").

In any event, the ultimate result does not hinge on whether the putative Claimants are classified as parties or not, or whether the subpoenas are classified as such or as individual requests for production. In any of the scenarios, the Court has authority, whether under Federal Rule 37 or 45 or the Court's inherent power, to strike all consents filed by the seventeen Claimants who have defied their subpoenas and dismiss those who fail to participate in the prosecution of this action.

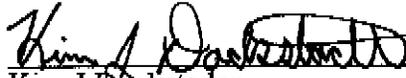
IV. CONCLUSION

For the reasons set forth herein, Defendant respectfully requests that the Court enter an Order striking the consents filed by Stefanie Bistline, Bland Ballard, Michael Moser, Rory Kip DeRouen, Jeffrey Parrish, Michael Jordan, Michelle Milliken, Isaac Moffett, Christopher McCullough, Eric Fillmore, Matthew Flynn, Jeffery Clevenger, Tim Hedding, John Scale, Mathew Jarame Ell, Chris Wing and Ken Ford for failure to respond to discovery requests (whether enumerated as subpoenas duces tecum or requests for production), and dismissing all such individuals from this action with prejudice.

Defendant further reserves its right to ask that Plaintiffs and/or Claimants pay the reasonable expenses, including attorney's fees, caused by the failures of the seventeen Claimants.

Dated this 28th day of December, 2001.

STOEL RIVES LLP



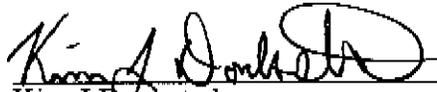
Kim J. Dockstader

CERTIFICATE OF SERVICE

I hereby certify that on this 28~~th~~ day of December, 2001, a true and correct copy of the foregoing DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE CONSENTS AND DISMISS POTENTIAL OPT-IN CLAIMANTS was served on the following individuals by the manner indicated:

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

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