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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. CLEVENGER, 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

**DEFENDANT MICRON ELECTRONICS,
INC.'S REPLY BRIEF IN SUPPORT OF
CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT RE:
WILLFULNESS**

Pursuant to Federal Rule of Civil Procedure 56 and District of Idaho Local Civil Rule 7.1(b)(3), Defendant Micron Electronics, Inc. ("MEI" or "Defendant"), by and through its attorneys, Stoel Rives LLP, hereby files this Reply Brief in support of its Cross-Motion for Partial Summary Judgment Re: Willfulness filed August 24, 2004 (Docket No. 269).

ORIGINAL

**DEFENDANT MICRON ELECTRONICS, INC.'S REPLY BRIEF IN SUPPORT OF
CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT RE: WILLFULNESS - 1**

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I. INTRODUCTION

Plaintiffs' opposition does not save them from a grant of summary judgment on Defendant's cross-motion regarding the issue of willfulness under the Fair Labor Standards Act (the "FLSA").¹ Plaintiffs fail to present any evidence sufficient to create a genuine issue of material fact, and have completely failed in meeting their burden to establish willful violations of the FLSA. Summary judgment for Defendant on the issue of willfulness is therefore appropriate, resulting in application of the standard two-year statute of limitations under the FLSA.

The undisputed facts in the summary judgment record plainly show the following:²

- Plaintiffs made baseless allegations at the commencement of and throughout this litigation with respect to Defendant's purported and "willful" violations of the FLSA, although Plaintiffs ultimately have been forced to retreat from such allegations. For example:
 - Contrary to Plaintiffs' initial (and until recently continuing) allegations, MEI properly included commissions in its overtime calculations and did not err in computing overtime compensation.³
 - Contrary to Plaintiffs' initial (and until recently continuing) allegations, MEI did not improperly alter timecards.⁴

¹ Plaintiffs apparently have filed only the "Affidavit of Daniel E. Williams re: Defendant's Cross-Motion for Partial Summary Judgment" (Docket No. 288) in opposition to the subject cross-motion. Although undersigned counsel received a document entitled "Plaintiffs' Response to Defendant's Cross-Motion for Partial Summary Judgment re: Willfulness Filed on August 24, 2004," it does not appear from the Court's docket that this or any other response was actually filed with the Court. Furthermore, no other documents or pleadings were received by undersigned counsel with respect to Plaintiffs' response to Defendant's cross-motion.

² Contrary to the requirements of Local Civil Rule 7.1(c)(2), Plaintiffs failed to file or serve any separate statement of facts that are in dispute. Accordingly, Defendant's statement of undisputed facts, which was timely submitted pursuant to Local Civil Rule 7.1(b)(1), stands unopposed by any direct or identifiable statement of disputed facts by Plaintiffs.

³ See Plaintiffs' Non-Opposition to Motion for Partial Summary Judgment on Payment of Premium on Commission Statements (Docket No. 222); see also Defendant's Reply to Plaintiffs' Notice of Non-Opposition to Motion for Partial Summary Judgment on Payment of Premium on Commission Statements (Docket No. 244).

- MEI developed policies and procedures regarding timekeeping and overtime in compliance with the FLSA.
- MEI's policies on timekeeping and overtime demonstrate that all employees were expected to accurately record their time, employees were not permitted to work off the clock, overtime had to be preapproved by a supervisor, and, when an employee worked in excess of 40 hours a week, he or she was paid time and one-half.
- MEI's overtime policy included the following admonition regarding off-the-clock work: "No work should be performed off the clock. All time worked must be recorded. Failure to record all time worked will subject the employee to disciplinary action up to and including termination."
- All employees received the timekeeping and overtime policies when they started working at MEI or one of its various subsidiaries.
- Pursuant to MEI's policy, and as confirmed by individual admissions, the inside sales representatives were responsible for accurately reporting their time.
- Inside sales representatives were trained on how to accurately report their time.
- As part of their employment responsibilities, supervisors were expected to make sure timekeeping and overtime policies were observed by inside sales representatives.
- If supervisors discovered their employees were working off the clock, the employees were reprimanded for it. Notably, in stark contrast to Plaintiffs' representation of the "*most egregious example of MEI's willful violation of overtime practices*,"⁵ are the actual and undisputed facts involving this purported example of a FLSA violation: Mr. Masteller's supervisors never told him to work off the clock, and, when they discovered he was working overtime and not reporting it, he was reprimanded for doing so.⁶

⁴ See Plaintiffs' Statement of Non-Opposition to Motion for Partial Summary Judgment Re: Plaintiffs' Claims of Altering Employees' Timecards (Docket No. 237).

⁵ Quoting Plaintiffs' Statement of Undisputed Facts filed in support of Plaintiffs' Motion for Partial Summary Judgment (re: willfulness) (Docket No. 225), at p. 2 (emphasis added) (referring to circumstances involving individual claimant Marvin Masteller). In this regard, Plaintiffs must live and die by their own words. If this is the "most egregious example of MEI's willful violation" of the FLSA, then it is apparent that summary judgment must be granted on Defendant's cross-motion with respect to the issue of willfulness.

⁶ Omnibus Affidavit (Docket No. 272), Exhibit 27 (Masteller Depo. 48:22-51: 4).

- All the supervisors who were deposed testified that they never told the inside sales representatives under their supervision to work off the clock.
- The overwhelming majority of the inside sales representatives testified that they were paid for all the time they actually reported, including overtime.
- Moreover, several inside sales representatives during the time period have testified that they reported and were paid for all of the time that they worked, including overtime.
- To the extent any inside sales representatives failed to accurately record some of their time worked in violation of MEI's policies, they did so voluntarily and deliberately without disclosure or the knowledge of MEI or their supervisors.

Plaintiffs' silence in the face of these undisputed facts in the record, as well as their flawed, generally broad and (finally) uncorroborated allegations of willful conduct, cannot fulfill their burden as the nonmoving party under Rule 56 with respect to the cross-motion.⁷

II. ARGUMENT

The Court should grant partial summary judgment on the issue of willfulness with respect to Plaintiffs' claims of violations of the FLSA. The absence of evidence to establish any willful violation of the FLSA, together with the undisputed and substantial facts in the record showing MEI's compliance with the FLSA, requires entry of summary judgment on this issue by grant of the pending cross-motion.

A. **The Court Should Strike Plaintiffs' Affidavit Submitted With Respect to Defendant's Cross-Motion for Partial Summary Judgment.**

The Affidavit of Daniel E. Williams re: Defendant's Cross-Motion for Partial Summary Judgment (Docket No. 288) ("Plaintiffs' Cross-Motion Affidavit") must be stricken from the record, because it is supported by deposition testimony that has not been properly authenticated

⁷ Plaintiffs may assert at oral argument that the Court must view the inferences drawn from the facts in the light most favorable to the nonmoving party; "[h]owever, when the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than would otherwise be required." *Montgomery v. J.R. Simplot Co.*, 916 F. Supp. 1033, 1037 (D. Or. 1994), *citing*, *California Architectural Bldg. Products v. Franciscan Ceramics*, 818 F.2d 1466, 1470 (9th Cir. 1987).

and is therefore inadmissible. On this basis, Defendant hereby moves for entry of an order striking Plaintiffs' Cross-Motion Affidavit.

Inadmissible evidence cannot be considered in a motion for summary judgment. Pursuant to Federal Rule of Civil Procedure 56(e), affidavits submitted in support of summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." To be admissible, evidence must be authenticated. Fed. R. Evid. 901(a) (authentication is "a condition precedent to admissibility"). Unauthenticated evidence must be stricken from the record, because "unauthenticated documents cannot be considered in a motion for summary judgment." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002); *Cristobal v. Siegel*, 26 F.3d 1488, 1494 (9th Cir. 1994).

"The requirement of authentication ... is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed.R.Evid. 901(a). For the purpose of summary judgment, depositions or excerpts from depositions are authenticated when the affidavit "identifies the names of the deponent and the action and includes the reporter's certification that the deposition is a true record of the testimony of the deponent." *Orr* at 774. Even if the affiant-counsel is present at the deposition, "[i]t is insufficient for a party to submit, without more, an affidavit from her counsel identifying the names of the deponent, the reporter, and the action and stating that the deposition is a 'true and correct copy.'" *Id.*

Plaintiffs' Cross-Motion Affidavit fails to properly authenticate the attached deposition excerpts, stating only, "[a]ttached to this affidavit are true and correct copies of the following" then listing the excerpts cited. Plaintiffs' Cross-Motion Affidavit does not meet the standard set forth in *Orr*, because, like the affidavit in *Orr*, the Affidavit here fails to identify the name of the

action and lacks the reporter's certification that the deposition is a true record of the deponent's testimony. Without proper authentication, the deposition transcripts are inadmissible and ought to be stricken from the record.

B. Summary Judgment Standard.

Rule 56 authorizes both sides, Plaintiffs (as claimants) and the Defendant (as a defending party), to move for summary judgment; accordingly, it is entirely appropriate for Defendant to file its cross-motion seeking partial summary judgment on the issue of willfulness. Fed. R. Civ. P. 56(a) and (b). Furthermore, under Rule 56 summary judgment is appropriate when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the moving party demonstrates the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and designate specific facts showing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails to make a showing to establish the existence of an element that is essential to the nonmoving party's case and upon which the nonmoving party will bear the burden of proof at trial, summary judgment will be mandated. *Id.* at 322.

Finally, Plaintiffs must show evidence that any alleged violation of the FLSA - in addition to stemming from a common policy or plan - was also willful. The Court "will not presume that conduct was willful in the absence of evidence." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003). Nevertheless, that is precisely what Plaintiffs ask this Court to do - presume that, merely because a few individuals claim to have worked off-the-clock, such conduct must have resulted from a willful violation of the FLSA by MEI. Not only is this argument faulty logic (i.e., *post hoc ergo propter hoc*), it is insufficient to avoid entry of summary judgment in favor of MEI on the issue of willfulness.

C. Plaintiffs Essentially Concede Defeat on Their Motion for Partial Summary Judgment and Defendant's Cross-Motion.

Plaintiffs' primary argument has been that they are entitled to summary judgment regarding the issue of willfulness, "[b]ased on the lack of facts discovered to date which in any way would demonstrate that MEI did anything but flagrantly ignore the FLSA's requirement to pay its sales representatives overtime." (Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment (Docket No. 224) at 6.) However, as indicated previously, this argument is fundamentally and inherently wrong – it ignores Plaintiffs' burden of proof, it is logically flawed, it presumes willfulness in the absence of evidence, and it is not supported by the undisputed facts which are in the record. This is precisely what led Defendant to file its own cross-motion on the issue of willfulness.

What is more, given the state of the record on Defendant's cross-motion, Plaintiffs must rely solely on their improper and inadmissible affidavit, which as indicated above should be stricken from the record. Plaintiffs also have failed to file with the Court any responsive brief or statement of disputed facts regarding the cross-motion. Defendant should not be placed in the position of speculating what Plaintiffs' arguments may be in opposition to the cross-motion. Moreover, the Court should not be required to mull through the record to determine what disputed facts may exist.

Viewed in a light most favorable to Plaintiffs, they essentially have conceded defeat on the issue of willfulness by failing to properly respond. Plaintiffs certainly cannot complain about the opportunity to meet their burden of demonstrating any evidence of willfulness. The initial complaint was filed in this action more than three years ago, discovery has been extensive and on-going since August 2001 (including numerous depositions by both sides, the production of voluminous records, and other

related efforts). Plaintiffs also have received multiple opportunities to file briefing on the issue of willfulness, including without limitation in response to the pending cross-motion, but have failed to do so. The reason for weaknesses in Plaintiffs' response is apparent there were no willful violations of the FLSA committed by MEI.

III. CONCLUSION

In conclusion, Plaintiffs have failed to raise any genuine issues of material fact that would preclude summary judgment as a matter of law on the issue of willfulness. Plaintiffs have failed to prove any willful violations of the FLSA. Therefore, the Court should grant Defendant's cross-motion and apply the standard two year statute of limitations under the FLSA for all purposes in this action.

STOEL RIVES LLP



Kim Dockstader

Attorneys for Defendant Micron Electronics, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of October, 2004, I caused to be served a true copy of the foregoing **DEFENDANT MICRON ELECTRONICS, INC.'S REPLY BRIEF IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT RE: WILLFULNESS** by the method indicated below, and addressed to each of the following:

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P.O. Box 2188
Boise, Idaho 83701-2188

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 Overnight Delivery
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III. CONCLUSION

In conclusion, Plaintiffs have failed to raise any genuine issues of material fact that would preclude summary judgment as a matter of law on the issue of willfulness. Plaintiffs have failed to prove any willful violations of the FLSA. Therefore, the Court should grant Defendant's cross-motion and apply the standard two year statute of limitations under the FLSA for all purposes in this action.

STOEL RIVES LLP



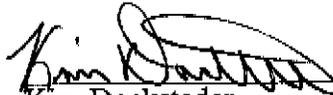
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