REPORT OF BRIAN H. KLEINER, PH.D.

GORDON J. PERRY VS. THE UPPER DECK COMPANY, LLC, ET AL.

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 05CV1329-LAB (POR)

I, Dr. Brian H. Kleiner, submit the following report in the above captioned lawsuit on behalf of the defendants:

QUALIFICATIONS

As more fully set forth in my Curriculum Vitae, a copy of which is attached hereto, I am a Professor of Human Resources Management in the College of Business and Economics at California State University, Fullerton and have been so for over 25 years. I also have conducted graduate courses at Chapman University, Pacific Christian College, and California State University, Dominguez Hills. My specialties include compensation management. I have taught many courses and published numerous articles related to this topic. As a result of my teaching and publishing achievements, California State University, Fullerton has provided me with many honors. I also have extensive experience as an expert witness consultant for both plaintiffs and defendants, having given testimony at trial in over 45 different cases.

PUBLICATIONS AUTHORED WITHIN THE PRECEDING TEN (10) YEARS

Please refer to my curriculum vitae attached hereto and marked as Exhibit A.

EXHIBIT 18 Kleiner

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PRIOR EXPERT TESTIMONY

I have testified as an expert either at trial or by deposition in the following matters within the preceding four years:

1. Cynthia Coleman v. Los Angeles Police Relief Association, et al. (Superior Court of California, Los Angeles County, Central District)

2. Pamela J. Harper v. California State Assembly, et al. (Superior Court of the State of California, Sacramento County)

3. Julie DeVall McElroy v. State of Iowa, et al. (United States District Court, Polk County, Iowa)

4. Anthony Williams v. Hewlett – Packard Company, et al. (Superior Court of the State of California, Pacer County)

5. Michael Bury, et al. v. Disneyland, et al (Superior Court of the State of California, Orange County)

6. Warren Heilman, et al. v. Honeywell, Inc. (United States District Court, District of Arizona)

7. Kimberly A. Marting, et al. v. Crawford and Company (United States District Court, Northern District of Illinois, Eastern Division)

8. Randell Martinez v. City of Santa Monica, et al. (Superior Court of the State of California, Los Angeles County, West District)

9. Lisa Weaver v. Sybron Dental Specialties, Inc., et al. (Superior Court of the State of

California, Orange County)

10. Shirin Rashcdi v. Crossroads Church of the Nazarene, Inc. et al. (Superior Court of the State of Arizona, Maricopa County)

11. Anh P. Pham v. Biomedical Applications of California, Inc., et al. (Superior Court of the State of California, Alameda County, Eastern Division)

12. Manuel A. Ferreira v. County of San Mateo (Superior Court of the State of California, San Mateo County)

13. Michael C. Seever v. Copley Press, Inc. and Daily Breeze (Superior Court of the State of California, Los Angeles County, Central District)

14. Lori Colebaugh v. Pinnocle Health Resources (Superior Court of the State of California, Orange County)

15. Joe Chavez and Jack Greunke v. Ford Motor Company (Superior Court of the State of California, Los Angeles County)

16. Neil Goldstein v. Western University of Health Services (United States District Court, Central District of California)

17. James Patrick Moultrey v. DTZ Staubach Tie Leung; The Staubach Company (Superior Court of California, Los Angeles County)

18. Steven P. Jackson v. NTMedia (United States District Court, District of Colorado)

19. Stanle G. Veenstra v. GE Financial Assurance, et al. (Superior Court of the State of California, Fresno County)

20. Soheil Anthony Binaei v. County of Orange (Superior Court of the State of California, Orange County)

21. Denice Byrd v. Santa Ana Unified School District (Superior Court of the State of California, Orange County)

22. Ken Iverson v. Crossroads Church of the Nazarene, Inc., et al. (Superior Court of the State of Arizona, Maricopa County)

23. Barry Kohl v. John E. Potter, Postmaster General, U.S. Postal Service (United States District Court, Central District of California)

24. Dustin Trust v. Foasberg Cleaners (Superior Court of the State of California, Los Angeles County)

25. Michael Lampkin v. American Title Company (Superior Court of the State of California, Santa Barbara County)

26. Kanahira, et al. v. Uyesugi, et al. (Circuit Court of the State of Hawaii, First Circuit)

27. Patricia A. Cole, Cathy Leal, and Becky Trueblood v. TCI Media Services, et al. (United States District Court, District of Idaho)

28. Susan Johnson v. Home Instead, et al. (Superior Court of the State of California, Ventura County, East County Division)

29. Zahra Sadeghi, et al. v. May Department Stores Company, et al. (Superior Court of the State of California, Orange County, Central Justice Center)

30. Raquel Salazar vs. Diversified Paratransit, Inc., et al. (Superior Court of the State of California, Los Angeles County, Southwest Division, Torrance)

31. Yvonne Reid v. GlaxoSmithKline (United States District Court, Southern District of California)

32. Mildred Blake v. Four Seasons Aviara Hotel Employment, Inc., et al. (Private arbitration before Judge Hoffman)

33. Adie Geiser v. Kern Community College District, et al. (Superior Court of the State of California, Kern County)

34. James Shin v. Washington Mutual Bank (Superior Court of the State of California, Los Angeles County, Central Division)

35. Rapidigm v. Pawan Bahuguna (Superior Court of the State of California, Alameda County)

36. Shelli Klotz v. Paul Romaine, et al. (Superior Court of the State of California, Orange County, Central Judicial District)

37. Doyle D. Baker and Debbie Baker v. Privatair, Inc., et al. (Superior Court of the State of California, Los Angeles County)

38. James Maakestad and Lisa Maakestad v. Mayo Clinic Arizona (United States District Court, District of Arizona)

39. Michael Jovich v. Green Hills Software, Inc. (Superior Court of the State of California, Santa Cruz County)

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40. Tamia Lenford v. Vision Infosoft (Superior Court of the State of California, San Diego County)

41. Vilma Jordana v. Affiliated Computer Services (Judicial Arbitration and Mediation Services, Los Angeles, California Office)

42. Arney Darling v. The Cola-Cola Company, et al. (Superior Court of the State of California, Orange County)

43. Terrill McCabe v. Acushnet Company (Superior Court of the State of California, San Diego County, North County Division--Vista)

44. Dohse v. Bob Hubbard Horse Transportation, Inc., et al. (Superior Court of the State of California, San Bernardino County.)

45. Wayne Hetman v. Santa Ana Unified School District, et al. (Superior Court of the State of California, Orange County, Central Justice Center)

46. Chase Holloman v. Mesilla Valley Christian Schools (State of New Mexico, Dona Ana County, Third Judicial District Court)

47. Ziba Chavoshi, M.D. vs. Michael S. Agron, M.D., et al. (Superior Court of the State of California, Los Angeles County)

COMPENSATION

Consultation: $365 per hour

Testimony. $450 per hour

INFORMATION CONSIDERED:

1. Plaintiff's initial disclosures

2. Deposition transcript of Mr. Perry dated December 14, 2006
3. Deposition transcript of Ms. Elizabeth
4. Deposition transcript of Ms. Baker
5. Deposition transcript of Mr. McWilliam
6. Deposition transcript of Mr. Erickson
7. Deposition transcript of Ms. Falette
8. Deposition transcript of Mr. Ramos
9. Deposition transcript of Ms. Forbes
10. Deposition transcript of Ms. Glenn
11. Exhibits 1-166
12. Documents produced by the parties

OPINION # 1

Based on the documentary evidence and in light of the long-term pattern of deceitful conduct by the plaintiff towards the defendants, plaintiff's estimate of his hours worked is unreasonable. In fact, there are strong grounds that plaintiff should not be entitled to even being paid for forty hours for many workweeks.

BASES AND REASONS FOR OPINION # 1

1. The defendants had a clearly stated policy concerning "Outside Employment" in the Upper Deck Company Team Player Guide. (Ex. 156, 000721-000751).

2. On January 6, 2001, plaintiff acknowledged receipt of this Guide, acknowledged that he understood the Company's policies, rules and procedures as referenced in the Guide and agreed to abide by them. (UD 00003)

3. The Outside Employment policy is as follows:

   "Outside Employment

   While employed by UDC, players are expected to devote their energies to their jobs within the company. For this reason, second jobs are strongly discouraged; and the following

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types of outside employment are strictly prohibited:

- Employment that may conflict with a player's work schedule, duties, and responsibilities.
- Employment that may create a conflict of interest or is incompatible with the player's employment with UDC.
- Employment that may impair or have a detrimental effect on the player's work performance with UDC.
- Employment that may require the player to conduct work or related activities on UDC's property, during or after the company's working hours.
- Employment that may directly or indirectly compete with the company's business interests.

Procedure for Authorization of Outside Employment

Players who wish to pursue outside employment that may create a real or apparent conflict of interest must submit a written request to Human Resources explaining the details of the outside employment. If the outside employment is authorized, the company assumes no responsibility for it. UDC will not provide Workers' Compensation coverage or any other benefits for injuries that result from the outside employment. Authorization to engage in outside employment can be revoked at any time by the company." (000730)

4. From the second week in October 2003 until the second week of March 2004 (approximately 5 months), unknown to the defendants plaintiff worked for a Von's grocery store while he was still a salaried employee with the defendants.

5. Specifically, the amount of hours plaintiff worked for Von's as derived from his earning history (Ex. 122) is as follows:

Week Ending in 2003 – 2004	Total Hours Worked
10/12	9.13
10/19	53.25
10/26	50.5
11/02	53.5
11/09	54.25
11/16	55.
11/23	53.75
11/30	29.25
12/07	47.75
12/14	50.25
12/21	52.75
12/28	44.25
01/04	49.75
01/11	48.25
01/18	48.
01/25	48.5
02/01	41.25
02/08	40.17
02/15	43.5
02/22	46.25
02/29	52.
03/07	32.
03/14	2.87

6. Plaintiff's deceitful conduct concerning his work at Von's was further manifested on pages 37 and 39 of his deposition transcript when he stated twice that he worked for Von's to "get a

little extra Christmas money."

7. During the time plaintiff worked at Von's, he was receiving medical treatment for a back and neck injury he sustained on February 24, 2003. This injury has apparently prevented him from finding employment since his termination by the defendants effective December 31, 2004, and clearly impaired his work performance for the defendants ever since the injury occurred.

8. Plaintiff's employment at Von's along with his allegedly working for the defendants "40 or more hours per week," according to his deposition testimony (p. 45 – 63), would hinder his recovery by placing so much stress upon his physical condition. Consequently, plaintiff's performance for the defendants from the second week in October 2003 to December 31, 2004 would be significantly impaired, requiring more work hours to complete jobs, which plaintiff could have completed faster with a healthy body. Plaintiff's testimony where he states that it was typical to work at Von's from 9:00 p.m. to 5:00 a.m. or 6:00 a.m. (p. 322) after which he would come in to Upper Deck without getting any sleep between 6:00 a.m. to 7:00 a.m. and work until 5:00 p.m. (p. 297) support this conclusion. His job duties at Von's required lifting. (p. 326) The injuries he suffered affected his ability to work at Upper Deck throughout his employment with them (p. 331), affecting the speed and consequent amount of time it would take him to get his job assignments done. (p. 332) Accordingly, even if the plaintiff were to establish that he worked an average of more than 40 hours per week since the second week in October 2003 to get his assigned jobs done, it would likely be attributable in large part to Perry's working such extensive hours with Von's.

OPINION # 2

The average number of hours per week plaintiff claims to have worked during his employment with the defendants is overestimated and lacks adequate substantiation.

BASES AND REASONS FOR OPINION # 2

1. Plaintiff's initial disclosures state the following:

a. During the 142 weeks between 2/4/2001 to 12/7/2003, plaintiff claims he worked 4230 `overtime hours or an average of 29.8 hours each and every week beyond his 40 hour workweek (or approximately 70 total hours per week).

b. During the 20 weeks between 12/8/2003 to 4/25/2004, plaintiff claims he worked 585 overtime hours or an average of 29.25 hours each and every week beyond his 40 hour workweek (or again nearly 70 total hours per week).

c. During the 35 weeks between 4/26/04 to 12/23/04, plaintiff claims he worked 1027.5 overtime hours or on average of 29.4 hours each and every week beyond his 40 hour workweek (or again nearly 70 total hours per week).

2. During his deposition, plaintiff could not provide any basis to substantiate the weekly hours he claims to have worked..

3. Not a single person in this case including the plaintiff himself, testified to plaintiff's claimed 69 - 70 hour workweeks each and every week he was employed by the defendants.

4. Plaintiff's own deposition testimony about his hours worked varies from between 60 - 65 hours per week (pp. 294, 308), to 65 hours per week (pp. 301, 306), and then to 65 <u>or</u> over per week (pp. 235, 243). Plaintiff cannot state with any conviction that he worked over 65 hours per week, and he acknowledges that figure could be as low as 60 hours per week. Plaintiff also admits he is not sure if his estimated hours worked takes into account any paid time off. (p. 308). Consequently, there is a significant difference of 9 to 10 hours per week between plaintiff's own testimony and the average overtime hours in plaintiff's initial disclosures.

5. Before addressing the deposition testimony of other witnesses, it is appropriate to highlight certain additional portions of plaintiff's testimony.

a. His hours for Rocci Construction and Luca Construction fluctuated greatly from week to week. (pp. 18, 23)

b. Plaintiff has no idea of the low number of hours he worked per week, only the highest amount. He also has no idea how he averaged the lowest number of hours he worked per week throughout his employment with Upper Deck. (pp. 233 - 234) He admits he could have worked less than 40 hours per week. (p. 239)

c. Mr. McWilliam did tell him his work hours were to be 8:00 a.m. to 5:00 p.m. with weekends off. (pp. 225 - 228)

d. It could have been after the first six months of his employment with Mr. McWilliam that he worked on a weekend. This is when he once went to Hawaii. (p. 228) He went to Hawaii in 2002.

e. Mr. McWilliam knew how many hours the plaintiff worked for him. (p. 233)

f. The plaintiff doesn't know how many hours he worked in February 2001. (p. 236)

g. Plaintiff documented his workweek for the time period from the beginning of January 2002 to the middle of April 2002. (p. 278) The one week in which total hours can be computed was 47.5 by his computation. (p. 270 - 274). He only worked on 3 weekends during that time period. (p. 284). The one weekend for which he specified the amount of time worked was for 1.5 hours. (Ex. 155)

h. At Upper Deck his usual arrival time on weekdays was between 6:00 a.m. to 7:00 a.m. (p. 297) His usual departure time was around 5:00 p.m. (p. 295, 297) His normal lunch was one hour. (p. 297) Therefore, from his perspective, on average he worked between 9 to 10 hours per day when he came to work Monday through Friday. This averages to 45 to 50 hours per week, not counting weekends. He does not know the

average number of days he worked per week (pp. 240 - 241) because he doesn't know the total or average number of Saturdays or Sundays he worked, or the average amount of time he worked when in fact he did work on a Saturday or Sunday. Yet, somehow plaintiff claims to have worked on average between 60 - 70 hours per week for every week he was employed.

6. The previous point once again raises additional doubts about the reasonableness of plaintiff's estimated hours worked. His estimate is further brought into question by the following:

   a. He testified that he never took a day off for working a weekend (p. 281), but earlier he testified that he was given or took a day off in the following week when he worked a weekend. He is not sure how many times he took a day off. (p. 138)

   b. He testified that he went to Hawaii once. (p. 228) After being reminded by an attorney it was in 2002, thereby hurting his claims for alleged weekend work, he stated he went to Hawaii a couple of times. (p. 228)

   c. He does not agree that his recollection of events from January 2002 to April 2002 was better when writing Ex. 155 contemporaneously with those events than December 14, 2006, the date of his giving deposition testimony. (p. 292)

   d. Despite the fact that Mr. McWilliam allegedly treated him poorly <u>quite often</u>, he was <u>never</u> upset or angry about how Mr. McWilliam treated him. (pp. 231- 232) He was not angry or upset <u>at all</u> when he was terminated. (pp. 250 - 251)

7. In attempting to get at the truth of the amount of hours plaintiff worked for the defendants, there is value in looking individually at certain periods of his employment based upon his supervision. I will suggest the following six periods for analysis:
   a. 2001 -- Supervised by Mr. McWilliam

b. 2002 – 2003 -- Supervised by Ms. Baker and Mr. McWilliam

c. January 2004 – July 2004 -- Supervised by Ms. Elizabeth and Mr. McWilliam

d. August 2004 – September 2004 -- Supervised by Ms. Elizabeth, Mr. Erickson, and Mr. McWilliam

e. October 2004 – November 2004 -- Supervised by Ms. Baker, Mr. Erickson, and Mr. McWilliam

f. November 2004 – December 2004 -- Supervised by Ms. Glenn, Mr. Erickson, and Mr. McWilliam

8. According to Baker (p. 31), Mr. McWilliam supervised the plaintiff in 2001. Mr. McWilliam did tell him his work hours were to be 8:00 a.m. to 5:00 p.m. with weekends off. (Perry, pp. 225 - 228) Plaintiff was told in January 2001 that his role was to work 40 hours per week with no overtime. (McWilliam, pp. 18, 40). In fact, he was told on numerous occasions not to work overtime by Mr. McWilliam because the job did not require overtime. (McWilliam, p. 41) There was an understanding that if the plaintiff worked overtime, he would get comp time. (McWilliam, p. 112). Plaintiff did work a few weekends and was given time off later. (McWilliam, p. 19). Plaintiff did not work over 40 hours per week. (McWilliam, p. 105) Accordingly, the most reasonable estimate for plaintiff's average work week in 2001 is 40 hours.

9. Ms. Baker supervised the plaintiff in 2002, 2003 and in October 2004. (pp. 31, 33) She has testified as follows:

> Plaintiff worked on average 10 - 12 hours Monday through Friday and on two weekend projects per month. (p. 77) She spoke with him on site between 6:30 a.m. to 6:45 a.m. on a daily basis. (pp. 32, 17). Plaintiff generally worked 60, 65 hours per week, sometimes 55 or 60, always in excess of 40. (p. 145)

10. There are numerous questions and problems related to Ms. Baker's testimony. The most important is that there is no adequate basis to substantiate the average number of hours worked per week because there is no documentation concerning ending time, whether weekend work involved only a Saturday or Sunday or both, the hours typically worked on a Saturday or Sunday, whether the lunch hour was substracted in her calculations, or whether holidays and other leaves factored into her computation. Even if plaintiff began work at 6:30 a.m. on average and ended at 5:00 p.m. with a one hour lunch as plaintiff testified was average, that amounts to a 9.5 hour day or 47.5 hours per week. Accordingly, the time worked on an average weekend project, how frequently they occurred, and whether there was any comp time given for them is especially important, but lacks any substantative documentary evidence or testimony.

11. The documentation that does exist during 2002 and 2003 clearly does not support the estimate Ms. Baker testified to in her deposition considering it is unclear whether Baker's estimate took into account the one hour lunch or how many times or hours on average plaintiff worked on the weekend.

12. As it turns out the plaintiff did keep a log for the period from January 3, 2002 to April 19, 2002. (Ex. 155). Some interesting facts emerge from it as follows:

    a. Only three weekends of work were noted. One was for 1.5 hours. The other two reflected a minimal amount of activity being done.

    b. The median average for plaintiff's ending time at work was 3:00 p.m.

    c. The average number of hours during weekdays between plaintiff's starting time and ending time where both were noted, not including a one hour lunch, was 8.1, thus making the average daily hours worked 7.1.

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d. The average number of hours worked during weekdays in which it was specifically mentioned no lunch was taken (contrary to company policy) or a shortened lunch was taken (contrary to company policy) was 8.6 hours.

e. The only complete 7 day period in which plaintiff identified the total hours he worked was between January 3, 2002 and January 9, 2002, in which the plaintiff computed as having worked 47.5 hours. This included weekend work. However, for four weekdays, plaintiff did not deduct the one hour lunch break required by policy, which he testified was normal (p. 297), and the other day indicated he violated company policy by not taking the one hour lunch. For January 4, the plaintiff made a math error of .1 hour. Thus, the hours that the plaintiff worked not including the one hour unpaid midday lunch break was 42.4, which includes 1.5 hours for weekend work. My review of the days described from January 10, 2002 to April 19, 2002 suggested to me that generally they were less time demanding than were the days between January 3, 2002 and January 9, 2002.

13. When asked for examples of weeks in which he worked more than 65 hours for the defendants, he gave in response only the one time he drove to Dallas and then to New York. (p. 157). As this was the best and only example that came to his mind, it is worth evaluating in some detail. Please refer to Ex. 154. Plaintiff's notes indicate on Saturday, February 8, 2003, he drove towards Dallas and arrived in Dallas on Sunday, February 9, at 2:00 a.m. The maximum number of hours mathematically possible is 26 hours and logically would be probably less than that. Yet, plaintiff noted 38.5 hours without any explanation of additional work done. Monday, February 10, he did not work at all. On Tuesday, February 11, he took off for New York and arrived Thursday, February 13. He wrote 20 + 19 hours for the trip. On Friday, February 14, he flew home. He then was given no work to do not only for Saturday, February 15, but also Sunday, February 16. He also was given further comp time on Monday, February 17, when he was not required to work. Not counting flying home from New York, this totals a maximum of only 65 hours for a 10 day period (February 8 - 17, 2003) or an

average of 6.5 hours per day; and this doesn't even include one hour unpaid lunches plaintiff was supposed to take each work day! Even using his unsubstantiated 38.5 hour figure to Dallas instead of my maximum possible 26 hour figure, the total hours for the ten day period is 77.5 or an average of 7.75 hours per day. Furthermore, between Tuesday, February 18, to Friday, February 21, 2003 there is a dispute between Francis and the plaintiff in which Francis indicated plaintiff wasn't around doing anything. Saturday, February 22, and Sunday, February 23, the plaintiff again did no work for the defendant. And this is the plaintiff's best example of the long hours he claims he had worked for the defendants!

14. The next day the plaintiff got into an accident at noon and did no duty or some form of modified duty for nearly all of the days of his remaining employment with the defendants. His work for the rest of 2003 under Ms. Baker contained much time off for physical therapy, visits to doctors, and paid vacations.

15. Beginning October 2003, as previously noted, plaintiff began his undisclosed employment with Von's that Ms. Baker was unaware of. That is also the only month where we have a calendar of plaintiff's scheduled work. No weekend work was given to him on that month according to the calendar.

16. Ms. Elizabeth was one of those people who scheduled the plaintiff, along with Mr. McWilliam and Ms. Baker, Mr. McWilliam's executive secretary. (Ex. 55) Her title was Senior Facilities Manager (Ex. 56); and she was the plaintiff's immediate supervisor. (Ex. 55) Beyond this her testimony is full of contradictions, such as:

    a. Her length of employment with the defendants was through September (pp. 42, 50, Ex. 55) vs. late October. (p. 40, Ex. 56)

    b. Based upon a log she kept in May and June, 2004 (the beginning and ending dates are unknown because there is no log to be found), she worked 65 hours per week, and he worked more than 70 (p. 94) vs. in that same time period she averaged 62

hours per week, and he usually worked 65 hours during that unspecified period of time. (Ex. 55)

c. Plaintiff worked almost every weekend since she began (p. 27) vs. plaintiff averaged two weekends a month after working more than 40 hours Monday through Friday. (Ex. 55)

d. Contrary to plaintiffs own testimony (p. 295), she claims that he worked 185 days after 5:00 p.m. from January through September. (p. 42)

e. Also contrary to plaintiff's testimony, he was not required to arrive at work prior to 8:00 a.m. a full 10% of the time. (p. 40)

17. Doubts about the credibility of Ms. Elizabeth's estimates are further heightened when she testified:

"The entire time I was working with Gordon I found him to be extremely professional. In spite of the long hours and the verbal abuse, I never heard Gordon complain. Gordon always executed his tasks completely, expeditiously, and correctly. Gordon always displayed courtesy and the utmost respect for Mr. McWilliam, his family, and his possessions. Gordon always went out of his way to educate new employees to use respect and honesty working with Mr. Mc William." (Ex. 55—underlining added) All this passage demonstrate is the "halo" bias she has towards the plaintiff, which likely accounts for her grossly inflated, poorly substantiated estimates of plaintiff's time worked.

18. Even if during the estimated 30 day time period (from the middle of May to the middle of June) were to be found to be accurate, it certainly can not be the basis of concluding that he worked the same amount of time for the other approximately 240 days. For instance, we know that the plaintiff worked at Von's for substantial hours until the middle of March without Ms. Elizabeth apparently being aware of it. We know that such work coincided with medical reports dated February 3, 2004 (Ex. 139) and March 2, 2004 (Ex. 141)

making clear that plaintiff's physical condition worsened during that time; and as a result he apparently took additional leaves of absence on February 26 (Ex. 140), March 9 (Ex. 142), March 15 (Ex. 143), March 22 for an MRI (Ex. 142), March 23 (Ex. 142, 144), March 26 (Ex. 143), May 21 (Ex. 146), June 1 (Ex. 147), June 14 (Ex. 148 – vacation request), June 22 (Ex. 149), July 28, 29, and 30 (Ex. 150) It is not at all clear how Ms. Elizabeth integrated the above data in even her simple calculation of her estimate for the time plaintiff worked in part of May and June or whether she deducted his one hour for lunch. However, significantly Ms. Elizabeth admits that it was not important for her to track when the plaintiff started work and when he ended work. (p. 37)

19. When Mr. Erickson began employment for the defendants in August 2004, he testified that he was not aware of plaintiff ever working after 5:30 p.m. (p. 120) through the end of December 2004; and the schedule of December 2004 (Ex. 69) reflected many weekdays of no work and no weekend work at all to offset an apparently somewhat busier month in November.

20. It also should be noted that the defendants give 10 full scheduled holiday days or nearly one every month. Furthermore, plaintiff received 80 hours or 10 additional days for vacation. No reference was ever made to any of the defendants' scheduled holiday days or plaintiff's vacation time when computing plaintiff's hours of work.

21. In conclusion, it is a very complicated issue to estimate accurately the plaintiff's hours of work with the defendants. For reasons previously given, the estimates given by the plaintiff, Ms. Baker, and Ms. Elizabeth seem greatly inflated and are very poorly substantiated. Memory of events that occurred years earlier are often notoriously unreliable. That is why reliance upon contemporary documentation is so important. Counting holidays and vacation time off as time worked but with no overtime, my own estimate is that the plaintiff probably did average some modest amount of hours over 40 per week when he worked for the defendants. Whatever amount that was, however, is fully offset by the fact that many if not all of these hours were due to the plaintiff's reckless abuse of his body,

escalated especially by his surreptitious work at Von's, where he impaired his ability to properly recover from his injuries so that he could devote his finest efforts for the defendants by depriving his body of needed rest, sleep and nutrition. This made him slower during his normal 40 hour workweek, thus requiring him to put in overtime contrary to Mr. McWilliam's early directives to him. Accordingly, plaintiff's estimate of hours worked is biased in large part or entirely upon plaintiff's surreptitiousness and deceitfulness by not following defendants' policies and instructions. His duplicity apparently fooled totally his immediate supervisors, Ms. Elizabeth and Ms. Baker, who considered him to be "absolutely honest." (Baker, p. 76)

I reserve the right to modify the opinions in this report and/or add new opinions based upon additional information.

Brian H Kleiner

BRIAN H. KLEINER, PH.D.

March 1, 2007

DATE

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