IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PATRICIA WINN CARTER, MAXINE M. JONES, CYNTHIA SILIANOFF, JUDY LAUBER, PATRICIA GRIMALDI, KATHLEEN LEPP, JULIE REITER, ALICE KOOIMAN, et al., individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

WEST PUBLISHING COMPANY, WEST PUBLISHING CORPORATION, WEST SERVICES, INC., and BANKS-BALDWIN LAW PUBLISHING COMPANY,

Defendants.

Case No. 8:97-cv-2537-T-26MAP

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Defendants West Publishing Company, West Publishing Corporation, West Services, Inc., and Banks-Baldwin Law Publishing Company (hereinafter all referred to as "West"), submit this memorandum of law in support of their motion for dismissal and entry of judgment on plaintiffs' Title VII claim and for summary judgment and dismissal of the Equal Pay Act claims of all plaintiffs who have consented to the jurisdiction of this Court.

INTRODUCTION

Maxine Jones and Patricia Carter commenced this class-action lawsuit in October 1997 claiming that they were denied the opportunity to purchase stock in the formerly privately held West Publishing Company.[1] They alleged that the failure to sell them stock in West was discriminatory based on their gender in violation of both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), and the Equal Pay Act, 29 U.S.C. § 206(d) et seq. ("EPA"). On May 20, 1999, this Court granted plaintiffs' motion to certify their Title VII claim as a class action under Federal Rule of Civil Procedure 23(b)(3).

On September 7, 2000, the Eleventh Circuit Court of Appeals reversed this Court's grant of class certification on the grounds that the named plaintiffs lack standing to assert a Title VII claim against West as the sole charge of discrimination on which the entire class relied was untimely. The court remanded the case back to this Court for further proceedings "consistent with [its] opinion." Accordingly, West seeks dismissal of plaintiffs' Title VII claim.

The Eleventh Circuit's ruling also requires that summary judgment be granted dismissing plaintiffs' EPA claim. Central to the Eleventh Circuit's decision was its finding that the payments of dividends and merger consideration to West's shareholders were non-discriminatory – because

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[1]Eighty-six women have filed consents to join, purporting to opt-in to the EPA action. (See e.g. Doc. 102) The earliest consent to join was filed on July 29, 1998. Under a tolling agreement reached by the parties and entered by this Court, all consents to join filed between August 19, 1998 and the date the Court lifted the stay in this matter, December 11, 2000, are deemed to have been filed on August 19, 1998. (See Doc. 71) All of the plaintiffs who consented to join this action will be referred to as the "opt-in plaintiffs."

they were paid in a neutral manner, without regard to gender, and based solely on the amount of stock owned. This finding, although made in the context of plaintiffs' Title VII claim, is fully applicable in all respects to plaintiffs' EPA claim.

Thus, it is now clear, as a matter of law, that no aspect of West's stock program could possibly be held to constitute a violation of the EPA. The initial sale of stock at book value – with no guaranteed benefit of any kind – plainly cannot constitute "wages" under the EPA. No court has ever held that the mere opportunity to buy stock can give rise to a valid EPA claim, and there is no support in the statute for such an unprecedented and illogical finding.[2] As for the payments of dividends and merger consideration, the Eleventh Circuit explicitly found that they cannot be treated as discriminatory wage premiums under Title VII and were based on a factor other than sex. This ruling conclusively bars a finding that these payments violated the EPA. In addition, the merger consideration received by West shareholders is non-actionable on the separate grounds that (i) this consideration, paid in exchange for something of value, cannot be deemed "wages" under the EPA; and (ii) it is beyond legitimate dispute that the consideration was not paid by plaintiffs' employer, West, but by The Thomson Corporation ("Thomson").

Furthermore, even if, arguendo, this Court were to find – contrary to all precedent – some aspect of West's stock program actionable under the EPA, plaintiffs' EPA claims are time-barred under the clear mandate of the Eleventh Circuit ruling. It is undisputed that the last sale of stock to any employee occurred more than three years prior to any plaintiff filing suit, and that any claims based on sales of stock are time-barred under the EPA's two-year statute of limitations – or even

[2] Indeed, this Court previously held that an issue of fact existed as to whether any part of West's stock program was subject to Title VII only because "the payment of cash dividends to shareholders on the shares might be the equivalent of a wage premium . . ." Because the EPA's definition of wage discrimination is more limited than the Title VII definition, the Eleventh Circuit's tacit recognition that the sale of stock could not be "wages" is applicable, a fortiori, to the EPA.

under its three-year statute, which applies only to "willful violations." Plaintiffs have therefore attempted to rely on the "continuing violation" doctrine, basing their claims on the payments of dividends and merger consideration. The Eleventh Circuit, however, explicitly found that these payments were not "continuing violations" for purposes of Title VII. This ruling compels a finding that these same payments were not "continuing violations" for purposes of the EPA.

Finally, although plaintiffs surely will argue that the limitations period should be tolled because the stock program was "secret," this contention cannot save plaintiffs' claims from dismissal. It is beyond dispute that any alleged "secrecy" ended on June 20, 1996, when Thomson's purchase of West's shares was announced and reported in the press. All of the plaintiffs, however, waited more than two years after June 20, 1996 to commence their EPA actions. Under well-settled law, it would be reversible error to apply either equitable tolling or equitable estoppel here, where the alleged basis for tolling ceased prior to the expiration of the EPA limitation period. Moreover, because the Eleventh Circuit has ruled that the payment of dividends and merger consideration were "neutral" and non-discriminatory, there could be no finding that these payments were "willful" violations, for purposes of applying the three-year limitations period. Thus, even assuming, arguendo, a tolling of the statute until June 20, 1996, the claims of all the plaintiffs – none of whom consented to join within two years of that date – would still be time-barred.

FACTUAL AND PROCEDURAL BACKGROUND[3]

Prior to its acquisition by Thomson on June 20, 1996, West offered certain employees, both men and women, the opportunity to buy stock in West. As a result of owning stock, shareholders received dividends, typically six times per year. Deposition of Grant E. Nelson taken in the matter of Gosche v. West Publishing Co. at 89-90, attached to the Affidavit of Susan E. Ellingstad at Tab 1.

[3]As this Court is familiar with the facts of this case, West will recite here only the facts directly relevant to this motion.

Dividends were an automatic aspect of stock ownership, paid to all shareholders according to the number of shares they held. Carter v. West Publ'g Co., 225 F.3d 1258, 1265 (11th Cir. 2000). West made its last sale of stock on August 30, 1994. Id. at 1261. Dividends were paid on West stock until June 4, 1996. Tab 1 at 93-94. On June 20, 1996, Thomson purchased West for $10,445 per share. Id. at 94. The merger consideration was deposited by Thomson with its paying agent. Affidavit of Priscilla Hughes, attached at Tab 2 to the Ellingstad Aff. On June 20, 1996, Thomson's counsel provided instructions to its paying agent as to the amounts it was to pay to each West shareholder. Id. at Exhibit C.

On November 6, 1996, more than two years after the last sale of stock by West, Maxine Jones filed a charge of discrimination with the EEOC. On October 16, 1997, more than three years after West's last sale of stock to any employee, Patricia Carter and Maxine Jones filed this lawsuit, alleging classwide claims of sex discrimination under Title VII and purporting to bring their Equal Pay Act claims as a collective action pursuant to 29 U.S.C. § 216(b).[4] West moved to dismiss plaintiffs' claims, arguing that both the EPA and the Title VII claims were time-barred. (Doc. 4) In response to West's motion to dismiss, plaintiffs argued that the continuing violation doctrine **applied equally** to both their Title VII and EPA claims. This Court denied West's motion. (Doc. 22)

Plaintiffs moved for class certification of their Title VII claim pursuant to Fed. R. Civ. P. 23(b)(3) on July 17, 1998. West argued, among other things, that the plaintiffs lack standing to assert a Title VII claim because no plaintiff had filed a timely charge of discrimination. On May 20, 1999, this Court certified plaintiffs' Title VII claim as a class action under Rule 23(b)(3). (Doc. 153)

[4]The two original named plaintiffs did not file and have never filed consents to join. The first consents to join this lawsuit were filed on July 29, 1998 (Doc. 51). For purposes of the statute of limitations, even the original named plaintiffs must file a consent to join and an EPA collective action is not commenced until the first consents to join are filed. See 29 U.S.C. § 216(b); Salazar v. Brown, 2996 WL 302673 (W.D. Mich. 1996); Wertheim v. Arizona, 1993 WL 603552 (D.Ariz. Sept. 20, 1993). Thus, for purposes of the statute of limitations, the EPA claim was not commenced until July 29, 1998.

On June 1, 1999, West petitioned the Eleventh Circuit for permission to appeal the class certification ruling under Rule 23(f), and on June 30 the Eleventh Circuit granted West's petition. (Doc. 182) In its appeal, West argued that in addition to failing to satisfy the requirements of Rule 23(b)(3), the plaintiffs lack standing to assert their claim because it is barred by the statute of limitations. The Eleventh Circuit agreed and held that neither equitable tolling nor the continuing violation doctrine applied to this case. Carter, 225 F.3d at 1267. With respect to the continuing violation doctrine, the court of appeals specifically rejected plaintiffs' argument that the dividend payments and merger consideration were akin to a "wage premium," ruling that those payments were not violations, but rather neutral effects of a one-time alleged violation -- the allegedly discriminatory sale of stock. Id. at 1265. The court of appeals remanded the case to this Court "for further proceedings consistent with this opinion." Id. at 1267.

ARGUMENT

I. LEGAL STANDARD

Summary judgment under Federal Rule of Civil Procedure 56 is appropriate where the evidence, viewed in a light most favorable to the non-moving party, reveals "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Steele v. Shah, 87 F.3d 1266, 1269 (11th Cir. 1996). Conclusory allegations or denials by the nonmoving party do not establish an issue of fact under Rule 56. Aketepe v. U.S., 925 F. Supp. 731, 733 (M.D. Fla. 1996), aff'd, 105 F.3d 1400 (1997), cert. denied, 522 U.S. 1045 (1998).

II. THE ELEVENTH CIRCUIT HAS DIRECTED THIS COURT TO DISMISS PLAINTIFFS' TITLE VII CLAIM AS TIME-BARRED.

The Eleventh Circuit reversed this Court's certification decision on the grounds that the named plaintiffs lack standing to bring their Title VII claim against West, either individually or as

class representatives, "because the sole EEOC charge upon which the entire class relies was untimely." Carter, 252 F.3d at 1267. Because no plaintiff filed a timely charge of discrimination, plaintiffs' Title VII claim must be dismissed with prejudice as directed by the Eleventh Circuit.

III. PLAINTIFFS' EQUAL PAY ACT CLAIMS MUST ALSO BE DISMISSED BECAUSE THE ELEVENTH CIRCUIT RULING PRECLUDES A FINDING THAT ANY PART OF WEST'S STOCK PROGRAM VIOLATED THE EPA.

A. Neither The Selling Of Stock Nor The Payment Of Dividends And Merger Consideration Constitutes The Payment of Wages Under The EPA.

This Court observed in its Class Certification Order, based on dictum in Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1304 (9th Cir. 1982), that Title VII might apply to West's stock program because "the payment of cash dividends to shareholders on the shares might be the equivalent of a wage premium which could violate Title VII.'" Carter v. West Publ'g Co., 1999 WL 376502 *8 (M.D. Fl. 1999). Considering the procedural posture of the case, this Court found that Title VII applied to the facts "as they stand today." Id. Since then, however, the Eleventh Circuit has squarely rejected plaintiffs' argument that the payment of dividends or merger consideration to shareholders was akin to "providing male employees a wage premium over similarly-situated female employees." Carter, 225 F.3d at 1264. If the dividends and merger consideration did not constitute a gender-based wage premium or compensation for purposes of Title VII, they are certainly not gender-based wage payments under the more limited definition of wage discrimination prohibited by the EPA.

Having lost the ability to argue that the dividends and merger consideration constituted discriminatory sex-based wage payments, plaintiffs are left with the unprecedented contention that

the opportunity to buy West stock at book value[5] – with no guaranteed benefit of any kind – constitutes the discriminatory payment of "wages" under the EPA. However, there is no support for this untenable argument either in the statute or the case-law. Indeed, employee stock purchase is conspicuously absent from the extensive regulatory definition of employer/employee transactions covered by the statute. See 29 C.F.R. XIV §§ 1620.10 and 1620.11. Significantly, each of the "wages" listed in the regulations require the employer to pay for something of value on behalf of the employee. Id. In contrast, when an employee purchases stock at the current stock price, as was the case at West, the employee receives no more than what she paid for – and has no guarantee that the stock will either maintain (let alone increase) its value or pay future dividends.

It is unsurprising, then, that no court has ever held that the mere opportunity to purchase stock falls within the scope of the EPA – or even the broader scope of Title VII, which embraces not only "wages," but all terms, conditions, and privileges of employment. Indeed, the Ninth Circuit, the only court specifically to address this issue, declined to hold that a discriminatory stock purchase program would alone violate Title VII. Bonilla, 697 F.2d at 1302.

Thus, there is simply no authority for finding that West paid EPA "wages" when it sold stock to some employees. Unlike Bonilla, plaintiffs have not alleged that stock ownership entitled employees to preferential wages, hours, job assignments, or any other employment benefits. On the day that the stock was purchased, the employee received exactly what she paid for. The fact that stock ownership ultimately resulted in the receipt of dividends and capital gains is patently irrelevant. West never guaranteed profits, and a company downturn could have resulted in the end of dividend payments – and capital losses instead of gains.

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[5]It is undisputed that this case does not involve the granting of stock options, but rather, the selling of stock at its then-current book value in a private company.

West asks this Court to reject plaintiffs' effort to expand the definition of "wages" under the EPA beyond the scope of the regulatory language and beyond the scope of any prior judicial decision.[6] Particularly now that the Eleventh Circuit has resolved this Court's concern that dividends and merger consideration could be considered a wage premium that enhanced compensation, plaintiffs' unprecedented EPA claims should be dismissed regardless of the application of the statute of limitations.

B. The Payment Of The Thomson Merger Consideration Is Also Non-Actionable Because It Was In Exchange For Substantial Value And Not Paid By Plaintiffs' Employer.

As demonstrated above, neither the dividends nor the merger consideration received by West's stockholders can give rise to an EPA claim because the Eleventh Circuit has held that all such payments were neutral and non-discriminatory. There are additional, equally compelling grounds for finding that the merger consideration cannot constitute EPA "wages" or give rise to a valid EPA claim. First, it is undisputed that the merger consideration was paid in exchange for something of value; to wit: ownership in West, which was transferred from West's shareholders to Thomson on June 20, 1996. To argue that this merger transaction was tantamount to "paying wages" is not only unprecedented; it is absurd.

Second, the merger consideration was not only paid in exchange for the ownership of West, it was paid by Thomson, not West. Thomson was indisputably not the employer of any plaintiff at the time of the merger and, accordingly, this payment by Thomson cannot, under even the most

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[6] See also Lloyd v. Georgia Gulf Corp., 961 F.2d 1190 (5th Cir. 1992) (stock purchase plan not "compensation" under Louisiana wage forfeiture law); McLaury v. Duff and Phelps, Inc., 691 F. Supp. 1090 (N.D. Ill. 1988) (stock ownership not a privilege of employment); Williams v. D. Richey Management Corp., 1988 WL 117498 (N.D. Ill. 1988) ("lost opportunity" not "a 'wage' within the meaning of the EPA").

tortured interpretation of the EPA, constitute wages paid by the plaintiffs' employer – which is required to show an EPA violation. See 29 U.S.C. § 206(d)(1).

Indeed, in the related Gosche v. West Publishing Company matter, West submitted the affidavit of Priscilla Hughes, one of the attorneys who worked for Thomson on the merger transaction and who oversaw the payments made to West shareholders. See Affidavit of Priscilla Hughes, attached as Tab 2 to the Ellingstad Aff. According to this undisputed affidavit, Thomson's counsel provided the merger consideration funds to the paying agent, who, on instruction from Thomson, transmitted the funds to West's shareholders.

It is thus undisputed that the merger consideration was ultimately paid by Thomson and Thomson was not the "employer" of any plaintiff at the time the payment was made. As a result, apart from all of the other arguments applicable to West's payment of dividends, this merger consideration cannot, as a matter of law, be deemed discriminatory "wages" under the EPA.

C. The Eleventh Circuit Held That The Dividends And Merger Consideration Were Paid Based On Stock Ownership, Not Sex.

The Eleventh Circuit ruling that the dividends paid by West and the merger consideration paid by Thomson were not gender-based payments is fatal to plaintiffs' EPA claim even if these payments were "wages" within the meaning of the EPA and even if the statute of limitations did not bar the claim. That is because, under the Eleventh Circuit's decision, West is entitled to summary judgment on its affirmative defense that these payments were based on a factor other than sex.

The Equal Pay Act prohibits an employer from discriminating between employees in the payment of wages on the basis of sex. 29 U.S.C. § 206(d)(1). To prove a prima facie case of wage discrimination under the Equal Pay Act, the plaintiff must show that:

(1) the employer pays different wages to employees of the opposite sex;

(2) the employees perform equal work on jobs that require equal skill, effort and responsibility; and
(3) the jobs are performed under similar working conditions.

See Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1532 (11th Cir. 1992); Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974). The burden of proof then shifts to the employer to show by a preponderance of the evidence that the pay differential is justified by one of the following: i) a seniority system; ii) a merit system; iii) a system that measures earnings by quantity or quality of production; or iv) a bona fide business reason, other than sex. 29 U.S.C. § 206(d)(1); Irby v. Bittick, 44 F.3d 949, 954 (11th Cir. 1995). When the defendant meets this burden, the plaintiff must produce affirmative evidence showing that the employer's explanation is pretextual for a sex-based pay disparity. Id. "The 'factor other than sex' affirmative defense is a broad, catch-all exception to the Equal Pay Act, and should not be overly limited." Id. at 956 n.10.

Whether the plaintiff has established a prima facie case or whether the defendant has established an affirmative defense are issues appropriate for disposal on summary judgment. See e.g., Irby, 44 F.3d at 957 (affirming summary judgment because pay disparity was based on experience and not sex); Byrd v. Ronayne, 61 F.3d 1026, 1035 (1st Cir. 1995) (affirming summary judgment for employer on affirmative defense that differential in compensation was based on factors other than sex); Tarango v. Johnson & Johnson Med., Inc., 949 F. Supp. 1285, 1290 (W.D. Tex. 1996) (same).

Here, the court of appeals specifically found that the dividends and merger consideration were not paid based on sex. As the court stated, dividends "operated in a neutral manner." West distributed dividends to each shareholder, **"regardless of their gender, based on the amount of stock owned."** Carter, 225 F.3d at 1265 (emphasis added). Quite apart from the issue of whether

the statute of limitations bars plaintiffs' claim, therefore, the Eleventh Circuit has held that the payments alleged in this case to violate the EPA were **not based on sex as a matter of law**. As such, summary judgment is appropriate on West's affirmative defense.[7]

IV. PLAINTIFFS' EQUAL PAY ACT CLAIMS MUST BE DISMISSED BECAUSE THEY ARE TIME BARRED.

Even if, arguendo, plaintiffs' EPA claims could survive the above substantive hurdles, they nonetheless must be dismissed because the Eleventh Circuit held as a matter of law that no discriminatory sex-based wage payment occurred within three years of any plaintiff filing an EPA lawsuit.

A. The Equal Pay Act Restricts Recovery To Damages From Violations Within The Two Or Three Year Period Prior To Each Plaintiff Filing Her EPA Claim.

Under the EPA, a plaintiff must commence her cause of action within two years after the cause of action accrued. 29 U.S.C. § 255(a). If the plaintiff can prove that the violation was "willful," a three-year statute of limitations applies. Id. The EPA statute of limitations presents an absolute bar to recovery of damages for violations which occurred outside this two or three-year period. Pollis v. New Sch. for Social Research, 132 F.3d 115, 118 (2d Cir. 1997) (no recovery "for violations outside the three-year limitations period"even when continuing violation theory applies); Nealon v. Stone, 958 F.2d 584, 591 n.5 (4th Cir. 1992) (plaintiff limited to recovering only for those violations occurring within three years prior to filing suit even when equitable doctrines apply to toll limitations period); Sinclair v. Automobile Club of Oklahoma, Inc., 733 F.2d 726, 729 (10th Cir.

[7]Plaintiffs are likely to argue, citing Corning Glass Works v. Brennan, 417 U.S. 188 (1973), that while the dividends and merger consideration were based on stock ownership and not gender, stock ownership was based on gender and therefore these neutral dividend payments were a continuation of that gender discrimination. However, the Eleventh Circuit has already rejected this argument. In any event, Corning Glass is factually inapposite as the night shift wages in question were found to be based on gender only because, when these higher wages were instituted, all of the employees on the night shift were men and all of the employees on the day shift were women. Here, West's stock owners included both men and women.

1984). See also Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164, 168 (8th Cir. 1995) ("Relief back to the beginning of the limitations period strikes a reasonable balance between permitting redress of an ongoing wrong and imposing liability for conduct long past.").

Here, plaintiffs' claimed violation is the alleged failure to offer women the opportunity to participate equally in West's stock program. Plaintiffs do not dispute that the last time West sold any stock to anyone – male or female – was August 30, 1994. Carter, 225 F.3d at 1261. Because none of the plaintiffs filed her lawsuit within three years from the last sale of stock, plaintiffs can point to no alleged EPA violation occurring within three years of any of them filing a claim. This is an absolute bar to recovery under the EPA.

B. Because The Eleventh Circuit Held That The Dividends And Merger Consideration Were Neutral Effects Of Stock Ownership, These Payments Cannot Constitute Continuing Violations Of The EPA.

Faced with this bar to recovery, plaintiffs presumably will renew their argument that the dividend payments and merger consideration paid within three years of plaintiffs' lawsuit constitute "discrete violations" for purposes of applying the continuing violation doctrine under the EPA. In light of the Eleventh Circuit's determination that it was reversible error to apply the continuing violation doctrine to these payments for purposes of Title VII, it also would be reversible error to apply that doctrine to the very same payments for purposes of the Equal Pay Act. Like Title VII, the EPA provides recovery only for distinct violations within the limitations period, rather than present consequences of past violations. Knight v. Columbus, Ga., 19 F.3d 579, 580-81 (11th Cir. 1994), reh'g en banc denied, 26 F.3d 1123, cert. denied, 513 U.S. 929 (1995). The continuing violation analysis is identical under Title VII and the EPA. Id. at n.1; Mitchell v. Jefferson County Bd. of Educ., 936 F.2d 539, 548 (11th Cir. 1991); EEOC v. Penton Indus. Publ'g Co., 851 F.2d 835,

838 (6th Cir. 1988); Nealon v. Stone, 958 F.2d 584, 590 n.4 (4th Cir. 1992). Indeed, plaintiffs themselves argued to this Court that "violations of Title VII and the Equal Pay Act are treated the same in terms of the continuing violation doctrine." (Doc. 7 at 13.)

In its September 7, 2000 Order, the Eleventh Circuit squarely addressed and rejected plaintiffs' argument that the payment of dividends and the merger consideration "resulted in an on-going practice of providing male employees a wage premium over similarly-situated female employees." Carter, 225 F.3d at 1264-1265. If the dividend payments and capital gains from the sale of West did not constitute discriminatory sex-based wage payments which violated Title VII, they are not "violations" for purposes of the continuing violation doctrine under the EPA.

Despite previously arguing that the continuing violation analysis under the EPA and Title VII is identical, plaintiffs might now try to convince this Court that the Eleventh Circuit's analysis in Carter does not apply to their EPA claim. Indeed, plaintiffs have signaled their intent to argue that the Eleventh Circuit found no continuing violation under Title VII only because it found no intentional act of discrimination within the statutory period. (Amended Case Management Report, Doc. 210) Plaintiffs have claimed that, because intent is not required under the EPA, the dividends and merger consideration can still constitute "violations" of the EPA even though they were not "violations" of Title VII. Id. This innovative argument, should plaintiffs make it, has no merit and should be rejected for what it is: a desperate attempt to escape the fatal blow struck by the Eleventh Circuit and another attempt to lead this Court into reversible error.

First, the Eleventh Circuit does not even mention "intent" in its decision. On the contrary, it consistently refers to, and relies on, the fact that the dividends and merger consideration were "neutral" and "non-discriminatory" – a separate and distinct finding from whether there was intent to discriminate. Nothing in the decision suggests that the Eleventh Circuit relied on, or even

considered, the element of intent when it ruled that the payments of dividends and merger consideration were not akin to the discriminatory "paychecks" at issue in Bazemore v. Friday, 478 U.S. 385 (1986), and its progeny.

Second, the Eleventh Circuit could not have relied on the intent element in finding no violation here for one very simple reason. Plaintiffs alleged both a disparate treatment and a disparate impact Title VII claim. See Plaintiffs' Second Amended Complaint (Doc. 123); Plaintiffs' Eleventh Circuit Brief at 26. Plaintiffs' disparate impact claim – just like their EPA claim – required no showing of intent to discriminate. See Griggs v. Duke Power Co., 401 U.S. 424 (1971); Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1526 n.11 (11th Cir. 1992). Because plaintiffs alleged a Title VII claim that did not require a showing of intentional discrimination, the Eleventh Circuit could not have based its rejection of the continuing violation doctrine on the presence or absence of intent.

Finally, the continuing violation doctrine has been held to apply identically under Title VII and the EPA. See e.g. EEOC v. Penton Indus. Publ'g Co., Inc. 851 F.2d 835 (6th Cir. 1988) (applying continuing violation theory equally to alleged violations under Title VII and the EPA). The Eleventh Circuit's rejection of the continuing violation theory is dispositive of plaintiffs' EPA claims.

C. Equitable Tolling And Equitable Estoppel Will Not Save Plaintiffs' EPA Claims.

Plaintiffs likely will again resort to arguing that the doctrines of equitable tolling or equitable estoppel should apply to save their time-barred EPA claims. Plaintiffs will argue that the Eleventh Circuit rejected equitable tolling only as to plaintiff Maxine Jones but that fact issues exist as to the

other plaintiffs. The application of these equitable doctrines would not only be erroneous, but would not save plaintiffs' claims in any event.

As a general principle, equitable modification of a statute of limitations applies "where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action," or where the plaintiff is excusably ignorant of filing requirements and, as a result, the plaintiff is prevented from filing her claim within the limitations period. English v. Pabst Brewing Co., 828 F.2d 1047, 1049-50 (4th Cir. 1987), cert. denied, 486 U.S. 1044 (1988) (emphasis added). To warrant tolling in the Eleventh Circuit, the conduct inducing the delay must be specifically intended to obtain such a delay and it must be so misleading as to cause the plaintiff's failure to file suit. Kazansas v. Walt Disney World, Co., 704 F.2d 1527, 1530-31 (11th Cir. 1983), cert. denied, 464 U.S. 982 (1983). The doctrines of equitable tolling and estoppel should be "sparingly applied" to a statutory limitations period. English, 828 F.2d at 1450.

Moreover, unlike a Title VII claim, which is tolled until the plaintiff has or should have knowledge of the basis underlying her claim, authority under the Fair Labor Standards Act, which encompasses the EPA, holds that knowledge of the alleged discrimination is not necessary to start the statute of limitations running. See e.g., Cuddy v. Wal-Mart Super Ctr., Inc., 993 F. Supp. 962, 965 (W.D. Va. 1998) ("there is no discovery rule applicable to the ADEA [also encompassed within the FLSA] statute of limitations, and thus **the time period may run before the charging party finds any proof of discrimination**"). As the Eleventh Circuit stated in Kazanzas, although lack of knowledge of one's rights "may be dispositive for a failure to comply with the 180 day provision, a relatively short time period, it is not important when assessing whether Kazanzas' claim is barred

because he did nothing to pursue his claim for more than two years." Kazansas, 704 F.2d 1527, 1530 (11th Cir. 1983) (emphasis added).

Nevertheless, even assuming for purposes of this motion that a plaintiff's lack of knowledge of discrimination can equitably toll the EPA statute of limitations, and even assuming that the alleged secrecy that allegedly surrounded West's stock program could warrant the application of equitable estoppel, there is still no issue of fact which would preclude summary judgment.[9] To avail themselves of equitable modification, plaintiffs must show that the defendant's bad conduct actually caused them to miss their statute of limitations. See Ellis v. General Motors Acceptance Corp., 160 F.3d 703, 706 (11th Cir. 1998) (equitable tolling can apply where defendant prevents plaintiffs from suing within the statutory period); English, 828 F.2d at 1049 (the misconduct attributed to the defendant must "prevent the plaintiff from filing his or her claim on time"); Ashafa v. City of Chicago, 146 F.3d 459, 463-64 (7th Cir. 1998).

Here, the last alleged violation – the last sale of stock – occurred on August 30, 1994. The two-year EPA statute of limitations thus expired on August 30, 1996 and the three-year limitations period on August 30, 1997. For purposes of the statute of limitations, none of the plaintiffs commenced their EPA lawsuits until July 29, 1998, almost four years after the last sale of stock. However, even taking their own allegations as true, plaintiffs cannot point to any conduct by West after June 20, 1996 – when Thomson purchased West's stock from the employee shareholders – which precluded plaintiffs from suing. In fact, plaintiffs have already conceded that the circumstances which warranted the application of equitable tolling or equitable estoppel ceased on

[9]Allegations of "secrecy" surrounding West's stock program are hardly the active deception or fraudulent concealment required for estoppel to apply. See Kazansas, 704 F.2d at 1531 (equitable estoppel requires "the crucial elements of fraud or misrepresentation").

the date that Thomson purchased West. See Doc. 87 at 14 ("Following the sale [on June 20, 1996], West's employees were free for the first time to openly discuss the discontinued stock program."). See also Carter, 225 F.3d at 1266 ("Plaintiffs do not point to any evidence of discrimination discovered after the sale that they needed to recognize that West was discriminating."). Significantly, on June 20, 1996, the EPA statute of limitations had yet to expire. Because any conduct that plaintiffs claim induced delay did not cause them to miss the statute of limitations, equitable modification does not apply.

Importantly, moreover, even if tolling or estoppel did apply during the period that plaintiffs claim to have lacked knowledge of their claim, plaintiffs are not entitled to have the EPA statute of limitations "reset" when the circumstances warranting tolling stopped. In other words, under either equitable tolling or equitable estoppel, if the factors causing delay cease within the statutory period, plaintiffs must still bring their claims within that period, or at least within a reasonable time thereafter. They are not entitled to a new, full limitations period at the time they gain the necessary knowledge to pursue their claims. Kazanzas, 704 F.2d at 1531.

As the Eleventh Circuit has held, **"[I]f there is still ample time to institute the action within the statutory period after the circumstances inducing delay have ceased to operate, a plaintiff who failed to do so cannot claim an estoppel."** Id. (emphasis added). See also Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318 (11th Cir. 1989) ("Once the circumstances inducing reliance are exposed, the plaintiff's obligation to timely file is reimposed."); Ashafa, 146 F.3d at 464 ("equitable tolling does not reset the statute of limitations; instead the doctrine requires 'that the plaintiff get the litigation under way promptly after the circumstance justifying the delay is not longer present'"); Unterreiner v. Volkswagen of Am., Inc., 8 F.3d 1206, 1213 (7th Cir. 1993) ("Equitable

tolling does not 'bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term.' . . . 'a plaintiff who invokes equitable tolling to suspend the statute of limitations must bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information.'").

Instead of acting diligently, the original named plaintiffs did not file their lawsuit until **16 months later and never filed a consent to join**. Every opt-in plaintiff also **waited more than two additional years** to file their claims. As a matter of law, no plaintiff filed within a reasonable time after the circumstances allegedly warranting delay had ceased. See Kazanzas, 704 F.2d at 1531 (refusing to apply tolling where plaintiff did nothing to pursue his claim for two years); Ernstes v. Warner, 860 F. Supp. 1338, 1342 (S.D. Ind. 1994) (refusing to apply tolling on grounds that thirteen-month delay in filing claim after discovering necessary facts was unreasonable as a matter of law). Because plaintiffs did not act reasonably in bringing their claims, the statute of limitations expired on each plaintiff's EPA claim.[10]

D. Even If This Court Applies Equitable Doctrines To "Reset" The Statute Of Limitations To Begin On June 20, 1996, Under The Eleventh Circuit Ruling, Plaintiffs Cannot Show A Willful Violation And Therefore Plaintiffs' Equal Pay Act Claims Must Be Dismissed As Time Barred.

Significantly, even if this Court holds either that the dividend payments and merger consideration were "continuing violations" under the EPA (and therefore the last EPA violation

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[10]Plaintiffs might argue, in an effort to retreat from the June 20, 1996 date, that tolling should apply **beyond** that date based on the unfairness of Local Rule 4.04(e), which restricted communications with class members after this lawsuit was commenced. First, as both this Court and the Eleventh Circuit have upheld the validity of Rule 4.04(e), see e.g. Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1002-03 (11th Cir. 1997), plaintiffs should not be allowed to invoke it as a reason for tolling to the detriment of defendants. Second, as Rule 4.04(e) did not apply to restrict communications until after October 16, 1997, sixteen months after plaintiffs concede everyone had the ability to obtain knowledge of their EPA claim, it cannot be used as an excuse for plaintiffs' delay. Finally, the fact that the attorneys for the two named plaintiffs were restricted after October 16, 1997 from contacting other women who might have claims against West and who were on notice of their claims since June 20, 1996, did not prevent these plaintiffs, many of whom are themselves lawyers, from retaining other counsel in order to pursue their rights.

occurred on June 20, 1996), or that it will apply equitable tolling or equitable estoppel to reset the accrual of the statute of limitations to June 20, 1996, plaintiffs' claims are still time-barred. It is undisputed that every single plaintiff seeking to join the EPA claim filed her consent to join form **more than two years** after June 20, 1996.

As indicated above, a collective action under the EPA is not "commenced" for statute of limitations purposes until the filing of a written consent to join. In the absence of timely written consents, collective actions will be barred by the statute of limitations. See footnote 13; Kulik v. Superior Pipe Specialties Co., 203 F. Supp. 938, 941 (E.D. Ill. 1962); Songu-Mbriwa v. Davis Memorial Goodwill Industries, 144 F.R.D. 1, 2 (D.D.C. 1992). Here, it is undisputed that none of the plaintiffs commenced an EPA lawsuit until July 29, 1998. To survive summary judgment, plaintiffs must therefore show a willful violation occurring within three years prior to July 29, 1998. See 29 U.S.C. § 255(a) (under the EPA, "a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued").

For purposes of the EPA, a willful violation requires conduct that is not merely negligent or even unreasonable. Rather, the plaintiff must show that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988). In adopting this standard for willfulness, the Supreme Court specifically rejected a showing that the employer merely knew the FLSA "was in the picture." Id. Instead, in the EPA context, "willful" is synonymous with "voluntary," "deliberate" and "intentional." Id.

Bare allegations of willfulness will not enable a plaintiff to survive summary judgment. Lopez v. Corporacion Azucarera de Puerto Rico, 938 F.2d 1510 (1st Cir. 1991) (granting summary judgment on issue of willfulness); Salmons v. Dollar Gen. Corp., 989 F. Supp. 730 (D. Md. 1996)

(granting summary judgment on issue of willfulness); Tarango, 949 F. Supp. 1285 (W.D. Tex. 1996) (Plaintiffs' allegation of willfulness will not defeat summary judgment).

Here, the Eleventh Circuit held that the dividend and merger consideration payments were "neutral and nondiscriminatory consequences" of the previous sale of stock. Carter, 225 F.3d at 1265. Because the court of appeals specifically found that these payments "operated in a neutral manner" and were neutral effects based on the amount of stock each shareholder owned, see id., these payments cannot be, as a matter of law, willful, deliberate or intentional payments which violated the EPA. See McLaughlin, 486 U.S. at 132-33. Moreover, the Eleventh Circuit's holding that these payments were made based on stock ownership "regardless of gender" also negates a finding of willfulness as a matter of law. See Tarango, 949 F. Supp. 1285 (W.D. Tex. 1996) (holding on summary judgment that employer's reasonable belief that pay differential was warranted by different responsibilities "alone takes the Defendant's actions outside the realm of willfulness").

Accordingly, even if this Court holds that the dividends and merger consideration were discrete, continuing violations of the EPA, because these violations cannot be characterized as "willful" giving rise to a three-year statute of limitations, summary judgment would still be appropriate on plaintiffs' EPA claims.

For all of the reasons outlined above, plaintiffs' Title VII and EPA claims should be dismissed with prejudice.

Dated: March 14, 2001

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