HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

MARIA CHAVEZ, KAREN HUNT, ANDREA WEBER, EVA CORTEZ, GREG JOHNSON and BRADY PROUTY,

Plaintiff-Intervenors,

v.

ELDORADO STONE, LLC, ELDORADO STONE OPERATIONS LLC, TIMOTHY O'DELL and ELMER RODRIGUEZ,

Defendants.

CIVIL ACTION NO. CV03-2768P

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FOR DEFENDANTS ELDORADO STONE LLC, AND ELDORADO STONE OPERATIONS LLC, ON THE ISSUE OF THE APPLICABLE DAMAGES CAP

NOTE ON MOTION CALENDAR: OCTOBER 8, 2004

I. INTRODUCTION

Courts frequently grant summary judgment on the single-employer issue in discrimination cases. There is a strong presumption in favor of corporate separateness, which will only be disregarded when there is integration and control beyond the normal

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parent/subsidiary relationship. Plaintiffs in this case hope to avoid summary judgment by alleging some interaction between Parent and its subsidiaries that **is unrelated to the material events.** There will always be some interaction between a Parent and its subsidiaries, but the Plaintiffs' broad allegations in this regard are not sufficient to avoid summary judgment. Plaintiffs' Opposition to the Present Motion ("Opposition") has not raised any material dispute of fact concerning the determinative issue: control over the day-to-day labor activities at Eldorado Operations, including the alleged wrongful acts. Plaintiffs do not even allege control by the Sister-Companies over the alleged discriminatory activities of Eldorado Operations. It is undisputed that Eldorado Operations made all of the relevant decisions on its own in Carnation, Washington. No one at Parent or the Sister-Companies had anything to do with the alleged wrongful acts.[1] Therefore summary judgment for Defendants is appropriate.

II. ARGUMENT

Plaintiffs have failed to meet their burden to defeat Defendants' Motion for Summary Judgment. Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Factual disputes about immaterial matters are irrelevant to a summary judgment determination. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial ... since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 – 23 (1986).

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[1] This Reply Memorandum will use the same defined terms as the Motion for Summary Judgment ("Present Motion") unless otherwise indicated.

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It is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative," *Anderson*, at 249 – 50, the nonmovant must come forward with specific facts showing a genuine issue for trial. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. *Id.* at 252; *see also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (nonmoving party may not rely on the pleadings but must present significant probative evidence supporting the claim); *Anderson*, 477 U.S. at 248 (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

Federal Rule of Civil Procedure 56(d) provides that if a motion for summary judgment will not dispose of the whole case, the Court

> shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It **shall thereupon make an order specifying the facts that appear without substantial controversy**, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just . . .

Fed. R. Civ. Pro. 56(d)(emphasis added).

Thus, the Court may grant summary adjudication as to specific issues if it will narrow the issues for trial. *First Nat. Ins. Co. v. F.D.I.C.*, 977 F. Supp. 1051, 1055 (S.D. Cal. 1997). The Court may issue summary judgment on all claims, only some of the claims, or even parts of claims, and may grant summary judgment as to specific issues to narrow the issues for trial. *Id.*; *see also In re Seaspan Intern, Ltd.*, 172 F. Supp. 2d 1314, 1320 (W.D. Wa. 2001). Summary judgment is appropriate where the responding party has failed to produce sufficient evidence to allow a reasonable trier of fact to find in its favor on an element of the respondent's claim or defense upon which it will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322 – 23;

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Calhoun v. Liberty Northwest Ins. Corp., 789 F. Supp. 1540, 1545 (D. Wa. 1992).

As explained below and in prior briefings in this case, Plaintiffs have failed to establish any genuine issue for trial as to whether Parent, the Sister-Companies, and Operations are a "single employer" or whether Parent and Operations combined had less than 101 employees during the Relevant Time Period.

A. Plaintiffs Do Not Contest and Therefore Concede the Elements Necessary to Grant Defendants' Motion for Summary Judgment.

Plaintiffs do not contest and therefore concede the following undisputed facts and points:

- The relevant time period ("Relevant Time Period") in this case is from at least January 2002 but no later than September 6, 2002 (Present Motion § III.A);
- The time for analyzing single employer status is the time that the alleged wrongful conduct occurred (Present Motion § IV.B.1);
- The same presumption against single employer status that applies to a parent and subsidiary also applies to the Sister-Companies, each of which must be analyzed separately under the four-factor test (Summary Judgment § IV.B.3);
- Apart from the conclusory assertion that Parent and all of its subsidiaries combined had several hundred employees as one "single employer," Plaintiffs do not dispute the facts presented in the Present Motion concerning the number of employees at Parent and Eldorado Operations. Specifically, Parent and Eldorado Operations combined had less than 101 employees during the Relevant Time Period (Present Motion § III.B).

B. The Single Employer And Number Of Employees Issues Are Appropriate For Summary Judgment Because Summary Judgment Is Frequently Granted To Dismiss Or Limit Punitive Damages Claims.

Plaintiffs mistakenly characterize Defendants' Summary Judgment Motion as an improper request for application of the Title VII damages cap prior to trial or any award. Numerous cases hold that the summary judgment stage **is** an appropriate time for the Court to make a determination on the single employer issue, and to make a determination as to the number of employees Operations has. In fact, courts routinely grant summary judgment for

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parent corporations, holding that the single employer doctrine does not apply. *See Swallows v. Barnes & Noble Bookstores, Inc.*, 128 F.3d 990, 995 – 96 (6th Cir. 1997) (affirming dismissal where defendants could not be treated as single employer or integrated enterprise); *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 781 (5th Cir. 1997) (affirming summary judgment where plaintiffs failed to produce evidence that parent and subsidiaries were single employer); *Herman v. United Bhd. of Carpenters and Joiners of Am.*, 60 F.3d 1375, 1384 – 85 (9th Cir. 1995) (affirming summary judgment dismissing ADEA claims where local and international unions were not single employer); *Rogers v. Sugar Tree Prods., Inc.*, 7 F.3d 577, 583 – 84 (7th Cir. 1993) (upholding dismissal for lack of subject matter jurisdiction where defendant did not have sufficient employees to subject it to the ADEA); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 - 63 (10th Cir. 1993) (affirming summary judgment where plaintiffs failed to establish genuine issue of material fact to dispute presumption that defendant was not plaintiffs' employer); *Torres v. Liberto Mfg.*, No. 3-01-CV-1888-1H, 2002 WL 2014426, at *7 (N.D. Tex. Aug. 30, 1992) (defendant entitled to summary judgment where plaintiff has failed to create any genuine issue of material fact as to whether defendant, by virtue of single employer doctrine, has sufficient number of employees to constitute a statutory employer pursuant to Title VII and the ADEA); *Glover v. Heart of America Mgmt. Co.*, 38 F. Supp. 2d 881, 890 – 92 (D. Kan. 1999) (defendant is dismissed at summary judgment where plaintiff is unable to overcome presumption of limited liability); *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138, 1145 – 46 (D. Nev. 1999) (dismissing at summary judgment plaintiff's Title VII claims against parent where single employer test not met); *Hunter v. Ark Rests. Corp.*, 3 F. Supp. 2d 9, 18 - 19 (D.C. Cir. 1998) (hostile work environment claims against defendant dismissed at summary judgment where plaintiff fails to establish single employer doctrine applicable); *Harris v. Palmetto Tile, Inc.*, 835

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F. Supp. 263, 269 (D.S.C. 1993) (court dismissed claims for lack of subject matter jurisdiction where defendant employed fewer than 15 employees and was thus not subject to Title VII); *Kelber v. Forest Elec. Corp.*, 799 F. Supp. 326, 331 (S.D.N.Y. 1992) (summary judgment granted for defendant parent company where parent and subsidiary did not constitute integrated unit for purposes of Title VII).

It is therefore appropriate for the Court to make a summary judgment ruling on both the single employer and the "number of employees" issues. Defendants understand that the Title VII damages cap could only be applied after trial, and then only in the unlikely event of a verdict for Plaintiffs in excess of the cap. That is no reason, however, not to make a determination now on the factors that determine the applicable cap. Those factors are ripe for summary judgment.

C. As A Matter Of Law, The Sister-Companies Had No Control Or Knowledge Concerning The Alleged Wrongful Events During The Relevant Time Period And Therefore They Cannot Be Considered A "Single Employer" With Eldorado Operations.

Plaintiffs' Opposition is virtually identical to their opposition to the First Motion. Their argument is that, since there is some evidence of interaction between the Parent and its subsidiaries, summary judgment is inappropriate. Plaintiffs essentially argue that when there is a parent with subsidiaries, all the related companies must be presumed a single employer. The law is exactly the opposite. Only in extraordinary circumstances, where the parent participated in the alleged unlawful conduct, will a parent and subsidiary be considered a single employer. ("The doctrine of limited liability creates a strong presumption that a parent company is not the employer of its subsidiary's employees, and the **courts have found otherwise only in extraordinary circumstances.**" *Frank,* 3 F.3d at 1362 (emphasis added); *Trevino v. Celanese Corp.,* 701 F.2d 397, 404 (5th Cir. 1983) ("[C]ourts have focused almost exclusively on one question: which entity made the final decisions regarding employment matters relating to the

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person claiming discrimination?").

Plaintiffs' Opposition cites a series of cases where the Parent companies had direct control of the day-to-day human resources function of the subsidiaries, including involvement in the alleged wrongful activity. *See Thornton v. Mercantile Stores, Inc.*, 13 F. Supp 1282, 1291 - 92 (M.D. Ala. 1998) (the parent company's human resources department set policy and practice for subsidiary, provided legal and risk management assistance, responded to EEOC charges against the subsidiary, and provided "extensive training" for the subsidiary's employees); *Blumenthal Theatres Circuit*, 240 NLRB 206, 204 (1979) (the parent company's executive admitted he "handle[d] all the labor relations" for subsidiary, including negotiating the collective bargaining agreement at issue in the case); *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930 (11th Cir. 1987) (parent executive directly controlled the personnel and payroll decisions for both companies and plaintiff worked for both companies); *Smith v. K & F Indus., Inc.*, 190 F. Supp 643 (S.D.N.Y. 2002) (parent interviewed plaintiff and offered her the job, set the subsidiary's day-to-day personnel policies, drafted plaintiff's severance agreement and communicated with her regarding whether she would sign it). These cases do not support Plaintiffs' Opposition because the facts of the present case are exactly the opposite from the cases Plaintiffs cite. Those cases actually undermine Plaintiffs' Opposition because they show the level of day-to-day control by other entities necessary to avoid summary judgment.

Moreover, Plaintiffs wishfully ignore and **do not refute** the fundamental point of the Present Motion -- that **each of the Sister-Companies must be analyzed separately under the four-factor single employer test**. *See* § IV.B.3 of the Present Motion. The determinative issue under the four-factor test is actual control of day-to-day human resources functions at Eldorado Operations during the time period when the alleged wrongful acts occurred, including control over the alleged wrongful decisions. *See* § 4 of the First Motion and § IV.B of the Present Motion. In this case the undisputed Relevant Time Period is the time period before September 6,

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2002. *See* §§ III.A and IV.B.1 of the Present Motion.

Plaintiffs do not even attempt to argue that anyone at the Sister-Companies had anything to do with the day-to-day activities or human resources functions at Eldorado Operations. The undisputed facts are that all the material events took place in Carnation, Washington at Eldorado Operations, and all of the alleged wrongful actions were undertaken by Eldorado Operations' personnel. *See* § II of the First Motion and § III of the Present Motion. Parent's Human Resources Director Elizabeth Roche did not even learn of the alleged wrongful acts until several weeks after they occurred. *Id.* These are undisputed facts upon which summary judgment for the Defendants is appropriate. *See* § IV.B of the Present Motion.

Plaintiffs' Opposition raised only immaterial facts, many of which occurred after the Relevant Time Period. For example, Plaintiffs state that Ms. Roche was hired in May 2002, and visited various facilities for purposes of developing a policy manual for Parent's employees. Plaintiffs additionally state that Ms. Roche conducted training for the various subsidiaries in November/December 2002. These allegations are not material to Defendants' Motion. Ms. Roche simply was not involved in any of the alleged unlawful acts. Moreover, in considering the Present Motion, it is critical to note that **Ms. Roche was an employee of Parent**, not any of the Sister-Companies.

Plaintiffs allege no facts to support an inference that the Sister-Companies controlled the day-to-day human resources function at Eldorado Operations, including the alleged wrongful acts (i.e., the alleged harassment of Plaintiffs Maria Chavez and Karen Hunt, and the alleged retaliatory termination of the other four Plaintiffs in September 2002). Plaintiffs offer no allegations to rebut the determinative facts that all the material decisions were made by Eldorado Operations personnel without knowledge or input from anyone at the Sister-Companies, or that the Sister-Companies did not participate in the management of the day-to-day activities of Eldorado Operations, including the human resources function. *See* § 3 of the Present Motion.

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Therefore, Plaintiffs have not raised a material fact sufficient to defeat summary judgment.

D. As A Matter Of Law, Plaintiffs Have Not Shown Evidence Of Extraordinary Interrelation Of Operations Sufficient To Defeat The Presumption Of Corporate Separateness.

As explained in the First Motion and the Present Motion, the overriding factor in determining whether separate entities are a "single employer" or a "joint enterprise" is actual control over labor relations, including the alleged unlawful acts. Regarding the less important factors in the four-factor test, Plaintiffs have done no more than show an ordinary parent/subsidiary relationship.[2] On the issue of interrelation of operations, Plaintiffs can only rely on testimony from Parent's CFO that pre-existing companies were brought together "under an umbrella" owned by Parent. Plaintiffs' Opposition at pp. 10 - 11. Plaintiffs also point out that Parent issued a consolidated financial statement including its own performance and its subsidiaries. Plaintiffs' Opposition at p. 12. Plaintiffs omit the fact that a separate financial statement was prepared for Eldorado Operations in 2002. *See* attachment to Hendershott's Decl.

Plaintiffs, however, present no facts or legal authority to show that a parent acquiring other subsidiaries in its industry is extraordinary. Obviously, parent companies always own their subsidiaries. Moreover, there is no evidence that it is extraordinary for the investment community to analyze a parent and its subsidiaries together when evaluating potential investments. The Citigroup prospectus only states the obvious - - if you count all the employees

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[2] Plaintiffs would like the Court to believe that an investment prospectus prepared by Citigroup directed at potential investors is a key document in the case because it states that "Eldorado employed 985 individuals." Obviously, this number includes Parent's employees and the employees of its subsidiaries. It is undisputed that Parent and its subsidiaries combined had several hundred employees, but that is not the issue on Summary Judgment. Moreover, Plaintiffs neglect to cite the numerous disclaimers contained in the Prospectus, which was prepared by a third-party in anticipation of a sale of Parent and its subsidiaries (e.g. "Citigroup has not conducted any investigation" with respect to the matters contained in the Prospectus and "This Memorandum does not purport to contain all information that may be required to evaluate" Parent and its affiliates). This prospectus is simply irrelevant to the issue of who controlled the day-to-day labor activities at Eldorado Operations.

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of Parent and its subsidiaries, there will be several hundred employees. However, there is no suggestion that the affiliated companies controlled Eldorado Operations or were involved in the alleged unlawful acts.

Plaintiffs must show an *extraordinary* degree of interrelation of operations in order to defeat summary judgment. *See* §§ III and IV of the First Motion. Plaintiffs have simply alleged that Parent owned several subsidiaries, that there were some shared officers and directors, and there was some interaction between the companies, mostly post-dating the Relevant Time Period. This is nothing extraordinary, and does not pertain to the material events in the case, as required to avoid summary judgment.[3] Summary judgment should be granted on the issues brought by Defendants' Present Motion in accordance with the precedent of other similar cases. *See* § II., above.

The undisputed material facts are that, during the Relevant Time Period, Eldorado Operations controlled its own day-to-day operations, including human resources, and made the allegedly wrongful decisions without the knowledge of any one at the Parent or Sister-Companies. This fact constitutes significant grounds for summary judgment on behalf of Defendants in accordance with the Proposed Order submitted with the Present Motion.

III. CONCLUSION

As a matter of law, the Sister-Companies were not the employer of Plaintiffs, and their employees should not be included in the count for purposes of Title VII damages. Eldorado Operations had less than 101 employees during the Relevant Time Period, even if Parent's employees are included.[4] Therefore, Defendants respectfully request a summary judgment ruling

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[3] *See* § II.A of the Reply Memorandum on the First Motion for cases explaining that shared officers/directors are a common feature of parent/subsidiary relationships and do not show the extraordinary interrelationship necessary to avoid summary judgment on behalf of an entity that did not directly employ the plaintiff(s).

[4] Defendants' vigorous assertion that Parent is not a single employer with Eldorado Operations is the subject of the pending First Motion.

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in accordance with the Proposed Order.

DATED this 7th day of October, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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