UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ADRIANNE CRONAS, on behalf of herself and all similarly situated persons,

Plaintiff,

Civil Action No.: 06-CV-15295 (GEL)

vs.

ECF Filing

WILLIS GROUP HOLDINGS, LTD., et al.,

Defendants.

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SHELLEY HNOT and HEIDI SCHELLER, on behalf of themselves and all similarly situated persons,

Plaintiffs,

vs.

Civil Action No.: 01-CV-06558 (GEL)[1]

WILLIS GROUP HOLDINGS, LTD., et al.,

Defendants.

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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR COMPEL ARBITRATION AND IN SUPPORT OF CROSS-MOTION FOR RELIEF FROM ORDER DENYING INTERVENTION IN *HNOT*

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[1] This caption is displayed because Ms. Cronas seeks relief from the Court's order denying intervention in Hnot, if her action is dismissed.

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PRELIMINARY STATEMENT

Ms. Cronas was employed by defendants from 1996 until her wrongful termination in 2004 – the culmination of defendants' pattern and practice of discrimination against her and others similarly situated in terms and conditions of employment, promotional opportunities, and compensation. In order to fully prosecute her claims, including her stock option under-compensation claims, as well as her individual and class claims for the years following 2001, Ms. Cronas sought to intervene as a named plaintiff and class representative in Hnot v. Willis Group Holdings Ltd., et al., 01-CV-06558 (GEL) (hereinafter "Hnot"), a class action which raises similar claims of discrimination against defendants, but which covers only those class claims certified under Fed. R. Civ. P. 23(b)(2) and spanning the years 1998-2001.

On November 30, 2006, this Court denied Ms. Cronas's motion to intervene, concluding that she would not suffer substantial prejudice as a result because "she remains free to bring a separate action against defendants." Hnot, Opinion & Order (Nov. 30, 2006) at 9. Accordingly, on December 16, 2006, Ms. Cronas filed the instant action alleging a Rule 23(b)(2) pattern and practice of gender discrimination and retaliation that generally mirrors the claims being litigated in the Hnot case, but for the period from 2002 up to the time of trial. She also seeks certification of class claims under Rule 23(b)(3) for the entire period 1998 through the present (certification which has so far not been granted in Hnot).

Defendants now move to dismiss Ms. Cronas's complaint, in large part on the very basis that it is a separate action, one which allegedly falls outside the purview of the single-filing rule. For the reasons discussed below, Cronas satisfies the administrative prerequisites of Title VII through the single-filing rule since (1) the EEOC charge filed by the Hnot plaintiffs in 1999

effectively put the defendants on notice of all of Ms. Cronas's individual and class claims on behalf of the large group of women which includes Cronas, and who Cronas alleges has been subjected to the same or similar or reasonably related and widespread ongoing discriminatory practices over many years, and (2) this Title VII action, while technically separate in form, is really an elaboration or extension of the Hnot litigation, which Ms. Cronas first tried to join as an intervenor, but was denied leave by this Court on the ground that she could proceed instead to file this separate action, and which, having been denied leave to intervene, is now the only way for Ms. Cronas to fully vindicate her rights. If arguendo Ms. Cronas were unable to take advantage of the single-filing rule, this Court can and should exercise its discretion to waive the requirement of an individual right-to-sue letter in the circumstances of this case. Moreover, because the arbitration clause in Ms. Cronas's employment contract does not extend to disputes of this nature, her state and federal claims can and should be adjudicated in court rather than in arbitration.

If, however, dismissal of this separate action were mandated, Ms. Cronas would be unable to vindicate her rights in any forum other than the Hnot case, and fairness and justice would require this Court to revisit the issue of intervention. Dismissal of Ms. Cronas's separate action, leaving her with no recourse for complete relief, would be prejudice far greater than that calculated by this Court in its decision denying intervention, and sufficient to tilt the balance in favor of intervention. As set forth below, Rule 60(b) permits this Court to relieve plaintiff from its prior order denying intervention where appropriate to accomplish justice, and that would be the case here.

ARGUMENT

I. Cronas Satisfies the Administrative Prerequisites of Title VII Via the Single-Filing Rule

The Second Circuit has repeatedly adopted the single-filing rule under the principle that, where two plaintiffs allege similar grievances against an employer, "'the purposes of the exhaustion requirement are adequately served if one plaintiff has filed an EEOC complaint.'" Snell v. Suffolk County, 782 F.2d 1094, 1101 (2d Cir. 1986) (quoting De Medina v. Reinhardt, 686 F.2d 997, 1013 (D.C. Cir. 1982)); see also Tolliver v. Xerox Corp., 918 F.2d 1052, 1057 (2d Cir. 1990). Those purposes are to provide prompt notice to the employer and to the agency so that conciliation may be achieved where possible. See Snell, 782 F.2d at 1101; Tolliver, 918 F.2d at 1057.

Those purposes were fulfilled when the Hnot plaintiffs filed their EEOC charge in August 1999, clearly placing defendants and the agency on notice of Ms. Cronas's closely related claims in this action. As long as a plaintiff's claims are "reasonably related" to the allegations set forth in another's EEOC charge, the single-filing rule applies. See, e.g., Malarkey v. Texaco, Inc., 983 F.2d 1204, 1208 (2d Cir. 1993); Kirkland v. Buffalo Board of Education, 622 F.2d 1066, 1068 (2d Cir. 1980); see also Connelly v. Manufacturers Hanover Trust, 1990 WL 129186, *3 (S.D.N.Y. Aug. 30, 1990) (citing Snell, 782 F.2d at 1097) ("It is not necessary that the incidents complained of be identical, so long as they are generically similar"); Spector v. Board of Trustees of Community-Technical Colleges, 463 F.Supp.2d 234, 247 (D. Conn. 2006) (applying the single-filing rule even though "the actual acts of discrimination and retaliation that the plaintiffs experienced are factually quite distinct"). Moreover, an EEOC charge placing the agency and

employer on notice of patterns of wide-spread discriminatory conduct, like the one here, satisfies the single-filing rule for similarly situated individuals who have not filed their own charges. See, e.g., Tolliver, 918 F.2d at 1058 (applying single-filing rule where EEOC charges give "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim.").[2]

As elaborated in Part I(A) infra, in this action, Ms. Cronas raises claims that are obviously reasonably related to, if not identical in most ways to, the Hnot plaintiffs' allegations in their EEOC charge. Accordingly, pursuant to the single-filing rule, Ms. Cronas's Title VII claims are timely.[3]

A. The Single-Filing Rule is Applicable to the Time Frame of Cronas's Claims

Defendants argue that the single-filing rule is inapplicable here because: (1) Ms. Cronas's claims for 1998-2001 are so similar to those asserted in the Hnot class action as to be duplicative and therefore dismissable; and (2) the post-2001 claims are not within the same time period as the EEOC charge filed in Hnot. Those arguments are meritless. First, while Ms. Cronas's claims for the 1998-2001 period are closely related to the allegations of widespread gender-based discrimination in the Hnot plaintiffs' EEOC charge, as required by the single-filing rule, they are not duplicative of the claims asserted in the Hnot class action because, inter alia, Ms. Cronas (1) raises a specific claim of under-compensation via stock options which has gone largely

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[2] Even differences in allegations or circumstances between parties which may justify denial of Rule 23(b)(3) class certification do not necessarily defeat application of the single-filing rule. See Tolliver v. Xerox, 918 F.2d 1052, 1059 (2d Cir. 1990).

[3] Defendants' contention that these legal principles do not apply in the context of a separate Title VII action is addressed in Part I(B) infra.

unexplored in Hnot, and (2) also seeks Rule 23(b)(3) class certification, which has not been granted in Hnot. Second, Ms. Cronas's post-2001 claims, like her claims and the Hnot plaintiffs' claims for the earlier period, arise from the open-ended time period suggested by the EEOC charge, which alleges widespread, ongoing discriminatory practices. Despite defendants' self-serving assertions to the contrary, the controlling case law does not limit the applicability of the single-filing rule to claims pertaining only to the dates literally depicted in the EEOC charge.

1. Cronas's 1998-2001 Claims are not Duplicative

Ms. Cronas alleges defendants' discrimination against females in the distribution of stock options – a specific form of under-compensation that has gone unexplored by the Hnot class – from 1998 through the end of her employment. See Cronas Compl. ¶¶ 19(I), 35-36, 42. Because, upon information and belief, no data have been produced in Hnot on stock options awards during the class period, as a class member, Ms. Cronas would face huge obstacles in proving economic loss from stock options that should have been granted to her in 1998-2001. Accordingly, this claim of under-compensation is not duplicative and, as a preliminary estimate, could amount to more than $700,000 in economic loss to Ms. Cronas during the class period. In addition, while the Hnot class is certified pursuant to Rule 23(b)(2), Ms. Cronas also seeks 23(b)(3) certification for all claims, including those stemming from the Hnot class period.

The case law cited by defendants for the proposition that plaintiffs may not allege duplicative claims against the same defendant in different actions is therefore inapposite. In Ardito v. Coombe, 107 F.3d 2, 1997 WL 80126, * 1 (2d Cir. Feb. 26, 1997), the Second Circuit dismissed as moot the appeal of a class action dismissal by the district court because, unlike Ms. Cronas, appellant would receive through an existing class action "all the relief to which he might

be entitled in this one."

Similarly, in Becker v. Schenley Industries, Inc., 557 F.2d 346, 348 (2d Cir. 1997), the court specifically held that the district court did not abuse its discretion in denying class action designation because "[p]laintiffs had another, more readily available means by which to have their claims determined through intervention in the Cole case." Whereas Ms. Cronas sought intervention in Hnot but was denied, the plaintiffs in Becker declined to intervene in a class action raising an identical claim despite two invitations from the district court to do so.

Finally, the court in Curtis v. Citibank, N.A., 226 F.3d 133, 136 (2d Cir. 2000), actually warned courts against making the type of error defendants invite upon this Court: "A court must be careful, when dismissing a second suit between the same parties as duplicative, not to be swayed by a rough resemblance between the two suits without assuring itself that beyond the resemblance already noted, the claims asserted in both suits are also the same." Id. The Curtis court ultimately dismissed as duplicative those allegations in the second action that plaintiffs could have raised in the first action given their named plaintiff status there. See id. at 139-40. In stark contrast, Ms. Cronas raises claims here that she did not have the opportunity to introduce in Hnot because she was denied leave to intervene as an individual plaintiff and class representative.

2. Cronas's Post-2001 Claims Arise Directly from the *Hnot* Plaintiffs' EEOC Charge

Defendants' contention that these claims do not arise out of discriminatory treatment in the same time frame as the timely-filed EEOC charge in Hnot is baseless. Implicit in their conclusion is the illogical assumption that the Hnot class period meets this standard, while Ms.

Cronas's post-2001 claims do not. There is no basis for defendants' arbitrary assumption that the 1999 EEOC charge, which specifically cites discriminatory incidents in 1996, 1997, 1998, and 1999, covers the Hnot class period through 2001, but not Ms. Cronas's closely related post-2001 claims. In fact, the EEOC charge filed by the Hnot plaintiffs described widespread and pervasive discriminatory practices affecting large classes of employees over time – with no fixed endpoint at 2001.

In particular, the Hnot plaintiffs alleged discriminatory "practices and activities [which] are widespread and pervasive at all levels of [Willis Corroon] and have resulted in significant economic and other damage to what we believe to be large classes of affected employees." See EEOC Charge, annexed hereto as Ex. 1 at 1.[4] The "widespread and pervasive" allegations made in the EEOC charge included, inter alia: (1) denial of promotions, id. at 6-7; (2) discrimination in compensation, including in the award of bonuses, id. at 7-9; (3) denial of adequate support commensurate with the female employees' positions, id. at 3-4; and (4) wrongful discharge based on both gender-discriminatory and retaliatory motives, id. at 14-15. See also EEOC Letter of Determination, annexed hereto as Ex. 2. Accordingly, the Hnot plaintiffs clearly charged that their grievances affected a group of individuals defined broadly enough to include Ms. Cronas, who by this action claims largely the same continuous gender-discriminatory patterns of under-compensation, denial of promotional opportunity, and wrongful discharge at the hands of defendants, for the entire period 1998 to the present. Clearly, then, the EEOC charge and the Hnot litigation have placed defendants on notice of Ms. Cronas's allegations of discriminatory

[4] The final section of the EEOC charge is entitled, in all capital letters, "A LARGE CLASS OF WOMEN EMPLOYEES HAS BEEN SUBJECTED TO DISCRIMINATORY AND/OR ABUSIVE TREATMENT." Ex. 1 at 15.

treatment, as well as their systemic nature. See, e.g., Connelly (finding claims reasonably related where they arise from same general alleged practice of gender discrimination in denial of promotions, unequal compensation, and discriminatory termination); EEOC v. Wilson Metal Casket Co., 24 F.3d 836 (6th Cir. 1994) (single-filing rule applies to unfiled claims of sexual harassment when EEOC charge and letter of determination regarding similar pattern of discrimination put employer on notice regarding the allegations).

Allegations of such continuous, ingrained practices are not conducive to a narrowly delimited time frame. Accordingly, on the basis of the EEOC charge, the Hnot plaintiffs moved on June 14, 2004, to certify a class "consisting of 'all current and former female employees who have been employed by the defendants in positions eligible for the award of officer titles such as Assistant Vice President, Vice President and Senior Vice President at any time from October 30, 1998 through the present.'" Hnot, Opinion & Order (August 17, 2006) at 4. This Court denied extending the temporal scope of the class period beyond 2001, not because the EEOC charge failed to cover the additional years, but because plaintiffs' counsel had allowed the deadline for post-2001 discovery to expire. See id. Accordingly, defendants have no reason to conclude that Ms. Cronas's post-2001 claims are not covered by the EEOC charge.

Applicable case law holds that courts may consider Title VII claims based on conduct occurring subsequent to the filing date of the EEOC charges, as long as the subsequent conduct and charges are reasonably related. That case law supports the maintenance of Ms. Cronas's claims beyond 2001 on the basis of the Hnot plaintiffs' EEOC charge, just as it does this Court's certification of a class period through 2001. For instance, in Almendral v. New York State Office of Mental Health, 743 F.2d 963, 967 (2d Cir. 1984), the Second Circuit held that the

district court erred in refusing to consider the discrimination that occurred after Almendral filed her EEOC complaint, reasoning that "a court may consider, in addition to the original EEOC charges, those claims 'reasonably related' to the EEOC charges" or that could "'reasonably [have been] expected to grow out of the [EEOC] charge of discrimination.'" (citation omitted). Like Ms. Cronas's claims, Almendral's subsequent allegations "'all address[ed] the same alleged course of discrimination . . . as contained in the original complaint.'" Id. (citation omitted).

In Butts v. City of New York Dept. of Housing Preservation and Dev., the Second Circuit specified that this principle applies even to those reasonably related incidents occurring after completion of the EEOC investigation:

> The third type of reasonably related claim is where a plaintiff alleges further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge. . . . Such an incident might not fall within the scope of the EEOC investigation arising from the charge, since it might occur after the investigation was completed, as was the case in Almendral. . . . However, the values associated with exhaustion are not entirely lost because the EEOC would have had the opportunity to investigate, if not the particular discriminatory incident, the method of discrimination manifested in prior charged incidents.

990 F.2d 1397, 1402-03 (2d Cir.1993) (superseded by statute on other grounds as recognized in Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684 (2d Cir. 1998) (citations omitted).

It is unclear, then, what defendants mean when they say that Ms. Cronas's claims fail under the single-filing rule because they are not in the same time frame as the timely-filed EEOC charge. Defendants seem to compare literally the dates specified in the EEOC charge to the dates of the incidents underlying Ms. Cronas's allegations (of course, without applying the same

standard to the already-defined Hnot class period).[5] Even in Snell, which defendants cite for their confusing proposition, the court said nothing about the particular time frame of the EEOC charges, but allowed those plaintiffs who had not filed their own charges to use the single-filing rule because "[a]ll these incidents [in the lawsuit] were of a similar nature and occurred at the Suffolk County Correction Facility within a three-year period."[6] Snell, 782 F.2d at 1101; see also Wilson Metal, 24 F.3d 836 (sexual harassment victim for three months in 1987 may take advantage of EEOC filing by similar sexual harassment victim discharged in 1984).

Had the Snell court applied defendants' standard and looked to the literal time frame of the EEOC charges, it would have denied plaintiffs' use of the single-filing rule. The underlying EEOC complaints in Snell were filed by four plaintiffs in May 1981; these complaints could not literally have covered the entire three-year period of plaintiffs' allegations in the lawsuit because an EEOC filing can reach only events that occurred in the past 300 days and obviously cannot capture specific events beyond the filing date. See id. at 1097.

In accordance with Snell, Ms. Cronas's claims and the Hnot allegations together cover the same time period (1998 to the present), which stems appropriately from the expansive allegations

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[5] Defendants make the puzzling statement that "Cronas cannot meet that condition [same time frame as EEOC charge] because she seeks to bootstrap her individual and class claims for the period beginning 2002 (after the Hnot class period ends) onto the EEOC charges filed in 1999 by class representatives in the Hnot Class Action." Defs.' Mot. at 7. They seem to place significance on the filing date of the EEOC charge, without then explaining why the charge covers the Hnot class claims through 2001 but not Ms. Cronas's claims after 2001.

[6] Similarly, rather than comparing the time frame of the unexhausted claims (i.e., claims of the plaintiff who had not filed her own EEOC charge) to that of the EEOC charge filed by the other plaintiff, the Connelly court considered whether "the grievances of the plaintiffs arise out of a similar time frame." 1990 WL 129186 at *3. It found that they did so, in part because the plaintiffs' tenure at defendant-company overlapped by a number of years. See id. Ms. Cronas's employment at Willis also overlapped with that of the named EEOC complainants.

of defendants' entrenched discriminatory policies in the Hnot EEOC charge. The Hnot plaintiffs attempted to cover this very time frame themselves, but were precluded by this Court for reasons unrelated to their EEOC charge. In fact, this Court recognized by opinion dated March 8, 2007 that "defendants have presented no evidence that defendants' conduct has changed" to date.[7] Hnot, Opinion & Order (March 8, 2007) at 15.

Moreover, the Snell court focused on whether two plaintiffs were similarly situated and received the same discriminatory treatment, rather than on time period, as "the appropriate standard for waiving the filing requirements." Id. at 1101. Thus, there is no reason for this Court to dismiss Ms. Cronas's post-2001 claims, as they are closely related to those being litigated by the Hnot plaintiffs.

Defendants also argue that Ms. Cronas's individual claims, including her 2004 demotion and termination, are not saved by the single-filing rule because they do not arise in the same time period as the claims asserted in the EEOC charge filed by the Hnot plaintiffs five years earlier. This argument is meritless for the reasons outlined above. The EEOC charge specifically referenced a practice of discriminatory and retaliatory demotion and termination which encompasses Cronas's individual claims.[8]

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[7] The Court rejected defendants' "bold" suggestion that, "because the Court has limited plaintiffs' class to persons employed by defendants between 1998 and 2001, 'there is no basis for awarding any injunctive or declaratory relief for practices that are now over five years old,'" reasoning that defendants had proffered no evidence that they had ever changed any of their discriminatory practices. Hnot, Opinion & Order (March 8, 2007) at 15. Defendants employ the same faulty rationale in seeking dismissal of Ms. Cronas's post-2001 claims.

[8] Defendants rely solely on Fields v. Merrill Lynch, 301 F.Supp.2d 259 (S.D.N.Y. 2004). Fields disallowed piggybacking onto a prior class action suit on the ground that plaintiff "has not shown a sufficient link between that lawsuit and the present action" and "has not pointed to any EEOC Charge of Discrimination involving similar discriminatory treatment that she should be

Accordingly, Ms. Cronas is entitled to maintain all of her claims – both individual and class – in this action under the single-filing rule.

B. The Single-Filing Rule Applies Here Notwithstanding that it is Being Invoked in a Separate Action; Alternatively, This Court Can and Should Waive the Right-to-Sue Letter Requirement in the Circumstances of This Case

At bottom, defendants are left with their technical contention that the single-filing rule does not allow Ms. Cronas to initiate this separate litigation, but rather only permits a plaintiff who has not filed her own EEOC charge to join a preexisting Title VII lawsuit in which at least one plaintiff has filed a timely charge. Defs.' Mot. at 4. Defendants overstate the implications of dicta in Tolliver v. Xerox Corp., 918 F.2d 1052 (2d Cir. 1990), and neglect the policies animating the single-filing rule as well as the equitable considerations in this case, all of which call for maintenance of this action.

Significantly, in Tolliver, the Second Circuit held that notice to defendants and the EEOC is achieved whether a plaintiff invokes the single-filing rule by joining a preexisting action or initiating a separate lawsuit. See 918 F.2d at 1057 ("The purpose of the charge filing requirement is fully served by an administrative claim that alerts the EEOC to the nature and scope of the grievance, regardless of whether those with a similar grievance elect to join a preexisting suit or initiate their own."). Accordingly, the court used the single-filing rule to permit plaintiffs who had not filed their own EEOC charges to initiate a separate lawsuit under the Age Discrimination in Employment Act ("ADEA"). 918 F.2d at 1057. In dicta, the court

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entitled to join . . . ." Id. at 264. Ms. Cronas has nothing in common with the Fields plaintiff, for she has clearly demonstrated the inextricable link between her allegations against defendants and the EEOC charge filed by the Hnot plaintiffs.

noted that, "under Title VII, the single filing rule has been used only to permit joining a preexisting suit in which at least one plaintiff had filed a timely charge."[9] Id. The court attributed this distinction to one factor – "Title VII's requirement that no person may initiate a Title VII suit without obtaining a right-to-sue letter," which is not required for ADEA suits.

Fundamentally, the right-to-sue letter issued to the Hnot plaintiffs should apply equally to Ms. Cronas under the circumstances here. While technically a separate action in form, this lawsuit is effectively an elaboration and extension of the Hnot case, which Ms. Cronas tried unsuccessfully to join as an intervenor. As a member of the certified Hnot class, Ms. Cronas has only this separate action available to her to expand Hnot's scope in accordance with the expansive EEOC charge filed in 1999 and the original Hnot complaint, which sought class certification for the entire period 1998 to the present.[10]

Accordingly, to require a separate right-to-sue letter for Ms. Cronas would be a mere contrivance in these circumstances, exalting form over substance and doing substantial injustice to Ms.Cronas and the class she seeks to represent.

Ten years after Tolliver, the court in Francis v. City of New York, 235 F.3d 763 (2d Cir. 2000), held that "presentation of a Title VII claim to the EEOC 'is not a jurisdictional [prerequisite], but only a precondition to bringing a Title VII action that can be waived by the parties *or the court*.'" 235 F.3d at 768-69 (quoting Petrias v. Board of Fire Commissioners, 180

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[9] Defendants falsely imply that "has been used" is synonymous with "must be used."

[10] This action is also Ms. Cronas's only means effectively to seek compensation for discriminatory stock option practices, which are a species of the more general discriminatory under-compensation claims enunciated in the EEOC charges but which have not so far been adequately pursued by the Hnot plaintiffs.

F.3d 468, 474 (2d Cir. 1999) (emphasis supplied)); see also Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."). In support of its holding, the Francis court referenced Petrias, a case in which the Second Circuit upheld the lower court's waiver of the right-to-sue letter requirement. See Francis, 235 F.3d at 767 (citing Petrias, 180 F.3d at 474). Accordingly, despite defendants' suggestion to the contrary, the Second Circuit has not declared a categorical prohibition on use of the single-filing rule to initiate a separate Title VII action like the one at hand.

Given this Court's rulings to date, a separate action is currently Ms. Cronas's only opportunity for fully vindicating her rights. It is the only way to make true this Court's conclusion that denial of intervention in Hnot would not substantially prejudice Ms. Cronas and the post-2001 class. Moreover, as a policy matter, Ms. Cronas should not be precluded from vindicating her rights because initially she placed the kind of faith in the named plaintiffs in the Hnot litigation that Federal Rule of Civil Procedure 23 anticipates.

The Supreme Court has held that Title VII's statute of limitations must be tolled for putative members of a class until class certification is denied, recognizing a strong policy interest in preventing the "needless multiplicity of actions" that would otherwise arise before a determination on certification in contravention of Federal Rule of Civil Procedure 23. Crown, Cork, & Seal, Co. v. Parker, 462 U.S. 345, 350 (1983). The same policy interest should dictate maintenance of this action at this time; Ms. Cronas and others like her should not be accused of failing to preserve their rights while attempting to avoid a needless multiplicity of actions. Ms.

Cronas determined to commence legal proceedings against Willis only when it clearly appeared that the Hnot plaintiffs were not adequately representing her interests (and those members of the post-2001 class). It was not until this Court, on August 17, 2006, denied class certification beyond 2001, in large part because "there is no basis for concluding that plaintiffs have been diligent in pursuing the discovery now at issue," that it became clear that those interests had been impaired, and that Ms. Cronas and the class had been substantially prejudiced. Hnot, Opinion & Order (August 17, 2006) at 9. Ms. Cronas then opted to avoid a needless multiplicity of actions by seeking to intervene, which the case law cited above makes clear is the preferred option. On November 30, 2006, this Court denied Ms. Cronas's motion to intervene, noting that the denial would not subject Ms. Cronas to substantial prejudice because she remained free to bring a separate action against defendants. Id.

These very factors now call for maintenance of a separate action. Dismissal of this action would undermine the prejudice analysis that informed the denial of intervention and simultaneously would leave Ms. Cronas with no forum for prosecuting her full spectrum of claims. See Part IV infra. Therefore, this Court should waive the right-to-sue letter requirement because fairness, and not excessive technicality, should govern Title VII actions.[11] See Love v. Pullman Co., 404 U.S. 522, 526-27 (1972).

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[11] Defendants wrongly suggest that allowing Ms. Cronas to piggyback on the Hnot charge would threaten to consume the Title VII filing rule. The close connection between Cronas's claims and the Hnot litigation, as well as the fact that she sought intervention before pursuing her own action, make these circumstances particularly appropriate for waiver of the right-to-sue letter requirement. In fact, as an alternative to waiver of the right-to-sue letter requirement, this Court could equitably estop defendants from moving to dismiss this action because defendants opposed Ms. Cronas's motion to intervene in Hnot on the ground, inter alia, that Ms. Cronas would not be prejudiced thereby. Hnot, Defs.' Mem. of Law in Opp. to Cronas's Motion to Intervene (Sept. 1, 2006) at 14.

"The complex problems that can arise from multiple federal filings . . . require . . . that the district court consider the equities of the situation when exercising its discretion." Curtis, 226 F.3d at 138. Here, those equities demand that Cronas and the post-2001 class have their day in court, either in this action or in the context of intervention in Hnot. See Part IV infra.

II. Supplemental Jurisdiction May Be Maintained Over State Law Claims

Plaintiff maintains that her federal claims should be permitted to proceed alongside her state law claims in federal court. However, should this Court dismiss Ms. Cronas's federal claims, it can nonetheless maintain supplemental jurisdiction over her state claims because the underlying facts overlap substantially with those in the related Hnot action.

The Second Circuit has held that the existence of subject matter jurisdiction in one action can provide supplemental jurisdiction in a separate related action. See Achtman v. Kirby, McInerney & Squire, LLP, 464 F.3d 328, 335-36 (2d Cir. 2006). In Achtman, the Circuit determined that the district court had supplemental jurisdiction over a malpractice action alleging the misconduct of two law firms in litigating a securities class action previously before the district court. See id. at 331, 335-36. The court invoked the following portion of the supplemental jurisdiction statute:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367(a); see also Achtman, 464 F.3d at 334-35.

The court reasoned as follows: (1) disputes are part of the "same case or controversy" within §

1367 when they "'derive from a common nucleus of operative fact,'" 464 F.3d at 335 (quoting Promisel v. First Am. Artificial Flowers Inc., 943 F.2d 251, 254 (2d Cir. 1991)); (2) two disputes arise from a "common nucleus of operative fact" when "'the facts underlying the federal and state claims substantially overlap[],'" id. (quoting Lyndonville Sav. Bank & Trust Co. v. Lussier, 211 F.3d 697, 704 (2d Cir. 2000)); and (3) "the facts underlying the present malpractice claims and the underlying securities claims 'substantially overlap[],' creating a common nucleus of operative fact," id. at 336.

The Hnot litigation confers on this Court supplemental jurisdiction over Ms. Cronas's state law claims, the underlying facts of which overlap substantially with the facts underlying the federal claims in Hnot. Like the Hnot plaintiffs under federal law, Ms. Cronas alleges under state law that Willis maintains a gender-discriminatory system for making promotion and compensation decisions and retaliates against employees for opposing these unlawful employment practices. See Cronas Compl. ¶¶ 64-85. Although there may be some facts stemming from Ms. Cronas's individual claims or during the time outside the Hnot class period that are not directly implicated in the Hnot litigation, the Achtman court found supplemental jurisdiction despite a similar reality. See 464 F.3d at 336 ("While there would surely be some facts at issue in the malpractice action that were not directly implicated in the BFG securities litigation itself, . . . the same was true in our fee dispute cases. We therefore follow their lead and find supplemental jurisdiction over these claims.").

Similarly, the Second Circuit has found supplemental jurisdiction over a state law action because the court was "already familiar with the relevant facts and legal issues" on the basis of its jurisdiction over a related action. Alderman v. Pan Am World Airways, 169 F.3d 99 (2d Cir.

1999). Having managed the Hnot litigation since July 2001 and ruled on Ms. Cronas's motion to intervene in that action, this Court indisputably has the requisite familiarity with the relevant facts and legal issues that would arise under Ms. Cronas's state claims to justify supplemental jurisdiction. Accordingly, a finding of supplemental jurisdiction in the event that Ms. Cronas's federal claims are dismissed would be consistent with the "considerations of judicial economy, convenience, and fairness to litigants" indispensable to a court's exercise of its discretion over jurisdiction. Purgess v. Sharrock, 33 F.3d 134, 138 (2d Cir. 1994).

III. Cronas's Claims are Not Subject to Mandatory Arbitration

At the end of their memorandum, defendants assert that Cronas's claims are subject to mandatory arbitration, and therefore barred from adjudication before this Court. This argument is meritless, just as it was when defendants first raised it in their opposition to Ms. Cronas's motion to intervene in Hnot.[12]

Arbitration is "a matter of contract" and "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Gerling Global Reinsurance Corp. v. Home Ins. Co., 302 A.D.2d 118, 126 (1st Dept. 2002) (quoting United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960)). "The mere invocation of the FAA does not operate to convert a nonarbitrable claim into an arbitrable one." Id. at 125. Rather, one must look to the language and context of the agreement to determine its scope and the parties' intent, and only those disputes which the parties agreed to submit to arbitration must in fact be

[12] Defendants simply rehash the arguments that appeared in their September 1, 2006 opposition to Ms. Cronas's motion to intervene in Hnot, even though they could have addressed the rebuttals in plaintiff's September 21, 2006 reply. Accordingly, we repeat the arguments from our reply here, but request the right to file a surreply, if necessary upon review of defendants' reply.

arbitrated. Alliance v. Bernstein Investment Research and Management., Inc., 445 F.3d 121, 125 (2d Cir. 2006), accord, State of New York v. Oneida Indian Nation of New York, 90 F.3d 58, 59, 62 (2d Cir. 1996)); Thompson-CSF, S.A. v. American Arbitration Assoc., 64 F.3d 773, 776 (2d Cir. 1995); see also Hoffman v. Aaron Kamhi, Inc., 927 F. Supp. 640, 644 (S.D.N.Y.1996) (agreement must put plaintiff on clear notice that he is waiving right to bring federal employment discrimination claims in federal court).

The state law principles which govern the state law claims are similar. A court will not order a party to submit to arbitration absent evidence of that party's "unequivocal intent to arbitrate the relevant dispute." Pharmacia & Upjohn Co. v. Elan Pharmaceuticals, 10 A.D.3d 331, 333-34, 781 N.Y.S.2d 95, 97-98 (1st Dept. 2004); Primavera Laboratories, Inc. v. Avon Products, Inc., 297 A.D.2d 505, 505-06, 747 N.Y.S.2d 16 (1st Dept. 2002) (citations omitted).[13]

In the instant case, defendants chose to forego this analysis altogether, and understandably so from their standpoint, because it is clear that neither defendants nor Cronas agreed to arbitrate the claims she seeks to bring in this action. The scope of their agreement, annexed to defendants' papers as Ex. A, is quite circumscribed. Paragraph 1 asserts only that Willis agrees to employ Cronas for the period of the agreement, and to pay her the proffered compensation, which Willis can change pursuant to its normal compensation review procedures. The remaining substantive terms of the agreement, including the representations and warranties, all focus exclusively on

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[13] The treatises on arbitration clauses also note that the "threshold for clarity of an agreement to arbitrate is greater than that respecting other contractual terms . . . and an agreement to arbitrate will not be extended by construction or implication . . . . Moreover, the fact that a party signifies willingness to arbitrate some disputes does not bind him or her to arbitrate all other disputes merely because of the general identity of the adversary interests or the interrelationship of the transactions involved." See, e.g., 23 Carmody-Waite 2d § 141:14 (April 2006) (citing cases).

matters of proprietary rights of the business, rules governing confidentiality of company information, rules governing employee loyalty and non-competition and non-solicitation by former employees. There is also a "Miscellaneous" clause that explicitly states that this Agreement constitutes the entire agreement between the parties.

The mandatory arbitration clause at ¶ 6 of this limited employment agreement states as follows: "Except for a claim beginning with a request for injunctive relief by Employer, Employer and Employee agree that any dispute arising under this Agreement shall be resolved by arbitration . . . ." Thus, the plain language of the arbitration clause limits the obligation to arbitrate to disputes arising under the Agreement – the scope of which is limited to matters wholly unrelated to the discrimination and retaliation claims Cronas alleges and seeks to litigate here, for herself and the class. None of those claims involves questions of confidentiality, loyalty, solicitation, non-compete rules, ethical violations, misuse of proprietary information or, in connection with paragraph 1, whether defendants paid the compensation initially offered or thereafter changed pursuant to normal compensation review procedures. Rather, all the claims in Cronas's complaint challenge defendants' alleged gender discrimination in assignments, promotion and compensation (and other terms and conditions of employment having nothing to do with the specific substantive paragraphs of the limited employment agreement executed in 1996), and alleged retaliation for opposing such discrimination.

Because the scope of the agreement does not touch upon the claims in this lawsuit, the arbitration clause does not apply here. See, e.g., Hoffman (holding that scope and language of arbitration agreement did not put plaintiff on notice that he was waiving right to bring federal employment discrimination claims in federal court). The September

19, 2006 affidavit of Cronas makes clear that she understood that the 1996 agreement was a standard non-compete agreement, and that it was not her understanding or intent, in executing that agreement, to waive her rights to sue for discrimination. See Ex. 3.

Similarly, it is also clear that defendants did not understand that this agreement would be proffered to compel arbitration of claims other than those relating to the non-compete and associated issues to which they and Cronas understood it specifically applied. This is evidenced by the fact that Willis later thought it necessary, in a subsequent employment agreement in 2003 with another newly-hired employee (annexed as Ex. 4 in redacted form to conceal the identity of that employee), to broaden the language of the mandatory arbitration clause to cover not just disputes "arising under the agreement" but rather "to any dispute arising either under this Agreement or from the employment relationship." (emphasis supplied). It appears obvious that defendants made that subsequent change because they understood that the arbitration clause of the prior agreement was far more limited in scope and did not generally require arbitration of employment claims, including the discrimination claims raised here by Cronas.

Accordingly, virtually all of the cases cited by defendants miss the mark since they stand for the general and unremarkable proposition that employment disputes and civil rights claims may be subject to the FAA and may be arbitrated. Only one district court case, Elwell v. Google, Inc., 2006 WL 217978 (S.D.N.Y. Jan. 30, 2006) (Cote, J.), appears worthy of discussion because, while distinguishable, it appears to be inconsistent with the authority in this Circuit and others noted above that precludes relegating a plaintiff to arbitration absent the demonstration of an unequivocal agreement and intent

by both parties to arbitrate the claim.

In Elwell, plaintiff brought claims for discrimination and retaliation based on a demotion and reduction in pay during a high-risk pregnancy when she informed her supervisors that she could no longer travel. Elwell had signed an employment agreement that included a specific provision designating her an at-will employee. The agreement also contained a mandatory arbitration clause – broader than that here – that stated, "I agree that any dispute or controversy arising out of or relating to any interpretation, construction, performance or breach of this Agreement, shall be settled by arbitration." Id.

The district court granted Google's motion to compel arbitration of plaintiff's civil rights claims based on its perception that "the core factual dispute underlying all plaintiff's allegations" was whether Google's decision to transfer plaintiff to another position and reduce her pay were permissible alterations of the terms of an at-will employee or were discrimination. Thus, the court held, since the first provision of the employment agreement explicitly set forth plaintiff's at-will employment status, this purported "core factual dispute" of plaintiff's case constituted a "dispute or controversy arising out of or relating to any interpretation, construction, performance or breach" of that employment agreement. Id. at 3-4.

Frankly, we fail to see how claims of pregnancy discrimination and retaliation can possibly arise under an employment agreement merely because that agreement recites that plaintiff is an at-will employee. Claims of unlawful discrimination really have nothing to do with whether the employee is an at-will employee or not. All at-will employees, just

like employees who have an employment contract that prohibits their demotion or termination other than for good cause, may still be subject to unlawful discrimination and retaliation, and whether they were or not has nothing to do with their at-will status. Nor does it appear that Elwell ever agreed or intended that her discrimination claims would arise under her agreement and would have to be resolved by arbitration rather than a jury. Accordingly, we respectfully submit that the district court's reformulation of the discrimination and retaliation claims into a "core dispute" having to do with her at-will status was error, and that the case was wrongly decided.

Nevertheless, Elwell is distinguishable from the case at bar. There is nothing in Cronas's narrow 1996 employment agreement – intended by both parties to be a limited agreement about non-competition and associated issues – to which her discrimination claims are related, in a "core factual dispute" or otherwise, which would be encompassed by the arbitration clause. Indeed, Cronas's arbitration clause confines arbitration to claims arising under the agreement, while Elwell's broader agreement required arbitration whenever the dispute is related to the "interpretation, construction, performance or breach" of the Agreement. Even if *arguendo* Elwell's discrimination claims somehow could be reformulated into a dispute involving the interpretation, construction, performance or breach of the Agreement, Cronas's claims cannot be under her agreement.

Therefore, because Cronas's agreement does not contemplate or require the arbitration of the claims she brings in this lawsuit,[14] mandatory arbitration is not a bar to

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[14] Moreover, Cronas's arbitration clause is probably invalid on its face, insofar as it so substantially and impermissibly limits the remedies that otherwise would be available to her under the civil rights laws.

adjudication of her claims before this Court.

IV. If This Action is Dismissed, Plaintiff Should Be Granted Leave to Intervene in *Hnot*

If this Court adopts defendants' argument that the single-filing rule cannot apply to a separate action or otherwise dismisses this action, see Part I(B) supra, it should relieve plaintiff from the November 30, 2006 order denying intervention in Hnot. Dismissal of this action would disprove this Court's determination that denial of intervention did not substantially prejudice Ms. Cronas and would therefore invite review of the intervention analysis in this new light.

Federal Rule of Civil Procedure 60(b)(6) allows a party to seek relief from a judgment or order for any reason "justifying relief from the operation of the judgment." A motion under Rule 60(b)(6) must be made, as is this one, "within a reasonable time." Fed. R. Civ. P. 60(b). The Second Circuit has held that Rule 60(b)(6) "represents a 'grand reservoir of equitable power (that should be) liberally applied'" and that "'vests power in courts adequate to enable them to vacate judgment whenever such action is appropriate to accomplish justice.'" Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044, 1051 (2d Cir. 1982) (citations omitted). If this action is dismissed, then Ms. Cronas's intervention in Hnot will prove her only access to justice.

In denying Ms. Cronas's motion to intervene pursuant to Federal Rule of Civil Procedure 24(a) and (b), this Court considered the length of Ms. Cronas's delay in seeking intervention, the point to which the Hnot lawsuit had progressed, prejudice to the existing parties from the applicant's delay, and prejudice to the applicant if the motion is

denied. Hnot, Opinion & Order (Nov. 30, 2006) at 4-5. It is this last factor that should tip the scale in favor of granting Ms. Cronas leave to intervene, if this Court dismisses her separate action.

In light of this Court's decisions to limit the scope of the Hnot class to 1998-2001 and to deny Ms. Cronas leave to intervene, if this action is dismissed, Cronas and similarly situated female employees of Willis will be unable to demonstrate continued pattern and practice gender discrimination after 2001, and to prove damages in under-compensation after 2001 through the Hnot action. As detailed in Part I(A) supra, Cronas also believes that she was discriminated against in the distribution of stock options during the class period, claims which may have substantial economic value, but which would remain unexplored in the Hnot action. By its November 30, 2006 order, this Court determined that denial of intervention would not cause Cronas significant prejudice because she could simply bring another action against defendants. However, if this action is dismissed, there can remain no doubt that her inability to prosecute these claims in the Hnot action would constitute substantial prejudice on both the liability and damages aspects of the case, not only for Cronas, but for other Willis employees, including other certified class members, who have similar under-compensation claims. Accordingly, if this action is dismissed, Cronas should be allowed to intervene in the Hnot action.

CONCLUSION

For the reasons detailed above, plaintiff urges this Court either to maintain her state and federal claims in this action, or to grant her leave to intervene in the Hnot action. Her access to justice rests on one of these two outcomes.

Dated: New York, New York
March 21, 2007

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[15] Sofia Yakren is admitted to the New York State Bar. Her admission to S.D.N.Y. is pending.