Shelly Hnot, and Heidi Scheller, on behalf of themselves and all similarly situated persons, Plaintiffs, v. Willis Group Holdings Ltd., Willis North America Inc., Willis of Massachusetts, Willis of New Jersey, and Willis of NY, Defendants-Appellees, v. Andrianne Cronas, Intervenor-Plaintiff-Appellant.

06-5761-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

February 15, 2007

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Initial Brief: Appellant-Petitioner

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TITLE: APPELLANT'S BRIEF

TEXT: [*1] **Preliminary Statement**

Intervenor-Plaintiff-Appellant Adrianne Cronas appeals from the order and memorandum of the Honorable Gerard E. Lynch, Southern District of New York, dated [**3] November 30, 2006 denying her motion to intervene as a class representative in Hnot v. Willis Group Holdings Ltd., 01-CV-6558 (GEL) as a matter of right or, alternatively, by permission.

The District Court had jurisdiction over Cronas's civil rights claims arising under the United States Constitution and New York state law pursuant to *28 U.S.C. §§ 1331*, *1343(4)*, *1367* and *2201*. Denials of motions to intervene are deemed final orders for purposes of appellate jurisdiction. See *New York News Inc. v. Kheel, 972 F.2d 482, 485 (2d Cir. 1992).* Therefore this Court has jurisdiction under *28 U.S.C. § 1291* over this appeal, which was timely filed on December 19, 2006.

Issues Presented

1. Did the District Court abuse its discretion when it denied Cronas's motion to intervene as a matter of right pursuant to *Federal Rule of Civil Procedure 24(a)(2)* as untimely?

2. Did the District Court abuse its discretion when it denied Cronas's motion for permissive intervention pursuant to *Federal Rule of Civil Procedure 24(b)(2)* as untimely?

[*2] **Standard Of Review**

The appellate court reviews rulings [**4] on motions to intervene for abuse of discretion. See *United States v. Glens Falls Newspapers, Inc., 160 F.3d 853, 854 (2d Cir. 1998).*

Statement of the Case

This is an appeal of the denial of a motion to intervene as a matter of right or permissively by a member of a certified class seeking to intervene as a named plaintiff and protect her rights and those of similarly situated for claims and damages which occurred beyond the class period. On November 30, 2006, the Honorable Gerard E. Lynch denied the motion. A timely Notice of Appeal was filed on December 19, 2006.

Summary of Argument

Intervenor-Plaintiff-Appellant Adrianne Cronas ["Cronas"] is a victim of pattern and practice gender discrimination and retaliation who sought to intervene as a named plaintiff in an ongoing class action when it became apparent that her rights and interests might not be fully protected. The questions before this Court are (a) whether the District Court abused its discretion in denying Cronas's motion to intervene as untimely, even though she never received notice of class certification and filed to intervene while the District Court was considering - but [*3] [**5] before it had determined - whether to define the scope of the class in a way that potentially excluded three years' worth of discriminatory and retaliatory treatment and damages Cronas and other similarly situated women suffered post-2001; and (b) whether the District Court abused its discretion in finding that Cronas would not be prejudiced by its denial of her motion based on a finding that she could bring an individual action asserting her claims, improperly ignoring the argument of Defendants-Appellees [herein after "Willis"] that such action would be precluded due to, inter alia, a failure to exhaust her administrative remedies, an argument Willis has since raised in moving to dismiss Cronas's subsequently filed individual action.

Based on the totality of the circumstances, the District Court abused its discretion in denying Cronas's motion based on findings that the motion was untimely and that she would not be prejudiced by this denial.

Statement of Facts

INTRODUCTION

Cronas seeks reversal of the District Court's denial of her motion to intervene as a named plaintiff in an ongoing class action lawsuit against Willis on behalf of officer and officer-equivalent [**6] female employees alleging a pattern and practice of discrimination in terms and conditions of employment, promotional [*4] opportunities, and compensation, and retaliation. As set forth below, there was a protracted dispute in that action regarding whether the class period should be limited to 1998-2001 or whether it should continue to the present, as well as whether plaintiffs in that action [hereinafter the "Hnot plaintiffs"] forfeited the right to seek discovery into Willis's post-2001 conduct. Ultimately, the District Court ruled on August 17, 2006 that the Hnot plaintiffs had waived the right to post-2001 discovery and that the class claims, which had been pleaded as ongoing from October 1998 to the present, would be cut off in 2001.

Cronas was employed by Willis from 1996 until her wrongful termination in 2004 and is a member of the certified class. However, she has claims of discrimination and significant claims for damages accruing therefrom for discrimination occurring for three years past the now certified class period. As soon as she became aware of the dispute over the class period and had sufficient information to reasonably recognize that her interests as a class [**7] member in that litigation might not be protected adequately given her post-2001 claims, she moved to intervene in this action. This motion was made prior to any ruling by the District Court on the underlying dispute about the class period. As set forth below, her claims mirror those of other Hnot class members but include allegations of continued disparate treatment and retaliation long past 2001, and [*5] include significant economic losses through her 2004 termination. She moved to intervene to ensure that her rights and those of similarly situated Willis employees who were victims of pattern and practice discrimination beyond 2001 are adequately represented. As set forth below, absent intervention, there is a serious risk that she will be unable to vindicate these post-2001 claims and would therefore be severely prejudiced. In denying the motion to intervene as untimely, the District Court abused its discretion and its decision should be reversed.

THE HNOT LITIGATION

In July 2001, five women who had been employed by Willis as officers or in officer-equivalent positions filed a class action suit against Willis alleging a pattern and practice of sex discrimination [**8] and retaliation against current and former female employees of Willis in positions of Assistant Vice President and higher. The Hnot plaintiffs brought these class claims under Title VII, *42 U.S.C. 2000e*, et seq., alleging systemic policies and practices which denied members of the putative class promotional opportunities and equal compensation as compared to their male counterparts, and retaliation. Specifically, they claimed discriminatory disparity in salaries, commissions, and bonuses, discrimination in assignments and promotions including steering business toward male employees, discrimination in terms and conditions of employment, and retaliation against [*6] women who complain about disparate treatment. (A75-97).

The complaint, which was amended twice, defined the class as "all current and former female employees who have been employed by the defendants at levels equivalent to Assistant Vice President, Vice President, and Senior Vice President at any time from October 1998 through the present." (A82). On June 14, 2004, the Hnot plaintiffs moved to certify, pursuant to *Federal Rules of Civil Procedure 23(b)(2)* and (b)(3), a class of "all current and [**9] former female employees who have been employed by the defendants in the positions eligible for the award of officer titles such as Assistant Vice President, President and Senior Vice President at any time from October 30, 1998 through the present." (A64). The Hnot plaintiffs' class certification motion was pending before the District Court for nine months, long after Cronas was terminated by Willis.

On March 21, 2005, the District Court certified a Rule 23(b)(2) class in the Hnot litigation of "all current and former female employees who have been employed by the defendants in positions eligible for the award of officer titles between 1998-2001." It reserved ruling on the propriety of certifying a Rule 23(b)(3) class. See *Hnot v. Willis Group Holdings, Ltd., 228 F.R.D. 476* (S.D.N.Y. March 21, 2005).

At the next case management conference on May 15, 2005, the Hnot [*7] plaintiffs pointed out that the class certified by the District Court failed, without explanation, to encompass the ongoing class period plaintiffs had sought. (A64-65). The District Court has admitted that it mistakenly understood the Hnot plaintiffs' proposed class to include only employees who [**10] worked for defendants from 1998-2001. (A65). It contends that the mistake arose from the fact that discovery had been conducted only for that period. Id.

At this case management conference, the Hnot plaintiffs asserted that, at an off-the-record discovery conference in August 2002, the District Court had directed the parties to conduct discovery solely for the period leading up through 2001 and to wait to see if class certification was granted before pursuing post-2001 discovery. (A62). It was the Hnot plaintiffs' vigorous contention that there was always an understanding that certification would be sought for a class beyond 2001.

Therefore, the Hnot plaintiffs argued that the District Court should have certified a class from 1998 to the present and permitted post-2001 discovery, as had been agreed upon and as appropriate to reflect the class allegations of ongoing discriminatory conduct up to the present as set forth in the complaint and class certification motion. The District Court initially instructed the parties to engage in mediation and attempt to settle the case. Once these efforts were unsuccessful, [*8] the District Court permitted briefing on whether it should [**11] expand the temporal scope of the class and permit post-2001 discovery. While this matter was before the District Court, no notice of class certification was published or sent to class members, including Cronas, that a class of individuals from 1998-2001 had been certified. To date, no such notice has been made.

The motion to modify the class certification order was not fully briefed until December 9, 2005 and remained *sub judice* for over eight months, until August 17, 2006.

CRONAS'S ALLEGATIONS

Cronas's claims are virtually the same as and mirror the claims of the Hnot plaintiffs and their class claims. Cronas was hired as a Vice President in 1996 by Willis, an insurance brokerage firm, to start an environmental practice at Willis NY/NJ. She was hired at a salary of $ 65,000. She was to bring in new business and cross-sell the existing book of business. In or about 1997, with approximately $ 500,000 in business, exceeding expectations, Willis made the NY/NJ environmental practice a stand-alone department, with Cronas as its head. She continued to sell and grow the environmental practice. By 1998, the now tri-state environmental practice, housed in the New York office, [**12] was a thriving practice, and the New York CEO, John Kelly, praised Cronas and her department's success [*9] to CEOs in other parts of the country. Kelly also appointed Cronas to the management committee of the New York office, making her the only team leader on the management committee who was a woman. See Compl. in Intervention at PP 29-31 (A46-47).

Nevertheless, in 1998, Jeffrey Gardner was hired as a Senior Vice President and Regional Environmental Practice Leader in New York over Cronas and replaced her on the management committee. Upon information and belief, Gardner had been an underwriter for another insurance company and had no insurance brokerage background or experience. Although Gardner was now team leader of the Environmental Practice department, Cronas effectively continued to run it and produce approximately 80% of its business. Cronas had not been offered either the positions of Senior Vice President or Regional Environmental Practice Leader, although she was more qualified for those positions than Gardner. (A47).

Gardner determined what out-of-town meetings Cronas could attend, and Cronas was frequently denied permission to attend such meetings, which among [**13] other things provided opportunities for business development, while upon information and belief, many of the male officers and team leaders were often out of the office on Fridays during the spring and summer playing golf with clients. [*10] (A47).

In or about early 1999, when Cronas threatened to quit, Willis made Cronas a Senior Vice President and the Manager of the New York Environmental Department, charged with developing business in the Tri-State area. She also continued to serve as a significant source of support on environmental insurance matters throughout the Northeast. (A47-48).

As Senior Vice President and Manager of the New York Environmental Department, Cronas developed and produced business in New York, New Jersey, Pennsylvania, Massachusetts and New Hampshire. Cronas worked directly with the local Willis brokers in those offices to develop and produce environmental business, and she also hired or trained a person in-house in some of those offices to develop and produce environmental business. (A48).

In or about late 1998 or early 1999, upon information and belief, Gardner and one or more male officers and/or team leaders received stock or stock options. Cronas [**14] was not offered and did not receive stock or stock options and was not aware that any had been offered. (A48).

In or about 1999, Gardner became the head of Willis's National Environmental Practice. Shortly thereafter, Gardner resigned and was replaced by Kenneth Ayers, who took the position in approximately November 2000. Upon [*11] information and belief, Ayers received stock or stock options as part of his compensation package. (A48).

In 1998, when Cronas was expanding the department, she posted the job of client service manager in-house (within Willis). A woman who had been with Willis more than 10 years at that time, applied for the job. She informed Cronas that, although she handled most of the major accounts in her former department, she had never received a promotion to Vice President. She also informed Cronas that she had trained several young men in her department who were then fast-tracked over her, and given privileges such as attending golf outings, entertaining clients and going on renewal trips while she was doing the work on the accounts. Cronas hired this woman and after less than a year promoted her to Vice President, despite resistance from Willis. (A48-49). [**15]

From 1999 to 2002, Cronas continued to grow the business of her department. In 2001, the department produced more than $ 2.5 million in new business revenue. Cronas was responsible for producing approximately 90% of that book of business. In 2002, her department produced approximately $ 5.5 million in new income. Cronas was appointed an Executive Vice President in 2002. During this period of time, and during other periods of her employment at Willis, Cronas was an exceptional producer of business. (A49).

[*12] Cronas almost always encountered resistance when attempting to get raises for the women in her department, resistance which was absent when it came to raises for the men. Obtaining promotions for men was also easier than obtaining promotions for women. (A49).

In 2002, when Cronas promoted her administrative assistant, who was dynamic and qualified, to the position of insurance technician, the CEO's assistant commented to Cronas that it was more than unusual for someone in the assistant's position to be promoted at all at Willis. (A49).

It was an acceptable practice at Willis for some men to have personal assistants to help them deal with email. Upon information and belief, [**16] none of the women officers had a personal assistant. (A49).

Upon information and belief, during the entire time Cronas was employed by Willis, she made less in compensation than comparable male officers, team leaders and exceptional producers of business. Upon information and belief, Cronas was not offered stock and stock options that were offered to and received by comparable male officers, team leaders and exceptional producers of business and, when she was given stock or options, the amounts she received were, upon information and belief, lower than those given to comparable males. For example, upon information and belief, male exceptional producers who were members of [*13] the Exceptional Producers Council and who produced in the previous fourth quarter were given 500 stock options every year from 2001 to 2003. Cronas qualified as a member of that Council every year during those years but did not receive the 500 stock options. (A49-50).

In or about late 2002, Cronas requested a transfer to the Willis office in Philadelphia for financial reasons, as her husband had been out of work for a long time. Gary Mathieson, who would become the New York CEO, told Cronas that he could [**17] not afford to lose her in New York, and said he would get her a raise. Although Willis then had a hiring freeze and was not giving raises, Mathieson reported back to Cronas that he had secured for her a raise of $

35,000. When Cronas asked him how he was able to manage that, he replied in substance that when they had evaluated Cronas's compensation and compared it to her counterparts, there was room to give her a raise. (A50).

In or about February 2004, Shelley Hnot was deposed in Hnot et al. v. Willis Group Holdings, Ltd., the case in which Ms. Cronas later sought to intervene as a named plaintiff. In that deposition, Hnot testified that Cronas told her that she was unhappy about Gardner's being hired over her head and that she was not given the position and the commensurate salary, and that Cronas felt that she was doing the work and Gardner was getting the credit. Cronas was not aware [*14] of Hnot's deposition or the substance of her testimony at the time. (A50).

In March 2004, Cronas was demoted and relieved of her management duties without cause. She was also removed as manager of the Environmental Practice department without cause. (A50).

CRONAS'S TERMINATION [**18] AND SUBSEQUENT MOTION TO INTERVENE

In June 2004, Cronas was terminated without cause. She was replaced by a man who had no environmental insurance or brokerage experience, at a salary of $ 250,000, far in excess of Cronas's salary of $ 185,000. Upon information and belief, Cronas's demotion and termination were discriminatory and retaliatory. (A50-51).

After her termination, Cronas retained counsel to represent her interests against Willis. In May 2005, Cronas's counsel, Rosalind Fink, learned that a class had been certified in Hnot and made several unsuccessful efforts to contact the Hnot plaintiffs' counsel to obtain more information on the status of the case. Unable to do so, she obtained a copy of the docket sheet and the First Amended complaint from the court clerk. (A35).

It was not until October 2005 that Ms. Fink was able to communicate with the Hnot plaintiffs' counsel and request information about the claims. Ms. Fink was particularly concerned about whether her client's claims were being fully [*15] litigated in the class action and whether the class action raised damages claims relating to disparate awards of stock options, since Cronas had discovered after [**19] her firing that similarly situated males had received valuable stock options she had not been granted. Ms. Fink also sought access to the discovery relating to Cronas. (A35).

The Hnot plaintiffs' counsel informed Ms. Fink that there was a confidentiality order in place but agreed to provide her with certain materials she sought if counsel for Willis would consent. Ms. Fink therefore contacted defense counsel, who agreed to consider the request but also offered to engage in settlement conversations regarding Cronas's individual claims. These settlement conversations continued from October 2005 until May 2006, at which point defense counsel informed Ms. Fink that Willis was not interested in settlement until a pending question regarding the scope of the certified class was resolved. During this period, no discovery documents were provided to Cronas's counsel. (A35-36).

Upon the breakdown of settlement talks in May 2006 and learning of this pending motion before the District Court regarding the temporal scope of the class, Ms. Fink contacted Beldock Levine & Hoffman LLP (BLH) to discuss representing Cronas's interests in the class action and moving to intervene to [*16] ensure [**20] that Cronas's interests were protected. Soon after - and, significantly, prior to any decision by the District Court on the pending motion regarding the scope of the class in Hnot - BLH contacted and advised the District Court that Cronas, who was terminated by Willis in 2004 and had claims stretching years beyond the narrower class period currently under challenge, would seek to intervene as a class representative to protect her rights and those of others discriminated by Willis beyond the 2001 cut-off period. (A29-30; A36).

The motion to intervene was filed on August 1, 2006, still prior to any decision by the Court on the class period. (A25). The motion also sought access to the Hnot discovery and post-2001 discovery to ensure that Cronas's claims and those of similarly situated female employees could be fully prosecuted. (A31-33). BLH moved quickly both to notify the District Court of Cronas's intention to file a motion to intervene and to file the motion itself, specifically so as to act in a timely manner and ensure that the District Court would take into account Cronas's interests and those of women discriminated against after 2001 prior to making any ruling [**21] on whether to extend the class period.

In her motion and the accompanying complaint in intervention she filed with the District Court, Cronas explained the extent of her relationship to and knowledge of the underlying action and the impediments she faced in learning [*17] whether her rights were being adequately protected. Most importantly, Cronas had not learned about a series of options grants made by Willis to similarly situated men from 2001 forward until well after she had been terminated. When she did learn about these grants, and, most particularly, about options grants that were made in the period from 2001 to 2003 (for which she arguably could only make discrimination claims if she were part of the Hnot class, the New York State and City nondiscrimination statutes having a three-year statute of limitations), she acted promptly to protect her interests and those of similarly-situated women who had been subjected to post-2001 discrimination. The prejudice, to her and the women she sought to represent in her motion to intervene, was clear, based on statute of limitations

grounds, as well as on the lack of post-2001 discovery and the very limited discovery on the options [**22] claims conducted by the Hnot plaintiffs.

On August 17, 2006, with Cronas's motion to intervene filed but not yet fully briefed, the District Court finally ruled on the motion on the class period that had been pending for well over eight months. In this decision, the District Court disputed the Hnot plaintiffs' counsel's memory of the off-the-record conference in 2002 and asserted that, regardless, counsel had subsequently agreed to fact discovery deadlines, thereby forfeiting the right to such discovery. On these [*18] findings, the District Court cut off the class period at 2001. n1 (A61-74).

n1 The District Court also took issue with the Hnot plaintiffs' counsel's interpretation of the meaning of the term "to the present" in its class definition, which the Hnot plaintiffs' counsel argued encompassed employees with claims up to the date of trial, rather than to the date the class certification motion was filed in June 2004. (A65-66).

THE DISTRICT COURT'S DECISION ON THE MOTION TO INTERVENE [**23]

Notwithstanding the clear timeliness of the motion given the totality of the circumstances and the substantial prejudice to Cronas as compared to Willis, on November 30, 2006, the District Court denied the motion to intervene as untimely.

The District Court's decision was based solely on the question of timeliness. Specifically, the Court found that Cronas should have moved for intervention no later than May 2005, when her counsel became aware that a class certification decision had been rendered. n2 The District Court also held that, even though any delay in the progress of the Hnot litigation was not Cronas's fault, the age of the litigation warranted denying her motion to intervene and requiring her to pursue her own litigation. (A144-152).

n2 The Court in fact suggested that she should have moved to intervene as soon as she was aware of the litigation, acknowledging Willis's argument that Cronas never indicated when she first learned of the lawsuit. (A 148). This is clearly an erroneous standard for assessing timeliness, and to the extent it informed the Court's decision, this was a clear error of law.

[**24]

The District Court also erroneously predicated its denial on a finding that Cronas would not be prejudiced in any way because she could initiate her own [*19] lawsuit on the post-2001 claims. (A152-153).

This is consistent with footnote 8 of the District Court's August 17, 2006 decision on the class cutoff date, which tacitly acknowledged Cronas's claims as set forth in her then-pending intervention motion. The District Court stated in this footnote that, independent of its ruling on the cutoff date, Willis could nonetheless be subjected to "burdens of additional discovery," because "additional employees or former employees of Willis may file suit alleging age discrimination during the 2002-2005 period," and thus present "a legitimate argument for compelling discovery of the material at issue." (A70).

In its papers opposing Cronas's motion, filed after this decision, Willis effectively disagreed with the District Court on this point, arguing that Cronas's claims were time-barred because she had failed to file an EEOC charge and could not rely on the single filing rule to piggyback on the Hnot plaintiffs' EEOC charge.

The District Court acknowledged Willis's position in [**25] its decision to deny intervention but, incredibly, declined to consider this and other defenses Willis had raised to Cronas's individual claims in weighing the prejudice to Cronas in denying her motion to intervene. (A152). As set forth more fully below, this was a highly damaging abuse of discretion that ignored the realities of Cronas's options [*20] to adequately seek redress absent intervention in the Hnot case.

Another important element of prejudice asserted by Cronas's counsel and improperly ignored by the District Court was based on the District Court's criticisms in its August 17, 2006 decision, whether or not justified, of the Hnot plaintiffs' counsel for failing to raise the issue of post-2001 discovery and failing to engage in such discovery within agreed-upon deadlines. Cronas argued that this criticism further supported her claim that her interests were not being adequately protected by the Hnot plaintiffs and that she and those like her would suffer enormous prejudice if their claims were not joined with those of the Hnot plaintiffs.

Cronas also pointed out to the District Court that, in comparison to her prejudice, the prejudice to Willis was virtually none. [**26] Specifically, nothing of consequence had occurred in the case between the time the District Court first ruled on class certification in March 2005 and the time Cronas had moved to intervene on August 1, 2006. And if, as the Court believed, others could bring separate actions alleging post-2001 claims, such actions no doubt would be deemed related cases with the Hnot litigation, thus requiring the District Court to deal with the post-2001 claims regardless. Requiring Cronas to bring a separate action, however, would not only impose unnecessary costs and burdens on her in [*21] terms of expending resources outside the context of the class to which she already was a member, but it would undermine judicial economy in requiring the Court to supervise two artificially-separate actions that alleged the same continuing discriminatory conduct, rather than subsuming Cronas's claims within the context of the ongoing litigation, which was originally designed by the Hnot plaintiffs to encompass all of these similar, continuing claims from 1998 to the time of trial. Willis would not be further burdened or prejudiced in any way because they would have to defend such claims one way or another, [**27] and to do so in the context of a separate lawsuit would be a waste of resources for defendants as well.

On December 19, 2006, Cronas filed a separate class action complaint on behalf of herself and similarly situated female employees of Willis, alleging a pattern and practice of gender discrimination and retaliation mirroring that being litigated in the Hnot case but for the period up to the time of trial. The complaint seeks certification of a Rule 23(b)(3) class for the period of 1998-2001 and both Rule 23(b)(2) and (b)(3) class for the period of 2002 until the time of trial. n3

n3 Cronas requests that the Court take judicial notice of this filing.

Willis has moved to dismiss this complaint, arguing that Cronas's claims are time-barred based on her failure to file her own EEOC charge. Specifically, it asserts that she cannot rely on the single-filing rule to piggyback on the EEOC [*22] charge of the Hnot plaintiffs to satisfy the Title VII exhaustion requirements. n4 While we do not concede [**28] the validity of Willis's argument, the case law suggests that Willis has a reasonable chance of prevailing on that point and of having Cronas's individual complaint dismissed. n5

n4 We ask this Court to take judicial notice of this recent filing by Willis.

n5 This argument lacked merit in the context of the motion to intervene, as the case law does permit the use of the single filing rule when a party seeks to join an action. It is a more difficult argument to make in the context of a separate action.

For all of these reasons, we respectfully assert that the District Court abused its discretion in finding that Cronas's motion was untimely and that she would not be significantly prejudiced by its refusal to grant her motion to intervene.

Legal Argument

I. INTERVENTION AS A MATTER OF RIGHT

Intervention as a matter of right is appropriate under *F.R.C.P. 24(a)(2)* when the applicant "claims an interest relating to the property or transaction which is the subject of the action and [**29] the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest. . . ." To intervene as a matter of right, a movant must "(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is [*23] not protected adequately by the parties to the action." *Brennan v. NYC Bd. of Ed., 260 F.3d 123, 128-29 (2d Cir. 2001)* (citation omitted). Rule 24 is to be construed liberally in favor of potential intervenors. See, e.g., *California ex rel.*

Lockyer v. U.S., 450 F.3d 436, 440 (9th Cir. 2006); Turn Key Gambling, Inc. v. Oglala Sioux Tribe, 164 F.3d 1080, 1081 (8th Cir. 1999); Brennan, supra at 193 n. 2.

There is no dispute that Cronas demonstrated the requisite interest in the action and how that interest (and those of others similarly-situated) is not adequately protected by the Hnot plaintiffs. Cronas also contends that she demonstrated that her motion was timely and that her rights will be impaired absent intervention, [**30] and the District Court's findings otherwise were an abuse of discretion.

A. The District Court Abused Its Discretion in Finding that the Motion to Intervene was Untimely

Timeliness of a motion to intervene is determined based on the totality of the circumstances. *D'Amato v. Deutsche Bank, 236 F.3d 78, 84 (2d Cir. 2001)* (citation omitted). Factors to consider include (1) how long the applicant has had notice of the interest; (2) prejudice to the existing parties as a result of any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances mitigating for or against a finding of timeliness. Id. An intervention [*24] motion's timeliness, which defies precise definition but is not defined solely by chronology, is determined in context, from all the circumstances. *United States v. Pitney Bowes, Inc., 25 F.3d 66, 70 (2d Cir. 1994); D'Amato, 263 F.3d at 84.* "The most important criterion in determining timeliness is whether the delay in moving for intervention has prejudiced any of the existing parties." *Miller v. Silbermann, 832 F. Supp. 663, 669 (S.D.N.Y. 1993)* (citations [**31] omitted). "Absent such prejudice, the motion for intervention will usually be deemed timely. Id. (citations omitted).

The District Court found that, at the latest, Cronas should have moved to intervene in May 2005 when her counsel became aware that a class certification decision had been rendered.

But it was only when the District Court denied the motion to extend the class period to comport with the class sought by the Hnot plaintiffs that her interests and those of similarly situated women with post-2001 claims became impaired and only shortly before this when Cronas learned that she had significant claims that might be lost. Until the District Court's August 17, 2006 ruling, Cronas and all other class members with post-2001 claims had a good faith basis to believe that the class period would comport with the class definition as set forth in plaintiff's complaint and motion for class certification and extend beyond 2001, [*25] and that the Court would extend the class period past 2001 and require defendants to disgorge the discovery relating to those claims. It was only the August 17, 2006 decision that definitively established that the interest of Cronas and the class [**32] in the post-2001 claims has not been adequately protected. As noted, Cronas moved to intervene before this decision was rendered.

Further, nothing of note happened in the litigation between May 2005 and the date Cronas sought leave to intervene.

In May 2006, when settlement discussions foundered and defense counsel advised Cronas's counsel that defendants were not willing to negotiate a settlement until after a decision was made on the pending motion to determine the temporal scope of the class, Cronas's counsel moved without delay to bring in new counsel with class action experience. (A35-36). In June 2006, Robert Herbst of BLH met with the Hnot plaintiffs' counsel, and in July 2006, Cronas's counsel was granted access to some of the papers on the motion to clarify the class period by the Hnot plaintiffs' counsel. On July 14, 2006, Cronas's counsel notified the District Court and defense counsel of her intention to seek leave to intervene, having earlier secured the consent of plaintiffs' counsel to our motion. (A31-33).

On these facts, the District Court's denial of Cronas's motion to intervene on timeliness grounds was an abuse of discretion.

[*26] B. The District [**33] Court Abused Its Discretion in Finding that Cronas Would Not Be Prejudiced by Denial of Her Motion to Intervene

The District Court also abused its discretion in finding that Cronas would not be prejudiced by denial of intervention.

In light of the District Court's decision to limit the scope of the class to 2001 and disallow discovery during the post-2001 period, Cronas and similarly situated female employees of Willis will be unable to demonstrate continued pattern and practice gender discrimination after 2001, and to prove up damages in under-compensation after 2001. Cronas also believes that she was discriminated against in being denied sock options in the years between 2001 and her termination, claims which may have substantial economic value. In addition, because no data had been produced on stock options awards during the class period, she will face huge obstacles in proving up her economic loss from stock options which should have been granted to her during the class period. From what we can tell preliminarily, that economic loss could amount to more than $ 700,000. This is further evidence of the fact that Cronas's interests have not been adequately protected and intervention [**34] is required. The above constitutes 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 [*27] members, who have similar under-compensation claims.

The District Court failed to adequately take account of the prejudice arising from the requirement that post-class cutoff claims be separately litigated, by assuming that Cronas could simply bring a separate suit alleging post-2001 claims. As an initial matter, the Court ignored the unnecessary and undue burden and expense that litigating these claims in a separate action would cause to Cronas and the other similarly-situated class members, as well as the undue burden on the Court in maintaining separate but wholly related actions regarding the same continuous discriminatory conduct. This in and of itself was an abuse of discretion warranting reversal.

Second, even if Cronas can pursue her own litigation, which she filed in late 2006 after the District Court denied her motion to intervene, there is the possibility that she cannot do so in federal court and that her state law under-compensation claims would only date back to [**35] 2003.

As noted above, the District Court's decision denying intervention was clearly based on its determination that Cronas and others could simply bring a separate action to litigate their significant and valuable post-2001 claims. In making this determination, it explicitly chose not to consider the defenses raised by Willis to Cronas's claims, most importantly that her claims were time-barred [*28] for failure to exhaust before the EEOC. (A152). This may prove to be a fatal error. Cronas followed the District Court's roadmap as a back-up plan and filed a separate action. She now, however, faces a motion to dismiss which may succeed in defeating her claims for failure to exhaust, since it is much harder to invoke the single-filing rule and piggy back on another plaintiff's timely EEOC charge and right to sue letter (in this case that of the Hnot plaintiffs) when one is moving to join that action, rather than bring her own. Therefore, there is a reasonable chance that Cronas in fact cannot bring a separate Title VII action to vindicate her rights post-2001, and cannot assert rights under the City and State Human Rights Laws for the period between the class cutoff and the [**36] date when her three-year statute of limitations runs. She thus could be fatally prejudiced by the District Court's flawed legal and factual findings. In ignoring this possible prejudice, the District Court abused its discretion in denying the motion to intervene and that decision should be reversed.

PERMISSIVE INTERVENTION

Alternatively, the District Court abused its discretion in denying the request for permissive intervention. Permissive intervention simply requires that (1) the applicant's claim presents either a common question of law or a common question of fact with the main action; (2) the motion is timely; and (3) the court has independent jurisdiction over the applicant's claims.

[*29] As noted above, the application was timely. Cronas's claims during the class period, and those post-2001 claims she attempts to assert on behalf of similarly-situated women, obviously share common questions of both law and fact with the Hnot plaintiffs and those of the other members of the currently-certified class, and the District Court clearly has jurisdiction over her claims when brought as a proposed intervenor. See, e.g., *Brown v. Eckard Drugs, Inc., 663 F.2d 1278 (4th Cir. 1981),* [**37] vacated on other grounds, *457 U.S. 1128 (1982)* (class member permitted to intervene in employment discrimination class action); *McNeill v. New York City Housing Auth., 719 F. Supp. 233, 250-51 (S.D.N.Y. 1989)* (permissive intervention granted because applicants presented identical legal claims to those of plaintiffs even though circumstances of intervenors' claims were different from those of original plaintiffs). n6

n6 Common questions of law and/or fact for purposes of intervention arise frequently in the class action context, and Rule 23 "expressly anticipates that class members may wish to intervene as named parties . . . ." See 6 Moore's Fed. Practice § 24.11.

[*30] **Conclusion**

For the reasons set forth above, Cronas respectfully requests that the Court reverse the November 30, 2006 memorandum and order and instruct the District Court to permit Cronas to intervene in the Hnot litigation as a named plaintiff.

Dated: New York, New York
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Respectfully [**38] submitted,

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TRACY HARRY

Dated: February 15, 2007

CERTIFICATION PURSUANT TO

Fed. R. App. P. 32(a)(7)(B) and (C)

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation of *Fed. R. App. P. 32(a)(7)(B)* and (C) because the brief contains 6565 words of text.

The brief [**39] complies with the typeface requirements of *Fed. R. App. P.32(a)(5)* and the type style requirements of *Fed.R.App.P.32(a)(6)* because this brief was prepared in a proportionally spaced typeface using Word Perfect 12, Times New Roman, Size 14.

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Dated: February 15, 2007