SHELLY HNOT and HEIDI SCHELLER, on behalf of themselves and all similarly situated persons, Plaintiffs, - against - WILLIS GROUP HOLDINGS, LTD., WILLIS OF NORTH AMERICA INC., WILLIS OF NEW YORK, WILLIS OF NEW JERSEY, WILLIS OF MASSACHUSETTS, Defendants-Appellees. - against - ADRIANNE CRONAS, Intervenor-Plaintiff-Appellant.

06-5761-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

March 19, 2007

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

Initial Brief: Appellee-Respondent

COUNSEL: [**1] PROSKAUER ROSE LLP, Attorneys for Defendants-Appellees, 1585 Broadway, New York, New York 10036-8299, (212) 969-3000.

Of Counsel: Bettina B. Plevan (BP-7460).

DISCLOSURES: CORPORATE DISCLOSURE STATEMENT

Pursuant to *Rule 26.1 of the Federal Rules of Appellate Procedure* and to enable judges of the Court to evaluate possible disqualification or recusal, the undersigned attorney of record for defendants-appellees hereby certifies that Willis of New York, Inc., Willis of New Jersey, Inc., and Willis of Massachusetts, Inc. are indirect subsidiaries of Willis North America Inc., which is an indirect subsidiary of Willis Group Holdings Ltd., and no publicly held company owns 10% or more of Willis Group Holdings Ltd.'s stock.

Respectfully submitted,

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TITLE: BRIEF OF DEFENDANTS-APPELLEES

TEXT: PRELIMINARY STATEMENT

Appellant Adrianne Cronas ("Cronas") has failed to cast any doubt on the propriety of the district court's denial of her motion to intervene in a five-year old class action suit. The district court did not abuse its discretion in ruling that Cronas' motion was untimely and "would constitute substantial prejudice" to defendants-appellees Willis Group Holdings Ltd., Willis North America Inc., Willis of Massachusetts, Willis of New Jersey, and Willis of New York ("Willis"). [**9] (A152). n1

n1 Cronas' Appendix is cited as "A" followed by the page number(s). Cronas' brief on appeal is cited as "Cronas Br."

The undisputed evidence shows that Cronas filed her motion to intervene more than five years after the litigation commenced, two and a half years after the close of fact discovery and one and a half years after class certification.

Cronas also sought to re-open and expand discovery to additional time periods, a request previously made by the named plaintiffs and denied by the district court. By this appeal Cronas in effect asks this Court to reverse that docket management decision which, of course, is unappealable. Cronas also sought to assert individual and class claims not part of the original suit that would greatly expand the scope of the case. Under these circumstances, there is no support for Cronas' contention that the district court abused its discretion in denying her motion to intervene.

[*2] **COUNTERSTATEMENT OF ISSUES PRESENTED**

1. Whether the district [**10] court abused its discretion when it denied Cronas' motion to intervene as a matter of right under *Federal Rule of Civil Procedure 24(a)(2)* because it was both untimely and highly prejudicial to Willis.

2. Whether the district court abused its discretion when it denied Cronas' motion for permissive intervention pursuant to *Federal Rule of Civil Procedure 24(b)(2)* because it was both untimely and highly prejudicial to Willis.

3. Whether this Court may disturb the district court's docket management decision to prohibit post-2001 discovery by ruling that the district court abused its discretion in denying Cronas' motion to intervene.

[*3] **COUNTERSTATEMENT OF THE CASE**

The initial class action complaint in this case, Hnot v. Willis Group Holdings Ltd., 01 Civ. 6558 (GEL) ("Hnot class action"), was filed in July 2001. On March 21, 2005, the Honorable Gerard E. Lynch certified a Rule 23(b)(2) class encompassing "all current and former female employees who have been employed by [Willis] in positions eligible for the award of officer titles between 1998 and 2001." See *Hnot v. Willis Group Holdings Ltd., 228 F.R.D. 476* (S.D.N.Y. March 21, 2005) [**11] (internal quotations omitted). Nearly eight months later, the Hnot plaintiffs moved to modify the class certification order to include female officers employed from 2001 to the time of trial and to re-open discovery, which had closed two and a half years earlier pursuant to the case management plan. On the heels of that motion, Cronas filed her motion to intervene on August 1, 2006 similarly seeking, *inter alia,* to expand the class period from December 31, 2001 to the date of trial. On August 17, 2006, the district court denied the Hnot plaintiffs' motion to extend the class period and refused to re-open fact discovery. (A73). No appeal was or could be taken from that decision.

On November 30, 2006 the district court denied Cronas' motion to intervene as a class representative, concluding that the motion was untimely and that granting Cronas' motion would substantially prejudice Willis. More specifically, the district court determined that Cronas' "fourteen-month delay in filing a motion [*4] to intervene would weigh heavily against a finding of timeliness." (A151). The district court noted that Cronas "repeatedly emphasizes . . . that her rights cannot be protected without [**12] an expansion of the class period, and that the purpose of her motion is to ensure both that the class is extended and that additional discovery is forthcoming." (A152 n.1). Paying particular attention to the lawsuit's age and the late stage to which it had progressed, the court ruled that "[g]ranting Cronas's motion would effectively require the Court to start from square one with respect to the post-2001 claims, and a final resolution of the claims pertaining to the 1998-2001 period would likely be delayed for many more months, if not years." (A151-152). The court held that "[t]his delay would constitute substantial prejudice to defendants, who have a legitimate interest in the expeditious resolution of claims that have been pending against them for more than half a decade." (A152).

The district court weighed the prejudice to both parties "in light of all the circumstances" and found the prejudice to Willis caused by the delay far outweighed any prejudice to Cronas. (A153). In fact, the court noted that Cronas remained free to file a separate action against Willis, which she promptly did shortly after the court's decision.

[*5] **COUNTERSTATEMENT OF FACTS**

The long-running [**13] employment discrimination class action Cronas seeks to join was filed in July 2001 by five female employees and former employees with Willis. Two plaintiffs remain and the case is set for trial on June 11, 2007. The Complaint, which alleges a pattern and practice of discrimination under Title VII, *42 U.S.C. § 2000e* and *42 U.S.C. § 1981a (A76)*, has been amended twice (first in October 2001 and later in September 2004). n2 Fact discovery was conducted for two and a half years, including 17 depositions, production of over 35,000 pages of hard-copy documents and 75,000 e-mails. Expert discovery was conducted, including the depositions of the parties' statistical experts and the issuance of numerous statistical reports. Finally, multiple motions have been filed and decided by the district court. n3 (A6-25).

n2 Cronas has never disclosed when she first learned of the Hnot class action.

n3 The motions include: motions seeking nationwide discovery (decided November 13, 2002 and January 9, 2004); motion to re-open the depositions of three witnesses (decided March 24, 2004); motion to amend the Complaint to add claims under New York, New Jersey and Massachusetts state law (decided August 10, 2004); class certification motion (decided March 18, 2005); summary judgment dismissing in part the individual claims of Shelley Hnot and Heidi Scheller (decided April 10, 2005); appeal of the class certification order (decided September 15, 2005); summary judgment dismissing the state law claims of Heidi Scheller (decided July 26, 2006); and motion to extend the class period (decided August 17, 2006).

[**14]

Cronas was employed by defendant Willis of New York, Inc. from September 1996 until her discharge in June 2004. (A46, 50). She was hired with the officer title of Vice President and in 1999 was promoted to Senior Vice [*6] President. (A46-47). Cronas is thus a member of the certified class in the Hnot class action and will receive whatever relief, if any, is secured for the class members at trial.

On August 1, 2006 (more than five years after the initial complaint was filed) Cronas sought to intervene as a class representative in the Hnot class action. Cronas' Complaint in Intervention asserts a number of individual claims, and purports to allege new claims on behalf of a purported class. Cronas' individual claims include: failure to promote her to the position of Regional Environmental Practice Leader in 1998; failure to provide Cronas with stock options in 1998 and 2001-2003; demotion from her management position in 2004; and discharge in 2004. (A47-51). Cronas never filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") but purported to rely on the EEOC charges filed by class representatives Shelley Hnot and Heidi Scheller in order to intervene [**15] and to revive her time-barred individual claims under Title VII and to assert post-2001 class claims. (A*39 P 4).*

Cronas' Complaint in Intervention also adds many new class action allegations not asserted during the five years of litigation. For example, Cronas asserts discrimination concerning the award of stock options, adds new allegations to the class promotion claim relating to hiring males not employed by Willis rather than promoting allegedly qualified females from within and adds new class claims [*7] for disparate impact and retaliation under New York and New York City law, all which were not asserted in the Hnot class action Complaint. (A42-44). The Complaint in Intervention also sought to expand the definition of officers (defined in the Hnot class action Complaint as "Assistant Vice President, Vice President and Senior Vice President") to include also "Executive Vice President, Regional Vice President, Director, Chief Operating Officer, and Chief Executive Officer." (A*38 P 1).*

Most significantly, Cronas sought to assert class claims for the post-2001 period even though the class certification order only certified a class for a period ending [**16] in 2001. (A*44 P 20).* Indeed, Cronas' intervention motion depended largely on her ability to extend the class period beyond 2001 and to obtain the pretrial discovery needed to prove such a claim, a request already denied by the district court.

On November 30, 2006, the district court denied Cronas' motion to intervene as untimely and highly prejudicial to Willis. (A152-153).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying Cronas' motion to intervene as a class representative because she did not satisfy the standard for intervention as a matter of right under Rule 24(a) or permissive intervention under [*8] Rule 24(b). The district court did not abuse its discretion in concluding that Cronas' proposed intervention was both untimely and highly prejudicial to Willis, the two most important criteria for evaluating intervention pursuant to either Rule 24(a) or Rule 24(b).

The motion to intervene, brought more than five years after litigation commenced, two and a half years after the close of non-expert discovery and one and a half years after class certification, was the epitome of untimeliness. It is thus astonishing that Cronas [**17] asserts that her motion to intervene was timely and that intervention will not inconvenience the parties. To the contrary, Cronas' intervention will subject the parties in the Hnot case to substantial additional discovery and motion practice that will further delay resolution of the Hnot class action. Because Cronas' Complaint in Intervention includes individual claims and new class claims, an expanded definition of the class and, most significantly, an expansion of the class period, granting the motion would delay the Hnot class action for years.

The entire premise of Cronas' motion to intervene was totally undermined by the district court's August 17, 2006 decision, in which the court rejected the Hnot plaintiffs' request to conduct discovery for the post-2001 period and expand the class period. As the district court held, granting additional discovery would "disrupt defendants' (and the

Court's) reasonable understanding that non-expert [*9] discovery in this case had been closed in all material respects for over two years." (A70).

Accordingly, the district court did not abuse its discretion in denying Cronas's motion to intervene in this action.

[*10] **ARGUMENT** [**18]

POINT I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING CRONAS' MOTION TO INTERVENE AS A MATTER OF RIGHT UNDER *FEDERAL RULE OF CIVIL PROCEDURE 24(a)*.

Pursuant to Rule 24(a)(2), to intervene as of right Cronas was required to demonstrate that: (1) the application was timely; (2) she had an interest in the action; (3) her interest may be impaired by the disposition of the action; and (4) her interest was not adequately protected by the parties to the action. *FED. R. CIV. P. 24(a)(2)*; *Brennan v. N.Y. City Bd. of Educ., 260 F.3d 123, 128-129 (2d Cir. 2001); Diduck v. Kaszycki & Sons Contractors, Inc., 149 F.R.D. 55, 58 (S.D.N.Y. 1993); United States EEOC v. Trans World Airlines, Inc., No. 86 Civ. 9381, 1991 U.S. Dist. LEXIS 11047,* at *2 (S.D.N.Y. Aug. 7, 1991); *Mrs. W. v. Tirozzi, 124 F.R.D. 42, 44 (D. Conn. 1989).* The party moving to intervene bears the burden of proof. *Diduck, 149 F.R.D. at 58.*

Cronas has not met this burden and, accordingly, the district court did not abuse its discretion in denying Cronas' motion to intervene. See *Marble Hill Oneida Indians v. Oneida Indian Nation, 62 Fed. App'x 389 (2d Cir. 2003)* [**19] (finding no abuse of discretion in the district court's decision to deny motion to intervene because the court's decision did not include an error of law or a clearly erroneous factual finding); *Patricia Hayes & Assocs. v. Cammell Laird Holdings* [*11] *U.K., 339 F.3d 76, 80 (2d Cir. 2003)* (quoting *Am. Sav. Bank, FSB v. UBS PaineWebber, Inc., 330 F.3d 104, 108 (2d Cir. 2003)* (the district court did not abuse its discretion in denying motion to intervene and noting that a district court abuses its discretion only when the court's decision "rests on an error of law ... or a clearly erroneous factual finding, or [] its decision - though not necessarily the product of a legal error or a clearly erroneous factual finding - cannot be located within the range of permissible decisions").

A. The District Court Did Not Abuse Its Discretion In Concluding That Cronas' Motion Was Untimely.

The district court did not abuse its discretion in determining that Cronas' motion was untimely because it correctly considered all of the factors "in light of all the circumstances" in the case. (A153). The Supreme Court ruled in *NAACP v. New York, 413 U.S. 345, 366 (1973),* [**20] that "[t]imeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." Cronas' motion to intervene in an action commenced more than five years before was untimely by any measure.

The date from which to measure timeliness is the date when Cronas learned of her interest in this case, which is the date when she learned a class action was filed. The Second Circuit has consistently stated that "the date on which the proposed intervenor learns of his or her *interest* in the litigation is of primary [*12] importance in the timeliness inquiry." See, e.g., *In re Bank of New York Derivative Litig., 320 F.3d 291, 300 (2d Cir. 2003); In re Holocaust Victim Assets Litig., 225 F.3d 191, 198 (2d Cir. 2000); Catanzano by Catanzano v. Wing, 103 F.3d 223, 232 (2d Cir. 1996); United States v. Pitney Bowes, Inc., 25 F.3d 66, 70 (2d Cir. 1994).* The date on which Cronas learned of her interest in this case would have been the date when she learned that a class action [**21] suit was filed. See *Iridium India Telecom Ltd. v. Motorola, Inc., 165 Fed. App'x 878, 880 (2d Cir. 2005)* (affirming district court's denial of motion to intervene as untimely finding movant "was aware or should have been aware of the adversarial proceeding when it was instituted").

Tellingly, Cronas has failed to disclose the date when she first learned of this class action lawsuit. Instead, she refers only to the date when her counsel learned of the class certification order. This Court should draw an adverse inference from Cronas' concealment and assume that she learned of the suit when it was filed in 2001. See *United States v. Vitagliano, 86 Fed. App'x 470, 473 (2d Cir. 2004)* (concluding that a proper factual predicate supported the district court's jury instruction that an adverse inference could be drawn from appellant's silence); *LiButti v. United States, 178 F.3d 114, 120 (2d Cir. 1999)* ("An adverse inference may be given significant weight because silence when one would be expected to speak is a powerful persuader"); *United States v. Tocco, 135 F.3d 116, 128-29 (2d* [*13] *Cir. 1998)* ("[a]bsent circumstances [**22] that render it more probable that a person would not respond to an accusation against him than that he would, such person's silence or other ambiguous conduct is admissible as an adoptive admission under *Fed. R. Evid. 801(d)(2)(B)*"), cert. denied, *523 U.S. 1096.* The district court recognized that "[Cronas'] omission is no mere oversight" because Cronas failed to correct the omission in her reply papers after defendants explicitly raised the

issue. (A148). This Court should therefore infer that Cronas knew of this action long before the class was certified, making her motion untimely by many years.

However, even if the delay is measured from the date when her counsel learned of the class decision in May 2005, the district court did not abuse its discretion in concluding that Cronas unduly delayed making her application. n4 Cronas acknowledges that she had notice of the certified class in May 2005 and delayed more than fourteen months before filing her motion to intervene. (A149). Cronas herself had engaged counsel when her employment was terminated in June 2004. (A*60 P 7).* Accordingly, she was advised by counsel and well aware of her rights over two [**23] years prior to her filing.

n4 The district court found that "to the extent that Cronas is correct in maintaining that the relevant date for purposes of determining timeliness is the date on which she learned that the current litigation would not fully and adequately protect her interests in pursuing post-2001 claims, that date was sometime in May 2005, about fourteen[] months before she filed her motion to intervene." (A149-150).

[*14] Courts have routinely denied intervention where the delay in moving to intervene was comparable to, or even shorter than, fourteen months. See e.g., *In re Holocaust Victim Assets Litig., 225 F.3d at 198-99* (applicant delayed eight months); *Catanzano, 103 F.3d at 232-33* (applicant delayed at least eighteen months); *Pitney Bowes, 25 F.3d at 71* (applicant had constructive knowledge of interest fifteen months prior to motion to intervene and actual knowledge for eight months); *Jones v. Richter, No. 97 Civ. 0291E, 2001 U.S. Dist. LEXIS 4228,* [**24] at *6 (W.D.N.Y. Apr. 3, 2001), aff'd without op., *No. 01 Civ. 7538, 2002 U.S. App. LEXIS 13340* (2d Cir. May 21, 2002) (applicant had actual knowledge of litigation for eight months prior to submitting application to intervene); *Rhodes v. Ohse, No. 97 Civ. 17, 1998 U.S. Dist. LEXIS 18376,* at *5-6 (N.D.N.Y. Oct. 30, 1998) (applicant learned of litigation fourteen months prior to moving to intervene). See also *United States v. Blaine County, Montana, 37 Fed. App'x 276, 278 (9th Cir. 2002)* (intervention denied where it would result in "inevitable delay" since discovery had been completed); *Smith v. Marsh, 194 F.3d 1045, 1050-51 (9th Cir. 1999)* (intervention untimely where filed at "a late stage in the proceedings," after significant discovery completed, substantive motions filed and decided, and class certified); *Caterino v. Barry, 922 F.2d 37, 39-41 (1st Cir. 1990)* (intervention untimely where motion made three years after action commenced, one year after [*15] discovery closed, after class certification granted and after substantive motions had been decided).

Cronas' argument that until the district [**25] court's August 17, 2006 ruling, "[she] 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 set forth in plaintiff's complaint and motion for class certification and extend beyond 2001" is simply not consistent with the facts. (Cronas Br. at 24). Cronas cannot claim she had a "good faith" basis when she admits that as early as May 2005 she knew of the district court's March 2005 certification decision limiting the class period from 1998 to 2001. (A149). As the district court unmistakably explained, the August 2006 decision "did not change *anything*" and merely "maintained the status quo by re-affirming the March 2005 holding that the class only encompasses employees employed from 1998-2001, and by re-affirming that fact discovery had closed in February 2004." (A150). In May 2005 (and earlier), "Cronas could and should have learned through reasonable diligence that the class, as certified by the [district] Court, only encompassed employees who had worked for Willis from 1998 through 2001." (A 149). Indeed, Cronas should have known that the class "could not possibly have encompassed the [**26] entire period during which [she] alleges discriminatory acts by [Willis]" because fact discovery was completed on or about February 28, 2004 pursuant to the publicly available November 2003 scheduling [*16] order. (A149). Therefore, Cronas should have known that the certified class did not include post-2001 claims and is properly accountable for the fourteen month delay.

Accordingly, the district court did not abuse its discretion in ruling Cronas' motion to intervene was untimely due to her extensive, unjustified delays.

B. The District Court Did Not Abuse Its Discretion In Concluding That Willis Would Be Prejudiced If Cronas Intervened.

In assessing the timeliness of a motion to intervene, courts also consider (i) prejudice to the existing parties resulting from any delay, (ii) prejudice to the applicant if the motion is denied, and (iii) any unusual circumstances militating for or against a finding of timeliness. See *D'Amato v. Deutsche Bank, 236 F.3d 78, 83-84 (2d Cir. 2001); Farmland Dairies v. Comm'r of New York State Dep't of Agric. & Mkts., 847 F.2d 1038, 1044 (2d Cir. 1988); Thompson v. Metro. Life Ins. Co., 216 F.R.D. 55, 69 (S.D.N.Y. 2003).* [**27] The district court did not abuse its

discretion in concluding that Willis, who has already spent significant time and resources litigating this action for more than half a decade, will suffer significant prejudice if Cronas is permitted to intervene to assert additional claims because of the inevitable delay in the Hnot class action proceedings due to the significant discovery requested. (A152). Moreover, the district court did not abuse its discretion because Willis will also be prejudiced if Cronas intervenes to assert claims which are time-barred and subject to mandatory arbitration.

[*17] **1. The District Court Did Not Abuse Its Discretion In Concluding That Willis Would Be Prejudiced By The Inevitable Delay In The Proceedings If Cronas Intervened.**

Willis would certainly face significant prejudice if intervention is permitted because Willis will be compelled to engage in discovery for Cronas' newly asserted class claims as well as the many new individual claims articulated in her Complaint in Intervention. Courts have routinely denied intervention when it will unduly delay the underlying action. See *United States v. Visa U.S.A., Inc., 98 Civ. 7076, 2000 U.S. Dist. LEXIS 11872* [**28] at *4 (S.D.N.Y. Aug. 17, 2000) (denying motion to intervention were new discovery, evidence, and legal issues would unduly delay the resolution of the case); *Trans World Airlines, Inc., 1991 U.S. Dist. LEXIS 11047,* at *4 (intervention "would undoubtedly prejudice" defendant since a "massive amount of discovery" had already been completed); *Mrs. W., 124 F.R.D. at 45* (intervention would delay the action in the form of pleadings and discovery regarding the factual bases for the intervenor's claims). See also *Johnson v. City of Memphis, 73 Fed. App'x 123, 133 (6th Cir. 2003)* (intervention will unduly delay proceedings given that extensive litigation has already occurred and intervenors would have to be given additional time to conduct discovery, file motions and respond to parties' prior pleadings); *Smith, 194 F.3d at 1051* (upholding district court's denial of motion to intervene where intervenors sought to inject new issues and matters thereby expanding the scope of the litigation and [*18] causing delay); *Oscar Private Equity Invs. v. Holland, No. 03 Civ. 2761, 2004 U.S. Dist. LEXIS 19485,* at *12 [**29] (N.D. Tex. Sept. 29, 2004) (where intervenor sought to become named class representative, "intervention would result in undue delay and unnecessary prejudice to the Defendants" because case would be delayed to conduct discovery concerning intervenors and no evidence exists that current class representative was inadequate).

Cronas' claims are for the post-2001 period, which the district court previously precluded based, among other things, on the prejudice to Willis and the court by the inevitable delay. (A70). For these claims to be considered, the parties would need to exchange document requests and interrogatories, negotiate and conduct new electronic searches on the e-mail accounts of Willis' employees, conduct statistical analyses of the new post-2001 class claims, and conduct a number of depositions, including several witnesses who were already deposed in this action. (A*60 P 9).* The district court recognized that "[t]he burdens that would be imposed by plaintiffs' discovery request [] are not trivial." (A70). Even under a conservative estimate, "the production of the requested computer database information could require 250 hours of work." (A70). Accordingly, [**30] further delaying the proceedings would severely prejudice Willis, which continues to seek an expeditious resolution of the Hnot class claims.

[*19] Cronas' avowed purpose for intervening was to assert post-2001 claims. n5 The district court had already concluded that the Hnot class action, which had been certified as to female Willis officer employees from 1998-2001, would not be expanded beyond 2001 and that no post-2001 discovery would be permitted. The district court astutely observed that, "[t]he delay in final resolution of the 1998-2001 claims might be minimized, of course, if Cronas were permitted to intervene but not permitted to re-open discovery or to expand the temporal scope of the class beyond 2001. It is clear from Cronas' motion papers, however, that she does not seek intervention on those terms." (A152 n.1). Thus, Cronas should not, through the vehicle of intervention, be permitted to secure in this action data for the post-2001 period because the district court has already denied the exact same request by the Hnot plaintiffs. (A73).

n5 Cronas' stated purpose in intervening was "'to ensure that her rights and those of similarly situated women who were employed *after 2001* are adequately protected.'" (A146 quoting Cronas' Mem. of Law).

[**31]

Because Cronas' stated purpose in intervening is to re-open discovery for the post-2001 period, reversal of the district court's denial of Cronas' motion to intervene would effectively handcuff the district court's ability to manage its own docket. It is well established that a district court is afforded broad discretion to manage its own docket. See *Hakim v. Leonhardt, No. 03 Civ. 9069, 2005 U.S. App. LEXIS 4373* at **3 (2d Cir. March 16, 2005) ("[w]e are loath to meddle in a [*20] district court's docket management decisions"); *Limonium Maritime, S.A. v. Mizushima Marinera, S.A., Nos. 99 Civ. 7219, 99 Civ. 7249, 1999 U.S. App. LEXIS 30447* at *3 (2d Cir. Nov. 18, 1999) ("[a]s a general rule, 'we are

very reluctant to interfere with district judges' management of their very busy dockets.'") (quoting *Whiting v. Lacara, 187 F.3d 317, 320 (2d Cir. 1999)).* Permitting Cronas to intervene and thereby re-open discovery on the post-2001 claims directly contradicts the district court's previous refusal to expand the class, a decision that was well within the court's broad discretion.

A further delay of the trial to allow discovery [**32] as to the post-2001 claims would unduly prejudice Willis. Originally filed in July 2001, the case is finally set for trial on June 11, 2007. Further delaying the final resolution of this case would be severely prejudicial because of the potential loss of memory as to facts in a case that is more than five years old and deals with events for several years before that. See *Newsome v. Brown, No. 01 Civ. 2807, 2005 U.S. Dist. LEXIS 4088,* at *22 (S.D.N.Y. March 16, 2005) ("'[e]videntiary prejudice includes things such as lost, stale, or degraded evidence, or witnesses whose memories have faded or who have died.'") (quoting *Danjaq LLC v. Sony Corp., 263 F.3d 942, 955 (9th Cir. 2001)),* aff'd, No. 05 Civ. 4735, 2006, U.S. App. 30979 (2d Cir. Dec. 12, 2006); *Forest Labs., Inc. v. Abbott Labs., No. 96 Civ. 159-A, 1999 U.S. Dist. LEXIS 23215,* at * 25 (W.D.N.Y. June 23, 1999) ("[e]videntiary prejudice occurs where an alleged [*21] infringer is unable 'to present a full and fair defense on the merits, due to the loss of records, the death of a witness, or the unreliability of memories of long past events.'") (quoting *A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1033 (Fed. Cir. 1992)),* [**33] aff'd, *239 F.3d 1305 (Fed. Cir. 2001); United States v. Blaustein, 325 F. Supp. 233, 238 (S.D.N.Y. 1971)* ("[p]rejudice to the defendants because of the long unjustified delay in bringing this case to trial 'may fairly be presumed simply because everyone knows that memories fade, evidence is lost, and the burden of anxiety upon any criminal defendant increases with the passing months and years.'") (quoting *United States v. Mann, 291 F. Supp. 268, 271 (S.D.N.Y. 1968)).*

In light of the foregoing, the district court did not abuse its discretion by considering the age of the lawsuit and the late stage to which it has progressed in concluding Willis will be substantially prejudiced if Cronas' motion is granted. (A151).

2. The District Court Did Not Abuse Its Discretion Because Willis Will Be Prejudiced If Compelled To Litigate Cronas' Claims For Which No Discovery Has Been Conducted.

Willis will be prejudiced if Cronas is permitted to intervene because they will be compelled to litigate new class claims, for which no discovery has been conducted. The parties' statistical experts have not analyzed these claims and class certification [**34] was granted without consideration of these claims. Assertion of these [*22] claims would thus substantially and further delay these proceedings. Cronas' new class claims include: a claim for stock option awards (compare A42 P 19(i) with A79 P 20); a modified promotion claim (compare A43 P 19(ii)(a) with A80 P 21(a)); new state law claims (A54-55); and a new class definition (compare A38P 1 with A75 P 1, A78 P 16).

If this Court overturns the district court's decision and grants Cronas' motion to intervene, Willis may also be compelled to litigate Cronas' individual claims, for which no discovery has been conducted. Cronas' individual claims include: failure to award stock options in 1998 and later years; failure to promote to certain management positions; demotion; and discharge. (A46-51). For these claims to be considered, the case will be substantially delayed because the parties will need to exchange document requests and interrogatories, negotiate and conduct new electronic searches on the e-mail accounts of Willis' employees, and conduct several depositions, including the deposition of Cronas.

3. The District Court Did Not Abuse Its Discretion [**35] **Because Willis Will Be Prejudiced If Cronas Intervenes To Assert Her Time-Barred Claims.**

Willis will be prejudiced if Cronas intervenes to assert federal claims in this action because they are time-barred. Cronas is not entitled to take advantage of the "single filing rule" to assert post-2001 class claims or other claims not part of the Hnot class action. The rule permits individuals who failed to file EEOC Charges [*23] to join an action if their individual claims "arise out of similar discriminatory treatment in the same time frame" as those plaintiffs who have filed administrative charges. *Snell v. Suffolk County, 782 F.2d 1094, 1100-01 (2d Cir. 1986)* (internal citations omitted). Unrelated claims included in an intervention complaint would be dismissed as well. See *Baker v. Nat'l R.R. Passenger Corp., No. 94 Civ. 0856, 1994 U.S. Dist. LEXIS 18275,* at *10-11 (S.D.N.Y. Dec. 21, 1994) (dismissing claims of plaintiffs who failed to file EEOC Charges to the extent their claims did not arise out of the events set forth in the EEOC Charge of the filing plaintiff). See also *Pauling v. Sec'y of the Dep't of Interior, 960 F. Supp. 793, 802-03 (S.D.N.Y. 1997)* [**36] (finding that plaintiff who did not file administrative charge could not take advantage of "single filing" rule because his claims were not sufficiently similar to those of the co-plaintiffs where plaintiffs worked in different departments, complained about different supervisors and identified different wrongs); *Fields v. New York State Office of Mental Retardation & Dev. Disabilities, 164 F.R.D. 313, 316 (N.D.N.Y. 1995)* (dismissing claims of intervening plaintiff because intervenor's complaint did not arise out of same circumstances and time frame as plaintiff's

administrative charge and finding that applicant was attempting to intervene "to circumvent his failure to file with the EEOC").

Cronas' individual claims of failure to provide stock option awards, demotion and termination are not similar to the class claims of gender [*24] discrimination in compensation and officer-level promotions. Moreover, the vast majority of Cronas' individual claims concern events in the post-2001 time period and are, therefore, not in the same time frame as the Hnot class claims. Thus, the district court did not abuse its discretion by denying Cronas' motion to intervene to assert [**37] her time-barred claims.

4. The District Court Did Not Abuse Its Discretion Because Willis Will Be Prejudiced If Cronas Intervenes to Assert Her Claims Which Are Subject To Mandatory Arbitration.

The district court did not abuse its discretion because Cronas may only pursue her claims through arbitration. Cronas is party to an Employment Agreement with defendant Willis of New York, Inc. (as successor to Willis Corroon Corporation of New York), which requires that "any dispute arising under this Agreement shall be resolved by arbitration" under the American Arbitration Association's Commercial Arbitration Rules. n6 (A98-101). Cronas' agreement to arbitrate is governed by the Federal Arbitration Act ("FAA"), *9 U.S.C. § 1* et seq. The FAA "establishes an 'emphatic' national policy favoring arbitration which is binding on all courts, State and Federal." *Singer v. Jefferies & Co., 78 N.Y.2d 76, 81* [*25] *(1991)* (citing, inter alia, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)).*

n6 Cronas' Employment Agreement provides that New Jersey law applies to any claims relating to her employment. (A98-101) Under New Jersey's two year limitations period pursuant to the New Jersey Law Against Discrimination, her state law claims are time-barred. See *Shepard v. Hunterdon Dev. Ctr., 174 N.J. 1, 20-21, 803 A.2d 611, 621-23 (N.J. 2002).* Even if, as alleged in her Complaint, New York law applies to Cronas' individual claims, under New York's three year limitations period, Cronas' only timely claim would relate to her alleged demotion in March 2004 and her discharge, which occurred in June 2004. See *Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 307, 461 N.Y.S. 2d 232, 238-9 (1983).* Regardless, her individual claims would be subject to mandatory arbitration pursuant to her Employment Agreement.

[**38]

Title VII and state law claims - like the claims asserted by Cronas - are not subject to a general legislative exception to arbitrability. See *Desiderio v. NASD, Inc., 191 F.3d 198, 204-5 (2d Cir. 1999),* cert. denied, *531 U.S. 1069 (2001); Chanchani v. Salomon/Smith Barney, Inc., No. 99 Civ. 9219, 2001 U.S. Dist. LEXIS 2036,* at *16 (S.D.N.Y. Feb. 28, 2001); *Gonzalez v. Toscorp Inc., No. 97 Civ. 8158, 1999 U.S. Dist. LEXIS 12109,* at *10-11 (S.D.N.Y. Aug. 5, 1999); *Friedman v. Metro. Life Ins. Co., No. 95 Civ. 10096, 1996 U.S. Dist. LEXIS 19889,* at *5 (S.D.N.Y. June 18, 1996). As such, her claims must be arbitrated. n7

n7 When a party to an arbitration agreement asserts arbitrable claims in a judicial forum which fall within the scope of the agreement, the FAA requires the Court to compel arbitration. *9 U.S.C. §§ 3* and *4* (1970); *Shearson/Am. Express v. McMahon, 482 U.S. 220, 226 (1987); Dean Witter Reynolds v. Byrd, 470 U.S. 213 (1985); Nelsen v. Colleary, 152 Misc. 2d 81, 83, 574 N.Y.S.2d 912, 914 (N.Y. Sup. Ct. 1991).* Accordingly, even if Cronas' motion to intervene was granted, her claims must be compelled to arbitration.

[**39]

Courts in this Circuit have compelled discrimination claims to arbitration where plaintiffs had employment agreements with broad, mandatory arbitration clauses similar to the provision contained in Cronas' Employment Agreement. See *Oldroyd v. Elmira Sav. Bank, 134 F.3d 72, 74 (2d Cir. 1998)* (compelling to arbitration claims of retaliatory discharge where plaintiff's employment agreement contained an arbitration clause providing that "[a]ny dispute, controversy or claim arising under or in connection with this Agreement shall be settled exclusively by [*26] arbitration"); *Powers v. Fox TV Stations, Inc., 923 F. Supp. 21, 22 (S.D.N.Y. 1996)* (compelling to arbitration age discrimination claims where plaintiff's employment contract provided that, "[a]ll disputes and controversies of every kind and nature arising out of or in connection with this agreement shall be determined by arbitration"). See also *Elwell*

v. Google, Inc., No. 05 Civ. 6487, 2006 U.S. Dist. LEXIS 3114, at *2-3 (S.D.N.Y. Jan. 30, 2006) (compelling to arbitration claims of pregnancy discrimination and retaliation where plaintiff's employment agreement provided [**40] that "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").

Accordingly, the district court did not abuse its discretion because Willis will be prejudiced if Cronas intervenes to assert claims which may only be pursued in arbitration.

C. The District Court Did Not Abuse Its Discretion In Concluding That Cronas Would Not Be Prejudiced If Required To Proceed In A Separate Proceeding.

Cronas contends the district court abused its discretion by not considering the "unnecessary and undue burden and expense" of a separate action and the "reasonable chance" that she will be unable to bring a separate action to vindicate her post-2001 rights. (Cronas Br. at 27-8).

[*27] This Court has held that the burden and expense of filing a separate action does not constitute prejudice to the intervenor. See *In Re Holocaust Victim Assets Litig., 225 F.3d 191, 199 (2d Cir. 2000)* ("[b]ecause appellants remain free to file a separate action, they have not established that they will be prejudiced if their motion to intervene is denied"); *SEC v. Everest Mgmt. Corp., 475 F.2d 1236, 1239 (2d Cir. 1972)* [**41] (rejecting proposed intervenors' argument that they would be prejudiced by a denial of their motion because "they [would] be required to bear the financial burden of duplicating the SEC's efforts"). In In Re Holocaust Victim Assets Litig., this Court upheld the district court's denial of six Ethnic Poles' motion to intervene in a class action against foreign banks for participating in crimes committed by the Nazi regime. This Court rejected the applicants' argument that they would be prejudiced if forced to bring a separate lawsuit finding "[the] potential obstacles to the pursuit of an independent lawsuit do not 'impair or impede the applicant's ability to protect [its] interest,' to an extent warranting intervention as of right." Id. quoting *FED. R. CIV. P. 24(a)(2)*.

The expenses of litigating Cronas' post-2001 claims are inevitable. Whether incurred in this lawsuit or as a part of a separate action, Cronas cannot claim that there will be any difference in the litigation costs. Moreover, Cronas' inability to bring a class claim on behalf of others does not constitute prejudice because she remained free to file a separate lawsuit against Willis. Thus, not only is Cronas' [**42] [*28] claim of prejudice unavailing, but it is also misplaced, as evidenced by the fact that she promptly filed a separate action against Willis within three weeks of the district court's decision.

Cronas argues prejudice because she currently faces a motion to dismiss in that action. Although Cronas properly concedes that her claims are time-barred and subject to arbitration, her contention that this constitutes prejudice is unavailing because these defenses would be properly asserted in response to her Complaint in Intervention. Indeed, Willis still maintains that Cronas cannot use the "single-filing rule" to intervene in this action and that her claims are subject to a broad arbitration clause. (see supra at pp. 22-26). Thus, the district court did not abuse its discretion by ruling that the prejudice to Willis outweighed the prejudice to Cronas. (A153).

D. The District Court Did Not Abuse Its Discretion Because Cronas' Interests Are Adequately Protected By The Hnot Plaintiffs.

Cronas' only claim of impaired interest is based on the district court's decision to limit the scope of the Hnot class to the period ending 2001. Cronas does not contend that the [**43] existing class representatives and their attorneys have failed to protect her interests for the certified class period of 1998-2001, or that her interests are impaired for the class period. In fact, there is a presumption of adequate representation "that arises when an applicant has the same ultimate objective as the original parties." *Mrs. W., 124 F.R.D. at 44.*

[*29] Cronas contends her interests are not adequately protected and her interests are impaired because the parties have not engaged in discovery for the post-2001 period. (Cronas Br. at 20, 26). Specifically, Cronas argues that she will face "huge obstacles" in proving discrimination claims for the post-2001 period, including her economic loss from stock options. (Cronas Br. at 26). However, the district court unequivocally denied the Hnot plaintiffs' motion to expand the class period and re-open discovery for the post-2001 period. Cronas' motion to intervene cannot be used as an alternative avenue for obtaining discovery for the post-2001 period. As discussed above, Cronas has filed a separate action and remains free to litigate her post-2001 claims in that action. (See supra at 26-28).

To the [**44] extent that Cronas claims that her alleged impaired interests and the lack of adequate representation relate to the lack of discovery on stock option awards, Cronas has similarly failed to articulate a reason for intervention.

(Cronas Br. at 26). The alleged failure to provide stock option awards is not a class claim. The class action Complaint only refers to stock option awards in the context of the individual allegations of class representative Shelley Hnot. (See A87 P 42, "Kelly announced in October 1998 that employees on the Regional Management Committee were among the employees offered these stock options. Although a member of the Regional Management Committee, Hnot was not given the opportunity to purchase stock"). Since the stock option awards are not a class [*30] claim, but rather an individual claim of Hnot, virtually no discovery occurred concerning the stock option awards. (A60 P10).

If Cronas believes that she has a viable, timely individual claim relating to stock option awards, she should initiate the arbitration process pursuant to her Employment Agreement. Since stock option awards are not class claims, Cronas cannot show a lack of adequate representation [**45] or an impaired interest as it relates to stock option awards. Accordingly, the district court did not abuse its discretion because Cronas' interests as a class member are adequately protected by the Hnot plaintiffs. n8

n8 Cronas' intervention would also needlessly add two new law firms as class counsel. As it is, two law firms, one of which is thoroughly knowledgeable in class action litigation, represent the two remaining plaintiffs and the class. Cronas has not articulated a reason why additional law firms are needed to litigate this action. The current class counsel have not sought assistance, nor is there any evidence that additional class counsel (who are unfamiliar with this litigation) are necessary at this late stage of the proceedings. This change is unnecessary and would exponentially increase plaintiffs' attorneys' fees and legal expenses. See e.g., *U.S. Trust Co. v. Alpert, 163 F.R.D. 409, 424 (S.D.N.Y. 1995)* (granting class certification and appointing one law firm as class counsel because representation by additional counsel "would occasion much duplication of work and be a wholly unnecessary drain on the [] funds available").

[**46]

POINT II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING CRONAS' MOTION FOR PERMISSIVE INTERVENTION UNDER *FEDERAL RULE OF CIVIL PROCEDURE 24(b)*.

A district court has broad discretion in resolving an application for permissive intervention. See *New York News, Inc. v. Kheel, 972 F.2d 482, 487 (2d Cir. 1992); Rosenshein v. Kleban, 918 F. Supp. 98, 106 (S.D.N.Y. 1996);* [*31] *Sackman v. Liggett Group, 167 F.R.D. 6, 22 (E.D.N.Y. 1996).* In fact, "a denial of permissive intervention has virtually never been reversed." *H.L. Hayden Co. v. Siemens Med. Sys., 797 F.2d 85, 89 (2d Cir. 1986)* (citing *United States v. Hooker Chem. & Plastics Corp., 749 F.2d 968, 990 n.19 (2d Cir. 1984)).*

There are three basic requirements for permissive intervention pursuant to Rule 24(b)(2): (1) a determination that the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties; (2) timely application; and (3) a question of law or fact in common between the applicant's claim or defense in the main action. *FED. R. CIV. P. 24(b)(2).*; *Mrs. W., 124 F.R.D. at 45.* [**47] The district court did not abuse its discretion in holding that Cronas cannot satisfy this standard, and accordingly, this Court should affirm the district court's decision to deny Cronas' motion to intervene as a class representative under Rule 24(b).

A. The District Court Did Not Abuse Its Discretion in Concluding That Cronas' Intervention Is Untimely.

As discussed above, Cronas' application was presented to the district court more than five years after this action commenced, two and a half years after discovery closed and more than sixteen months after class certification. It is clearly untimely. Therefore, the district court did not abuse its discretion in denying Cronas' motion for permissive intervention.

[*32] **B. The District Court Did Not Abuse Its Discretion in Concluding That Cronas' Intervention Will Prejudice Willis.**

Cronas' intervention will cause great prejudice to Willis as detailed above. Willis will be compelled to litigate Cronas' time-barred claims (see supra pp. 22-24), litigate new class claims added by Cronas' Complaint in Intervention which did not appear in the original class action Complaint (see supra pp. 21-22) and [**48] expend time and money re-opening discovery and retaking the depositions of witnesses who were deposed over three years ago (see supra p. 18). Furthermore, the district court has already denied the Hnot plaintiffs' request for additional discovery for the post-2001

period and, Willis will face a significant burden if Cronas is permitted to obtain such discovery through intervention. (see supra pp. 21-22). Accordingly, the district court did not abuse its discretion in denying Cronas' motion for permissive intervention.

C. The District Court Did Not Abuse Its Discretion Because Cronas' Claims Do Not Share Common Questions Of Law Or Fact With The Class.

Cronas' individual claims are so distinct from the class claims, that they do not share common questions of law or fact with the class. Courts have consistently denied motions for permissive intervention where the intervenor does not share common questions of law or fact with the class. See *Washington Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co., 922 F.2d 92, 97 (2d Cir. 1990)* (affirming district courts' denial of motion to intervene where intervention would "radically [*33] alter" the [**49] scope of the underlying action to create a much different suit); *Sierra Club v. United States Army Corps of Eng'rs, 709 F.2d 175, 177 (2d Cir. 1983)* (finding district court did not abuse its discretion in denying intervention because intervenor did not share common questions of law or fact); *Marriott v. County of Montgomery, 227 F.R.D. 159, 167-168 (N.D.N.Y. 2005)* (denying permissive intervention where intervenor failed to demonstrate the existence of a common question of law or fact), aff'd, *No. 05 Civ. 1590, 2005 U.S. App. LEXIS 25428* (2d Cir. Nov. 22, 2005); *Metzler v. Bennett, No. 97 Civ. 0148, 1998 U.S. Dist. LEXIS 5441,* at *29 (N.D.N.Y. Apr. 15, 1998) (denying motion for permissive intervention where no common question of law or fact because applicants' claims based on different statutory provisions which arose out of different factual context).

Cronas' individual claims are significantly different from the class claims, and her new claims would multiply and modify the class claims. Her intervention would therefore unnecessarily clutter this action and require the discovery period to be re-opened long after [**50] the close of fact discovery on the eve of trial.

Although Cronas' class claims include gender discrimination in compensation and promotion at the officer levels, these allegations would require the district court to permit discovery for the post-2001 period, a request previously denied by the court. (A73). If this Court grants Cronas' motion to intervene, the [*34] parties will need to engage in extensive discovery concerning the new post-2001 class claims. This would include preparing new class certification briefing of these claims, conducting statistical analyses of the new post-2001 class claims, exchanging document requests and interrogatories, negotiating and conducting new electronic searches on the e-mail accounts of Willis' employees, and conducting several depositions, including several witnesses who were already deposed in this action.

Further, Cronas' individual claims focus on the alleged failure to award her stock options, the denial of a promotion to Regional Environmental Practice Leader, demotion and discharge. (A46-51). Both her individual and post-2001 claims are time-barred under federal law. (See supra pp. 22-24). Moreover, permitting Cronas' intervention [**51] would require Willis to explore, litigate and defend claims that are factually distinct and individualized to Cronas.

Since the post-2001 claims and new individual and class claims do not share common questions of law or fact with the class claims, Cronas cannot meet the standard for permissive intervention. Therefore, the district court did not abuse its discretion in denying Cronas' motion.

[*35] **CONCLUSION**

For all the reasons set forth above, this Court should affirm in its entirety the district court's decision denying Cronas' motion to intervene pursuant to *FED. R. CIV. P. 24(a)* and (b).

Dated: March 19, 2007
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, Bettina B. Plevan, certify that the following is true and correct:

The preceding brief complies with the type-volume limitations of *Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure*, because the brief contains 7,541 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), [**52] as indicated by the word count of the word processing system used to prepare the brief.

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CERTIFICATE OF E-MAILING

I, Bettina B. Plevan, an attorney admitted to practice in the State of New York, hereby certify that on March 19, 2006 I emailed a copy of the Brief of Defendants-Appellees in Portable Document Format (PDF) to briefs@ca2.uscourts.gov. The attorneys for Intervenor-Plaintiff-Appellant were carbon copied on the e-mails at rherbst@blhny.com and rozfink@lgc.org.

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ANTI-VIRUS CERTIFICATION FORM

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