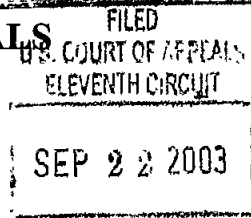


03-13128EE

CASE NO. 03-13128-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT



ARLENE M. STONE, on behalf of herself
and all other present and former employees
similarly situated,

Plaintiff-Proposed Intervenors-Appellants,

v.

FIRST UNION CORPORATION,
FIRST UNION NATIONAL BANK OF FLORIDA,
FIRST UNION CORPORATION OF FLORIDA,
WACHOVIA CORPORATION

CLOSED
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLEES

J. THOMAS KILPATRICK

ATTORNEYS FOR APPELLEES

Alston & Bird LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Pursuant to FRAP 26.1 and 11th Cir. R. 26.1-1, the following is a complete list of all persons and entities known to Appellee to have an interest in the outcome of the instant case:

1005 Corp.

1024 Dodge Street Limited Partnership

110 Monastery Associates, Limited Partnership

1700 Associates

2-4 Potter Place Urban Renewal, L.P.

343 South Dearborn II, LLC

349-59 Lenox LLC

3716 Third Avenue LLC

425 South Tryon Street, LLC

A.M. Pappas TechAMP II International, L. P.

A4 Health Systems, Inc.

ABCA, Inc.

Patricia Abraham

Academy Venture Fund, LLC

Accel Group LLC

Acist Medical Systems, Inc.

Maxine Adams

Adhesion Technologies, Inc.
Advanced TelCom Group, Inc.
AdvisorTech Corporation
Affinity Internet, Inc.
Agilera, Inc.
AHG Tax Credit Fund 1, L.L.C.
AHG Tax Credit Fund II, L.L.C.
AHG Tax Credit Fund III, L.L.C.
AHG Tax Credit Fund IV, L.L.C.
AHG Tax Credit Fund IX, L.L.C.
AHG Tax Credit Fund V, L.L.C.
AHG Tax Credit Fund VI, L.L.C.
AHG Tax Credit Fund VII, L.L.C.
AHG Tax Credit Fund X, L.L.C.
AHG Tax Credit Fund XII L.L.C.
Albemarle & Bond Holdings, PLC
Donna Alexander
Alidian Investment, LLC
Cheryl Ann Allen
Allentown Development Company, Inc.
Rae Aloisio
Alston & Bird LLP
American Industrial Capital Partners Fund III, L. P.

Anacuitas Manor, Ltd.
Andalusia Senior Housing, L. P.
Annville Housing Limited Partnership
Antioch Senior Housing Limited Partnership
Apollo Tax Credit Fund-XIV LLC
Appomattox Governor's School L.P.
Arbor Glenn L.P.
Arbor Village, L.P.
ARCap Investors, L.L.C.
Arcon HealthCare, Inc.
Argo Partnership, L. P.
Phyllis A. Aschliman
Ashton Court State Credit Partner, L.L.C.
Ashton Court, L. P.
Ashton Court, L. P.
Ashton Hills State Credit Partner, LLC
Ashton Hills, L.P.
Ashton Landing State Credit Partner, L.L.C.
Ashton Landing, L.P.
Ashton of Richmond Hill, L. P.
Ashton Pointe, LLP
Athens Rental Housing, L.P.
Atlantic Savings Bank, FSB

AZ-#1599 Garland, LLC
AZ-#3115 Rio Grande City, LLC
AZ-#3611 Birmingham, LLC
AZ-#3618 Leland, LLC
AZ-#3624 Ft. Worth, LLC
AZ-#3628 Greensboro, LLC
AZ-#3629 Columbus, LLC
AZ-#3634 Enid, LLC
AZ-#3644 Jackson, LLC
AZ-#3650 Huber Heights, LLC
AZ-#3652 Shreveport, LLC
AZ-#3653 Sharonville, LLC
AZ-#3655 San Antonio, LLC
AZ-#3663 Jeffersontown, LLC
AZ-Warehouse Zanesville, LLC
Bacon Housing, L.P.
Banco Wachovia
Banco Wachovia
Honorable Ted. E. Bandstra
April Baroni
Barrett Place II Limited Partnership
Barrett Place Limited Partnership
Barry, Evans, Josephs & Snipes, Inc.

Bart, Inc.

BaseSix, Inc.

Bateman Eichler, Hill Richards Housing Investors, Inc.

Bateman Eichler, Hill Richards Realty Co., Incorporated

Bateman Eichler, Hill Richards Realty Services, Inc.

Bateman Eichler, Hill Richards, Inc.

Margarita Bautista

BB-Erie PA, LLC

BB-Newport News VA, Inc.

BB-Newport News VA, LLC

BB-Newport News VA, LLC

Beacon Industrial Group LLC

Beacon Industrial Group, LLC

Beaumont Avenue Apartments, L. P.

Beechridge II, LLC

Beechridge Limited Partnership

Norma Beeman

BEHR Housing Investors 1980-1, L.P.

BEHR Housing Investors 1981-1, L.P.

Belair/Chapel Development Associates, LLC

Belair/Chapel Financing Associates, LLC

Belenos, Inc.

Belenos, Inc.

Caroline Bell

Bell Ridge Associates LLC

Bell Sport Holdings, LLC

Belleview L.P.

Benchmark Cable Acquisition Fund VII, L. P.

Bensalem Senior Apartments, L.P.

Bernice Bernstein

Besso Holdings Limited

BGMCO PA, Inc.

BIPAN Holding Company

Black Diamonds LLC

Black Enterprise/Greenwich Street Corporate Growth Partners, L.P.

Blanton Green Associates Limited Partnership

Blue Water Venture Fund H, LLC

Blue Water Venture Fund III, LLC

Blunt, Ellis & Loewi, Inc.

BOB Title Holdings, Inc.

Boettcher & Company, Inc.

Boettcher Properties, Ltd.

Laura M. Bogan

Connie Bowers

Bowler Housing L.P.

Larry Bowman

Boxer Building LLC
BPL Holdings, Inc.
BR Limited Partnership
Bradford Equities Fund III, L.P.
Bradford Equities Fund, L.P.
Bradford Equities Fund, LP
Brand Equity Ventures I, L.P.
Brand Equity Ventures II, L.P.
Brazos Equity Fund, L.P.
Ashley D. Brightwell
Bristow Stebbins Owners, LLC
Brittany Associates II, Ltd.
Brittany Associates, Ltd.
Brittany Point Apartments Limited Partnership
BRL Universal Compression Funding I, L. P.
Broadview Capital Partners, L.P.
Brynwood Partners I, L. P.
Brynwood Partners IV, L. P.
Bull Run Creek Associates, LLC
BullsEye Telecom, Inc.
Burdale Financial Holdings Limited
Burdale Financial Limited
Mary Burrell

Wesley Burrell
Shirley Bushee
Business Development Corporation of South Carolina
Edwina Byrd
Camellia Court Apartments Limited Partnership
Campus 1000 Fremont, LLC
Canaan Ventures II L. P.
Cannon/Hearthwood Limited Partnership
Cantebury of Hilliard, Ltd.
Canton Mill State Credit Member, L.L.C.
Canton Mill, LLC
Capital Across America
Capital.com, Inc.
CapitalSource Holdings, LLC
Capitol Finance Group, Inc.
CapTrust Financial Advisors, LLC
CapTrust Financial Advisors, LLC
James Carlile
Carlyle High Yield Partners, L.P.
Onalee Carmer
Cecilia Carmichael
Carolina BroadBand, Inc.
Carousel Capital Partners II, L. P.

Carousel Capital Partners, L. P.
Carriage Court Apartments Limited Partnership
Brenda J. Carter
Yolanda Casanova
Emilia Castillo
Catalyst Equity Fund, L.P.
CCP Limited Partnership
Cedar Forest Limited Partnership
Celadon, Inc.
Central Fidelity Capital Trust I
Central Fidelity Properties, Inc.
Centro Internationale Handelsbank Aktringeseelschaft
Centurion Funding, Inc. (Roseville, CA)
Centurion Funding, LLC
Century Capital Partners II, L.P.
CFTA Holdings, LLC
CFTA Holdings, LLC
CFTA, Inc.
Louie Challancin
Earl Chambers
Chambers Bridge Urban Renewal Housing, L. P.
Charleston Place Limited Partnership
Chartwell Capital Investors, L. P.

Chartwell Investments II, L.P.
Cherokee Hills Associates LLC
Chisholm Partners III, L. P.
Chisholm Partners IV, L. P.
CHP II, L. P.
Church Street Senior Housing, L. P.
ClassNotes, Inc.
Cimarron Estates, Ltd.
Citrus County Land Corp
Citrus County Service Corp
City Affordable Housing LLC
Claire Tower, LP
Clarity Partners, L. P.
CMLB 2001, LLC
Cobb Park Townhomes, L.P.
Coleman Swenson Hoffman & Booth IV, LP
Coliseum Lofts, L.P.
Columbia at Bells Ferry Partners, L.P.
Columbia at Bells Ferry State Credit Partner, L.L.C.
Columbia at Greens, L.P.
Columbia Gardens, L.P.
Columbia Village, L.P.
Ana Comellas

Commonwealth Investors II, L. P.
Comsys Holding, Inc.
Congress Credit Corporation
Congress Financial Corp.
Congress Financial Corporation
Congress Financial Corporation
Congress Financial Corporation
Congress Financial Corporation
Congress Financial Corporation
Congress Financial Corporation
Congress Financial Corporation
Congress Financial Corporation
Congress Financial Corporation
Carmen B. Contreras
CoreBriX, Inc.
CoreStates Capital I
CoreStates Capital II
CoreStates Capital III
CoreStates Fund Management (Ireland) Ltd.
CoreStates Holdings, Inc.
CorpRex, LLC
Denise Corredeira
Altamese Council
Shirley Courtney

Craigmont II, L.P.
Cranford Avenue Apartments, L.P.
Creative Choice Homes IX, Ltd.
Creative Choice Homes X, Ltd.
Creekside at Bellemeade Limited Partnership
CREST 2000-1 Holding SPV, Inc.
Crest Communication Partners, L.P.
Crestmore Village Apartments Limited Partnership
Crestmore Village Apartments Phase II Limited Partnership
Samuel Crissinger
Crosby Financial Holdings Limited
Cross Atlantic Technology Fund, L.P.
Crosswinds Green Associates Limited Partnership
Crosswinds Green II Associates Limited Partnership
James Crowley
Patricial Crowley
CS Outsourcing Holdings Limited
CSB Information Services PTE Ltd.
CT I Limited Partnership
CTB Realty Ventures XXI, Inc.
Cupertino Town Center, LLC
Grace Curtis
CUT Holdings, LLC

Dagne Cuza
CVO Greater China Partners, L.P.
Arthur Danburg
Danville Community Development Corporation
Davenport Alley, L.P.
Delores Davis
Jane Davis
Queen Dean
Sylvia DeComo
Delaware Trust Capital Management, Inc.
DeMuth, Folger & Wetherill II, L. P.
Elaine Dennery
DHM Arcadia Partners, L.P.
Evangelina Diaz
Gladys Diaz
Digital Access, Inc.
Digital Access, LLC
DIMAC Corporation
DJ Investments, LLC
Virgil Dobeck
Dendra Dobson
Beverly Douglas
Draper Atlantic Venture Fund II, L. P.

DS Coinvestment I, LLC
Ginette Ducrepin
Duro Communications, Inc.
Duro Communications, Inc.
Eastern/Haven Development Associates, LLC
Eastern/Haven Financing Associates, LLC
Eastgate Properties, L.P.
Sandra Eaton
Jeannette Eder
Edison Venture Fund IV, L.P.
Educaid Student Holdings, Inc.
Education Financing Services, LLC
Colleen Eggen
EIMCO Trust
EIMCO Trust
Elkmont Partners, L.P.
Ellenton Housing Associates, Ltd.
Elm Lake Apartments, Ltd.
Energy Search LP
EnerVest Energy, L.P.
Enhancement Services Corporation
Equitable Realty Associates, L. P.
Equity Insurance Agency, Inc.

ESI (MA) Insurance Agency, Inc.
ESI Insurance Agency, Inc. of Colorado
ESI Insurance Agency, Inc. of Oklahoma
ESI Insurance Agency, Inc. of Utah
ESI Insurance Agency, Inc. of Wyoming
Established Holdings Limited
Eureka I, L.P.
European Credit Management Limited
Linda Evans
Event Zero, Inc.
EVEREN Capital Corporation
EVEREN Securities Holdings, Inc.
Evergreen Advisors LLC
Evergreen Apartments, L.P.
Evergreen Asset Management Corp.
Evergreen Investment Company, Inc.
Evergreen Investment Management Company, LLC
Evergreen Investment Services, Inc.
Evergreen Management, S. A.
Evergreen Service Company LLC
Evergreen Worldwide Distributors, Ltd.
Evolution Networks, Inc.
Fairbrooke Apartments Limited Partnership

Fairfax County Redevelopment and Housing Authority/HCDC One L.P.
Fairfax County Redevelopment and Housing Authority/HCDC Two L.P.
Farmington, Incorporated
FCC-PR, Inc.
Ralph Feith
Argelia Fernandez
FFBIC New York II, Inc.
FFBIC New York, Inc.
FFBIC, Inc.
FFL Services Corporation
Fidelcor Business Credit Corporation
Fifth and Market Corporation
Financial Life Insurance Company of Georgia
Financial World Funding Corp.
First American Service Corporation
First Atlanta Corporation
First Atlanta Lease Liquidation Corporation
First Bank of Florida Mortgage Corp.
First Clearing Corporation
First Corporate Center, Inc.
First Fidelity Insurance Services of Delaware, Inc.
First Fidelity Insurance Services, Inc.
First Fidelity International Bank

First Fidelity Urban Investment Corporation
First International Advisors, LLC
First International Advisors, LLC
First Money Store Securities, Inc.
First National Bank of Atlanta, The
First National Properties, Inc.
First Penco Realty, Inc.
First Union Affordable Housing Community Development Corporation
First Union Affordable Housing Corp.
First Union ATM Solutions, Inc.
First Union Auto Finance, LLC
First Union Auto Loan Securitization, Inc.
First Union Bank and Trust Company (Cayman) Ltd.
First Union Capital I
First Union Capital II
First Union Capital III
First Union Capital Partners 2001, LLC
First Union Capital Partners 2001, LLC
First Union Capital Partners, Inc.
First Union Capital Partners, LLC
First Union Capital Partners, LLC
First Union Commercial Corporation
First Union Commercial Corporation

First Union Commercial Corporation
First Union Commercial Corporation
First Union Commercial Leasing Group, L.L.C.
First Union Commercial Leasing Group, L.L.C.
First Union Commercial Mortgage Loan Warehouse Corp.
First Union Commercial Mortgage Securities, Inc.
First Union Commercial Mortgage Services, Inc.
First Union Commercial Shared Resources, LLC
First Union Community Development Corporation
First Union Development Corporation
First Union Direct Bank, N. A.
First Union Exchange Services, LLC
First Union Financial Investments, Inc.
First Union FPS, Inc.
First Union Fremont, LLC
First Union Futures Corporation
First Union Genesis Holdings, Inc.
First Union Guaranteed Tax Credit Fund I, LLC
First Union Holdings, Inc.
First Union I, Inc.
First Union Institutional Capital I
First Union Institutional Capital II
First Union Institutional Debt Management, Inc.

First Union Institutional Mortgage Services, LLC
First Union Insurance Agency of FL, Inc.
First Union Insurance Agency of NC, Inc.
First Union Insurance Agency, Inc.
First Union Insurance Group Trust I
First Union Insurance Services Agency, Inc.
First Union Insurance Services, Inc.
First Union International Banking Corporation
First Union International Capital Markets Limited
First Union Investment Banking Partners 2000, LLC
First Union Investment Banking Partners 2001, LLC
First Union Investors, Inc.
First Union KM Holdings, Inc.
First Union Leveraged Capital 2001, LLC
First Union Leveraged Capital 2001, LLC
First Union Leveraged Capital, LLC
First Union Leveraged Capital, LLC
First Union Life Insurance Company
First Union Merchant Banking 1997, LLC
First Union Merchant Banking 1998, LLC
First Union Merchant Banking 1999, LLC
First Union Merchant Banking 2000, LLC
First Union Merchant Banking 2001, LLC

First Union Merchant Banking, 1998-II, LLC

First Union Merchant Banking, 1999-II, LLC

First Union Money Store Home Equity Loan Warehouse Corp.

First Union Mortgage Corporation

First Union National Bank

First Union National Bank of Delaware

First Union Overseas Investment Corporation

First Union PASS Co., Inc.

First Union Private Capital, Inc.

First Union Private Equity Fund II, L. P.

First Union Private Equity Fund, L. P.

First Union Private Equity Fund, L.P.

First Union Private Investment Funds Hedged Equities Super Accredited, L. P.

First Union Private Investment Funds Hedged Equities Super Accredited, L. P.

First Union Private Investment Funds Hedged Technology Fund, Accredited, L. P.

First Union Private Investment Funds Hedged Technology Fund, Accredited, L. P.

First Union Private Investment Funds Multi-Strategy Accredited, L. P.

First Union Private Investment Funds Multi-Strategy Accredited, L.P.

First Union Private Investment Funds Multi-Strategy Super Accredited, L. P.

First Union Private Investment Funds Multi-Strategy Super Accredited, L. P.

First Union Rail Corporation
First Union Real Estate Asset Company of Connecticut
First Union Real Estate Asset Company of Georgia
First Union Real Estate Asset Company of New Jersey
First Union Real Estate Asset Company of North Carolina
First Union Real Estate Investment Company of Connecticut
First Union Regional Community Development Corporation, Inc.
First Union Regional Foundation
First Union Residential Securitization Transactions, Inc.
First Union Risk Management, Inc.
First Union Securities Financial Network, Inc.
First Union Securities, Inc.
First Union Services, Inc.
First Union Shared Resources, LLC
First Union Title Corporation
First Union Trust Company of California
First Union Trust Company, National Association
First Union Venture Capital Fund, L. P.
First Union/Maher Partners
Deborah Fitzgerald
Flagship Partners, L.P.
Jessica P. Flax
L.V. Fletcher

Floral Oaks Apartments, Ltd.
FOIL, Inc.
Forum Capital Markets, LLC
Fountain Place Associates Limited Partnership
Fox Haven Limited Partnership
Franklin Capital Associates III, L.P.
Franklin Ridge, LLC
FU/DG Indianola, LLC
FUCP/NEP, LLC
FUNC Holdings, Inc.
FUSI Insurance Services of Alabama, Inc.
FUSI Insurance Services of Hawaii, Inc.
FUSI Insurance Services of Massachusetts, Inc.
FUSI Insurance Services of Nevada, Inc.
FUSI Insurance Services of Ohio, Inc.
FUSI Insurance Services, Inc.
FUSI Insurance Services, Inc. of Texas
Gary Gandy
Sharon Garcia
Susan Gardner
G. C. Leasing, Inc.
General Homes Corp.
Genesis Gardens, L.P.

Georgia Las Brisas, LP
Ghent-Farmington Associates
GHG Newport Landing Limited Partnership
GiantBear.com, Inc.
GJA R/E Corp.
Glen Royall Mill Limited Partnership
Glenburn Associates Limited Partnership
Global Private Equity IV L.P.
Glory Street LLC
GOCOM Holdings, LLC
Goense Bounds & Partners A, L. P.
Honorable Alan S. Gold
Gold Rush I Apartments Limited Partnership
Gold Rush II Apartments Limited Partnership
Golfview Associates Limited Partnership
Carmen Gonzalez
Douglas Good
Linda Gottsleben
Grafton 66, LLC
Grande Pointe Associates, Ltd.
Michael Graybill
Great Hill Equity Partners II, LP
Green Gables Apartments, Ltd.

Green Ridge Associates, LLC
Greenleaf Village of Groveland, Ltd.
GreenLink LLC
Greenville Agricultural Credit Corporation
Greystone of McDonough L.P.
Griffin Corporate Services, Inc.
Leonard Gross
Grottoes Partners L.P.
Grundy Gardens II Senior Apartments, L.P.
Racquel Guerrero
Hagerstown Robinwood Senior Associates, LLC
Helen Hall
Hamilton Dorsey Alston Company, Inc.
Hamilton Manor Limited Partnership
Hanover/FUDC Master Limited Partnership
Harbinger/Aurora QP Venture Fund, LLC
Decourcy Hard
Harlingen Community Development Corporation 1, LP
Linda Harmon
Haskell Limited Partnership
Haverhill Affordable Housing, Ltd.
Hawthorne Court, LLC
John Hayes

Haymount Manor Associates Limited Partnership
Headhouse Retail Associates, L.P.
Heartland Pork Enterprises, Inc.
Heatherwood Apartments Limited Partnership
Barbara Hedrick
Marie Heredia
Heritable Bank Limited
Heritable Bank Limited
Heritage Place State Credit Partner, L.L.C.
Rosemarie Herrera
Linda Herrick
HHS Property Corporation
Hickory Hollow Senior Apartments Limited Partnership
High Ridge Capital Partners II, L.P.
High Ridge Capital Partners, L. P.
HOB Entertainment, Inc.
HOB Entertainment, Inc.
HomEq Servicing Corporation
Homes for Fredericksburg Limited Partnership
Marianne Hopkins
Horace Bushnell Limited Partnership
Horizon Management Services, Inc.
Horizon Telecom International, Inc.

Horizon Telecom International; Inca
Patricia Hosea
Housing Equity Fund of Virginia I, L.P.
Housing Equity Fund of Virginia II, L.P.
Houston Venture Partners, Ltd.
HRC General Partner Limited Partnership
Hub Building Limited Partnership
James Hudson
Hunt, DuPree, Rhine & Associates, Inc.
Brenda Hunter
Huntington Park Apartments Limited Partnership
Thomas Hutcheson
IDM Funding Corp.
IGI/Earth Color, Inc.
IJL Financial, Inc.
IJL Holdings, Inc.
Indian Run Limited Partnership
Industrial Valley Real Estate Co.
INFLOW Group, Inc.
INFLOW Group, Inc.
Inner City Media Corporation
Integrated Capital Group, Inc.
Interchange Partners

International Progress, Inc.
Ironbrand Capital LLC
Ironbrand Capital LLC
ISC Realty Corporation
J.D. Power Clubs, Inc.
Joe Ann Jackson
Jacksonville Affordable Housing, Ltd.
May Jenkins
Jose Jarquin
Jefferson Center, L.P.
Jefferson Properties, Inc.
JERSEY CENTER/FIDOREO, INC.
Eva Jo
Job, Berenberg, Gossler & Co.
Felicia Marie John
Mary L. Johnson
Johnson Lane Space Smith Corporation
Richard Jones
Rosa Jordan
JPSD, Inc.
JV Mortgage Capital, Inc.
JV Mortgage Capital, L.P.
JWGenesis Capital Markets, Inc.

JWGenesis Insurance Agency, Inc.
JWGenesis Insurance Services, Inc.
KAFU Holdings, LLC
Kelmscott Communications, L.L.C.
Kelmscott Communications, L.L.C.
Kensington of Kissimmee, Ltd.
Kestrel Technologies, Inc.
Martha Kiel
J. Thomas Kilpatrick
Catherine King
Connie King
KKM, Inc.
Knowledge Planet.com, Inc.
Knox Homes, L.P.
Robert Kofman
Mildred Korsnick
Marlene Kowachik
Elfriede Kruger
KSI Insurance Agency, Inc. of Ohio
L & M Hoe Associates LLC
William Lacayo
Lafayette Family L.P.
Lake Street Lofts, L.L.C.

Lake Weston Apartments (Orlando) Limited Partnership
Lakeland Holdings, LLC
Lakewood Terrace, LP
Ibis Lamas
Emergene Lamons
Landsbanki Islands hf
Lantana Associates, Ltd.
Arthur Largent
Laurel Pointe of Salisbury Limited Partnership
Laurel Pointe, LLC
Dorothy Laurie
Emma Lima
Ricardo Linares
Leeds Equity Partners, L.P.
Liberty/Milford Mill Development Associates, LLC
Liberty/Milford Mill Financing Associates, LLC
Lifecare, Inc.
LJM2 Co-Investment, L. P.
Louis Lodato
Lodge at Shavano Park, LP
Lodge at Warner Ranch, LP
Loewen Development of Wappingers Falls, L.P.
Edward Logan

Lone Stone, L. C.
Long, Travers & FASO
Longview Green Associates, L.P.
Marie Jose Louis
Lovett Underwood Neuhaus & Webb, Inc.
LuxN Investment LLC
Malcolm MacDiarmid
Maggie L. Walker Governor's School Tenant, L.P.
Magnolia Arbor State Credit Partner, L.L.C.
Magnolia Arbor, L.P.
Magnolia Arbor, L.P.
Magnolia Creste State Credit Partner, L.L.C.
Magnolia Creste, L.P.
Magnolia Heights, L.P.
Magnolia Walk Apartments, Ltd.
Major Brokerage Co., Inc.
Judith Mallett
ManagedStorage International, Inc.
Manor Ridge Limited Partnership
Marathon Fund Limited Partnership IV, L.P.
Howard Markowitz
Alberto Martin
Martin's Landing II Limited Partnership

Martin's Landing Limited Partnership
Maryland Housing Equity Fund III Limited Partnership
Matthew International Sales, Inc.
Kathleen Mazzi
McGlinn Capital Management, Inc.
Bertha Mcogg
David McCombie
MD Sass Corporate Resurgence Partners, L.P.
Meadow Ridge Senior Apartments Limited Partnership
Meadowmont JV, LLC
Mecklenburg Securities Corporation
MedCap Properties, LLC
Medical Equipment Credit PTE Ltd.
Meigher Communications, L.P.
Melbourne Atlantic Joint Venture
Mentor Perpetual Advisors, LLC
Mercy Housing Georgia I, LLLP
Mercy Housing Georgia I, LLLP
Meridian Acceptance Corporation
Meridian Investment Company
Meridian Mortgage Corporation
Meridian Point Senior Apartments Limited Partnership
Meridian Properties, Inc.

Meridian Venture Partners
Meridian Venture Partners II, LP
Dorothy Meriweather
Miami River Park Associates, Ltd.
MicroInvestors, LLC
Midtown Square State Credit Partner, L.L.C.
Midtown Square, L. P.
Midtown Square, L.P.
Mike Fort Worth TX, LLC
Mike Jacksonville FL, LLC
MMC Capital Technology Fund II, L. P.
Monarch Place Apts. LP
Donna Motecalvo
Montgomery Homes L. P. IX
Montgomery Homes Limited Partnership X
Monument Street Funding, Inc.
Monument Street Funding, Inc.
Monument Street Funding, Inc.
Monument Street Funding, Inc.
Monument Street Funding, Inc.
Monument Street Funding, Inc.
Monument Street Funding, LLC
Monument Street International Funding-1, LLC
Monument Street International Funding-II, LLC

Rogelio Moral

Moravian House III, LP

Morgans Ridge, LLC

Regina Morera

Jorge Morin

Mountain Falls Park, Inc.

Mountain Ventures Buckeye, LLC

Mountain Ventures Cleveland, LLC

Mountain Ventures Erlanger, LLC

Mountain Ventures Golden State, LLC

Mountain Ventures Goose Creek/St. James, LLC

Mountain Ventures Hinsdale, LLC

Mountain Ventures Indianapolis/Allisonville, LLC

Mountain Ventures Mason, LLC

Mountain Ventures Mecklenburg, LLC

Mountain Ventures Michigan, LLC

Mountain Ventures Milwaukee, LLC

Mountain Ventures New Carlisle, LLC

Mountain Ventures Perrysburg, LLC

Mountain Ventures Philadelphia, LLC

Mountain Ventures Shorewood, LLC

Mountain Ventures Smithfield, LLC

Mountain Ventures South Bloomfield, LLC

Mountain Ventures SRI, LLC
Mountain Ventures Waynesboro, LLC
Mountain Ventures, LLC
MSF Holding, Ltd.
Mulberry Corporation
Multi-Credit Corporation of Thailand PCL
Multi-Risk Consultants (Thailand) Ltd.
MV Atlanta Braselton II, LLC
MV Atlanta Liberty Expansion, LLC
MV Atlanta Sugarloaf II, LLC
MV Chicago Cantera I, LLC
MV Chicago Meridian Business I, LLC
MV Cincinnati Pfeiffer I, LLC
MV Cleveland Emerald Valley I, LLC
MV Cleveland Landerbrook I, LLC
MV Columbus Easton I, LLC
MV Indianapolis Plainfield II, LLC
MV Minneapolis Lunar Pointe I, LLC
MV Minneapolis Norman Center I, LLC
MV Nashville Airpark East I, LLC
MV Nashville Aspen Grove Business Center 1, LLC
MV Nashville Aspen Grove Business Center II, LLC
MV Nashville Metrocenter II, LLC

MV Nashville Metropolitan Airport I, LLC
MV Orlando Celebration II, LLC
MV Orlando Lee Vista I, LLC
MV Orlando Lee Vista II, LLC
MV Orlando Northpoint I, LLC
MV Orlando Northpoint II, LLC
MV Raleigh Governor's Village I, LLC
MV Raleigh Perimeter Park I, LLC
MV Raleigh Perimeter Park II, LLC
MV Raleigh Walnut Creek I, LLC
MV Raleigh Walnut Creek II, LLC
MV Raleigh Walnut Creek III, LLC
MV St. Louis Lakeside Crossing I, LLC
MV St. Louis Lakeside Crossing II, LLC
MV St. Louis Riverport II, LLC
MV Tampa Fairfield II, LLC
MV Tampa Fairfield III, LLC
MV Tampa Lakeland I, LLC
MV Tampa Regency II, LLC
MVP Distribution Partners
Nantucket Bay Limited Partnership
National Auto Finance Company, L.P.
National Temple Limited Partnership-II

Navis Partners V, LP
NeoWorld Holdings, LLC
NEP Broadcasting, LLC
NEP Supershooters, L. P.
NEP Supershooters, L. P.
NEPA Venture Fund, L.P.
New Heritage Place, LLC
New Rivers Towers Limited Partnership
New Salem of Virginia, Inc.
New Salem, Inc.
New World Development Corporation, Ltd.
New World Group Holdings, Ltd.
Shirley Newby
Barbara Newkirk
NewSouth Holdings, Inc.
NFPS, Inc.
NFPS, Inc.
Nineacres Limited
NNI Bell Street Limited Partnership
North Carolina Bioscience Investment Fund, LLC
North Carolina Economic Opportunity Fund, L. P.
North Hart Run Joint Venture
North Hart Run, Inc.

Novient, Inc.
Novient, Inc.
Nth Degree Global, LLC
Oak Crest Apartments of Kannapolis, Ltd.
Jose Obrador
ODC Selborne House Limited Partnership
OFFIT Energy Income Fund, L. P.
OFFITBANK
OFFITBANK Compass Fund, Inc.
OFFITBANK Compass Fund, L.P.
OFFITBANK Cross Market Fund, Inc.
OFFITBANK Cross Market Fund, L.P.
OFFITBANK Derivatives, Inc.
OFFITBANK Energy Fund, Inc.
OFFITBANK Greater China, Inc.
OFFITBANK Latin America Fund, Inc.
OFFITBANK Latin America Income Fund, L.P.
OFFITBANK M-R Securities Fund, Inc.
Oilwell Supply, L.P.
Magaly Ojeda
Old York Agency, Inc.
Oldbridge Urban Renewal, L.P.
Thomas Oller

One Market Street, LLC
One Pleasant Green Place, Ltd.
One South Place, L.P.
OneSecure, Inc.
Oosterpark Corporation
Optiglobe, Inc.
Orianna Street Limited Partnership
Orillion Corporation
Outsourcing Solutions, Inc.
Outsourcing Solutions, Inc.
Overlook at Brook Run Associates, L.P.
Overlook at Brook Run II Associates. L. P.
Pacific Horizon Partners III, L.P.
Pacific Park State Credit Partner, L.L.C.
Pacific Park, L. P.
Pacific Park, L.P.
Pacific Venture Group, L. P.
Packaging Investments, LLC
Virginia Paice
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Sharon Palmer
Ana Paredes
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Philadelphia National Limited
Philadelphia National Limited
Philadelphia National Limited
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Piedmont Venture Partners II, L.P.
John Pitrelli
Dorothy Pittman
Diane Pleasants
Polaris International Securities Investment Trust Co., Ltd.
Rosie Pompilio

Pooled Auto Securities Shelf, LLC
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Prescott, Ball & Turben, Inc.
Princeton Reconveyance Services Inc.
Professional Direct Agency, Inc.
Prometheus Laboratories, Inc.
Prometheus Laboratories, Inc.
Qualitor, Inc.
Questpoint L.P., Inc.
R.B.C. Corporation
Radnor Venture Partners, L. P.
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Railroad Y L.P.
Ravenwood of Kissimmee, Ltd.
Real Estate Consultants of the South, Inc.
RedCelcius, Inc.
Redwood Domestic Fund, L.P.
Arlene Reetz
Reiman Holding Company, LLC
Reiman Holding Company, LLC
Reisterstown/Northern Development Associates, LLC
Related Club West Housing Associates, Ltd.
Republic Brokerage Corp.

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Residential Asset Funding Corporation
Retail Investment Corp., Inc.
Retirement Plans Securities, Inc.
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Marcia Rickett
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Robins Landing, L. P.
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Nieves Rodriguez
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RS Maritime Corporation
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S.H.E. Urban Renewal Associates, L.P.
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Sable Point II Apartments Limited Partnership
Maria Salbaluco
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David J. Sales
Salisbury Senior Housing Limited Partnership
San Benito Housing, Ltd.
Sanctum, Inc.
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Saranor Apartments Limited Partnership
SAS-1600 Arch Street, L.P.
Savings Associations Financial Enterprises, Inc.
Jack Scarola

SCM China Growth Fund LDC
Searcy Denny Scarola Barnhart and Shipley
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Senior Residences of Jacksonville I Limited Partnership
Senior Residences of Stillwater Limited Partnership
Senior Residences of West Memphis I Limited Partnership
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Shenandoah Station, L.P.
Shenandoah Valley Properties L.P.
Patricia Shepro
Dulce Sheran
Sienna Limited Partnership III
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Signet Student Loan Corporation
Silas Technologies, Inc.
Simonds Industries, Inc.
Honorable Andra M. Simonton
SK 55 Wall LLC
Skyhawk Agency, Inc.
Carol Slaughter
Angela M. Sless
Sheila Soloway
Somerset Apts., L.P.

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Spring Ridge Holdings, Inc.
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St. Charles Place, L.P.
St. Joseph's Affordable Housing Limited Partnership
St. Philip Villas State Credit Partner, L.L.C.
St. Philip Villas, L.P.
St. Philip Villas, L.P.
Stanton Glenn Limited Partnership
Statesboro Rental Housing, L.P.
Howard Stearns
Steeplechase Apartments II, Ltd.
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STF Institutional Partners II, L.P.
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Arlene M. Stone
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Structured Credit Partners, LLC
Studebaker Limited Partnership
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Sundial Apartments, L.P.
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SURREY DOWNS/FIDOREO, INC.
Sycamore Row, LLC
Sara Szytlerman
Tattersall Advisory Group, Inc.
Taylor & Clark Insurance Services, Incorporated
TAYLORR LAKES/FIDOREO, INC.
TCIG NC State Credit Fund, LLC
TDH II Limited
Tech Resources Group, Inc.
TechAMP International, L.P.
Helena Tetzeli
The Boettcher 1981-2 Drilling Program, Ltd.
The Exchange Building Limited Partnership
The Fairfax Corporation

The First Service Corporation of South Carolina

The Maples Limited Partnership

The Money Store Advertising Services Limited

The Money Store Auto Finance Inc.

The Money Store Commercial Mortgage Inc.

The Money Store HELOC Holding, Inc.

The Money Store Holdings Limited

The Money Store Insurance Services Corp.

The Money Store Investment Corporation

The Money Store Limited

The Money Store of New York, Inc.

The Money Store, Inc.

The Money Store/Service Corp.

Betty Thomas

TI Remnaco, Inc.

Timber Run Limited Partnership

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Jeanette Timmons

TMS Auto Holdings, Inc.

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Leonor Torregroza
Totten Tower L.P.
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Tryon Management, Inc.
Brenda Tuell
Jacqueline Tuttle
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TWC Eighty-Four, Ltd.
TWC Eighty-Seven, Ltd.
TWC Eighty-Three, Ltd.
TWC Ninety-Eight, Ltd.

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ULQ, LP
Ultraprise Corporation
Unifirst Financial Services, Inc.
Union Commerce Title Company, LLC
Union Hamilton Assurance, Ltd.

Union Hamilton Reinsurance, Ltd.
United Bancshares, Inc.
United Bancshares, Inc.
United Bank of Philadelphia
United Bank of Philadelphia
United Messaging, Inc.
US Salt Holdings, LLC
US Salt Holdings, LLC
Utilicom Networks, LLC
Valtus, Inc.
Vanteon, Inc.
Gilbert Vazquez
VCP-Alderman Park Partners, Ltd.
VCP-SB Associates, Ltd.
Vector Divisas Casa de Cambio S.A. de C.V.
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Villages at Warner Ranch PUD, LP

Cary Villalonga
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Virginia Center Associates, L.P.
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Vondelpark Corporation
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Wachovia Bank, National Association
Wachovia Bank, National Association
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Wachovia Capital Investments, Inc.
Wachovia Capital Trust I
Wachovia Capital Trust II
Wachovia Capital Trust V
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Wachovia Corporate Services, Inc.
Wachovia Corporation of Alabama
Wachovia Corporation of Tennessee
Wachovia Employer Solutions, LLC
Wachovia Exchange Services, Inc.
Wachovia Help Corporation

Wachovia Insurance Agency, Inc.
Wachovia Insurance Services, Inc.
Wachovia International Banking Corporation
Wachovia International Capital Corporation
Wachovia International Servicos, LTDA
Wachovia International Servicos, LTDA
Wachovia Leasing Corporation
Wachovia Management Company, Inc.
Wachovia Merchant Services, LLC
Wachovia Mortgage Reinsurance Company
Wachovia Operational Services, LLC
Wachovia Realty Management Corporation
Wachovia Realty Management Holding Company, Inc.
Wachovia Securities International Limited
Wachovia Securities, Inc.
Wachovia SF Corporation
Wachovia Trust Company
Wachovia Trust Services, Inc.
WAG Belair, LLC
WAG Eastern, LLC
WAG Fairview Boise, LLC
WAG Liberty/Milford Mill, LLC
WAG Reisterstown, LLC

Judy Walden

Thomas Walker

Waller House Corporation

Warder Mansion L.P.

Washington Apartments Associates, Limited Partnership

Water Street Insurance Agency, Inc.

Waterford Manor II, L.P.

Waterford Manor, L.P.

WBP Associates

West 152 Street Associates LLC

West Brickell Apartments, Ltd.

West Hanover Urban Renewal, L.P.

Western Integrated Networks, LLC

Western Integrated Networks, LLC

WestPoint Stevens Inc.

Westville, Ltd.

WG Saginaw Lansing MI, LLC

Wheat Benefit Services, LLC

Wheat First Butcher Singer Private Equity Fund, Limited Partnership

Wheat Service & Equipment Corporation

Lewis White

Robert White

White Amber, Inc.

Whitney Hotel Limited Partnership

Vivian Wilkerson

William Byrd Hotel Associates, L.P.

Glena Williams

Williams Landing Limited Partnership

Willow Key Apartments Limited Partnership

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Willow Ridge Apartments of Greensboro Limited Partnership

Willow Ridge Associates

Willow Trace Limited Partnership

Willows, LLC

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WNB Corporation

Women's Growth Capital Fund I, L.L.L.P.

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Woodlawn Joint Venture

WSH Holdings, Ltd.

Xcelerate Corp.

Xpede, Inc.

French Yarbrough

Yorktown Arms Development Limited Partnership

Carol Zagame

Elaine Zajac

Zero Stage Capital II, L.P.

STATEMENT REGARDING ORAL ARGUMENT

Appellees submit that the narrow issues presented in this appeal are clearly governed by well established precedent in this Circuit and that oral argument is not necessary.

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STATEMENT OF JURISDICTION

This Court has jurisdiction only over the District Court's denial of Appellants' Motion to Intervene as a matter of right. The denial of a motion to intervene is "not considered an appealable final order." E.E.O.C. v. Eastern Airlines, Inc., 736 F.2d 635 (11th Cir. 1984). Under this Court's "anomalous rule," however, this Court has limited jurisdiction to determine whether the District Court erred in denying intervention as a matter of right. Id. If the District Court did not err, this Court's "jurisdiction evaporates and [this Court] must dismiss the appeal for want of jurisdiction." F.T.C. v. American Legal Distributors, Inc., 890 F.2d 363 (11th Cir. 1989).

This Court clearly does not have jurisdiction over the District Court's denial of the motion for permissive intervention. Davis v. Butts, 290 F.3d 1297, 1299 (11th Cir. 2002) (quoting Meek v. Metro Dade County, 985 F.2d 1471, 1476 (11th Cir. 1993) ("Standing alone, an order denying permissive intervention is neither a final decision nor an appealable interlocutory order because such an order does not substantially affect the movant's rights").

STATEMENT OF THE ISSUES

- I. WHETHER THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO INTERVENE AS A MATTER OF RIGHT WHERE APPELLANTS' LEGAL INTERESTS, AS A MATTER OF LAW, WOULD NOT BE IMPAIRED BY THE CONTINUING LITIGATION OF THE INDIVIDUAL PLAINTIFF'S CLAIMS AND WHERE THE INDIVIDUAL PLAINTIFF WOULD ADEQUATELY REPRESENT APPELLANTS' INTERESTS
 - A. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT APPELLANTS' LEGAL INTERESTS WOULD NOT BE IMPAIRED BY THE CONTINUATION OF THE UNDERLYING LITIGATION WITHOUT INTERVENTION WHERE APPELLANTS' INTERESTS WOULD NOT BE IMPAIRED BY EXISTING AND FUTURE RULINGS BY THE DISTRICT COURT BECAUSE, AMONG OTHER REASONS, APPELLANTS WOULD HAVE THE OPPORTUNITY TO RE-LITIGATE ANY SUCH ADVERSE RULINGS
 - B. WHETHER THE INDIVIDUAL PLAINTIFF WILL ADEQUATELY REPRESENT APPELLANTS' INTERESTS WHERE APPELLANTS AND THE INDIVIDUAL PLAINTIFF SHARE THE SAME ULTIMATE GOALS IN THE UNDERLYING LITIGATION, INTEND TO PURSUE THESE GOALS WITH THE SAME LEGAL THEORIES, AND INTEND TO SUPPORT THEIR RESPECTIVE CLAIMS WITH MUCH OF THE SAME EVIDENCE
- II. WHETHER THE DISTRICT COURT ERRED IN DECLINING TO RELY UPON APPELLANTS' ARGUMENTS REGARDING THE PROPRIETY OF THE DISTRICT COURT'S DECERTIFICATION ORDER IN DENYING APPELLANTS' MOTION TO INTERVENE WHERE ARGUMENTS THAT THE DISTRICT COURT ERRED IN DECERTIFYING THE CLASS ARE NOT RELEVANT TO THE ANALYSIS OF A MOTION TO INTERVENE AS A MATTER OF RIGHT

STATEMENT OF THE CASE

I. The Course of Proceedings and Dispositions in the Court Below.

A. Background.

On November 30, 1992, Plaintiff Stone submitted a charge of Discrimination to the Equal Employment Opportunity Commission ("EEOC") alleging age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). On September 23, 1994, after her charge had been dismissed by the EEOC, Stone filed a Complaint on behalf of herself and others similarly situated alleging age discrimination against First Union Corporation and affiliated entities.¹ (Complaint, R1).

B. Conditional Certification and Discovery.

In October 1998, the District Court conditionally certified a class under 29 U.S.C. § 621 *et seq.* consisting of current and former employees of First Union National Bank of Florida who were at least 40 years of age and alleged to have suffered certain adverse actions because of their age ("Opt-In Plaintiffs"). (Conditional Certification Order, R127). Pursuant to the court's order, notices were sent out to prospective class members. By the spring of 1999, approximately 180 class members had opted to join the conditionally

certified class. (Reports of Opt-In Summaries R339, R404, & R495).

Subsequently, a number of Opt-In Plaintiffs withdrew from the class leaving approximately 160 class members. (Notices of Withdrawal, R364, 405, 494).

Following conditional certification, the parties engaged in discovery for approximately two years focusing primarily on issues related to class certification. During this discovery period, First Union deposed the Opt-In Plaintiffs, and the parties exchanged extensive written discovery. Pursuant to a consent scheduling order, all non-expert discovery closed on February 23, 2001. (Scheduling Order, R514).

Pursuant to the same consent scheduling order, on February 23, 2001, First Union filed a motion to decertify the class. (Mot. to Decertify, R699). Opt-In Plaintiffs responded to that motion on April 11, 2001. (Resp. to Mot. to Decertify, R736). In addition, the parties filed several supplemental briefs addressing new developments in the governing case law and answering various questions posed by the District Court, the last of which was filed on July 13, 2001. (Reply Brief in Supp. of Mot. to Decertify, R765; Supp. Mem. in Supp. of Mot. to Decertify, R828; Second Supp. Mem. in Supp. of

¹ Currently, First Union Corporation, First Union National Bank of Florida, First Union Corporation of Florida, and Wachovia Corporation are parties to

Mot. to Decertify, R885; Supp. to Resp. to Mot. to Decertify, R861). The Court held oral argument on August 9, 2001 and provided each party the full opportunity to be heard. On August 24, 2001, Opt-In Plaintiffs requested and were granted leave to file a supplemental brief. (Mot. to Supp. Oral Argument, R949).

C. **The District Court Decertifies the Conditionally Certified Class.**

After reviewing all of the parties' voluminous submissions on the decertification issue, on September 4, 2001, the District Court issued an Order granting First Union's motion to decertify the conditionally certified class. (Order Granting Mot. to Supp. Oral Arg. on Mot. to Decertify, Granting Motion for Summary Judgment on Disparate Impact Theory, Granting Mot. to Decertify, R957-28) (hereinafter "Decertification Order"). The District Court began the Decertification Order with a thorough discussion of the standard applicable to collective actions under the ADEA and concluded that, in order to establish the appropriateness of a collective action, Opt-In Plaintiffs bore the burden of demonstrating that they were "similarly situated." (Decertification Order, R957-17). More specifically, the court held that whether Opt-In Plaintiffs were "similarly situated"

this case. This brief collectively refers to these parties as "First Union."

depended on a review of a variety of factors listed by this Court in Hipp v. Liberty National Life Insurance Company, 252 F.3d 1208 (11th Cir. 2001) and Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996), including the following: (i) the type and number of acquisitions at issue, (ii) the positions and job titles held by Opt-In Plaintiffs, (iii) the types of alleged adverse employment actions, (iv) the physical location where Opt-In Plaintiffs worked, and (v) whether Opt-In Plaintiffs had produced evidence of a pattern or practice of discrimination. (R957-26-27). Based on an extensive analysis and discussion of each of these factors, the court ultimately concluded that "[w]hen applied to the factors set forth by the Eleventh Circuit in Hipp and Grayson, the relevant facts weigh heavily in favor of decertification," and summarized its reasoning as follows:

The proposed opt-in-class mixes employees with different job titles and from all levels of the organization; includes individuals employed within different divisions of the bank; includes individuals who assert a variety of claims, many of which have not been asserted by the representative Plaintiff; and fails to provide evidence of the application of an overriding discriminatory policy, practice, or procedure.

(R957-28).

D. The Plaintiffs Begin Their Attempts to Undo Decertification.

Shortly after the decertification of the class, the former Opt-In Plaintiffs began a lengthy and persistent campaign to undo the court's

decertification order. This campaign began on September 19, 2001, when the former Opt-In Plaintiffs filed a motion to reconsider the Decertification Order. (Mot. for Recon. of Decertification Order, R976). In support of this motion for reconsideration, the former Opt-In Plaintiffs first argued that the District Court's decision was premature in light of a number of issues. (R976-2-6). Specifically, they argued that a number of motions to compel discovery and motions for sanctions were outstanding at the time of the court's ruling on decertification. (R976-3). They further argued that the court's decertification order was premature because the parties had not yet submitted their expert reports. (Id.). Second, in addition to arguing that the Decertification Order was premature, the former Opt-In Plaintiffs argued that the District Court had applied the incorrect legal standard by erroneously relying on the failure to prove a pattern or practice of age discrimination. (R976-6). Third, the former Opt-In Plaintiffs argued that the District Court had erroneously relied on the absence of expert reports in finding a lack of statistical evidence in support of a unifying pattern of discrimination. (R976-9). Fourth, the former Opt-In Plaintiffs argued that the District Court had erroneously relied on an affidavit submitted in support of the decertification motion, which the former Opt-In Plaintiffs had moved to strike. (R976-10). Finally, the former Opt-In Plaintiffs argued that the

District Court erroneously relied on a number of factual errors relating to the alleged similarities of the former Opt-In Plaintiffs. (R976-13).

In a lengthy order dated February 11, 2002, the District Court denied the former Opt-In Plaintiffs' Motion for Reconsideration. (Omnibus Order, R1053). As an initial matter, the District Court found that the former Opt-In Plaintiffs' purported "new" evidence consisting of affidavits from their experts were "not probative and untimely." (R1053-4). Specifically, the court found that the information submitted in connection with the former Opt In-Plaintiffs' Motion for Reconsideration could have been submitted in opposition to Defendant's Motion for Decertification but that the former Opt-In Plaintiffs elected not to do so. (R1053-5). Moreover, with respect to the former Opt-In Plaintiffs' argument that the District Court erred in not considering the expert reports in ruling on decertification, the District Court specifically held that the former Opt-In Plaintiffs had consented to a scheduling order that contemplated the filing of the decertification motion prior to the date on which the parties would exchange expert reports. (R1053-7). The court further observed numerous representations by Plaintiffs' counsel in open court that the decertification motion would be ripe for adjudication prior to the completion of expert discovery. (R1053-7-12). In this regard, the District Court also observed that, in their opposition to the

decertification motion, the former Opt In-Plaintiffs never argued that their expert reports were necessary to resolving the issue of decertification and did not contend that a ruling on decertification would be premature.

(R1053-13). Indeed, the court concluded that the former Opt-In Plaintiffs' arguments that the decertification order was premature "border[ed] on bad faith" and were "disingenuous." (R1053-5 & 14).

After the District Court's well reasoned denial of the motion for reconsideration, former Opt-In Plaintiffs moved for permission to appeal the Decertification Order. In support of this motion, the former Opt-In Plaintiffs recycled the arguments that they had asserted in support of their Motion for Reconsideration. This Court denied the petition to appeal without opinion on May 1, 2002.

Still refusing to accept the District Court's decertification order, on March 8, 2002, the former Opt-In Plaintiffs filed a motion to designate additional representative plaintiffs. (Mot. for Designation of Rep. Plaintiffs, R1081). In this motion, Plaintiffs sought to add unspecified former Opt-In Plaintiffs as representative plaintiffs in order to "give the breadth of job title representation that the court found lacking in" the Decertification Order. (R1081-2). Recognizing the procedural flaws of this motion, the court

denied this motion on November 13, 2002. (Order Denying Mot. for Designation of Rep. Plaintiffs, R1187).

Leaving no stone unturned, on December 9, 2002, Plaintiff Stone filed a Motion for Leave to Amend Complaint ("Motion to Amend"). (R1199). In her Motion to Amend, Plaintiff Stone moved pursuant to Rule 15(a) of the Federal Rules of Civil Procedure to add all 160 former Opt-In Plaintiffs as named parties to Plaintiff Stone's case. (Id.). In support of this motion, Plaintiff Stone reasserted her same arguments that the former Opt-In Plaintiffs were sufficiently similarly situated to proceed in one case. (R1199-19-85). Plaintiff Stone also argued that adding the former Opt-In Plaintiffs as parties to the case was appropriate in light of "major additional new evidence" consisting "principally" of expert reports allegedly demonstrating the similarity of the Opt-In Plaintiffs' claims and the existence of a pattern and practice of discrimination at First Union. (R1199-17).

E. The Motion to Intervene – the Only Order Currently on Appeal.

In a final (so far) attempt to undo the District Court's Decertification Order, on December 20, 2002, the 160 former Opt-In Plaintiffs moved to intervene in Plaintiff Stone's individual case. (Motion to Intervene, R1207). In support of their Motion to Intervene, the former Opt-In Plaintiffs again relied on their well worn contentions that their claims were sufficiently

similar to be litigated in a single case. (R1207-22-86). Likewise, the former Opt-In Plaintiffs again argued that granting their Motion to Intervene despite the court's prior ruling on decertification was appropriate in light of Plaintiffs' expert reports, which were not before the court when the court decertified the class. (R1207-37-48).

F. District Court Denies the Motion to Amend and Motion to Intervene.

In an order dated May 28, 2003, the District Court denied the Opt-In Plaintiffs' Motion to Amend and Motion to Intervene. (Omnibus Order, R1272). The court subsequently entered a revised Omnibus Order dated July 1, 2003 that corrected typographical errors in the May 28, 2003 order but did not substantively alter that order. (Corrected Omnibus Order, R1276).² In ruling on the Motion to Amend, the court first concluded that the standard applicable to the joinder of parties pursuant to Rule 20 of the Federal Rules of Civil Procedure is more stringent than the standard for a collective-action under the ADEA. (R1276-14-15). The Court then reiterated that its prior decision to decertify the class was based on a variety of factors including:

² In discussing the denial of the Motion to Amend and Motion to Intervene, First Union cites to the corrected Omnibus Order dated July 1, 2003. (R1276).

(1) whether the Plaintiffs all held the same job titles; (2) whether the Plaintiffs worked in different geographical locations; (3) the extent to which the claimed discrimination occurred during different time periods and by different decisionmakers; (4) whether the Plaintiffs provided 'statistically significant' evidence of discrimination; (5) whether the Plaintiffs alleged similar, though not identical, discriminatory treatment; (6) whether the Plaintiffs have sufficiently pled and supported by affidavits, depositions and the like that Defendants' decisionmakers have articulated and manifested a clear intent to purge the Defendant of older employees; and (7) whether the Defendant took steps to implement its plan, such as targeting older employees for criticism and creating a paper trail that would be grounds for their demotion.

(R1276-15). Reviewing its prior ruling decertifying the class, the District Court again commented that it had applied these factors and determined that the maintenance of a collective action was inappropriate. (R1276-7-8). The court then concluded that the former Opt-In Plaintiffs had advanced no argument warranting a reversal of the decertification decision and, since they had not convinced the court that its decision to decertify the class was inappropriate under Section 216(b), the former Opt-In Plaintiffs could not meet the more stringent burden of demonstrating the appropriateness of joinder pursuant to Rule 20 of the Federal Rules of Civil Procedure.

(R1276-29-30).

Furthermore, in denying the Motion to Amend, the District Court specifically and thoroughly analyzed the former Opt-In Plaintiffs' expert reports, which allegedly constituted the "major additional new evidence"

that warranted adding 160 additional plaintiffs to this case. (R1276-17-29). The District Court summarized the report and agreed with First Union's criticisms of various aspects of these reports. (R1276-17-22). After its review, the court again reiterated that its decertification decision had been based on the overall consideration of the seven factors from Grayson and Hipp and that their expert reports were irrelevant to the majority of these factors, including the former Opt-In Plaintiffs varied positions and job titles, the fact that the former Opt-In Plaintiffs worked in numerous different geographical locations, the different time periods in which the alleged discrimination occurred, and the assertion of different types of adverse employment actions. (R1276-29).

After determining that the reports were not probative to most of the court's decertification analysis, the court specifically focused on whether the reports altered its conclusion that the former Opt-In Plaintiffs had failed to produce sufficient evidence of an overarching plan or practice of age discrimination. (R1276-23, 25-27). First, the court noticed deficiencies in the reliability of the expert reports. (R1276-28). As an example, the court scrutinized an admission from two of the experts, Drs. Bernardin and Villanova, that they had not constructed a model that replicated the actual decisionmaking process that had been used by First Union. (Id.). Similarly,

the court took notice of the portion of a report from another expert, Dr. Lundquist, that individual managers had been given substantial hiring discretion. (R1276-27). The court agreed with First Union's contention that such discretion by individual managers further suggested that the former Opt-In Plaintiffs had not been subjected to a unified discriminatory practice. (Id.). The court also noted the existence of inconsistencies and contradictory positions taken by some of the experts. (R1276-28). Concluding its analysis of the experts' reports, the court found that the reports did not provide any basis for reconsidering the decertification because

the purported class members have brought numerous different types of claims that relate to several different mergers and acquisitions involving different entities and institutions, or employed in different branches and divisions of First Union under several different job titles and classifications, and failed to show sufficient evidence of a pattern or practice of age discrimination to which they were all subjected.

(R1276-29).

After denying the Opt-In Plaintiffs' Motion to Amend, the District Court turned to the Motion to Intervene. (R1276-30). The court began its analysis of the Motion to Intervene by noting that that the former Opt-In Plaintiffs based their Motion to Intervene primarily on the same arguments they had used to support their Motion to Amend. (Id.). That is, the former Opt-In Plaintiffs contended that, as established by their expert reports, they

were so similarly situated that they were entitled to intervene as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure and should be permitted to intervene under Rule 24(b) of the Federal Rules. (Id.).

The Court also recited the applicable standards for a Motion to Intervene in the Eleventh Circuit. (R1276-30-31). After doing so, the court held that the Motion to Intervene depended on whether the Opt-In Plaintiffs could establish that they were "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." (R1276-32). Specifically, the court observed that the former Opt-In Plaintiffs contended that their interests would be impaired if the Motion to Intervene were denied because (1) judges in subsequent single-plaintiff actions would not be bound by the court's ruling allowing the former Opt-In Plaintiffs to "piggyback" on Plaintiff Stone's timely filed EEOC charge and that any such rulings would leave those Plaintiffs without a remedy; (2) the trial of individual claims asserted by the former Opt-In Plaintiffs would be prejudiced by non-binding rulings in the litigation of Plaintiff Stone's claims which would have persuasive effect on the subsequent litigation of the claims asserted by the former Opt-In Plaintiffs; and (3) that many of the former Opt-In Plaintiffs were too old to begin litigating their claims anew. (Id.). Addressing these arguments, the court

held that the chance that other courts would not follow its ruling regarding allowing the Opt-In Plaintiffs to "piggyback" on Plaintiff Stone's timely filed charge was not an interest that would be impaired by the continued litigation of Plaintiff Stone's claims because the claims of many former Opt-In Plaintiffs were already time barred when Plaintiff Stone first filed her charge. (Id.) On this point, the court further held that other former Opt-In Plaintiffs would not be prejudiced by any such rulings because they would only find themselves in the same position as if the class action had never been filed. (Id.) Second, the court held that the potential for adverse stare decisis did not represent a sufficient interest in the litigation because each Opt-In Plaintiff would have the opportunity to litigate themselves any issues that might be litigated in Plaintiff Stone's case and that subsequent courts would not be bound by the District Court's ruling on such issues. (R1276-33). The court also noted that, based on its conclusion that the former Opt-In Plaintiffs were not similarly situated, there would be no reason to believe that other courts would be persuaded by the rulings in Plaintiff Stone's case. (Id.) Finally, in response to Plaintiffs' claims concerning their old age and poor health, the court observed the absence of any authority supporting such factors as a basis for intervention and that the Opt-In Plaintiffs were themselves delaying the adjudication of their individual claims by

continuously filing motions attempting to reestablish the collective status of their claims even after the court had decertified the putative class. (R1276-33-34). Thus, finding that the former Opt-In Plaintiffs had not established the existence of an interest in Plaintiff Stone's case that would be impaired if they were not allowed to intervene in Plaintiff Stone's case, the court found that the Plaintiffs had not established that they were entitled to intervention as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure. (Id.).

The Court also denied Plaintiffs' Motion to Intervene through permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure. (R1276-35). The Court concluded that the Opt-In Plaintiffs had "provided no compelling rationale to allow a collective action under 24(b), and merely appear to be searching for another rule under which to make arguments the Court has rejected." (Id.). In light of its previous ruling that Plaintiffs were not sufficiently similarly situated to proceed through a collective action under the ADEA, the court concluded it would be inappropriate to grant Plaintiffs permissive intervention to join Plaintiff Stone's suit. (Id.).³

³ The District Court's denial of the former Opt-In Plaintiffs' motion for permissive intervention is not before this Court. This Court's jurisdiction

This appeal followed.

II. Statement of Facts

For purposes of Opt-In Plaintiffs' appeal of the District Court's denial of the Motion to Intervene, the facts surrounding Plaintiff Stone's employment with First Union – as well as the facts associated with the Opt-In Plaintiffs' involvement with First Union – are irrelevant. Indeed, the issue before the Court is purely a legal one and in-depth knowledge of the myriad factual scenarios is unnecessary to decide this issue.

What is relevant is the history of this litigation and Opt-in Plaintiffs' numerous attempts to undo the district court's Decertification Order. Thus, all relevant factual information may be found at the Statement of the Case section of this brief.

III. Standard of Review

The denial of a motion to intervene as a matter of right is reviewed de novo. Purcell v. BankAtlantic Fin. Corp., 85 F.3d 1508, 1512 (11th Cir. 1996). However, factual findings made in connection with the denial of a

exists only to determine whether the District Court properly denied the motion for intervention as a matter of right. If it did, then this Court's jurisdiction disappears and it cannot consider the District Court's denial of permissive intervention.

motion to intervene as a matter of right are reviewed for clear error. Meek v. Metro. Dade County, 985 F.2d 1471, 1477 (11th Cir. 1993).

SUMMARY OF THE ARGUMENT

This appeal is nothing more than yet another attempt in a very long series of attempts by the members of a decertified collective action to be relieved from the District Court's order decertifying their formerly conditionally certified class. Indeed, Appellants' Initial Brief reads as if Appellants were appealing the District Court's decertification order. This Court should not be misled by Appellants' attempts to obscure the issue presented in this appeal. Whether the District Court properly decertified the class is not an issue before this Court. Instead, the only issue before this Court – the only issue over which this Court has jurisdiction – is the narrow issue of whether the District Court properly denied a motion to intervene as a matter of right by approximately 160 former members of the now decertified class.

When the actual issue presented in this appeal, and the law applicable to this issue, are considered, this appeal presents a very easy case. Clearly, the District Court did not err in denying Appellants' Motion to Intervene because Appellants have not, and can not, demonstrate two of the elements necessary to be entitled to intervention as a matter of right under Rule 24(a)

of the Federal Rules of Civil Procedure. First, Appellants cannot demonstrate any legal interest in the underlying lawsuit that would be impaired if intervention were denied. Appellants' argument that litigating Plaintiff Stone's claims without allowing Appellants to intervene could create adverse rulings that would have negative stare decisis effect on Appellants' claims is without merit. If the District Court rules in favor of Plaintiff Stone on the issues in which Appellants claim an interest, then Appellants' interests in this regard could be furthered, not impaired. Conversely, to the extent the District Court has already ruled against Plaintiff Stone on these common issues, and to the extent the District Court might enter additional adverse rulings, Appellants' interests would not be impaired because, if they are not allowed to intervene and instead pursue their own individual claims, Appellants would be afforded a "second bite at the apple" on these issues. In other words, if the District Court has, or might, enter adverse rulings on the issues in which Appellants claim an interest, denying Appellants' Motion to Intervene would actually advance those interests because Appellants would be allowed to re-litigate the District Court's adverse rulings.

Even if Appellants could demonstrate an interest that might be impaired by allowing Plaintiff Stone's individual case to proceed, Appellants

still would not be entitled to intervene as a matter of right because Appellants cannot demonstrate that Plaintiff Stone will not adequately represent their interests. As Appellants repeatedly assert, Plaintiff Stone and Appellants share the same goals, and they intend to pursue these goals by advancing the same legal theories and intend to support these theories with much of the same evidence. Likewise, it is beyond dispute that there is no "collusion" between Plaintiff Stone and First Union that would support the conclusion that Plaintiff Stone will not adequately represent Appellants' interests, and there is no other reason to conclude that Plaintiff Stone will not follow her clear incentives to advance the interests that she shares with Appellants.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Appellants Cannot Establish the Requirements for Intervention as Matter of Right.

Rule 24(a) of the Federal Rules of Civil Procedure governs

Appellants' motion to intervene as a matter of right. Rule 24(a) provides:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and 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, unless the applicant's interest is adequately represented by existing parties.

Fed.R.Civ.P. 24(a). Thus, absent an unconditional statutory right to intervene, in order to establish intervention as a matter of right, a proposed intervener must demonstrate that (1) the motion to intervene is timely; (2) the proposed intervenor has an interest in the "property or transaction which is the subject of the action"; (3) the proposed intervenor's interest would be impeded or impaired by continuing the underlying litigation; and (4) the proposed intervenors interests are not adequately represented by the existing parties. Chiles v. Thornburg, 865 F.2d 1197, 1212 (11th Cir. 1989).

Here, it is undisputed that the ADEA does not provide a statutory right to intervene. Mitchell v. McCorstin, 728 F.2d 1422, 1423 (11th Cir. 1984). Further, First Union does not contend that Appellants' motion to intervene was untimely; nor does it dispute that, under applicable law, Appellants have an interest in the underlying litigation. First Union does contend, however, that intervention is improper because (1) Appellants' interest in Plaintiff Stone's case would not be impaired by the denial of intervention and (2) even if Appellants' interests were impaired, Appellants cannot demonstrate that Plaintiff Stone will not adequately represent their interests.

II. Appellants Cannot Demonstrate That Their Legal Interests in Plaintiff Stone's Case Against First Union Would be Impaired if They Were Not Allowed to Intervene.

A proposed intervenor does not have a right to intervene under Rule 24(a) of the Federal Rules unless continuing the underlying litigation would impair the proposed intervenor's legally cognizable interests. Chiles v. Thornburg, 865 F.2d 1197, 1212 (11th Cir. 1989). Moreover, such interest must be a "direct, substantial, legally protectable interest in the proceedings." Lloyd v. Alabama Dept. of Corrections, 176 F.3d 1336, 1334 (11th Cir. 1999) (quoting Worlds v. Department of Health & Rehabilitative Servs., 929 F.2d 591, 594 (11th Cir.1991)).

While under certain circumstances the potential stare decisis effect of decisions made in the underlying litigation can constitute an impairment of interests for the purposes of intervention as a matter of right, the persuasive effect of adverse judgments does not necessarily satisfy the impairment requirement. ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1323 (11th Cir. 1990) ("Furthermore, a potential stare decisis effect does not automatically supply the practical disadvantage warranting intervention."); Chiles, 865 F.2d at 1212.

Here, Appellants cannot demonstrate a legally cognizable interest that would be impaired by continuing to allow Plaintiff Stone to pursue her claims without allowing intervention by Appellants.

A. The District Court's Rulings in Plaintiff Stone's Case Would Not Impair Appellants' Interests.

Appellants' primary argument that their interests would be impaired if they are not allowed to intervene in Plaintiff Stone's case is that, in the continued litigation of Plaintiff Stone's individual claims, the District Court is likely to make a number of rulings that would have potential stare decisis effect in the subsequent litigation of Appellants' claims. (Appellants' Initial Brief at 35). Specifically, Appellants first contend that the District Court has already disregarded their expert reports and improperly accepted First Union's criticism of these reports. (Id. at 38-39). Thus, Appellants argue that their interests in utilizing these expert reports in subsequent litigation would be impaired by the persuasive effect of these, and possibly other, rulings regarding the expert reports. (Id. at 41). Similarly, Appellants assert that the District Court could enter adverse rulings in Plaintiff Stone's case on the issue of whether a pattern or practice of discrimination existed at First Union and that these rulings could also

impair Appellants' subsequent litigation of their discrimination claims.

(Id. at 38).

Appellants' arguments regarding the stare decisis effect of the District Court's rulings in Plaintiff Stone's case are logically wrong and flatly contradicted by controlling law. In ruling on the issues that Appellants anticipate arising in Plaintiff Stone's case, the District Court will either rule in favor of Plaintiff Stone on issues such as the admissibility of the expert reports and the appropriateness of a pattern-and-practice trial under Teamsters, or the court will rule against Plaintiff Stone on these issues. If the District Court ultimately rules in favor of Plaintiff Stone on these issues, then these favorable rulings could enhance the interests of Appellants in the subsequent litigation of their claims. In other words, if the District Court were to rule in favor of Plaintiff Stone on these issues, any stare decisis effect of these rulings will help, not hinder, Appellants' interests.

On the other hand, to the extent the District Court has already rendered rulings that are adverse to Appellants' interests in this case, and to the extent the court might enter further adverse rulings, Appellants' interests would not, as a matter of law, be impaired for the purposes of a motion to intervene as established in this Court's decision of Worlds v. Department of Health and Rehabilitive Services, 929 F.2d 591, 594 (11th Cir. 1991).

Under facts that are very similar to those presented in the instant appeal, in Worlds, after the district court had decertified a class of employees alleging discrimination in hiring and promotion, 145 former class members moved to intervene in the named plaintiffs' case. The district court denied the motion to intervene, and this Court affirmed. Id. In reaching this decision, this Court held that the proposed intervenors possessed an interest in the ongoing litigation because they alleged that they had suffered similar wrongful acts as the named plaintiffs. Id. at 594. Nevertheless, this Court rejected the proposed intervenors' contention that adverse rulings in the course of the named plaintiffs' case would impair the proposed intervenors' interests. Id. The Court noted that the district court had already rejected a substantial portion of the evidence that the proposed intervenors intended to advance in support of their claims. Id. Thus, the court concluded that, not only would the proposed intervenors' interests not be impaired if intervention were denied, but that these interests would actually be enhanced by refusing intervention. Specifically, if intervention were granted, the proposed intervenors would be bound by the district court's adverse rulings but, if intervention were denied, the proposed intervenors would be afforded a second opportunity to obtain favorable rulings these issues. Id. The Court reasoned:

because so much of the evidence that would be applicable to both appellant and the plaintiffs has already been rejected by the district court there is little likelihood that stare decisis would leave appellant in a worse position if he is not allowed to intervene . . . appellant will now have the opportunity to return to the district court in the separate suit and seek the introduction of sufficiently authenticated statistical and other evidence of discrimination.

Id. at 594-95; see also ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1323 (11th Cir. 1990) (holding that an industry association was properly denied intervention as a matter of right because, inter alia, the association would have a subsequent opportunity to challenge environmental regulations imposed on its member companies).

In the instant case, just as in Worlds, to the extent that the District Court has already entered adverse rulings with respect to Appellants' expert reports, and to the extent that it might enter future adverse rulings with respect to other aspects of Plaintiff Stone's case, Appellants would not be impaired by any stare decisis of such decisions. Indeed, as in Worlds, Appellants' interest in this regard could be advanced by denying intervention because, if intervention were denied, Appellants would be able to assert their arguments anew in an attempt to gain favorable rulings.

B. Appellants Cannot Prevail on Their Motion to Intervene as a Matter of Right Based on Arguments of Efficiency and Cost.

Appellants contend that denying intervention would impair Appellants' interests based on "inefficiency" and would constitute a "waste of resources." (Appellants' Initial Brief at 41). Specifically, Appellants assert that their interests would be impaired "because separate actions would be prohibitively expensive, duplicative, and an extraordinary waste of resources." (Id. at 42).

This argument is nothing more than another not-so-subtle attempt to gain immediate appellate review of the District Court's decertification decision. Indeed, in support of this argument, Appellants rely exclusively on cases addressing the certification of collective actions and expressly argue that "ADEA plaintiffs should proceed collectively." (Appellants' Initial Brief at 42) (emphasis in original). Despite Appellants' tired contentions, the District Court has repeatedly ruled that Appellants are not entitled to proceed collectively, and this Court has already denied Appellants' petition to appeal the District Court's decertification order on an interlocutory basis. Thus, once again, decertification is not an issue before this Court at this time. Therefore, Appellants' arguments that they should

be allowed to proceed collectively in order to promote efficiency and conserve resources are completely and entirely irrelevant to whether the District Court erred in denying Appellants' motion to intervene as a matter of right.

C. Appellants Are Not at Risk of Losing Remedies by the Denial of Intervention.

There is no merit to any suggestion that any Appellant would lose remedies to which they are otherwise entitled if intervention were denied. It is a simple and indisputable truth that not a single Appellant would lose any rights by virtue of having participated in the conditionally certified class. All of the former Opt-In Plaintiffs were permitted to "piggy back" onto Plaintiff Stone's EEOC charge while the case was conditionally certified as a collective action, regardless of whether they themselves had filed timely EEOC charges. Now that the class has been decertified (the propriety of which is not an issue before this Court), these former Opt-In Plaintiffs find themselves in the same position as if there had never been a conditionally certified class. Some Opt-In Plaintiffs had filed timely EEOC charges and can pursue their individual claims, and some had not and cannot because their claims are time barred. The fact that this case pended for a period of time as a conditional class action does not allow the former

Opt-In Plaintiffs additional time in which to pursue their claims.

Focusing more on the issue presented in this appeal, none of the former Opt-In Plaintiffs are entitled to intervene in Plaintiff Stone's case just to provide them a remedy that might otherwise be time barred or limited by applicable limitations periods.

III. Appellants Have Not Shown That Plaintiff Stone Will Not Adequately Represent The Interests that Appellants Claim in Plaintiff Stone's Case.

Where proposed intervenors "seek to achieve the same objectives as an existing party in the case" a presumption arises that the existing parties adequately represent the interests of the proposed intervenor. United States v. Miami, 278 F.3d 1174, 1178 (11th Cir. 2002) (citing Meek v. Metro Dade County, 985 F.2d 1471, 1477 (11th Cir. 1993); Athens Lumber Co. v. FEC, 690 F.2d 1364, 1366 (11th Cir. 1982)). For example, in Athens Lumber, this Court found that the existing parties adequately represented the interests of a union seeking to intervene in ongoing litigation because both the FEC, which was already a party, and the union shared the same ultimate objective of upholding the constitutionality of certain federal election laws. Athens Lumber, 690 F.2d at 1366, 1367. Likewise, in facts that are very similar to the circumstances presented in this appeal, in United

States v. Miami, this Court concluded that the interests of a labor union seeking to intervene in ongoing litigation were adequately represented by the existing parties because the union shared the same goals of eradicating discrimination and promoting the interests of minorities as one of the existing plaintiffs. United States v. City of Miami, 278 F.3d at 1179; see also United States v. Georgia, 19 F.3d 1388, 1392 (11th Cir. 1994) (holding that a civic group was properly denied intervention as a matter of right in an ongoing school desegregation case because both the citizens group and the county board of education, which was already a party to the lawsuit, shared the common goal of eliminating detrimental affects of school segregation).

In order for a proposed intervenor to demonstrate that the existing parties do not adequately represent its interests, the proposed intervenor must demonstrate (1) "collusion" between the existing parties, (2) that one of the existing parties has an interest adverse to those of the proposed intervenor, or (3) failure of a representative party to fulfill its duty of representation. Clark v. Putnam County, 168 F.3d 458, 461 (11th Cir. 1999) (citing FSLIC v. Falls Chase Special Taxing Dist., 983 F.2d 211, 215 (11th Cir. 1993) (quoting

United States v. United States Steel Corp., 548 F.2d 1232, 1236 (5th Cir.1977)).

In this case, Appellants have not and cannot demonstrate that Plaintiff Stone will not adequately represent their interests.

Appellants do not, and could not, contend that any collusion exists between First Union and Plaintiff Stone to compromise Appellants' alleged interests in this litigation. Likewise, Appellants do not, and could not, contend that Plaintiff Stone has failed to perform any duty to represent Appellants' interests or that Plaintiff Stone's interests are inconsistent with Appellants' interests.

To the contrary, it is beyond dispute that, not only do Plaintiff Stone and Appellants share common goals, they also intend to pursue these goals through identical arguments, strategies, and evidence. As has been repeatedly asserted, according to Appellants and Plaintiff Stone "100% of the former opt in Plaintiffs claim that Defendants engaged in a pattern-or-practice of age discrimination . . .during its acquisition of banking institutions in Florida between August 1991 and May 1994." (Appellants Initial Brief at 11). Appellants and Plaintiff Stone further acknowledge that "all will rely on the same legal theories, evidence and witnesses in the liability phase of a

pattern-or-practice trial." (Id.) (emphases in original). More specifically, Plaintiff Stone and Appellants continually represent to this Court, as they did to the District Court, that "100%" of the former Opt-In Plaintiffs "were acquired by First Union and subjected to – and now challenge – the same merger selection/displacement process." (Id.). Plaintiff Stone and Appellants also repeatedly contend that they all intend to advance the same theories of a pattern-and-practice of discrimination at First Union and that they intend to avail themselves of the favorable burden-shifting analysis from the Supreme Court's decision in Teamsters. (Id. at 23 and 31-35). As a final example, Appellants and Plaintiff Stone also aver that they all seek at least one common remedy in the form of injunctive relief against First Union. (Id. at 24). Accordingly, since Plaintiff Stone claims to have exactly the same objectives in her case as would Appellants and because Plaintiff Stone intends to attempt to achieve these goals with the same theories and evidence as Appellants, Appellants cannot demonstrate that Plaintiff Stone does not adequately represent their interests.

Moreover, an examination of the interests that Appellants claim would be impaired by a refusal to allow intervention even further illustrates that Plaintiff Stone will adequately represent Appellants'

interests. Appellants claim that their interests would be impaired by potential adverse rulings that could have persuasive effect in subsequent litigation on issues such as the admissibility of expert reports and the existence of a pattern or practice of discrimination. (Appellants' Initial Brief at 35-41). However, Plaintiff Stone shares all of these interests. She could benefit in her own case by obtaining favorable rulings on the admissibility of expert reports and the existence of a pattern or practice of discrimination at First Union. Thus, in order to further the goals that she shares with Appellants, Plaintiff Stone clearly will adequately represent Appellants' interests in this regard.

Appellants' contention that inadequacy of representation is demonstrated because Appellants cannot, by statute, participate in Plaintiff Stone's case is without merit. The standard for demonstrating inadequacy of representation is not satisfied with the mere showing that the proposed intervenors are not, or could not be, parties to the ongoing lawsuit. Appellants have cited no authority in support of this contention. Indeed, if the simple fact that a proposed intervenor could demonstrate inadequacy of representation by simply showing that the proposed intervenor is not currently, or could not be, a party to the

ongoing litigation, then the inadequacy-of-representation element would be a nullity because in every case in which intervention is sought, the proposed intervenor is necessarily not already a party to the lawsuit. Instead, the standard with respect to adequacy of representation depends on whether the existing parties will adequately represent the legal interest that the proposed intervenor claims will be impaired if intervention is denied. Georgia v. United States Army, 302 F.3d 1242, 1250 (11th Cir. 2002) (specifying that the allegedly impaired legal interests must be the same legal interest for which the intervenor demonstrates inadequate representation). Indeed, Appellants recognize this principle by correctly noting that determining a proposed intervenor's interest in underlying litigation cannot be determined without a reference to the impairment of the proposed intervenor's interest. (Appellants' Initial Brief at 33) (citing Chiles v. Thornburg, 865 F.2d 1197, 1214 (11th Cir. 1989)).

IV. The District Court Did Not Base Its Denial of Appellants' Motion to Intervene as a Matter of Right on Appellants' Failure to Prove a Pattern or Practice of Discrimination or Because Appellants' Did Not Share "Exactly" The Same Job Titles.

Perhaps more than any other arguments in their Initial Brief, Appellants' final argument amounts to nothing more than a blatant attempt to re-litigate the District Court's decertification decision. Appellants repeat

their well-worn arguments that the District Court erroneously required Appellants to prove a pattern or practice of discrimination in ruling on the Motion to Intervene and that the court erroneously required Appellants to have exactly the same job titles. (Appellants' Initial Brief at 46-54). Indeed, Appellants do not even bother to attempt to tie these arguments to any analysis of whether the District Court erred in denying their Motion to Intervene. (Id.). Obviously, the District Court did not base its denial of the Motion to Intervene on Appellants' failure to demonstrate a pattern of discrimination or the fact that many of the Appellants had different job titles. Instead, although the court recognized that Appellants supported their Motion to Intervene with the same arguments that Appellants had used in support of the motion to amend to add the former Opt-In Plaintiffs as named parties, the District Court's analysis was primarily based on the impairment-of-interest prong of the standard for intervention as a matter of right under Rule 24(a) of the Federal Rules. (R1276-31-32). Therefore, Appellants' lengthy arguments about the standards applicable to putative collective actions and the District Court's analysis thereof are completely misplaced.

In addition to being misplaced, Appellants' recycled arguments are simply wrong. In decertifying the class, the District Court did not require Appellants to "definitively prove a pattern-or-practice of discrimination

before they could proceed collectively." (Appellants' Initial Brief at 46). To the contrary, as the District Court clarified in denying Appellants' Motion to Amend, the court's decertification analysis was premised on the very clear and very numerous differences among the former Opt-In Plaintiffs and their claims. (R1276-8-15). As the court stated, "[t]he proposed opt-in class mixes employees with different job titles and from all levels of the organization; includes individuals employed within different divisions of the bank; includes individuals who assert a variety of claims, many of which have not been asserted by the representative plaintiff." (R1276-8). In light of these differences, the court also found that there was insufficient evidence in the record of any common plan or practice of discrimination that applied to all of these otherwise very different putative class members. (R1276-23). Thus, the court did not require Appellants to prove the merits of their pattern-or-practice claims, but instead, found that Appellants had not produced sufficient evidence of a discriminatory policy that could lend a common thread to the otherwise vastly disparate members of the putative class. (Id.).

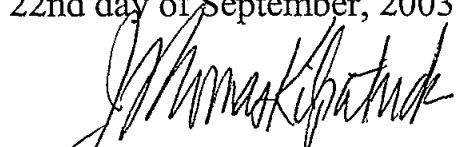
Likewise, Appellants' argument that the District Court required Appellants to have "exactly the same job titles and claims" is also completely wrong. (R1276-23-24). The District Court listed the fact that

Appellants worked in many different positions with many different job titles as only one of the sub-factors supporting the very clear conclusion that Appellants were not sufficiently similarly situated to proceed as a collective action. Further, even when reviewing Appellants' job titles, the court did not apply any standard requiring "exactly" the same job titles. Instead, the court recognized the obvious practical reality that, among many other differences, Appellants were not similarly situated because the conditionally certified class included exempt and non-exempt employees under the FLSA and "high level managers, mid-managers, . . . first line supervisors, . . . clerical, technical and administrative employees." (R1276-24). Indeed, just to illustrate the absurdity of Appellants' contention that the District Court erroneously overemphasized Appellants' job titles, in discussing Plaintiff Stone's Motion to Amend, the District Court again reiterated that "the types and numbers of acquisitions at issue and the diversity of job titles, while not dispositive standing alone, weigh in favor of decertification of the class." (R1276-25).

CONCLUSION

For the foregoing reasons, the District Court did not err in denying Appellants' Motion to Intervene as a matter of right. Therefore, this Court should dismiss the instant appeal for lack of jurisdiction.

Respectfully submitted this 22nd day of September, 2003.



J. Thomas Kilpatrick
Georgia Bar No. 418300
Attorney for Appellee
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Telephone: 404-881-7000
Facsimile: 404-881-7777

CERTIFICATE OF COMPLIANCE

Counsel for First Union hereby certifies that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) as it contains only 7,694 words.



J. Thomas Kilpatrick
Georgia Bar No. 418300
Attorney for Appellee
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Telephone: 404-881-7000
Facsimile: 404-881-7777

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by U.S. Mail
with sufficient postage affixed thereto to the following:

Brenda J. Carter
1451 West Cypress Creek Road
Suite 300
Ft. Lauderdale, FL 33309

Jack Scarola
Searcy Denney Scarola
Barnhardt & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

This 22nd day of September, 2003.



J. Thomas Kilpatrick