04-4281(L)-cv,

04-4882(CON)-cv, 04-4297(CON)-cv, 04-4869(CON)-cv, 04-5960(Con)-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Mary Ann Durkin, Kathleen Brennan, Susan J. Giannone, Esther Lidstrom, Jean Marcovecchio, Michele Meyer, Lorraine McIntyre, Ellen Stein, Barbara Stemmle, Doreen Triola, Kathleen Vedder,

Plaintiffs-Appellants

Margaret Cavanagh,

Appellant

(*For Continuation Of Caption See Inside Cover*)

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

BRIEF FOR THE UNITED STATES AS APPELLEE

R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
KARL GELLERT
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-4441

(For Continuation of Appearances See Inside Cover)

Alice Woodson White, on behalf of herself and all others similarl situated, Jacqui Harris Wilson, on behalf of herself and all others similarly situated, Carolann Calamia, on behalf of herself and all others similarly situated, Karen Ryan,

Plaintiffs

v.

Nassau County Police Department, Daniel P. Guido, Commissioner, Nassau County Police Department, Ralph G. Caso, County Executive, Nassau County Board of Supervisors, Nassau County Board of Supervisors, Francis T. Purcell, Member, Nassau County Board of Supervisors, Alfonse D'Amato, Member, Nassau County Board of Supervisors, John W. Burke, Member, Nassau County Board of Supervisors, Michael J. Tully Jr., Member, Nassau County Board of Supervisors, Vincent A. Suozzi, Member, Nassau County Board of Supervisors, Hannah Komanoff, Member, Nassau County Board of Supervisors, Nassau County Civil Service Commission, Gabriel S. Kohn, Chairman, Nassau County Civil Service Commission, Edward S. Witanowsky, Member, Nassau County Civil Service Commission, Edward A. Simmons, Member, Nassau County Civil Service Commission, Nassau County Patrolmen's Benevolent Association, Municipal Police Training Council, Thomas R. Blair, Commissioner, Buffalo Police Department, Michael J. Codd, Commissioner, New Police Department, Nassau County, a municipal corporation organized pursuant to the laws of the State of New York, Daniel Guido, Nassau County Police Department, Gabriel S. Kohn, Nassau County Civil Service Commission, Edwards S. Witanowski, Nassau County Civil Service Commission, Edward A. Simmons, Nassau County Civil Service Commission, Nassau County Patrolmen's Benevolent Association,

Defendants-Appellees

William G. Connelie, Superintendent, New York States Police, Patrick J. Corbett, J. Wallace La Prade, Assistant Director, Federal Bureau of Investigation,

Defendants

United States of America,

Plaintiff-Appellee

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTE:

RULES:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 04-4281(L), 04-4882(Con), 04-4297(Con), 04-4869(Con), 04-5960(Con)

MARY ANN DURKIN, KATHLEEN BRENNAN, et al.,

Plaintiffs-Appellants

MARGARET CAVANAGH,

Appellant

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

NASSAU COUNTY, et al.,

Defendant-Appellees

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

BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLEE

JURISDICTION

The Appellants' jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in holding that the Beneficiaries' claims for additional benefits under the Consent Decree were barred by the doctrine of laches when they waited more than 15 years before moving the district court to enforce the Decree.

2. Whether the district court abused its discretion in refusing the Beneficiaries' request for further discovery.

3. Whether the district court erred when, based on its denial of the other Beneficiaries' claims as barred by laches, it denied the application of an eleventh Beneficiary to be added to the proceedings.

STATEMENT OF THE CASE

The appellants in *United States* v. *Nassau County*, Nos. 04-4297, 04-4869, and 04-5960, are Beneficiaries of a 1982 Consent Decree to which the United States and Nassau County, the Nassau County Police Commissioner, and the Nassau County Civil Service Commissioners (collectively "Nassau County") are parties. The Consent Decree resolved a lawsuit filed by the United States in 1977 alleging that Nassau County had unlawfully discriminated on the basis of sex, race, and national origin in hiring and promotions within the Nassau County Police Department. In 1984, the Beneficiaries were hired under the Consent Decree.

In July 2002, ten Beneficiaries moved the district court to enforce the Consent Decree against Nassau County, arguing that they were entitled to additional benefits. The County and the United States opposed the request. Mary Ann Durkin, a plaintiff from the private class action *White* v. *Nassau County Police*, sought similar additional benefits under the consent decree that had settled that case. Ms. Durkin is not a party to the *United States* v. *Nassau County* action or Decree, and the United States is not a party to the *White* action or decree.

On December 17, 2002, the district court denied the Beneficiaries' and

Durkin's request for additional benefits as time barred by adopting the state six-year statute of limitations. R. 402.[1] On appeal, this Court vacated the district court's decision, holding that because the motions to enforce the decrees were equitable actions rather than actions at law, the equitable doctrine of laches applied to the request for additional benefits rather than the statute of limitations. *Brennan* v. *Nassau County*, 352 F.3d 60, 63 (2d Cir. 2003). The Court remanded for further factual development on the issue of laches and on the issue of whether the Beneficiaries' claims were ripe for review.

After remand, the district court ordered the parties to submit written arguments regarding the issues of laches and ripeness, R. 411, which the parties did, R. 417, R. 421. Durkin and the Beneficiaries sought discovery, which the United States and Nassau County opposed. R. 424, R. 425, R. 426. The district court referred the discovery issue to a magistrate, who ordered that discovery could proceed on the issue of laches and ripeness. R. 440. As discovery proceeded, the United States and Nassau County sought protective orders and the Beneficiaries sought to compel discovery. R. 461, R. 462.

On July 16, 2004, an eleventh Beneficiary, Margaret Cavanagh, requested that she be added to the proceedings. JA 400-403. On July 20, 2004, the district court, based on the papers filed by the parties, denied the Beneficiaries' and

---

[1] "R." denotes the entry on the district court docket in *United States* v. *Nassau County*, 9:77-cv-01881-JS-ETB. "JA" denotes the joint appendix. "SPA" denotes the special appendix following the appellants' brief. "Br." denotes

Durkin's request for additional benefits as time-barred under the doctrine of laches. SPA 1-14. Based on its July 20 order, the court denied Margaret Cavanagh's request to be added to the proceedings. SPA 15-16. Durkin and the Beneficiaries sought reconsideration and further discovery; the district court held a hearing on July 29, 2004, and the parties submitted further pleadings, JA 409-439; JA 440-445; JA 446-488. On August 13, 2004, the district court denied the motion for reconsideration and reaffirmed its order, finding Durkin's and the Beneficiaries' requests barred by laches. SPA 17-27. These consolidated appeals followed.

STATEMENT OF THE FACTS

On September 21, 1977, the United States filed this suit against Nassau County, alleging a pattern or practice of employment discrimination against African Americans, Hispanics, and women in the Nassau County Police Department, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*, as well as other statutory and constitutional provisions. JA 162.

On April 21, 1982, after more than four years of substantial discovery and litigation, the United States and Nassau County entered into the Consent Decree, in which Nassau County expressly denied a pattern or practice of discrimination, but agreed to provide remedial relief for African Americans, Hispanics, and women. The purpose of the Consent Decree was to ensure that African American, Hispanic, and female applicants were considered for employment on an equal basis with other applicants, and to remedy the "present effects of the County's alleged prior

discriminatory employment practices." JA 163.[2] Among other things, the Decree required that Nassau County (1) take certain steps regarding its selection and qualification criteria, JA 164-169, and its future recruitment and appointment of police officers, JA 169-172; (2) accommodate female officers who wished to transfer to other positions, JA 172-173; and (3) provide remedial relief to certain women who, in March 1972, had taken an examination as part of their application to the Nassau County Police Department, JA 175-182.

Women who had taken the March 1972 examination and who still wished to become police officers were eligible for appointment. JA 180-181. The Beneficiaries completed their instruction and training and were appointed to the Nassau County Police Department in September 1984. JA 30. Paragraph 46(e) of the Consent Decree states, in relevant part:

> [T]he County shall provide each of those females who is appointed pursuant to Paragraph 46d, *supra* and who successfully completes all phases of instruction at the Training Academy with all of the emoluments of the rank of Police Officer, including retroactive seniority, for all purposes (except pension and time-in-grade for eligibility for promotion), in that rank [as of specified dates].

JA 181. The retroactive seniority dates for the Beneficiaries in these appeals were June or October 1973. JA 30, JA 401. The Beneficiaries received the benefit of retroactive seniority under Paragraph 46(e). JA 253 (Tr., 10/11/02 Hr'g at 17) (Beneficiaries' counsel explaining that retroactive seniority date was used for

---

[2] The Patrolmen's Benevolent Association of Nassau County was also a defendant in the action, and it entered into the Consent Decree, as did defendant-intervenor Superior Officer's Association of Nassau County. JA 163, JA 198.

"longevity pay," the number of vacation days accruing each year, and for selection of vacation dates, tour and work schedules).

Paragraph 46(f) of the Consent Decree states:

> Lastly, the County shall provide each of these females with a back pay award to compensate her for the monetary loss she has incurred as a result of the County's alleged unlawful refusal to consider her for appointment as a Police Patrolman or for hire as a Police Cadet these females shall be determined by the United States, but in no event shall the amount of the back pay award exceed $17,600.00 to any female who meets those criteria set forth in Paragraph 43, *supra*, and $13,200.00 to any female who meets those criteria set forth in Paragraph 44, *supra*. None of these females is required to indicate a present interest in or to accept an offer of appointment as a condition of her receipt of the back pay award to which she is entitled under this Paragraph 46f.

JA 182. The Beneficiaries received this back pay award. JA 31-32 (awards ranged from $2,076.32 to $10,381.60).

On July 26, 2002, nearly eighteen years after they were appointed as police officers, ten Beneficiaries obtained an *ex parte* order from the district court directing Nassau County to show cause why the County should not be compelled to comply with the Consent Decree. R. 399.[3] In their papers supporting their application for the order, the ten Beneficiaries alleged that Nassau County failed to comply with the requirements of Paragraph 46(e) in three ways: (1) by refusing to credit them with vacation, sick leave, and personal days for the period between the retroactive seniority date and their actual appointment date; (2) by taking the

[3] As noted above, Beneficiary Margaret Cavanagh was not part of the proceedings at that time.

position that their pensions would be calculated from their appointment date rather than from the retroactive seniority date; and (3) by taking the position that their separation pay should be calculated from their appointment date rather than from their retroactive seniority date. JA 153-154, JA 160-161. The district court held that these requests for additional benefits were barred by the doctrine of laches.

SUMMARY OF THE ARGUMENT

1. The district court did not abuse its discretion in concluding that the Beneficiaries' request for further benefits under the Consent Decree was barred by laches. Laches is an equitable doctrine that bars requests for relief where the movant has inexcusably delayed seeking relief, and that delay prejudiced the other parties. Shortly after September 1984, when they were appointed to the police department, the Beneficiaries knew they were not being credited with the approximately 297 vacation days, 286 sick leave days, or 55 personal days they now seek. Similarly, in November 1984, the Beneficiaries knew that their pension benefits were being calculated with an effective date of September 1984 rather than, as they now seek, June or October 1973. The Beneficiaries also knew as early as September 1986 and March 1991, when two Beneficiaries separated from the Department, that the County was not calculating termination leave under the collective bargaining agreement based on the 1973 retroactive seniority date.

The Beneficiaries do not attempt to excuse their more than 15-year delay in seeking these additional benefits, other than to assert that their claims for these benefits do not "accrue" until they separate from service. The inquiry under the

doctrine of laches, however, is not when the claim accrues, but when the Beneficiaries knew of the alleged misconduct. The United States showed that it was prejudiced by this inexcusable delay by the loss of relevant documents. The district court therefore did not abuse its discretion in concluding the request for additional benefits was time-barred.

2. The district court did not abuse its discretion in denying the Beneficiaries' request for further discovery. The Beneficiaries have not shown that there is any specific discovery that they could have undertaken to enable them to rebut the showing of laches established by the documents and their admissions already in the record.

3. The district court also did not err in denying Margaret Cavanagh's application to be consolidated with the other Beneficiaries. The record established that Cavanagh knew by at least 1985 that the County was not providing her the additional benefits she now seeks. Because Cavanagh sought to have her claims consolidated with the claims of the other Beneficiaries, which the district court found to be time-barred, the district court did not err in similarly denying her application.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY BARRING THE BENEFICIARIES' CLAIMS UNDER THE DOCTRINE OF LACHES

A. Standard Of Review

This Court reviews only for an abuse of discretion the district court's decision to bar the Beneficiaries' request for additional benefits under the doctrine of laches. See *Perez* v. *Danbury Hospital*, 347 F.3d 419, 426 (2d Cir. 2003).[4]

B. The Beneficiaries Failed To Meet Their Burden To Show That Their Substantial Unexcused Delay Did Not Bar Their Request For Additional Relief

To prove laches a party must establish "(1) the plaintiff knew of the defendant's misconduct; (2) the plaintiff inexcusably delayed in taking action; and (3) the defendant was prejudiced by the delay." *Ikelionwu* v. *United States*, 150 F.3d 233, 237 (2d Cir. 1998); see also *Ivani Contracting Corp*. v. *City of New*

---

[4] The Beneficiaries assert (Br. 18-19) that the standard or review is *de novo*, but the cases they cite for support are inapposite. In *Ivani Contracting Corp.* v. *City of New York*, 103 F.3d 257, 259 (2d Cir.), cert. denied, 520 U.S. 1211 (1997), this Court applied the *de novo* standard of review to a district court's grant of summary judgment under Federal Rule Civil Procedure 56, which grant had been erroneously premised on the doctrine of laches, see *id*. at 260 (laches does not bar federal statutory claim seeking legal damages brought within the limitations period). Similarly, the other case to which the Beneficiaries cite is also inapposite: In *Ikelionwu* v. *United States*, 150 F.3d 233, 236-237 (2d Cir. 1998), the Court noted that it had not yet settled the appropriate standard of review when a suit was dismissed under Federal Rule of Civil. Procedure 12(b) based on laches. This case, like *Perez*, involves a request for the court to exercise its equitable powers to enforce a consent decree; the traditional abuse of discretion standard of review for the doctrine of laches therefore applies.

York, 103 F.3d 257, 259 (2d Cir.) (Laches "bars a plaintiff's equitable claim where he is guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant.") (internal quotation marks omitted), cert. denied, 520 U.S. 1211 (1997); see also *id.* at 259-260 (discussing history of doctrine). An analogous statute of limitations is relevant in measuring the unreasonableness of a party's failure to bring its claim. Here, the district court found that the most analogous statute of limitations was the six-year limitations period for contract actions under state law. Where a claim is brought beyond the statute of limitations, courts will presume laches applies and the burden of rebutting laches falls to the plaintiff. See *Conopco, Inc.* v. *Campbell Soup Co.*, 95 F.3d 187, 191 (2d Cir. 1996); *Brennan* v. *Nassau County*, 352 F.3d 60, 64 n.6 (2d Cir. 2003) (quoting *Conopco*). The Beneficiaries conceded that they bore the burden of disproving laches. JA 493 (Tr., 7/29/04 Hr'g, at 5).

1. The Beneficiaries Delayed More Than 15 Years Before Seeking Additional Relief Under the Consent Decree

The district court found that the evidence showed that the Beneficiaries had known for more than 15 years before they moved to enforce the Consent Decree that they were not getting the three types of additional benefits they now seek. SPA 23-24 (listing evidence). That conclusion was entirely correct.

a. Additional Leave

The Beneficiaries claim that they are entitled to be credited with the vacation, sick, and personal days that would have accumulated between their

retroactive seniority date and their appointment date — approximately 11 years. These types of leave accumulated at a rate of 27 vacation days, 26 sick days, and 5 personal days each year. JA 43. Thus, under the Beneficiaries' interpretation of the Consent Decree, they would have begun their service in September 1984 with approximately 297 days of vacation, 286 days of sick leave, and 55 personal days.

The Beneficiaries argue (Br. 23-24) that their request for these additional days does not "accrue" until they separate from service and when, under the collective bargaining agreement, the County would be required to pay them for their unused leave. There are at least two flaws with this argument. First, for purposes of laches, the inquiry is not when a claim "accrues" but rather when the movant first learned of the other parties' alleged misconduct. *Ikelionwu*, 150 F.3d at 237. Second, the alleged misconduct here is the County's refusal to credit the Beneficiaries with leave that "accumulated" in the 11 years prior to their appointment as police officers in 1984. The injury of not being paid for *unused* leave upon separation is derivative of the injury of never being credited with the leave in the first place. The benefit of vacation, sick, and personal days is primarily that they can be used during one's career, not that they can be saved up and cashed in upon retirement.

Indeed, as Durkin stated in an affidavit in the district court, each year an officer had to request in writing to have unused leave carried over to the next year; failing to do so resulted in the loss of the leave. JA 336. This belies the Beneficiaries' assertion that they expected the leave that they claim should have

been credited to them in 1984 would be cashed out upon their retirement; they knew that leave not carried over from year to year was lost.[5] The district court was correct in concluding that the evidence established that the Beneficiaries knew they were not being credited with this additional leave for at least 15 years prior to their filing their motion. SPA 23-24 (listing evidence). Indeed, two of the Beneficiaries — Esther Lidstrom and Doreen Triola — separated from the Department in 1986 and 1991. Lidstrom was specifically told by Nassau County that she would not be credited with additional leave. JA 135.

In a December 1984 internal memorandum, Nassau County took the position that under the Consent Decree "retroactive seniority" did not include "anything that results in a monetary or possible monetary cost to the county," and that therefore "[a]t this time, the members [hired under the Decree] are not to be credited with sick leave, vacation time, personal days or any other time or leave that predates the date of their actual appointment to this Department." JA 140. The Beneficiaries point to the words "at this time" to argue (Br. 24) that this memorandum does not contradict their claim that they would be entitled to be paid for this leave after they separate for service. But that interpretation of this memorandum is nonsensical in light of the preceding sentence, which excludes

---

[5] The collective bargaining agreement in effect when the Beneficiaries were appointed provides that an officer may not carry over more leave than the amount she accrues in a year. JA 59 (Section 8.11-9). This again belies the Beneficiaries' assertion that they believed they would have 11 years worth of accrued leave credited to them when they separated from service.

from "retroactive seniority" anything that imposes additional monetary costs, not merely anything imposing those costs in 1984.[6] Further, even if the Beneficiaries' interpretation of this memorandum were not nonsensical, they have failed to show that they were even aware of the memorandum, let alone asserted its existence as an excuse for their waiting 18 years to seek judicial relief.

b. Additional Pension Benefits

The Beneficiaries' argument regarding pension benefits (Br. 26) is somewhat confusing because they focus on the so-called "1/60th" rule of Section 384-E under the New York State Employee Retirement System. As the district court noted, this 1/60th rule is merely the formula used to calculate pension benefits based on an employee's years of service beyond 20. SPA 5; JA 46. Thus, it is clear that the Beneficiaries are seeking to retire after 20 years of service from their appointment date — September 1984 — but to receive pension benefits calculated for the additional 11 years from the retroactive seniority date in 1973. As the district court noted, the Beneficiaries were informed by the Retirement

---

[6] Excluding additional monetary costs from the benefit of "retroactive seniority" under Paragraph 46(e) is consistent with the back pay award provided under Paragraph 46(f), which states that the County "shall provide each of these females with a back pay award to compensate her for the *monetary loss* she has incurred as a result of the County's alleged unlawful refusal to consider her for appointment," and which limits any award to a maximum of either $17,600 or $13,200. JA 181-182 (emphasis added). The Beneficiaries argue (Br. 24 n.9) that this interpretation is incorrect because that paragraph provides for "back pay" not "all monetary damages." Although they are correct that the term "all monetary damages" is not used, the term "monetary loss she has incurred" is virtually identical language.

System in November 1984 that their effective date for pension benefits was their appointment date — September 28, 1984. SPA 6; JA 33, JA 102-111.

Again, the Beneficiaries do not try to excuse their 18-year-delay in seeking additional pension credit, other than now to assert (Br. 26) that their claims for pension benefits do not accrue until they retire. Again, the Beneficiaries misconstrue the inquiry for laches: The question is not when a claim accrues, but when they knew of the alleged misconduct. *Ikelionwu*, 150 F.3d at 237. The Beneficiaries do not dispute that as early as November 1984 they knew they were not being credited with the additional 11 years of service for pension purposes.

Moreover, the claim for additional pension benefits is unambiguously excluded under the language of the Consent Decree. JA 181 (retroactive seniority applied "for all purposes" "except pension"). "When the language of a consent decree is unambiguous, 'the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.'" *United States* v. *Broadcast Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001) (quoting *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971)); *United States* v. *International Bhd. of Teamsters*, 141 F.3d 405, 408 (2d Cir. 1998) ("[a] court is not entitled to expand or contract the agreement of the parties as set forth in the decree").

c. Termination Pay

The third type of benefit the Beneficiaries seek is not based on the Consent Decree directly but rather on a collective bargaining agreement between Nassau County and the Police Benevolent Association (PBA), which is the officers' collective bargaining representative. Under Section 8.12-1 of the PBA Contract for 1984 and 1985, "[u]pon separation from service after ten (10) years, * * * such employee * * * shall be entitled to cash payment for accumulated terminal leave computed on an entitlement basis of five (5) days for each year of completed service. * * * Years of completed service shall only include time served as a member of the Police Force of the County on a full pay status[.]" JA 59. The Beneficiaries apparently contend that their years of retroactive seniority are the equivalent of years "on a full pay status" and so should be counted as years of completed service under Section 8.12-1. The United States is not a party to the collective bargaining agreement, and presumably how that agreement should be interpreted is a matter to be worked out by the parties through the grievance procedures or otherwise. But it is not a particularly plausible interpretation of time served "on a full pay status" that it would be equivalent to receiving a back pay award to compensate for monetary loss. Certainly nothing in the Consent Decree compels this interpretation of the collective bargaining agreement.

The Beneficiaries argue that the obligation to pay termination benefits under the PBA Contract does not arise until after they separate from service. But, again, that is not the inquiry under laches; rather, the question is when the Beneficiaries

knew the County was not interpreting the Consent Decree to require this payment under the terms of the PBA Contract. As noted above, two Beneficiaries have already separated from service: Esther Lidstrom in 1986 and Doreen Triola in 1991. Lidstrom inquired whether she would be provided separation benefits based on her 1973 retroactive seniority date or her 1984 appointment date; she was informed they would be calculated based on her 1984 date. JA 135. The district court therefore correctly concluded that the Beneficiaries knew for at least 15 years before they filed their motion in 2002 that the County was not interpreting the Consent Decree as they desire. SPA 23-24.

2. The Beneficiaries' Delay Was Inexcusable And Prejudiced The United States And Nassau County

To show that their delay in bringing their motion was excusable, the Beneficiaries argue (Br. 27-29) that they did not quietly sit by but rather complained to Nassau County about their not getting all the relief they wanted. The district court noted that Durkin's affidavit established that beginning in 1982 Durkin sought from Nassau County the leave benefits she now seeks. SPA 8-9; JA 330-331. The district court also noted that the Beneficiaries had asserted in their memorandum of law that "within a year after they reported to the Police Academy, beneficiaries of the USA Consent Decree requested that the County comply with its obligation under the Consent Decree." SPA 13; JA 286; SPA 23-24 (noting evidence); JA 137-138 (1985 letter from counsel for Nassau County discussing claims by Beneficiary Margaret Cavanagh for, among other things, additional

leave).

The Beneficiaries claim (Br. 28-29) that this case is similar to *EEOC* v. *Local 638*, 753 F.2d 1172 (2d Cir. 1985), aff'd *sub. nom*., *Local 28* v. *EEOC*, 478 U.S. 421 (1986). In *Local 638*, this Court rejected the defendants' laches defense to the district court's finding of contempt, noting that the

> plaintiffs did not sit quietly by while defendants refused to comply with the district court's orders. Instead, they complained, albeit informally, to the defendants and to the administrator [appointed by the district court] on many occasions. Defendants had ample notice that plaintiffs were dissatisfied with their efforts, *and they cannot credibly claim they relied on plaintiffs' "inaction"*.

753 F.2d at 1179 (emphasis supplied). But the Beneficiaries' reliance on this conclusion is misplaced for at least two reasons: First, the delay in bringing the contempt motion in that case was less than five years. See *id*. at 1176 (contempt motion filed in April 1982); *EEOC* v. *Local 638*, 565 F.2d 31 (2d Cir. 1977) (affirming district court's order underlying subsequent contempt finding). Thus, *Local 638* hardly justifies the delay of more than 15 years in this case.

Second, as noted from the emphasized language, this Court's conclusion was that the defendants could not show prejudice from the delay because they could not have relied on the plaintiffs' "inaction." Under the doctrine of laches, prejudice can be shown where a party changes its position based on the plaintiff's delay. *Conopco*, 95 F.3d at 192. Neither the United States nor Nassau County has asserted a change in position, and the district court found that type of prejudice not present here. SPA 25.

The Beneficiaries assert (Br. 29) that because they initially sought to enforce the Consent Decree using "less drastic" measures than moving to compel compliance, their delay was not unreasonable. But this is not like a situation in which a plaintiff spends a reasonable time attempting to convince the other party to comply and then brings suit. See, *e.g.*, *King* v. *Innovation Books*, 976 F.2d 824, 833 (2d Cir. 1992) (no unreasonable delay in author bringing infringement suit after other party had expended more than $7 million promoting film, where author first learned of possible infringement six months before and voiced his objections); *Gilliam* v. *American Broad. Cos.,* 538 F.2d 14, 18, 25 (2d Cir. 1976) (no unreasonable delay in bringing infringement suit 11 days before planned broadcast, where plaintiffs objected as soon as they learned of infringement and entered into negotiations that ultimately proved futile). The Beneficiaries' "less drastic" measures were to complain, but their complaints produced no results and yet they waited more than 15 years before seeking judicial enforcement.

The Beneficiaries assert (Br. 30) that they were not obligated to bring these claims until after they separated from service, relying on *Kling* v. *Hallmark Cards, Inc.*, 225 F.3d 1030 (9th Cir. 2000). But the court in *Kling*, consistent with this Court's decisions, held that "any delay is to be measured from the time that the plaintiff knew or should have known about the potential claim at issue." 225 F.3d at 1036. As discussed above, the Beneficiaries knew of these claims more than 15 years before they sought to enforce the Consent Decree. They have not shown why their extreme delay was excusable.

For purposes of laches, prejudice also can be shown when the passage of time makes evidence unavailable or difficult to obtain. *Robins Island Pres. Fund, Inc.* v. *Southold Dev. Corp.*, 959 F.2d 409, 424 (2d Cir.) ("[a] defendant may suffer prejudice * * * because the delay makes it difficult to garner evidence to vindicate his or her rights"), cert. denied, 506 U.S. 1001 (1992); see also *Prudential Lines, Inc.* v. *Exxon Corp.*, 704 F.2d 59, 65 (2d Cir. 1983) ("an inequity might result in a case where a claim is permitted to go forward where relevant evidence has been lost due to a petitioner's delay in bringing suit"). That was the prejudice found by the district court here. The district court noted that, although some evidence was still available, other evidence was not. SPA 25-26 (citing statement of counsel for the United States that many records were unavailable, JA 268, and affidavit describing unsuccessful search for documents in government offices and in Federal Records Center, JA 141-142); see also JA 512 (counsel for the United States noted that "[w]e simply don't have documents, given the passage of time, to demonstrate the intent of the parties [to the Consent Decree]").

The Beneficiaries do not dispute the district court's conclusion that the United States had shown that due to the delay, records were no longer available. Rather, they merely point out (Br. 31-32) that Nassau County had records available and that there were still witnesses available to testify. But the standard under laches is not that prejudice can only be shown when there is *no* evidence available. See *Robins Island Pres. Fund, Inc.*, 959 F.2d at 424 (prejudice found where it is "difficult to garner evidence"); *Danjaq LLC* v. *Sony Corp.*, 263 F.3d 942, 955 (9th

Cir. 2001) (prejudice shown from "lost, stale, or degraded evidence"); *Winchester* v. *Pension Comm.*, 942 F.2d 1190, 1194 (7th Cir. 1991) (prejudice found where lost evidence "diminishes the defendant's chance of success at trial"); see also *Smith* v. *Caterpillar, Inc.*, 338 F.3d 730, 734 (7th Cir. 2003) ("the decision to apply the doctrine of laches lies on a sliding scale: the longer the plaintiff delays in filing her claim, the less prejudice the defendant must show").

The Beneficiaries conceded that they bore the burden of disproving laches. They have not shown that their extreme delay in seeking judicial enforcement was excusable, and they do not dispute that the United States showed that relevant documents were no longer available. They have not shown, therefore, that the district court abused its discretion in barring their claims under the doctrine of laches.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY PRECLUDING FURTHER DISCOVERY

A. Standard of Review

A district court's discovery rulings "are reversed only upon a clear showing of an abuse of discretion." *In re Fitch, Inc.*, 330 F.3d 104, 108 (2d Cir. 2003). "A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision — though not necessarily the product of legal error or a clearly erroneous factual finding — cannot be

located within the range of permissible decisions." *Zervos* v. *Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

B. The Beneficiaries Failed To Show Any Specific Discovery Needed To Rebut Laches

After the district court's July 20, 2004, order finding their claims barred by laches, Durkin and the Beneficiaries moved for reconsideration of that decision, arguing that they needed further discovery. The district court held a hearing on the reconsideration motion; it directed that Durkin and the Beneficiaries "must be prepared to show a specific and particularized need for discovery and/or further briefing on the limited issues related to the doctrines of laches and ripeness." SPA 18. Prior to the hearing, Durkin and the Beneficiaries submitted an affirmation of counsel with attachments, JA 409-439, and an affidavit from a retired police officer, JA 440-445. At the July 29, 2004, hearing, the United States and Nassau County submitted to the district court a Joint Index of Facts and Documents in the Record Which are Relevant to the Issue of Laches and Ripeness. JA 446-488.

At the hearing, the district court directed counsel for Durkin and the Beneficiaries to identify what further discovery was needed regarding laches and ripeness. JA 492-493. Counsel stated that discovery was needed to develop the record regarding the issue of prejudice and the issue of when the Beneficiaries learned of their claims. JA 493-494. When the court questioned why further affidavits from his clients had not been submitted in response to the December 2003 order requiring written argument, counsel stated "our firm had decided that,

at that time, the affidavits that we supplied to the Court were sufficient with regard to the issues." JA 495. On appeal, the Beneficiaries have abandoned their argument that they needed further discovery regarding what they knew. Now they argue (Br. 40-43) only that they were precluded from rebutting the showing of prejudice by the United States and Nassau County.

The Beneficiaries first complain (Br. 40) that they were not permitted to depose the persons who negotiated the Consent Decree so they could "contest claims or presumptions of faded memories and prejudice." But The United States did not establish prejudice by claiming witnesses had faded memories. As discussed above, it showed that relevant documents were no longer available. Indeed, as the Beneficiaries point out (Br. 40) at the October 11, 2002, hearing before the district court, John Gadzichowski, the attorney who had negotiated the Consent Decree on behalf of the United States, described to the district court his recollection of the negotiations and the meaning of the Consent Decree. JA 242-249. Mr. Gadzichowski's recollection contradicted the Beneficiaries' interpretation of the Consent Decree. Because Mr. Gadzichowski has not claimed his memory was faded, the Beneficiaries have not shown how deposing him could have helped them rebut the showing of prejudice.

The only other evidence the Beneficiaries discuss (Br. 42-43) in support of their argument that the district court decided the issue of laches prematurely is a June 2000 letter from counsel for Nassau County to Mr. Gadzichowski. The letter is not in the record. The Beneficiaries assert (Br. 43 n.13) that the letter is absent

from the record because it was not available to them when, in April 2004, they filed their written submission in response to the district court's December 2003 order. But, as noted above, in July 2004, after they had obtained this letter in discovery, Durkin and the Beneficiaries submitted an affirmation with attachments and an affidavit in support of their motion for reconsideration. The Beneficiaries do not explain why they could not have submitted this letter at this time as well. The Beneficiaries also assert (Br. 43) that Nassau County and the United States did not produce to them a letter from Mr. Gadzichowski to counsel for Nassau County that prompted the June 2000 letter. But, as counsel for the United States informed the district court, the United States had no such letter to produce. JA 511.

Because the Beneficiaries have not shown any specific discovery that they needed to rebut the showing of prejudice, they have not shown that the district court abused its discretion in not permitting them further discovery. See *Gualandi* v. *Adams*, 385 F.3d 236, 245 (2d Cir. 2004) (district court did not abuse its discretion in not permitting further discovery, where plaintiff did not demonstrate

additional discovery was needed to decide issue that was fatal to her claims).[7]

III

THE DISTRICT COURT DID NOT ERR IN DENYING MARGARET CAVANAGH'S APPLICATION TO CONSOLIDATE HER CLAIMS WITH THE CLAIMS OF THE OTHER BENEFICIARIES

On July 13, 2004, Margaret Cavanagh, an eleventh Beneficiary, filed an application seeking to be consolidated with the other Beneficiaries. JA 400-403. After the district court denied the claims of the other Beneficiaries, it denied Cavanagh's application to be consolidated based on that decision. SPA 15-16. Cavanagh argues she was denied a "full and fair hearing." Cavanagh's application requested that her claim be consolidated with the other Beneficiaries' claims because she was "seeking the same relief." JA 403. In denying the motion for reconsideration, the district court noted that the record showed that in 1985 Cavanagh had raised her complaints regarding not receiving additional leave benefits. SPA 24; JA 137-138. Cavanagh does not show how a further hearing could have enabled her to overcome the evidence establishing laches. Certainly,

---

[7] The Beneficiaries also argue (Br. 43-45) that the district court failed to comply with the mandate of this Court to develop a factual record on remand. The Beneficiaries' argument overstates this Court's directive. See *Brennan* v. *Nassau County*, 352 F.3d 60, 64 (2d Cir. 2003) ("further factual development of the record appears to be required with respect to each of Durkin's claims" regarding the issue of laches); *id*. at 65 (court "remand[s] so that the district court may further develop the factual record to determine the ripeness of [the Beneficiaries'] claims"). Consistent with this Court's mandate, the district court did further develop the factual record. Nassau County, the United States, and Appellants filed pleadings including affidavits and documents. The Beneficiaries have not shown how further factual development of the record could have rebutted the showing of laches.

the district court did not abuse its discretion in denying her application without further discovery. *Gualandi* v. *Adams*, 385 F.3d at 245 (2d Cir. 2004). If the other Beneficiaries' claims were filed years too late, *a fortiari*, so were Cavanagh's.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General

_____
DENNIS J. DIMSEY
KARL N. GELLERT
Attorneys
Civil Rights Division
United States Department of Justice
RFK Bldg – Rm 3728
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
202-353-4441

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and 29(d), I certify that the foregoing Brief of the United States as Appellee is proportionally spaced, has a typeface of 14 points, and contains 6508 words, as determined using the word counting feature of WordPerfect 9.

_____
KARL N. GELLERT
Attorney

CERTIFICATE SERVICE

I certify that on February 9, 2005, I served two copies of the foregoing BRIEF OF THE UNITED STATES AS PLAINTIFF-APPELLEE by First Class Mail on

Michele Gapinski
Slavin, Aguilo & Horowitz, LLP
350 Jericho Turnpike, Suite 101
Jericho, NY 11753

Peter J. Clines
County Attorney's Office
Ralph G. Caso Executive & Legislative Building
One West Street
Mineola, NY 11501

_____
KARL N. GELLERT
Attorney