UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

--X

DAVID FLOYD, *et al.*,

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK,

Defendant-Appellant

--X

Docket No. 13-3088

JAENEAN LIGON, *et al.*,

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants-Appellants

--X

Docket No. 13-3123

DECLARATION IN FURTHER SUPPORT OF MOTION FOR LIMITED REMAND

ZACHARY W. CARTER declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am the Corporation Counsel of the City of New York, attorney for defendants-appellants the City of New York, et al. (the "City") in the above-captioned cases.

2. This declaration is submitted in response to the oppositions filed by proposed intervenors Patrolmen's Benevolent Association, Detectives Endowment Association, Lieutenants Benevolent Association, Captains Endowment

Association, and Sergeants Benevolent Association (collectively, "Police Unions") and in further support of the City's motion for a limited remand to the District Court for the purpose of exploring a resolution.

3. By order dated November 25, 2013, this Court held Police Unions' intervention motions in abeyance to "maintain and facilitate the possibility that the parties might request the opportunity to return to the District Court for the purpose of exploring a resolution."

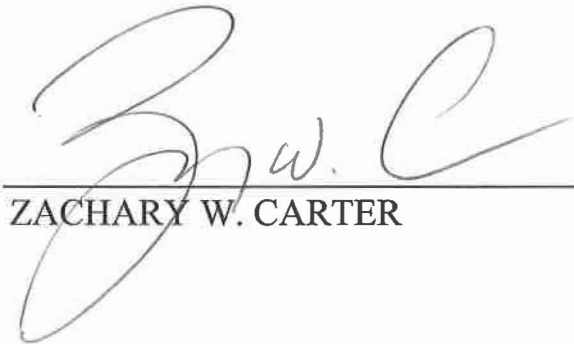
4. As the City has now moved for remand to explore resolution of the case, the City hereby withdraws its prior consent to Police Unions' motion to intervene. For the reasons set forth in the accompanying memorandum of law, Police Unions have no cognizable right to intervene in this appeal.

5. Further, the City has now reached a voluntary agreement in principle with *Floyd* and *Ligon* Plaintiffs on reforming the New York City Police Department's ("NYPD") stop-and-frisk policies and practices. The Police Unions' involvement as an intervenor at this juncture, and the delay caused by further litigation, may hinder that settlement. Denial of Police Unions' motion to intervene will not affect any status that the Police Unions may have as a stakeholder in the remedial process.

6. Moreover, the public interest favors the expeditious resolution of these cases and implementation of the reform process. Allowing Police Unions to intervene at this stage would frustrate this interest.

7. For the reasons set forth herein, and in the accompanying memorandum of law, the City respectfully requests that the Court remand each of the above-captioned cases to the District Court for 45 days to permit the parties to explore a resolution.

Dated: New York, New York
February 14, 2014



ZACHARY W. CARTER

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Docket No. 13-3123

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR LIMITED REMAND

PRELIMINARY STATEMENT

Defendants-Appellants City of New York, et al. ("the City") submits this memorandum of law in reply to the opposition filed by proposed intervenors Patrolmen's Benevolent Association, Detectives Endowment Association, Lieutenants Benevolent Association, Captains Endowment Association, and Sergeants Benevolent Association (collectively, "Police Unions") and in further support of the City's motion for a limited remand to the District Court for the purpose of exploring a resolution.

To avoid unnecessary repetition, the City adopts the arguments regarding intervention set forth in *Floyd* and *Ligon* Plaintiffs' memoranda of law and adds only the following points.

ARGUMENT

Police Unions provide no convincing basis for denying the City's motion for a limited remand. Even if Police Unions could demonstrate "imperative reasons" for this Court to entertain their intervention on appeal in the first instance, Police Unions have not shown that they have a legally protectable interest in this action to establish their entitlement to intervention as of right. Nor should the Court grant permissive intervention at this juncture, because granting intervention would be severely prejudicial to the parties and would frustrate the compelling public interest in allowing this litigation to be finally resolved. Therefore, the City's motion for a limited remand for the purpose of pursuing a resolution should be granted.

I. Police Unions Are Not Entitled To Intervention As Of Right Pursuant to Rule 24(a).

To intervene as of right, a movant must have a "direct, substantial, and legally protectable" interest in the litigation. *E.g., Person v. N.Y. State Bd. of Elec.*, 467 F.3d 141, 144 (2d Cir. 2006). "An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." *Washington Electric Coop. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990).

Police Unions first assert that they have a legally protectable interest in this action on the theory that their collective bargaining rights are implicated by the district court's decisions. PBA Opposition, at 11-12; SBA Opposition, at 11. However, it is quite clear that the matters described in the Remedies Opinion are not mandatory subjects of collective bargaining, but rather managerial prerogatives under the New York City Collective Bargaining Law.

Specifically, New York City Administrative Code § 12-307(b) provides that the City has the right to:

> determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

The City's authority in such matters is particularly broad in the context of police work. As the New York State Court of Appeals has observed, "[w]hile the Taylor Law policy favoring collective bargaining is a strong one, so is the policy favoring the authority of public officials over the police." *Patrolmen's Benevolent Association ("PBA") v. New York State Public Employment Relations Board ("PERB")*, 6 N.Y.3d 563, 575-76 (2006). This Court has also consistently recognized the important interests in the "NYPD's ability both to manage its personnel effectively and to assure the public that it is doing so." *Lynch v. City of New York*, 737 F.3d 150, 163 (2d Cir. 2013). Thus, the establishment and revision of policing policy are generally not mandatory subjects of collective bargaining. *PBA*, 6 N.Y.3d at 571-72 (collecting cases and holding that police discipline is not a subject of collective bargaining).[1]

Because the matters covered in the Remedies Order are part of the City's managerial prerogative, the mere possibility that part of the Remedies Order may one day touch on a matter subject to collective bargaining is wholly insufficient to justify intervention, especially at this late stage of the litigation process. *Sheppard v. Phoenix*, 1998 U.S. Dist. LEXIS 10576 (S.D.N.Y. 1998), is highly instructive in this regard. In *Sheppard*, the City of New York had entered into a consent decree which made significant alterations to the policy regarding use of force against inmates in the custody of the New York City Department of

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[1] Much of the holding of a PERB decision relied on by Police Unions, *Scarsdale Police Benevolent Association v. Village of Scarsdale*, 8 PERB ¶3075, Case No. U-1698, 1975 WL 388328 (PERB November 7, 1975), is implicitly overruled by the Court of Appeals decision in *PBA*.

Correction. *Id.* Among the practices altered by the consent decree were "investigation of use of force incidents, employee discipline, disciplinary penalty schedules, assignment/transfer of staff, [and] use of chemical agents." *Id.* at *17.

The unions in *Sheppard* sought intervention in the district court to challenge the ordered relief, citing their alleged interest in collective bargaining. *Id.* at *1-3. Rejecting this argument, the Court denied the unions' motion to intervene. *Id.* at *30. The Court found the unions relied on a general interest in collective bargaining, but failed to identify any collective bargaining provision or rule or regulation regarding collective bargaining. *Id.* at *17. The Court further noted that the reforms contemplated "concern[ed] the Department of Correction's operations" and were "essentially covered by the management rights provision of § 12-307(b)." *Id.* at *22.

Here, Police Unions' argument is similarly flawed. The Unions have not cited any specific provisions of the collective bargaining agreement that would be altered by the Remedies Order, nor have they alleged any specific rule or regulation regarding collective bargaining that will not be honored.

The Unions' reliance on *City of New York*, 40 PERB ¶ 3017, Case No. DR-119, 2007 WL 7565480 (PERB Aug. 29, 2007), is misplaced. In that case, PERB found that the NYPD's decision to issue new bullet-resistant vests was a mandatory subject of collective bargaining, but only because of its fact-specific determination that the "paramount purpose" of the vests was officer safety. The Remedies Order, in contrast, affects the management and supervision of police

officers and the provision of police services to the public, which are core matters for the NYPD's management and a managerial prerogative under the New York City Collective Bargaining Law. As this Court found in *Lynch,* and as the New York Court of Appeals held in *PBA,* the NYPD must be allowed latitude to manage, organize, and discipline its own officers as it sees fit. The Remedies Order addresses those very processes, and nothing more.

Police Unions additionally cite *United States v. City of Los Angeles,* 288 F.3d 391 (9th Cir. 2002), for the proposition that "police unions and other bargaining units are frequently allowed to participate in such proceedings to protect their collective bargaining rights and other affected rights." SBA Opposition, at 18-19. However, *City of Los Angeles* is inapposite in several respects. In that case, which never proceeded to trial and in which no liability finding had been made, the Ninth Circuit found that the unions could intervene as of right before approval of the proposed consent decree because they had a protectable interest in the merits of the action where "the complaint [sought] injunctive relief against its member officers." 288 F.3d at 399. Notably, the union in *City of Los Angeles* was seeking to intervene in the lower court, not at the appellate level, and no decree had been approved yet.

Here, in contrast, the Remedies Order has not only reached the appellate level, but imposes injunctive relief solely against the City of New York and not against any individual union member. Further, as set forth above, all of the

relief granted by the immediate reforms are matters not subject to collective bargaining because they fall wholly within management prerogative.

Although additional remedies may be ordered at the conclusion of the joint remedial process, it is entirely speculative for Police Unions to claim that any such future provisions will violate their collective bargaining rights under state law. Such remote speculation cannot outweigh the compelling interests of the parties in reaching a resolution. To the extent that *City of Los Angeles* may be read broadly to support union intervention based on speculative future harm, we respectfully submit that the case was wrongly decided. Rather, the well-reasoned decision of the District Court for the Southern District of New York in *Sheppard* is far more persuasive.

Police Unions also err in their reliance on *United States v. City of Detroit*, 712 F.3d 925 (6th Cir. 2013). That case is clearly distinguishable because the district court's order directly abrogated some provisions in the collective bargaining agreements. *Id.* at 926. Indeed, the Sixth Circuit emphasized that "collective bargaining rights have been impaired, *not just practically, but directly*, by the decision of the district court." *Id.* at 931 (emphasis added). In contrast, here, Police Unions fail to support their contention that the immediate reforms in the Remedies Order directly infringe upon collective bargaining rights.

Police Unions further argue that they have a concrete interest in this action based on reputational harm, because "[t]he court entered findings that unfairly besmirch the reputations of the men and women of the NYPD." PBA

Opposition, at 12-13. Police Unions, however, cite no authority recognizing such reputational harm as a protectable interest under Rule 24(a). Moreover, this assertion is purely speculative because the District Court imposed liability on the City, not the unions which bear no responsibility for setting the NYPD's policies and practices.

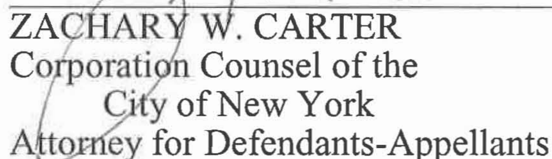
II. Police Unions Should Not Be Granted Permissive Intervention Pursuant To Rule 24(b).

Finally, the circumstances disfavor permissive intervention for Police Unions because it would "unduly delay or prejudice the adjudication of the rights of the existing parties." *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 202 (2d Cir. 2000) (internal quotation marks and citations omitted). Indeed, granting permissive intervention to Police Unions, and then permitting the appeal to move forward, would frustrate the City's efforts with Plaintiffs to bring this litigation to an end.

CONCLUSION

For the foregoing reasons, the City's motion for a limited remand to the District Court for the purpose of exploring a resolution should be granted.

Respectfully submitted,



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