UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DAVID FLOYD, et al., Plaintiffs, - against - CITY OF NEW YORK, et al., Defendants.	08-CV-1034 (AT) ECF Case

SUPPLEMENTAL REPLY MEMORANDUM OF LAW OF THE POLICE INTERVENORS IN FURTHER SUPPORT OF MOTION TO INTERVENE PURSUANT TO <u>FEDERAL RULE OF CIVIL PROCEDURE 24</u>

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The Police Intervenors respectfully submit this Supplemental Reply Memorandum of Law in Further Support of their Motion to Intervene Pursuant to Federal Rule of Civil Procedure 24.[1]

INTRODUCTION

The Police Intervenors seek to intervene to participate in future remedial proceedings and to appeal the Court's injurious and erroneous decisions. The Court's orders directly concern police practices over an eight-year period, and the proposed remedy, in which the City now intends to acquiesce, will affect both the officers' day-to-day activities and their collective bargaining and other rights. Under well-established precedent, the police unions have a right to intervene under Rule 24(a).

The City originally consented to this motion. Dkt. Nos. 414 (*Floyd*), 152 (*Ligon*). Having switched positions, the City now seeks to join Plaintiffs' objections. Yet the Police Intervenors have plainly shown protectable interests in the proceedings before this Court and the Court of Appeals. The parties claim that the Police Intervenors' motion is untimely because it was made after this Court initially found liability, but they can identify no genuine prejudice to their interests as a result of the motion's timing. Rather, the parties simply wish to prevent others with substantial and legitimate interests from defending those interests in this litigation.

First, as to timing, where an applicant seeks to intervene for the remedial phases and for appeal, as here, the "critical inquiry" is not how long the case has been pending, but whether the intervenor acted "promptly" after the judgments. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977). As the Sixth Circuit recently held, where a public union seeks to intervene "on a prospective basis, allowing appeal of recently issued orders and participation in new

[1] Terms are as defined in the Police Intervenors' March 5, 2014 memorandum of law in support of their motion to intervene ("Initial Br.").

matters," the district court should not deny intervention because the union did not participate earlier. *United States v. City of Detroit*, 712 F.3d 925, 932 (6th Cir. 2013).

Second, as to the Police Intervenors' interest, the parties repeatedly and fundamentally misapprehend the nature of the interest and the justification for intervening at the present stage. As the Ninth Circuit has recognized, police unions "ha[ve] a protectable interest in the merits phase of the litigation" where the plaintiffs "seek[] injunctive relief against its member officers and raise[] factual allegations that its member officers committed unconstitutional acts in the line of duty." *United States v. City of Los Angeles*, 288 F.3d 391, 399 (9th Cir. 2002). The Police Intervenors also have a protectable interest in the fashioned remedies since their "state-law rights to negotiate about the terms and conditions of [their] members' employment" may be diminished "as part of court-ordered relief after a judicial determination of liability." *Id.* at 400. The unions thus have a right to have their collective bargaining rights determined by a state administrative and judicial process, and the prospective consent decree would short-circuit those rights and deprive them of that remedy. The unions not only satisfy Rule 24, but they have standing, on behalf of their members, to appeal opinions that will have a direct effect on them and that have already impugned the integrity of thousands of hard-working public servants. The motion to intervene should be granted.[2]

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[2] Plaintiffs contend that the motion to intervene in *Ligon* should be denied because the Police Intervenors focus their arguments on *Floyd*. The Remedies Opinion, however, is a joint opinion issued in both cases, and the appeals similarly have traveled together. The *Ligon* preliminary injunction opinion, like the *Floyd* Liability Opinion, contains findings of unconstitutional conduct by particular members of the Police Intervenors, *see Ligon v. City of New York*, 925 F. Supp. 2d 478, 498-510 (S.D.N.Y. 2013), and rests in part on the same expert's analysis of the UF-250 forms as in *Floyd*, *id.* at 510-16. The unions' arguments in favor of intervention on remedies and appeal thus apply to both cases.

ARGUMENT

POINT I

THE POLICE INTERVENORS MAY INTERVENE AS OF RIGHT PURSUANT TO RULE 24(A)

A. This Motion Is Timely

Plaintiffs argue that the motion is untimely because the Police Intervenors did not choose to intervene earlier, Pl. Br. at 16-20, 27-29, yet they misunderstand this application. In contrast to the cases upon which Plaintiffs rely, the intervenors seek to participate on a prospective basis, during the implementation of any remedial process, and to appeal as a party-appellant the Court's underlying orders. The Supreme Court addressed the issue in *United Airlines*, 432 U.S. at 395-96, and held that a motion to intervene for purposes of appeal would be timely if filed within 30 days of the judgment. Under such circumstances, courts "often permit intervention even after final judgment, for the limited purpose of appeal, or to participate in future remedial proceedings." *City of Detroit*, 712 F.3d at 931 (citation omitted).

Thus, in *Hodgson v. United Mine Workers*, 473 F.2d 118, 129 (D.C. Cir. 1972) (a case approved by *United Airlines*, 432 U.S. at 395 n.16), the application was timely even though the union members sought to intervene "after the action was tried, and some seven years after it was filed." 473 F.2d at 129. The proposed intervenors "sought only to participate in the remedial, and if necessary the appellate, phases of the case," and thus, timeliness posed "no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved." *Id.* Similarly, in *City of Detroit*, the Sixth Circuit permitted a union to intervene in an environmental case that had been pending for 30 years. The Court found that "[t]he mere passage of time—even 30 years—is not particularly important to the progress-in-suit factor. Instead, the proper focus is on the stage of the proceedings and the nature of the

case." 712 F.3d at 931. And in *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996), the Court reversed, as an abuse of discretion, a denial of intervention and vacated the approval of a consent decree, ruling that the police unions' motion to intervene prospectively in a civil rights case was timely, where they moved to intervene 37 and 47 days after the publication of the consent decree.

In addition, this motion is timely because the Police Intervenors have sought intervention promptly after "it became clear to the respondent that the interests of the [intervenors] would no longer be protected by" the existing parties. *United Airlines*, 432 U.S. at 394; *see also Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005) ("Prior to the district court's entry of final judgment it was reasonable for [proposed intervenor] to rely on Appellees to argue the issue of subject matter jurisdiction."); *Edwards*, 78 F.3d at 1000 (timeliness should be measured from the time when "from the time [proposed intervenors] became aware that [their] interest would no longer be protected by the existing parties to the lawsuit"); *Dow Jones & Co. v. U.S. Dep't of Justice*, 161 F.R.D. 247, 252-53 (S.D.N.Y. 1995) (Sotomayor, J.) (finding intervention timely where the movant "had some basis for believing that [defendant] would adequately protect her interest" and only sought to intervene after "she realize[d] that the [defendant] might not fully exercise its right to appeal").

In opposing intervention, Plaintiffs rely upon cases where the movants asked the district court to revisit its prior rulings or sought to intervene suddenly to undo a *fait accompli*. For instance, in *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 596 (2d Cir. 1986), which involved residential segregation, the court found against the city on liability and then conducted a three-month proceeding to determine the location of a new multifamily housing site.

Subsequently, nearby homeowners moved to intervene to ask the Court to redo the completed proceeding, and it was for that reason the motion was untimely.

Likewise, in *Farmland Dairies v. Commissioner of the New York State Department of Agriculture & Markets*, 847 F.2d 1038 (2d Cir. 1988), the prospective intervenors had actively participated in the state administrative proceeding prior to the litigation and had made a decision not to participate in the district court. The State and the company subsequently negotiated an arm's length compromise, which was presented to and approved by the district court. It was only ***after*** the Court "marked the case 'settled and discontinued with prejudice'" that the intervenors moved to intervene for "reargument" and "if necessary, to pursue an appeal." *Id.* at 1042. The court's decision that, under those circumstances, intervention was untimely is both unremarkable and completely distinguishable from this case. *See id.* at 1044.[3]

Here, the Police Intervenors sought to intervene shortly after the decisions were entered, well before any settlement negotiations, and with plenty of time to participate prospectively in the City's pending appeal. The parties simply cannot identify any cognizable prejudice from intervention at this time. The City is seeking to resolve this case by acceding to the Court's injunction, with the sole modification being a three-year deadline, at which point the City could seek (but could not be guaranteed) the termination of the monitorship. The Police Intervenors' motion would not upset any carefully drawn or long-negotiated compromise. Rather, it would

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[3] Plaintiffs' other cases are to the same effect. *See, e.g.*, *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (motion to intervene, filed three days before fairness hearing, was untimely); *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 194-95, 198-99 (2d Cir. 2000) (motion to intervene filed on last day to object to settlement, where negotiations and court proceedings about the settlement had been ongoing for months, was untimely); *Catanzano v. Wing*, 103 F.3d 223, 233-34 (2d Cir. 1996) (movants waited for "months (probably years)" before raising new arguments).

permit the Police Intervenors to continue the appeal that the City has begun and ensure their participation in a remedial process that, even the parties acknowledge, must include the participation of the Police Intervenors in some fashion. Pl. Br. at 20.

Moreover, the Plaintiffs' complaint that the Police Intervenors should have sought to intervene before trial is fundamentally misplaced. "[T]he time that the would-be intervenor first became aware of the pendency of the case is not relevant to the issue of whether his application was timely." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977). Such a rule would be wasteful of "scarce judicial resources" and increase the "litigation costs of the parties," since the courts would field many intervention motions that would "later prove to have been unnecessary." *Id.* This case is a perfect example. Had the City prevailed at trial, the unions' participation would have remained unnecessary. The ***timing*** of the motion therefore causes no cognizable prejudice at all to the parties, since "prejudice to the existing parties other than that caused by the would-be intervenor's failure to act promptly [is] not a factor meant to be considered" under Rule 24(a). *Id.* at 265. Indeed, "Plaintiffs are in the same position they would have been in if [the proposed intervenor] had intervened in an earlier stage of the litigation process, *i.e.*, they would be subject to the delay inherent in an appeal." *Dow Jones*, 161 F.R.D. at 253. The Police Intervenors' motion is timely.

B. <u>The Police Intervenors Have a Direct, Protectable Interest in These Actions</u>

In their Initial Brief, the Police Intervenors demonstrated that they have a protectable interest in this litigation because the Liability Opinion directly concerns the constitutionality of officers' conduct, and the Remedies Opinion directly affects officers' work, training, safety and collective bargaining rights. A police union has a "protectable interest in the merits phase of the litigation" where plaintiffs seek "injunctive relief against its member officers" and allege that

officers "committed unconstitutional acts in the line of duty." *City of Los Angeles*, 288 F.3d at 399-400. Here, Plaintiffs challenged police officers' conduct, relying upon police officer witnesses and the UF-250 forms, and the Remedies Opinion directs numerous actions that, in turn, will have a direct impact upon officers' day-to-day activities and will displace the fundamental state-law labor bargaining process.

In response, the Plaintiffs and the City argue that the Police Intervenors' bargaining interests will not be affected by the prospective consent decree and, in any event, the unions' interests will be adequately protected by their informal participation in the consultative process the Remedies Opinion orders. But these arguments miss the point. The City has a state-law obligation to negotiate with the unions over topics that are bargainable under the State's Taylor Law and the NYCCBL. If a union and the City disagree over whether or not a particular proposed change is bargainable, state law provides for a specific process by which the Board of Collective Bargaining ("BCB"), which has subject matter expertise, will decide whether or not that proposed change is bargainable. The unions have a right to ask the Board to make determinations regarding any of the myriad subject matters contemplated by the Remedies Opinion and to appeal that determination where necessary, through the state courts or to the New York State Public Employee Relations Board ("PERB"). *See* N.Y.C. Admin. Code § 12-308 (providing for judicial review of BCB decisions); N.Y. Civ. Serv. Law § 205(5)(d) (providing for PERB review of BCB decisions).[4]

[4] The Plaintiffs claim, incorrectly, that *Patrolmen's Benevolent Ass'n of the City of N.Y., Inc. v. City of New York* ("*PBA*"), 6 OCB2d 36 (BCB 2013), holds that none of the subjects of the Remedies Order are bargainable. Pl. Br. at 26. On the contrary, as the Initial Brief showed, that case demonstrates that "the procedural aspects of employee performance evaluations are mandatory subjects of bargaining," and the procedural aspects include a number of the policies that are part of the Quest for Excellence Program, which the Liability Opinion

Most importantly, the Remedies Opinion and prospective consent decree make no provision for any state-law mechanism to resolve state-law disputes over bargainability. In contrast, in *City of Los Angeles*, the proposed consent decree did provide a mechanism for disagreements over bargainability to be referred to state authorities, 288 F.3d at 400-01, yet the court still found the union's interest going forward sufficient to support intervention as of right. Here, the Unions have stated a protectable interest in the content of any such consent decree and must be granted intervention so that the Court may hear such arguments. *Accord Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001) ("whether [the proposed intervenors] ***lack a cognizable interest***" cannot be determined by evaluating whether the intervenor's arguments on the merits will ultimately prevail (emphasis added)). If a proposed remedies order "contains – ***or even might contain*** – provisions that contradict the terms" of the CBA, the union members have "a protectable interest." *United States v. City of Portland*, No. 12-cv-2265 (D. Or. Feb. 19, 2013), at 7 (emphasis added), attached as Ex. C to Opening Engel Decl. (Dkt. Nos. 438-3 (*Floyd*), 173-3 (*Ligon*)).[5] In *City of Los Angeles*, the court approved intervention even though the United States argued that the consent decree preserved the unions' rights to bargain with the City and that thus it was "purely speculative that the parties will not agree on what provisions are subject to collective bargaining and on how any disputes over those provisions should be resolved." 288 F.3d at 401. The Ninth Circuit rejected that reasoning because the consent

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specifically targets for revision. *See PBA*, 6 OCB2d at 5-8, 14, 19-21; *Floyd v. City of New York*, 959 F. Supp. 2d 540, 600-01, 611 n.337 (S.D.N.Y. 2013).

[5] Thus, the case is distinguishable from *Sheppard v. Phoenix*, No. 91 Civ. 4148, 1998 WL 397846, at *6 (S.D.N.Y. July 16, 1998), relied upon by the parties, where the court was faced, not with the complex remedial process contemplated by the Remedies Order, the full contours of which remain to be determined, but rather with what the court viewed as a "narrowly drawn" consent decree. *Id.* at *8.

decree purported to federalize what otherwise would be a state-law process and because Rule 24's standard is whether the order "'may' impair rights 'as a practical matter'" not "whether the decree will 'necessarily' impair them." *Id.* The same is true here.

C. The Police Intervenors' Interests Would Be <u>Impaired by the Disposition of These Actions</u>

In their Initial Brief, the Police Intervenors explained how their interests would be impaired by the disposition of these actions. As to liability, the Police Intervenors would plainly be prejudiced if the City were to withdraw the appeal. And as to remedy, the Police Intervenors have an interest in the rules contained in any consent decree. While Plaintiffs and the City give short shrift to the Police Intervenors' state law rights to have issues concerning terms and conditions decided through bargaining and the statutory process, nothing in the cases they cite suggests that the unions lack such rights. This impairment to the Police Intervenors' statutory bargaining process rights alone supports intervention.

Indeed, the impairment to the Police Intervenors' interests here is far from remote and speculative. The Remedial Order requires numerous specific reforms that raise substantial issues about whether such reforms are subject to mandatory collective bargaining.[6] The relevant legal inquiry is whether the Police Intervenors' interest ***may*** be impaired if these matters are determined without their participation. The Police Intervenors have demonstrated a number of

[6] Plaintiffs cite a snippet from a press interview with the president of one of the police unions and claim that it suggests some deleterious motive on the part of the unions. To the contrary, the interview makes the point that this case involves matters over which the City and the unions should bargain. *See* Pl. Br. at 10, 28-29. If the City wishes to change police practices that implicate the rights of the police unions and their members, then the appropriate means by which to do so is at the bargaining table, not through a collusive agreement between the City and Plaintiffs that would then be imposed upon the police unions without their consent.

specific aspects of the actions mandated by the Remedies Opinion that directly impair their rights:

- As the BCB has confirmed, significant portions of the NYPD's Quest for Excellence Program are mandatory subjects of bargaining. *See PBA*, 6 OCB2d 36, at 16-19 ("[T]he fact that these changes are closely tied to the Department's mission is not a defense to its failure to bargain over them.").

- Training may be a subject of bargaining. *See, e.g.*, *L. 2507 & L. 3621, DC 367 v. City of New York*, Decision No. B-20-2002, 69 OCB 20 (BCB 2002); Initial Br. at 17.[7]

- Body cameras are likewise subject to bargaining. Initial Br. at 17.

In response, the parties evince a limited understanding of the scope of collective bargaining. The City does nothing more than quote the NYCCBL's management rights provision. But simply citing that provision does not suffice to exempt the City from bargaining for all aspects of training, supervision, monitoring, and other subjects that affect the Police Intervenors' members' terms and conditions of employment.

As the Ninth Circuit recognized, state courts are charged with determining the state law issues underlying collective bargaining agreements, and it is not the province of the federal courts to address and decide such issues, even when presented in the course of settling a federal action by decree. *See City of Los Angeles*, 288 F.3d at 401. Additionally, it is apparent that the

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[7] Plaintiffs assert that "the Police Unions offer no reason to believe that the exception to which they advert—where training is required to obtain a license or certification—will be applicable to any training programs developed pursuant to the Remedial Order." Pl. Br. at 26. The standard as offered by Plaintiffs is at best incomplete. Whether training is subject to bargaining must be decided under the state law process. There is simply no support for Plaintiffs' suggestion that training is subject to bargaining ***only*** when required to obtain a license or certification. *See Uniformed Fire Officers Ass'n v. City of New York*, Decision No. B-6-2003, 71 OCB 6 (BCB 2003) (procedure by which a Fire Officer could obtain the necessary educational requirements for a promotion in rank was mandatorily bargainable). In-house training is also subject to bargaining when "required by an employer as a qualification for continued employment, for improvement in pay or work assignments or for promotion." *Id.* at 9.

management rights provision does not excuse the dramatic impairment of the Police Intervenors' rights that would come from the Remedies Opinion.

First, the application of the management rights clause to bargaining disputes is at best questionable. As Plaintiffs explicitly recognize, New York's Taylor Law requires that the procedures of mini-PERBs, such as the BCB, be "substantially equivalent" to its own provisions and rules. *See* N.Y. Civ. Serv. Law § 212(1). Because the Taylor Law includes no analogous provision to the so-called management rights clause in NYCCBL § 12-307(b), and because that section conflicts with the Taylor Law's policy favoring collective bargaining regarding all terms and conditions of employment, NYCCBL § 12-307(b) fails to meet the substantial equivalence standard. *See, e.g.*, *Uniformed Firefighters Ass'n v. City of New York*, Decision No. B-39-2006, 77 OCB 39 (BCB 2006) (dissenting opinion of Board Members Moerdler and Simon).[8]

Second, even if the management rights clause would govern some disputes between the City and the Police Intervenors, Plaintiffs disregard the strong public policy in favor of collective bargaining. At most, the management rights clause is a limited exception to a public employer's duty "to bargain in good faith concerning all terms and conditions of employment." *Watertown v. N.Y.S. Pub. Employee Relations Bd.*, 95 N.Y.2d 73, 78 (2000). New York's public policy in favor of collective bargaining is "strong and sweeping." *Id.* This presumption "may be overcome only in 'special circumstances' where the legislative intent to remove the issue from mandatory bargaining is 'plain' and 'clear,' or where a specific statutory directive leaves 'no

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[8] Plaintiffs' assertion that the NYCCBL is "by definition, 'substantially equivalent,'" Pl. Br. at 23 n.13, is incorrect. There is a continuing obligation on the part of the BCB to carry out its statutory functions consistent with the Taylor Law, and a failure by the agency to do so may be challenged by either the PERB (in state court) or an aggrieved party. N.Y. Civ. Serv. Law §§ 205(5)(d), 212(2).

room for negotiation.'" *Id.* (internal citations omitted). In other words, assuming that it is applicable, the management rights clause is the exception to the general rule of New York public policy that matters that impact terms and conditions are subject to bargaining under New York law. *Id.* at 79 ("Absent 'clear evidence' that the Legislature intended otherwise, the presumption is that all terms and conditions of employment are subject to mandatory bargaining."). The Plaintiffs have failed to make the specific showing necessary in order to demonstrate that ***all*** of the topics contemplated by the Remedies Opinion are not bargainable.

Indeed, while Plaintiffs cite cases holding that discipline itself is not a subject of bargaining, the limited sweep of those cases proves the Police Intervenors' point. While courts have found that the statutory grant of disciplinary authority to the Police Commissioner removed certain disciplinary matters from collective bargaining,[9] no analogous statutory grant of authority prohibits bargaining over work rules, training, equipment, privacy rights, workload or safety concerns, all of which are directly affected by the Remedies Opinion and will be affected further by the Joint Remedial Process. Indeed, as noted above, *see supra* note 4, the BCB flatly rejected the City's argument that evaluation procedures, which are directly implicated here, were not mandatorily bargainable under the management rights clause. *PBA*, 6 OCB2d 36. The notion that these subjects are excluded from collective bargaining has no support.

The Remedies Opinion further contemplates that the joint remedial process will concern issues of training, supervision, monitoring, and other matters that may impact terms and

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[9] Indeed, in *City of New York v. Patrolmen's Benevolent Ass'n of the City of New York* ("*PBANY*"), 14 N.Y.3d 46 (2009), relied on by Petitioners, the Court of Appeals made clear that the boundaries of the "discipline" exception are themselves limited. *See id.* at 59-60 ("We are not saying that every step that the Commissioner takes or every decision that he makes to implement drug testing is excluded from bargaining.").

conditions of employment. When determining the bargainability of a subject that is asserted to be a working condition, the Board (or PERB where applicable) must weigh the interests of both the employer and the union. *See City Employees Union, Local 237 v. N.Y.C. Dep't of Homeless Servs.*, 2 OCB2d 37, at 14 (BCB 2009) (requiring a "case-by-case determination [that] takes the form of a balancing test" to determine "the extent of the parties' duty to negotiate"). Plaintiffs cannot seriously contend that aspects of training, supervision, monitoring, and other actions contemplated by the remedial process will not affect terms and conditions of employment. These matters, if disputed, should be resolved by a state law process.

Plaintiffs' argument that the Police Intervenors cannot show impairment without citing a provision of the collective bargaining agreement ("CBA") is not only incorrect, but entirely irrelevant to determining whether the unions' bargaining rights have been impacted. The City has the obligation to bargain over ***any*** change to mandatory subjects of bargaining, not only those already contained in the agreement. This is a fundamental part of collective bargaining and is explicit in the collective bargaining law. *See* N.Y. Civ. Serv. Law § 204(2) ("[T]he appropriate public employer shall be, and hereby is, required to negotiate collectively with [a certified or recognized] employee organization in the determination of, and administration of grievances arising under, the terms and conditions of employment of the public employees as provided in this article . . . ."); N.Y.C. Admin. Code § 12-306(a)(5) (prohibiting the public employer from "unilaterally mak[ing] any change as to any mandatory subject of collective bargaining"). Moreover, in the event that the Court orders remedies that would otherwise violate the CBA or existing Department procedures, those violations would not be subject to the CBA's grievance and arbitration procedures, depriving the Police Intervenors of their contractual remedy, in addition to their loss of statutory remedies discussed *supra*. *See* Patrolmen's

Benevolent Association CBA, Art. XXI, Declaration of Steven A. Engel, Esq., Ex. A.[10] Further, any changes to the Police Intervenors' terms and conditions of employment that are negotiated between the "stakeholders" identified in the Remedies Opinion—including community leaders, religious groups and plaintiffs' attorneys—would completely undermine the unions' rights under the CBA as "the sole and exclusive bargaining representative" for each of their respective unions with respect to terms and conditions of employment. *See id.* Art. I, § 1.

In short, the Police Intervenors have demonstrated that they have a right to intervene in this action because they have substantial rights under state law that would be impaired absent intervention, including the right to have issues of training, supervision, monitoring, and other actions that impact terms and conditions of their members' employment resolved in good faith bilateral bargaining, or by the process mandated under New York statute, if bargaining is unsuccessful. The Police Intervenors may protect their rights only by intervening for the purpose of challenging on appeal the liability findings on which the Remedies Opinion is premised and participating as a party in any future remedial proceedings.

D. The Police Intervenors' Interests Will Not Be <u>Adequately Protected by the Parties to This Action</u>

As the Police Intervenors demonstrated in their Initial Brief, and as the parties do not dispute, there can be no question that the Police Intervenors' interests are not aligned with any existing party's as to any proposed consent decree or appeal. The Plaintiffs argue, however, that the Police Intervenors' interests will be adequately protected by the City in any remedial process. This is plainly not the case. The inadequacy requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should

[10] The CBAs of the other Police Intervenors have equivalent provisions. *See* Engel Decl. ¶ 4.

be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). As shown above, the unions' interests are misaligned with the City's regarding collective bargaining. *See also, e.g.*, *Vulcan Soc. of Westchester Cnty., Inc. v. Fire Dep't of City of White Plains*, 79 F.R.D. 437, 441 (S.D.N.Y. 1978) (finding that unions and their employers have adversarial interests regarding collective bargaining and that unions' interests can best be protected by intervention ***before*** any consent decree is adopted); *N.Y. Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (reversing denial of intervention, where proposed intervenors would merely likely "make a more vigorous presentation" of certain arguments than the governmental party). Plaintiffs attempt to distinguish *Vulcan Society* on the ground that "the antagonistic employer-employee relationship was at the center of the issues in that case." Pl. Br. at 30. But this is a distinction without a difference. Whether or not the ***Plaintiffs*** believe that the City's relationship with its 35,000 police officers is a core topic covered by the sweeping findings in this litigation is immaterial. It is precisely to bring these issues to the Court's attention that the Police Intervenors seek to intervene.

Moreover, as the change in mayoral administrations has amply demonstrated, the City may act on the basis of political or other motivations that it does not share with the unions. The very act of announcing the intent to acquiesce in all of the remedies previously ordered is a prime example of just such a divergence. This is not to say that the City is not permitted to exercise its authority to set policy. Rather, in a remedial process heavily subject to oversight from a federal monitor and a federal court, it is imperative that the unions be given a full and ***equal*** voice in any process that occurs, not consigned to the consultative one that the parties and the Remedies Opinion contemplate.

POINT II

ALTERNATIVELY, THE POLICE INTERVENORS
SHOULD BE GRANTED PERMISSIVE INTERVENTION

As shown in the Initial Brief, the Police Intervenors also meet the standard for permissive intervention. Fed. R. Civ. P. 24(b). In response, the parties essentially rehash the same arguments in opposing Rule 24(a)(2) intervention. *See* Pl. Br. at 30-31; City Br. at 7. For the same reasons discussed above and in the Initial Brief, these arguments are incorrect, and permissive intervention is appropriate as well.

POINT III

THE POLICE INTERVENORS HAVE
STANDING TO APPEAL THIS COURT'S PRIOR ORDERS

The Police Intervenors also have Article III standing to pursue an appeal even if the City were to seek to withdraw it. As the Second Circuit has recognized, "[t]o have standing at the appellate stage . . . a litigant must demonstrate 'injury caused by the judgment rather than injury caused by the underlying facts.'" *Tachiona v. United States*, 386 F.3d 205, 211 (2d Cir. 2004). The standing requirement is met if the litigant can show a "concrete and particularized" injury, which can be as abstract as seeking to protect "'the aesthetic and recreational values'" of an area the plaintiff uses. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 183 (2000). Its "contours" are "very generous" and are satisfied by "'an identifiable trifle of injury.'" *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.* ("*NCAA*"), 730 F.3d 208, 219 (3d Cir. 2013), *petitions for cert. filed*, 82 U.S.L.W. 3515 (U.S. Feb. 12, 2014, Feb. 13, 2014) (Nos. 13-967, 13-979, 13-980) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 n.14 (1973)).

The Police Intervenors satisfy this test because their daily work lives will be affected by the acts the Remedies Opinion requires the City to require the police officers to perform. *See* Initial Br. at 22. This is not merely an "unfavorable" "precedent," Pl. Br. at 14 (quoting *Tachiona*, 386 F.3d at 211), but an order that will require the NYPD to change the terms of the officers' employment.

Additionally, the reputational harm the Police Intervenors have suffered by virtue of the Liability Opinion is sufficient for standing. As the Third Circuit recently held, sports leagues, such as the NCAA, had standing to challenge a New Jersey law that would have allowed increased gambling because that law would "taint" the leagues with an "unwanted association with an activity they (and large portions of the public) disapprove of—gambling." *NCAA*, 730 F.3d at 218, 220. The court found standing even though the proposed laws did not restrict the leagues at all or require them to do anything; rather, the law allowed others to do something that was previously prohibited. *Id.* (citing cases holding that reputational harm, without referring to its economic effects, is sufficient to show injury in fact for standing purposes). Of course, here, the Court's orders have a direct on the day-to-day lives of Police Intervenors and their members, as well as on their reputations.

Numerous cases recognize that reputational injury can give rise to an injury in fact. A"blackened" reputation, *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 162 (2d Cir. 2003), provides standing. The Second Circuit's comment that such a reputational hit would also likely have financial consequences, *see* Pl. Br. at 13, hardly implies that the court's holding rested on that finding. To the contrary, the *Gully* court quoted in support a D.C. Circuit case that found a judge "had standing to challenge a public reprimand he received from the Judicial Council of the Fifth Circuit." *Gully*, 341 F.3d at 162 (quoting *McBryde v. Comm. to Review*

Circuit Council Conduct & Disability Orders of the Judicial Conference of the U.S., 264 F.3d 52, 57 (D.C. Cir. 2001)). Of course, a public reprimand to a federal judge does not have any economic impact on the judge.

Plaintiffs argue that any reputational harm was the result of the underlying conduct that led to the Liability Opinion, not of the Liability Opinion itself. *See* Pl. Br. at 13. The circularity of that reasoning is manifest. The police officers' conduct and reputations are placed at issue only if, in fact, the Liability Opinion can survive appellate scrutiny. Just as the City previously argued, and the unions now contend, this Court's findings that the NYPD, through its officers, have engaged in systematic racial discrimination and have made at least 200,000 unlawful stops are premised upon fundamental legal errors that have caused serious reputational harm to the officers and should be reviewed by the Second Circuit. If Plaintiffs believe these opinions are well-founded in the law, then they should be ready to expose them to the scrutiny of the Court of Appeals. What is clear, however, is that the Police Intervenors' interests in seeking to challenge these opinions and redress the reputational injury they have caused to their members suffice to demonstrate standing for purposes of appeal.

CONCLUSION

The Police Intervenors respectfully request that the Court grant their motion to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) or, in the alternative, permissively under Rule 24(b).

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