UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 13-3088

DAVID FLOYD, *et al.*,

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK,

Defendant-Appellant.

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PLAINTIFFS-APPELLEES' OPPOSITION TO THE UNIONS' MOTIONS TO INTERVENE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

Plaintiffs-Appellees submit this memorandum of law in opposition to the motions of the Patrolmen's Benevolent Association, (PBA), Lieutenants Benevolent Association, Captains Endowment Association Detectives Endowment Association, and the Sergeants Benevolent Association (SBA), collectively "the Unions," to intervene as appellants in this appeal. *See* Dkt ## 252-2 (PBA Mot.), 282-3 (SBA Mot.).

As the Unions' papers make abundantly clear, they remarkably seek intervention primarily, if not solely, to continue the City's appeal in the event that the incoming mayoral administration withdraws it. But the Unions have no standing to continue this appeal even if the City withdraws – a possibility that has not yet even come to pass – because the Liability and Remedies Orders do not hold them or their members liable for constitutional violations and do not impose injunctive relief on them or their members. This alone is fatal to their intervention motion. Yet the Unions also fail to satisfy the requirements for intervention under Fed. R. Civ. P. 24. Putative intervenors must timely seek protection of cognizable legal interests implicated in the underlying actions, but the Unions' motions are years late, and the Unions have no actionable interest. Further, intervention is inappropriate where a current party is aligned in interest and, given that the City has aggressively prosecuted this case and the appeal, the Unions do not and cannot

make this showing. The potential that the incoming mayor might withdraw the appeal is inapposite because he has stated in submissions to this Court that he will consider the interests of the Unions' members in developing any remedial proposals. For these same reasons and because of the severe prejudice which continuing the appeal and delaying vindication of Plaintiffs' constitutional rights will cause, permissive intervention is also unwarranted under Rule 24(b).

Accordingly, the Unions' motions to intervene must be denied.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Daniels v. City of New York*

Daniels v. City of New York was commenced as a putative class action in 1999, alleging that the City of New York had implemented a policy and practice of unconstitutional and race-based stops-and-frisks, and seeking injunctive relief including changes to NYPD policies and practices for the training, supervision, discipline and monitoring of officers on stop-and-frisk and racial profiling. *See Daniels v. City of New York*, 99 Civ. 1695 (SAS), Dkt # 1 (S.D.N.Y. Mar. 8, 1999).

In January 2004, the District Court so-ordered a stipulation of settlement which required the City to, among other provisions: (i) implement stop-and-frisk audits that created new job duties and additional workload for certain NYPD sergeants and lieutenants, Charney Decl., Ex. A, at 5-6, Ex. B; (ii) expand stop-and-frisk and racial profiling trainings for newly promoted NYPD sergeants and

lieutenants, Charney Decl., Ex. A at 8; and (iii) ensure that all stop-and-frisk incidents be documented on a revised version of the UF250 form. Charney Decl., Ex. A at 8, Attachment B, Ex. C. The settlement was in effect until December 31, 2007, Charney Decl., Ex. A at 6. At no point prior to that date did the Unions attempt to intervene in *Daniels*. Moreover, there is no indication that the City and the Unions collectively bargained over any of these reforms.

B. Procedural History of *Floyd v. City of New York*

1. Pre-Trial Proceedings in the District Court

Plaintiffs commenced the present action in January 2008, naming the City and several individual Union members as defendants and requesting class-wide injunctive relief, including changes to the NYPD's policies and practices for training, supervision, discipline and monitoring of officers on stop and frisk and racial profiling. *Floyd v. City of New York*, 08 Civ. 1034 (SAS), Dkt ## 1, 50 (S.D.N.Y.). Fact discovery proceeded for two-and-a-half years, during which time dozens of police union members were deposed and document discovery included union members' discipline and other records, but at no point did the Unions seek to intervene. Charney Decl. ¶ 3.

On August 31, 2011, the district court denied Defendants' summary judgment motion, holding there was a disputed issue of fact for trial on whether current NYPD policies and practices for officer training, supervision, monitoring

and discipline were adequate to prevent a widespread practice of unconstitutional stops. *See Floyd v. City of New York*, 813 F.Supp.2d. 417, 456 (S.D.N.Y. 2011).

On March 4, 2013, Plaintiffs filed their brief in support of permanent injunctive relief, seeking: (i) changes to the UF250 form and the policies for evaluating police officer performance regarding stops-and-frisks; (ii) the appointment of an independent monitor; and (iii) creation of a joint remedial process to develop changes to the NYPD's systems for training, supervising, monitoring, and disciplining officers on stop-and-frisk and racial profiling. *See Floyd*, 08 Civ. 1034, Dkt # 268 (S.D.N.Y. Mar. 6, 2013). The Police Unions at no point prior to trial sought leave to respond to Plaintiffs' remedy brief or to intervene. On April 11, 2013, the City responded to the Plaintiffs' brief opposing each of the requested forms of relief. *See Floyd*, 08 Civ. 1034, Dkt. #274 (S.D.N.Y. Apr. 11, 2013). On March 8, 2013, the Plaintiffs' claims against Union member defendants were withdrawn with prejudice. *See* Charney Decl., Ex. D.

2. Trial

During the nine-week trial, more than 50 officers, sergeants, lieutenants, captains, deputy inspectors, and inspectors testified, describing in detail their job duties, responsibilities and workload, and the ways in which stops are documented and reviewed, officers are trained, supervised, and monitored on stop-and-frisk and racial profiling, and civilian complaints about improper stops are investigated and

disposed of. *See* Charney Decl., Ex. E ¶¶ 23, 25-33, 43-49, Ex. F ¶¶ 86-107, 122-136. In addition, senior NYPD officials and the City's remedies expert testified about why the UF250 form should not be revised to include a narrative section on the basis for a stop. *See* Charney Decl., Ex. G at Trial Tr. 2901-05, 3008, 3012-13, 7757:2 – 7761:15; 7787:14-18; 7804:7-19 7805:5 – 7807:4.

3. The District Court's Liability and Remedies Decisions

In the Liability Order, the district court found only the City liable for constitutional violations. *See* Dkt # 22 at 129-326 (Liab. Ord.) at 192. In the Remedies Order, the district court declined to impose injunctive remedies on the City and instead directed the City and Plaintiffs, together with a court-appointed monitor, to develop and submit to the court proposed changes to NYPD policies, training, documentation, supervisory, monitoring and disciplinary systems for stop-and-frisk and racial profiling, and a proposed FINEST message, none of which will be implemented unless and until approved by the district court in a subsequent order. Dkt # 22 at 327- 363 (Rem. Ord.) at 13-25; *Floyd*, 08 Civ. 1034, Dkt # 402 at 6-7 (S.D.N.Y. Sept. 17, 2013). The Remedies Order further obligates the City to eventually undertake a one-year pilot project for officer body-worn cameras that will be based on procedures to be developed by the court monitor and subsequently ordered by the District Court, and that the City and Plaintiffs engage in a six to nine-month Joint Remedial process to develop supplemental reforms based on

input from a stakeholders, including "NYPD personnel and representatives of police organizations", which will be submitted to the district court but not implemented until the court approves them. Rem Ord. at 25-32. The Order does not require the Unions or their members to do anything.

4. The Present Appeal and the Unions' Intervention Motions

On August 16, 2013, the City filed a notice of appeal indicating it was appealing the district court's Liability and Remedies Orders. *See* Dkt # 1. On September 11 and 12, respectively, the last two days on which to file a notice of appeal, the Unions noticed appeals of those same two orders, Dkt ## 52, 69. Simultaneously, in the district court, they moved to intervene in this appeal and the remedial phase of the district court proceedings. *See Floyd*, 08 Civ. 1034, Dkt ## 390-393, 395-397 (S.D.N.Y.). Those motions were fully briefed as of October 25, 2013 and are currently *sub judice* with the district court. *See id.*, Dkt ## 412-416.

The City and the SBA have indicated they intend to raise the same legal issues on appeal. *See* Dkt # 22 Addendum B; Dkt # 94, Addendum B.[1] In pursuing this appeal, the City has sought and obtained a stay of the District Court's Remedies Order, and moved to vacate the District Court's Liability and Remedies Orders. *See* Dkt ## 72, 247, 265. The City, in its stay motion (Dkt # 72 at 28-29, 333-35, 339-43), and the Unions, in their amici briefs in support of that motion

[1] The other Police Unions have not filed a Pre-Argument Statement.

(Dkt # 107-2 at 8, 30, 32, 33; Dkt # 169 at 4-5, 7), advanced the same arguments about public and officer safety and administrative burdens. Mayor-Elect Bill DeBlasio, in his capacity as the New York City Public Advocate, submitted an amicus brief in opposition to the stay, Dkt # 205, in which he *agreed* with the City and Unions that concerns about officer safety and departmental resources should be considered in the development the immediate and joint reforms. *Id*. at 9, 20-22.

C. The City's Voluntary Changes to Stop-and-Frisk Policies

Periodically, the City has altered the duties and workload of NYPD personnel at various ranks with respect to stop and frisk, including: (i) a 2011 revision to the UF250 form requiring additional detail on reasons for use of force, Charney Decl., Ex. H; (ii) a 2012 revision to the NYPD Patrol Guide requiring executive officers (who have the rank of captain) for the first time to conduct the stop-and-frisk self-inspections in each precinct, *id*. Ex. I; (iii) a March 5, 2013 NYPD Chief of Patrol memorandum requiring patrol officers to provide narrative details about the reasons for stops on the UF250 forms they complete, *id*. Ex. J; (iv) 2011 changes to police officer performance evaluation procedures that significantly increased the frequency with which officers document the quantity of their stop activity and supervisors must review that documentation, *id*., Ex K; and (v) in 2012 and 2013, requiring more than 8,000 officers to attend an off-site stop-and-frisk training course (that was legally inaccurate). *Id*., Ex. G at 5121. There is

no indication that any of these changes were collectively bargained.

ARGUMENT

I. THE UNIONS' INTERVENTION MOTIONS ARE NOT PROPERLY BEFORE THIS COURT

As set forth in the Appellees' opposition to the Unions' intervention motions in *Ligon v. City of New York*, being heard in tandem with this appeal, there is no basis for this Court to consider the intervention motions before the district court. *See* Appellees' Brief in Opposition to Unions' Motion to Intervene in *Ligon v. City of New York*, 13-3123 ("Ligon Opp.") at 3-8. And even if this Court deems it appropriate to rule on the Unions' motions, because they only seek intervention in the appeal, PBA Mot. at 1; SBA Mot. at 1, there is no reason to decide now, *sua sponte*, whether to grant them intervention into future remedial proceedings in the district court. *See Anderson v. Branen*, 27 F.3d 29, 30 (2d Cir. 1994) (noting that this Court will ordinarily not consider issues not raised on appeal "unless manifest injustice would otherwise result") (citation omitted). Because the District Court will have ample opportunity to rule on the Unions' pending motions to intervene in the remedial proceedings, which were fully briefed to the district court on October 25, 2013, there is no reason to depart from the general rule that motions to intervene be addressed first to the district court. *See Drywall Tapers & Pointers of*

Greater, N.Y. v. Nastasi & Assocs., 488 F.3d 88, 94 (2d Cir. 2007).[2] In the meantime, given the stay, the Unions will not be prejudiced by having the District Court decide the question on remand.

II. THE UNIONS LACK STANDING TO PURSUE THIS APPEAL

The Unions seek intervention to continue the appeal if the next mayoral administration withdraws it in a baldly political move that ignores the pertinent threshold requirement for doing so: standing, which the Unions lack.

"An intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Article III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *see also Schulz v. Williams*, 44 F.3d 48, 52 (2d Cir. 1994) (Cabranes, J.) (same) (citing *Diamond*). In addition, an intervenor only has standing to "appeal a judgment by which it is bound" or to appeal when its "legal rights are directly implicated by [a judgment's] entry." *Plumbers, Pipefitters & MES Local Union No. 392 Pension Fund v. Fairfax Financial Holdings Ltd.*, 433 Fed. App'x 28, 30-31 (2d Cir. 2011) (summary order) (citations omitted). The Unions have not, and cannot, satisfy these requirements.

To establish Article III standing, a party must show: (1) it has suffered an

[2] The Unions purported concern about "avoid[ing] piecemeal litigation", SBA Mot. at 7; PBA Mot. at 9, is disingenuous, given that they seek to pursue an appeal of a preliminary remedial order rather than waiting to appeal until a final judgment. *See* Dkt # 22 at 339-40, 357; Dkt # 143 at 16-17.

injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the conduct complained of; and (3) it is likely, not merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also In re Joint Eastern and Southern Dist. Asbestos Litig.*, 78 F.3d 764, 779 (2d Cir. 1996) (same) (finding intervenor lacked standing to appeal). The Unions bear the burden of demonstrating standing. 13D Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc. § 3522 (2d ed. 1992); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

The Unions have no standing to appeal the District Court's Liability Order because that order did not hold them or any of their members liable for any constitutional violations. The SBA claims, without any evidentiary support, that the District Court's factual findings that some individual union members committed misconduct will "adversely affect the careers and lives" of these individuals and "cast doubt on the ability of" other union members to do their jobs effectively, which "will in turn affect[] officer and public safety." SBA Mot. at 13. Such "conjectural" and "speculative" harms are not sufficient to confer Article III standing on the SBA or its members. *See Lujan*, 504 U.S. at 560-61. Similarly, the purported (and imagined) chill on lawful police conduct does not confer standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1152 (2013); *Laird v. Tatum*,

408 U.S. 1, 11-16 (1972).

The Unions have also not established a basis for standing to appeal the District Court's Remedies Order. They do not dispute that they are not bound by the directive to engage in a consultative process to develop remedies, which is all the Remedies Order compels. *See* Rem. Ord. at 13-32. This should end the inquiry. *See Hollingsworth v. Perry*, 133 S.Ct. 2652, 2662 (2013) (holding that intervenor sponsors of state ballot initiative lacked standing to appeal district court decision that initiative was unconstitutional where "[d]istrict [c]ourt had not ordered them to do or refrain from doing anything"). Instead, the Unions argue that yet-to-be developed remedies will somehow negatively affect unidentified collective bargaining rights. SBA Mot. at 14-16, PBA Mot. at 15-16. Yet a party's standing cannot be based upon "speculative chains" "that require guesswork as to how independent decision makers will exercise their judgment," *Clapper*, 133 S. Ct. at 1150. Outside of cases directly challenging a defendant employer's labor or employment practices, there is no precedent for the proposition that a union has standing to appeal a liability determination or remedies order against the employer.[3] The Unions thus lack standing to appeal the Remedies Order.[4]

[3] The rare cases in which unions had standing to appeal involved appeals from the entry or rejection of consent decrees in employment discrimination cases whose terms directly infringed upon union members' contractual employment rights. *See Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 482-84 (6th Cir. 1985); *Howard v. McLucas*, 782 F.2d 956, 959 (11th Cir. 1986); *Black Fire*

Accordingly, the Unions lack standing to pursue this appeal.

III. THE UNIONS CANNOT SATISFY THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT UNDER Fed. R. Civ. P. 24(A)

As set forth below and in *Ligon* Appellees' brief in opposition the Unions' motion to intervene, the Unions have also failed to satisfy each of the four requirements for intervention as of right. *See Ligon* Opp. at 8-19; *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001).

A. The Unions Lack a Legally Protectable Interest in this Appeal

The Unions' contention that merely "speculative" legal interests satisfy Rule 24(a), PBA Mot. at 16, is contrary to this Court's precedent. To intervene as of right, a putative intervenor's interest must be "direct, substantial and legally protectable." *Washington Elect. Coop, Inc. v. Mass. Municip. Wholesale Elect. Co.*, 922 F.2d 92, 96-97 (2d Cir. 1990). "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." *Id*. (citations omitted); *St. Johns Univ. v. Bolton*, 450 Fed. App'x 81, 83 (2d Cir. 2011) (summary order) (Cabranes, Pooler, Wesley, J.J.) (same).

Fighters Ass'n of Dallas v. City of Dallas, Tex., 19 F.3d 992, 994 (5th Cir. 1994); *United States v. Int'l Bhd. of Teamsters*, 931 F.2d 177 (2nd Cir. 1991).

[4] To the extent the Unions, by implication, seek a right to participate in the remedial process, such a request must be directed to the District Court in the first instance and, in any event, is very different than having a legal right to challenge the very existence of that process, which is the purpose of the present appeal.

As set forth above, the Unions have no direct, legally cognizable interest in appealing the Liability Order. *Supra* at 10. The Unions' citation to *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), for the proposition that their interests are cognizable simply because the Liability Order included factual findings that some of their members "committed unconstitutional acts in the line of duty," SBA Mot. at 13; PBA Mot. at 14, is misleading. The Ninth Circuit based its ruling in *City of Los Angeles* on the fact that the plaintiffs not only made allegations, *but sought injunctive relief*, against individual union members. 288 F.3d at 399. Plaintiffs here withdrew their claims against individual union members six months before the Unions sought intervention, *see* Charney Decl., Ex. D, and the two District Court orders the Unions seek to appeal make no findings of liability against, and impose no injunctive relief on, any union members.

As for the Remedies Order, the Unions cite to *City of Los Angeles* and *Watertown v. State of New York Pub Emp't Relations Bd.*, 95 N.Y.2d 73 (2000), for the unremarkable proposition that they have "state law rights" to collectively bargain "over the terms and conditions of members' employment." PBA Mot. at 15, 16; SBA Mot. at 14-16. But none of those bargainable "terms and conditions of employment" under New York law are at issue in this case. As noted in the *Ligon* Appellees' intervention opposition, the fact that none of the remedial issue areas discussed in the Remedies Order - e.g., training, supervision, discipline, stop

documentation, body worn cameras - are addressed anywhere in the Unions' collective bargaining agreements distinguishes this case from all those cited by the Unions in which intervention was granted to a police unions in a cases challenging the constitutionality of a police department's' law enforcement practices. *See Ligon* Opp. at 15-16 (discussing cases).[5] Moreover, as explained in *Ligon* Plaintiffs' brief, New York City and state labor law treat these remedial topics as non-bargainable. *Id*. at 14 (citing cases); *compare* N.Y. City Admin. Code § 12-307(a) (listing mandatorily bargainable terms and conditions of employment such as employee wages, benefits, and hours) *with* § 12-307(b) (listing non-bargainable public employer policy decisions).[6] That these issues are not subject to bargaining

[5] The only other cases cited by the Unions where police unions were granted intervention, *Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996), and *U.S. v. City of Hialeah*, 140 F.3d 968 (11th Cir. 1998), were Title VII challenges to municipalities' police officer employment practices. The consent decree at issue in *Edwards* directly affected members' promotion opportunities under law, 78 F.3d at 1004, while the consent decree in *Hialeah* curtailed the seniority rights of union members provided for in the collective bargaining agreement. 140 F.3d at 982.

[6] The New York City Board of Collective Bargaining (BCB), which has exclusive primary jurisdiction to make determinations about what matters are subjects of mandatory bargaining under § 12-307(b), *see Sheppard v. Phoenix*, No. 91 Civ. 4148, 1998 WL 397846, *6 (S.D.N.Y. July 16, 1998) (citing *Uniformed Firefighters Ass'n of Greater New York v. City of New York*, 79 N.Y.2d 236 (1992)), has held that "the establishment of training procedures, in most circumstances, is a matter of management right and not a mandatory subject of bargaining." *Uniformed Firefighters Ass'n*, Decision No. B-43-86, at 15 (BCB Sept. 25, 1986). The narrow exception to which the Unions point (where employees must get training necessary to obtain a certification required for continued employment, *id*.) does not apply because there is no such requirement being ordered here. As for body worn cameras, the BCB has held that "decisions

is further supported by the fact, as discussed *supra* at 2-3, 7-8, the Unions have not bargained over prior changes to stop and frisk practices and trainings.

Finally, while the Unions claim they have a right to bargain over the "practical impact" of potential stop-and-frisk reforms, on officer "workload, staffing, and safety," SBA Mot. at 15, in fact they have no legally cognizable bargaining right here. As explained in the *Ligon* Appellees' opposition, the right to bargain about the *impact* of the reforms contemplated by the Remedies Order does not give the Union the right to bargain over *the reforms themselves*. *Ligon* Opp. at 15. This distinction is important because only the latter issue is implicated by the appeal of the Remedies Order, which merely enumerates the areas of the City's stop-and-frisk program in which it must develop reforms. Dkt # 22 at 339-54. The Unions will have the chance, once the specific reforms have been developed and so-ordered, to negotiate with the City over the impact of the reforms on members' workload and safety. *Cf. Eng v. Coughlin*, 865 F.2d 521, 526 (2d Cir. 1989).

B. The City Adequately Represents the Unions' Interests

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regarding the selection or use of equipment" are discretionary and non-mandatory subjects of bargaining. *See LEEBA v. City of New York*, 3 OCB2d 29, at 42-44 (BCB 2010). The New York State Public Employee Relations Board decision cited by the Unions, *City of New York*, 40 PERB ¶ 3017, Case No. DR-119 (PERB Aug. 29, 2007), PBA Mot. at 6, is inapposite because the matter which the Board found to be mandatorily bargainable was the police department's obligation to buy new bullet-proof vests for officers, which the Board expressly distinguished from the question of *when officers must wear such vests*, which it suggested was not mandatorily bargainable. *City of New York*, at 11. The body worn camera provisions are comparably only to the latter issue. *See* Rem. Ord. at 27.

In arguing that they must only make a "minimal" showing that City's representation of their interests "'may be' inadequate," SBA Mot. at 16; PBA Mot. at 17-18, the Unions ignore this Court's long held "presumption of adequate representation" where "the putative intervenor and a named party have the same ultimate objective" in the proceeding. *Butler, Fitzgerald & Potter, P.C. v. Sequa Corp.*, 250 F.3d 171, 179-80 (2d Cir. 2001). This presumption "attaches in the absence of 'evidence of collusion, adversity of interest, nonfeasance, or incompetence.'" *St. John's Univ. v. Bolton*, 450 Fed. App'x at 84 (quoting *Butler*).

The Unions cannot rebut the presumption that the City adequately represents their interests in this appeal. As detailed *supra* at 6-7, the City and Unions have the exact same objectives for this appeal, objectives the City has aggressively pursued.[7] As for the Unions' vague reference to their purported "collective bargaining interests," SBA Mot. at 17-18; PBA Mot. at 18, to the extent they even rise to the level of protectable legal interests implicated by this appeal, which, as discussed *supra*, they do not, the Unions have not rebutted the presumption that the City can adequately represent these interests in this case. As the employer of NYPD officers, the City by definition is obligated to consider officer safety and workload when developing and implementing stop-and-frisk policy reforms. *See United States v. City of New York*, 2012 U.S. Dist. LEXIS 12085, *8-9 (E.D.N.Y.

[7] As for the Unions' argument that the City may drop the appeal, as discussed *supra* at 9-12, the Unions lack standing to pursue the appeal in the City's absence.

Feb. 12, 2012). Moreover, the City has continued to raise these same concerns throughout the trial and on appeal, and Mayor-Elect De Blasio has acknowledged the importance of these concerns in court filings. *See supra* at 4-5, 6-7. Thus, the Unions have failed to show what, if any, "distinct perspective" they would bring to the issues raised by the Remedies Order. PBA Mot. at 18-19.

The Unions' claim that their labor-management relationship with the City automatically renders the City's interests adversarial to theirs has no support in law or fact. The only case the Unions cite for this proposition, *Vulcans Society of Westchester Cty v. Fire Dept. of the City of White Plains*, involved intervention by a firefighter union concerned about changes to the municipal defendant's firefighter hiring and promotion practices following an employment discrimination lawsuit. 79 F.R.D. 437, 441 (S.D.N.Y. 1978). The antagonistic employer-employee relationship was at the center of the issues in that case, which is not the case here. And aside from the general assertion that their interests "may differ on collective bargaining issues," SBA Mot. at 17, the Union provides no examples of how those interests might in fact conflict on this appeal. This dearth of examples is fatal to the Unions' motion. *See*, *e.g.*, *Penick v. Columbus Educ. Ass'n*, 574 F.2d 889, 890-91 (6th Cir. 1978) (denying intervention where teachers union "provided no specific example" to suggest that school board had not adequately represented interests of teachers); *City of New Orleans*, 12-CV-1924, Dkt #102 at 21-22 (denying police

unions intervention into consent decree where disagreements between government and unions were "for the most part unarticulated.").

C. The Unions' Motions Are Untimely

"Among the most important factors in a timeliness decision [under Rule 24(a)] is the length of time the intervenor knew or should have known of his interest[.]" *Catanzano v. Wing*, 103 F.3d 223, 232-33 (2d Cir. 1996) (internal quotation and citation omitted). The Unions knew or should have known their interests were implicated by this case years ago. The complaint itself put the Unions on notice of the very supposed interests now being claimed, and the pretrial proceedings were widely publicized, including a 2011 summary judgment decision detailing Plaintiffs' claims about failures in supervision, training, discipline, and monitoring. *See S.H. v. Stickrath*, 251 F.R.D. 293, 299-300 (S.D. Ohio 2008) (union's motion to intervene untimely where allegations of systemic constitutional violations "at the outset" of the case put union on notice that remedy would alter union members' duties, training and supervision); *Farmland Dairies v Comm'r of the N.Y. State Dep't of Agric.*, 847 F.2d 1038, 1044 (2d. Cir. 1988) (not timely even if movant "moved to intervene promptly after learning that [the government entity] would not appeal the district court's injunctive order").[8]

[8] By contrast, in instances where a motion to intervene is considered timely because it was "filed within the 30-day period for filing a notice of appeal," *see* SBA at 10, the proposed intervenors' interests *first* arose out of the appealed from

Moreover, Courts may deny an intervenors' motion if intervention would prejudice existing parties. *See Farmland* 847 F.2d at 1044-45; *United States v. In re NASDAQ Market-Makers Antitrust Litig.*, 184 F.R.D. 506, 513 (S.D.N.Y. 1999). The Unions' intervention to litigate this appeal in the City's absence would foster the very prejudice that courts have rejected, including the appellant's "determin[ation] that the public interest would best be served by forgoing appeal," *see Farmland*, 847 F.2d at 1044, forcing the parties to "relitigate issues which have already been decided after lengthy proceedings," *see United States v. Yonkers Board of Educ.*, 801 F.2d 593, 596 (2d Cir. 1986), frustrating settlement negotiations between plaintiffs and the City, *see Jones v. Richter*, 97-cv-0291E(M) (JTE), 2001 U.S. Dist. LEXIS 4228, *8 (W.D.N.Y. Apr. 3, 2001), and forcing litigation that would substantially delay "the substantial relief afforded [plaintiff class]." *See Garrity v. Gallen*, 697 F.2d 452, 457 (1st Cir. 1983).

On the other hand, the Unions will not be prejudiced by denial of intervention. The Remedial Order does not require the Unions or their members to do anything and contemplates police officer participation in the development of remedies. Rem. Ord. at 29. Given that the prejudice to the Plaintiffs, and the City if it withdraws the appeal, far outweighs any prejudice to the Unions, "intervention on the part of the late arrivers must yield." *See Farmland*, 847 F.2d at 1044-45.

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order. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *Drywall* 488 F.3d at 88; *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991).

IV. THE UNIONS SHOULD NOT BE GRANTED PERMISSIVE INTERVENTION UNDER Fed. R. Civ. P. 24(B)

The Court should not grant permissive intervention to the Unions in this appeal. As discussed in Point III.C *supra*, the Unions' motions are untimely, and timeliness considerations "apply with even greater force to permissive intervention." Wright & Miller, 7C Fed. Prac. & Proc. § 1916 (3d ed.). In addition, in deciding whether to grant permissive intervention, courts may consider whether the putative intervenor will significantly contribute to development of the underlying factual issues and the just and equitable adjudication of the legal questions. *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191-92 (2d Cir. 1978). The Unions cannot contribute to the factual issues underlying the Liability Order because the liability record is closed, and to the extent they have anything to add to the underlying factual issues regarding remedies, they can do so as part of the Court ordered process. *See* Rem. Ord. at 2. Finally, the Court must consider whether permissive intervention "will 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 and citation omitted), which as discussed *supra* at 19, would be great if the Unions are permitted to intervene to continue the appeal even if the City decides to withdraw it.

CONCLUSION

For the reasons stated above, the Unions motions to intervene in the present appeal should be denied.

Dated: New York, New York
November 25, 2013

/s/

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