UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID FLOYD, et al.,	:	
Plaintiffs,	:	
-against-	:	Case No. 08 Civ. 1034 (SAS)
CITY OF NEW YORK, et al.,	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW OF SERGEANTS BENEVOLENT ASSOCIATION IN FURTHER SUPPORT OF SUPPLEMENTAL MOTION TO INTERVENE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24

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Pursuant to this Court's Order dated February 25, 2014 (Dkt. No. 428), Proposed Intervenor the SBA, submits this Reply Memorandum of Law in Further Support of its Motion to Intervene Pursuant to Federal Rule of Civil Procedure 24.

I. INTRODUCTION

The SBA represents the front line of law enforcement in the City, and its members' lives and livelihoods have been and will be affected by this litigation. The SBA has direct, legally protectable interests at risk, including its statutory right to defend its members against the allegations and findings made in the merits phase of this litigation that they violated the Constitution, and protecting its members' collective bargaining rights. The remedial measures contemplated in those proceedings will directly affect the day-to-day lives of SBA members and may fundamentally alter the way they do their jobs. The results those proceedings will generate—court-approved and mandated changes to NYPD policies and practices, the full scope of which are yet to be determined—will affect the ability of the SBA to negotiate the terms and conditions of its members' employment, including on matters of officer safety. Moreover, as at least one court has recognized in a nearly identical context, when it is disputed whether a union has the right to intervene in remedial proceedings to protect its collective bargaining rights, it should be permitted to intervene to present its views on the subject, not summarily excluded from the proceedings without a chance to be heard.

The Opposing Parties' claim that the sweeping and individualized findings of wrongdoing by SBA members in the Liability Opinion do not support the SBA's interest in defending and vindicating those members in the Appeal likewise is meritless. A union should be allowed to defend the reputations of its members against factual allegations of unconstitutional conduct that have already tarnished their careers. *See United States v. City of Los Angeles*, 288 F.3d 391, 400 (9th Cir. 2002). The SBA has a direct, protectable interest in doing so.

The SBA has acted promptly and appropriately to protect its interests as they became apparent, and intervention at this stage will in no way prejudice any existing party. Focusing narrowly on the number of years that have elapsed since the inception of this lawsuit, the Opposing Parties ignore the fact that there was no reason for the SBA to intervene until after the two erroneous Opinions were issued. Viewed in actual context, the timing of the SBA's Motion does not pose any timeliness issue. There is no fair reason why the SBA should not be made a party to this matter.

II. ARGUMENT

A. The SBA May Intervene as of Right.

1. The SBA Has Direct, Protectable Interests in This Action That Will Be Impaired If the SBA Is Not Permitted to Participate.

A party seeking to intervene "must show *only an interest within the context of the case*, and . . . demonstrate that its interest *may be* impaired by an adverse decision in the case." *Bridgeport Guardians v. Delmonte*, 227 F.R.D. 32, 34 (D. Conn. 2005) (emphasis added) (citing *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123 (2d Cir. 2001)). The party "need not have an independent cause of action to be considered to have an interest within the scope of Rule 24(a)." *Id.* (citing *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972)). The SBA has satisfied these standards.[1]

[1] As a preliminary matter, contrary to Plaintiffs' incorrect assertion, the SBA seeks to intervene in this matter for all material purposes, including both to participate in any remedial proceedings before this court and to pursue the appeal of the Opinions in the Second Circuit. Pl. Mem. of Law 12, 12 n.6, 21. In its opening brief, the SBA stated its request to intervene in the Second Circuit in the conditional ("in the event that this matter returns to the Second Circuit," SBA's Mem. of Law 1) only because this matter is currently on limited remand pursuant to the Order of the Second Circuit dated February 21, 2014 and, therefore, the proceedings in the Second Circuit will not continue unless and until that remand period ends. Appeal Dkt. No. 479. To be clear, the SBA respectfully seeks to intervene both in any remedial proceedings and in the Appeal.

a. The SBA Has a Direct, Protectable Interest in Participating in the Development of Remedies Pursuant to the Purported Settlement Agreement Between the City and Plaintiffs.

The SBA has a direct, protectable interest in any remedial proceedings held pursuant to the Remedies Opinion and the parties' agreement. Those proceedings will establish rules that SBA members will be required to follow when carrying out stop, question, and frisk policies. The standards for constitutionality articulated by the Court in the Remedies Opinion directly affect how the SBA members conduct that technique; how they review police officers' implementation of that technique; and how they will train other officers in that technique. Such changes bear on public and officer safety, because officers rely on the stops as a proactive law enforcement tool designed to stop crime before it starts, and on frisks to keep them safe in stops potentially involving weapons and other threats to physical welfare. In this respect, the Remedies Opinion directly affects the day-to-day realities of SBA members in the field, resulting in the SBA's direct interest in the Remedies Opinion and any remedial proceedings.

This Court itself has acknowledged the interest of labor organizations in the remedial process. In the Remedies Opinion, this Court cited repeatedly to other collaborative remedial proceedings involving police reforms as exemplars of how such reforms should be achieved, and specifically recommended that the approaches taken in those other matters be used as models for the remedial proceedings in this case. In particular, the Court directed the parties to the reforms implemented in Cincinnati, Ohio, and noted that the Cincinnati process may be used as a model. Remedies Op. 28, 30-31. Significantly, one of the direct participants in the Cincinnati Collaborative Procedure was the Fraternal Order of Police, *a bargaining unit representing police officers*, just like the SBA. *In re Cincinnati Policing*, 209 F.R.D. 395, 403 (S.D. Ohio 2002). In approving the resulting consent decree, the Southern District of Ohio noted that the police union, as a formal party to the agreement, played a critical role in formalizing the reforms. *Id.*

Similarly, in *City of Los Angeles*—to which this Court cited in the Remedies Opinion for the proposition that all affected parties should be permitted to participate in the remedial process—the Ninth Circuit disapproved of the concept of "'streamlining' the litigation" by excluding certain proposed intervenors, a goal the court warned "should not be accomplished at the risk of marginalizing those—*such as* ***the Police League*** and the Community Interveners—*who have some of the* ***strongest interests*** *in the outcome*." 288 F.3d at 404 (emphasis added). The Ninth Circuit in *City of Los Angeles* reversed the decision of the district court not to permit the Police League, a bargaining unit representing certain ranks of police officers, to intervene in the remedial proceedings as a matter of right pursuant to Rule 24. *Id.*

City of Los Angeles supports the SBA's direct, protectable interest in any remedial proceedings. The *Los Angeles* court noted, just as the SBA has argued, that "[t]he Police League has state-law rights to negotiate about the terms and conditions of its members' employment as LAPD officers and to rely on the collective bargaining agreement that is a result of those negotiations. . . . These rights give it an interest in the consent decree at issue." *Id.* at 399-400. The SBA has analogous state-law collective bargaining rights under the NYCCBL. N.Y. City Admin. Code § 12-307(6). Plaintiffs argue that *City of Los Angeles* is inapplicable because the consent decree at issue in that case contained specific provisions regarding the union's collective bargaining rights, while no such provisions exist here. Pl. Mem. of Law 22-25. But the fact that no consent decree has yet been entered here only underscores the need for the SBA to participate in any remedial proceedings. Because most of the specific remedial measures have yet to be identified, and because they are apparently slated for determination in prospective remedial proceedings, the SBA "has the right to present its views on the subject to the district court and

have them fully considered in conjunction with the district court's decision to approve the [measures]." *City of Los Angeles*, 288 F.3d at 400.

Plaintiffs further attempt to distinguish *City of Los Angeles* and other cases that have reached similar conclusions by asserting that here any harm to the SBA's collective bargaining rights is speculative. Pl. Mem. of Law 25. This argument fails because "[w]hether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. *No specific legal or equitable interest need be established*." *Forest Conserv. Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995) (emphasis added), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *see Bridgeport Guardians*, 227 F.R.D. at 34 (noting that proposed intervenor "need not have an independent cause of action to be considered to have an interest within the scope of Rule 24(a)"). In *City of Los Angeles*, for example, the United States made the same argument Plaintiffs make here, *i.e.*, that because the consent decree preserved the unions' rights to bargain with the City, 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 it, reasoning that "the relevant inquiry is whether the consent decree 'may' impair rights 'as a practical matter' rather than whether the decree will 'necessarily' impair them." *Id.* (citing Fed. R. Civ. P. 24(a)(2)).

The City's reliance on *Sheppard v. Phoenix*, No. 91 Civ. 4148, 1998 WL 397846 (S.D.N.Y. July 16, 1998), is misplaced. In that case, the parties had executed a 48-page stipulation of settlement that specifically identified the measures that would be approved by the court in that case. *Id.* at *1. The court was therefore able to analyze written provisions of an agreement (*i.e.*, "the contested provisions of the Stipulation") to determine whether or not they

implicated the collective bargaining rights of the proposed intervenors. *Id.* at *7. Here, in contrast, because there is no finalized stipulation or consent decree regarding remedial measures before the Court, this Court cannot decide as a matter of law that the measures eventually implemented will not have collective bargaining ramifications. Again, the SBA "has the right to present its views on the subject to the district court and have them fully considered in conjunction with the district court's decision to approve the [measures]." *City of Los Angeles*, 288 F.3d at 400.

Finally, and for similar reasons, the Opposing Parties' argument that some of the issues the SBA provides as examples of collective bargaining matters may not be specifically held to be within the scope of collective bargaining (Pl. Mem. of Law 22-24; City's Mem. of Law 4-5) misses the point: the very purpose of the remedial proceedings, which apparently will flow from the settlement, is to determine specific remedies to be implemented. Moreover, the "mere threat" that collective bargaining rights will be impaired constitutes a substantial effect, and the SBA is "not required to prove with certainty that particular employees would lose contractual benefits." *United States v. City of Hialeah*, 140 F.3d 968, 982 (11th Cir. 1998) (citing *United States v. City of Miami*, 664 F.2d 435, 446 (5th Cir. 1981)). Many of the proposed remedies likely will have an impact on the SBA's collective bargaining rights (if the SBA is not involved) regarding issues that have a practical impact on the SBA's members' workload, staffing, and safety (among other things), including changes to training, forms and other paperwork, discipline, and supervision (among other things). *See* N.Y. City Admin. Code § 12-307(6)b.[2]

[2] As § 12-307(6)b provides, "Decisions of the city or any other public employer on [certain managerial] 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." Thus, "practical

While it is not possible for the SBA to predict at this stage all of the reforms that ultimately will be implemented, those that are mandated by the Remedies Opinion (which the Opposing Parties have indicated will definitely be implemented under their settlement agreement) will cause, at a minimum, "practical impacts" that implicate collective bargaining rights. For example, the Remedies Opinion contains directives for "an improved system for monitoring, supervision, and discipline," Remedies Op. 23; "direct supervision of review of stop documentation by sergeants," Remedies Op. 23; "policies specifically requiring sergeants who witness, review, or discuss stops to address not only the effectiveness but also the constitutionality of those stops, and to do so in a thorough and comprehensive manner," Remedies Op. 24; and, in connection with the Court's order that the NYPD institute the use of body-worn cameras, "procedures for the review of stop recordings by supervisors and, as appropriate, more senior managers," Remedies Op. 27.[3]

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impacts" (among other things) are the subject of mandatory collective bargaining. Such impacts cannot always be ascertained in advance or in the abstract because they must be assessed individually, based on effects that may not be immediately foreseeable to the Court or the Opposing Parties. On the other hand, practical impacts can be far more easily recognized by an organization such as the SBA with the unique perspective and experience of having members who implement City and NYPD policy at the street level.

[3] Plaintiffs are thus incorrect to characterize the SBA's interests as "remote" or "contingent." Pl. Mem. of Law 24-25. In the cases on which Plaintiffs rely in making this argument, there were *multiple* contingencies on which the interest would depend. *See Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 875 (2d Cir. 1984) (finding insufficient showing of protectable interest because "the interest asserted by [proposed intervenor] depends upon two contingencies"), *cited in* Pl. Mem. of Law 24-25. Here, unlike in *Restor-A-Dent*, there are *no* contingencies in play. The reforms mandated in the Remedies Opinion will affect the SBA's members' duties, including terms and conditions of employment and "practical impacts" thereof that are subject to collective bargaining. Moreover, as discussed in greater detail below, the SBA's members have been identified by name in the Liability Opinion and the district court found that they violated the Constitution. *See* Liability Op. 72-74, 86-87, 90-91, 95-98, 125-26 n.463, 164, 142-43. And the district court has articulated standards regarding the constitutionality of stops and frisks that are vague and will impact the day-to-day operations of the SBA's members. *See* Liability Op. 177-92; Remedies Op. 13-25. The SBA's interest exists now, and it will only be amplified by later events.

All of the above changes, which were ordered based on an incorrect determination of widespread constitutional violations, threaten officer and public safety by causing undue hesitation on the part of officers who otherwise would legitimately use constitutionally sound investigative stops to prevent crime and perform constitutionally sound frisks to protect themselves and the public during the course of such a stop. Such safety concerns create an independent interest that does not depend on whether or not any "practical impacts" will necessarily result from the reforms. For this and other reasons discussed below, the remedies will affect interests of the SBA regardless of whether they implicate collective bargaining, and the SBA must have a role in shaping them.[4]

b. The SBA Has a Direct, Protectable Interest in Defending Its Members Against Accusations and Findings of Wrongdoing.

The SBA also has an interest in defending the rights, reputations, and livelihoods of its members, and enabling them perform their duties going forward without fear of being publicly impugned for doing so. It thus has a direct, protectable interest in challenging this Court's determination on the merits. The Liability Opinion—the findings of which the City has now conceded—characterized various actions of SBA members as violating the U.S. Constitution, and then proceeded to articulate standards for constitutional stops and frisks that the SBA believes are in many respects vague, ambiguous, or difficult to apply in practice. Liability Op. 71-98, 181-92. As the SBA has noted, the Liability Opinion also identifies sergeants by name; asserts that they are untruthful; concludes that numerous stops that they supervised, approved, or

[4] Contrary to what Plaintiffs suggest, it is not sufficient that the SBA may have "input" as part of a "Joint Remedial Process." Pl. Mem. of Law 29. If the SBA is not a party, Plaintiffs and the City will be free to discount or completely ignore such "input," because only parties to the remedial proceedings will have the ability to present a consent decree or settlement agreement to the Court for approval, though the SBA reserves its right to challenge any such result.

conducted broke the law; and makes sweeping criticisms of the culture among police sergeants and officers generally. Liability Op. 72-74, 86-87, 90-91, 95-98.

These factual allegations create a direct, protectable interest in the context of a proceeding regarding police practices. As the basis for its finding of a "protectable interest in the merits" for a police union in a case strikingly similar to this one (involving accusations of unconstitutional police conduct), the Ninth Circuit in *City of Los Angeles* found highly significant the fact that the plaintiffs had "raise[d] factual allegations that its member officers committed unconstitutional acts in the line of duty." *City of Los Angeles*, 288 F.3d at 399 (also noting that plaintiffs sought injunctive relief against the union's members). The Ninth Circuit concluded, "These allegations are sufficient to demonstrate that the [union] had a protectable interest in the merits phase of the litigation." *Id.* Thus, the Opposing Parties are wrong to suggest that, in the absence of potential injunctive relief directed against individual members, there is no protectable interest here.

c. This Motion Is Timely Because the SBA Has Acted Promptly to Intervene in This Matter.

The SBA moved to intervene in this matter within 30 days after the issuance of the two Opinions.[5] It does not seek to re-litigate issues decided at trial, but to accomplish two forward-looking objectives: (1) to challenge certain aspects of the Opinions on appeal; and (2) to participate in remedial proceedings that have yet to begin. The events that prompted it to intervene, and its inability to have foreseen the necessity of its involvement in this matter, fully

[5] The Second Circuit has endorsed the practice of intervening for purposes of appeal and has held that a motion to intervene filed within 30 days after judgment is timely in such a situation. *Drywall Tapers & Pointers, Local Union 1974 v. Nastasi & Assocs., Inc.*, 488 F.3d 88, 95 (2d Cir. 2007) ("Since Local 52 filed a notice of appeal within 30 days of the Order issuing the Consent Injunction, albeit at a time when it was not a party, its status as a party, if intervention is granted, should permit it to renew its appeal.").

support a finding that its motion is timely. *See* SBA's Mem. of Law 7-13. Moreover, this Motion is timely under cases holding that a post-judgment motion to intervene is timely if filed within the time for filing an appeal. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96, (1977) (holding that, because post-judgment motion to intervene was filed within time period for taking appeal, motion was timely); *Yniguez v. Arizona*, 939 F.2d 727, 734 (9th Cir. 1991) (noting that the "general rule [is] that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal").

The Sixth Circuit's recent decision in *United States v. City of Detroit* supports a finding of timeliness here. 712 F.3d 925 (6th Cir. 2013). The Sixth Circuit reviewed the denial of motions to intervene pursuant to Rule 24 that certain municipal employees' unions had filed to challenge a remedial order issued after 30 years of litigation. *Id.* at 926-27. The remedial order sought to bring the City of Detroit's municipal water and sewer authority into environmental regulatory compliance. *Id.* The Sixth Circuit held that the unions' motions were *not* untimely, and that the district court's denial of the motions was an abuse of discretion. *Id.*

The Sixth Circuit reasoned that "[t]he mere passage of time—even 30 years—is not particularly important to the progress-in-suit factor," and that "the proper focus is on the stage of the proceedings and the nature of the case[.]" *Id.* at 931. "Where future progress remains and the intervenor's interests are relevant, intervention may be the most effective way to achieve a full and fair resolution of the case." *Id.* The court held that the appropriate way of addressing any timeliness concerns raised by the unions' motions to intervene was to limit the unions' role to a prospective one directed at the remedial process and any timely appeal of past orders. *Id.*

Like the unions in *City of Detroit*, the SBA seeks only a prospective role to shape future remedial efforts and challenge certain rulings of the lower court on appeal. The SBA acted

promptly as soon as it knew that it would have any interest in participating in future proceedings in this case. *See Acree v. Iraq*, 370 F.3d 41, 49-50 (D.C. Cir. 2004) ("Post-judgment intervention is often permitted . . . where the prospective intervenor's interest did not arise until the appellate stage. . . . In particular, courts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court[.]"), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009).

Similarly, in *Hodgson v. United Mine Workers*, a motion to intervene filed by a union 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 118, 129 (D.C. Cir. 1972); *see also United Airlines*, 432 U.S. at 395 n.16 (citing *Hodgson* with approval). The court granted the motion to intervene because the proposed intervenors "sought only to participate in the remedial, and if necessary the appellate, phases of the case" and therefore, the timing of the motion created "no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved." *Id.*

In arguing that the SBA's intervention motion was untimely, Plaintiffs rely heavily on a Second Circuit decision regarding whether one milk producer could intervene in a lawsuit involving a competing milk producer that sought to challenge the constitutionality of a statute under which it had been denied a license to sell milk. *Farmland Dairies v. Comm'r of the N.Y. State Dep't of Agric. & Mkts.*, 847 F.2d 1038, 1040-43 (2d Cir. 1988). The intervening party sought to intervene only after the state party decided not to appeal an adverse decision and, therefore, the Second Circuit found its motion to intervene untimely. *Id.* at 1042-44.

Farmland Dairies is inapposite because the licensing of a competing milk producer—which the proposed intervenors in that case knew all along was a potential end result—is not the

same as an extraordinary pair of erroneously reasoned Opinions that accuse police officers, including SBA members, of widespread violations of the Constitution based on flawed reasoning and insufficient evidence. The SBA could not have foreseen that the Opinions would find that, over an eight-year period, at least 200,000 stops conducted by NYPD officers were unconstitutional and that officers intentionally targeted minorities, based solely on a purported statistical analysis of UF-250 forms, and without any consideration of the totality of the unique circumstances of each of the 4.4 million stops at issue, as Supreme Court precedent requires. *See, e.g.*, *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013); *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Nor could the SBA have anticipated a sweeping opinion mandating unprecedented remedies that even the Court acknowledged would "inevitably touch on issues of training, supervision, monitoring, and discipline." Remedies Op. 11.

In the other decisions on which Plaintiffs rely for their untimeliness argument, the intervention came at an inexplicably late stage in the settlement process and was plainly unfair to the parties. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (holding that unnamed class member could appeal approval of class settlement, but that motion to intervene, filed three days before fairness hearing, was untimely); *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 198-99 (2d Cir. 2000) (holding that motion to intervene filed eight months after parties began settlement negotiations, which would have effect of "sending them back to the drawing board" was untimely). That is not the case here. The SBA moved as soon as it was able to review and analyze the Opinions, and long before the parties contemplated or reached any settlement.

Under the relevant law, Plaintiffs' criticism of the SBA for not intervening at the outset of the case—or even at any point during the pendency of the case—is unfounded. The SBA did

not know until the issuance of the Liability Opinion that the Court would unfairly criticize several SBA members, incorrectly find their conduct to have violated the law, and articulate unclear standards for constitutionally acceptable stops and frisks. Indeed, no one could foresee that the Court would rely solely on the review of UF-250s, which have never before served as the sole basis for review, to find over 200,000 stops unconstitutional. And the SBA did not know, and could not have known, of the particular interest it would have in the separate Remedies Opinion and proceeding (which had not yet been ordered and was not reasonably foreseeable) until after the Remedies Opinion had been issued. Because the SBA's interest in this matter did not crystallize until after the Court issued the Opinions and the SBA has acted promptly since that time, the SBA's motion is timely.

Finally, Plaintiffs cannot demonstrate any prejudice from the timing of the intervention. *See Cook v. Bates*, 92 F.R.D. 119, 122 (S.D.N.Y. 1981) ("In the absence of prejudice to the opposing party, even significant tardiness will not foreclose intervention."). Plaintiffs criticize the SBA for the purported untimeliness of its intervention motion, and they accuse the SBA of "want[ing] the Court-ordered remedial processes to fail." Pl. Mem. of Law 28. On the contrary, the SBA simply wants any resolution the Court ultimately approves to account for all competing interests, permit the SBA to engage in collective bargaining to the extent that issues within its scope arise, and to give finality to this resolution so that further litigation challenging it is not necessary.

2. The Interests of the SBA Will Not Be Adequately Protected by the Present Parties to This Action.

The inadequacy requirement of Rule 24(a) "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *see*

also City of Los Angeles, 288 F.3d at 39. Under this standard, the interests of the SBA will not be adequately represented by any current party to the litigation.

With respect to the merits of Plaintiffs' claims (specifically, the appeal of the Liability Opinion in the Second Circuit), there can be no dispute that the interests of the SBA are not adequately represented, because no party is going to prosecute the appeal if the SBA does not do so. *See Yniguez*, 939 F.2d at 737 ("[N]o representation constitutes inadequate representation.").

With respect to the remedial proceedings, the interests of the City and the SBA are not the same, and the City, under former Mayor Bloomberg, recognized as much when it consented to the SBA's intervention. *See* Dkt. No. 414. Plaintiffs are wrong to suggest that, simply because "the City by definition is obligated to consider officer safety, workload and other interests which the Unions claim will be implicated by [the] reforms," Pl. Mem. of Law 29, the City's continued involvement in developing the reforms will sufficiently give voice to the specific concerns of the SBA's members, as opposed to higher-level policy—and political—concerns. *See, e.g.*, *Bridgeport Guardians*, 227 F.R.D. at 35 ("The City's interest is in public safety and managerial efficiency; its interests do not necessarily align with those of the Union concerning pay, seniority, and assignments."). Nor, as the SBA noted in its opening brief, does it make any sense to suggest that the employer of members of a collective bargaining unit has interests that are completely aligned with its employees, because the two parties are in naturally adversarial stances on many issues relating to the members' terms and conditions of employment. The City under Mayor Bloomberg agreed. *See* Dkt. No. 414 ("[r]ecognizing that the interests of the City and the Unions may differ on collective bargaining issues").

A potential intervenor is required to show only that the representation *may* be inadequate, not that it will be or has been inadequate, a showing that is "minimal." *See Michigan State AFL-*

CIO v. Miller, 103 F.3d 1240, 1247 (6th Cir. 1997); *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1319 (6th Cir. 1992); *Trbovich*, 404 U.S. at 538 n.10. The SBA satisfies this "minimal" burden.

3. The SBA Has Standing to Prosecute the Appeal.

Plaintiffs are wrong to argue that the SBA's motion to intervene should be denied for lack of standing as to the appeal pending in the Second Circuit. Pl. Mem. of Law 12-16. As the Second Circuit has held, a nonparty may appeal a judgment if it is either bound by the judgment or has an interest affected by the judgment, both of which exceptions are applicable here. *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 77-79 (2d Cir. 2006).[6]

The SBA is bound by changes to NYPD policy because its sergeant members will have increased responsibilities for supervision, monitoring, training, and discipline—with no corresponding ability to bargain collectively regarding those changes, or the practical impacts resulting therefrom. The Remedies Order does not simply compel a consultative process, as Plaintiffs characterize it. Pl. Mem. of Law 14. Instead, it specifies remedies that *must* result

[6] In fact, it is not the SBA, but *Plaintiffs* who lacked standing in this case. The harm they alleged—constitutional violations in past encounters with NYPD officers—did not establish a realistic threat that any such violations would occur again in the future. Therefore, their request for injunctive relief did not present a case or controversy under Article III of the United States Constitution. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-07 (1983) (finding lack of jurisdiction over request for injunctive relief against police officers based on allegedly illegal use of chokehold tactics in past encounters with plaintiff, because "standing to seek the injunction requested depended on whether [plaintiff] was likely to suffer future injury from the use of the chokeholds by police officers," and allegations related to past incidents was insufficient to establish future threat). This Court has "a continuing obligation to satisfy [itself] that federal jurisdiction over the matter before [it] is proper." *Filsaime v. Ashcroft*, 393 F.3d 315, 317 (2d Cir. 2004). Therefore, this Court should examine the issue whether Plaintiffs have standing in this matter, which they do not. Moreover, this is precisely the type of issue that the City will not raise with the Court, now that it has aligned interests with the Plaintiffs, making the SBA's intervention all the more appropriate in this matter.

from that process (e.g., body-worn cameras and various sweeping and detailed changes to supervision, monitoring, and training). These changes, which the City has acquiesced to, with a promise to develop even more specific remedial measures for approval by this Court, are binding on SBA members because they will become terms and conditions of their employment with the NYPD.

SBA members also have interests affected by the Liability Opinion, because the Court in that opinion made specific factual findings regarding individual sergeants, accusing them of violating the Constitution, not telling the truth, and other disparaging conclusions based on limited and unreliable evidence. Plaintiffs downplay the concept of "reputational harm" to SBA members, but as Plaintiffs themselves admit, the Second Circuit has held unequivocally that "an injury to reputation will satisfy the injury element of standing." *Gully v. NCUA Bd.*, 341 F.3d 155, 161-62 (2d Cir. 2003). Plaintiffs ask this Court to require the proposed intervenors to present evidence of "reputational harm individual Union members actually suffered as a result of the Liability Orders." Pl. Mem. of Law 13. However, that is contrary to the recognized principle that reputational injury can be self-evident: the Second Circuit held in assessing reputation harm as a basis for standing that "[i]t is *self-evident* that [the party's] reputation will be blackened by the Board's finding of misconduct and unfitness." *Gully*, 341 F.3d at 162 (emphasis added). Similarly, here, it is self-evident that officers branded in the Liability Opinion as violators of the Constitution will suffer harm to their reputations, impeding their career advancement and otherwise disrupting their livelihoods.

Plaintiffs incorrectly assert that "the Unions have failed to identify any individual NYPD officers who the District Court found had conducted unconstitutional stops-and-frisks and who [had suffered or will suffer harm as a result]." Pl. Mem. of Law 13-14. This statement is

patently inaccurate. As the SBA has repeatedly pointed out, the Liability Opinion contains page after page of findings specifically attributed to individual sergeants, identified by name and singled out as bad actors. Liability Op. 71-98, 181-92. The interests of the SBA in challenging these findings is thus by no means "speculative" or "conjectural." Pl. Mem. of Law 14. Rather, the harm has already been done, and the SBA seeks to vindicate its members by demonstrating on appeal that the findings were legally and factually deficient.

B. Alternatively, the SBA Should Be Granted Permissive Intervention.

In the alternative, and for the same reasons stated above and in the SBA's opening brief, this Court should grant the SBA permissive intervention.

III. CONCLUSION

For all of the above reasons, the SBA respectfully requests that the Court grant its 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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Respectfully submitted,

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