

The Police Intervenors respectfully submit this Memorandum of Law in Opposition to the parties' Motion for Modification of Remedial Order.¹ In accordance with the limited remand order issued by the Second Circuit, this Court should decide the Police Intervenors' pending motion to intervene before entertaining any potential modification of the Remedies Order or other resolution of this matter. The Police Intervenors oppose the current parties' efforts to short-circuit the full and fair appellate consideration of the merits of this Court's previous rulings.

ARGUMENT

POINT I

THIS COURT SHOULD DECIDE THE POLICE INTERVENORS' MOTION TO INTERVENE BEFORE ADDRESSING THE MOTION FOR MODIFICATION

Under the limited remand ordered by the Court of Appeals, before approving any settlement between the City and the Plaintiffs, this Court should rule on the Police Intervenors' motion to intervene. As the Second Circuit recognized, the outcome of the motion to intervene will inform any settlement negotiations or further proceedings in this matter. Indeed, the propriety of any injunction against the City rests on a highly questionable Liability Opinion, which the Police Intervenors seek to appeal.

On February 21, 2014, the Second Circuit ordered a limited remand to this Court "for the purpose of supervising settlement discussions among such concerned or interested parties as the District Court deems appropriate, and resolving the motions to intervene" filed by the Police Intervenors and another police union. Dkt. Nos. 426 (*Floyd*), 166 (*Ligon*) at 8-9.

Acknowledging that the Police Intervenors had sought to intervene in this Court and also directly

¹ Terms are as defined in the Police Intervenors' March 5, 2014 memorandum of law in support of their motion to intervene.

in the pending appeal, the Court of Appeals stated that “we believe it preferable that the motions [to intervene] be addressed [in the district court] in the first instance, particularly because the appropriateness of intervention and the form it takes could well bear on settlement negotiations.” *Id.* at 7-8. The Court observed that the District Court “is better positioned to deal with the complexities that might arise during multi-faceted settlement negotiations in which a variety of interests must be accommodated.” *Id.* at 8.

Consistent with the Second Circuit’s remand order, the motion to intervene must be decided before any potential resolution of this matter can be entertained. The Court’s expectation that the “appropriateness of intervention and the form it takes” would bear on the form of the settlement, or any potential settlement negotiations, plainly presupposes that intervention will be determined prior to this matter being resolved. Yet Plaintiffs and the City have never made any prior effort to involve the Police Intervenors in any such “settlement negotiations,” and the joint motion does not even mention the Second Circuit’s mandate regarding the intervention motion, let alone explain why this Court should approve a motion that contemplates the City’s withdrawing its appeal prior to a determination on the fully briefed motion to intervene.

The Police Intervenors seek to intervene to participate in any settlement negotiations as the parties in interest that they are, to participate in future remedial proceedings, and to appeal the Court’s injurious and erroneous decisions. As the Court of Appeals recognized, the outcome of the motion to intervene “could well bear on settlement negotiations.” *Id.* Indeed, if the motion to intervene is granted, and the Police Intervenors are successful in pursuing their appeal on the merits, those actions would plainly bear upon the necessity and the scope of the injunction

that the City and Plaintiffs seek to modify. For that reason, the motion to intervene should be decided prior to adjudicating the joint motion.

POINT II

THE POLICE INTERVENORS HAVE A PROTECTABLE INTEREST IN THE SCOPE OF THE INJUNCTION

For the reasons stated in the Police Intervenors' Supplemental Memorandum of Law and Supplemental Reply in support of their motion to intervene (Dkt. Nos. 437, 453 (*Floyd*), 172, 184 (*Ligon*)), the Injunction has a direct impact on the protectable rights of the police unions, and the City's acquiescence in the harmful and erroneous prior rulings would prejudice their rights. The Police Intervenors satisfy all of the requirements to be permitted to intervene as of right under Federal Rule of Civil Procedure 24(a). The Liability and Remedies Opinions harm the Unions' members' reputations, significantly affect their day-to-day activities, and intrude on their state-law collective bargaining rights.

Yet, as the parties have confirmed, the City and Plaintiffs' proposed resolution of this matter contains no provision for the Police Intervenors to bring legitimate disputes over their collective bargaining rights before the appropriate state authority. *See* Supplemental Reply in Support of Motion to Intervene, Dkt. Nos. 453 (*Floyd*), 184 (*Ligon*) at 7-14. Indeed, in their Memorandum of Law, the parties do not so much as mention the Police Intervenors' outstanding motion to intervene or how the injunction would bear upon those interests.

Instead, the parties' Memorandum of Law makes clear that substantial federal control over the NYPD would persist for at least three years: "The proposed modification does not eliminate or alter in any way the substantive reforms which the City will be required to develop, implement and comply with under the Remedial Order, nor does it in any way restrict the Court-

Appointed Monitor's ability to assist with and oversee the development and implementation of injunctive remedies in both cases and to monitor and assess the City's compliance with such remedies." Dkt. Nos. 458 (*Floyd*), 190 (*Ligon*) at 7-8. Thus, all of the harmful findings of the Liability Opinion would remain in place; indeed, without those findings, the injunction the City now invites upon itself would not be warranted because there would be no finding of unlawful conduct.

The modification the parties do seek makes even clearer why the presence of the Police Intervenors as full parties to this action is essential. The proposed modification contemplates that in order for the monitorship to end after three years, the City must show "by a preponderance of the evidence at that time" that it is in "substantial compliance" with the extensive reforms contemplated by the Remedies Opinion. Dkt. Nos. 457-1 (*Floyd*), 189-1 (*Ligon*). The proposed modification expressly provides that "[i]f the City fails to make such showing, the Monitor's position will continue" until the City can make such a showing. This language sets up the very real possibility of a full-blown hearing should there be disagreement about the level of compliance the City has achieved, and also creates yet another potential opportunity for the City to acquiesce in the Plaintiffs' demands if there is no counterweight in this suit in the form of the Police Intervenors.

Further, the parties reveal in their Memorandum of Law, but not in the proposed modification, that they "have also agreed" that the newly created Inspector General of the NYPD will "continue to monitor and report to the parties and the public . . . on the NYPD's compliance with the reforms required by the Remedial Order" after the Monitorship ends. Dkt. Nos. 458 (*Floyd*), 190 (*Ligon*) at 5. Although the Inspector General apparently will not be "subject to any Court oversight," the parties do not contemplate seeking any end to this Court's jurisdiction over

this matter until at least two more years have passed, and then only if “the City can show it has maintained substantial compliance” with the ordered reforms. *Id.* This significant extrajudicial portion of the parties’ agreement—any written form of which has never been made public, beyond the filings before this Court—further militates in favor of providing the Police Intervenors with full rights as parties to protect their interests.

CONCLUSION

The Police Intervenors respectfully request that the Court defer consideration of the Joint Motion for Modification of Remedial Order until after ruling on the Police Intervenors’ motion to intervene, in accordance with the terms of the limited remand order of the Court of Appeals.

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