UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID FLOYD, et al., :

Plaintiff, :

-against- : Case No. 08 Civ. 1034-AT-HBP

CITY OF NEW YORK, et al., :

Defendant.
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MEMORANDUM OF LAW OF SERGEANTS BENEVOLENT ASSOCIATION IN 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 Sergeants Benevolent Association (the "SBA") submits this Memorandum of Law in Support of its Supplemental Motion to Intervene Pursuant to Federal Rule of Civil Procedure 24.

I. INTRODUCTION

The SBA, a collective bargaining unit representing sergeants in the New York City Police Department (the "NYPD"), respectfully requests that this Court grant its motion to intervene as of right (or, in the alternative, that it be permitted to intervene) in this matter for the purpose of participating in the court-supervised settlement discussions regarding the parties' proposed resolution of this matter or, in the event that this matter returns to the Second Circuit, for the purpose of participating in the appeal currently pending in the Second Circuit, *Floyd, et al. v. City of New York*, 2d Cir. No. 13-3088 (the "Appeal").

Based on all available information, the City of New York (the "City") and Plaintiffs are no longer adversarial parties. All of the parties' public representations regarding the alleged resolution reached by the parties suggest that the City has agreed to concede liability on behalf of the NYPD and its officers, and implement the remedies ordered by the District Judge formerly assigned to this case in her opinion on remedies in this matter dated August 12, 2013 (the "Remedies Opinion"). The concession of liability by the City will cause irreparable damage to the lives and livelihoods of SBA members by branding them for the rest of their careers as violators of the Constitution. The implementation of the reforms set forth in the Remedies Opinion will have immediate practical impacts on the terms and conditions of SBA members' employment that are the mandatory subject of collective bargaining.

The SBA should thus be made an intervenor party to this matter because it has direct, legally protectable interests that will be impaired in the SBA's absence. First, the SBA should be permitted to defend its members against the allegations made in the merits phase of this litigation

(and findings made by this Court) that they violated the Constitution. "These allegations are sufficient to demonstrate that [a union] ha[s] a protectable interest in the merits phase of the litigation." *United States v. City of Los Angeles*, 288 F.3d 391, 399 (9th Cir. 2002). Second, the SBA should be made a party to this case so that it can protect its members' collective bargaining rights. *EEOC v. AT&T Co.*, 506 F.2d 735, 741-42 (3d Cir. 1974). "Clearly [a union] has an interest in the provisions of its collective bargaining agreements with [its collective bargaining partner] which may well be modified or invalidated by [any settlement agreement or consent decree] made in its absence and, equally clearly, its continuing ability to protect and enforce those contract provisions will be impaired or impeded by the [settlement agreement or] consent decree." *Id.*

The SBA meets all other requirements for intervention. The SBA's request to intervene is timely because the SBA filed it as soon as it learned of the reforms ordered in the Remedies Opinion and before the period for appealing the Opinions expired. The SBA's interests will be impaired if the settlement is approved without consideration of the practical impact of the proposed reforms, which this Court will not hear any perspective on without the SBA's involvement. Finally, the SBA's interests will not adequately be represented by the current parties, which now appear to have agreed with respect to liability and the proposed reforms.

Any approval of a settlement agreement without the SBA's participation will be subject to challenge by the SBA. And, if the SBA's motion is not granted, it intends to continue pursuing all available options for having its voice heard on any reforms, including (if necessary) appropriate legal challenge to any consent decree arising out of the parties' alleged resolution. This Court should grant the SBA's motion to intervene, give its members necessary

representation to protect their legal rights, and create an opportunity for meaningful and effective reforms that will be satisfactory to all interested and affected parties.

II. FACTUAL BACKGROUND

A. The Litigation and the Appeal

On August 12, 2013, this Court issued two Opinions (the "Liability Opinion" and the "Remedies Opinion"; collectively, the "Opinions") regarding the claims of Plaintiffs-Appellees ("Plaintiffs") that they and similarly situated individuals were subjected to stopped or frisked or both by New York City Police ("NYPD") officers in a manner that violated the Fourth and Fourteenth Amendments of the United States Constitution. The Liability Opinion found the City of New York (the "City") liable for the constitutional violations, and the Remedies Opinion ordered a permanent injunction requiring the City to conform its stop, question, and frisk practices to the United States Constitution. Liability Op., Dkt. No. 373; Remedies Op., Dkt. No. 372. The Remedies Opinion also ordered the appointment of an independent Monitor to oversee the implementation of reforms that would bring the stop and frisk practices into constitutional compliance. Remedies Op. 9-13.

On August 16, 2013, the City filed a Notice of Appeal of the Opinions, thereby initiating proceedings in the U.S. Court of Appeals for the Second Circuit (the "Appeal"). *See* Dkt No. 379. The Notice of Appeal was filed by the Bloomberg administration, which was nearing the end of its final term.

In order to protect the interests of the SBA[1] members affected by the Opinions, especially in light of the fact that the likely new mayor would reverse the City's position in this litigation

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[1] The SBA is a an independent municipal police union whose membership consists of approximately 13,000 active and retired sergeants of the NYPD. The SBA is the collective bargaining unit for those sergeants in their contract negotiations with the City of New York (the "City"). The SBA's central mission is to advocate for, and protect the interests of, its NYPD police sergeant members. Affidavit of Edward D. Mullins, Dkt. No. 397 ¶ 3.

(resulting in alignment of interests between the City and Plaintiffs),[2] the SBA timely sought to intervene in this matter both in the remedies proceedings and in the Appeal on September 11, 2013, and simultaneously filed a timely Notice of Appeal. *See* Dkt. Nos. 387, 388, 395. On September 12, 2013, a group of other police unions also moved to intervene. *See* Dkt. Nos. 395-98.

On September 23, 2013, in the Second Circuit, the City filed a motion to stay all proceedings in this Court pending a decision in the Appeal. *Floyd, et al. v. City of New York*, 2d Cir. No. 13-3088, Dkt. No. 72. On September 27, 2013, the SBA sought leave to file papers in support of the City's motion for a stay, which the Second Circuit granted on October 10, 2013. *See* Appeal Dkt. Nos. 105, 158. On October 18, 2013, the City filed a letter with this Court consenting to the intervention of the SBA and the other police unions. *See* Appeal Dkt. No. 414. In that letter, the City stated, in relevant part:

> Recognizing that the interests of the City and the Unions may differ on collective bargaining issues, because of the widespread potential impact of the Court's August 12, 2013 Liability Opinion and Remedies Opinion and subsequent related orders on the City and police officers, the City consents to the Unions' motions to intervene.

Id. On October 31, 2013, the Second Circuit issued an Order granting the City's motion for a stay pending appeal. *See* Appeal Dkt. No. 247. That Order also directed the removal of the District Judge from the proceedings below and the reassignment of the case. Appeal Dkt. No. 246. Plaintiffs moved for en banc review of the Court's October 31, 2013 Order, *see* Appeal Dkt. No. 267; and the City moved to vacate the Opinions and Orders, *see* Appeal Dkt. No. 265.

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[2] Following the issuance of the two Opinions, then-mayoral candidate and City Public Advocate Bill de Blasio engaged in "a relentless critique of the [NYPD's] stop-and-frisk tactics." He promised that he would drop the City's appeal of the Opinions "on Day 1" of his administration. Candidate de Blasio later filed papers in the Second Circuit in his capacity as Public Advocate in support of Plaintiffs and in opposition to the City's motion to stay the remedial proceedings in the District Court. See Appeal Dkt. Nos. 175, 205.

On November 12, 2013, in light of the Second Circuit's Order staying all proceedings in this Court, the SBA moved to intervene directly in the appellate proceedings in the Second Circuit. Appeal Dkt. No. 283. On November 25, 2013, the Second Circuit issued an Order that all of the pending motions, including the SBA's motion to intervene and that of a group of other police unions seeking intervention, which was filed on November 7, 2013; the request for en banc review of the October 31, 2013 Order; and the City's request for vacatur, be "held in abeyance pending further order of the court." Appeal Dkt. No. 338. The purpose of that Order, as the Second Circuit stated, was "[t]o maintain and facilitate the possibility that the parties might request the opportunity to return to the District Court for the purpose of exploring a resolution." *Id.*

Meanwhile, without the SBA's involvement, after Mr. de Blasio took office as Mayor of the City, the City and Plaintiffs engaged in negotiations to terminate the Appeal and resolve this matter by implementing the District Judge's ordered remedies.[3] On January 30, 2014, the City filed a motion for "a limited remand for the purpose of exploring a resolution." Appeal Dkt. No. 459. On the same date, the City and the Plaintiffs announced publicly that they had resolved all of Plaintiffs' claims. All of the parties' public representations regarding the alleged resolution suggest that the City has agreed to concede liability on behalf of the NYPD and its officers, including SBA members, as found by the District Court; to implement all of the remedies ordered by the District Court; and to relinquish any right to challenge the District Judge's rulings on appeal. While the SBA has not reviewed any written agreement between the City and Plaintiffs and was not included in the negotiation, public statements made by Mayor de Blasio

[3] While the parties did not disclose that they intended to take such steps, Mayor de Blasio openly announced, just before he took office, "We will drop the appeal on the stop-and-frisk case, because we think the judge was right about the reforms that we need to make." Annie Correal, *De Blasio Names City's Top Lawyer, Appearing to Signal a Further Shift in Policy*, N.Y. Times, Dec. 29, 2013 (quoting Mayor de Blasio's statements at press conference to introduce new City Corporation Counsel).

and the Center for Constitutional Rights indicate that the only limitation to be placed on any of the District Court's reforms is that the Monitor ordered by the District Judge's Remedies Opinion will serve for a term of three years (rather than indefinitely). But even that limitation apparently is conditioned on the City achieving substantial compliance with all of the District Judge's ordered reforms (to be set forth in a consent decree alluded to by the City) within that three-year period.

On February 21, 2014, over the objections of the SBA and other proposed intervenors and amicus parties, the Second Circuit granted the motion for limited remand "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." Appeal Dkt. No. 479. On February 25, 2014, this Court directed the proposed intervenors to submit these supplemental moving papers on their motions to intervene. Dkt. No. 428.

On March 4, 2014, the parties submitted to the Court a joint settlement status report in which they stated, in relevant part:

> Under [the settlement] agreement, the parties will make our best efforts to submit to this Court within approximately two weeks a joint application to modify the District Court's August 12, 2013 Remedial Order . . . by specifying that the term of the Court-appointed monitor be limited to three years, provided that the City can show by the end of that term that it has substantially complied with all Court-ordered injunctive relief.

Dkt. No. 433. This statement confirms that the City and Plaintiffs intend to adopt wholesale and follow to the letter the Court's Remedies Opinion, and that the purported settlement is, in effect, a concession of liability by the City and an acquiescence to all of the court-ordered reforms.

B. The SBA and the Opinions

NYPD police sergeants are at the front line of police services in the City. Affidavit of Edward D. Mullins ("Mullins Aff."), Dkt. No. 397 ¶ 7. Among other things, a sergeant is

responsible for supervising patrolmen and other subordinate officers, implementing policies of the NYPD on the street level. *Id.* A sergeant is required to train, instruct, monitor, and advise subordinates in their duties, and is held directly responsible for the performance of those subordinates. *Id.* Failure to carry out any of the above responsibilities can, and often does, result in the imposition of disciplinary sanctions against the sergeant, who is the front-line supervisor responsible for carrying out the mission of the NYPD during thousands of street-level encounters. Mullins Aff. ¶ 12.

In addition to supervisory responsibilities, however, a sergeant also routinely performs field police work, which typically consists of relatively complex law enforcement activities with which only sergeants are entrusted. Mullins Aff. ¶ 8. Some sergeants spend the entire work day in the field patrolling streets in his or her precincts, either in uniform or in plain clothes conducting surveillance. Mullins Aff. ¶ 9. Sergeants also patrol in the field in cars, unmarked vans, on foot, and on horseback. Mullins Aff. ¶ 10. They are directly dispatched to more difficult and complex calls, are expected to determine and verify probable cause in all arrests in their units, and are the only police officers authorized to use certain types of non-lethal weapons such as Tasers. *Id.* Sergeants are also required to prepare various law enforcement reports and are ultimately responsible for all paperwork in their units. Mullins Aff. ¶ 11.

In this matter, the Court has examined the constitutionality of a policing tool referred to as “stop, question and frisk,” whereby a police officer may briefly detain an individual upon reasonable suspicion that criminal activity “may be afoot” and may, in connection with the detention, perform a protective frisk of the individual if the officer reasonably believes that the person is in possession of weapons. Liability Op. 19-26. Plaintiffs in this matter (characterized by the Court as “blacks and Hispanics who were stopped”), individually and on behalf of a class,

argued that NYPD's use of stop and frisk (1) violated their Fourth Amendment rights because they were stopped without a legal basis; and (2) violated their Fourteenth Amendment rights because they were targeted for stops based on their race. Liability Op. 1-2. On August 12, 2013, following a nine-week bench trial, the Court issued and entered the Liability Opinion, finding the City liable for violating plaintiffs' Fourth and Fourteenth Amendment rights; and the Remedies Opinion, which ordered a permanent injunction requiring the City to conform its stop, question and frisk practices to the United States Constitution. Liability Op., Dkt. No. 373; Remedies Op., Dkt. No. 372. The Remedies Opinion also ordered the appointment of an independent Monitor to oversee the implementation of reforms that would bring the stop and frisk practices into constitutional compliance. Remedies Op. 9-13.

The Remedies Opinion contains the following specific statements and findings regarding sergeants and supervising officers generally:

- "An essential aspect of the Joint Process Reforms will be the development of an improved system for monitoring, supervision, and discipline," Remedies Op. 23;

- "[C]omprehensive reforms may be necessary to ensure the constitutionality of stops, including revisions to written policies and training materials, improved documentation of stops and frisks, direct supervision and review of stop documentation by sergeants," Remedies Op. 23;

- "[B]ased on the findings in the Liability Opinion, there is an urgent need for the NYPD to institute 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

- "Because body-worn cameras are uniquely suited to addressing the constitutional harms at issue in this case, I am ordering the NYPD to institute a pilot project in which bodyworn cameras will be worn for a one-year period by officers on patrol in one precinct per borough — specifically the precinct with the highest number of stops during 2012. The Monitor will establish procedures for the review of stop recordings by supervisors and, as appropriate, more senior managers," Remedies Op. 27.

The Liability Opinion also specifically mentions sergeants in numerous places, highlighting the role of sergeants in carrying out and supervising stop, question and frisk practices. For example, the Court notes that Sergeant Jonathan Korabel was one of two officers who conducted one of the stop-and-frisk arrests at issue in this matter. Liability Op. 125-26 n.463. Similarly, the Court identified Sergeant James Kelly as one of three officers involved in what the Court determined was an unconstitutional frisk of Plaintiff Floyd. Liability Op. 164. The Court noted as to one of the incidents at issue that, after conducting the stop and recovering a knife, two officers called Sergeant Daniel Houlahan to the scene to assist them in the field. Liability Op. 142-43.

C. The SBA's Collective Bargaining Rights

Because the SBA is a recognized bargaining unit representing employees of New York City (i.e., police officers), its bargaining authority is defined by the New York City Collective Bargaining Law ("NYCCBL"). N.Y. City Admin. Code § 12-307(4). The NYCCBL provides:

> [A]ll matters, including but not limited to pensions, overtime and time and leave rules which affect employees in the uniformed police, fire, sanitation and correction services, or any other police officer as defined in subdivision thirty-four of section 1.20 of the criminal procedure law who is also defined as a police officer in this code, shall be negotiated with the certified employee organizations representing the employees involved.

N.Y. City Admin. Code § 12-307(4). The SBA is a certified employee organization representing police sergeants, and is recognized by the City as sole and exclusive collective bargaining representative for all employees of the NYPD with the title of sergeant.[4] Therefore, the City is required to negotiate with the SBA all matters within the scope of collective bargaining under the NYCCBL. The NYCCBL circumscribes the scope of collective bargaining as follows:

> **Scope of collective bargaining; management rights. a.** Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations

[4] *See* Sergeants Benevolent Association June 1, 2005 – August 29, 2011 Agreement, *available at* http://sbanyc.org/documents/resources/2005-2011SbaContract.pdf

> shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions and provisions for the deduction from the wages or salaries of employees in the appropriate bargaining unit who are not members of the certified or designated employee organization of an agency shop fee to the extent permitted by law, but in no event exceeding sums equal to the periodic dues uniformly required of its members by such certified or designated employee organization and for the payment of the sums so deducted to the certified or designated employee organization, subject to applicable state law, except that:
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> * * *
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> **b.** It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, ***notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining*.**

N.Y. City Admin. Code § 12-307(6)b (emphasis added).

While the City retains discretion under the NYCCBL to make high-level policy decisions regarding how public employees such as police officers are to perform their work, the practical impact resulting from those decisions remains the subject of collective bargaining. Unions such as the SBA have authority to negotiate with the City regarding matters that have a practical effect on their workload, staffing, safety, and other matters that may be affected by City decisions. The City is required to negotiate with the SBA all matters within the scope of collective bargaining under the NYCCBL.

III. ARGUMENT

A. The SBA May Intervene as of Right Pursuant to Rule 24(a).

Rule 24(a) provides for non-party intervention as of right. Fed. R. Civ. P. 24(a). A court must grant a non-party's motion to intervene as of right if: (1) the motion is timely; (2) the putative intervenor has an interest in the existing litigation; (3) the intervenor's interest would be impaired by the outcome of the litigation; and (4) the intervenor's interest will not be adequately represented by the existing parties. *Id.*; *D'Amato v. Deutsche Bank,* 236 F.3d 78, 84 (2d Cir. 2001). Courts construe these requirements liberally in favor of intervention, a principle the Ninth Circuit has articulated as follows:

> A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a *practical* interest in the outcome of a particular case to intervene, [the court] often prevent[s] or simplif[ies] future litigation involving related issues; at the same time, [the court] allow[s] an additional interested party to express its views . . . .

City of Los Angeles, 288 F.3d at 397-98 (emphasis in original) (internal quotation marks and citation omitted); *see also Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) ("[L]iberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'") (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)); *United States v. Ritchie Special Credit Invs. Ltd.*, 620 F.3d 824, 831 (8th Cir. 2010) ("We construe Rule 24 liberally and resolve any doubts in favor of the proposed intervenors."); 6 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE 24.03[1][a], at 24-22 (3d ed. 2008) ("Rule 24 is to be construed liberally . . . and doubts resolved in favor of the intervenor.").

Here, all four factors are met. The SBA has two categories of protectable interests: (1) defending its members, who were unfairly accused of violating and found to have violated the Constitution, against further harm to their reputations and livelihoods that would result from the

City's concession of liability on their behalf; and (2) participating in the development and approval of reforms that will directly affect SBA members by increasing their workload and affecting staffing and employee safety, practical impacts that are mandatory subjects of collective bargaining under New York law. Those interests will be impaired if the SBA is not allowed to participate in any settlement reached in this Court. The SBA's interests will not adequately be represented by the City, which now appears to have agreed to concede liability and implement the reforms as set forth in the Remedies Opinion. Moreover, the City will not present the Court or its appointed Monitor (which the parties have stated publicly will be part of the resolution) with the unique perspective that the SBA will present—a perspective that will also inform the development and approval of the reforms to specific NYPD practices that the parties have stated they have agreed to pursue.

Because it satisfies the requirements of Rule 24(a), the SBA should be granted intervention in this matter as of right.

1. The SBA Has Direct, Protectable Interests in This Action.

While the parties have not disclosed the details of their alleged settlement agreement, based on the public statements of the City and Plaintiffs about the resolution they will jointly ask this Court to approve, two things appear to be certain. First, the City intends to concede liability on behalf of the NYPD and its officers, including the members of the SBA. Second, the City intends to adopt the reforms set forth in the Remedies Opinion, including the prescribed changes to monitoring, supervision, discipline, and equipment. Both of these aspects of the alleged settlement create direct protectable interests for the SBA; specifically, (1) an interest in defending its members against accusations of constitutional violations found in the Liability Opinion, the truth of which the City has indicated it plans to concede; and (2) an interest in

protecting its collective bargaining rights, which may be violated by reforms the City agrees to implement consistent with the Remedies Opinion.

Regarding the first interest, the Liability Opinion characterized various actions of SBA members as violating the U.S. Constitution. Liability Op. 71-98; 181-92. The Liability Opinion identifies sergeants by name, asserts that they are untruthful, and concludes that numerous stops that they supervised, approved, or conducted broke the law. For example, the Court notes that Sergeant Jonathan Korabel was one of two officers who conducted one of the stop-and-frisk arrests at issue in this matter. Liability Op. 125-26 n.463. Similarly, the Court identified Sergeant James Kelly as one of three officers involved in what the Court determined was an unconstitutional frisk of Plaintiff Floyd. Liability Op. 164. The Court noted as to one of the incidents at issue that, after conducting the stop and recovering a knife, two officers called Sergeant Daniel Houlahan to the scene to assist them in the field. Liability Op. 142-43. In addition, the Liability Opinion derogates the general practices and performance of NYPD sergeants, including findings that assert the creation of "a culture of hostility" perpetuated by Sergeant Raymond Stukes, Liability Op. 72-74; inadequate supervision of stops by Sergeant Charlton Telford; *id.* at 86-87; insufficient record-keeping by Sergeant Michael Loria; *id.* at 90-91; and various examples of allegedly poor supervision by sergeants generally, *id.* at 95-98.

Such findings are sufficient to establish a direct, protectable interest. *United States v. City of Los Angeles*, 288 F.3d 391, 399 (9th Cir. 2002) (finding "protectable interest in the merits" for police union based on "factual allegations that its member officers committed unconstitutional acts in the line of duty"). In fact, in *City of Los Angeles*, the Ninth Circuit reversed the district court's decision to the extent that it found that such an interest was insufficient to intervene in the merits phase. *Id.*at 402. These aspects of the Liability Opinion, if

conceded by the City on behalf of the NYPD and its officers, would adversely affect the careers and lives of these SBA members, and cast doubt on the ability of other members to perform their duties effectively while avoiding similar accusations in the future, which in turn affects officer and public safety. Because of that interest in the merits, the SBA's motion should be granted so that it may protect that interest in this Court or, if the matter returns to the Second Circuit, on appeal.

Regarding the second interest, the reforms to police practices that are set forth in the Remedies Opinion, which the parties' public statements and their joint settlement status update (Dkt. No. 433) indicate will be implemented as part of the settlement agreement, are the mandatory subject of collective bargaining because they would have an immediate practical impact on workload, staffing, safety, and other terms and conditions of employment of the SBA's members. 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 bodyworn cameras, "procedures for the review of stop recordings by supervisors and, as appropriate, more senior managers," Remedies Op. 27.

The reforms also will affect the safety of sergeants who frequently conduct stops themselves and now will be limited in their ability to protect themselves from dangerous situations involving weapons. Furthermore, the reforms entail the creation of new disciplinary procedures for officers who are found to have engaged in unconstitutional stops, which will

affect sergeants both in the conduct of stops and in the supervision of subordinate officers who conduct stops.

Many of these reforms will fall within the scope of collective bargaining as set forth in § 12-307(6)b of the NYCCBL. As discussed above, the City is required to negotiate with the SBA regarding such reforms. Thus, the SBA has a direct interest in advocating for its members in this matter by participating in the court-supervised settlement discussions that will determine the nature and scope of the reforms.

Courts have permitted intervention by unions for the purpose of challenging consent decrees that could undermine the unions' collective bargaining rights. *See AT&T* , 506 F.2d at 741-42; *Stallworth v. Monsanto Co.*, 558 F.2d 257, 268-69 (5th Cir. 1977). In *City of Los Angeles*, *supra*, the Ninth Circuit concluded that a police union had an interest in litigation involving a proposed consent decree between the City of Los Angeles and the United States, because the consent decree may have been inconsistent with the terms of the memorandum of understanding between the city and the union governing the terms and conditions of the Police League's members' employment. 288 F.3d at 399-400. The court observed, "The 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." *Id.* The Ninth Circuit reasoned that, to the extent that it was disputed whether or not the consent decree conflicted with the memorandum of understanding, "the Police League *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 consent decree*." *Id.* at 400 (emphasis added). Other courts have employed similar reasoning in finding a protectable interest for unions seeking to intervene in litigation. For example, in *EEOC v. AT&T,* a union

was permitted to intervene to contest a proposed consent decree between the government and an employer that could have affected the terms of a collective bargaining agreement. 506 F.2d 735, 741-42 (3d Cir. 1974). In *CBS, Inc. v. Snyder,* the court recognized that a union had a legally protectable interest in participating in proceedings that may have affected the interpretation or enforceability of a collective bargaining agreement. 798 F. Supp. 1019, 1023 (S.D.N.Y. 1992), *aff'd,* 989 F.2d 89 (2d Cir. 1993).

Like the proposed consent decrees at issue in *City of Los Angeles, AT&T,* and *Snyder*, the proposed resolution here likely will bear directly on the SBA's collective bargaining rights. The Court's prescribed changes to supervision, training, discipline, and other policing matters that the parties have indicated they will adopt in their settlement thus create a protectable interest for the SBA because they interfere with the ability of the SBA to negotiate collectively regarding the practical impact of proposed City reforms—specifically, the way in which those reforms will affect sergeants' ability to perform their primary policing duties while simultaneously managing paperwork concerning stops. Moreover, the practical effect of such reforms could be to discourage officers from performing stop and frisks altogether in order to avoid disciplinary or legal proceedings in the event that a given stop is later determined to have been unconstitutional. Such an impact bears directly on officer safety. To the extent that it is disputed whether or not either the Opinions or the proposed resolution affect any collective bargaining rights, 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[.]" *City of Los Angeles*, 288 F.3d at 400. Thus, the SBA's motion to intervene should be granted.

2. The SBA's Interest May Be Impaired by the Disposition of This Action.

If the SBA is not permitted to intervene in this matter, it (and its members) may be unlawfully bound by the product of settlement discussions in which they were not permitted to participate. The result of a settlement here (and, in the event that no settlement is reached, the Appeal) will have a direct, practical impact on the SBA's membership that it will not have been properly permitted to negotiate collectively in accordance with the NYCCBL. Therefore, the SBA's "continuing ability to protect and enforce [its] contract provisions will be impaired or impeded by" a judgment that approves any agreed-upon reforms without the SBA's involvement or input. *AT&T,* 506 F.2d at 742 (permitting union to intervene for purpose of challenging consent decree approving settlement because "[c]learly [the union] has an interest in the provisions of its collective bargaining agreements with AT&T which may well be modified or invalidated by the memorandum of agreement and consent decree of January 18, 1973 made in its absence and, equally clearly, its continuing ability to protect and enforce those contract provisions will be impaired or impeded by the consent decree"); *see also City of Los Angeles*, 288 F.3d at 401 (permitting intervention of union to challenge consent decree because "the consent decree by its terms purports to give the district court the power, on the City's request, to override the Police League's bargaining rights under California law and require the City to implement disputed provisions of the consent decree").

Mayor de Blasio has stated publicly that he and his administration "think the judge was right about the reforms that [the City and the NYPD] need to make."[5] The City and Plaintiffs have now announced publicly that they have resolved all of Plaintiffs' claims in an agreement

[5] Annie Correal, *De Blasio Names City's Top Lawyer, Appearing to Signal a Further Shift in Policy*, N.Y. Times, Dec. 29, 2013 (quoting Mayor de Blasio's statements at press conference to introduce new City Corporation Counsel).

under which the City promises to implement all of the reforms to NYPD practices that were ordered in the Remedies Opinion.[6] The parties have now confirmed in a submission to this Court that they intend only to seek slight modification of the Remedies Order, and will otherwise allow it to remain in force and effect. Dkt. No. 433. The resolution thus does not appear to give any consideration to the practical impact any changes to policy will have on police officers. A denial of the SBA's Motion to Intervene would thus result in an infringement on the SBA's collective bargaining rights and an incomplete presentation to the Monitor and this Court regarding how reforms might imperil police officers' safety or impair their rights.

Moreover, in the event that any settlement or consent decree is approved by this Court without the SBA's involvement or input, the SBA intends to challenge the validity of such an order through every available mechanism. Like the unions in *City of Los Angeles* and *AT&T*, the SBA has rights that are protectable, whether in these court-supervised settlement discussions, on appeal to the Second Circuit, or in a separate, collateral action. To approve a settlement without allowing the SBA to protect those rights thus would be to deprive the settlement of finality and defeat the purpose of the limited remand ordered by the Second Circuit. To avoid such an eventuality, this Court should permit the SBA to intervene now.

3. The SBA's Interest Will Not Be Adequately Protected by the Parties to This Action.

At this stage, no current party will adequately protect the SBA's interest. To determine whether the existing parties to a matter adequately represent a prospective intervenor's interest, courts consider: (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the

[6] *See* Benjamin Weiser and Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. Times, Jan. 30, 2014.

proceedings that other parties would neglect. *Northwest Forest Res. Council v. Glickman,* 82 F.3d 825, 838 (9th Cir. 1996). The requirement of inadequate representation "is satisfied if the applicant shows that representation of his interest [by existing parties] *may be* inadequate." *City of Los Angeles, supra,* 288 F.3d at 398 (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972)) (alteration in original) (emphasis added) (internal quotation marks omitted). This showing is "minimal." *Trbovich*, 404 U.S. at 538 n.10.

Here, no party will "undoubtedly" make "all" of the SBA's arguments. Plaintiffs and the City now are united in their positions and their public statements reveal that *none* of the SBA's arguments will be made.[7] To the extent that the City does make any arguments designed to protect the interests of SBA members—such as their safety and the public's safety—those arguments will be inherently inferior to the arguments the SBA would make, because the City's interest in such issues is not nearly as focused and informed as that of the SBA. *See Natural Res. Defense Council v. Costle*, 561 F. 2d 904, 912 (D.C. Cir. 1977) (granting motion to intervene because "the appellants' interest is more narrow and focussed [sic] than EPA's, being concerned primarily with the regulation that affects their industries"). The Second Circuit held in *Costle* that intervention by a non-party is appropriate in such circumstances. *Id.* Due to its members' narrower and more focused expertise, the SBA is likely to make a more vigorous presentation to the court regarding the discrete details of their supervisory and field work than the City would be able to make. *N.Y. Pub. Interest Research Grp., Inc. v. Regents*, 516 F.2d 350 (2d Cir. 1975) ("[W]e are satisfied that there is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would the [state authority party]").

[7] *See, e.g.*, Benjamin Weiser and Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. Times, Jan. 30, 2014. ("A new judge, Analisa Torres, will be asked to approve the agreement; once it is ratified, Mr. de Blasio said, "we will drop the appeal, and also with the court's approval, we will settle the case.").

Unions and their collective bargaining counterparties (i.e., employers) do not have an identity of interests. *See Vulcan Soc. of Westchester Cnty., Inc. v. Fire Dept. of City of White Plains*, 79 F.R.D. 437, 441 (S.D.N.Y. 1978) ("Although the municipalities involved have the same interest in seeking qualified and efficient fire personnel, it could hardly be said that all the interests of the union applicants are the same as those of the municipalities. This court would be hard pressed to find that the employers of the unions, with whom the collective bargaining is done, would represent the interests of the unions in these agreements and otherwise with the same vigor and advocacy as would the unions themselves."). Here, the SBA and the City are adversaries to one another in the collective bargaining process and find themselves in antagonistic postures toward one another in many instances.[8] Indeed, the City itself acknowledged the likelihood of conflict resulting from the parties' divergence of interests on issues that implicate collective bargaining rights, when it consented to the SBA's intervention. *See* Dkt. No. 414. Thus, the SBA cannot rely on the City to present the views of police sergeants, city employees who sit on the other side from the City at the collective bargaining table. This is particularly true now that the current mayoral administration has sided with Plaintiffs and taken a position that is effectively adversarial to NYPD officers regarding reforms to police practices.

Furthermore, because the City has stated that it will not pursue the Appeal,[9] if the SBA does not intervene, the Appeal will simply end, precluding any review of the Opinions. Representation is inadequate when an existing party chooses not pursue an appeal and a non-party intervenes for the purpose of prosecuting the appeal. *Yniguez v. State of Arizona*, 939 F.2d

[8] For example, sergeants face potential civil liability for approving stops. In such circumstances, the City and SBA member's positions are adversarial to the extent that the City seeks to argue that the sergeant did not act within the scope of his or her employment in order to decline indemnification and thereby protect its own interests.
[9] *See* Benjamin Weiser and Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. Times, Jan. 30, 2014.

727, 730 (9th Cir. 1991) ("Having decided not to appeal the district court's decision on the merits, the Governor inadequately represents the interests of [proposed intervenors]"). In *Yniguez*, for example, the sponsors of a ballot initiative did not seek to intervene in the district court proceedings, relying on a governmental defendant to represent their interests. *Id.* When they learned that the governmental defendant had opted not to appeal, they sought to intervene to prosecute the appeal themselves. *Id.* The district court denied intervention but the Ninth Circuit reversed, holding (among other things) that the proposed intervenors had established inadequacy of representation because "no representation constitutes inadequate representation." *Id.* at 737; *see also Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004) ("In particular, courts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court."). Likewise here, the City's representation is inherently inadequate because it is has stated that it will not even prosecute the Appeal, a fact that requires the SBA to intervene to preserve its rights.

The SBA thus would not adequately be represented by the current parties in either the court-supervised settlement discussions or the Appeal. In fact, intervention is the only way for the SBA to ensure participation in the Appeal by at least one appellant. The SBA should be allowed to be heard on the issues in this matter and is entitled to intervene as of right.

4. This Motion Is Timely.

Courts determine the timeliness of a motion for leave to intervene by examining the totality of the circumstances, with a particular emphasis on four factors:

> (1) how long the applicant had notice of its interest in the action before making its motion; (2) the prejudice to the existing parties resulting from this delay; (3) the prejudice to the applicant resulting from a denial of the motion; and (4) any unusual circumstance militating in favor of or against intervention.

In re Holocaust Victim Assets Litig., 225 F.3d 191, 198 (2d Cir. 2000); *accord Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric. & Markets,* 847 F.2d 1038, 1044 (2d Cir. 1988). In evaluating the timeliness of a post-judgment application to intervene, "[t]he critical inquiry . . . is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977). The timeliness requirement of Rule 24 is a lenient one. *See*, *e.g., 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."). Thus, even when a motion to intervene "was filed several years after the underlying matter had been pending in this court, mere lapse of time does not render it untimely." *Id.*

Here, the SBA satisfied the timeliness requirement and its motion should be granted.

a. The SBA Acted Promptly to Participate in the Post-Judgment Phase in this Court.

This Motion is timely to the extent that it seeks intervention in this matter for the purpose of participating in the negotiation and development of a settlement agreement to be approved by the Court. Courts have held that intervention after the liability phase of a litigation is timely when a yet-to-be-determined remedy will affect the rights of the intervening third party. *See, e.g., Spirt v. Teachers' Ins. & Annuity Ass'n,* 93 F.R.D. 627, 637 (S.D.N.Y. 1982) (noting that a motion to intervene is timely when "intervention is sought with respect to a post-judgment proceeding that seeks to resolve a substantial problem in formulating the relief to be granted on account of the judgment"), *aff'd in part and rev'd in part on other grounds,* 691 F.2d 1054 (2d Cir. 1982), *vacated on other grounds,* 463 U.S. 1223 (1983); *see also United States v. Hooker Chems. & Plastics Corp.,* 540 F. Supp. 1067, 1082-83 (W.D.N.Y. 1982); *Fleming v. Citizens for Albemarle, Inc.,* 577 F.2d 236, 237-38 (4th Cir. 1978), *cert. denied,* 439 U.S. 1071 (1979);

Liddell v. Caldwell, 546 F.2d 768, 771 (8th Cir. 1976). Accordingly, courts have permitted parties to intervene at the post-judgment remedy phase. *See*, *e.g.*, *Ctr. for Biological Diversity v. Delgado*, 61 F. App'x 381 (9th Cir. 2003); *see also United States v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992) (holding that court may permit intervention at any stage in the proceeding, including post-judgment).

In granting a party's post-judgment motion for leave to intervene for certain purposes, the *Spirt* court noted that:

> [I]t is beyond peradventure that post-judgment intervention motions are, in certain circumstances, "timely," *see*, *e.g.*, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396, 97 S.Ct. 2464, 2471, 53 L.Ed.2d 423 (1977), and that such circumstances may be presented where, as is the case here, intervention is sought with respect to a post-judgment proceeding that seeks to resolve a substantial problem in formulating the relief to be granted on account of the judgment, *see Hodgson v. United Mine Workers*, 473 F.2d 118, 129 (D.C.Cir.1972).

93 F.R.D. at 637. Courts have expressly recognized as timely post-judgment intervention for the purpose of having a voice in shaping the relief to be granted. *See Costle*, 561 F.2d 904 ; *Hodgson v. UMW*, 473 F.2d 118 (D.C. Cir. 1972); *see also Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 782 F. Supp. 870 (S.D.N.Y. 1991) (holding that motion to intervene was timely even though filed almost two years after notice of interest in case, because motion was filed shortly after interest became direct).

Here, this Supplemental Motion is the SBA's second motion to intervene, the first having been filed on September 11, 2013. The SBA filed the original motion promptly after the Opinions were issued, and thus promptly after it learned of the reforms to be implemented pursuant to the Remedies Opinion, which reforms will affect the collective bargaining rights and safety of SBA members. Therefore, the SBA is timely for intervention in the post-judgment phase before this Court.

b. The SBA Acted Promptly to Appeal the Opinions.

The SBA filed its initial Motion to Intervene on September 11, 2013, within the 30-day period for filing a Notice of Appeal (and it simultaneously filed its own Notice of Appeal). Accordingly, the SBA timely acted to participate in the Appeal.

While Rule 24 does not set forth a specific time for seeking intervention for the purpose of appealing a judgment, courts that have examined this issue have held that, if the motion to intervene is filed within the 30-day period for filing a notice of appeal, it is timely. For example, the U.S. Supreme Court held in *McDonald* that a motion to intervene filed after judgment, but within the 30-day period for parties to the litigation to appeal the judgment, was timely. *McDonald*, 432 U.S. at 396 ("[T]he respondent filed her motion within the time period in which the named plaintiffs could have taken an appeal. We therefore conclude that the Court of Appeals was correct in ruling that the respondent's motion to intervene was timely filed and should have been granted."). Similarly, in *Drywall Tapers & Pointers of Greater N.Y., Local 1974 v. Nastasi & Associates Inc.*, the Second Circuit held that a notice of appeal filed by a non-party, after the non-party moved for leave to intervene, but before the court had ruled on the motion, was not untimely. 488 F.3d 88, 95 (2d Cir. 2007).

The fact that the City has indicated it will not pursue the Appeal[10] further supports a finding that this Motion is timely. Courts have held that, when a party seeking to intervene in a district court case that has proceeded to judgment acts promptly after finding out that an existing party will not or may not appeal the judgment, its motion for leave to intervene is timely. *See, e.g.*, *Stallworth*, 558 F.2d at 268-69 (5th Cir. 1977) (noting that "whether the request for intervention came before or after the entry of judgment, [is] of limited significance," and

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[10] *See* Benjamin Weiser and Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. Times, Jan. 30, 2014.

intervention motion filed weeks after entry of consent judgment was timely because judgment affected intervenors' employment rights). The D.C. Circuit reasoned in such a case as follows:

> [T]he appellants claim that in moving to intervene they were prompted by the post-judgment prospect that the Government might not appeal. Prior to the entry of judgment, the appellants say, they had no reason to intervene; their interests were fully consonant with those of the Government, and those interests were adequately represented by the Government's litigation of the case. We agree. In these circumstances a post-judgment motion to intervene in order to prosecute an appeal is timely (if filed within the time period for appeal) because "the potential inadequacy of representation came into existence only at the appellate stage." *Dimond v. District of Columbia,* 792 F.2d 179, 193 (D.C. Cir. 1986); *see United Airlines, Inc. v. McDonald,* 432 U.S. 385, 395-96, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977).

Smoke v. Norton, 252 F.3d 468, 471 (D.C. Cir. 2001); *see also Acree* , 370 F.3d at 50 ("Post-judgment intervention is often permitted . . . where the prospective intervenor's interest did not arise until the appellate stage or where intervention would not unduly prejudice the existing parties."), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009).

Here, the SBA did not have reason to intervene for purposes of appealing the Opinions until after the Opinions were issued. Moreover, the SBA's reason for intervention was amplified after it learned that the City, under a prospective new mayoral administration, would not continue to pursue the Appeal. The SBA acted promptly after learning of its interest in this matter and, therefore, its Motion is timely.

c. The SBA's Intervention Would Not Prejudice the Existing Parties, and Denying Intervention Would Prejudice the SBA.

Because the liability phase of this matter already has been decided by this Court and the court-supervised settlement discussions have barely begun, there can be no prejudice to the existing parties. The SBA seeks the right to participate only in shaping the reforms to be approved by this Court and, in the event that no resolution is approved, prosecuting the Appeal of the Opinions. Because both of the phases in which the SBA would participate as an

intervenor were in their earliest stages at the time the SBA first sought to intervene and remain in their infancy to date, the SBA's addition as a party to this matter cannot result in any prejudice to any party.

On the other hand, if the SBA is excluded from the participation in the post-judgment phase here, it will be severely prejudiced because it will be shut out of the reform process, a process that will change the way in which sergeants do their jobs and thereby directly affect the SBA members' terms and conditions of employment.

As this Court acknowledged in the Opinions, sergeants play a major role, both directly in the field and indirectly as supervising officers, in the administration of stop, question, and frisk policies. Indeed, as the evidence introduced at trial established, sergeants are primarily responsible for carrying out the street-level practices of the NYPD's administration, including the implementation of its stop, question, and frisk policy. The Opinions specifically note numerous instances of stops that were either conducted personally by sergeants or reviewed or supervised by sergeants. *See*, *e.g.*, Liability Op. 125-26 n.463 (noting that sergeant was one of two officers who conducted stop and frisk); Liability Op. 164 (identifying sergeant as one of three officers involved in frisk); Liability Op. 142-43 (noting that two officers who conducted stop called sergeant to scene to assist them). The perspectives of the sergeants regarding the practical factors at play in policing should be presented to this Court as the court-supervised settlement discussions proceed. Moreover, failure to do so will prejudice the SBA's collective bargaining rights.

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

In the alternative, this Court should exercise its discretion to permit the SBA to permit the SBA to intervene pursuant to Federal Rule of Civil Procedure 24(b). Fed. R. Civ. P. 24(b). The threshold requirement for permissive intervention is a "claim or defense that shares with the

main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Permissive intervention must not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). In addition, the court may consider factors such as whether the putative intervenor will benefit from the application, the nature and extent of its interests, whether its interests are represented by the existing parties, and whether the putative intervenor will contribute to the development of the underlying factual issues. *United States Postal Serv. v. Brennan,* 579 F.2d 188, 191-92 (2d Cir. 1978) (quoting *Spangler v. Pasadena City Board of Educ.,* 552 F.2d 1326, 1329 (9th Cir. 1977)). "Rule 24(b)(2) is to be liberally construed." *Degrafinreid v. Ricks.*, 417 F. Supp. 2d 403, 407 (S.D.N.Y. 2006) .

In the event that the Court is inclined not to grant the SBA's application for intervention as of right, it should nevertheless permit the SBA to intervene for the purposes stated above. The SBA has various claims and defenses under the NYCBBL and other state and federal laws related to the proposed reforms and their effect on SBA members' duties and obligations. The SBA's participation would not unduly delay either the court-supervised settlement discussions, which have not yet begun, or the Appeal. Both proceedings would benefit from the SBA's inclusion due to its unique perspective on the relevant issues, as discussed above. Finally, for the same reasons set forth above, the SBA has significant interests in the outcome of the process, its interests would not adequately be represented by any current party, and it is a source of critical factual information regarding the nature of police work that will aid the Court in determining whether any settlement reached by the parties involving reforms to police practices should be approved. Accordingly, permissive intervention should be granted.

IV. 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).[11]

Dated: New York, New York.
March 5, 2014

Respectfully submitted,

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[11] While Rule 24(c) states that a "motion to intervene must . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought," the pleadings are closed in this matter, judgment has already been rendered, and the SBA seeks to participate only prospectively, for the purposes of appeal and to have a voice in the court-supervised settlement discussions. Therefore, there are no pleadings to be filed at this time. The SBA respectfully requests that this Court excuse it from this requirement, as courts have done in similar circumstances. *See*, *e.g.*, *Massachusetts v. Microsoft*, 373 F.3d 1199, 1250 n.19 (D.C. Cir. 2004) (reversing district court's denial of motion to intervene and noting that proposed intervenor seeking only to participate in appeal was not required to file pleading under Rule 24(c) because "judgment had already been rendered" and, "in any event, 'procedural defects in connection with intervention motions should generally be excused by a court'") (quoting *McCarthy v. Kleindienst,* 741 F.2d 1406, 1416 (D.C. Cir. 1984)).