UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

– X

DAVID FLOYD, individually and on behalf of all others similarly situated, *et al.*,

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK,

Defendants-Appellants.

– X

JAENEAN LIGON, , individually and on behalf of her minor son, J.G., Jacqueline Yates, individually and on behalf of a class of all others similarly situated, *et al.*,

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants-Appellants.

– X

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO VOLUNTARILY DISMISS THE APPEALS

Docket No. 13-3088

Docket No. 13-3123

PRELIMINARY STATEMENT

Defendant-appellants ("the City"), submit this memorandum in further support of the City's motion for an order: (a) marking the above-captioned City's appeals in both *Floyd* and *Ligon* voluntarily dismissed with prejudice, pursuant to Federal Rules of Appellate Procedure ("FRAP") 42(b); (b) extinguishing the stay pending appeal, and (c) expediting the issuance of a mandate to that effect.

We are in receipt of the Court's order, dated August 14, 2014, which (1) sets an expedited briefing schedule for the putative intervenor unions' appeals from the district court's July 30, 2014 order denying their motions to intervene; and (2) calendars certain pending matters, including the unions' appeal from the denial of intervention, for argument on October 15, 2014.

For the reasons set forth below, the unions' oppositions provide no reason to delay the voluntary dismissal of the City's appeals in these actions, or the issuance of the mandates terminating those appeals. And even if the City's appeals are not immediately dismissed, there is absolutely no basis to continue the stay pending appeal that was previously granted on the City's motion and for the City's benefit.

ARGUMENT

As the Court is aware, the City has determined that it does not wish to pursue its appeals from the district court's remedial order, dated August 12, 2013, and plaintiffs have consented to the City's request to dismiss them. Thus, all parties to the City's appeals from the August 12, 2013 order support the dismissal of those appeals.

The only entities seeking to prevent the voluntary dismissal of the City's appeals are the non-party unions, which previously filed motions to intervene in the appeals in this Court, in addition to filing motions to intervene in the district court. This Court ordered a limited remand of the City's appeals in part so that the district court could address the unions' motions to intervene filed in that

court, and, as noted above, the district court has now denied those motions in proceedings held following the remand.[1]

The unions argue that the Court should not grant the City's motion to voluntarily dismiss its appeals without first resolving their motions filed in this Court to intervene in the City's appeals. But this gets it exactly backwards. By definition, the dismissal of our appeals on consent of all parties to those appeals will render academic the unions' motions to intervene in the appeals. But this hardly means that the unions' motions to intervene should hold up the voluntary dismissal of the City's appeals—this approach would have the tail wagging the dog. And indeed, the unions have identified no case in which a non-party was allowed to intervene at the appellate level to take over a pending appeal after the sole named appellant had decided to voluntarily withdraw that appeal.

Moreover, the unions' contentions in their recent oppositions clash with this Court's prior order granting a limited remand of the appeals so that a resolution of these matters could be explored in the district court, and so that the district court could rule on the unions' motions to intervene pending in that court. The unions' current oppositions essentially rehash the same arguments that they made in previously opposing the limited remand. This Court's order granting the limited remand implicitly rejected the unions' attempts to frustrate the resolution of

[1] An opposition to the City's motion to withdraw the appeal was filed by the Patrolmen's Benevolent Association, the Lieutenants Benevolent Association, and the Captains' Endowment Association. A separate opposition was filed by the Sergeant's Benevolent Association ("SBA").

the City's appeals, and the Court should reject those same arguments advanced again now as a basis to prevent the resolution of the City's appeals.

In accordance with the Court's earlier order granting a limited remand, the parties to the appeal worked together and have now agreed to a revised remedial order, which the district court has approved. And, as directed by the Court's remand order, the district court has now ruled on the unions' motions to intervene pending in that court. The district court has denied those motions in a thorough 108-page decision.

There has been no substantial change affecting the unions' asserted interests since the limited remand was granted over their objection, other than the district court's denial of their respective intervention motions. This Court made clear in the remand order that the question of intervention was best addressed first by the district court, followed by review of the district court's determination by this Court on appeal, if necessary. *See also Drywall Tapers & Pointers, Local Union 1974 of I.U.P.A.T. v. Nastasi & Assocs.*, 488 F.3d 88, 95-96 (2d Cir. 2007). As this Court contemplated in the remand order, the unions may take immediate appeals from the district court's orders denying intervention. Indeed, the unions have done so, and the Court has ordered those appeals to be expedited. There is no reason for the unions' pursuit of their own appeals from the denial of intervention to delay the dismissal of *the City's* appeals. The unions should not be permitted to block the City's pursuit of voluntary dismissal of its own appeals.

Furthermore, the points previously raised by the City on its motions for limited remand are all the more persuasive now that the City has formally moved to discontinue its appeals. For the unions to be permitted to pursue appellate review of the district court's remedial rulings as the sole appealing party, they must not only establish that they meet the prerequisites for intervention, but they must also show that they have standing to manufacture a continuing case or controversy under Article III. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-65 (1997). This the unions cannot do, because their state-law collective bargaining rights are not implicated, nor are their members' reputations affected in any actionable manner.

As the City has shown, and as the District Court has providently ruled (*see* July 30, 2014 District Court Order, at 71-75), the topics described in the district court's August 12, 2013 remedies order are not mandatory subjects of collective bargaining, but rather constitute managerial prerogatives under the New York City Collective Bargaining Law. N.Y.C. Admin. Code § 12–307(a), (b); *Patrolmen's Benevolent Association v. New York State Public Employment Relations Board*, 6 N.Y.3d 563, 575-76 (2006) (collecting cases and holding that police discipline is not a subject of collective bargaining); *Sheppard v. Phoenix*, 1998 U.S. Dist. LEXIS 10576 (S.D.N.Y. 1998) ("…[C]learly the responsibilities conferred upon the City of New York … by the federal courts, for safeguarding the constitutional rights of incarcerated persons in their custody, cannot be delegated, abnegated or surrendered through collective bargaining."). In short, state law

affords the NYPD broad latitude to manage, organize, and discipline its own officers as it sees fit. The district court's remedies order addresses those very processes.

The unions' assertions are also speculative at this time (*see* July 30, 2014 District Court Order, at 101). Allegations of possible future injury are insufficient to establish Article III standing. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). The remedies order contemplates a lengthy consultative process under the auspices of the Court Monitor and Facilitator, a process in which the unions have been granted stakeholders' roles. That process will culminate in a final order of the district court, the contours of which remain to be seen. *See* Remedies Order, at 14, 29-32.

The unions' claimed reputational harm is likewise insufficient to confer standing, because the allegations they put forth are vague, unsubstantiated, and purely conclusory (*see* July 30, 2014 District Court Order, at 53). *See McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conf. of the United States*, 264 F.3d 52, 57 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 821 (2002). The unions unjustifiably fault the district court for failing to hold hearings or take evidence in addressing their motions to intervene following this Court's limited remand. But the unions failed to request an evidentiary hearing or take advantage of their opportunity to develop a factual record in the district court regarding their claims of reputational injury.

The SBA, but not any of the other unions, also makes the remarkable and unfounded request that the Court's previously issued stay of the remedies order should remain in place, despite the City's motion to voluntarily withdraw the appeals and thereby dissolve the stay. The stay was previously obtained by the City on the City's motion. The SBA asserts absolutely no authority for the notion that a putative intervenor may seek the continuation of a stay granted for the benefit of a party, where the party has disavowed any continuing need for that relief. And the SBA does not even attempt to demonstrate any entitlement to a stay pending appeal on its own behalf.

CONCLUSION

In light of the foregoing, the City's motion should be granted in its entirety, the City's appeals should be marked voluntarily dismissed, and the mandates should issue forthwith, thereby dissolving the stay pending appeal. At a minimum, the stay granted on the City's motion and for its benefit should be vacated.

Dated: New York, New York
August 18, 2014

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Docket No. 13-3088-cv; 13-3123-cv, 13-3461-cv

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