UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DAVID FLOYD, *et al.*,

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK,

Defendant-Appellant.

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APPELLEES' RESPONSE TO THE OPPOSITION OF NON-PARTY UNIONS TO APPELLANT'S MOTION TO VOLUNTARILY DISMISS THIS APPEAL

Docket No. 13-3088

There is no merit to the opposition filed by the Sergeants Benevolent Association ("SBA"), the Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA"), and other police unions (collectively, "the Unions") to Defendant-Appellant the City of New York's motion to voluntarily dismiss this appeal. The City's motion is routine and the Unions make no effort to explain why it should be denied. Instead, they conflate this simple motion to withdraw a now-defunct appeal with their separate appeal of the District Court's denial of intervention. In the Unions' pending appeal, which this Court has expedited, the Court will review the District Court's decision for abuse of discretion, which the well-reasoned 108-page decision of the lower court surely does not reflect.

The actual parties to this dispute have agreed to undertake the long-delayed consultative remedial process ordered by the District Court in August 2013, which will include various stakeholders, including the Unions themselves. This resolution is clearly in the public interest and yet the Unions continue to delay these efforts by

opposing the City's motion. Further, the Unions have made no showing to support their request to continue the stay of the District Court's August 2013 Orders - nor, in light of the stay factors, could they.

Accordingly, the Court should grant the City's motion dismissing its appeal and issue the mandate dissolving the stay.

FACTUAL AND PROCEDURAL BACKGROUND

The Court is already familiar with the factual and procedural background of this litigation and *Ligon*. The following points are relevant to this motion.

On November 22, 2013, a panel of this Court denied the City's motion to vacate the District Court's Liability and Remedial Orders and invited the parties to request remand "for the purpose of exploring a resolution." *Floyd*, Dkt No. 334; *Ligon*, Dkt. No. 238. This invitation was reiterated by the full Court three days later. *See Ligon v. City of N.Y.*, 743 F.3d 362, 364 (2d Cir. 2014). The parties conferred and agreed to limit the period of the court-appointed monitor required by the Remedial Order to three years, subject to negotiated definitions of "substantial compliance." The City then sought a remand to the District Court to memorialize the parties' agreement, which this Court ordered on February 21, 2014. *Id.* In the same order, the Court denied the request of the putative intervenors, the Unions, that their intervention motions be decided before remand, explaining that it was preferable "that the [intervention] motions be addressed in the District Court in the

first instance." *Id.* at 365 (citing *Drywall Tapers & Pointers of Greater N.Y., Local Union 1974 v. Nastasi & Assocs. Inc.*, 488 F.3d 88, 94 (2d Cir. 2007)).

On July 30, 2014, following supplemental briefing below, the District Court issued a comprehensive 108-page Opinion soundly rejecting the Unions' request to intervene, based on a fulsome review of the records in *Daniels*, *Floyd,* and *Ligon*, the legal authority cited by the parties and Unions as well as other relevant case law from this and other Circuits, and the factual underpinnings of the Unions' arguments. The Court found that (1) that the Unions' motions were untimely, (2) that they failed to show any protectable legal interest in opposing the district court's orders in this case, and (3) that the Unions lacked standing to pursue an appeal challenging those orders. *See Floyd v. City of N.Y.*, 08 Civ. 1034, 2014 U.S. Dist. LEXIS 104945 (S.D.N.Y. July 30, 2014) (Dkt. 466), slip op. at 2.

Correcting the Unions' "fundamental misstatement of the case law on post-judgment intervention," the court explained that timeliness is measured from the point when a putative intervenor has "actual or constructive notice" of potentially adverse proceedings. *Floyd*, slip op. at 23. The Court identified, in eighteen pages of factual analysis, numerous points since 1999 when the Unions—which did not seek to intervene until after the Court issued its Liability and Remedies Orders in August 2013—were put on actual or constructive notice that their interests were implicated. *Id*. at 29-46. The court also stressed that the Unions' delay was striking

given that "numerous stakeholders, including members of the New York City Council, civic groups, and the DOJ filed submissions with the Court before and after the *Floyd* trial." *Id.* at 19.

The Court found significant prejudice to both the plaintiffs, *id.* at 47, and the City, where the Unions seek "an appeal the City no longer wants to pursue in order to vindicate a policy the City no longer wants to implement," trenching upon the "City's right to settle a lawsuit or prosecute an appeal," and infringing "upon the City's prerogative to determine policing policy." *Id.* at 47-48.

On the legal interest question, the Court, following well-established law, found that the Unions "present[ed] no evidence of the 'serious reputational harm' that their members have suffered or an explanation of how the findings are 'highly injurious.'" *Id.* at 53. The Court rejected the notion that NYPD officers are tarnished by the Liability Order because it "rests on the flawed assumption that anonymous officers who have not taken part in this litigation have a reputational interest arising from the Court's finding against their employer"—as this was a *Monell* action attributing fault to the City, not to individual officers. *Id.* at 55. Recognizing that courts do not grant intervention based on such attenuated claims of reputational harm, the Court stressed that doing so here would invite "endless litigation whenever the City is sued for police misconduct." *Id.* at 63.

The Court also rejected the Unions' demand to intervene to appeal the

Remedy Order, because their "allegations regarding their collective bargaining interests are so conclusory as to evade any meaningful court analysis," and because they "overstate their rights and misapply" New York State Collective Bargaining Law. *See id.* at 68-74. The Court also stressed that, because the Remedial Order itself identifies the Unions as a critical stakeholder in the remedial process, they would have ample opportunity to present their views on any proposed reforms, which would be duly considered by the Court before such reforms are ordered. *Id.* at 107. This latter finding rendered the Unions' request to intervene in the remedy phase of the case functionally moot.

As for standing, recognizing the unprecedented nature of the Unions' request, *see id.* at 82, the Court detailed in 25 pages of analysis why the Unions lack any concrete injury attributable to any of the actual orders issued in *Floyd* and *Ligon*. *Id.* at 82-103.

In a separate order, the District Court approved the parties' proposed modification of the Remedial Order, *see id.* at 106, which would limit the period of the court-appointed monitor to three years, subject to stipulated definitions regarding the City's "substantial compliance" with the Remedial Order. On August 6, 2014, with Appellees' consent, the City moved this Court pursuant to Federal Rule of Appellate Procedure 42(b) to withdraw its appeal and to expedite issuing the mandate to restore the matter to the District Court. *Floyd*, Dkt. 484.

ARGUMENT

I. The Unions Have Not Shown Why the City's Motion To Dismiss Its Own Appeal Should Not Be Granted

The non-party Unions oppose the City's motion to voluntarily dismiss its own appeal without ever explaining why the Court should deny this routine procedural motion. Instead, the Unions seek to argue the merits of their intervention appeal. This is the wrong place and time for that argument. The established procedure—as followed by the panel thus far—is for the District Court to first decide the intervention motion, for the Unions to appeal the District Court's decision, which they have done, and for this Court to review that decision for an abuse of discretion. There is no merit to the Unions' misplaced opposition to the City's motion.

"A motion by the appellant to dismiss under [Federal Rule of Appellate Procedure] 42(b) 'is generally granted, but may be denied in the interest of justice or fairness.'" Charles Alan Wright & Arthur Miller *et al.*, *Federal Practice and Procedure* § 3988 (4th ed. 2014) (quoting *Am. Auto. Mfrs. Ass'n v. Comm'r, Mass. Dep't of Envtl. Protection*, 31 F.3d 18, 22 (1st Cir. 1994)). Where both parties assent, the motion is considered routine and regularly granted. *See Margulin v. CHS Acquisition Corp.*, 889 F.2d 122, 124 (7th Cir. 1989). None of the few rare grounds on which such motions have been denied are present here, *see Am. Auto.*, 31 F.3d at 23 (citing cases), nor do the Unions make such a claim.

The Unions' misplaced argument that they should be allowed to intervene is properly raised in their appeal of the District Court's denial of that motion. The Unions create confusion by conflating two procedurally distinct processes: their appeal of the denial of the intervention motion, and their opposition to the City's motion to withdraw. As this Court explained in *Drywall Tapers & Pointers of Greater N.Y., Local Union 1974 v. Nastasi & Assocs. Inc.*, 488 F.3d 88 (2d Cir. 2007), the "appropriate" procedure for resolving the intervention application is first, "to remand [the union]'s purported appeal . . . to the District Court to enable that Court, with its jurisdiction restored, to adjudicate the merits of [the] intervention motion." *Id.* at 95; *see also Marino v. Ortiz*, 484 U.S. 301, 304 (1988). "If that motion is denied, [the union] may appeal such a denial." *Drywall Tapers*, 488 F.3d at 95. On appeal, the lower court's decision is "reviewed under an abuse of discretion standard." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994); *see also Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 176 (2d Cir. 2001).[1]

Given this well-established procedure, the Unions' opposition to the City's dismissal motion is baseless, and appears instead to be a disguised effort to avoid the abuse-of-discretion standard of review of the District Court's intervention

[1] Both denial of intervention as a matter of right and as a matter of permissive intervention are reviewed for abuse of discretion. *Pitney Bowes*, 25 F.3d at 69; *NAACP v. New York*, 413 U.S. 345, 366 (1973); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 192 (2d Cir. 1978).

decision. This standard cuts hard against the Unions' likelihood of overturning the District Court's decision, which suggests why they have failed to acknowledge that standard in their briefs, and have taken the unusual position of opposing the City's voluntary dismissal motion. Allowing the Unions to prevent the City's Rule 42(b) dismissal would deviate completely from this Court's long-standing precedent. Accordingly, the Court should grant the City's motion to dismiss this appeal now.

II. The Unions Have Made No Showing Why the Stay Should be Continued

The stay entered by this Court on October 31, 2013, by its own terms, continues only until "disposition of the [City's] appeals" in *Floyd* and *Ligon*. *Floyd*, Dkt. 247, at 2. As the parties have now reached a full resolution of the City's appeals in both cases, the Unions are asking this Court to stay the District Court's Liability and Remedial Orders pending the disposition of *the Unions'* appeals of the District Court's order denying intervention. Thus, the Unions must meet the heavy burden of showing that a stay is justified. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009). However, the Unions have not addressed any of the four relevant stay factors—the absence of even one of which is fatal, *id.*—likely because they are aware that they could not make the necessary showing.

First, the Unions cannot make a "strong showing" that they are "likely to succeed on the merits" of their intervention appeal. *See id.* The District Court's 108-page intervention decision was based on extensive analysis, legal authority,

and review of the factual record, and this Court is limited to reviewing that decision for an abuse of discretion. For that reason, it seems, the Unions have avoided discussing the District Court's decision except in a single footnote. Even there they address only the aspect of the decision finding their intervention application to be untimely.[2] In any event, the District Court analyzed each of the relevant timeliness factors in-depth and correctly concluded that they all weighed against the Unions. Slip op. at 28-46. The Unions have not and cannot show that the District Court abused its discretion in concluding that their intervention was untimely.[3] Thus, the likelihood that the Unions will prevail on their appeal is nil.

The other stay factors also support dissolving the stay. The Unions cannot claim irreparable injury absent a stay because they can participate in the district court remedial process as stakeholders while their intervention appeal is pending. On the other hand, continuing the stay will substantially injure the actual parties, and the public interest lies squarely against continuing the stay. As the District

[2] A would-be intervenor must show timeliness of intervention, "an interest relating to the property or transaction" at stake, that "the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest," and that its "interest [is] not adequately represented by the other parties." *Pitney Bowes*, 25 F.3d at 70. The District Court found the Unions failed to establish any of these necessary elements, *see supra* pp. 3-4, and the Unions have not challenged the court's analysis.

[3] The cases cited by the Unions are unconvincing. Their principal case, *Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996), was decided on *de novo* review following the Fifth Circuit's unique circuit precedent because the lower court gave no reasons for its timeliness determination. *Id.* at 1000. In stark contrast, the District Court here gave extensive reasons for its timeliness decision.

Court explained, "plaintiffs face significant prejudice if [the Unions] are permitted to prolong the legal wrangling and further delay plaintiffs' hard-won relief." Slip op. at 47. As highlighted in recent events, the public has a compelling interest in ending unconstitutional and racially discriminatory law enforcement practices. The Mayor, the Public Advocate, and the City Council all agree.

In sum, the Unions have failed to make any effort to meet their burden to show that the stay should continue.

CONCLUSION

Based on the foregoing, the City's motion for voluntary dismissal of this appeal should be granted and the mandate issued forthwith, dissolving the stay.

Dated: New York, New York
August 18, 2014

Respectfully submitted,

/s/

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