IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DAVID FLOYD, et al.,	:	
Plaintiffs-Appellees,	:	Docket No. 13-3088
-against-	:	
CITY OF NEW YORK, et al.,	:	
Defendants-Appellants.	:	

MEMORANDUM OF LAW OF SERGEANTS BENEVOLENT ASSOCATION IN SUPPORT OF MOTION TO INTERVENE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Sergeants Benevolent Association hereby states that it is a non-stock, nonprofit corporation and, therefore, there are no parent corporations or publicly held corporations that own its stock.

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Pursuant to Federal Rule of Appellate Procedure 27, Proposed Intervenor Sergeants Benevolent Association (the "SBA") submits this memorandum of law in support of its motion to intervene in this matter as appellants. Appellant, the City of New York (the "City"), consents to the SBA's motion. Plaintiffs-Appellees oppose. The SBA has timely filed a Notice of Appeal with this Court, to which no party has objected.

I. INTRODUCTION

The SBA, a collective bargaining unit representing sergeants in the New York City Police Department (the "NYPD"), respectfully seeks to intervene in this matter as an appellant for the purposes of challenging the Southern District of New York's opinions dated August 12, 2013 (the "Liability Opinion" and the "Remedies Opinion"; collectively, the "Opinions"). On October 31, 2013, this Court properly stayed the proceedings in the district court and found that the district judge who authored the Opinions violated the Canon of Judicial Ethics by appearing partial in favor of the plaintiffs below.[1] The SBA, whose members are most immediately affected by the district judge's erroneous rulings and whose conduct was most heavily criticized in the district judge's findings regarding the

[1] In accordance with the practice that has been prescribed by both the Supreme Court and this Court, the SBA first timely moved to intervene in the district court matter. *See Drywall Tapers and Pointers of Greater New York, Local Union 1974 of I.U.P.A.T., AFL-CIO v. Nastasi & Assocs., Inc.*, 488 F.3d 88, 94 (2d Cir. 2007). As a result of this Court's October 31, 2013, Order, however, all proceedings in the district court matter have been stayed and, therefore, the SBA respectfully moves this Court directly in order to participate in this appeal.

constitutionality of certain stop and frisk encounters, satisfies the standards for mandatory intervention and, in the alternative, permissive intervention in this Court because the SBA's members have protectable interests in both of the Opinions. Those Opinions are legally and factually flawed and a dangerous judicial intrusion into the day-to-day law enforcement work performed by sergeants and police officers generally, and threaten to undermine the SBA's collective bargaining rights.

Moreover, the SBA's participation is critical now that it appears clear that the City, under Mayor-Elect Bill de Blasio, will not continue its own challenge of the fundamentally flawed Opinions. If the SBA is not permitted to intervene, no existing party will represent its interests and the merits of the Opinions may never be reviewed. The SBA should therefore be made a party to this appeal and permitted to present the Court with the reasons why the Opinions should be reversed.

II. BACKGROUND

The SBA is a an independent municipal police union whose membership consists of approximately 13,000 active and retired sergeants of the NYPD. *See* Affidavit of Edward D. Mullins ("Mullins Aff.") ¶ 2, Declaration of Courtney G. Saleski, Ex. A. The SBA is the collective bargaining unit for those sergeants in

their contract negotiations with the City. The SBA's central mission is to advocate for, and protect the interests of, its NYPD police sergeant members. *Id.* ¶ 3.

NYPD police sergeants are at the front line of police services in the City. Mullins Aff. ¶ 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. *Id.* ¶ 12.

In addition to supervisory responsibilities, a sergeant routinely performs field police work, which typically consists of relatively complex law enforcement activities with which only sergeants are entrusted. *Id.* ¶ 8. Some sergeants spend the entire work day in the field patrolling streets in their precincts, either in uniform or in plain clothes conducting surveillance. *Id.* ¶ 9. Sergeants also patrol in the field in cars, unmarked vans, on foot, and on horseback. *Id.* ¶ 10. They are directly dispatched to 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 also are

required to prepare various law enforcement reports and ultimately are responsible for all paperwork in their units. *Id.* ¶ 11.

The SBA is recognized by the City as the sole and exclusive collective bargaining representative for all employees of the NYPD with the title of sergeant.[2] Therefore, under the New York City Collective Bargaining Law ("NYCCBL"), the City is required to negotiate with the SBA on all matters within the scope of collective bargaining. N.Y. City Admin. Code § 12-307(4). This includes the "practical impact that decisions on [certain high-level policy matters left to the City's discretion] have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety." N.Y. City Admin. Code § 12-307(6)b.

In the matter below, the district court examined the constitutionality of a policing tool commonly referred to within the NYPD 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. *Floyd v. City of New York*, --- F. Supp. 2d ---, No. 09 Civ. 1034, 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013) ("Liab. Op."), Dkt. No. 373, 19-26. Plaintiffs in this matter (characterized by the

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

district 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. Liab. 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. *Id.* at 13-15. The Liability Opinion specifically mentions and criticizes sergeants by name, highlighting the role of sergeants both in carrying out and in supervising stop, question and frisk practices. *See* Liability Op. 125-26 n.463, 164, 142-43.

Also on August 12, 2013, the district court also issued the Remedies Opinion, which ordered a permanent injunction requiring the City to conform its stop, question and frisk practices to the U.S. Constitution, and ordered the appointment of an independent Monitor to oversee the implementation of reforms that would bring the stop and frisk practices into constitutional compliance. *Floyd v. City of New York*, --- F. Supp. 2d ---, Nos. 08 Civ. 1034, 12 Civ. 2274, 2013 WL 4046217 (S.D.N.Y Aug. 12, 2013) ("Remedies Op."), Dkt. No. 372, 9-13. The Remedies Opinion also contains specific statements and findings regarding sergeants and supervising officers generally. *See* Remedies Op. 23-24, 27.

On August 16, 2013, the City filed a Notice of Appeal of the Opinions. the "Appeal"). *Floyd* Notice of Appeal, Dkt No. 379. On September 11, 2013, the SBA timely—within the 30-day period for appealing the Opinions, *see United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977)—moved to intervene in the district court matter for the purposes of both appealing the Opinions and participating in the remedial proceedings and filed a Notice of Appeal. *Floyd* Dkt. Nos. 387, 388. The Appellees opposed and the City consented to the motion. *Floyd* Dkt. Nos. 412, 414.

On September 23, 2013, the City moved this Court to stay all proceedings in the district court. Dkt. No. 72. On October 31, 2013, this Court granted the City's motion for a stay. Dkt. No. 244. In granting the motion, this Court "stay[ed] all proceedings" pending "further action by the Court of Appeals on the merits of the ongoing appeals." *Id.* Accordingly, the district court cannot take action on the SBA's pending motion to intervene. In the same Order, this Court also directed the removal of the district court judge from these proceedings for violating the Code of Conduct for United States Judges. *Id.*

On November 5, 2013, Public Advocate Bill de Blasio was elected Mayor of the City. Mayor-Elect de Blasio previously has stated his intention to abandon the appeal, has publicly supported the district judge's decision below, and has even

filed a brief supporting the Appellees' opposition in this Court to the City's motion for a stay. *See Floyd* Dkt. No. 175.

III. ARGUMENT

A. Intervention Directly in This Appeal is Appropriate.

This Court has the authority to permit the SBA's intervention in this Appeal. *Drywall Tapers and Pointers of Greater New York, Local Union 1974 of I.U.P.A.T., AFL-CIO v. Nastasi & Assocs., Inc.*, 488 F.3d 88, 94 (2d Cir. 2007) ("[T]here is authority for granting a motion to intervene in the Court of Appeals.") (citing *Bates v. Jones*, 127 F.3d 870, 873-74 (9th Cir. 1997) and *Hurd v. Illinois Bell Telephone Co.*, 234 F.2d 942, 944 (7th Cir. 1956)). While the *Drywall Tapers* court noted that "it will normally be the better practice for a district court to rule on a pending motion to intervene" before the proposed intervenor is allowed to participate in the appeal, *id.*, the SBA has followed that practice here, and has moved this Court for intervention only because the district court matter is stayed, including any ruling by the district court on the SBA's pending motion to intervene in the proceedings below. The SBA thus has no alternative but to seek to intervene directly in this matter.

Intervention by the SBA here also will promote judicial economy. First, this Court already is familiar with the issues presented in this matter. Second, permitting this intervention will avoid the piecemeal litigation that would result if

the City dismisses the appeal, the matter is returned to the district court for determination of the SBA's intervention motion, and a subsequent appeal ensues. Moreover, permitting intervention will ensure continuance of this appeal, despite Mr. de Blasio's indication that his administration will not pursue the appeal on behalf of the City.

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

Non-party intervention on appeal is governed by the same considerations set forth in Rule 24. *See Int'l Union Auto, Aerospace & Agric. Implement Workers of Am. v. Scofield*, 382 U.S. 205, 217 n.10 (1965) ((“[T]he policies underlying intervention may be applicable in appellate courts. Under Rule 24(a)(2) or Rule 24(b)(2), we think the charged party would be entitled to intervene.”). Rule 24(a) provides for non-party intervention 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. *See, e.g., United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (“A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the

courts.") (internal quotation marks and citation omitted). Here, the SBA satisfies the requirements of Rule 24(a) for intervention in this matter as of right.

1. 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 the 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). In evaluating the timeliness of a post-judgment application to intervene for the purposes of participating in the appellate phase of a litigation, "[t]he critical inquiry . . . is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *McDonald*, 432 U.S. at 395-96. Courts frequently permit intervention in a district court matter after the issuance of a judgment in circumstances where the party seeking to intervene did not have notice of its interest in the litigation until after the court issued a judgment, and where the party seeking to intervene will be the only party prosecuting an appeal. *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004) ("Post-judgment intervention is often permitted . . . where the prospective intervenor's interest did

not arise until the appellate stage[.]"), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009); *McDonald*, 432 U.S. at 394 ("[A]s soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests.").

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.*

The SBA acted promptly by first filing a motion to intervene with the district court within the 30-day period for filing a Notice of Appeal (and simultaneously filing a Notice of Appeal on its own behalf). If the motion to intervene is filed within the 30-day period for filing a notice of appeal, courts generally consider it timely. *See 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."); *Drywall Tapers*, 488 F.3d 88, 95 (2d Cir. 2007) (same); *see also Yniguez v.*

Arizona, 939 F.2d 727, 734 (9th Cir. 1991) (noting that the "general rule [is] that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal").

That the SBA filed this motion promptly after this Court's Order granting a stay of proceedings below further supports a finding that it is timely. *See Acree v. Iraq*, 370 F.3d 41, 49-50 (D.C. Cir. 2004) ("Post-judgment intervention is often permitted . . . where the prospective intervenor's interest did not arise until the appellate stage. . . . In particular, courts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court[.]"). The SBA did not have reason to intervene directly in this Court until after the stay was granted and the district court divested of jurisdiction. Therefore, it has acted promptly in the circumstances.

The SBA also acted promptly after the election of Mr. de Blasio, who promises to discontinue the City's appeal. 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 may not appeal the judgment, its motion for leave to intervene is timely. *Acree v. Iraq*, 370 F.3d 41, 49-50 (D.C. Cir. 2004) ("Post-judgment intervention is often permitted . . . where the prospective intervenor's interest did not arise until the appellate stage. . . . In particular, courts often grant post-judgment motions to intervene where no existing

party chooses to appeal the judgment of the trial court[.]"); *see Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (permitting intervention when proposed intervenor's interest did not crystallize until after government party decided not to pursue appeal). Therefore, this motion is timely.

Finally, the SBA's intervention would not prejudice the existing parties, and denying intervention would prejudice the SBA. Because the appellate phase of this case is only beginning, there can be no prejudice to the existing parties. The SBA seeks the right to participate only in challenging the Opinions in this Court, which will not prejudice any party. *See Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996) (permitting police unions to intervene prospectively in civil rights case when motions to intervene were filed 37 and 47 days after publication of consent decree). On the other hand, if the SBA is excluded from this appeal, it will be severely prejudiced because it will be foreclosed from presenting to this Court the reasons why the Opinions are erroneous, shutting it out of a process that will address and potentially change the way in which sergeants do their jobs, and thereby directly affecting its members' terms and conditions of employment.

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

The SBA has direct and protectable interests in the matters decided in both the Liability and Remedies Opinions. First, the Liability Opinion characterized

various actions of SBA members as violating the U.S. Constitution, and then proceeded to articulate standards for constitutional stops and frisks that the SBA believes are in many respects vague, ambiguous, or difficult to apply in practice. Liability Op. 71-98; 181-92. The Liability Opinion also identifies sergeants by name, asserts that they are untruthful, and concludes that numerous stops that they supervised, approved, or conducted broke the law. *See* Liability Op. 125-26 n.463, 164, 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. *See United States v. City of Los Angeles*, 288 F.3d 391, 404 (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"). These aspects of the Liability Opinion, if affirmed, 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. Thus, the SBA has a

strong protectable interest in the merits of this action and must participate to defend its members with respect to their past conduct, to help shape better standards to govern future conduct, and to gain the clarity necessary for the sergeants to protect themselves and the public.

Second, the SBA has multiple, direct, protectable interests affected by the Remedies Opinion in this matter. Like the Liability Opinion, the standards for constitutionality articulated by the Court in the Remedies Opinion directly affect how the SBA members conduct the technique of stop, question and frisk; how they review their supervisees' implementation of that technique; and how they will train other officers in that technique. In this respect, the Remedies Opinion directly affects the day-to-day realities of SBA members in the field—including matters that bear on officer and public safety, resulting in the SBA's direct interest in the Remedies Opinion.

In addition, the SBA has an interest in this appeal because the Remedies Opinion allows the district court to set employment practices that would otherwise be subject to bargaining under state law. The SBA has state-law collective bargaining rights under the NYCCBL, N.Y. City Admin. Code § 12-307(6), which gives the SBA a protectable interest in this appeal. *See City of Los Angeles*, at 399-400 ("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. . . . These rights give it an interest in the consent decree at issue."); *see also City of Watertown v. State of New York Pub. Emp't Relations Bd.*, 95 N.Y.2d 73, 78 (2000) (noting that public employers have duty "to bargain in good faith concerning all terms and conditions of employment"). The Remedies Opinion, for example, imposes mandatory training directed by the court that will become a qualification for continued employment which, absent court direction, would be treated as a routine subject of collective bargaining. *See City of New York v. Uniformed Firefighters Ass'n*, Decision No. B-43-86, 37 OCB 43, at 15 (BCB 1986); *Uniformed Firefighters Ass'n* v.*City of New York*, Decision No. B-20-92, 49 OCB 20, at 8 (BCB 1992). Moreover, the mere "threat" that collective bargaining rights will be impaired creates a substantial interest, and the SBA is "not required to prove with certainty that particular employees would lose contractual benefits." *United States v. City of Hialeah*, 140 F.3d 968, 982 (11th Cir. 1998). Many of the proposed remedies predictably will have an impact on the SBA's collective bargaining rights (if the SBA is not involved) regarding issues that have a practical impact on the SBA's members' workload, staffing, and safety (among other things), including changes to training, forms and other paperwork, discipline, and supervision (among other things). *See* N.Y. City Admin. Code § 12-307(6)b. Those aspects of the Remedies Opinion that affect the SBA's collective bargaining

rights demonstrate the SBA's direct, protectable interest here in minimizing the erosion of the SBA's rights.

Without the participation of the SBA, these proceedings will undermine the SBA's collective bargaining rights. The ultimate result of this matter 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 the mandated reforms without the SBA's involvement or input. *E.E.O.C. v. A.T. &T. Co.*, 506 F.2d 735, at 742 (3d Cir. 1974); *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").

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

The inadequacy requirement of Rule 24(a) "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers Of Am.*, 404 U.S. 385, at 538 n.10 (1977); *see also City of Los Angeles*,

288 F.3d at 39. Here, the interests of the SBA will not be adequately represented by any current party to the litigation.

It is unlikely that the City will make any of the SBA's arguments because the Mayor-elect has filed court papers in support of the Appellants, has stated that the district court's order was correctly decided, and has stated that he will dismiss the appeal upon assuming office. Representation is inadequate when an existing party has chosen not to pursue an appeal and a non-party intervenes for the purpose of prosecuting the appeal. *Yniguez*, 939 F.2d at 730 ("Having decided not to appeal the district court's decision on the merits, the Governor inadequately represents the interests of [proposed intervenors]"). That is because "no representation constitutes inadequate representation." *Id.* at 737; *see also Acree*, 370 F.3d at 50 ("In particular, courts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court.").

Moreover, regarding collective bargaining interests, the interests of an employer of members of a collective bargaining unit, such as the City, are not aligned with its employees, because the two parties are in naturally adversarial stances on many issues relating to the members' terms and conditions of employment. The City agrees. *See Floyd* Dkt. No. 414 ("[r]ecognizing that the interests of the City and the Unions may differ on collective bargaining issues").

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

In the alternative, this Court should find that the SBA meets the standard for permissive intervention, which may be granted in the court's discretion. 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)) (internal quotation marks omitted).

In the event that the Court is inclined not to grant the SBA's application for intervention as of right, for the reasons stated above, the SBA meets the standard for permissive intervention and should thus be permitted to intervene. The SBA members' conduct is directly at issue in the Liability Order and the Remedies Opinion, if implemented, would directly affect both their day-to-day activities and

their collective bargaining rights. Additionally, the SBA's participation would not unduly delay or cause prejudice to any parties in this matter.

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).[3]

Dated: New York, New York.
November 12, 2013

Respectfully submitted,

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[3] 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," since the SBA now seeks to intervene directly in an appeal, that requirement is inapplicable here.