UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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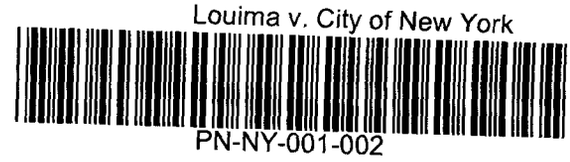
ABNER LOUIMA and MICHELINE LOUIMA,

Plaintiffs,

-against-



98 CIV 5083 (SJ)

THE CITY OF NEW YORK (CITY); THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK (PBA); individually and in their official capacity as New York City Police Officers - JUSTIN VOLPE, CHARLES SCHWARZ, THOMAS BRUDER, SERGEANT MICHAEL BELLOMO, FRANCISCO ROSARIO, ROLANDO ALEMAN, PETER BLAICH, JOSEPH O'BRIEN and JEREMIAH DALY; individually, in their official capacities as New York City Police Officers, and as PBA Delegates -THOMAS WIESE and TIMOTHY LEE; in their official capacities as President of the PBA - LOUIS MATARAZZO and PATRICK LYNCH; individually, and in their official capacity as New York City Police Officers, and in their official capacity as agents of the PBA - MICHAEL IMMITT and ANTHONY ABBATE; individually and in their official capacity as employees of the Emergency Medical Service (EMS) for the City of New York - WILLIAM PAGAN and FRANK BIRNBAUM; individually and in their official capacity, JOHN DOES, police officers and non-uniformed employees of the New York City Police Department, the identity and number of whom is presently unknown; individually and in their official capacity as New York City Police Officers RICHARD ROES, supervisory police officers of the City of New York, the identity and number of whom is presently unknown; and individually and in their official capacity as police officers and/or agents for the PBA - WILLIAM WOES, agents for the PBA, the identity and number of whom is presently unknown,

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW
IN RESPONSE TO THE PBA'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Although couched in the familiar language of Rule 12(b)(6) and replete with requisite boilerplate concerning "bald" and "conclusory" allegations, the Memorandum of Law ("Memorandum") submitted by defendants PBA, et al. in this case is an extraordinary document.[1] At bottom, the PBA defendants argue that the facts set forth in the complaint – describing the PBA's policy and custom of subverting the criminal and civil justice system on behalf of violent police officers and its specific actions aimed at assuring that Mr. Louima's case would never see the light of day and that he would endure further pain and humiliation for having pursued legal remedies – are "not properly redressed by the federal civil rights laws." Memorandum at 3. Both the general practices and the specific acts of perjury, subornation, and intimidation set out in the complaint, the PBA assures the Court, are "necessary" incidents of its role as collective bargaining agent for its police officer members. Id. at 11. As will be demonstrated below, these assertions are no less an affront to settled principles of civil rights law than they are to common sense and common decency.

As will also become clear, the facts alleged in the complaint – which, consistently with the notice pleading contemplated by Fed. R. Civ. P. 8(a), constitute only a small selection of what emerged in the course of three criminal trials -- have not been presented in order to "'shock,'" Memorandum at 21 (quoting Barr v. Abrams, 810 F.2d 358, 363 (2nd Cir. 1987)) (though it is hard to present them in a way that might not provoke that reaction). Rather, they

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[1]The PBA seeks dismissal of all claims against the union, its past and present presidents, and individual defendants Immitt and Lee (defendants Abbate and Wiese, though sued, in part, based on their actions on behalf of the PBA are not signatories to the motion, nor does the motion address claims against "William Woe" defendants). Except where specifically indicated, this Memorandum will refer to the movants – union and individual – as "the PBA."

have been set out so as to demonstrate the patent illegality of Defendants' conduct and Mr. Louima's plain entitlement to redress from the PBA for its central, culpable role in the constitutional deprivations to which he has been subjected.

At the outset, the PBA's Motion fails to clear even the lowest hurdle confronting a defendant seeking dismissal of a federal complaint: it does not attempt to demonstrate that the factual allegations of the Complaint do not state a claim. Rather then accept as true – as any Rule 12(b)(6) movant must, see, e.g., King v. Simpson, 189 F.3d 284 (2nd Cir. 1999) – the allegations in Mr. Louima's civil rights complaint, the PBA seeks to respond to a different and tellingly incomplete set of "facts." Thus, where the complaint alleges that defendant Schwarz "helped restrain Louima while Volpe took a stick and shoved it into Mr. Louima's rectum," ¶6, that "Schwarz and Volpe administered summary punishment," ¶42, and that "Schwarz, attempting to silence Mr. Louima's cries of pain, placed his booted foot on Mr. Louima's face," ¶44, the PBA characterizes the complaint as alleging a "real . . . injury stemming from an act committed by a police officer," Memorandum at 1 (emphasis supplied); id. at 3 ("Louima was assaulted and sodomozied by defendant Justin Volpe"), and insists that Mr. Louima "departs from the realm of reality" in asserting that the actions described were not those of "one depraved individual." Memorandum at 12 (emphasis supplied). And where the complaint states that Mr. Louima "was beaten severely by Schwarz and Wiese about the face and body," ¶37 (emphasis supplied), the Memorandum offers a carefully abbreviated summary of that paragraph, characterizing it as alleging that "Louima was beaten." Id. at 3.[2]

[2]Nor does this exhaust the evidence of Defendants' obtuse approach toward the contents of the complaint. Their "statement of facts" – offered in support of an argument that the complaint's allegations are insufficient contains other indications that relevance to Mr. Louima's claims against

But mere inconsistency with conventions of federal pleading is not the most troubling aspect of the PBA's submission. What makes the Memorandum especially unsettling is that the facts the PBA takes pains to ignore are ones that have already been established, by proof beyond a reasonable doubt, in the course of three criminal trials, see, e.g., United States v. Bruder, 103 F. Supp. 155, 177 (E.D.N.Y. 2000) ("[t]he jury found that Schwarz helped Volpe to sodomize Louima with the admitted purpose of humiliating him") – and that the omissions come in a

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them was a criterion for exclusion from Defendants' summary.

Among the allegations the PBA would have the Court ignore for purposes of deciding its motion are that defendant Wiese was "at all relevant times . . .an agent of the PBA, acting under its directives," ¶26.d; "that one or more of these PBA agents invoked their 5th Amendment right against self incrimination" in testifying before matters at issue here (¶77); that Defendant Immitt "testified falsely," (¶78); the basement meeting was convened by "defendant Wiese, in his capacity as PBA delegate"(¶72); see also ¶83 c.; and the discussion of "ways to intimidate Louima" was not confined to "the officers," Memorandum at 5, but rather is believed to have included the "participants" (¶72), including Immitt; the PBA maintains "policies, customs and practices of suppressing confessions and admissions of criminal conduct committed by police officers, of discouraging police officer witnesses from doing their duty, and of condoning and facilitating false statements to investigators" (¶79); there were "scores of phone calls between and among the officers involved and the PBA agents" (¶83.d); the PBA "intimidat[ed] and defam[ed] those individuals who did answer investigators' questions (¶94.d); the PBA "circulat[ed] false and defamatory information concerning Mr. Louima, in an effort to discourage him from telling authorities and courts the truth about what was done to him and to diminish the credibility of any information and testimony he did give" (¶95. e); the "PBA, through its agents, continues to deter and discourage police officer witnesses from testifying truthfully in federal court" (¶132); "PBA and other unions 'put[] immense pressure on the guiltless officer – who may want to answer questions – not to stray from the common practice of abiding by union advice and remaining silent'; that 'PBA delegates and attorneys help reinforce the code of silence,' and that 'the PBA often acts as a shelter and protector of the corrupt cop, rather than as a guardian of the interests of the vast majority of its membership, who are honest police officers.'" (¶164) (quoting Mollen Commission); and "it has been [the PBA's] standard operating procedure to abet and orchestrate the obstruction of justice in even the most notorious instances of police misconduct,"(¶170) – including in the notorious police killing of Anthony Baez (¶171) and others. See generally ¶173 ("It is the custom and practice of the PBA to treat those officers who want to come forward – and not those who violently abuse citizens – as wrongdoers"); compare also Memorandum at 18 (asserting that respondeat superior principles are inapplicable to § 1985 claim here because "plaintiffs seek[] only money damages from the PBA" with complaint at 55 (plaintiffs request that the Court award "equitable relief against the PBA").

pleading responding to a complaint seeking to hold the PBA accountable for, among other things, a continuing effort to suppress the true facts concerning Mr. Louima's torture. See ¶¶112, 135, 141. Nor is it plausibly a coincidence that the facts which the PBA cannot bring itself to accept even for pleading purposes are the very same ones that the several of the individual defendants have been sentenced to substantial terms of imprisonment for having denied.[3]

But while disregard for this basic 12(b)(6) requirement is probably the most jarring of the defects in Defendants' pleading – and should suffice in itself to defeat their demand for dismissal – the Memorandum's unreliability does not stop with its factual recitation. Whatever surface plausibility the PBA's various assertions concerning causation, legal duty, and state action might have is obtained by distorting – or simply ignoring – applicable decisions of the Supreme Court and the Second Circuit, by attacking straw-man legal theories the PBA mistakenly ascribes to Mr. Louima's complaint, and by diverting attention to legal principles that have scant relevance to this case.

Thus, for example, the Memorandum labors to show that the PBA is not a "governmental entity" – a fact that is not in dispute – but nowhere reckons with the established principle that a non-governmental actor may be held fully accountable under Section 1983 on proof that it was a "wilful joint participant" – as the PBA surely stands accused of having been – in government action depriving an individual of his federal rights, Adickes v. S. H. Kress & Co., 398 U.S. 144,

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[3]As the complaint illustrates, saying that Mr. Louima's charges "depart from reality" is a familiar tactic in Defendants' arsenal – and those words are by no means the harshest ones they have directed at Mr. Louima. For purposes of a motion to dismiss – and beyond, see. Emich Motors v. General Motors, 340 U.S. 558, 568-69(1951) – prudence suggests that the Court proceed on the assumption that, in instances of conflict, the verdicts of juries convinced unanimously beyond reasonable doubt are a more reliable indicator of "reality" than is whatever version of the events of 1997 that the PBA may now be advancing.

152 n.7 (1970); Dwares v. City of New York, 985 F.2d 94, 98 (2nd Cir. 1993); see also Hughes v. PBA, 854 F.2d 876, 880-81 (2nd Cir. 1988). And the PBA discusses at some length (though not correctly) the common law rule that proximate causation requires more than "furnishing a condition" that permits a tort to occur, see Memorandum at 21-22, without even bare acknowledgment of the abundant case law specifically teaching that, for Section 1983 purposes, a policy of deliberate indifference to preventable and plainly foreseeable constitutional deprivations can establish the necessary link. See, e.g., Fiacco v. City of Rensselaer, 783 F.2d 319, 326 (2nd Cir. 1986) (explicitly rejecting "suggestion that a municipal policy that . . . merely permits or tolerates unconstitutional acts by city employees cannot be the basis for . . . liability under § 1983"). And the PBA cites a patchwork assortment of state law tort cases as supporting its assertion that labor unions must be treated differently from other private wrongdoers under section 1983, see Memorandum at 16, when, in fact, the case law makes clear that they, no less than other private actors, are subject to the legal obligation, imposed by section 1983, to refrain from participation in unconstitutional state action. See, e.g., Andrews v. Education Ass'n of Cheshire, 829 F.2d 335 (2d. Cir. 1987).

Finally, the PBA would have the Court dismiss Mr. Louima's case on the specious ground (a) that his complaint seeks to hold the PBA liable simply because those who brutally attacked him under color of law happened to be union members or (b) that it treats the mere fact of their municipal employment as sufficient to render union officials state actors. In so arguing, Defendants are simply striking out at arguments of their own imagining. Any fair reading of the complaint – let alone the indulgent one contemplated by Federal Rule 12(b)(6) – makes clear that no such rule of automatic liability is asked for, nor is one needed to hold the PBA and its

agents responsible for the consequences of the union's active, willing involvement in a deeply ingrained municipal custom of protecting police officers from criminal and civil rights liability for violent deprivations of innocent citizens' constitutional rights.

I. Controlling Principles

A. Substantive Law

42 U.S.C. § 1983 provides that :

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

It is axiomatic that section 1983 does not create substantive rights beyond those protected by the Constitution and laws of the United States. Its purpose is to provide a remedy to those who (1) are deprived of rights (2) under color of law. See Singer v. Fulton County Sheriff, 63 F.3d 110 (2nd Cir. 1995).

In Monroe v. Pape, 365 U.S. 167, 172-83 (1961), the Supreme Court held that the "color of law" requirement does not limit § 1983 liability to defendants whose actions are authorized by law, and the Supreme Court's decisions have made equally clear that whether particular conduct was under color of law fact cannot be settled by the fact that the defendant is or is not an officer of the state. See Adickes, 398 U.S. 144 (1970); Terry v. Adams, 345 U.S. 461 (1953). Adickes specifically recognized that when a private person acts pursuant to a State law, policy or custom – i.e. a "practice[] . . . so permanent and well settled" as to have the force of law, 398 U.S. at 167-68 – he acts under color of law.

Adickes also established that

> [p]rivate persons, jointly engaged with state officials in the prohibited action are acting "under color of law for purposes of [Section 1983]." To act 'under color' of state law does not require that the accused be an officer of the State. It is enough that he is a wilful participant in joint activity.

398 U.S. at 152 (quoting United States v. Price, 383 U.S. 787, 797 (1966)). And other decisions have made clear that the actions of individuals who are not officers of the state may also give rise to § 1983 liability when the individual "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)); see also Lugar v Edmondson Oil Co., Inc., 457 U.S. 922 (1982); see generally Anaya v. Crossroads Managed Care Sys., 195 F.3d 584, 596 (10th Cir. 1999) ("If any one of the tests indicates a party is a state actor, that alone is sufficient to find the party a state actor"); Lugar, 457 U.S. at 939 (whether a party acts under color of law is a "necessarily fact-bound inquiry").

In Monell v. New York City Department of Social Servs., 436 U.S. 658 (1978), the Supreme Court, after canvassing the legislative history of the 1871 Act, overruled prior precedent and held that municipalities may be sued under section 1983 based on the unconstitutional acts of their employees and agents. Such suits, the Court held, however, may not proceed based on a theory of respondeat superior. Instead, the plaintiff must show that the municipal defendant was itself a participant in the deprivation, by showing that the challenged actions were pursuant to or the result of a municipal policy or custom.

The Court has also affirmed what the disjunctive language of § 1983 would suggest: that a defendant's responsibility under § 1983 does not depend on a plaintiff's proving the existence

of a formal municipal policy condoning unconstitutional conduct. See Monell, 436 U.S. at 691 (municipality must answer in § 1983 for actions pursuant to a "governmental custom even though such custom has not received formal approval"); Adickes, 398 U.S. at 168; Vann v. City of New York 72 F.3d 1040, 1049 (2nd Cir. 1995). Indeed, defendants may be held liable based on customs that directly contradict their official pronouncements of governmental policy. See, e.g., City of St. Louis v. Prapotnik, 485 U.S. 112, 131 (1985) (existence of anti-discrimination policy would not immunize municipality against liability for discrimination); White-Ruiz v. City of New York, 983 F. Supp. 365, 392 & n.19 (S.D.N.Y. 1997); see generally Myriam E. Gilles, Breaking The Code of Silence: Rediscovering "Custom" in Section 1983, 80 B.U. L. REV. 17 (2000).

While a defendant's negligence will not give rise to liability under § 1983, proof of deliberate indifference to a foreseeable constitutional violation will suffice to establish legal responsibility. City of Canton v. Harris, 489 U.S. 378, 388 (1989); see also Dodd v. City of Norwich, 827 F.2d 1, 5 (2nd Cir. 1987)(discussing requirement that plaintiff link challenged policy to injury); see Gentile v. Suffolk County, 926 F.2d 142, 152-53 (2nd Cir. 1991) (same); Jett v. Dallas Ind. Sch. Dist., 491 U.S. 701, 737 (1989) ("it is for the jury to determine whether the deprivation of rights at issue . . . [was caused by] acquiescence in a long-standing practice or custom which constitutes the 'standard operating procedure' of the local government entity").

Finally, while the legal standards governing the types of cases are not precisely identical, courts have established that the same factors – proof of (1) custom or policy and (2) deliberate indifference – are the touchstones for deciding when a government employee's supervisor or a private defendant may be held accountable under the statute for the unconstitutional conduct of

an employee, see Memorandum at 17 (citing Austin v. Paramount Parks, Inc., 195 F.3d 715 (4th Cir. 1999) (private defendant); Spencer v. Doe, 139 F.3d 107, 112 (2nd Cir. 1998) (supervisor); cf. Doe v. Taylor Ind. Sch. Dist., 15 F.3d 1443, 1453 (5th Cir.) (en banc) "[t]he legal elements of an individual's supervisory liability and a political subdivision's liability, however, are similar enough that the same standards of fault and causation should govern").

Although private defendants who conspire with state officers to take unconstitutional action may be held accountable for the harm that action causes, section 1983 does not provide a distinct cause of action based on inchoate unconstitutional action, see Hampton v. Hanrahan, 600 F.2d 600, 622 (7th Cir. 1979) ("mere proof of a conspiracy is insufficient to establish a section 1983 claim"), rev'd with respect to attorney's fees, 446 U.S. 754 (1980). Rather, proof of such concerted action can establish that a challenged deprivation of rights was under the "color of law," and § 1983 conspiracy liability is a subset of the broader principle – familiar in civil law – that an individual may be held to answer for the harm caused by wrongful conduct in which he was a wilful participant. See id. at 627 (liability for "joint action" and "conspiracy" both derive from the rule that "when persons 'who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit are equally liable with him'") (quoting W. PROSSER, TORTS (4th ed. 1971) at 292). Thus, proof of conspiracy is"[o]ne way to establish joint action," Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989) -- it is not a mandatory prerequisite to liability. Accord Lugar, 457 U.S. at 943 n* (Burger, C.J., dissenting) (noting that Court had found private actor liable under joint participation theory without any "allegation of collusion or conspiracy with state actors").

Moreover, even in cases where § 1983 liability is premised exclusively on conspiracy allegations, there is no need to prove that there was an overt agreement, see LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 427 (2nd Cir. 1995) ("tacit understanding" suffices), nor need the agreement's existence be proved through direct evidence, see Hampton, 600 F.2d at 627; Adickes, 398 U.S. at 155 (reversing summary judgment notwithstanding plaintiff's conceded lack of knowledge "of any communication between [the allegedly conspiring parties]"), nor need the plaintiff show that the various participants "agreed on the details of the conspiratorial scheme or even know who the other conspirators are" so long as they "underst[ood] the general objectives of the scheme, accept[ed] them, and agree[d], either explicitly or implicitly, to do [their] part to further them," Jones v. City of Chicago, 856 F.2d 985, 992 (7th Cir. 1988). Rather, the cases make clear that existence of an "understanding" suffices – one which may be inferred from the "sequence of events," Adickes, 398 U.S. at 157; see also Kunik v. Racine County, 946 F.2d 1574, 1580 (7th Cir. 1991) ("the agreement need not be overt, but if not, the acts alleged must be sufficient to raise an inference of mutual understanding"); Hampton, 600 F.2d at 627 (holding that § 1983 conspiracy liability can be based on defendant's lending "'aid or encouragement to the wrongdoer, or ratify[ing] and adopt[ing] his acts'") (quoting W. PROSSER, supra); Pangburn v. Culbertson, 200 F.3d 65, 72 (2nd Cir. 1999) (noting that "[§ 1983 conspiracies are by their very nature secretive operations, and may have to be proven by circumstantial, rather than direct, evidence") (internal quotation omitted).[4]

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[4]"The question whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can 'infer from the circumstances that the alleged conspirators . . . reached an understanding' to achieve the conspiracy's objectives." Hampton, 600 F.2d at 621 (quoting Adickes, 398 U.S. at 158-59); cf. Abbott v. Latshaw, 164 F.3d 141 (3rd Cir. 1998) (at the motion to dismiss stage, "no more" than compliance with "the standards

* * *

Defendants' contentions concerning who may "properly" be sued for violating Mr. Louima's civil rights, Memorandum at 3, and what federal civil rights laws "contemplate," Memorandum at 14, must be evaluated in light of the text, structure, and purposes of those statutory provisions. See generally Price, 383 at 801(courts must accord Reconstruction Era civil rights statutes "a sweep as broad as [their] language"); Great American S & L v. Novotny, 442 U.S. 366, 381 (1979) (Powell, J., concurring) (construction of those statutes must take account of the "the purpose, history, and common understanding" of their terms).

As the Supreme Court has explained, the principal concern of the statute now codified at 42 U.S.C. §§ 1983, 1985 & 1986 – the Ku Klux Klan Act of 1871 – was the inability and unwillingness of governments in the southern states to secure the federal rights guaranteed newly freed African Americans and their political allies, in the face of organized efforts (by the Klan and others) to subvert the administration of justice and interfere with federal elections, federal courts, and federal officials seeking to subject wrongdoers to the rule of law. See Briscoe v. LaHue, 460 U.S. 325 (1983).

In Briscoe, the Court thus described the congressional debates leading up to the enactment of the 1871 Act:

> Hours of oratory were devoted to the details of Klan outrages – arson, robbery, whippings, shootings, and murders . . . .These acts of lawlessness went unpunished, legislators asserted, because Klan members and sympathizers controlled or influenced the administration of state criminal justice. In particular, it was contended that Klan members were obligated, by virtue of their membership in the organization, to protect fellow members who were charged with criminal activity. They had a duty to offer themselves for service on grand

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of notice pleading" is required of a plaintiff alleging a § 1983 conspiracy).

> and petit juries and to violate their juror's oath by refusing to indict or convict regardless of the strength of the evidence. They were also bound to appear as witnesses, and again to violate their oaths by committing perjury, if necessary, to exculpate their Klan colleagues.[5]
>
> It is clear from the legislative debates that, in the view of the Act's sponsors, the victims of Klan outrages were deprived of "equal protection of the laws if the perpetrators systematically went unpunished."[6]

460 U.S. at 338.

B. The Rule 12(b)(6) Standard

A motion to dismiss should be granted only if it appears "beyond doubt" that there is "no set of factual circumstances" that would enable the plaintiff to sustain a cause of action. Because the Federal Rules do not require the plaintiff to plead evidence, see Fed. R. Civ. P. 8(a), and because the complaint necessarily is filed without the benefit of discovery, a court evaluating a Rule 12(b)(6) motion must accept as true the allegations of the complaint and afford the plaintiff the benefit of all reasonable inferences from those factual allegations. Hernandez v. Coughlin, 18 F.3d 133, 136 (2nd Cir.), cert. denied, 513 U.S. 836 (1994) Cf. Fed. R. Civ. P.

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[5]The Supreme Court here included a footnote noting that the Act's supporters in Congress had repeatedly referred to testimony before an investigatory committee of two former Klan members, who described a Klan oath binding its members to commit perjury. See 460 U.S. at 337 n.18 (citing Cong.Globe, 42d Cong., 1st Sess. 152, 158, 173, 201, 320-321, 322, 340, 437, 439, 443-444, 457, 458, 503, 516, 518, 653, 654, 687 (1871)).

[6]In Briscoe, the Court ultimately held that § 1983 did not abrogate traditional absolute immunity from civil liability based on perjured statements presented by witnesses in criminal trials. In explaining this holding (which it expressly limited to in-court testimony offered at trial), the Court stressed that the congressional deliberations had been concerned virtually exclusively with the problem of false exculpatory testimony – not the use of perjured testimony to wrongfully convict – and noted the importance of another provision of the same statute, now codified at § 1985, in combating conspiracies to commit perjury. See also Crespo v. New York City Police Comm'r, 930 F. Supp. 109, 117-18 (S.D.N.Y. 1996) (Briscoe immunity not available to police witnesses who perjure themselves in initiating baseless prosecutions).

11(b)(3) (factual allegations of complaint either have "evidentiary support" or are "reasonably likely" to be supported with the aid of discovery); see also Bernheim v. Litt, 79 F.3d 318, 321 (2nd Cir. 1996) (special solicitude is owed complaint "where the plaintiff alleges civil rights violations"). With narrow exceptions (for example, matters subject to judicial notice), see, e.g., Samuels v. Air Transp. Local 504., 992 F.2d 12, 15 (2nd Cir. 1993), the court may not consider matters outside the complaint's four corners, and the defendant may not contest the truth of any of the allegations. See Ricciuti v. New York City Trans. Auth., 941 F.2d 119 (2nd Cir. 1991) (in deciding Rule 12(b)(6) motion, it is inappropriate to consider whether documents referenced in pleading would satisfy standards of admissibility under Evidence Rules).

While the Federal Rules do not permit the plaintiff to rest on conclusory allegations, the level of specificity they require is keyed to that necessary to give the defendant a fair opportunity to frame a responsive pleading. Ricciuti, 941 F.2d at 123 (Rule 8(a)(2) "is designed to permit the defendant to have a fair understanding of what the plaintiff is complaining about and to know whether there is a legal basis for recovery"). To insist upon greater factual specificity for particular categories of claims or complaints is incompatible with the purpose and plain meaning of Federal Rules 8 and 9, which enumerate expressly (and exhaustively) the matters that must be pleaded with particularity, see Leatherman v. Tarrant County, 507 U.S. 163 (1993) – and with Circuit precedent, which instructs that civil rights complaints be liberally construed. See generally Conley v. Gibson, 335 U.S. 41, 47 (1955) (reversing dismissal of complaint that failed to "set forth specific facts to support its general allegations of discrimination"); Pisello v. Town of Brookhaven, 933 F. Supp. 202, 211 (E.D.N.Y. 1996) (in case "where it is not reasonable for the Court to expect that the plaintiff be familiar with the full range of the defendant ['s practices

under challenge. . . . dispositive motions with respect to section 1983 claims are better left for summary judgment").[7]

II. The PBA Is Legally Responsible For Its Role in Denying Mr. Louima's Federal Civil Rights

A. The Complaint States a Claim Under Section 1983

Although there can be no serious disagreement that Mr. Louima has pleaded – and suffered – deprivations of his federal civil rights, see Memorandum at 1, 3; see also Bruder, 103 F. Supp. 2d at 178 (jury necessarily found that actions were "under color of law"), the PBA insists that neither its active role in creating, maintaining and fostering a code of silence nor its energetic use of intimidation and perjury in Mr. Louima's case could give rise to § 1983 liability. According to Defendants, even when it is accepted that: (1) knowledge that the PBA can be relied upon to thwart investigations emboldens violent police officers who commit acts of criminal brutality and (2) the willingness of the PBA to resort to lies and intimidation in fact (a) prevents the truth from surfacing in such cases; and (b) prevents honestly inclined police officers from carrying out their duty and from coming to the aid of innocent civilians who are under police attack or in need of medical attention; and that (3) the PBA, knowing that Mr. Louima had in fact been beaten and sexually brutalized and remained handcuffed to his hospital bed as a prisoner, spent its energies devising, in conjunction with his tormentors, a campaign aimed at publicly humiliating him and derailing his efforts to seek redress, such involvement would be too "attenuated" to give rise to a civil rights claim. Although the Memorandum attempts to support

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[7]Although some Second Circuit decisions have been read as imposing a heightened pleading standard in certain classes of § 1983 cases, see Dwares, those requirements, as several recent decisions have recognized, do not survive the Supreme Court's decision in Leatherman. See Pisello, 931 F. Supp. at 210.

these counterintuitive assertions with (sometimes) plausible-sounding arguments concerning the elements of Section 1983 liability – and with wholly implausible efforts to disparage the complaint's hundreds of factual allegations as "bare" and nonspecific – the obstacles to recovery that the PBA would have the Court insert into the statute is entirely irreconcilable with governing law.

1. The PBA May Be Held Jointly Liable Under Section 1983 Based On Its Role in Depriving Mr. Louima of His Rights

At the outset, to the extent that the Memorandum's assertion that section 1983 responsibility for the injuries to Mr. Louima "lie[s] with the City, the police department, and the individual officer [*sic*] " id. at 3, is meant to suggest that these actors' liability would somehow foreclose holding the PBA accountable, it plainly misapprehends the law. Responsibility under § 1983 is not an either/or proposition, whereby a court must decide whether one entity or another is the wrongdoer. It is not at all uncommon for a plaintiff to have viable section 1983 claims against multiple defendants, see Lusby v. T.G. & Y Stores, Inc., 749 F.2d 1423 (10th Cir. 1984) (upholding liability against private actor and municipality who acted in concert), cert. granted and vacated on other grounds sub nom. City of Lawton v. Lusby, 474 U.S. 805 (1985), aff'd on reconsideration, 796 F.2d 1307 (10th Cir.1986); Fiacco,783 F.2d 319 (upholding liability against both municipality and individual officers); cf. Dennis v. Sparks, 449 U.S. 24 (1980) (affirming that private individual who conspired with state actor may be liable, notwithstanding latter's entitlement to absolute immunity). Indeed, such joint liability is an inescapable consequence of decisions affirming that municipalities, see Monell, supervisors, see Wright v. Smith, 21 F.3d 496, 502 (2nd Cir. 1994), private actors, Adickes, and co-conspirators, id, can be held

responsible for government employees' unconstitutional actions. Here, in light of the nature of his allegations, the fact that Mr. Louima has such strong § 1983 claims against individual officers and the City can only strengthen – and obviously does not extinguish – his claim against the PBA. Cf. City of Los Angeles v. Heller, 475 U.S. 796 (1986) (per curiam) (failure to prove case against individual defendant may, under certain circumstances, limit municipal liability).

2. The Complaint Alleges PBA Involvement Under "Color of Law"

A centerpiece of the Defendants' Memorandum is that the PBA actions described in the complaint – which include (1) joining with the City to create a custom whereby officers' silence regarding unsolved crimes of violence against civilians goes unpunished and honesty concerning brutal civil rights violations is vilified and; (2) using unique powers delegated by the City to promote cover-ups of violent criminal acts to and punish those who do not hew to the conspiratorial plan; and (3) acting affirmatively, in conjunction with police officers, to harm Mr. Louima and impede his ability to obtain full redress – could not have been taken under "color of law."

Although that assertion has a surface plausibility – if only because the PBA is not a governmental entity, but see infra – it does not survive collision with decades of Supreme Court precedent settling that "to act 'under color' of state law does not require that the accused be an officer of the State," Adickes, 398 U.S. at 152, and delineating the circumstances supporting private party liability under § 1983. As noted above, the Adickes decision held the "color of law" requirement satisfied either when a private party is shown to be a "wilful participant in joint action" violative of the Constitution, 398 U.S. at 152, or when that party acts unilaterally, but pursuant to an unconstitutional government-enforced custom, id. at 171, and other decisions

have affirmed the availability of a § 1983 remedy when the misconduct of a private actor is made possible "because the wrongdoer is clothed with the authority of state law." Kern v. City of Rochester, 93 F.3d 38, 43 (2nd Cir. 1996) (citations omitted), or where the "the injury caused is aggravated in a unique way by the incidents of governmental authority." Edmonson v. Leesville Concrete Co. Inc., 500 U.S. 614, 621 (1991). Mr. Louima's complaint states § 1983 claims against the PBA on each of these theories. See generally Anava, 195 F.3d at 596 ("If any one of the tests indicates a party is a state actor, that alone is sufficient to find the party a state actor").

a. Section 1983 Liability Does Not Depend On Proof That The PBA Is a Governmental Entity

The PBA begins with a desultory argument that the "color of law" determination here is controlled by a quarter-century old decision of the Southern District, Wright v. PBA, 1975 WL 215 (S.D.N.Y. July 23, 1975). Because the court in that case held that the PBA would not liable as a "state actor," the PBA suggests, the same outcome must obtain here. See Memorandum at 10; see also id. at 9 (citing Williams v. City of New York Dep't of Corrections, 1998 WL 160988, *2 (E.D.N.Y. Mar. 30, 1998) for the proposition that a § 1983 "plaintiff must allege facts that would establish that a governmental entity deprived her of a right secured by law" (emphasis supplied)). This line of argument amounts to little more than wishful thinking on Defendants' part.[8]

[8] The case cited by the PBA, Williams, in no way considered the circumstances under which a non-governmental entity may be held to act "under color of law." Indeed, there was no dispute in that case that the defendant, the City Corrections Department was a state actor; the dispositive issue concerned whether plaintiff had alleged the deprivation of a federal right, and the Court ruled that she had not. As explained below, the general rule Defendants seem to cite Williams as announcing is neither correct – it conflicts both with venerable Supreme Court authority holding that private entities can act under color of law and with the recognition, on the same page of the Memorandum, that § 1983 liability may be imposed either on persons "who either are state actors or are acting under

However the issue was resolved on the facts of the Wright case, the proper question for § 1983 purposes is not whether a private entity such as the PBA is or is not a "state actor," but rather whether the particular practices and actions giving rise to the complaint were taken "under color of law." There is no contention in this case that the PBA is a governmental entity, i.e., one whose every act is presumptively "under color of law," Lugar, 457 U.S. at 935, and it is no more legally significant that the PBA was found, in another case, not to have been acting under color of law, than it would have been had there been prior decisions (as there might well have) placing particular actions of the private defendants in Adickes, Lugar, or Leesville beyond the reach of section 1983.

In fact, in Hughes v. PBA, the Second Circuit upheld the district court's decision to entertain a section 1983 claim based on allegations of "joint activity" between the PBA and the NYPD – even as it noted that the district court had recognized, correctly, that the union "was not a state actor." See 854 F.2d. at 880. Thus, if this Court were to take the all-or-nothing approach that Defendants seem to embrace, it would be the Court of Appeals' decision in Hughes, rather than Wright, that necessarily would control. United States ex rel. Schnitzler v. Follette, 406 F.2d 319, 322 (2nd Cir. 1969); cf. generally West v. Atkins, 482 U.S. 42, 56 (1989) ("It is [defendant's] function while working for the State, not . . . the fact that he may be employed by others to perform similar duties, that determines whether he is acting under color of state law").

Nor do the decisions in Kern v. City of Rochester and Jackson v. Temple Univ., 731 F.2d

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color of law" Memorandum at 9 (emphasis supplied) – nor would the rule be violated here: Mr. Louima does allege that "a governmental entity deprived [him]" of his rights; the PBA's real objection is to his unwillingness to limit his claims to those among the responsible actors that were governmental entities or employees.

931 (3rd Cir. 1983) (discussed in the Memorandum at 11-12), help the PBA. There is no suggestion here that the mere fact that a union's leaders and agents are simultaneously government employees would make the union a state actor in its dealings with its own members, or that actions which do not involve PBA agents' "abusing the positions given [them] by the state" would nonetheless be "under color of law." Here, unlike in Jackson, there is no room for arguing that a constitutional violation under color of law did not occur (the only question, as even the PBA acknowledges, is whether Defendants are legally accountable based on their conduct), and the complaint describes PBA misconduct – taken pursuant to a widely understood municipal custom, compare Kern, 93 F.3d at 44 – that necessarily involved exercise of power conferred by state law and policy.[9]

Jackson is even farther afield. The action at issue in that case was the defendant union's allegedly "unconstitutional" failure to pursue plaintiff's grievance – there was not even an allegation that plaintiff's public "[e]mployer was in any way involved in the Union's decision not to proceed to arbitration," id. at 933 – and the Third Circuit affirmed exclusively on the ground that no deprivation had been alleged. Indeed, the appellate court there followed the district court in assuming for purposes of its decision that state action somehow was present, id. Cf. Polk Country v. Dodson, 454 U.S. 312 (1981) (holding that actions taken by government-paid

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[9]The fact pattern of Kern might be more analogous if the plaintiff firefighter had shown that the union president responded to Kern's refusal to accept his sexual advances by persuading union member-firefighters not to protect Kern were she endangered while in the line of duty and perhaps even more analogous if he instructed that the firefighters refuse to battle any fire that might occur at her house. Cf. Pisello, 933 F. Supp. at 207 (noting that defendant municipality was alleged to have "arbitrarily refused to act" on plaintiff's applications to rebuild his real estate business after destruction by suspiciously motivated fire). Even that hypothetical case would lack the elements of longstanding municipal involvement that characterize the practices and conduct here.

criminal defense counsel, in connection with adversarial proceeding against the State, are not "fairly attributable to the State").[10]

b. The Color of Law Requirement Is Satisfied By The PBA's Wilful Joint Participation

Although the Memorandum does not press very hard the suggestion that the PBA's status as non-governmental entity actually settles the "color of law" question, its more sustained argument – that the complaint's supposed failure to allege with specificity the "time and place" of a conspiratorial agreement between the PBA and the City forecloses § 1983 liability, Memorandum at 11-13 – is no less fatuous. This argument simply ignores decades of settled law recognizing the multiple ways by which a private party can act "under color of law," see Anaya, precedent that refutes the notion that proof of the sort of discrete, comprehensive "agreement" which the Memorandum demands is the sine qua non of private party liability under section 1983.

The Supreme Court and the Courts of Appeals repeatedly have held private actors accountable under § 1983 without proof of the sort of formal agreement that the Memorandum

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[10]Although the PBA makes much of the complaint's contention that its liability may be established under respondeat superior principles, see Memorandum at 17 (citing ¶84 of the complaint), that same paragraph also alleges that the PBA agents' acts were performed pursuant to their authority under the union – obviating any need to decide whether any sort of vicarious liability may be imposed. As the remainder of the complaint makes clear, although the actions of Immitt and Lee – and the post-torture conduct of Wiese – are directly attributable to the PBA (because they were carrying out union policy), the complaint does not allege that Defendants should be held liable for the torture on the theory that the individual officers were acting as agents of the PBA. To the contrary, the PBA' legal responsibility for Mr. Louima's physical abuse derives not from the fact that the individuals who attacked him were union members or agents, but rather from the fact that the union's policies and customs, evincing hostility to the punishment of even the most wrong-doing police officers, heightened the danger that such violent police actions occur. See infra (discussing law governing responsibility based on deliberate indifference).

treats as indispensable. In Leesville and Lugar, the Court explicitly upheld liability based on a private actor's joint participation in unconstitutional conduct (the defendant in Lugar obtained a writ of attachment from a state court clerk, initiating a procedure found to violate the Due Process Clause), notwithstanding the absence of any "allegation of collusion or conspiracy with state actors," 457 U.S. at 943 at n.* (Burger, C.J., dissenting), and in Lusby the Court of Appeals for the Tenth Circuit did not demand that plaintiff pinpoint the particular time and place where the municipal authorities and private defendants agreed to implement a custom of arrest without probable cause. Indeed, even in the decision that the PBA has cited, Austin v. Paramount Parks, Inc., 195 F.3d 715 (4th Cir. 1999), there is no suggestion that when a plaintiff proves that private actors and government officials are longstanding participants in a custom of unconstitutional conduct he must further allege a formal agreement entered into at a particular time or place. See id. at 728 ("a private corporation is liable under § 1983 . . .when an official policy or custom of the corporation causes the alleged deprivation of federal rights"); see also Jackson Lockdown/ MCO Cases, 568 F. Supp. 869 (C. D. Mich. 1983) (upholding § 1983 claim against prison guards' union, because the union's actions, though opposed by government officials,"were possible only due to the power conferred on the guards by the state").

Indeed, the very nature of municipal liability for "custom" – i.e., a "practice[] . . . so permanent and well settled" as to have the force of law – stands against the idea that a complaint could be dismissed for not stating the time and place at which an "agreement" was entered into. Thus, in Ginsberg v. Healey Car & Truck Leasing, Inc., 189 F.3d 268, 271 (2nd Cir. 1999), the Second Circuit made clear that a section 1983 cause of action lies against a private defendant when the complaint alleges an arrest pursuant to a municipal custom of reflexive acceptance of

the defendant's recommendations, a conclusion supported by that Court's earlier opinion in Dwares. In that case, the Court of Appeals, surveying prior cases involving claims of private § 1983 liability for concerted action, observed that while a private security guard's merely summoning the police will not suffice to hold the business owner accountable under Section 1983 for a resulting arrest (even if the guard is an off-duty police officer), the defendant will be liable if there is a custom or understanding that individuals reported by the private party will be arrested without the arresting officer's undertaking any further independent probable cause determination. Accord Lusby 749 F.2d at 1432 (upholding private defendant's liability in Monell case, because municipality maintained a policy that "delegate[d] a nondelegable duty [i.e, deciding whom to arrest] and facilitates private abuse of criminal charges").[11] Indeed, even Adickes, which described a § 1983 conspiracy as involving a "meeting of the minds," 398 U.S. at 158, provides scant support for the notion that a particular time and place of "agreement" must be alleged with particularity: the Supreme Court reversed summary judgment for the defendant

[11] Indeed, it is symptomatic of the "heads we win, tails you lose" quality of the PBA's Memorandum that Mr. Louima is taken to task, see Memorandum at 13 n.3, for pleading that the PBA and City's customs are of long standing. The PBA's arguments that the three-year section 1983 limitations period precludes the complaint's reliance on "acts of conspiracy that allegedly occurred twenty-five years ago" drastically misread the Second Circuit's decision in Pinaud v. County of Suffolk, 52 F.3d 1159 (2nd Cir. 1995). That case did not come close to holding that evidence that a custom more than three years old is somehow irrelevant or illegitimate; it held that, subject to various tolling principles, a plaintiff can not bring a suit based on specific municipal actions (pursuant to the long-running policy) that took place more than three years before filing suit. Although the complaint in this case references practices that go far back in the past (which add force to the systemic claims) the wrongs committed against Mr. Louima took place within the limitations period – and indeed continue. See Ginsberg, 189 F.3d at 271 (considering evidence of how many times conduct had occurred "in the past thirty two years" in determining whether custom or policy existed); Adickes, 398 U.S. at 173 ("the relevant inquiry is whether at the time of the episode there was a longstanding and still prevailing state-enforced custom"); Walker, 974 F.2d at 300 (plaintiff who did "not expressly allege a history of police perjury . . . should be allowed to pursue discovery in order to determine whether" such a practice existed).

notwithstanding the absence of evidence of communication between the private and public actors, on the ground that their "understanding" might still be inferred from "the sequence of events." See also LeBlanc-Sternberg, 67 F.3d at 427.[12]

These decisions are consistent with the principle that formal conspiracy represents only "one form" of the wilful joint participation in unconstitutional conduct that § 1983 prohibits, See Collins, 878 F.2d at 1154 ; Hampton, 600 F.2d at 627. Indeed, to the extent that civil rights decisions might be read as relying on a less stringent definition of conspiracy than prevails, for example, in the criminal law, the basis for such a distinction would be sound: unlike the criminal law, §1983 does not punish the act of wrongful agreement per se – the § 1983 remedy is available only to those whose rights have been deprived, see Singer, 63 F. 3d at 119 – and there is no legitimate reason why persons who are wilful joint participants in unconstitutional action – but cooperate tacitly or pursuant to custom, rather than by express agreement – should be excused from liability. Cf. Dennis, 449 U.S. at 27 (affirming decision of lower court concluding that "'that there was no good reason in law, logic, or policy for conferring immunity on private persons who [conspire with governmental actor entitled to official immunity]'"); McHenry v. Chadwick, 896 F.2d 184, 188 (6th Cir. 1990) (civil liability for officer who stands by while others commit constitutional tort).

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[12]Indeed, relying on the same authority that Defendants cite for the rule that a "plaintiff must provide details of time and place . . .," see Memorandum at 12, the Second Circuit has stated the principle somewhat differently:"while a plaintiff should not plead mere evidence, he should make an effort to provide some 'details of time and place and the alleged effect of the conspiracy' 2A Moore's Federal Practice ¶¶ 8.17[6], at 8-109 to 8-110 (2d ed. 1992)." Dwares, 985 F.2d at 99 (emphasis supplied). Even that less stringent formulation predated the Supreme Court's decision in Leatherman, holding that heightened pleading rules for § 1983 complaints are inconsistent with the Federal Rules.

c. The Complaint Adequately Pleads Joint Participation

Because the PBA does not fully acknowledge that wilful joint participation in unconstitutional governmental conduct can give rise to § 1983 liability, the Memorandum does not even attempt to carry its Rule 12(b)(6) burden of showing that under "no set of facts" could the complaint's allegations state a claim on that theory. But it is apparent the PBA could not have met that burden had it tried.

First, as to the actions taken after the initial assault on Mr. Louima, the PBA's joint participation with state actors – police officers acting under color of law – is pleaded in undeniably ample and specific detail. See, e.g., ¶¶ 69-84, 94, 106-110, 117, 120-22, 130-33. Indeed, these allegations would appear to meet even the supercharged, heightened pleading standards that the PBA asks the Court to impose.

With respect Counts XIV and XV, concerning the code of silence, whatever the merits of the contention that the web of customs and policies pursued jointly with the City over the course of many years is too "attenuated" from Mr. Louima's physical injuries to give rise to section 1983 liability, see infra, there can be no disagreement that the policies and customs described in the complaint are plainly "law, policy, custom or usage" within the meaning of section 1983, see Jeffes v. Barnes, 208 F.3d 49, 62 (2nd Cir. 2000) (police code of silence may give rise to Monell liability); Sharp v. City of Houston, 164 F.3d 923, 935, 936 (5th Cir. 1999) (affirming judgment against city based on code of silence); White-Ruiz v. City of New York, 983 F. Supp. 365 (S.D.N.Y. 1997) (finding City liable under Monell principles for code of silence); cf. United States v. Bruder, 2000 WL 290269 (E.D.N.Y. Feb. 5, 2000) *4 (holding evidence of defendant Schwarz's prior coverup activities admissible under Federal Rules to show "his commitment to

an unwritten . . . 'code of silence'"). Nor does the complaint skimp in its description of the PBA's active, wilful involvement in developing, furthering and implementing the challenged customs and practices. See, e.g., ¶¶ 15-20 (joint role of City and PBA in promoting an atmosphere "in which the very worst police officers feel assured that evidence of misdeeds depriving citizens of the civil rights, no matter how awful, will be hidden by PBA representatives) ¶¶155-57 (noting joint role of PBA and City in misapplying "48-hour rule") ¶¶164, 169 (noting Mollen Commission's conclusion that PBA puts "immense pressure" on honest officers to maintain silence and "acts as a shelter and protector of the corrupt cop, rather than as a guardian of the interests" of honest police officers); ¶¶ 170-71 (noting past instances of PBA misconduct), ¶172 (PBA "manipulate[s] 48-hour rule and makes improper use of . . . spurious . . .privilege to orchestrate cover-ups among co-conspirators and identify and silence police witnesses who would otherwise give honest testimony").

Rather than address itself to the complaint's actual and extensive factual allegations. the PBA devotes more than a page of its Memorandum to a recitation of decisions stating that "a bare allegation of a conspiracy between private and state entities is insufficient to bring the private entity within Section 1983," Memorandum at 12 (quoting, inter alia, Stagman v. Ryan, 176 F.3d 986, 10002 (7th Cir. 1999)); that complaints must go beyond "conclusory allegations"; and that they must include "with some degree of particularity the overt acts which defendants engaged in." Id. (quoting Serbalik v. Gray). But these unexceptionable rules simply have no application to this complaint, which includes scores of paragraphs describing specific overt acts committed by the PBA, see, e.g., ¶14 (PBA "disparaged and intimidated those officers who discharged their moral legal and moral duty" to report to investigators); ¶71 (PBA agents

suppressed information); ¶ 59 (PBA pressured defendant Rosario); ¶75 (describing roll call appearances by Immitt); ¶76 (intimidation of witnesses by Immitt and Lee); ¶72, 122, 131 (PBA sought to humiliate, defame Mr. Louima and to deter him from testifying); ¶83 (describing conspiratorial meetings and phone calls); ¶81 (describing PBA treatment of witnesses as "suspects"); ¶78 (alleging grand jury perjury by defendant Immitt); ¶ 132 (PBA "continues to deter and discourage . . .witnesses from telling the truth"). In the face of this specificity, Defendants' own broad assertions that the complaint's allegations "fall far short of stating a viable claim," id. at 13, have an oddly hollow ring. See also id. at 8 (citing decisions allowing courts to disregard factual allegations when they are "internally inconsistent" or "contradicted by documents incorporated in complaint" – without ever suggesting that any factual allegation in Mr. Louima's complaint fall into either category).[13]

To the extent that the Memorandum does advance any specific basis for dismissing counts XIV and XV, it is the complaint's supposed failure to "particularize the overt acts allegedly taken by the PBA" or "even [to] attempt" to identify a specific 'agreement' between the PBA and the City, "let alone"specify the particular "time and place" where agreement was reached. Memorandum at 13. As for the overt acts, the paragraphs just cited speak for themselves – all the more so in light of the Second Circuit's admonition that the specificity required under the Federal Rules is not an end unto itself, but rather must be sufficient to alert the PBA of the nature of the claim against which it must defend. Ricciuti, 941 F.2d at 123.

And whether or not it is "as replete with factual allegations as the [PBA] might prefer,"

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[13]As noted above, although Count XV might be "conclusory" in the literal sense that it does not actually re-plead the necessary factual allegations, which appear in the body of the complaint. the Federal Rules encourage that way of drafting complaints. See Fed. R. Civ. P. 10(c).

Harvey v. Treder, 1987 WL 47371 *6 (E.D.N.Y. 1987) it is hard to see how a fair-minded reader of the complaint – which devotes more than thirty paragraphs specifically setting out the respective roles of the PBA and the City in jointly creating and maintaining the "blue wall" – could find, as the PBA purports to, that it does not even allege a "nexus" between those two defendants, Memorandum at 13.

If the appropriate question is asked, i.e., whether, at this stage – before the commencement of discovery – the complaint (1) includes sufficient allegations from which joint participation by the City and PBA could be inferred and (2) makes those allegations with specificity sufficient for Defendants to formulate their responsive pleading, the fate of Defendants' motion is sealed. Notwithstanding the PBA's placing the words "code of silence" in quotation marks, any claim by Defendants not to be able to grasp from the complaint what role Mr. Louima alleges the PBA played is not well taken. Among other things, the complaint references independent analysts' conclusions that a code of silence exists and that responsibility for it resides, jointly, with the City (for tolerating it, notwithstanding its inconsistency with the rule of law) and the PBA (for promoting it), and, it alleges, among other things, the role played both by the jointly agreed-to "48 hour-rule," See Messman v. Hemke, 133 F.3d 1042, 1045 n.2 (7th Cir. 1997) (collective bargaining agreement provision can give rise to joint § 1983 liability), by the City's and the PBA's mutual understanding of how the rule should apply in practice (i.e., extending it to criminal, as opposed to merely administrative investigations and allowing the union to decide whom to denominate as "witnesses" and "suspects," for purposes of the rule's protections), and by the City's acquiescence in certain officers' (PBA delegates) disregarding

Circuit, the PBA, as a private party, could not be held accountable based solely on its role as "wilful participant" in government actors' unconstitutional conduct, the factual allegations of the complaint would not permit dismissal for failure to allege PBA action under color of law. First and foremost, the complaint identifies the PBA as occupying a pivotal role in a quintessential state function: the investigation of violent crime. See Dwares (when government delegates quintessential governmental responsibility to private party, that party acts under color of law); accord Lusby; cf. Richardson v. McKnight, 521 U.S. 399 (1997) (upholding denial of qualified immunity to privately employed prison guards sued under § 1983). It is by no means ordinary to allow a private party to help decide which individuals suspected or believed to have witnessed violent offenses will be interviewed by law enforcement authorities investigating the crime (or to give the party the power to prevent an interview from taking place, by labeling as a "witness" someone who otherwise might not meet the investigator's understanding of that term), see ¶17 (noting that other jurisdictions show no similar solicitude for police officers suspected of violent crime), and it is all the more so given the PBA's avowed belief that orchestrating cover-ups and intimidating witnesses is a part of its job description as collective bargaining agent. See Memorandum at 11; compare Paramount, 195 F.3d at 730 (noting lack of "evidence that . . . police officers routinely consulted [private defendant] or obtained his approval concerning impending arrests").

Second, the PBA's agents – including the individual defendants in this case – are themselves police officers, charged by law with apprehending violent criminals (including violent police officers) and bringing them to justice – and endowed by law with unique powers in order to do so. See ¶ 56 (noting official policy that "[a]ll members of the service have an

absolute duty to report . . . serious misconduct of which they become aware") (emphasis added). Although the Memorandum purports not even to perceive a conflict in the dual role of sworn peace officer and obstructor of justice – by simply insisting that, even when they wear the uniform of the NYPD, PBA agents' obligations to the wrongdoing member are always paramount, the complaint makes clear that Defendants maximize, unecessarily and for improper purposes, the extent to which these two roles become "blurred." Memorandum at 2, 14. Cf. Lusby, 749 F.2d at 1429 n.2 (noting off-duty police officers "confusion of his private and public roles" in holding him - and his private employer – liable under § 1983).

In the first place – and as will be further explained below – the PBA's understanding of its officer/agents' competing responsibilities is fundamentally wrong, see In re Grand Jury Subpoenas Dated January 20, 1998, 995 F. Supp. 332, 336 (E.D.N.Y. 1998), and under no conceivable notion of union privilege would an employee-representative be authorized – let alone "duty-bound," Memorandum at 16 – to intimidate witnesses and orchestrate cover-ups, whether or not he does so on behalf of his "client." But for "color of law" purposes, the significant fact is the extent to which the complaint describes the PBA's using its agents' employment as police officers to accomplish its improper organizational objectives. Not only do PBA actions take place in ways that are only possible by virtue of the fact that Defendants' agents are themselves police officers, but Defendants accomplish their objectives largely by a unique ability to persuade government actors – police officers – not to do their legal duties. See Wagenmann v. Adams, 829 F.2d 196, 211 (1st Cir. 1987) (upholding § 1983 verdict against private defendant because he "possessed and exerted influence over the . . . police, and conspired with them to have [plaintiff] arrested"); see also Dwares, 985 F.2d at 98 (it is state action when police specifically decline to

provide protection to an individual for the purpose of allowing private party's wrongful conduct to succeed). Indeed, to the extent that the PBA's ultimate threat against an officer contemplating cooperating with a misconduct investigation is that his or her partner – and fellow union member – will not respond to a distress call while they are on duty – the PBA exercises leverage that is uniquely bound up with state authority. Cf. White-Ruiz, 983 F. Supp. at 383 (noting that officers refused to assist plaintiff in "potentially dangerous situation" in retaliation for her having breached the code of silence).

The events of this case supply an example of the myriad ways in which the PBA accomplishes its own purposes under guise of law. Although there is no claim that Officers Volpe, Schwarz, Bruder, and Wiese were acting as PBA members at the moment they were beating or torturing Mr. Louima, it is abundantly clear that Wiese quickly assumed the role of PBA delegate, accompanying Volpe to the hospital on the night of August 9 when he himself was not injured, see Attachment A (Tr. 837-38, Burns),[15] and Defendant Schwarz himself testified that telephone calls made to defendant Abbate and others on August 11 – while Mr. Louima continued to be treated as a perpetrator, rather than a victim of crime – were made by Wiese, in his capacity as PBA delegate. See id. (Tr. 1820-23, Schwarz) ("Tommy was a delegate and as a delegate that is part of his responsibilities"). Compare Complaint ¶71 ("defendant PBA quickly became involved in the conspiracy") with Memorandum at 2 (asserting that complaint

[15]Attachment A contains transcripts of testimony at the (second) federal criminal civil rights trial of Defendants Wiese, Bruder, and Schwarz. Although the facts and testimony included are not necessary to state a claim – and need not have been pleaded with specificity in the complaint – such material is a proper subject of judicial notice, and the Court accordingly has discretion to consider it in evaluating the merits of the PBA's claim that "no set of facts" exists that could support its involvement before August 13. Cf. People v. Rosenberg, 160 A.D.2d 327 (1st Dep't 1990).

does not allege PBA involvement until August 13 meeting).[16]

e. The PBA Actions Are Under "Color of . . . Custom or Usage"

Finally, the PBA, no less than the store owner in Adickes, may fairly be held accountable under § 1983 for having acted pursuant to a State-enforced custom of unconstitutional behavior. Even if the PBA were not a wilful, joint builder of the "blue wall" – which it is – the complaint plainly states that New York police intentionally tolerate violence or threats of violence toward those who violated the practice of maintaining silence concerning police brutality. When these unconstitutional governmental customs are as pervasive as they are properly alleged to be here, private actors who avail themselves of them, Adickes teaches, may be held to be acting under "color of law."

3. Under Settled Law, The PBA's Involvement Is "Personal"

No more tenable than their arguments about the "color of law" requirement are Defendants' assertions that the link between the code of silence and the actions of the police officers is inadequate as a matter of law to hold the PBA accountable for the harm those officers inflicted. Because the PBA and its agents were not present during the physical abuse of Mr. Louima, but cf. ¶26d. (noting that defendant Wiese was, at the relevant time, a PBA delegate), and did not learn of what had been done to him until (soon) afterward, the Defendants insist,

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[16]Indeed, Defendants' repeated assertions that the PBA's involvement did not begin until the day Mr. Louima's custody ended, August 13, not only misread the complaint, they ignore the sworn testimony of defendant Immitt– a high-ranking PBA official – that he first heard of an incident – from Wiese – on August 11, at a time when Mr. Louima remained under arrest, Attachment A (Tr. 965. Immitt); see also id. (Tr. 966-67) (testifying that meeting in 70th precinct basement occurred on either August 12 or 13).

legal responsibility may not extend beyond the individual officers (or, as the PBA would have it, "officer_") – and the City, which undertook to hire and train those individuals. Memorandum at 3. Defendants present this argument in three guises: (1) that the PBA is being held vicariously liable for the conduct of its members, rather than based on its own involvement; (2) that the code of silence described in the complaint cannot be the "proximate cause" of the injuries to Mr. Louima (because, Defendants say, the climate of lawlessness fostered by the PBA and the City merely "permitted, rather than caused" the individual officers' violent assaults); and (3) that the PBA, as a labor union and collective bargaining agent, owed no duty to Mr. Louima or any other citizen of New York to refrain from the practices described in the complaint.

At the outset – and despite the skepticism that the PBA attempts to convey by use of quotation marks – the complaint alleges with unquestionably sufficient particularity the existence of a code of silence, and the suggestion that "Plaintiffs here do not attempt to relate the PBA's wrongful practices to plaintiffs' injuries," Memorandum at 21, is especially perplexing. Scores of paragraphs of the complaint reference trial testimony and independent findings attesting to the existence and operation of the "blue wall" – and to the PBA's role in maintaining it.

And any burden on Mr. Louima's part to allege a "relation" between this custom and his injury arguably is satisfied by this single paragraph of his complaint:

> After the torture, defendant Volpe displayed the stick to other police officers at the precinct and bragged to them about what he had done.

¶47. It is unimaginable that anyone but a New York City police officer fully versed in the code of silence would do what Volpe did – boast of having committed a barbaric criminal act and brandish the inculpatory evidence for all to see – to an audience of on-duty New York Police

Officers inside a precinct house, and, as the complaint describes, Volpe's confidence in the code's potency proved not to have been misplaced. Not a single one of those officers who witnessed this depraved display came forward promptly to implicate him – as legal duty (not to mention human decency) obliged them to, see ¶¶55, 56 – and even officers who had no personal connection to the 70th precinct or the individual defendants understood that their role was to lie on behalf of the culpable officers to investigatory authorities. See ¶¶ 49, 57-58 (describing conduct giving rise to criminal convictions of defendants Rosario and Aleman). See Kibbe v. City of Springfield, 777 F.2d 801, 805-6 (1st Cir. 1985) (upholding municipal liability for brutality, because participation of numerous officers "is more likely to reflect the operating procedures of the police department"), cert. dismissed, 480 U.S. 257 (1987). Nor are Defendants on more solid ground when they contend that the complaint insufficiently pleads PBA involvement in and responsibility for the code of silence. The complaint explains in considerable detail how the PBA, both in the past and in this case, has taken the lead role in assuring that guilty officers tell a false but consistent story, ¶¶14, 15, 19, 20, 71-74, 155, and that those individual officers who might otherwise consider coming forward to perform their duty and tell the truth are persuaded – if necessary by threats and intimidation – to remain silent. ¶¶14, 75, 76, 164, 169, 170, 173. These efforts operate in conjunction with the City's documented dereliction in investigating and disciplining officers who lie, fail to come forward, or threaten those who do come forward. See ¶¶ 148-74.

a. The Link Between The Code of Silence And The Injuries Satisfies Section 1983's Causation Requirement

The PBA's assumption that an allegation of "direct involvement in the assault on

Louima," id. at 18, is a necessary precondition of PBA liability simply misstates the law. Although section 1983 does not provide for strict or vicarious liability, the Supreme Court, looking to the history and text of the statute – which provides a cause of action against a party who "subjects or causes [another] to subject[]" a plaintiff to a deprivation of his civil rights – repeatedly has held that practices and customs exhibiting deliberate indifference to violent deprivations at ground level suffice to establish § 1983 liability for entities and individuals who are not contended to have been "direct participants" in the actual violence. See Monell, 436 U.S. at 692; cf. M. AVERY, K. BLUM & D. RUDOVSKY, POLICE MISCONDUCT LAW & LITIGATION (1999) § 4-6 ("[m]otions to dismiss or for summary judgment on the ground that the plaintiff has not pleaded or established . . . 'personal participation' in the acts complained of are not well taken").

As the Southern District explained recently, rejecting a former New York Police Commissioner's arguments that he could not be held accountable for unconstitutional retaliation against an officer because "he was not aware of any retaliation against [her]": "there is no requirement that the supervisor be personally aware of the specific acts of misconduct about which the plaintiff is complaining." White-Ruiz. Rather, the court continued:

> The Second Circuit has determined that "personal involvement" may be defined as "(1) direct participation, or (2) failure to remedy the alleged wrong after learning of it, or (3) creation of a policy or custom under which unconstitutional practices occurred, or (4) gross negligence in managing subordinates. . . . [L]iability may be imposed when an official has actual or constructive notice of unconstitutional practices and demonstrates "gross negligence" or "deliberate indifference"

White-Ruiz, at *12 (citations omitted) (emphasis supplied); accord Sorlucco v. New York Police

Dep't, 91 F.2d 864, 871-72 (2nd Cir. 1992) (plaintiff "did not have to prove that the Commissioner actively participated in the general discriminatory practice of his department" to establish municipal liability); Spencer v. Doe, 139 F.3d at 112.

This is the unmistakable import of the Supreme Court's teaching in Monell and its progeny, and both that Court and the Second Circuit have repeatedly affirmed what the PBA suggests cannot be the case: that a defendant may be held accountable for violent constitutional deprivations without itself having "directly" participated in the violence or deprivation of rights. See City of Canton v. Harris, 489 U.S. 378, 390 n.10 (1989) (municipality's failure to train police in use of deadly force can give rise to liability for unconstitutional taking of life). Thus, in Dodd v. City of Norwich, the Second Circuit rejected a defendant's claim that a municipal policy concerning when police would holster their guns could not have caused the death of a suspect who tried to grab the revolver from the officer who was arresting him:

> The city contends on appeal that the "cause" of Dodd's death was his own voluntary act in lunging for the exposed gun and was not any act or policy of the city. Monell's view of causation is, we think, more encompassing than such a narrow, immediate focus on the cause of the shooting. In adopting its policies a municipality must take into consideration the reasonably foreseeable conduct not only of its own employees but also of those citizens with whom its employees will interact. Basic principles of causation would render the policy a proximate cause of Dodd's death if Dodd's intervening actions were "within the scope of the original risk" and therefore foreseeable. W. Prosser, Handbook of the Law of Torts §§ 44, at 273 (4th ed. 1971).

827 F.2d at 5; see also Ricciuti, 941 F.2d at 123 ("evidence that the municipality had notice of but repeatedly failed to make any meaningful investigation into charges that police officers had used excessive force in violation of the complainants' civil rights" suffices to hold city liable for violent acts); Fiacco, 783 F.2d at 326 ("we reject the notion advanced by the City defendants that

a municipality may not be held liable under § 1983 on the basis of a policy of deliberate indifference to the constitutional rights of persons within its domain" that was "demonstrated by the failure of the City defendants to exercise reasonable care in investigating claims of police brutality"); Bielevicz v. Dubinon, 915 F.2d 845, 851 (3rd Cir. 1990) ("causal link between ... a known but uncorrected custom or usage and a specific violation is established if occurrence of the specific violation was made reasonably probable by permitted continuation of the custom"); cf. Jett 491 U.S. at 737 (whether deprivation of rights at issue was caused by defendant's "acquiescence in a long-standing practice or custom which constitutes the 'standard operating procedure' of the local government entity" id "for jury to determine").

These decisions repeatedly have recognized that a municipality's failure to hire or train its police officers properly can be involvement sufficient to hold the city accountable for the physical harm resulting from by those officers' individual acts of unconstitutional violence. City of Canton; Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987); see also Jeffes, 208 F.3d at 61 (failure to train corrections officers to respect Free Speech right of guard speaking out against abuse of inmates); Walker , 974 F.2d at 300 (reversing dismissal of suit based on failure to train police to refrain from giving perjured testimony); Harris v. City of Pagedale, 821 F.2d 499, 508 (8th Cir. 1987) ("where it becomes clear that the police force needs close and continuous supervision because of a known pattern of misconduct, and the municipality fails to provide such supervision." continuation of the misconduct is "the inevitable result") (internal quotation omitted).

Even closer to the facts of this case are decisions specifically holding that a municipal custom or policy of failing to discipline rogue officers can be said, for section 1983 purposes. to

cause the injuries suffered by those subjected to police misconduct. See Canton, 489 U.S. at 390; Vann, 72 F.3d at 1051 (reversing summary judgment on causation because "it would be entirely permissible for the jury to find that the Department's restoration of [individual officer] to full-duty status and its indifference to the postreinstatement civilian complaints against him caused him to feel entitled, whether on duty or off, to compel the 'respect' he demanded through the use of violence"); Turpin v. Mailet, 619 F.2d 196, 201 (2nd Cir. 1980); Cox v. District of Columbia, 821 F. Supp. 1, 19 (D.D.C. 1993) (finding causal link between inadequate discipline practices and individual acts of violence), aff'd 40 F.3d 475 (D.C. Cir. 1994) (table); Sango v. City of New York, 1989 WL 86995 *9-*10 (E.D.N.Y. Jul. 25, 1989) (holding that inadequate review of civilian complaints amounted to a municipal custom, which caused officers to feel they would not be disciplined --and therefore caused civilian injuries); see also Walker v. City of New York, 974 F.2d 293, 297 (2nd Cir. 1992) (unjust conviction may be attributed to municipality if plaintiff can prove "a practice of condoning perjury (evidenced perhaps by a failure to discipline for perjury" or that "policymakers were aware of a pattern of perjury by police officers but failed to institute appropriate training or supervision"); Gentile v. County of Suffolk, 926 F.2d 142, 152-53 (2nd Cir. 1991) (affirming the sufficiency under Monell of district court finding that "County's long history of negligent disciplinary practices regarding law enforcement personnel . . . gave rise to . . . malicious prosecution"); Bielevicz, 915 F.2d at 851 (defendant officer was "emboldened by the City's laxity" concerning false public intoxication arrests).

Indeed, in Myatt v. City of Chicago, 1991 WL 94036, *7 (N.D. Ill.), the court expressly allowed a case to go forward seeking to hold the City accountable for acts of police violence, based on the plaintiff's allegations "that the City is and has been aware of the code of silence in

the Police Department which prevents officers from reporting or testifying against fellow officers who might use excessive force . . . . lack of action on the part of the City over this years can properly be characterized as 'deliberate indifference.'" See also Sharp v. City of Houston, 164 F.3d 923, 935, 936 (5th Cir. 1999) (affirming verdict against city because "jury could have decided that the [police department] tolerated and even fostered an attitude of fierce loyalty and protectiveness within its ranks, to the point that officers refused to address or report each others' misconduct"); White Ruiz, (holding that "plaintiff [had] offer[ed] sufficient evidence to permit a reasonable trier of fact to infer that the 'blue wall of silence' constitutes a custom or usage of the Department and that the actions allegedly directed against plaintiff by her fellow officers were a manifestation of that practice" and citing evidence that the code of silence "was stringently, if informally, enforced in the Department" and that "the Department had neither acknowledged the existence of the code of silence nor taken any steps to end it"); Ariza v. City of New York, 1996 WL 118535 (E.D.N.Y.) (noting testimony that "the code of silence operates to discourage officers from making public the wrongful acts of fellow officers").[17]

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[17]As noted above, Defendants do not cite these last decisions, but obliquely seek to distinguish them on the ground that the "wall of silence" findings of the Mollen Commission concern apply only to police corruption, rather than violence. Memorandum at 24 n.7. Whatever the merits of the decisions cited by the PBA, Defendants travel a long way from asserting that Mr. Louima has "departed from reality" for having even suggested that there is a code of silence to acknowledging the existence of a code, but arguing that it protects only venal, but not violent police officers. In point of fact, the Mollen Commission – whose mandate was to study police corruption – surely did not conclude that the same union pressures that allow corruption to flourish are not present in cases of brutality, and its harsh findings concerning the union's and the City's support for the code of silence hardly helps the PBA carry its burden of showing that there is "no set of facts" that could establish the legal responsibility sketched out for the PBA in the complaint. Cf. United States v. Bruder 2000 WL 290269 *4 ("Schwarz urges that there is an 'immense disparity' between lying about a police officer's use of profanity and conspiring to cover up a uniquely brutal act of police misconduct. But this difference is a matter of degree, not type"); Ariza v. City of New York, 1996 WL 118535 (E.D.N.Y. Mar. 7, 1996) at *5 (rejecting argument that "code prevent[ing] reports

The PBA's contrary arguments concerning causation invite the Court to overlook this body of controlling precedent, in favor of flawed analogies to dimly relevant legal doctrines. First. rather than reckon with the numerous cases specifically addressing the sort of causation required under § 1983, Defendants instead refer the Court to two cases, decided under New York law. See Memorandum at 21-22 (discussing Sheehan v. City of New York, 40 N.Y.2d 496. 387 N.Y.S.2d 932 (N.Y. 1976) and Heredia v. United States, 887 F. Supp. 77 (S.D.N.Y. 1995)). According to the PBA, because the courts in these cases ruled for the tort defendants, on the ground that "proximate cause" cannot be established "merely" by showing the defendant "creat[ed] the circumstances that occasion an injury," it follows that "merely" creating an environment where police violence goes unpunished is not enough to hold the PBA (and the City) responsible under § 1983 for the consequences of any violence that actually ensues. Memorandum at 21.

At the outset, if there were any conflict between what is required by New York tort law and what has been held necessary to establish causation under § 1983, the latter obviously would be controlling here. See Fiacco, 783 F.2d at 326 (expressly rejecting defendant's assertion "that a "policy that . . . merely permits or tolerates unconstitutional acts by city employees cannot be the basis for municipal liability under § 1983"); Myers v. City of Orange, 157 F.3d 66, 74 (2nd Cir. 1998) ("defendants in § 1983 actions may be held liable for those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties") (citation omitted). But even the cases the Memorandum cites – arising from factual settings that are far

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of corruption or dishonesty by fellow officers" – the existence of which apparently was conceded by defendants – was irrelevant to claim that code was enforced for reporting ethnic favoritism).

removed from those presented here – do not announce the legal rule that the PBA argues for. Indeed, those cases and others decided under New York law affirm that a defendant will be liable even for damages caused by an intervening intentional tort if the defendant foresaw or should have foreseen that the misconduct would ensue. Kush by Marszalek v. City of Buffalo, 59 N.Y.2d 26 (1983). Thus, in Heredia, the court, in refusing to impose tort liability on a defendant who lent a car (in violation of an administrative regulation) to another whose negligent driving caused injury, stressed that the possibility of third parties' careless driving was not the problem toward which the regulatory prohibition was aimed. See 887 F. Supp. at 83 (plaintiff's injury was not "foreseeable, because the regulations were [not] intended to protect against the kind of harm which actually occurred"). Here, Defendants stand accused not merely of negligence concerning foreseeable wrongful conduct (which is all that New York tort law actually requires) – but of a custom and policy of reckless and deliberate indifference to the very consequence that ensued: that their actions would embolden violent police brutality.

In similar fashion, the Memorandum steers clear of precedents such as Adickes, and Lusby, which address the extent of § 1983 liability for conduct – like that here – whose unconstitutionality is beyond doubt, directing the Court's attention to decisions denying § 1983 relief on the analytically distinct ground that the plaintiff had failed to show deprivation of a constitutional right. While the Supreme Court's decisions Deshaney v. Winnebago County Dep't Soc. Servs., 489 U.S. 189 (1989) and Martinez v. California, 444 U.S. 277 (1980), stand for the proposition that the Fourteenth Amendment does not include a general right to government protection from private violence, but cf. Dwares, 985 F.2d at 98-99 (recognizing that the Deshaney rule does not foreclose all failure-to-protect liability), neither case purported to

decide when a private defendant can be held accountable based on its involvement in actions that were unconstitutional and committed under color of law.[18] The proper legal standards for linking customs and policies to particular constitutional deprivations are not undemanding, see Walker, 974 F.2d at 297-98, but the cases cited, which address an entirely distinct element of section 1983 liability are unilluminating.

Finally, the notions of duty that the PBA seeks to inject into this case simply have no place under section 1983. The sources of the PBA's legal obligation to Mr. Louima are the Constitution and § 1983 itself, which provides a remedy against all persons who participate in deprivations of federal rights accomplished under color of law. Once more, the PBA's selective sampling of State cases could hardly be less probative. In Burns Jackson Miller Summit & Spitzer, 59 N.Y.2d 314, 464 N.Y.S.2d 712 (N.Y. 1983), see Memorandum at 16, the New York Court of Appeals addressed a question of the New York Legislature's intent: whether a private right of action could be implied from the statute prohibiting strikes by municipal unions.[19] The question presented for this Court's decision is diametrically different: the statute under which the PBA is sued is one whose specific and exclusive purpose is to provide a cause of action against

[18]Although Martinez does include language indicating that the "decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law," this observation, which came after the Court's holding that the plaintiff had failed to allege the deprivation of a federal right, was explicitly limited to the facts of the "particular parole decision" before the Court. 444 U.S. at 285. The Court's decision also expressed reluctance to impose constitutional obligations in the "practical and troublesome area," of parole decision making, 444 U.S. at 283; see id. (noting that "basic risk that repeat offenses may occur is always present in any parole system").

[19]Notably, while the New York Court of Appeals held that the statute could not be privately enforced through a damages action, it affirmed lower court rulings that unions could be sued – albeit not by the particular plaintiff – on a common law public nuisance theory, i.e., that there were preexisting common law duties that the statute had not abolished.

those who wilfully participate in deprivations of individual rights under color of law.[20] Indeed, even if abstract common law categories applied, the tort duties to refrain from the sort of wilful and reckless misconduct alleged in the complaint run against the world. See also infra. at V. (discussing PBA's common law responsibilities for its actions).

b. Section 1983 Fully Applies to Labor Unions Who Act Jointly With State Actors to Deny Civil Rights

To the extent that the Memorandum argues, see id. at 16, that labor unions can only be sued for actions taken in their proprietary capacity – and therefore not under Section 1983 – the

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[20]Lizzi v. National Ass'n of Letter Carriers, 755 F. Supp. 68 (E.D.N.Y. 1991) (discussed. Memorandum at 15), is, if anything, even less relevant. The labor union defendant in that case was not charged with maintaining a custom or a policy of reckless disregard for the constitutional rights of the plaintiff: the sole claim was that the union's (successful) representation of one of its members in connection with his disciplinary hearing made the defendant responsible for a subsequent tortious act committed within the scope of his employment. Here, liability is not based on the PBA's having kept Volpe, for example, on the force, by representing him in administrative disciplinary hearings and thereby "furnishing the condition" for him to brutalize again. See ¶ 145 (noting, in the course of claim against the City, that "the Police Department received a number of complaints concerning defendant Volpe's excessive use of force on civilians," which were wrongly determined to have been "unfounded"); see also ¶149 (citing Police Department's failure to take disciplinary action against Schwarz for having "testified untruthfully at a departmental hearing in an unsuccessful attempt to help defendant Abbate – himself the object of more than two dozen civilian complaints – on the force").

Rather, the complaint charges the PBA's custom of using extralegal means to protect the most violent and lawless police officers – a practice that has the near certain result of producing constitutional deprivations (although the paragraphs cited would have some relevance if Defendants were staking their dismissal motion, as they are not, on the idea that the individual officers were not aware of the blue wall. See Batista v. Rodriguez, 702 F.3d 393, 399 (2nd Cir. 1983) (rejecting Monell claim for lack of evidence that officer defendants "were aware of any City policy condoning police violations of civil rights"). Moreover, the PBA's insistence that it owes "no duty" to Mr. Louima is especially jarring, given that so many of the cover-up activities in which the Defendants stand accused of having played a central role involved the PBA's singling Mr. Louima out for maltreatment.

governing law is, yet again, emphatically to the contrary.[21] To begin with, municipal unions are regularly subjected to section 1983 liability under the same standards as are others who violate constitutional rights. This includes in cases where the constitutional deprivation is accomplished through operation of a collective bargaining agreement. See, e.g., Messman v. Hemke, 133 F.3d at 1045 n.2 (noting absence of dispute that municipal employees' union "was acting under color of state law when it joined with the City in drafting and ratifying the [collective bargaining agreement]"); Bromley v. Michigan Educ. Ass'n, 82 F.3d 686 (6th Cir. 1996) (entertaining § 1983 case against union for having abridged represented bargaining unit member's free speech rights); Andrews v. Education Ass'n of Cheshire, 829 F.2d 335 (2nd. Cir. 1987) (same).

Unions are routinely held liable under federal civil rights statutes for their role in having encouraged, agreed to, or acquiesced in policies that lead to deprivations of third parties' civil

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[21]Although not relevant to the question of section 1983 liability, the PBA exaggerates considerably when it posits that these decisions stand for a universal common law principle that "a union is not legally responsible for torts committed by its members," Memorandum at 16. Although those cases arguably hold that a union will not be held responsible for a tort based only on the fact that their lawful representation of a member/tortfeasor in a grievance proceeding was a but-for cause of subsequent misconduct, unions have been held accountable when their involvement extends beyond good-faith discharge of clear statutory duties. See, e.g., Browne v. International Bhd. of Teamsters, 203 A.D.2d 13, 609 N.Y.S.2D 237 (1994) (upholding union liability for strike-related violence). Similarly, the Memorandum might be literally correct in saying that "unions have not been held liable in tort for their actions as unions," id. (emphasis supplied), in that the decisions the PBA chooses to cite declined to hold union defendants liable, there are many decisions that do hold unions liable for tort, see Caso v. District Council 37, AFSCME, 350 N.Y.S.2d 173 (A.D. 1973). Indeed, the New York Court of Appeals held, in Burns Jackson, that unions may be sued in tort, but found no liability on the facts of that case. See also Boyle v. Anderson Fire Fighters Ass'n Local 1262, AFL-CIO, 497 N.E.2d 1073 (Ind. App. 2 Dist.1986) (fighting fires was "ministerial duty" owed by union members to all members of general public); Burke & Thomas, Inc. v. International Org. of Masters, Mates & Pilots, 600 P.2d 1282 (Wash. 1979) ("We do not question that a public employee union may be held to answer for its torts"). As will be shown below, there are many more decisions holding unions accountable for conduct "as unions" committed, as here, in violation of civil rights laws.

rights. See, e.g., McDonald v. Santa Fe Trail Transp., 427 U.S. 273, 284 (1976) (union Title VII liability is appropriate when union "acquiesced and/or joined in" employer's discriminatory policies); Guerra v. Manchester Terminal Corp., 498 F.2d 641, 656 (5th Cir. 1974) (union liable for inducing employer to discriminate); Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 487 (2nd Cir. 1985), aff'd in part and remanded on other grounds, 479 U.S. 60 (1986) (joint union liability for failure to accommodate employee's religious practice); Murphy v. Miller Brewing Co., 307 F. Supp. 829 (E.D. Wis. 1969). Once more, the PBA purports to provide the Court with a snapshot of the legal landscape but has managed to place its thumb over the part of the lens that would capture the many precedents (here, an overwhelming majority) that do not support its assertions.

Finally, the Court need not be long detained with the PBA's contention that Mr. Louima seeks to hold the union accountable for actions resulting from the "necessary" performance of its tasks as collective bargaining agent, charged with responsibility for representing guilty and innocent members alike. Although the Memorandum's warnings that section 1983 liability here would convert unions into "'judges'" rather than "'advocates,'" see id. (quoting Lizzi) may have some abstract rhetorical bite, they are stunningly inapposite to the facts set out in the complaint in this case.

First, it is not "necessary" that those who engage in violent misconduct have as their "advocates" individuals who are themselves police officers, under a sworn duty to uphold the law and protect the public. As Judge Raggi held in finding that communications between PBA agents and police officer members were not privileged against disclosure to a grand jury, there is no even arguable basis for barring disclosure to those other than the employer, see In re Grand

Jury Subpoenas Dated January 20, 1998, 995 F. Supp. 332, 336 (E.D.N.Y. 1998) (distinguishing City of Newburgh on that basis), and there is no reason why the PBA's members' need for confidential advice cannot be met through direct consultation with (union-provided) criminal defense lawyers. See id. at 339 & n.6 (noting that officers were "competent to discuss [their] concerns fully and frankly with licensed counsel" and contrasting union representatives with translators or others whose services truly are required "to facilitate communication between attorney and client"). In the face of this ruling, which involved the same parties and arose from the same underlying facts as does this case, it is striking that the PBA continues here to assert that there is an implicit exception to an officer's duty to protect the public for cases where that police officer is a PBA agent and where the criminal is a union member who has brutalized a civilian.

In fact, Mr. Louima does not seek to hold the PBA accountable for good-faith efforts to protect its members' legal rights – or even solely for wrongful nondisclosure of officers' criminal confessions. See ¶19 ("The PBA and its agents are not mere passive receptacles of inculpatory information. Instead, in this case and many others, the PBA [acts affirmatively] . . . with the specific intent of determining what evidence of criminality must and can be hidden from law enforcement authorities"). The complaint describes actions that go far beyond what any "advocate" may – let alone "must" – go. See In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1038 (2nd Cir. 1984) ("advice in furtherance of [fraudulent or unlawful] goals is socially perverse . . . and not worthy of protection under ordinary rules of [attorney/client privilege]"). Although the Memorandum does not say so in so many words, the PBA's position only becomes coherent – but still not correct, obviously – if suborning perjury,

intimidating witnesses, and obstructing the resolution of investigations of violent crimes are really "necessary" incidents of the duty running from union to member. But the law is clear that even a criminal defense lawyer – whose duty of advocacy is long-established and jealously protected – may not engage in that sort of conduct, and if an attorney is accused of having done so, it is no defense, as the PBA seems to assume, that he was advancing his client's interests. Cf. United States v. Fayer, 523 F.2d 661 (2nd Cir. 1975). Indeed, as the allegations of the complaint make clear, the PBA's actions do not even meet that description: although violent criminals such as Schwarz, Volpe, and Wiese may benefit from the union's approach, honest officer/members who are deterred from coming forward – as the law requires them to do – are actually placed in harm's way (although the risk is, concededly, a largely theoretical one, given the City's lax record of discipline for those who commit code-of-silence violations, see, e.g., ¶ 165); see generally ¶ 164 (noting Mollen Commission conclusion that "the PBA "often acts as a shelter and protector of the corrupt cop, rather than as a guardian of the interests of the vast majority of its membership, who are honest police officers").

4. The Complaint Adequately States a Deprivation of Federal Rights

The PBA's final line of defense against section 1983 liability is to argue that the complaint does not state a claim that the PBA deprived Mr. Louima of rights that are of "constitutional" dimension. Memorandum at 18-20. There can, of course, be no question that Mr. Louima's complaint states a claim under § 1983 for arrest without probable cause, see Weyant v. Okst, 101 F.3d 845 (2nd Cir. 1996); for use of unreasonable force by beating him while he was handcuffed in the squad car, Graham v. Connor, 490 U.S. 386 (1989); use of unreasonable force by the degrading and violent torture in the precinct house, Powell v. Gardner.

891 F.2d 1039 (2nd Cir. 1989), deliberate indifference to his need for medical attention while in custody, see Weyant, 101 F.3d at 857; Taylor v. Bowers, 966 F.2d 417 (8th Cir. 1992), and for continued detention, i.e., shackling him to his hospital bed, without probable cause. With respect to these undeniable constitutional injuries, the PBA rests its demand for excuse from section 1983 liability only on the ground, discussed in the preceding pages, that these specific actions are, one way or another, too remote as a matter of law from the PBA's wrongful customs and practices.

The Memorandum – necessarily – takes a different tack regarding claims arising from those actions, many specifically directed at Mr. Louima by the PBA, which were aimed at deterring and discrediting his testimony, interfering with the ordinary course of justice, and punishing him for pursuing legal redress. Even if the allegations of the complaint are true, the Defendants submit, i.e., if (1) the PBA, knowing that Mr. Louima had suffered life-threatening injuries through the vicious acts of the individual defendants, promptly took the side of his tormentors, (2) used improper means to orchestrate a cover-up aimed at preventing the individual officers from having to answer criminally and civilly for their actions, and (3) embarked on a campaign specifically designed to inflict further emotional harm on Mr. Louima and his family, in order, among other things, to deter him from seeking redress and from testifying in criminal cases (and to dissuade authorities and jurors from crediting his allegations), such actions do not state a constitutional claim. See Memorandum at 19. This argument has two parts: (1) a contention that the complaint does not state a claim against the PBA for unreasonable seizure because it (supposedly) does not allege PBA involvement before August 13 – the same day that Mr. Louima was finally released from police custody, see id., and (2) an assertion that the PBA's

cover-up-related conduct violated no constitutional right of Mr. Louima's, because his right to petition for redress supposedly has not been compromised. See Memorandum at 3 (asserting Mr. "Louima has had his day in court"). The very pendency of this civil suit, the PBA insists, is conclusive proof that Mr. Louima has no viable constitutional claim. Id.. Neither prong of the PBA's argument holds up under scrutiny.

With respect to the first, it is well to note what did not happen: there is no basis in the complaint (or in fact) for believing that the PBA, upon learning of the extreme brutality that had been visited upon Mr. Louima, set out promptly to set matters right, only to find out that Mr. Louima had, that same day, already been ordered freed. Cf. United States v. Dallas, 2000 WL 1473896 (2nd Cir. Oct. 4, 2000) *4 (stating requirements for abandonment defense in criminal conspiracy). For purposes of this motion, it must be accepted that the PBA was meeting on August 13 in an effort to determine which lies were necessary to frustrate the course of justice and what conduct directed at Mr. Louima would be most effective in humiliating and silencing him. The nub of the PBA's assertion, then, is only that the fluke of timing (i.e., that both the meeting described in the complaint and the release occurred on the same day) means that the PBA cannot be held responsible for "any deprivation of Mr. Louima's rights from August 9 to August 13" – even if it may plainly be inferred from the complaint's allegations that, had Mr. Louima not been released, Defendants would have taken whatever steps thought necessary to perpetuate the violation of his Fourth Amendment rights.

But this entire argument rests on an inaccurate – and, for Rule 12(b)(6) purposes, entirely untenable – reading of the complaint: as affirmatively alleging that the basement meeting on August 13 represented Defendants' first involvement. In fact, the complaint specifically pleads

that "defendant PBA quickly became involved in the conspiracy and through its agents, played a significant role in advancing the cover-up." ¶71. Defendant Immitt himself has testified that, as early as August 10, he had been made aware (by defendant Wiese) that something had happened at the 70th Precinct, and more important, both Defendant Schwarz and Inspector Burns of the Internal Affairs Bureau testified under oath that Wiese , a PBA delegate, was carrying out the duties of PBA agent, in connection with this case, as early as August 10. See Attachment A.[22]

The circularity of the PBA's argument concerning Mr. Louima's First Amendment rights is not easy to miss. At the same time that the Memorandum purports to accept that Mr. Louima, like other citizens, enjoys a First Amendment right to petition the government – including the courts and the authorities charged with investigating the crimes committed against him – it insists upon a rule that would make that right a practical nullity. Under Defendants' view of the law, if efforts to intimidate a would-be plaintiff succeed, then a wrongdoer will escape liability for both his wrongdoing and the bad acts committed after the fact; and if, as here, a cover-up is less than entirely successful, and the plaintiff makes it to court, no "deprivation" has occurred.

Although the Memorandum – uncharacteristically – cites supporting authority that is in point (albeit from a District Court in another Circuit, see Memorandum at 19 (citing Griffin v.

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[22]Although Defendants might argue, with some plausibility, that Wiese had a personal interest that transcended his role as PBA delegate, it is far too early to determine which of the three hats – violent criminal, police officer, or PBA fixer – Defendant Wiese was wearing at any particular time, especially in view of specific testimony offered that it was the latter of these.

As for defendant Abbate, although he was not, at the times relevant, an employee or official representative of the PBA, the facts alleged in the complaint do not foreclose his being found to be Defendants' agent. With the benefit of discovery, the precise nature of Abbate's relationship with Defendants should become more clear.

Holy, 1996 WL 556969 (N.D. Ill. Sep. 26, 1996)); see also Vasquez v. Hernandez, 60 F.3d 325, 332 (7th Cir. 1996), other courts have had no difficulty perceiving the perverseness of such a rule. See, e.g., Bell v. City of Milwaukee, 746 F.2d 1205, 1261 (7th Cir. 1984) (noting that a narrow interpretation of the court access right "would encourage police officials to conceal the circumstances relating to unlawful killings"); Gonsalves v. City of New Bedford, 939 F. Supp. 921, 927 (D. Mass.1996) (if "the mere filing of a suit was sufficient in every case to extinguish a 1983 claim for cover-up, the concept would be a nullity because the issue of cover-up is only presented to a court once a case is filed"), and that narrow understanding is not the law of this Circuit. See Barrett v. United States, 798 F.2d 565, 575 (2nd Cir. 1986) (allowing claim to go forward based on diminution of value of verdict because defendants' "obstruction of justice in conducting a defense to that action deprived [plaintiffs] not of the whole of their . . . lawsuit, but only of a part of that protected property"); McGarty v. Town of Carmel, 997 F. Supp. 435, 437 (S.D.N.Y. 1998); see also Ryland v. Shapiro, 708 F.2d 967, 973-74 (5th Cir. 1983) (observing that "any interference with a substantive constitutional right, such as the right of access to the courts, may by itself amount to a constitutional deprivation" and noting that cover-up related delay "would cause stale evidence," and make litigation more expensive); Gonsalves, 939 F. Supp. at 927 ("[t]he fact that the plaintiff filed this lawsuit despite the immediate, intentional efforts to cover-up the beating and the denial of medical care that the jury found proven does not extinguish the defendants' potential liability for cover-up").

Indeed, the wrongfulness of such an interpretation of the First Amendment is not limited to these undeniably perverse consequences: in fact, the rule the PBA presses for is in powerful tension with basic postulates of constitutional law. As an initial matter, the "right 'to petition for

a redress of grievances [is] among the most precious of liberties safeguarded by the Bill of Rights' and is 'intimately connected . . . with the other First Amendment rights of free speech and free press,'" Gagliardi v. Village of Pawling, 18 F.3d 188, 194-95 (2nd Cir. 1994) (quoting United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967)), and those other guarantees of the First Amendment consistently have been held violated by policies that merely make their exercise more difficult – irrespective of whether or not the plaintiff actually decides to run the gauntlet, See Davis v. Village Park II Realty Co., 578 F.2d 461, 463 (2nd Cir. 1978), or whether the challenged policy amounts to a complete prohibition of protected activity. See New York Times v. Sullivan, 376 U.S. 254 (1964); Arkansas Writers Project v. Ragland, 481 U.S. 221 (1987); Rutan v. Illinois Reublican Party, 497 U.S. 62, 72-73 (1990) (it was error, in public employee's First Amendment case, to require proof of an adverse action "substantially equivalent [to] dismissal"); see generally LeBlanc-Sternberg, 67 F.3d at 426 ("since the loss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury . . . the victim of a conspiracy to deprive First Amendment freedoms has standing to bring suit before the conspiracy has resulted in economic or tangible injury"); see also Fisher v. City of Cincinnati, 753 F. Supp. 681 (S.D. Ohio 1990) (explaining inapplicability of procedural due process standards in case brought under First Amendment court access right).

To the extent that decisions such as Griffin or Vasquez have relied on Bounds v. Smith, 430 U.S. 817 (1977) and Lewis v. Casey, 518 U.S. 343 (1997), as establishing that the right to court access is violated only when it is substantially burdened, they have overlooked a number of legally critical distinctions. Not only did those decisions arise in the prison setting, where government interference with First Amendment rights are most tolerated, see Turner v. Safley,

482 U.S. 78 (1987), they have involved prison rules and practices that have the unintended effect of making court access more difficult. Here, the intent was to burden Mr. Louima's rights. See Hudspeth v. Figgins, 584 F.2d 1345, 1348 (4th Cir. 1978); McGarty v. Town of Carmel, 997 F. Supp. 435 (S.D.N.Y. 1998); see generally Loper v. New York City Police Dept, 999 F.2d 699, 705 (First Amendment inquiry is more searching in cases of intended, as opposed to incidental, burdens on First Amendment freedoms).[23]

But even the dubiously restrictive approach could not support granting Defendants' motion to dismiss here. To the contrary, the complaint adequately alleges that the PBA has interfered with – and continues to – Mr. Louima's right to obtain meaningful relief for his injuries. See Nielsen v. Clayton, 1995 WL 417569 (7th Cir. 1995) ("Where a cover-up of a constitutional deprivation continues during trial, plaintiffs are being denied adequate, effective and meaningful access to the courts. Thus, plaintiffs were entitled to recover for emotional

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[23]Dissenting from the Seventh Circuit's decision in Vasquez, Judge Crabb argued persuasively that if prejudice is to be treated as an element of right of court access claim, the analytical framework should build on doctrine developed in cases addressing the constitutionality of governmental delay in indicting or trying defendants. In such cases, she explained:

> deliberate delay by the government weighs heavily in favor of finding breach of the constitutional right. . . . .[I]n pre-indictment delay cases, deliberate delay may impute a violation of due process even if the indictment is brought within the limitations period. I see no reason to alter this analysis when examining interference with access to the courts caused by a conspiracy of state actors. The reason for delay in this particular case could hardly be more egregious. The very nature of a conspiracy makes it difficult for parties from whom evidence or other information is being withheld to determine the extent of their harm. When state actors seek to protect one or more of their own by concealing evidence, hindering investigation or failing to cooperate with the judicial process, it is all the more difficult to discern the full extent of the victim's deprivation. Where, as here, there is evidence of a conspiracy to intentionally impede justice, the showing of prejudice required should be minimal.

60 F.3d at 332 (Crabb, D.J., dissenting) (citation omitted).

distress suffered until they obtained relief for Nielsen's death, which was when the jury returned a verdict in their favor") (cited in Gonsalves, 939 F. Supp. at 927). The complaint alleges, for example, that, by dint of the cover-up, critical evidence has been destroyed, "potentially inculpatory evidence" was removed, and false stories were solidified; and needless expenses incurred. See also ¶26.o. (noting that identities of "William Woe" PBA defendants remain unknown to Mr. Louima); cf. Davis, 578 F.2d at 463. The price for Mr. Louima's perseverance has been extreme emotional extreme hardship – including both fear of physical retribution and the humiliation pursued by the PBA. Finally, although acquittals have no preclusive effect in this civil case, Defendants' efforts – the many specifics of which remain unknown to Mr. Louima at this stage – have placed upon Mr. Louima the burden of proving conduct, such as the police car beating, that would already have been established had Defendants permitted justice to run its course.[24]

III. The PBA Actions Violate The Civil Rights Conspiracy Laws

A. The PBA's Liability For Section 1986 Does Not Depend on Proving Its Conspiratorial Involvement

The PBA makes only one argument in support of its contention that count XII of the complaint, charging Defendants with neglect to prevent a civil rights conspiracy, must be

[24]Finally, to the extent that Defendants maintain that their conduct does not fall within the doctrinal prohibitions of the First Amendment, that does not mean that dismissal would automatically be warranted. See County of Sacremento v. Lewis, 523 U.S. 833, 843 (1998) (where specific constitutional guarantee does not apply, conduct violates the Fourteenth Amendment if it "shocks the conscience").

dismissed.[25] Because liability under that provision is contingent upon viable allegations (and. ultimately, proof) that section 1985 was violated, the Memorandum argues, if the Court accepts Defendants arguments against holding them liable under that statute, but see infra, the § 1986 claim must fall, too.

That is error. Although it is a truism that a claim under § 1986 may not go forward absent a viable section 1985 claim (because liability is premised on defendant's neglect in allowing a § 1985 conspiracy to succeed), it is no less well established that a defendant may be held accountable, under section 1986 for failing to have prevented a civil rights conspiracy in which it was not a participant. Peck v. United States, 470 F. Supp. 1003,1012 (S.D.N.Y. 1979); accord Platsky v. Kilpatrick, 780 F. Supp. 110, 113 (E.D.N.Y. 1991); see generally Hampton, 600 F.3d at 629. Thus, dismissal of Count XII could only be appropriate if the PBA showed that the complaint does not state a viable claim of any Section 1985 conspiracy – against any Defendants – including the police officers who hurled racial epithets against Mr. Louima as they savagely beat him.[26]

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[25]42 U.S.C. § 1986 provides that:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented

[26]Moreover, a defendant may be held accountable under §1986 for failing to prevent accomplishment of any Section 1985 conspiracy, including those for which no proof of race- or class-based animus is required. See Kush v. Rutledge, 460 U.S. 719, 726 (1983) ("it is clear that Congress did not intend to impose a requirement of class-based animus on persons seeking to prove

The PBA, wisely, does not even attempt that demonstration – nor does the Memorandum argue in any way that the complaint fails adequately to plead the other elements of section 1986 liability: that Defendants allowed injuries to be inflicted that they could have, in the exercise of due care, prevented. Clark v. Clabaugh, 20 F.3d 1290 (3rd Cir. 1994) (proof of negligence suffices to establish liability under § 1986);, Park v. City of Atlanta, 120 F.3d 1157 (11th Cir. 1997). Even if knowledge Wiese acquired in the course of the abuse of Mr. Louima is not imputed to his principal, as ordinary principles of agency law would provide, see In re Mediators, Inc., 105 F.3d 822, 827 (2nd Cir. 1997), it is undeniable that he came to act in this case as a PBA agent "soon thereafter," see supra, and the complaint similarly makes clear that still higher ranking PBA officials became aware (to understate matters significantly) of the conspirators' plan to maintain Mr. Louima under custody as a criminal suspect and deter him (and others) from giving truthful testimony to investigators and from seeking redress for his injuries. Furthermore, it is readily apparent from the complaint's other allegations that the conspiracies would have been less successful in damaging Mr. Louima had the PBA not undertaken to interfere with its members' doing their legal duty – or, indeed, if the PBA's own police officer/agents, upon

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a violation of their rights under the first clause of Section 1985(2)").

Although, in recently amending their complaint, Plaintiffs inadvertently neglected to alter the wording of Count XII so as to state unambiguously that the PBA is being sued for failing to prevent any of the § 1985 conspiracies – and not merely those pleaded under § 1985(3) – the full breadth of Plaintiffs' theory of recovery should be apparent from the body of the complaint, and. given the facts of this case, any claim by Defendants to have been prejudiced by this typographical error should be met with considerable skepticism. Cf. Fed. R. Civ. P. 15. As is made clear above. Defendants' contentions concerning the § 1985 and § 1986 claims that the complaint does unambiguously plead are decidedly cursory, and an assertion that they would have proceeded differently on § 1986 had there been no clerical oversight must be evaluated in the light of those patently flawed arguments. If the Court deems doing so the appropriate course, Plaintiffs will seek leave formally to amend the complaint with this correction.

Although § 1985(3) accords a remedy to a person "injured in his person or property . . . as a result of the conspiracy to intimidate or retaliate,"(i.e., a § 1985(2) conspiracy) the "gist of the wrong at which § 1985(2) is directed," the Court explained, "is not deprivation of property, but intimidation or retaliation against witnesses in federal-court proceedings."[27] Precisely like the plaintiff in Haddle, Mr. Louima seeks compensation from Defendants for injuries to his "person," e.g., emotional distress, inflicted as part of the Section 1985(2) conspiracy. Whether or not he has a protectable interest in the outcome of these proceedings – or a constitutional right to be free from these acts, cf. Paul v. Davis,424 U.S.693 (1976)) – Haddle teaches, the answers are not relevant to the § 1985 inquiry.

The decisions cited by the PBA as supporting its position are beside the point -- even when judged according to the already relaxed standards of relevance prevailing in the rest of the Memorandum. Even if it were true that the PBA's actions were intended exclusively to benefit the officers in their federal criminal trials – and in no way contemplated civil litigation with Mr. Louima, see Memorandum at 20 ("to the extent that plaintiffs seek redress for acts designed to protect guilty officers from punishment, there is no pleading of injury to Louima") – section 1985(2) would proscribe conspiracies to "deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully," and holds liable "persons engaged in such a conspiracy [who] do or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property." § 1985(2), (3) (emphasis supplied). See

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[27]As the Supreme Court explained, § 1985(3) specifies the remedy provision for all the various conspiracies prohibited in the three subsections of the provision. 525 U.S. at 125 n.2.

learning of the atrocities, had done their own official duties as police officers and reported misconduct. As the complaint details, Defendants did none of this, opting instead, to appear at roll calls urging union members – in defiance of their official duty and, in certain instances, against their own penal interests – to maintain silence. Cf. ¶164

B. The Complaint Adequately Pleads Injury Under Section 1985

Defendants also argue – indeed it is the only argument advanced in support of their motion to dismiss Count XI (which challenges PBA efforts to impede the due course of justice in federal courts) – that Mr. Louima has inadequately alleged "injury," on the ground that the only interest the complaint asserts is in having the culpable individual defendants criminally prosecuted. Because "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another," the Memorandum insists, id. at 23 (quoting Silverstein v. Barnes, 1986 WL 4525, aff'd, 798 F.2d 467 (2nd Cir. 1986)), Mr. Louima's § 1985 claims should fail.

This argument would be facially implausible under any circumstances – it is so contrary to the plain language of § 1985 – but it is especially ineffective in the wake of the Supreme Court's unanimous decision in Haddle v. Garrison, 525 U.S. 121 (1998), which expressly rejected the argument that for § 1985 purposes, plaintiffs must state an injury to a constitutionally cognizable interest. Reversing lower court rulings that a § 1985(2) plaintiff's claim that his at-will employment had been terminated in retribution for his having testified in a federal trial did not state the sort of "injury" required to maintain a cause of action under that statute (because there is no arguable liberty or property interest in continued at-will employment), Chief Justice Rehnquist explained that the plain meaning of the statute's text foreclosed such a reading.

id. ("[T]he party so injured"may have an action for the recovery of damages occasioned by such injury . . . against any one or more of the conspirators") (emphases supplied). Thus, not only may Mr. Louima sue for damage done as part of the effort to prevent him from testifying, "as a witness" – just as the plaintiff in Haddle could sue based on retaliation for having testified in a "federal criminal trial," 525 U.S. at 122 – without showing that he has a "legally protectable interest," in a conviction, he may also hold the PBA liable for any damage to his property, including a cause of action, that has been done as part of the federal conspiracy. See Barrett, 798 F.2d at 575. Haddle leaves no room for Defendants' argument that Mr. Louima can go forward only by showing that destroying his person or property (and not exculpating the officers) was the specific objective (or "design" Memorandum at 20) of the conspiracy. Cf. Gonsalves, 939 F. Supp. at 927 (noting that "cover-up may also have had other objectives, such as preventing criminal prosecution").

C. The Complaint Adequately Alleges PBA Involvement in Section 1985(3) Conspiracies and the Section 1985(2) Conspiracy to Impede the Due Course of State Justice

1. The Complaint's Allegations of Class-Based Animus Are Sufficient

While the foregoing shows that the complaint states viable claims under both Sections 1986 and 1985(2) (ones for which evidence of racial animus by the PBA is undeniably unnecessary) – the Memorandum's assumption that the animus requirement means that only those participants who have joined Section 1985(3) deprivation conspiracies for racially motivated reasons is mistaken. In Bell v. City of Milwaukee, 746 at 1259-60, the Court of Appeals for the Seventh Circuit held that it is the character of the conspiracy – and not the

individual's state of mind – that determines whether a conspiracy participant can be held liable under § 1985(3). Rejecting an appellant's argument that he could not be held liable under § 1985(3) without individualized proof of specific racial animus on his part, the court ruled that "racial animus of a key conspiratorial actor who initiates and maintains the conspiracy is sufficient to establish conspiracy racial animus under Section 1985." Yeadon v. New York City Trans. Auth, 719 F. Supp. 204, 212 (S.D.N.Y.1989), is to similar effect. In that case, supervisor defendants who participated, as the PBA is alleged to, in a racially motivated conspiracy were held legally accountable for involvement, without any apparent claim that their participation had the same motivation. Accord Green v. Francis, 705 F.2d 846 (6th Cir. 1983) (police defendants liable under section 1985 for failure to intercede in race-based conspiracy).[28]

2. The PBA Is Liable For Hindering The Provision of Equal Protection

Even if Defendants were right that absence of proof that their own participation was racially motivated would defeat a claim based on § 1985(3)'s "Deprivation" clause, see Griffin v. Breckenridge, 403 U.S. 88 (1971), finally, that would not be grounds for dismissing Count IX, which alleges violation of the second clause of Section 1985(3), proscribing conspiracy "for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws" (emphasis supplied). That provision, whose terms aptly describe the PBA's systematic efforts to

[28]These decisions are wholly consistent with basic principles of civil liability. To the extent that § 1985(3) is understood to reflect a congressional judgment that racially motivated or other class-based conspiracies are especially pernicious, no principle of law or equity suggests that an individual who energetically devotes himself to the success of that conspiracy should not be accountable to the conspiracy's victim, on the ground that he was motivated by different (but still undeniably anti-social) purposes.

assure that even the most culpable police officers are not brought to justice, has not been construed authoritatively to impose a class-based animus requirement. See Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 281 (1993); id. at 289-90 (Souter, J., concurring in part and dissenting in part); Town of West Hartford v. Operation Rescue, 991 F.2d 1039 (2nd Cir. 1993), and, as the facts of this case well illustrates, such a limitation would be neither necessary nor appropriate.

While the Supreme Court has held that class-based animus is an element of a claim under the "deprivation" clause of §1985(3), the Court's opinions have been explicit in recognizing that that requirement derives not from the statutory text but from a pragmatic need to assure that § 1985(3) does not federalize what would otherwise be ordinary tort suits. See Griffin, 403 U.S., at 102. Although this need to keep Section 1985(3) within manageable limits – particularly in cases of "purely private conspiracies," see Griffin, 403 U.S. at 104 (noting perceived constitutional difficulties in regulating private party conduct) – is broadly consistent with concerns expressed by the statute's drafters, there is no similar need for such extra-textual limitation for claims under the prevention clause, see Bray, 506 U.S. at 301 (Souter, J., concurring and dissenting). and it would be especially inappropriate to impose one to defeat a claim, such as Mr. Louima's, that so deeply implicates the original purposes and plain meaning of the statute. See Bray, 506 U.S. at 348 (O'Connor, J., dissenting) (noting that the "requirement of class-based animus is a reasonable shorthand description of the type of actions the 42d Congress was attempting to address" but cautioning that "that shorthand description" should not be allowed to "take on a life of its own"); but see Libertad v. Welch, 53 F.3d 428 (1st Cir. 1995) (imposing animus requirement in prevention clause case); Upper Hudson Planned Parenthood, Inc. v. Doe, 836 F.

Supp. 939 (N.D.N.Y. 1993) (same).[29]

The only rationale advanced for importing a racial animus requirement into the prevention clause – the presence of "equal protection" language in the statute – is deeply flawed. First, there is powerful evidence that the statute's framers did not understand the phrase "equal protection of the laws" as limited to refraining from reliance on classifications that modern doctrine treats as "suspect," see Earl A. Maltz, The Concept of Equal Protection of the Laws- An Historical Inquiry, 22 SAN DIEGO L. REV. 499, 537 (1985); Steven J. Heyman, The First Duty of Government: Protection, Liberty and the Fourteenth Amendment, 41 DUKE L. J. 507 (1991), and the legislative history cited in Briscoe firmly establishes that organized efforts to frustrate the operations of the criminal justice system were a core concern of those who enacted § 1985(3). See 460 U.S. at 338 ("It is clear from the legislative debates that, in the view of the Act's sponsors, the victims of Klan outrages were deprived of 'equal protection of the laws if the perpetrators systematically went unpunished.'"). Moreover, even under current doctrine, selective withholding of governmental protection – when improperly motivated – states an Equal Protection claim. Village of Willowbrook v. Olech, 120 S. Ct. 1073 (2000) (per curiam); LeClair v. Saunders 627 F.2d 606, 609-10 (2nd Cir. 1980) (a selective treatment claim may be premised upon intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person); Dwares, 985 F.2d at 99 (police refusal to protect flag burners violates

[29]As Justice Souter's opinion explained, the text of the Prevention Clause – like those other provisions of Section 1985 that have been held not to require class-based animus, see Kush – is, by its nature limited to conduct closely bound up with state action. id. at 301 ("the act of frustrating or thwarting state officials in their exercise of the State's police power would amount simply to an extralegal way of determining how that state power would be exercised").

> sever the liability of the original tort-feasor but . . . [t]hat doctrine has no application when the intentional or criminal intervention of a third party or parties is reasonably foreseeable. When the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs.

(citations omitted); see also Derdiarian v. Felix Contracting Corp. 51 N.Y.2d 308, 434 N.Y.S.2d 166 (1980), ("liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence"); City of Birmingham v. Benson, 631 So.2d 902 (Ala. 1993) (applying principle in concluding that bouncer could be liable for homicide committed by bar's customer because "he should have realized the likelihood . . . that a third person might avail himself of the opportunity to commit such a tort or crime"); cf. Dwares, 985 F.2d at 99 ("it requires no stretch to infer that [police's] prior assurances [that defendants would not be arrested] increased the likelihood that the 'skinheads' would assault the demonstrators").

Indeed, it was precisely this principle that led courts to rule for the defendant in the two cases Defendants cite, Heredia and Sheehan. Although the defendant in Heredia could be considered negligent (for having lent his car, in violation of an administratively imposed duty) he could not be held accountable in tort, because the intervening conduct (negligent driving) was not foreseeable. In other words, "the defendant's conduct was part of the causal chain of events leading to the injury but the resulting injury could not have been reasonably anticipated by the defendant." Benson, 631 So.2d at 907.

Nor, as noted above, can Defendants properly analogize this case to Lizzi. In that case the intervening tort arguably was a foreseeable consequence of the union defendant's actions, but

Equal Protection); cf. Evans v. Romer, 517 U.S. 620 (1996). A regime that denies equal rights and remedies to those seeking redress for police-inflicted violence – or a systematic effort to undermine the State's provision of equal rights – is an affront to these same principles.[30]

V. The Complaint States Common Law Claims Against the PBA and the Individual Defendants

A. The Complaint Adequately Pleads A Cause of Action For Negligence

Defendants argue that Count XVI, Mr. Louima's claim for common law negligence. fails for the same reasons as do Counts XIV and XV, his claims of systematic wrongdoing in violation of the federal civil rights laws: because a party whose conduct "creates an atmosphere" where violence flourishes cannot be held liable for acts of violence that actually occur. See Memorandum at 27 (citing Heredia, 887 F. Supp. at 83).

But the PBA is no more right about causation under the common law than under § 1983. In Kush by Marszalek v. City of Buffalo, 59 N.Y.2d 26 (1983), the New York Court of Appeals explained the causation showing required under State common law. Answering a school district's argument that it could not be held liable in negligence when the plaintiff's injury resulted from an intervening crime or intentional tort – the theft of dangerous chemicals from school premises – the Court explained:

Defendant is correct that an intervening intentional or criminal act will generally

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[30]Indeed. a policy that provides rights and remedies to victims of violent acts based on whether or not the attacker was a police officer should not survive even "rational basis" Equal Protection review. See City of Orange, 157 F.3d at 74 (policy of refusing to prosecute cross-complaints does not satisfy "rational basis" standard); Navarro v. Block, 72 F.3d 712, 717 (9th Cir. 1995) (holding that even when policy of differential treatment of domestic violence victims is not motivated by discriminatory intent, it may still be challenged as lacking a rational basis).

the court held that the union's conduct should not be considered negligent. Although its pursuit of a grievance on behalf of the wrongdoer was the but-for cause of plaintiff's injury, Lizzi explained, it would have been "fatuous," to hold the union accountable for having done its duty as a union, i.e., representing a member of the bargaining unit in a grievance proceeding. But the Memorandum reads that decision for far more than it is worth, i.e., as if it announced (1) that any union action that is intended to advance the interests of bargaining unit members is similarly privileged and (2) that (because the union's legal duty to its member was found in that particular case to be stronger than any general obligation to prevent harm) unions can never be held liable to members of the public for the consequences of negligence.[31] Neither of these conclusions is supportable; indeed, Defendants' arguments are refuted by cases imposing common law duties on unions (1) for creating dangerous situations and tolerating lawless actions, see Browne; (2) for inducing or encouraging members to ignore their duties to the public, Boyle v. Anderson Fire Fighters Ass'n Local 1262, AFL-CIO, 497 N.E.2d 1073 (Ind. App. 2 Dist.1986), and (3) for violating statutes in a way that causes private harm, Caso v. District Council 37, AFSCME, 350 N.Y.S.2d 173 (A.D. 1973) (upholding right of general public to collect damages on nuisance theory); Burns Jackson Miller, 464 N.Y.S.2d at 720 (affirming availability of nuisance remedy and holding that Taylor law was not meant to pre-empt common law tort actions for damages caused by union's illegal activities).[32] The duty of individual police officers to report instances

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[31]The only claims in Lizzi concerned the union's action vis-a-vis its members; an important aspect of Count XVI involves the union's relationship with its agents, i.e., its neglgient failure to train them in a way that enables them to continue to discharge their duties as peace officers.

[32]The PBA does not have available to it the defense that helped the union escape common law liability in Burns Jackson. Unlike in that case, Mr. Louima's injuries are not comparable in kind and degree to those suffered by the general public.

of violence is a ministerial one, see Boyle (municipal firefighters have nondiscretionary duty to fight fires), and therefore imposes a duty to individual members of the general public, one with which Defendants may not tortiously interfere.[33]

B. The Complaint Adequately Pleads Intensional Infliction of Emotional Distress

The PBA also insists that the complaint fails to state a claim for intentional infliction of emotional distress, arguing that because the ultimate purpose of Defendants' campaign against Mr. Louima was not to cause him harm, but rather to help the individual police officers avoid criminal prosecution, there exists no set of facts that could establish the requisite "intent." Memorandum at 28. Even if this were an accurate reading of the complaint, the PBA cites no authority as support for the theory that New York law exempts from liability those who knowingly and intentionally cause harm, so long as they can show that, in doing so, they had an ulterior (if equally improper) motive. No such authority exists. Instead – and directly contrary to the PBA's assertions that a cause of action will only lie where infliction of harm is the sole purpose of the misconduct – New York courts, consistently with the Restatement (Second) of Torts, have recognized that recklessness, i.e., indifference to the likelihood that severe emotional harm will ensue suffices to satisfy the "intent" element of the tort. See Dana v. Oak Park Marina, Inc., 230 A.D.2d 204, 209, 660 N.Y.S.2d 906, 910 (4th Dep't 1997) (holding that liability can be established by showing "disregard of a substantial probability of causing [] severe emotional distress"); see id. (citing similar precedent from other departments).

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[33]As in Boyle, the activities of the union and its members are uniquely affected with the public safety, and when the union undertakes to help determine how a criminal investigation occurs. it is assumes a duty, imposed by traditional tort principles, not to heighten the dangers faced by third parties.

Nor is there anything to the PBA's argument that the complaint's intentional infliction claim is actually one for defamation in disguise, see Memorandum at 28-29, and must be dismissed for reasons specific to defamation law. Yet again, the controlling New York law is directly to the contrary. Whether intentional infliction is, as Defendants insist, a disfavored claim, the Appellate Division in Esposito-Hilder v. SFX Broadcasting, Inc., 665 N.Y.S.2d 697, 699 (3rd Dep't 1997) considered and rejected the specific argument that there can be no cause of action for infliction of distress where the same conduct (in that case, an insulting and embarrassing radio broadcast) would give rise to a defamation claim. Upholding the viability of the distinct intentional infliction claim – even in circumstances where the defamation claim could not go forward – the court quoted the Court of Appeals' observation that "[t]he tort is as limitless as the human capacity for cruelty. The price for this flexibility in redressing utterly reprehensible behavior, however, is a tort that, by its terms, may overlap with other areas of the law, with potential liability for conduct that is otherwise lawful." 665 N.Y.S. 2d at 700 (quoting Howell v. New York Post, 81 N.Y.2d 115, 122 [1993]); see also id. (noting that Court of Appeals had specifically rejected argument that intentional infliction claim may never be used as "end around" limitations of overlapping tort). Esposito-Hilder finally cited other appellate decisions that had implicitly taken the same position: in Cohen v. Feiden, the court noted, the Second Department had considered separately (though ultimately rejected on the merits) an emotional distress claim grounded on precisely the same "ill-chosen remarks to parties in . . . a custody proceeding" as was plaintiff's defamation suit.

Finally, to the extent that the Defendants assert that the intentional infliction claim is barred by the statute of limitations, that is an affirmative defense, see Fed. R. Civ. P. 8(c), which

the complaint is not required to anticipate. But the PBA's argument is devoid of merit in any event. First, Federal Rule 15(c)(2) specifically provides that an amended pleading relates back to the date of the original pleading when "the claim . . .arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Here, the initial complaint, filed within the one year limitations period, alleged that there had been a campaign to defame and publicly humiliate Mr. Louima, see ¶¶ 140-47, and put the PBA on notice that it was being sued for its post-attack conduct toward him. The statute of limitations cannot be invoked to penalize Mr. Louima for not having learned soon enough that there had been a secret, conspiratorial meeting in the precinct basement or that the PBA, through Wiese, Immitt, and possibly others had orchestrated that meeting – facts that emerged for the first time in a criminal trial heard earlier this year. See Keating v. Carey, 706 F.2d 377 (2nd Cir. 1983) (if defendant has concealed facts that are critical to a cause of action, the statute of limitations is tolled); Barrett, 689 F.2d at 329-30 (a plaintiff with knowledge of one claim, but deprived of information critical to another is entitled to tolling in that claim).

But even if the first complaint had less fully put Defendants (who have known all along that, inter alia, the meeting took place), the amended complaint makes clear that the PBA's Defendants' actions are not a thing of the distant past: see ¶¶ 109, 132 (alleging, respectively, that "defendants' efforts to conceal the truth continue to the detriment of Mr. Louima," and that " the PBA continues to deter and discourage" truthful testimony). See Neufeld v. Neufeld, 910 F. Supp. 977, 983 (S.D.N.Y. 1996) (noting the under New York law, "certain wrongs are considered to be continuous wrongs, and the statute of limitations, therefore, runs from the commission of the last wrongful act."); Dana, 660 N.Y.S.2d at 910 (continuous tort

doctrine applies in reckless infliction

cases).

1. The Complaint Adequately States Claims Against Defendants Immitt and Lee And On Behalf of Plaintiff Micheline Louima

On the last two pages of their Memorandum, Defendants attempt to sneak officers Immitt and Lee out of the case. First, Defendants insist that the complaint alleges

> in conclusory fashion . . . that Immitt and Lee sought to deter individual officers from coming forward, to intimidate any officers who did come forward and to publicize to the perpetrators and other police officers the names of individuals thought to be cooperating in the investigation. Immitt is later alleged to have invoked a privilege concerning communication with union members. Compl. ¶ 77

Even without fully correcting for Defendants' penchant for selective summarization – the last-cited paragraph also alleges that Immitt pleaded the Fifth Amendment when his assertion of privilege was overruled and is followed by an allegation that what testimony he did give was perjurious – plaintiff's contention that such allegations are somehow impermissibly "conclusory" is essentially self-refuting. To the extent that the PBA implies that such factual allegations(not to mention the ones the Memorandum leaves unmentioned) do not comport with the requirement that Immitt and Lee be given fair notice as to the nature of the claims against them, then it is the Memorandum that "departs from [the] reality" of what the Federal Rules require. Fed. R. Civ. P. 8(a).

The remainder of the Memorandum's arguments on behalf of Lee and Immitt incorporate by reference the arguments already made in support of dismissing claims against the PBA. Those arguments do not fare any better for the individuals than for the union. Indeed, they fare

worse. There is even less difficulty in finding the actions of Immitt and Lee, both of whom are New York police officers, to have been "under color of law," and the PBA's arguments concerning "respondeat superior," and union privilege – however spurious when advanced on behalf of the union – are, of their own terms, inapplicable to these individual defendants.[34]

CONCLUSION

For the foregoing reason, Plaintiffs Abner and Micheline Louima respectfully request that the Motion of the PBA et al. to dismiss be denied in its entirety.

Respectfully submitted,

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[34]With respect to Micheline Louima's claims, Count XXV, the Memorandum similarly advances no rationale for dismissal apart from asserting that these stand or fall with her husband's. See id. at 30. With that proposition Plaintiffs do not disagree, though, for all the reasons already set out, they respectfully submit that the claims must stand.

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TO: All Counsel List, Below

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

LOUIMA, et al.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

98 CV 5083 (SJ)(CLP)

AFFIDAVIT OF SERVICE

----------x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

NAOMI FEIN, being duly sworn, deposes and says: I am not a party to this action, am above the age of eighteen (18) years, and reside in New York, New York. On November 8, 2000, I served the attached Plaintiffs' Memorandum of Law in Opposition to PBA's Motion to Dismiss by handing a true copy thereof, enclosed in an envelope, to a messenger from the Dynamex Messenger Service, and addressed to the following person on behalf of defendants Patrolmen's Benevolent Association of the City of New York, Louis Matarazzo, Patrick Lynch and Michael Immitt at the last known address set forth after the name:

Douglas P. Baumstein, Esq.
Kelly Murray & Balber, LLP
516 Fifth Avenue
New York, NY 10036

Further, and on the same date, I placed one copy each of afore-mentioned Memorandum of Law in individual envelopes with first class postage, addressed to the persons on the attached "All Counsel List," and placed aforementioned envelopes in an official receptacle of the United States Postal Service.

NAOMI FEIN

Sworn to before me this
8th day of November, 2000

NOTARY PUBLIC

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NOTARY PUBLIC STATE OF NEW YORK
NO. 02BR6044495
QUALIFIED IN KINGS COUNTY
COMMISSION EXPIRES JULY 10, 2002

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA, :

98 CR 196(S-3)

-against- United States Courthouse
: Brooklyn, New York

THOMAS BRUDER
CHARLES SCHWARZ
THOMAS WIESE,

Defendants.

: February 7, 2000
9:30 o'clock a.m.

- - - - - - - - - - - - - - - - X

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE EUGENE H. NICKERSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by CAT.

not have mentioned the stick or the feces to his partner?
A. No.
Q. Did Officer Weise at some point during his description of these events describe Officer Volpe in a certain way?
A. Yes.
Q. What did he say?
A. When he -- when Officer Weise was explaining to us what he observed in the bathroom he described Volpe as half a fucking nut. Half a fucking nut.
Q. According to Officer Weise, what happened after he and his partner arrived at the hospital?
A. Weise describes at the hospital there's officers coming in and they're basically getting triage, which is they're seen by some hospital staff, some nurses, and they get treated and there's paperwork involved. There's a lot of paperwork involved and Weise describes he is the P.B.A. delegate, union delegate and part of his role is to take care of the officers, make sure the paperwork is done right and that they get proper medical care, that they are treated well by the hospital and whatnot.

He describes as the group of officers are waiting around to be seen by doctors or treated for any injuries they're basically telling war stories and they're shooting the breeze, so to speak.
Q. According to Officer Weise, does he have a particular

conversation with Officer Volpe regarding the events in the station house?

A. Yes.

Q. Who says what?

A. If I may refresh?

Q. Yes.

A. Weise informs us that Volpe has a conversation with him in the hospital where he basically says to Weise, Tom, I got a little carried away, you know, things like that. He later says that he made a guy shit his pants or he made the guy shit his pants, that's the second guy I made shit his pants.

Q. According to Officer Weise, that's what Officer Volpe tells Weise in the hospital?

A. In the hospital, correct.

Q. What, if anything, does Officer Weise say in response to Officer Volpe, after Volpe tells him I got a little carried away?

A. Weise describes having sort of counseled him and said to Volpe maybe you should get off patrol, maybe you shouldn't be dealing with people and go talk to your brother Damion Volpe, who was also at that time a P.B.A. delegate in the 70 Precinct, and maybe Damion for whatever contacts he has could get you off patrol where you're not interacting with people.

Q. According to Officer Weise, what was Officer Volpe doing after that in the hospital?

A. Correct.
Q. It was not working on behalf of IAB that's conducting the investigation, correct?
A. Correct.
Q. You were representing these three defendants; is that fair?
A. Yes.
Q. Now, when did you first learn that IAB was conducting an investigation into the sexual assault of Abner Louima?
A. At the time I learned it I didn't know it was a sexual assault.
Q. When did you first learn that IAB was conducting an investigation into an assault of Abner Louima?
A. I had gotten a phone call that there was an investigation at the 70.
Q. Who did you get that phone call from, sir?
A. Thomas Wiese.
Q. When was that?
A. To the best of my recollection, I think it was a Monday. I don't know the exact date.
Q. You think it was a Monday?
A. I think.
Q. What did Officer Wiese say to you and what did you say t him?
A. He just told me there was some kind of an investigation

that this prisoner is now in the hospital. Yes, that did concern me.

Q When you heard about the fact they were looking for sticks, broom sticks, does that mean anything to you at that time?

A At that point I assumed that maybe they were investigating that he was beaten with a broke stick or a mop handle.

Q Did you leave the precinct after your meal?

A Yes.

Q Where did you go?

A We were assigned to what they call, I believe it was assigned to sensitivity -- I would have to look at the memo book to see.

But it was a condition we had there were various locations that we were assigned to go and check on. Make sure there is nothing unusual.

Locations such as mosques, churches synagogues, I think Brooklyn College was on the list.

Q Did you go to Brooklyn college?

A Yes.

Q Did you make any phone calls at Brooklyn college?

A Yes.

Q Tell us what phone calls were made and who made them and what was said to the best of your recollection?

A To the best of my recollection we drove to Brooklyn College. We were concerned Tommy and I about what we had learned in the precinct. And I parked the car and Tommy said he wanted to call Thomas Bruder to let him now there was an IA investigation related to the arrest we brought in that night.

Q Did he tell you why he wanted to call Tommy?

A Wanted to let him know there was an investigation going on.

Q Did he say anything about being a delegate?

A Tommy was a delegate and as a delegate that is part of his responsibilities.

Q Does he use your phone card?

A Yes, what happened was neither one of us had change so I gave Thomas Wiese my phone call.

Q Did you hear his conversation?

A No.

Q Did you make any phone calls?

A Yes.

Q Who did you call?

A I called Anthony Abbate.

Q Who is Anthony Abbate and his relationship to you?

A Anthony Abbate is a friend of mine. We worked together in the 70th Precinct.

Before I got in the anti-crime unit I worked the 4:00 to 12:00 shift, which is 3:00 p.m. to I think 11:35 at night.

We worked on the same shift. He was also a PBA delegate for the precinct.

Q Why did you call him?

A I was very concerned. Anthony is a good friend of mine minimum, a very experienced delegate. I had some concerns I wanted to talk to him about it. I wanted to talk to somebody that was removed from this, that wasn't associated with this in any way that could give me an objective non-biased opinion or viewpoint.

And some of the concerns I had was primarily all those people in Internal Affairs in the precinct obviously thought it had to be something serious.

My immediate concern was they were going to place me on modified assignment. Usually when you get placed on modified assignment you work the day tour hours. I was concerned because it would interfere with my responsibilities I had at home.

I was also concerned about I had an application in with the Police Department Emergency Service Unit.

Q Is that an elite unit?

A Yes, within the Police Department they receive a lot of specialized training. I was informed a couple of weeks prior I was going to have an interview with them.

My concerns were, obviously I was concern about the prisoner I brought in was in the hospital.

I was concerned they would placed me on modify duty and interfere with my responsibilities and I was concerned it was going to affect my interview with emergency services.

Q At that particular point, on August 11th, and the telephone call with Anthony Abbate, did you have any knowledge to the extent of Abner Louima's injuries?

A No.

Q Did you have any knowledge of the fact that he was sexually assaulted in the bathroom?

A No.

Q None whatsoever?

A None.

Q What, if anything, if you recall did Anthony Abbate say with regard to your conversation with him and your concerns?

A He didn't say much. He mainly listened to me and he just said to me: You know, it does sound like it's something serious and that is a serious investigation. And he told me that I should probably seek some type of legal counsel.

Q Were you the only person that spoke to Mr. Abbate on that phone call from your phone card?

A No.

Q Who else did?

A After I spoke to him, Tommy spoke to him.

Q Did you hear the conversation between Tommy and Mr. Abbate at that time?