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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ABNER LOUIMA and MICHELINE LOUIMA,

Plaintiffs,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

98 Civ. 5083 (SJ)

Louima v. City of New York

PN-NY-001-004

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE THIRD AMENDED COMPLAINT AGAINST DEFENDANTS THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., PATRICK LYNCH, LOUIS MATARAZZO, MICHAEL IMMITT AND TIMOTHY LEE

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Defendants, the Patrolmen's Benevolent Association of the City of New York, Inc. (the "PBA"), and Patrick Lynch ("Lynch"), Louis Matarazzo ("Matarazzo"), Michael Immitt ("Immitt") and Timothy Lee ("Lee") (collectively, the "Individual PBA Defendants"), respectfully move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") to dismiss plaintiffs Abner Louima ("Louima") and Micheline Louima's Third Amended Complaint and Jury Demand (the "Complaint" or "Compl.") for failure to state a claim upon which relief may be granted.[1]

PRELIMINARY STATEMENT

The Complaint does not state a viable claim against the PBA or the Individual PBA Defendants. To be sure, it pleads a very real physical injury suffered by Louima stemming from an act committed by a police officer, on duty and in uniform, within a police precinct facility. But it is there, at least with respect to the PBA, where the

[1] The PBA notes that it is moving against the Third Amended Complaint pursuant to the order of Magistrate Judge Pollak dated September 25, 2000. However, the PBA has only been served with an unsigned draft "proposed" Third Amended Complaint.

Complaint departs from the realm of reality and moves into the area of conjecture, surmise and legal sophistry. Plaintiffs allege that the incident leading to Louima's injuries is not the result of actions of one depraved individual, but the product of over twenty-five years of policies and customs of the City of New York. Through the expedient of alleging that these policies and customs were developed and maintained at the "behest and in close conjunction with the PBA," plaintiffs seek to lay responsibility for Louima's injuries on the PBA, the collective bargaining agent for New York City Police Officers. Plaintiffs attempt to buttress this position by alleging that the PBA should be held accountable for the acts of police officers, committed within the scope of their employment by the New York Police Department. This proposition, in light of the clear language of the City Charter, the New York City Collective Bargaining Law and principles of agency law, is plainly false and transparently an attempt to blur the lines of responsibility between the employer City and the union, which is chartered to act as an advocate for its membership.

Even according to plaintiffs' allegations, the PBA did not become involved in the facts underlying this case until August 13 -- the day Louima was released from custody and four days after Louima's physical injuries were sustained, confirming the absence of any causal link between those injuries and any acts committed by the PBA. Based on these and other legal infirmities set forth below, plaintiffs have failed to plead adequately a basis of liability against the PBA for physical injuries suffered by Louima or his alleged wrongful detention.

As to the alleged activities of the PBA which post-date Louima's release from custody, the Complaint fails to allege a constitutional injury arising from those actions

that would support a claim against the PBA. Louima has had his day in court -- six police officers have been convicted of crimes -- and his civil action proceeds apace. Similarly, Louima has not alleged that his relations have been restricted so as to constitute a violation of his right to free association.

In short, all of plaintiffs' claims are inadequately pled as against the PBA. That is not because Louima did not suffer a serious injury, which he clearly did. It is because the injuries he suffered are not properly redressed by the federal civil rights laws and because the PBA is not a proper party to this action. Until such time as the legislature grants the PBA the right to hire, train, supervise, discipline and fire New York City Police Officers, the responsibility for acts such as the one perpetrated upon Louima lie with the City, the police department, and the individual police officer.

STATEMENT OF FACTS

For the purposes of a motion to dismiss, we accept as true the allegations in the Complaint. According to the Complaint, on August 9, 1997 Louima was arrested outside the Rendez-Vous nightclub in Brooklyn, New York. Compl. ¶¶ 4, 34. On route to the 70th precinct, the patrol car stopped twice and Louima was beaten while police officers are alleged to have hurled racial and ethnic epithets at him. Comp. ¶¶ 4, 37. At the precinct, Louima was assaulted and sodomized by defendant Justin Volpe ("Volpe"). Compl. ¶¶ 5, 6, 41, 42.

Volpe also is alleged to have threatened to kill Louima and his family if Louima reported the assault. Compl. ¶¶ 9, 46. Plaintiffs allege that none of the officers at the precinct made any effort to stop Louima's assault or to report it to the proper authorities. Compl. ¶¶ 7, 54.

It is alleged that, immediately after the assault, Louima was taken to a holding cell where he was lodged before being transported to Coney Island Hospital. Compl. ¶¶ 10, 63. When Emergency Medical Services was summoned, Louima told the medical technicians what had occurred. Compl. ¶ 11. The technicians are alleged to have delayed treatment and filed a false report with the intent of assisting the police in covering up the incident. Compl. ¶¶ 11, 64.

The Complaint further alleges that, from August 9 until August 13, when criminal charges against Louima were dropped, he was handcuffed to his hospitable bed as he convalesced. Compl. ¶¶ 12, 68. Although the New York Police Department's Internal Affairs Bureau had been notified of the assault on August 10, no police officer was questioned until August 13. Compl. ¶ 82. According to the Complaint, this delay created a "window of opportunity" in which evidence was allegedly removed and cover stories were allegedly created. Compl. ¶ 83.

After the attack, it is alleged that the PBA attempted to cover-up the incident. Compl. ¶¶ 14, 71. On or about August 13, 1997, certain officers, including defendants Volpe, Wiese, Schwarz and Bruder, are alleged to have met with PBA agents who heard incriminating admissions which, according to the Complaint, the PBA agents had an obligation to report. Compl. ¶¶ 71, 72. The PBA and its police officer agents then allegedly adopted and orchestrated an affirmative strategy of obstruction and falsification, which included helping several of the individual defendants to devise an exculpatory version of what happened. Compl. ¶¶ 1, 14.

On August 13, four days after the incident, Officer Wiese is alleged to have convened a meeting in the basement of the 70th precinct with Immitt and the officers most

directly implicated in the attack on Louima. Compl. ¶ 72. At this meeting, the officers allegedly concocted a common story and discussed ways to intimidate Louima. Compl. ¶ 72, 73. The Complaint charges that the officers discussed a plan to claim that Louima's injuries resulted from consensual sexual activities. Compl. ¶ 74. Thereafter, Immitt allegedly appeared at the 70th precinct for several days, to urge officers to remain silent about the incident. Compl. ¶ 75. Immitt and Lee (a PBA delegate) purportedly attempted to dissuade officers from coming forward to explain what happened. Compl. ¶ 76. The PBA's attempted cover-up of wrongdoing is alleged to be the direct result of its policies, customs and practices. Compl. ¶ 79.

As another prong of the attenuated theory of causation set forth in the Complaint, plaintiffs allege that the City and the PBA, also contributed to the attack on Louima by maintaining a so-called "code of silence" or "blue wall" which emboldens officers to act violently and assures that otherwise honest officers remain silent or lie about what they know. Compl. ¶¶ 15, 20. The City's policy of waiting forty-eight hours before questioning police officers accused of wrongdoing (the "48 hour rule") is alleged to be a contributing factor to the "code of silence." Compl. ¶ 16. These policies and practices are alleged to have created an atmosphere where the most violent police officers felt assured that acts of misconduct would not be swiftly and effectively investigated and prosecuted. Compl. ¶ 184.

The Complaint acknowledges that the PBA is a labor union representing approximately 29,000 New York City police officers (Compl. ¶ 25), and that the relationship between the PBA, its members and the City of New York is governed by a collective bargaining agreement and by the rules and regulations of the New York Police

Department ("NYPD" or the "Department") which are set forth in a document known as the "Patrol Guide." Compl. ¶ 25

The Complaint also recites that the Patrol Guide provides that an officer subject to an official administrative investigation must be given two days notice before being questioned. Compl. ¶ 80. Officers who are witnesses to alleged wrongdoing are given four hours notice before they may be questioned. Compl. ¶ 80. Plaintiffs allege that the City has created a custom of extending the "48 hour rule" to criminal as well as administrative investigations and has granted the PBA a role in deciding who are witnesses and who are suspects for purposes of invocation of the "48 hour rule" -- even for criminal investigations -- and that it did so in this case. Compl. ¶¶ 80-82.

It is alleged that Lynch and Matarazzo are, respectively, the present and former President of the PBA. Compl. ¶¶ 27, 28. No other allegation is made against Lynch or Matarazzo except, in the most conclusory terms, they are alleged to have been involved in negligently training, monitoring and supervising PBA representatives. Compl. ¶ 179.

CAUSES OF ACTION

Plaintiffs allege twenty-three causes of action, eleven of which are directed at the PBA.

- Count II alleges a conspiracy under 42 U.S.C. § 1983 between the PBA and the individual defendants to deprive Louima of his constitutional rights by attempting to cover up the assault on Louima.

- Count VII alleges that the PBA and the individual defendants deprived Louima of his First and Fourteenth Amendment Rights to have access to, and seek redress in, the courts as a result of the attempted cover up.

- Count VIII alleges a conspiracy with racial animus pursuant to 42 U.S.C. § 1985(3) between the individual defendants and the PBA based on the individual defendants' use of racial and ethnic epithets toward Louima.

- Count IX alleges a conspiracy to hinder provision of equal protection pursuant to 42 U.S.C. § 1985(3) as a result of the attempted cover up.

- Count X alleges a conspiracy to impede due course of justice pursuant to 42 U.S.C. § 1985(2) between the individual defendants and the PBA.

- Count XI alleges a conspiracy to obstruct federal justice pursuant to 42 U.S.C. § 1985(2) between the individual defendants and the PBA by trying to deter witnesses from giving testimony in a federal grand jury and in a federal proceeding.

- Count XII alleges that the PBA neglected to prevent a 42 U.S.C. § 1985(3) conspiracy in violation of 42 U.S.C. § 1986.

- Count XIV is stylized as a systemic claim against the City and the PBA. It alleges that the City and the PBA have created an environment that encourages police brutality which led to Louima's rights being violated.

- Count XV alleges a conspiracy pursuant to 42 U.S.C. § 1983 between the City and the PBA to create customs and policies that allow for the most "brazenly brutal officers to believe that they can use excessive force with impunity."

- Count XVI alleges claims for gross negligence and negligence against the PBA, Immitt, Matarazzo and Lynch for failure to perform a purported duty "to make sure that its members and its agents, who are also police officers, do not violate their duties as police officers." (Compl. ¶ 180).

- Count XIX alleges intentional and negligent infliction of emotional distress against the PBA, Immitt and Lee for impeding the investigation into Louima's assault and for spreading rumors that Louima suffered injuries as the result of consensual sexual activity.

- Count XXV asserts a pendent claim by Micheline Louima.

ARGUMENT

In deciding a motion to dismiss, the function of this Court is to assess the legal feasibility of the complaint. See Darius v. City of New York Dep't of Corrections, 1998 WL 724055, *1 (E.D.N.Y. Oct. 13) (Johnson, J.). The complaint must set forth sufficient information to allow the court to determine if there is any recognized legal theory upon which relief can be granted. See District of Columbia v. Air Florida, Inc. 750 F.2d 1077, 1078 (D.C. Cir. 1984). The failure to allege any fact connecting defendant to the alleged

wrong or to allege that any wrong has been committed is fatally defective. See Kadar Corp. v. Millbury, 549 F.2d 230, 233 (1st Cir. 1977); Sutton v. Eastern Viavi Co., 138 F.2d 959 (7th Cir. 1943).

While the pleading standard is generally a liberal one, bald assertions and conclusions of law will not suffice. See Leeds v. Meltz, 85 F.3d 51, 53 (2nd Cir. 1996). If conclusory allegations are not supported by allegations of material facts, the claims are subject to dismissal. See, e.g., Duncan v. AT &T Communications, Inc., 668 F. Supp. 232, 234 (S.D.N.Y. 1987). Conclusory allegations may also be disregarded if they are contradicted by other facts alleged, by documents incorporated into the complaint, or by facts that are subject to judicial notice. See, e.g., Gersten v. Rundle, 833 F. Supp. 906, 910 (S.D. Fla. 1993), aff'd, 56 F.3d 1389 (11th Cir. 1995) (court need not accept allegations in complaint when facts alleged in complaint are internally inconsistent); Barnum v. Millbrook Care Ltd. Partnership, 850 F. Supp. 1227, 1233 (S.D.N.Y. 1994), aff'd, 43 F.3d 1458 (2nd Cir. 1994) (allegations may be ignored if contradicted by documents incorporated in complaint).

I. PLAINTIFFS' FEDERAL LAW CLAIMS SHOULD BE DISMISSED

Plaintiffs assert nine claims against the PBA seeking relief under 42 U.S.C. §§ 1983, 1985 and 1986. Those claims are set forth in counts II, VII, VIII, IX, X, XI, XII, XIV, and XV of the Complaint. Plaintiffs assert federal claims against Immitt and Lee in counts II, VII, VIII, IX, X, XI and XII.[2] All of these claims should be dismissed for failure to state a claim upon which relief can be granted.

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[2] No federal claims are asserted against Matarazzo and Lynch.

A. Plaintiffs' Claims Under 42 U.S.C. § 1983 Should Be Dismissed For Failure To Plead State Action

It is axiomatic that 42 U.S.C. § 1983 only provides remedies for constitutional injuries caused by persons who either are state actors or are acting under color of state law. See Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982). 42 U.S.C. § 1983 provides, in relevant part, that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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. . . .

Accordingly, in order to plead a § 1983 claim, "a plaintiff must allege facts that would establish that a governmental entity deprived her of a right secured by law." Williams v. City of New York Dep't of Corrections, 1998 WL 160988, *2 (E.D.N.Y. Mar. 30, 1998) (Johnson, J.).

1. Counts II, VII, XIV And XV Should Be Dismissed Because The PBA Is Not A State Actor

Plaintiffs do not (and cannot) allege that the PBA is a governmental entity. Therefore, in order to assert a § 1983 claim, plaintiffs must allege facts suggesting that the NYPD is responsible for the PBA or that the PBA was acting under color of state law when it engaged in the alleged wrongful conduct set forth in the Complaint. See Jackson v. Temple University, 721 F.2d 931 (3rd Cir. 1983) (affirming district court's dismissal of § 1983 action against labor union for public employees and holding that there were no facts alleged that established that the union's actions could be fairly attributable to the

state). However, other than the conclusory statement that the PBA was "acting under color of law" (Compl. ¶ ¶ 107, 112), no such factual allegations appear in the Complaint.

The issue of whether the PBA is a state actor for purposes of § 1983 has already been decided in the negative. See, e.g., Wright v. Patrolmen's Benevolent Ass'n, 1975 WL 215 (S.D.N.Y. July 30, 1975). In Wright, the court granted the defendant union's motion to dismiss, holding that

> although the issue was not raised by any party, any action arising under . . . Section 1983 must involve state action . . . . The moving defendants are a labor union and three of its officials. The union is independently funded, operating separately from the police department, and in no way intertwined with it, except to the extent that its members are policemen.

Id. at *1.

Moreover, when officers of a public employee union commit acts in their capacities as union members, they are not acting as state actors for purposes of § 1983. See, e.g., Kern v. City of Rochester, 93 F.3d 38 (2nd Cir. 1996). In Kern, plaintiff employee of the Rochester Firefighter's union, alleged that her superior, the union president ("Cavuoto"), had sexually harassed her on numerous occasions, and thus violated her equal protection rights. Id. at 41. Plaintiff alleged that Cavuoto was acting under color of state law because he was simultaneously employed by the Rochester Fire Department (the "RFD") during the period in which he allegedly harassed her. The district court disagreed, granting defendants' motion to dismiss on the grounds that Cavuoto, although a lieutenant in the RFD during the time in which the alleged harassment took place, was acting solely in his capacity as union president during the course of his harassment of plaintiff.

The United States Court of Appeals for the Second Circuit affirmed, holding that plaintiff "fails to demonstrate that Cavuoto exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Id. at 43 (internal citations omitted). In support of its conclusion, the Court noted that Cavuoto did not hold his position as union president by virtue of any action of the city and that he performed functions solely for the benefit of the union, not the city. Id., see also Jackson, 721 F.2d at 932 (holding that union could not be held liable for wrongful termination of public employee under 42 U.S.C. § 1983 because union was not acting under color of state law).

Here plaintiffs fail to allege any "state action" taken by the PBA to deny their rights. Rather, the Complaint asserts that the PBA's agents took part in a *post facto* conspiracy to conceal and cover-up the alleged wrongful conduct perpetrated on Louima. These allegations against the PBA's agents relate to their role as union officials performing necessary union functions such as representing members in connection with disciplinary proceedings. As in Kern, the mere fact that the PBA's agents happen to also be police officers does not mean that they acted under color of state authority. Accordingly, Counts II, VII, XIV and XV should be dismissed.

2. Counts XIV And XV Should Be Dismissed Because Plaintiffs Have Not Adequately Alleged That The PBA Conspired With A State Actor

Private entities that are not state actors may be held liable under § 1983 if they are alleged to have conspired with a state actor. See Storck v. Suffolk County Dep't of Social Services, 62 F.Supp.2d 927, 940 (E.D.N.Y. 1999). However, Plaintiffs'

allegations in support of Counts XIV and XV of the Complaint do not adequately allege a conspiracy between the PBA and the City sufficient to meet the state actor requirement.

In order to state a conspiracy claim under 42 U.S.C. § 1983, plaintiffs must allege that wrongful conduct (1) was committed by a person acting under color of state law and (2) deprived a person of rights or privileges secured by the Constitution or the laws of the United States. Hazan v. City of New York, 1999 WL 493352 *2 (S.D.N.Y. 1999), citing Pitchell v. Callan, 13 F.3d 545, 547 (2nd Cir. 1994). However, conclusory allegations of conspiracy such as those set forth in the Complaint provide an insufficient basis for § 1983 liability. See Stagman v. Ryan, 176 F.3d 986, 1003 (7th Cir. 1999) ("a bare allegation of a conspiracy between private and state entities is insufficient to bring the private entity within the scope of Section 1983"). Rather, to plead a conspiracy under 42 U.S.C. § 1983

> plaintiff must allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy. A complaint containing only conclusory, vague or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss.

Serbalik v. Gray, 27 F. Supp.2d 127, 132 (N.D.N.Y. 1998) (emphasis added) (citations omitted). Moreover, "complaints . . . must include specific allegations of facts showing a violation of rights 'instead of a litany of general conclusions that shock but have no meaning.'" See Waldron v. Rotzler, 862 F. Supp. 763 ,768 (N.D.N.Y. 1994) (citing Barr v. Abrams, 810 F.2d 358, 363 (2nd Cir. 1987)). The plaintiff must provide "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).

Here, Plaintiffs' allegations fall far short of stating a viable claim of conspiracy between the PBA and the City. Plaintiffs do not even attempt to allege the existence of any agreement to develop and maintain "policies and customs exhibiting deliberate indifference to the constitutional rights of citizens" (Compl. ¶ 149), let alone to attribute any specificity to the time, place or nature of such agreement. Nor do Plaintiffs particularize the overt acts allegedly taken by the PBA.[3] Absent a well-pleaded conspiracy, there is no nexus between the acts of the PBA and the acts of the City. Accordingly, the PBA cannot be charged with liability as a state actor under 42 U.S.C. § 1983, and Counts XIV and XV should be dismissed.

B. The Federal Claims Should Be Dismissed Because The PBA Cannot Be Held Liable For The Acts Of Its Members

1. The PBA Does Not Owe A Legal Duty To Third Parties

In Counts XIV and XV, plaintiffs allege that the City and the PBA violated Louima's constitutional rights by creating an atmosphere conducive to police brutality. Plaintiffs claim that "practices and customs of the City of New York . . . have caused police officers, including the officer defendants in this case, to believe that they can violate the rights of citizens with impunity," (Compl. ¶ 167) and that this culture exists "because of, rather than despite, the efforts of the PBA." Compl. ¶ 168.[4]

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[3] Moreover, to the extent plaintiffs rely on acts of conspiracy that allegedly occurred twenty-five years ago, such reliance is misplaced. The United States Court of Appeals for the Second Circuit has held that a plaintiff may not base § 1983 conspiracy claims on acts occurring more than three years prior to the filing of his complaint. See Pinaud v. County of Suffolk, 52 F.3d 1139, 1153-4 (2d Cir. 1995); Singleton v. City of New York, 632 F.2d 185 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981).

[4] Count XVI sets forth the same allegations in support of plaintiffs negligence claims, asserting that the PBA's policies and practices negligently "created an atmosphere" where officers believed that misconduct would not be "effectively investigated and prosecuted." Compl. ¶ 184.

Plaintiffs allege that the PBA helped to create an atmosphere conducive to police brutality by: (1) promoting the "48 hour rule" as a tool to "assist target officers in conspiring to cover up their crimes," (Compl. ¶ 155, 156); (2) failing to require its delegates to report crimes and misconduct imparted from the targets of investigations, (Compl. ¶¶ 155, 180); (3) supporting a "code of silence" which hinders police officers from reporting fellow officer's misconduct, (Compl. ¶¶ 168-174); (4) using the attorney-client privilege and delegate-member privilege "to orchestrate cover ups," (Compl. ¶ 172); and (5) requesting that the City "develop[] and maintain[] policies and customs exhibiting deliberate indifference to the constitutional rights of its citizens." Compl. ¶ 149.

However, plaintiffs seek to create a basis for liability against the PBA by conflating the role of the PBA, a collective bargaining agent, with the role of the NYPD, the organization charged with the training and supervising police officers. See New York City Charter Ch. 18 § 434 (stating that the police commissioner "shall have cognizance and control of the government, administration, disposition and discipline of . . . the police force of the department.").[5] By blurring the relationship between the PBA and the City, plaintiffs seek redress against the PBA for injuries that were never contemplated by the civil rights laws or intended to be asserted against private entities. Plaintiffs' claims founder against the PBA because the PBA does not employ police officers, does not control the conduct of police officers, and indeed does not interact with the public. Rather, the PBA is an advocate for the interests of its members and is not legally

[5] Additionally, as the New York City Collective Bargaining Law states: "[i]t is the right of the city . . .to . . . direct its employees; take disciplinary action; . . . [and] determine the methods, means and personnel by which government operations are to be conducted[.] Decisions of the city . . . on those matters are not within the scope of collective bargaining[.]" N.Y.C. Admin. Code § 12-307(b).

responsible to third parties for the actions of its members. See Lizzi v. National Association of Letter Carriers, 755 F. Supp. 68 (E.D.N.Y. 1991) (Nickerson, J.).

In Lizzi, plaintiff alleged that the Letter Carriers' Union (the "Union") was responsible for an act of sexual molestation committed by one of its members. The union member had been arrested for public lewdness, and the Postal Service sought to fire or transfer him. Id. at 68-69. The Union filed a grievance on behalf of the member, resulting in his reinstatement. Id. at 69. The plaintiff in Lizzi alleged that the molestation occurred only because the Union permitted the member to come into contact with plaintiff's daughter.

In granting the Union's motion to dismiss, the court held that the Union had a duty to represent its members and that duty required the Union to pursue a grievance on its member's behalf. Id. The court rejected plaintiff's contention that the union's successful representation of its member could give rise to liability to a third party:

> It is fatuous to suppose that because [a union successfully asserts and protects the rights of a member] the union should be liable for injuries thereafter inflicted by the employee on a member of the public. *A union is an advocate, not a judge guarding the interests of putative third persons.* It should not be required, at peril of being held liable at the hands either of the employee or of a third party, to conclude that the employee's version of the facts is erroneous or to determine in advance the eventual decision of the employer or the arbitrator.

Id. (emphasis added). Similarly, in Percuoco v. Hampton House Condominium, 765 F. Supp. 149, 151 (S.D.N.Y. 1991) aff'd, 952 F.2d 393 (2nd Cir. 1991), the court held that a union could not be held liable for the acts of its member, a security guard, whose negligence allegedly contributed to plaintiff's assault by a third party, where the union had prevented its member's termination through a successful grievance procedure.

In short, Lizzi and Percuoco stand for the proposition that a union is not legally responsible for torts committed by its members. Moreover, unions have been held not liable in tort for actions taken in their capacity as unions (as opposed to their capacity as a business, land-owner, or employer). See Burns Jackson Miller Summitt & Spitzer v. Lindner, 59 N.Y.2d 314, 464 N.Y.S.2d 712 (N.Y. 1983) (Transit workers not liable for damages caused by their decision to strike); Jamur Productions Corp. v. Quill, 51 Misc.2d 501, 273 N.Y.S.2d 348 (Sup.Ct. N.Y. Co. 1966) (same). Courts have extended this rule even when the union's actions affect public safety. See e.g. White v. International Association of Firefighters, Local 42, 738 S.W.2d 933 (Mo. App. W.D. 1987) (holding that firefighters could not be liable in tort for fire damages to property where illegal strike lead to property damage due to fire).

Contrary to plaintiffs' allegations, the PBA does not have a legal duty to "make sure its members and its agents, who are also police officers, do not violate their duties as police officers to report crimes and misconduct by fellow officers." Compl. ¶ 180. That legal duty resides solely with the City. New York City Charter Ch. 18 § 434. To the contrary, the PBA is duty bound to maintain the confidences of its members during the course of employer-initiated disciplinary proceedings. See City of Newburgh v. Newman, 70 A.D. 2d 362, 421 N.Y.S.2d 673 (3d Dep't 1979).

In City of Newburgh, the Appellate Division held that it was improper for the City to question a PBA official about conversations he had with a police officer concerning disciplinary charges brought against the officer. Id. at 363. The Court held that such conversations between union representatives and members are confidential and protected against disclosure:

> To invade that confidentiality tends to inhibit the employees from seeking the advice of their union representatives as to matters affecting their interest and similarly to deter the representatives from proffering advice, if sought. Thus, questioning by responsible representatives of an employer as to private internal union affairs such as events transpiring during discussions relating to the rights of employees in the face of anticipated disciplinary charges interferes with the full measure of the protected right of organization and representation accorded by the Taylor Law.

Id. 70 A.D.2d at 365, 421 N.Y.S.2d at 675. Contrary to plaintiffs' allegations, the PBA cannot be held liable for failing to divulge wrongdoing by its members. Rather, PBA officials owe an obligation to PBA members not to reveal to the police department confessions of wrongdoing.

2. The PBA Is Not Liable Under A Theory Of Respondeat Superior

In paragraph eighty-four of the Complaint, plaintiffs allege that the PBA is liable for the acts of individual defendants under the doctrine of respondeat superior. However, in actions brought under 42 U.S.C. § 1983, personal participation is an essential allegation, and the doctrine of respondeat superior is not applicable. See, e.g., Austin v. Paramount Parks, Inc., 195 F.3d 715, 727-28 (4th Cir. 1999) (private corporation sued under § 1983 is not subject to respondeat superior liability); Jones v. Sabis Educational Systems, Inc., 52 F. Supp.2d 868, 878 (N.D. Ill. 1999) ("a private corporation is not vicariously liable under § 1983 for its employees' deprivations of others' civil rights"); Sheridan v. Andrus, 465 F.Supp. 662 (D.Colo. 1979). Rather, to hold a defendant liable under 42 U.S.C. § 1983, whether for money damages or for injunctive relief, the plaintiff must allege that the defendant had individual and personal knowledge of, or affirmatively participated in conduct constituting deprivation of the plaintiff's constitutional rights. See

Shepherd v. Sanchez, 2000 U.S. Dist. Lexis 10161 at * 8 (S.D.N.Y. July 21, 2000) Here, plaintiffs do not allege any PBA involvement in the assault on Louima and do not allege direct conduct by the PBA constituting a deprivation of Louima's constitutional rights.

Moreover, the doctrine of respondeat superior does not apply to a claim brought under 42 U.S.C. § 1985 when the plaintiff seeks money damages, as distinguished from equitable relief. See Adams v. Pate, 445 F.2d 105, 107 (7th Cir. 1971). Here, plaintiffs seeks only money damages from the PBA.

C. Plaintiffs Have Failed To Allege That They Suffered Constitutional Injury As The Result Of The PBA's Actions

In order to state a claim under 42 U.S.C. § 1983, a plaintiff must allege that he suffered a constitutional injury as the result of defendant's acts. People United for Children v. City of New York, 108 F.Supp.2d 275, 302 (S.D.N.Y. 2000). Here, plaintiffs do not set forth such allegations against the PBA. Accordingly, Counts II, VII, IX, X and XI should be dismissed.

1. Counts II And VII Do Not Allege Constitutional Injury Caused By The PBA

In Counts II and VII of the Complaint, Plaintiffs allege that Louima sustained various constitutional injuries as the result of the PBA's alleged conspiracy to conceal the wrongful acts perpetrated against him. Compl. ¶¶ 94, 108. Count II alleges that Louima was deprived of his constitutional rights to be "free from unreasonable seizure, to associate and speak freely, and to have access to and seek redress from the courts." Compl. ¶ 93. In Count VII, plaintiffs allege that the PBA denied Louima's "First and Fourteenth Amendment rights to have access to and seek redress in the courts." Compl. ¶ 107.

According to the Complaint, the assault on Louima took place on August 9, 1997. Compl. ¶ 4. The earliest date on which the PBA is alleged to have become involved in a supposed cover-up is August 13, 1997. Compl. ¶ 72.[6] August 13 is also the date on which all charges against Louima were dropped and he was released from incarceration Compl. ¶ 12. Thus, based on plaintiffs' own allegations, none of the alleged wrongdoing by the PBA could have caused any deprivation of Louima's rights from August 9 to August 13.

Moreover, plaintiffs do not allege that the PBA knew of or contributed to Louima's arrest. Thus, any injuries allegedly sustained as the result of Louima's "unreasonable seizure" could not give rise to liability against the PBA. Nor did any of the PBA's alleged actions affect Louima's rights to free association. See Angola v. Civiletti, 666 F.2d 1, 7 (2nd Cir. 1981) (the right to free association is "restricted to relationships having a predominantly political focus"). Furthermore, Louima does not identify any First Amendment forum to which he has been denied access, and plaintiffs' access to the courts is evidenced by the existence of this case and the criminal convictions of several officers on duty at the 70th precinct that evening. Compl. ¶ 3; see Griffin v. Holy, 1996 WL 556969 (N.D.Ill. Sep. 26, 1996).

In Griffin, the court dismissed § 1983 conspiracy claims in a case in which a plaintiff alleged that a number of police officers falsified their reports to indicate that plaintiff had shot himself when one of the officers had done so. The plaintiff argued that this cover-up had prevented the plaintiff from seeking effective legal redress. The court rejected this argument, holding that where a plaintiff "was personally involved in his

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[6] A former PBA official named Abbate is alleged to have participated in a cover-up at an unspecified earlier date (Compl. ¶ 70), but the acts of this alleged former employee, as set forth in the

arrest . . . and therefore possesses firsthand knowledge of the facts" a § 1983 conspiracy claim can not survive. Id. at *4; see also Thompson v. Boggs, 33 F.3d 847, 852 (7th Cir. 1994) (affirming dismissal of claim for denial of access to courts where "the facts known to [plaintiff] were sufficient to enable him to promptly file the instant lawsuit"). Counts II and VII fail against the PBA because plaintiffs have not alleged any legally cognizable injuries resulting from the actions of the PBA.

2. Plaintiffs' Counts IX, X And XI Fail To Plead Injury

Counts IX, X and XI also must fail against the PBA. Count IX alleges a conspiracy to hinder equal protection under 42 U.S.C. § 1985(3). Plaintiffs contend that, in furtherance of this conspiracy, the PBA engaged in a number of acts intended to hinder the investigation into Louima's assault. Compl. ¶ 122. Count X alleges a conspiracy among defendants under 42 U.S.C. § 1985(2) "to impede the due course of Justice [sic] in New York State." Compl. ¶ 125. Count XI alleges that in violation of 42 U.S.C. § 1985(2), the PBA's agents, including Immitt and Lee, attempted to intimidate and deter witnesses from testifying to federal authorities. Compl. ¶ 131, 132.

Injury is a requisite element of both § 1985(2) and § 1985(3) claims. See Chahal v. PaineWebber, 725 F.2d 20, 23 (2nd Cir. 1984); Farrell v. Child Welfare Admin., 77 F.Supp.2d 329, 332 (E.D.N.Y. 1999). However, here, to the extent plaintiffs seek redress for acts designed to protect guilty officers from punishment, there is no pleading of injury to Louima. Rather, "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." Silverstein v. Barnes, 1986 WL 4545, (S.D.N.Y. 1986) aff'd, 798 F.2d 467 (2nd Cir. 1986) citing, Linda R.S. v. Richard D., 410

Complaint, can scarcely be imputed to the PBA under any theory of agency.

U.S. 614, 619 (1973). Thus, Louima lacks standing to assert claims arising from acts intended to make it difficult to bring his attackers to justice. Additionally, to the extent plaintiffs assert claims regarding threats made by Volpe for the purpose of silencing Louima (Compl. ¶ 9), plaintiffs have not stated a claim against the PBA because they do not allege that the PBA participated in making any such threats.

D. Counts XIV and XV Should Be Dismissed Because Plaintiffs Fail To Allege That The PBA's Actions Proximately Caused Plaintiffs' Injuries

Counts XIV and XV of the Complaint purport to set forth a sprawling conspiracy between the City and the PBA covering at least twenty-five years of misconduct. Compl. ¶¶ 148-177. A court's "first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." Canton v. Harris, 489 U.S. 378, 385 (1989); Gierlinger v. Gleason, 160 F.3d 858, 872 (2nd Cir. 1998) (holding that in all § 1983 cases "plaintiff must prove that defendant's action was a proximate cause of plaintiff's injury"). Plaintiffs here do not attempt to relate the PBA's alleged wrongful practices to plaintiffs' injuries, instead relying on "a litany of general conclusions that shock but have no meaning." Barr v. Abrams, 810 F.2d 358, 363 (2nd Cir. 1987).

Plaintiffs' allegations of proximate cause amount to little more than pleading that the City has allowed an environment to develop in which police brutality is tolerated. That environment is alleged to have permitted, rather than caused the attack on Louima. However, New York Courts have found that merely creating circumstances that occasion an injury is insufficient to show proximate cause. See Sheehan v. City of New York, 40 N.Y.2d 496, 503, 387 N.Y.S.2d 92, 96 (N.Y. 1976) (holding that bus driver's violation of

abuse resulting in severe injuries for the child. The court addressed whether a "reckless failure by Wisconsin welfare authorities to protect a child from a parent's physical abuse deprives the child of liberty or property within the meaning of the Fourteenth Amendment," holding that the welfare authorities' failure to take action did not proximately cause the child's injuries. Id. at 299. In so holding, the Court stated that

> a constitutional tort requires deprivation by the defendant, and not merely a failure to protect the plaintiff from a danger created by others. * * * [D]eprivation in the constitutional sense requires more than a minimal or fictitious causal connection between the action of the state and the injury of the plaintiff.

Id. 302-303.

Here, Louima fails to allege any direct causal link between acts committed by the PBA and his injuries, instead relying on the identical theories of "injury to the public at large" rejected by the courts in Martinez and Deshaney. For example, in paragraph 174 of the Complaint, plaintiffs allege that "as a direct and proximate result of the City's and PBA's policies and their deliberate indifference, defendants violated Mr. Louima's constitutional rights[.]" Similarly, paragraph 177 alleges that "[t]his conspiracy between the City and the PBA is ultimately responsible for, and the direct and proximate cause of the violation of Abner Louima's rights[.]" Plaintiffs' contentions against the PBA are utterly bereft of connection to the alleged assault in this case. Plaintiffs do not contend that the PBA encouraged, participated in, or set in motion the attack on Louima. Instead, plaintiffs merely allege in the most general terms that the acts of the PBA created an atmosphere in which the attack on plaintiff could take place. This pleading of

"atmospheric causation" is far removed from the pleading of a concrete chain of events that proximately caused an injury to plaintiffs.[7]

E. Counts VIII, IX and X Should Be Dismissed For Failure To Allege That The PBA Acted With Racial Animus

Counts VIII and IX plead the "cover-up" allegations as violations of 42 U.S.C. § 1985(3), and Count X casts those same allegations as violative of 42 U.S.C. § 1985(2). However, to state a claim for a violation of 42 U.S.C. § 1985(3), or to state a claim of impeding justice in state courts under § 1985(2), the plaintiff must allege that the defendant acted with racial animus or with other class-based, invidiously discriminatory motive. See Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993), citing Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971); Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 34 (1st Cir. 1996); Koch v. Mirza, 869 F. Supp. 1031, 1038 (W.D.N.Y. 1994); Portman v. County of Santa Clara, 995 F.2d 898, 909 (9th Cir. 1993) (holding that in order to plead a violation of impeding state court justice under 42 U.S.C. 1985 (2) plaintiff must plead racial or other class-based animus). Such allegations must be pleaded with specificity. Waldron v. Rotzler, 862 F. Supp. 763, 769 (N.D.N.Y. 1994).

Here, plaintiffs set forth no facts suggesting that the PBA acted with any racial or class-based animus against plaintiff. The only incident of racial animus identified in the complaint is the alleged use of racial epithets by officers during the assault on Louima. Compl. ¶ 43. Such action precedes any alleged involvement by the PBA and is alleged to

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[7] It should also be noted that plaintiffs' reliance upon the Mollen Commission Report (Compl., Count XIV, ¶¶ 152, 164, 169) to prove allegations of conspiracy between the City and the PBA is misplaced. Federal courts in New York have made clear that the Mollen Report deals only with alleged Police Department toleration of corruption, not toleration of brutality. See Shaw v. City of New York, 1997 U. S. Dist. LEXIS 4901 (S.D.N.Y. April 15, 1997) (citing cases, and holding the Mollen Commission Report inadmissible in a § 1983 case involving allegations of excessive force); see also Yanez v. City of New York, 29 F. Supp.2d 100, 111-12 (E.D.N.Y. 1998) (Mollen Commission Report deals only with a "wall of silence" protecting corruption in the police force, not other types of police misconduct).

have been uttered by uniformed police officers acting as agents of the NYPD. Id. The only allegation of racial animus by the PBA is the naked assertion that "the PBA, through its agents, was a willful participant in joint action with officers acting under color of law." Compl. ¶ 117. This conclusory allegation falls well short of the specific pleading necessary to sustain a claim of racial animus. See Waldron, 862 F. Supp. 763, 769 (N.D.N.Y. 1994) (noting that under a related statute "the events of the intentional and purposeful discrimination, as well as the racial animus constituting the motivating factor for the defendant's actions must be specifically pleaded in the complaint to withstand dismissal under Rule 12(b)(6)". Because no specific allegations of racial animus are directed at the PBA, these claims must be dismissed.

F. Plaintiffs Claim Under 42 U.S.C. § 1986 Because Plaintiffs' Claims Under 42 U.S.C. § 1985 Fail

Count XII is brought under 42 U.S.C. § 1986 which requires that plaintiff first set forth a viable claim under § 1985. Koch v. Mirza, 869 F. Supp. 1031, 1039 (W.D.N.Y. 1994) (citing cases). Because plaintiffs have not pleaded a valid claim under 42 U.S.C. § 1985, their claim under 42 U.S.C. § 1986 must be dismissed.

II. PLAINTIFFS' STATE LAW CLAIMS SHOULD BE DISMISSED

A. Count XVI Should Be Dismissed Because Plaintiffs Fail To Plead Proximate Cause And Because The PBA Owes No Legal Duty to Plaintiffs

Count XVI of the Complaint alleges negligence and gross negligence against the PBA, Lynch, Matarazzo and Immitt. These claims require that plaintiffs allege a duty owed to them by the defendant and that the breach of that duty proximately caused the injury. See Hanley v. East Moriches Union Free School Dist. II, 712 N.Y.S.2d 617 (2nd Dep't 2000). Like Counts XIV and XV of the Complaint, Count XVI alleges that the PBA "created an atmosphere" that led to Louima's assault. Compl. ¶ 184. As set forth in Point I., D supra, these claims fail because the PBA's alleged acts are too remote from plaintiffs' injuries to establish proximate cause. Moreover, under the principles delineated in Lizzi, the PBA is not responsible to members of the general public for the torts of New York City police officers.

Plaintiffs allege that the PBA, Lynch, Matarazzo and Immitt were negligent in training, supervising and monitoring those of its representatives who consult with and counsel police officers suspected of criminal acts, or officers who witness criminal acts by other officers. Compl. ¶ 179. According to the Complaint, the PBA and the Individual PBA Defendants have a duty to ensure that PBA members report crimes by other officers, and the PBA and the Individual PBA Defendants have been negligent in the training they give to police officers in that regard. Compl. ¶ 180-81. Furthermore, plaintiffs allege that the PBA and the Individual PBA Defendants knew or should have known that the PBA's practices and policies have contributed to concealment of criminal acts by police officers and thus obstructed the investigations of officers. Compl. ¶ 182-

83. The PBA and the Individual PBA Defendants allegedly helped create an atmosphere in which violent officers felt their criminal acts would not be investigated or prosecuted. Compl. ¶ 184.

Plaintiffs' negligence allegations parallel their "systemic claim" that the PBA created an atmosphere that made it easier for police brutality to flourish. However, plaintiffs fail to link any of these activities to the circumstances surrounding Louima's injuries. As demonstrated in the cases set forth above, proximate cause requires more than establishing that a defendant's actions "occasioned" the circumstances that led to an injury. See Sheehan, 40 N.Y.2d at 503; Heredia, 887 F. Supp. at 83. Proximate cause requires a direct link between the negligent action and the injury. Salsedo v. Palmer, 278 F. 92, 95 (2nd Cir. 1921). Plaintiffs have not pleaded that link here and consequently Count XVI should be dismissed.

A. Count XIX for Infliction of Emotional Distress Should Be Dismissed

Plaintiffs' Count XIX for intentional infliction of emotional distress against the PBA, Immitt and Lee fails because it is time-barred and because it is actually a claim for defamation, artfully pleaded as a claim for infliction of emotional distress.

1. Plaintiffs' Count XIX for Intentional and Negligent Infliction of Emotional Distress Is Actually An Inadequately Pleaded Defamation Claim

Count XIX fails to state a claim for infliction of emotional distress and must be dismissed. Plaintiffs allege that the PBA, Immitt, and Lee caused emotional distress to Louima by preventing the exposure of Louima's assault. Compl. ¶ 205. Plaintiffs allege that the PBA caused emotional distress by spreading a false rumor that Louima had

incurred his injuries through consensual sexual activity. Compl. ¶ 206. As a result, plaintiffs contend, Louima endured "humiliation and ridicule." Compl. ¶ 206.

Plaintiffs' claim that Louima was emotionally upset as the result of the PBA's efforts to conceal his assault, fails to state a claim for intentional infliction of emotional distress.[8] In order to state a claim for intentional infliction of emotional distress, a plaintiff must allege extreme or outrageous conduct, intent to cause severe emotional distress, a causal connection between the conduct and plaintiff's injury, and severe emotional distress. See Treglia v. Town of Manlius, 68 F. Supp.2d 153, 160 (N.D.N.Y. 1999). Here, under plaintiffs' own theory, the alleged conduct was taken to protect the defendants rather than distress the plaintiff. Thus, plaintiffs' have not alleged intent against the PBA.

The second basis of plaintiffs' claim for infliction of emotional distress is the spreading of a false rumor to cause Louima humiliation and ridicule. Compl. ¶ 206. The making of a false statement to expose someone to "public contempt, ridicule, aversion or disgrace" creates a cause of action for libel or defamation. Plataniotis v. TWE Advance/Newhouse Partnership, 270 A.D.2d 627, 628, 704 N.Y.S.2d 327, 331 (3rd Dep't, 2000). However, plaintiffs nowhere plead the particulars of when the statement was made, by whom, to whom, or exactly what was said. All these particulars must be set forth in a defamation claim. See Williams v. Varig Brazilian Airlines, 169 A.D.2d 434, 564 N.Y.S.2d 328, 330 (1st Dep't 1991), app. den., 78 N.Y.2d 854, 573 N.Y.S.2d 467 (1991) (defamation claim defective for lack of identification of to whom statement was

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[8] Plaintiffs do not attempt to plead that the PBA negligently inflicted emotional distress. In order to allege negligent infliction, the plaintiff must allege that the defendant owed a special duty to him. O'Reilly v. Nynex Corp., 262 A.D.2d 207, 208, 693 N.Y.S.2d 13, 14-15 (1st Dep't 1999). Plaintiffs have not done so here and consequently do not state a claim for negligent infliction of emotional distress.

made); Reeves v. Continental Equities Corp. of America, 767 F. Supp. 469, 473 (S.D.N.Y. 1991) (dismissing defamation complaint for failure to plead when statement was made, who made it, or to whom it was made); Gill v. Pathmark Stores, Inc., 237 A.D.2d 563, 655 N.Y.S.2d 623, 624-25 (2nd Dep't 1997) (defamation complaint fatally defective because it failed to set forth the actual words spoken and did not specify to whom the words were published). Moreover, a cause of action for intentional infliction of emotional distress must be dismissed where "it falls in the ambit of other traditional tort liability," such as defamation. Herlihy v. Metropolitan Museum of Art, 214 A.D.2d 250, 263, 633 N.Y.S.2d 106 (1st Dep't 1995). Because plaintiffs' cause of action for infliction of emotional distress is actually an inadequately pleaded cause of action for defamation, it must be dismissed.

2. Count XIX Is Time-Barred

Count XIX is time-barred and must be dismissed. Defamation and intentional infliction of emotional distress each have a one-year statute of limitations in New York. See CPLR § 215(3) (one-year statute of limitations for defamation); Montefusco v. Nassau County, 39 F. Supp.2d 231, 238 (E.D.N.Y. 1999) (one year statute of limitations for intentional inflection of emotional distress); Campbell v. Grayline Air Shuttle, Inc., 930 F. Supp. 794, 803 (E.D.N.Y. 1996) (same). Plaintiffs do not allege when the false rumor was spread by defendants. Yet allegations of spreading false rumors about Louima were not raised by plaintiffs against the PBA until service of the Second Amended Complaint, dated June 27, 2000.

No direct or indirect allegation of emotional distress was alleged in the original complaint or the First Amended Complaint against the PBA. Thus, Plaintiffs waited

more than two and a half years after August 9, 1997 before pleading for the first time the PBA's responsibility for the rumor.[9]

This belated pleading of PBA involvement in spreading false rumors about Louima is invalidated by the one-year limitations period applying to defamation and intentional infliction alike. Accordingly, Count XIX of the Complaint should be dismissed.

III. MICHELINE LOUIMA'S CLAIMS FAIL BECAUSE THEY ARE DERIVATIVE OF ABNER LOUIMA'S CLAIMS

Count XXV of the Complaint is a derivative claim brought by Micheline Louima based on the injuries suffered by her husband. Because the PBA has no legal duty to Louima, did not proximately cause any of his injuries and is not responsible for the deprivation of any of Louima's rights, this claim must be dismissed against the PBA and the Individual PBA Defendants.

IV. THE CLAIMS AGAINST THE INDIVIDUAL PBA DEFENDANTS SHOULD BE DISMISSED

Even given the liberal pleading standards of Fed. R. Civ. P. 12(b)(6), plaintiffs have wholly failed to allege a claim against Lynch and Matarazzo. The sole factual allegation in the Complaint against Matarazzo is that "in his official capacity, [he] was at relevant times, the President of the PBA." Compl. ¶ 27. The only allegation against Lynch is that "in his official capacity, [he] is the current President of the PBA." Compl. ¶

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[9] Count XIX does not relate back, for statute of limitations purposes, to the filing date of the original complaint because the alleged facts on which the count is based do not arise out of the same conduct, transaction or occurrence originally pleaded against the PBA. See Fed. R. Civ. P., 15(c)(2); Mackensworth v. S.S. American Merchant, 28 F.3d 246, 251-52 (2nd Cir. 1994). Also, under Barrow v. Wethersfield Police Dept., 66 F.3d 466, 468-70 (2nd Cir. 1995), as modified, 74 F.3d 1366 (2nd Cir. 1996), plaintiffs may not belatedly add new defendants on a claim merely because plaintiffs did not identify the new defendants in a timely fashion.

28. Plaintiffs do not set forth what acts Lynch and Matarazzo are alleged to have committed that would give rise to liability. Lynch and Matarazzo are named only in Count XVI of the Complaint, plaintiffs' negligence claim. Because the PBA does not owe a duty to plaintiffs, its president acting in his official capacity owes no greater duty. See point II, A supra.[10] Accordingly, the Complaint should be dismissed as against Matarazzo and Lynch.

For their part, Immitt and Lee are alleged to have played a role in the so-called cover up. Compl. ¶ 71-86. Immitt is alleged to have attended the August 13 meeting in the basement of the 70th Precinct. Compl. ¶ 72. Plaintiffs do not allege what specific actions Immitt engaged in during that meeting. Thereafter, Immitt is alleged to have appeared at roll calls for the 70th Precinct in an effort to urge officers to remain silent in response to the investigator's inquiries. Compl. ¶ 75. In conclusory fashion, plaintiffs allege 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 with the investigation. Compl. ¶ 76. Immitt is later alleged to have invoked a privilege concerning communications with union members. Compl. ¶ 77.

Plaintiffs' claims against Immitt and Lee should be dismissed for the reasons set forth in Points I through III above. Because plaintiffs did not suffer any injury cognizable under 42 U.S.C. §1983 et. seq., Counts II, VII, VIII, IX, X and XI should be dismissed against Immitt and Lee. (See Point I. C, supra). Additionally, plaintiffs do not allege racial animus against either Immitt or Lee. Consequently, Counts VIII, IX and X

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[10] Additionally, Lynch's negligence could not have caused Louima's injuries because Lynch only became President of the PBA on July 1, 1999, almost two years after the assault on Louima.

should be dismissed. (See Point I. E, supra). Because the § 1985 claims fail against Immitt and Lee, the § 1986 claim must be dismissed. (See Point I. F, supra). Finally, plaintiffs' state law claims in Counts XVI and Count XIX and Micheline Louima's derivative claim in count XXV fail against Immitt and Lee for the reasons set forth in Points II and III, supra.

CONCLUSION

For the foregoing reasons, the PBA, Lynch, Matarazzo, Immitt and Lee respectfully request that the Complaint be dismissed with prejudice.

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