

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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THE BUILDING INDUSTRY ELECTRICAL  
CONTRACTORS ASSOCIATION on behalf of itself  
and its members and UNITED ELECTRICAL  
CONTRACTORS ASSOCIATION, on behalf of itself  
and its members,

**Oral Argument Requested**

10 Civ. 08002 (RPP)

Plaintiffs,

- against -

THE CITY OF NEW YORK on behalf of itself and its  
various Agencies and THE BUILDING and  
CONSTRUCTION TRADES COUNCIL OF  
GREATER NEW YORK AND VICINITY, on behalf  
of itself and its signatory affiliated Local Unions,

Defendants.  
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**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION  
TO DEFENDANTS' MOTIONS TO DISMISS, MOTIONS FOR SUMMARY  
JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION  
TO AMEND THE COMPLAINT PURSUANT TO FED.R.CIV.P.15**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

PRELIMINARY STATEMENT ..... 1

STATEMENT OF FACTS ..... 2

    1. The Parties ..... 2

    2. PLAs Generally ..... 4

    3. The City PLAs ..... 4

    4. Work Covered Under the City PLAs ..... 7

    5. The City PLA Studies ..... 8

ARGUMENT ..... 13

    POINT I ..... 13

        STANDARD ON A MOTION TO DISMISS ..... 13

    POINT II ..... 16

        PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS AGAINST THE CITY AND BCTC ..... 16

    POINT III ..... 18

        THE CITY PLAs CREATE POLICY AND ARE TANTAMOUNT TO REGULATION ..... 18

        A. Federal Preemption Under the NLRA ..... 18

        B. “Market Participant” Doctrine ..... 19

        C. Project Labor Agreements ..... 20

        D. BCTC Has Acted “Under Color of State Law” In Violation of § 1983 ..... 30

        E. Plaintiffs’ Claims Are Not Preempted. .... 32

    POINT IV ..... 33

        THE CITY PLAs VIOLATE NEW YORK STATE LAW ..... 33

        A. The Court Should Exercise Supplemental Jurisdiction ..... 33

        B. Defendants Have Violated New York’s Public Bidding Laws ..... 36

        C. *Thruway Authority* and the “More than a Rational Basis” Standard ..... 36

        D. N.Y. Labor Law § 222 ..... 41

    POINT V ..... 44

        PLAINTIFFS’ CROSS-MOTION FOR LEAVE TO AMEND THE COMPLAINT SHOULD BE GRANTED ..... 44

CONCLUSION ..... 46

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Acista v. City of New York</i> 2004 WL 691270 (S.D.N.Y. March 31, 2004).....	35
<i>Ammerman v. Sween</i> , 54 F.3d 423 (7th Cir. 1995).....	34
<i>Associated Builders and Contractors, Inc. v. City of Rochester</i> , 67 N.Y.2d 854, 492 N.E.2d 781, 501 N.Y.S.2d 653 (1986) .....	36
<i>Bang v. Utopia Restaurant</i> , 923 F.Supp. 46 (S.D.N.Y.1996) (holding that private citizen who acted in concert with police to perpetrate false arrest could be held liable under § 1983).....	30
<i>Blatch ex rel. Clay v. Hernandez</i> , 360 F.Supp.2d 595 (S.D.N.Y.2005) .....	35
<i>Brown v. Tomcat Electrical Security, Inc.</i> , 2007 WL 2461823 (E.D.N.Y. 2007) .....	35
<i>Building &amp; Construction Trades Department v. Allbaugh</i> , 353 U.S. App. D.C. 28, 295 F.3d 28 (D.C. Cir. 2002).....	6, 30
<i>Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.</i> ("Boston Harbor"), 507 U.S. 218, 113 S.Ct. 1190 (1993) .....	<i>passim</i>
<i>Cardinal Towing &amp; Auto Repair, Inc. v. City of Bedford, Tex.</i> , 180 F.3d 686 (5th Cir. 1999) .....	<i>passim</i>
<i>Cartagena v. City of New York</i> , 257 F.Supp.2d 708 (S.D.N.Y. 2003) .....	35
<i>Chamber of Commerce v. Lockyer</i> , 463 F.3d 1076 (9th Cir. 2006) (en banc), <i>rev'd on other grounds sub nom., Chamber of Commerce v. Brown</i> , 554 U.S. 60, 128 S.Ct. 2408, 171 L.Ed.2d 264 (2008).....	26, 35
<i>Ciambriello v. County of Nassau</i> , 292 F.3d 307 (2d Cir. 2002) .....	30, 31
<i>Colfax Corporation v. Illinois State Toll Highway Authority</i> , 79 F.3d 631 (7th Cir. 1996) .....	29

*Cromer Fin. v. Berger*,  
137 F.Supp.2d 452 (S.D.N.Y. 2001) ..... 14

*Dangler v. New York City OTB Track Betting Corp.*,  
193 F.3d 130 (2d Cir. 1999) ..... 6, 15

*Empire State Chapter of Associated Builders and Contractors, Inc. v. City of Oswego*,  
239 A.D.2d 875, 659 N.Y.S.2d 672 (4th Dep’t. 1997)..... 39

*Empire State Chapter of Associated Builders and Contractors, Inc. v. Smith*,  
2010 WL 4702280 (N.Y.Sup. 2010) ..... 43

*Gibbs-Alfano v. Ossining Boat & Canoe Club, Inc.*,  
47 F.Supp.2d 506 (S.D.N.Y. 1999) ..... 31

*Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*,  
545 U.S. 308, 125 S.Ct. 2363 (2005) ..... 33

*Havens Realty Corp. v. Coleman*,  
455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)..... 17, 45

*Healthcare Ass’n of New York State, Inc. v. Pataki*,  
471 F.3d 87 (2d Cir. 2006) ..... 18, 26

*In Exxon Mobil Corp. v. Allapattah Servs., Inc.*,  
545 U.S. 546, 125 S.Ct. 2611 (2005) ..... 34

*In re Air Crash at Belle Harbor, NY, on November 12*,  
2001, WL 21032034 (S.D.N.Y. 2003) ..... 6, 34

*In re Worldcom, Inc.*  
2003 WL 21498904 (S.D.N.Y. 2003) ..... 44

*Iqbal v. Hasty*,  
490 F.3d 143 (2d Cir. 2007) ..... 14

*Irish Lesbian & Gay Org. v. Giuliani*,  
143 F.3d 638 (2d Cir.1998) ..... 16

*James v. Bauet*,  
2009 WL 3817458 (S.D.N.Y. Nov. 11, 2009)..... 33, 35

*Jered Contr. Corp. v. New York City Tr. Auth.*,  
22 N.Y.2d 187, 292 N.Y.S.2d 98, 239 N.E.2d 197 (1968) ..... 36

*John Hancock Mut. Life Ins. Co. v. Amerford Int’l Corp.*,  
22 F.3d 458 (2d Cir.1994) ..... 44

*Johnson v. Rancho Santiago Cnty. College Dist.*,  
623 F.3d 1011 (9th Cir. 2010) .....26, 29

*Kramer v. Time Warner, Inc.*,  
937 F.2d 767 (2d Cir. 1991) ..... 15

*L & M Bus Corp. v. New York City Dept. of Educ.*,  
2009 WL 4911623 (1st Dept. 2009).....40, 44

*Lederer v. BP Products North America*,  
2006 WL 3486787 (S.D.N.Y. 2006) .....34

*Lerner v. Fleet Bank, N.A.*,  
318 F.3d 113 (2d Cir.), *cert. denied*, 540 U.S. 1012, 124 S.Ct. 532 (2003)..... 13

*Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations  
Commission*,  
427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976)..... 19, 22, 32

*London v. Polishook*,  
189 F.3d 196 (2d Cir.1999) ..... 16

*Lyndonville Sav. Bank & Trust Co. v. Lussier*,  
211 F.3d 697 (2d Cir.2000) .....33

*Makarova v. United States*,  
201 F.3d 110 (2d Cir.2000) ..... 14

*Margel v. E.G.L. Gen Lab Ltd.*,  
2010 W L 445192 (S.D.N.Y. 2010) ..... 45

*Marketxt Holdings Corp. v. Engel & Reiman, P.C.*,  
693 F.Supp.2d 387 (S.D.N.Y. 2010) ..... 14

*Master Builders of Iowa, Inc. v. Polk County*,  
653 N.W.2d 382 (Iowa 2002).....29

*Metro. Life Ins. Co. v. Massachusetts*,  
471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985)..... 19

*Moore v. PaineWebber, Inc.*,  
189 F.3d 165 (2d Cir.1999) ..... 13

*Naftchi v. New York Univ.*,  
14 F.Supp.2d 473 (S.D.N.Y.1998) ..... 33

*Nelcorp Elec. Contracting Corp. v. County of Broome*,  
2008 WL 615075 (Sup. Ct. 2008) .....39, 40

*New York State Chapter, Inc., v. New York State Thruway Authority, v. Dormitory Authority of the State of New York*,  
88 N.Y.2d 56, 643 N.Y.S.2d 480 (1996) (“*Thruway Authority*”) .....*passim*

*Newman & Schwartz v. Asplundh Tree Expert Ins. Co.*,  
102 F.3d 660,662 (2d Cir. 1996) ..... 15

*NextG Networks of New York, Inc. v. City of New York*  
2004 WL 2884308 (S.D.N.Y. 2004) .....26

*NLRB v. Iron Workers*,  
434 U.S. 335, 98 S.Ct. 651, 54 L.Ed.2d 586 (1978).....21

*Northern Illinois Chapter of Associated Builders and Contractors, Inc. v. Lavin*,  
431 F.3d 1004 (7th Cir. 2005) .....29

*Padberg v. McGrath-McKechnie*  
203 F.Supp.2d 261 (E.D.N.Y. 2002) .....17

*Rodriguez v. Mount Vernon Hosp.*,  
2010 WL 3825715 (S.D.N.Y. 2010) .....46

*Ruotolo v. City of New York*,  
514 F.3d 184 (2d Cir.2008) .....6, 13, 14

*Ryder v. Merrill Lynch*,  
748 F.2d 774 (2d Cir. 1984) .....45

*San Diego Building Trades Council v. Garmon*,  
359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)..... 18, 22, 32

*Smylis v. City of New York*,  
983 F.Supp. 478 (S.D.N.Y.1997) .....34

*Sprint Spectrum L.P. v. Mills*,  
283 F.3d 404 (2d Cir. 2002) .....25

*Terra Securities ASA Konkursbo v. Citigroup, Inc.*,  
688 F.Supp.2d 303 (S.D.N.Y. 2010) ..... 14

*Valencia ex rel. Franco v. Lee*,  
316 F.3d 299 (2d Cir.2003) .....33

*Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc.*,  
475 U.S. 282, 106 S.Ct. 1057 (1986) .....*passim*

*Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi*,  
215 F.3d 247 (2d Cir.2000) ..... 16

**FEDERAL STATUTES**

Fed. R. Civ. P. 12(b)(1) .....1, 13-16

Fed. R. Civ. P. 12(b)(6) .....1, 13-16

Fed. R. Civ. P. 56..... 1, 16

28 U.S.C. § 1331 ..... 33

28 U.S.C. § 1367 ..... 34

28 U.S.C. § 1367(a)..... 33

29 U.S.C. § 151 *et seq.* ..... 1, 14

29 U.S.C. § 152(2)..... 21

29 U.S.C. § 158 ("Section 8(e)") ..... 20

29 U.S.C. § 158(b)(4)(B)..... 20

29 U.S.C. §§ 159(c) and (e)..... 21

42 U.S.C. § 1983 .....*passim*

42 U.S.C. § 1988 ..... 14

**STATE STATUTES**

N.Y.C.P.L.R. § 7804(b)..... 34, 35

N.Y. Gen. Mun. Law § 100-a..... 36

N.Y. Gen. Mun. Law § 103(1) ..... 36

N.Y. Gen. Mun. Law § 101(1)(a-c)..... 43

N.Y. Labor Law § 222.....*passim*

**PRELIMINARY STATEMENT**

Plaintiffs, THE BUILDING INDUSTRY ELECTRICAL CONTRACTORS ASSOCIATION (“BIECA”) on behalf of itself and its members, and UNITED ELECTRICAL CONTRACTORS ASSOCIATION (“UECA”), on behalf of itself and its members (collectively, the “Plaintiffs”), respectfully submit this Memorandum of Law in opposition to the motions to dismiss of Defendant The City of New York (the “City”) and Building and Construction Trades Council of Greater New York and Vicinity and its affiliated Local Unions (the “BCTC”), seeking dismissal of the Complaint pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) or alternatively, for summary judgment pursuant to Fed.R.Civ.P. 56 and in support of Plaintiffs’ cross-motion to amend the Complaint pursuant to Fed.R.Civ.P. 15(a)(2).

This action arises out of the City’s enactment of a series of Project Labor Agreements (“PLA”), entered into by and between various agencies of the City and BCTC, that cover both new construction and the renovation, rehabilitation and repair of public works projects let before June 30, 2014, that the City has valued in the aggregate in excess of five billion dollars (\$5,000,000,000). While the City attempts to characterize their conduct as “proprietary” in nature, based on their magnitude and scope, the virtual monopolistic power given to the BCTC to control the labor force employed on these PLA projects and the favoritism that these PLAs represent, these PLAs constitute an impermissible attempt to regulate labor policy in the construction industry in New York City in violation of the preemption principles of the National Labor Relations Act (“NLRA”), 29 U.S.C. § 151 *et seq.*, New York State Labor Law and New York’s competitive bidding statutes.

## STATEMENT OF FACTS

### 1. The Parties

Plaintiff BIECA is a trade association consisting of twenty-seven (27) contractors, of which sixteen (16) perform publicly financed projects for the City (the “BIECA contractors”). (Cplt., ¶ 5.)<sup>1</sup> The object and purpose of BIECA is, *inter alia*, to further the interests of its members and those in any way related to the construction industry, to do anything necessary, suitable and proper, including the institution of legal proceedings, consistent with the public interest as well as the interest of this industry and trade, to bargain collectively for the members of this association and to strive to secure labor peace and tranquility in the construction industry. (*Id.*)

BIECA, on behalf of its contractors, has entered into a collective bargaining agreement with Local 363, United Electrical Workers of America, IUJAT, (“Local 363 CBA”). (Cplt., ¶ 6.) The relevant sections of the Local 363 CBA are as follows:

1. Article I requires BIECA and its contractors to recognize Local 363 as the “sole and exclusive bargaining representative of all of the electrical workers ... who are or may hereinafter become employed” by any BIECA contractor (*Id.*);
2. Article 2 requires all employees, who are employed by BIECA contractors, to become members of Local 363 by paying dues and initiation fees (Cplt., ¶ 7); and
3. Article 25 of the CBA requires all contractors that participate in the BIECA to contribute to The Building Trades Welfare Fund, Building Trades Annuity Fund; The Building Trades Educational Benefit Fund; and the Electrician’s Retirement Fund (collectively the “Building Trades Funds”), as well as the United Service Workers Union Security Fund, on behalf of their employees who work on job classifications covered by the CBA. (Cplt., ¶ 8.)

Plaintiff United Electrical Contractors Association (“UECA”), is a trade organization and not-for-profit corporation formed in 1965 under the laws of New York State. (Cplt. ¶ 9.) The

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<sup>1</sup> Reference herein to “Cplt., ¶ \_\_\_” shall be to Plaintiffs’ Complaint dated October 21, 2010, annexed to the accompanying Declaration in Opposition of Felicia S. Ennis, Ex. 1. (“Ennis Decl.”)

UECA currently consists of thirteen (13) contractor-members, of which five (5) perform publicly financed projects for the City of New York (the "UECA contractors"). (*Id.*) The object and purpose of the UECA is, *inter alia*, to further the interests of its members and those in any way related to the construction industry, to do anything necessary, suitable and proper, including the institution of legal proceedings, for the accomplishment of its lawful objectives, and to bargain collectively for its members. (*Id.*)

Since 1995, the UECA has been engaged in ongoing collective bargaining negotiations with Local Union No. 3, International Brotherhood of Electrical Workers ("Local 3"). Local 3 is a member of the BCTC. To date, the UECA and Local 3 have not successfully negotiated a collective bargaining agreement nor has an impasse been declared. (Cplt., ¶10.)

Pursuant to a December 7, 1995 Settlement Agreement with the National Labor Relations Board ("Settlement Agreement"), contractors that participate in the UECA are required to contribute to the Building Trades Funds on behalf of their eligible employees pursuant to the terms of a written Participant Agreement between the Funds' Boards of Trustees and the employers. (Cplt., ¶11.)

BIECA and UECA contractors are currently performing public works projects that have a total value in excess of \$500 million dollars. Additionally, some of the BIECA and UECA contractors have over forty (40) years of experience in performing these public works projects, collectively "Plaintiff Contractors". (Cplt., ¶ 12.) Both BIECA and UECA have standing to bring this action because of the injuries they have sustained and on behalf of their members; the interests they seek to protect are related to the respective trade association's purposes; and neither the claims asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

## 2. PLAs Generally

A PLA is a prebid contract between a construction project owner and a labor union or building trades council such as the BCTC, representing a group of affiliated local unions. (Cplt., ¶ 20.) The use of PLAs on public projects has traditionally been limited to very large projects, which present unique construction issues based on their size, scope and complexity. (*Id.*) PLAs generally (1) apply to all work performed under a specific contract or project, or at a specific location; (2) require recognition of the “signatory” union as the sole bargaining representatives for covered workers, whether or not the workers are members of the union; (3) supersede all other collective bargaining agreements binding on the signatory unions; (4) prohibit strikes and lockouts; (5) require hiring of at least 88% of its workers through the signatory union’s hiring hall; (6) require all subcontractors to become signatory to the agreement; (7) establish uniform work rules covering overtime, working hours, dispute resolution, and other matters; and (8) require compliance with union wage, benefit, seniority, apprenticeship and other rules and contribution to the union benefit funds. (Cplt., ¶ 22.)

Projects covered by PLAs generally state on their face that they are “open” to all successful bidders – union or non-union – who agree to be bound by the terms and conditions of the PLA. (Cplt., ¶ 23.) In reality, because PLAs favor the “signatory” contractors and make it cost prohibitive for non-signatory contractors to bid on PLA projects, the presence of a PLA artificially limits the pool of qualified bidders. (See Tuerck Aff., ¶¶ 23-28.)<sup>2</sup>

## 3. The City PLAs

On or about November 24, 2009, Mayor Michael Bloomberg and the BCTC announced a series of five (5) PLAs (“City PLAs”), which were characterized as, “among the largest of such

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<sup>2</sup> Reference herein to “Tuerck Affidavit, \_\_\_” shall be to the accompanying Affidavit in opposition of Professor David G. Tuerck, PhD.

agreements in the United States.”<sup>3</sup> According to Defendants, negotiations for the City PLAs initially began in January 2009, after the BCTC requested a meeting with Mayor Bloomberg. (LaBarbera Aff., ¶16.)<sup>4</sup> Initially, Defendants met to discuss the potential scope of work to be covered by a PLA, with the BCTC negotiating for the “broadest scope of work possible.” (*Id.*, ¶22.) Thereafter, Defendants spent eight months negotiating the terms of the City PLAs. (Simpson Decl., ¶11.)<sup>5</sup> Negotiations included discussions of broad categories of work, ranging from new construction projects, to renovation and rehabilitation work. (LaBarbera Aff., ¶23.) After the negotiations were completed “in or around the end of September,” the City then submitted the PLAs to its consultants to analyze the potential cost savings. (*Id.*, ¶24.)

Following the completion of negotiations with BCTC but prior to entering into the PLAs, the City commissioned studies from four consultants: Hill International, the LiRo Group, the Turner Construction Company and Tishman Construction. (Simpson Decl., ¶ 13.) The City also prepared a Report and Recommendation to each of the agencies executing the PLAs. (*Id.*, ¶14.)

The City PLAs are intended to cover work let and bid during Fiscal Years 2010 to 2014. (Cplt., ¶25.) Pursuant to the BCTC’s negotiations with the City, only those unions belonging to the BCTC were permitted to become participating signatory unions to each of the City’s PLAs and benefit from being recognized as the collective bargaining representative for all persons who perform work on PLA projects. (*Id.*, ¶ 26.)

The work covered by the City’s PLAs include a multitude of projects. Two of the agreements are for the rehabilitation and renovation of existing city owned structures:

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<sup>3</sup> See Mayor’s Office of Contract Services, <http://www.nyc.gov/html/mocs/html/vendors/pla.shtml>, “Project Labor Agreements,” Ennis Decl., Ex. 2.

<sup>4</sup> Reference herein to “LaBarbera Aff., \_\_\_” shall be to the Affidavit of Gary LaBarbera, President of BCTC, in support of BCTC’s motion to dismiss.

<sup>5</sup> Reference herein to “Simpson Decl., \_\_\_” shall be to the Declaration of Marla G. Simpson, Director, Mayor’s Office of Contract Services (“MOCS”), in support of the City’s motion to dismiss.

- **PLA between the City of NY on behalf of Various Agencies and BCTC (“PLA for Various City Agencies”)** - covering over \$1 billion worth of work, the scope of work under this PLA includes the renovation, repair, alteration, rehabilitation or expansion of unspecified City-owned buildings located throughout the five boroughs during the 2010-2014 fiscal years for twelve (12) separate City agencies: Department For The Aging (“DFTA”), Administration for Children’s Services (“ACS”), Department of Citywide Administrative Services (“DCAS”), Department of Correction (“DOC”), Department of Design & Construction (“DDC”), Fire Department (“FDNY”), Department of Homeless Services (“DHS”), Human Resources Administration (“HRA”), Department of Health and Mental Hygiene (“DOHMH”), Department of Parks & Recreation (“DPR”), Police Department (“NYPD”) and Department of Sanitation (“DSNY”) (*Id.*, ¶ 27(a));
- **PLA between the New York City Department of Environmental Protection (“DEP”) and BCTC (“DEP PLA”)** - covering unspecified repair, alteration, rehabilitation and renovation construction contracts bid and let by DEP prior to June 30, 2014. (*Id.*, ¶ 27(b).)

Three agreements are for new construction:

- **PLA between Department of Design & Construction (“DDC”) and BCTC (“DDC PLA”)** - covering the construction of eight (8) separate projects of various sizes (*Id.*, ¶ 27(d));
- **PLA between Department of Sanitation (“DSNY”) and BCTC (“DSNY PLA”)** - covering the new construction of three projects – East 91st Street (est. project cost \$217 million), Southwest Brooklyn Marine Transfer Station (est. project cost \$161 million), and Manhattan 1/2/5 Garage (est. project cost \$283.3 million). These three projects collectively total \$661.3 million in new construction costs. (*Id.*, ¶ 27(c)); and
- **PLA between Department of Parks & Recreation (“DPR”) and BCTC (“DPR PLA”)** – covering new construction of the Bronx River Greenway Riverhouse project. (*Id.*, ¶ 27(e); *see also*, Simpson Decl., Exhs. ¶¶ 20-46 .)<sup>6</sup>

<sup>6</sup> Copies of the City PLAs and related documents are annexed to the moving papers of both Defendants. However, to avoid duplication and confusion, reference herein will be to the exhibits annexed to the Simpson Decl. Copies of the 5 City PLAs referenced in Plaintiffs’ Complaint are annexed to the Simpson Decl. at Exhs. “E” (PLA for Various City Agencies), “H” (DDC PLA), “R” (DEP PLA), “U” (DSNY PLA), and “Z” (DPR PLA.) The City has also annexed a PLA between the New York City Department of Housing Preservation and Development (“HPD PLA”) executed on November 5, 2010. *Id.*, Ex. “CC.” The HPD PLA, which is for renovation and rehabilitation work, was executed after Plaintiffs commenced the within action and therefore not referenced in the Complaint. However, Plaintiffs now seek to amend their complaint to include a challenge to the HPD PLA and any future PLAs enacted by the Defendants that fail to comply with federal and state law.

In the aggregate, the first four (4) PLAs listed above cover \$5.3 billion dollars worth of public works projects. (See Simpson Decl., ¶ 5.) Additionally, the DPR PLA covers contracts estimated at \$5.94 million in new construction<sup>7</sup> and the HPD PLA covers contracts estimated at \$115.15 million,<sup>8</sup> for an approximate total of \$5.4 billion in public works projects. These PLAs cover work in almost half of the categories of capital projects performed by the City. (Simpson Decl., ¶ 7.) The City has not indicated what portion of the total capital volume of work is covered by these City PLAs.

#### 4. Work Covered Under the City PLAs

The City PLAs are generally broad in scope, make vague reference to the actual work to be performed, in most instances apply to multiple projects and in the case of the PLA for Various City Agencies, DEP PLA and HPD PLA, apply to a multitude of unspecified contracts expected to be performed in the future.

For example, in the PLA for Various City Agencies, the broad scope of work is described as follows:

Program Work shall be limited to designated rehabilitation and renovation construction contracts bid and let by an Agency (or its Construction Manager where applicable) after the effective date of this Agreement with respect to rehabilitation and renovation work performed for an Agency on City-owned property under contracts let prior to June 30, 2014. Subject to the foregoing, and the exclusions below, such Program Work shall mean **any and all** contracts that predominantly involve the renovation, repair, alteration, rehabilitation or expansion of an existing City-owned building or structure within the five boroughs of New York City. Examples of Program Work include, but are not limited to, the renovation, repair, alteration and rehabilitation of an existing temporary or permanent structure, or an expansion of above ground structures located in the City on a City-owned building. This Program Work shall also include JOCS contracts, demolition work, site work, asbestos and lead abatement, painting services, carpentry services, and carpet removal and installation, to the extent incidental to such building rehabilitation of City-owned buildings or

<sup>7</sup> See Report and Recommendation for DPR PLA dated January 11, 2010, p. 3, Simpson Decl., Ex. AA.

<sup>8</sup> See Report and Recommendation for HPD PLA dated September 1, 2010, p. 3, Simpson Decl., Ex. DD.

structures. Art. 3, Sect. 1(emphasis added)(PLA for Various City Agencies, Simpson Decl., Ex. E.)

Similarly, the work described under the DEP PLA is as follows:

Program work shall be limited to designated rehabilitation and renovation construction contracts bid and let by the Agency (or its Construction Manager where applicable) after the effective date of this Agreement and let prior to June 30, 2014 which cover rehabilitation and renovation work performed for the Agency on City-owned property and which predominantly involve the renovation, repair, alteration, rehabilitation or expansion of an existing City-owned building or structure at a water pollution control plant, a water filtration plant, or a pumping station within the five boroughs of New York City. This Program Work shall also include JOCS contracts, demolition work, site work, asbestos and lead abatement, painting services, carpentry services, and carpet removal and installation, to the extent incidental to such building rehabilitation of City -owned buildings or structures. (DEP PLA, Art. 3, Sect. 1, Simpson Decl., Ex. R.)

The HPD PLA also contains a similar description of work, covering “any and all contracts that predominantly involve the renovation, repair, alteration, rehabilitation or expansion of an existing City-owned residential apartment building” covered by HPD’s Tenant Interim Lease (“TIL”) Program. (HPD PLA, Art. 3, Sect. 1, Simpson Decl., Ex. CC.) In summary, the three City PLAs for renovation and repair work do not identify or describe the specific work to be performed on the projects that they intend to cover and seem to cover a multitude of unrelated projects covering a broad spectrum of work.

The three City PLAs for new construction are similarly vague concerning any description of the nature or scope of the work to be performed and seek to cover the broadest scope of work possible. Like the three City PLAs for renovation and repairs, the City PLAs for new construction omit any reference to the specific features of the covered projects.

## **5. The City PLA Studies**

As previously stated, after the parties had reached an agreement on the terms of the PLAs, the City commissioned various studies to determine whether the PLAs would produce cost savings. (LaBarbera Aff., ¶ 24.) The City used the following four consultants to produce

these studies. Hill International (“Hill”) produced the studies for the PLA for Various City Agencies (Simpson Decl., Ex. G) and HPD PLA. (*Id.*, Ex. EE). LiRo Program and Construction Management, P.C. (“LiRo”) produced the studies for the DEP PLA (*id.*, Ex. T)<sup>9</sup> and DPR PLA (*id.*, Ex. BB.) LiRo also produced three studies for the DSNY PLA: the “East 91st MTS,” (*id.*, Ex. W) the “SW Brooklyn MTS,” (*id.*, Ex. X) and the “Manhattan Sanitation Garage.” (*Id.*, Ex. Y). LiRo produced five (5) studies in connection with the DDC PLA: “40th Precinct,”(*id.*, Ex. L) “Zeraga EMS,”(*id.*, Ex. M) “Greenpoint EMS,” (*id.*, Ex. N) “Queens Library Rockaway” (*id.*, Ex. O) and “Queens Library Hunters Point.” (*Id.*, Ex. 32.) Tishman Technology Corporation (“Tishman”) and Turner Construction Company (“Turner”) also prepared studies in connection with the DDC PLA. Tishman prepared the “PSAC II” study (*id.*, Ex. J) and Turner prepared the “Policy Academy” (*id.*, Ex. K) and “Solar II” studies. (*Id.*, Ex. 31)(collectively, the “PLA studies.)

Each PLA study contains similar if not identical conclusions. For example, each study concludes that by obtaining certain union concessions, including standardizing work hours, overtime time hours, work shift rules and holidays for each of the various construction trades along with “no strike” provisions and common grievance procedures [Simpson Decl., ¶¶54-62], the City would realize substantial cost savings on projects covered by these PLAs. The PLA studies also identify cost savings attributable to the Wicks Law exemption for public works projects covered by PLAs. (*Id.*, ¶ 15.) However, as detailed in the accompanying Tuerck Affidavit, the PLA studies are based on the flawed and unsupported methodology that only BCTC contractors historically bid on and perform City work. (Tuerck Aff., ¶¶ 13-18.) The PLA studies further conclude that by obtaining certain concessions from the BCTC unions under the

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<sup>9</sup> The LiRo study for the DEP PLA [Simpson Decl., Ex. T] was never previously produced by the City despite requests for same. (*See* Ennis Decl. pp 30-45.)

City PLAs, the City saves money. (*Id.*, ¶17.) What each of the PLA studies fails to address is whether PLAs offer any real cost savings when compared to projects performed in the absence of a PLA, where the actual qualified bidding pool of contractors –including other union and non-union contractors - is able to bid for City work through the competitive bidding process. (*Id.*, p. 19.) Professor Tuerck details in his Affidavit, the presence of the City PLAs will artificially reduce the qualified bidding pool by eliminating Plaintiffs and other non-BCTC contractors from competing for City work. (*Id.*, ¶¶ 21-28.) Thus, by reducing competition, PLAs actually increase construction costs.

PLAs have a chilling effect on the bidding process by artificially limiting the pool of potential qualified bidders. At least one study in New York State has shown that letting a public works contract for bidding under a PLA artificially reshapes and limits the pool of potential qualified bidders.<sup>10</sup> Several factors common to each of the City PLAs operate to eliminate qualified bidders from the bidding pool and thus serve to increase construction costs. For example, the mandatory provisions of the City PLAs are virtually identical, containing the same common features:

1. Requirement that all contractors and subcontractors sign a Letter of Assent or the equivalent thereof, agreeing to be bound by the terms of the PLA and certifying that they have no other commitments or agreements that would preclude complete compliance with the PLA (Art. 2, Sect. 3);
2. Recognition of the signatory unions as the sole and exclusive bargaining representatives of all employees performing on-site work (Art. 4, sect. 1);
3. Requirement that contractors hire workers through signatory union's job referral systems and hiring halls (Art. 4, Sect. 2(A));
4. Limit on hiring of employees of non-signatory contractors to 12% of their own workforce (Art. 4, Sect. (B));

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<sup>10</sup> Erie County Courthouse Construction Projects: Project Labor Agreement Study, Ernest & Young (Philadelphia, PA: September 10, 2001), Tuerck Aff., Exhibit 17.

5. Union security provisions requiring all employees to pay union dues or equivalent to signatory union (Art. 4, Sect. 6);
6. Grievance and arbitration procedures governed by the local signatory union for that craft (Art. 9, Sect. 1); and
7. Contributions for employee benefits into those funds designated by signatory union (Art. 11, Sect. 2). (Cplt., ¶ 28.)

While these factors favor BCTC signatory contractors and unions, they serve to increase costs for non-BCTC signatory contractors, including the Plaintiffs, and act to deter non-BCTC contractors from bidding on PLA-covered projects. (Tuerck Aff., ¶ 24.) For example, the requirement that a contractor must draw 88% of its labor from the signatory BCTC trade union's hiring hall forces a non-BCTC contractor to work with a "stranger" workforce, decreasing productivity and quality of work. (*Id.*, ¶ 25.) Additionally, by having to pay fringe benefits into the BCTC union funds, a BIECA or UECA contractor would have to pay the same fringe benefits twice, once into the BCTC signatory union's funds and once into the Building Trades Funds. As a result, the Plaintiff contractors are unable to compete with BCTC signatory contractors who are only required to pay fringe benefits into BCTC funds. (*See* Cplt., ¶¶ 33-35.)

Another mandatory provision of each City PLA – the Letter of Assent – also deters the Plaintiff Contractors and others from bidding on projects covered by the City PLAs. (Cplt., ¶¶ 30-32.) The Letters of Assent require each contractor awarded a bid under a City PLA to agree to be bound by the terms of the PLA and to certify that it has no other commitments or agreements that would preclude its full and complete compliance with the PLA. (*Id.*) To the extent a contractor has other existing collective bargaining obligations, this requirement would preclude the contractor from bidding on PLA covered work. For example, in order to be awarded a contract covered by a City PLA, a contractor is required to sign a Letter of Assent, agreeing to be bound by the terms of the PLA and certifying that it has no other commitments or

agreements that would preclude its full and complete compliance with the PLA. (Cplt. ¶ 30; *see also*, Simpson Decl., ¶ 8 and Ex. D.) However, this requirement contained in the Letter of Assent fully interferes with the existing collective bargaining agreements (“CBA”) between the BIECA contractors and Local 363. (Cplt., ¶31.) Since BIECA contractors cannot sign a Letter of Assent without risking an unfair labor practice charge by the National Labor Relations Board (“NLRB”), they are effectively excluded from bidding on work covered by a City PLA.<sup>11</sup>

The requirement that a contractor sign a Letter of Assent to perform work under a City PLA also interferes with the UECA’s ongoing collective bargaining negotiations with Local 3, since a UECA contractor would essentially have to sign a CBA with Local 3 to perform work on a covered project. (*Id.*, ¶ 32.)

In addition to the PLAs studies, the Reports and Recommendations prepared by the City in support of the PLAs also rely upon the “significant cost savings and efficiencies” reported by the New York City School Construction Authority (“SCA”) in their use of a PLA with the BCTC. (Simpson Decl., ¶ 18.) However, no SCA report or study is provided. In fact, as more fully set forth in the accompanying Ennis Declaration, the SCA has repeatedly ignored requests for such information and has never produced any report or study concerning the cost saving benefits of its PLA. (*See* Ennis Decl., ¶¶ 12-29.) Based on the SCA’s repeated failure to produce such information, an inference can be drawn that the SCA’s use of PLAs provides no real cost savings than what could otherwise be achieved through the competitive bidding process. At a minimum, the absence of any real data demonstrating cost savings under PLAs used by the

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<sup>11</sup> The Letter of Assent requirement places the BIECA contractors and all other non BCTC unionized contractors on the horns of a dilemma or between a rock and a hard place. If the contractor does not sign the Letter of Assent it will not be awarded the PLA project; if the contractor does sign the agreement it may be exposed to an unfair labor practice charge being filed by the National Labor Relations Board; and if it falsely signs the Letter of Assent it may subject itself to criminal prosecution for filing a false document with a governmental agency. The chilling effect of this conundrum is real and not merely hypothetical and confronts all contractors who have a CBA with a non BCTC union.

SCA or any other agency raises genuine issues of material fact concerning the validity of the City PLAs.

The PLA studies further contend that the City PLAs are necessary for labor harmony. For example, the PLA studies state that “when non-union contractors have received significant awards there have been demonstrations by unionized labor which have caused work stoppages, strikes, major traffic disruption and interferences with the activities and business of the general public as well as those targeted by the demonstrators.” (Tuerck Aff., ¶ 32.) However, the PLA studies provide scant evidence that projects similar to those covered by the City PLAs have ever been the subject of a strike or work stoppage. For example, the only evidence of a strike found in the PLA studies is a vague reference to a strike by Local 7, Marble & Terrazzo workers in 2009 that lasted 7 days. (*Id.*)

## **ARGUMENT**

### **POINT I**

#### **STANDARD ON A MOTION TO DISMISS**

Defendants City and BCTC both move to dismiss the Complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) and alternatively, both Defendants seek summary judgment.<sup>12</sup>

The “standards for dismissal under Rule 12(b)(6) and 12(b)(1) are substantively identical.” *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (2d Cir.), *cert. denied*, 540 U.S. 1012, 124 S.Ct. 532 (2003); *see also, e.g., Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169 n. 3 (2d Cir.1999). Defendants’ motions to dismiss pursuant to Rule 12(b)(6) must be denied unless the Plaintiffs have failed to allege “enough facts to state a claim to relief that is plausible on its face.” *See Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir.2008), *citing, Bell Atlantic*

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<sup>12</sup> Conspicuously absent is BCTC’s Rule 56.1 Statement of Undisputed Facts required to support a motion for summary judgment. Failure to submit this statement constitutes additional grounds for this Court’s denial of BCTC’s motion for summary judgment.

*Corporation v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007). The Second Circuit has interpreted the foregoing language to "requir[e] a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible," rather than to mandate a "universal standard of heightened fact pleading." *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007). In making this determination, the court must accept the factual allegations of the complaint as true and must draw all reasonable inferences in favor of the plaintiff. *Ruotolo*, 514 F.3d at 188. The Complaint satisfies all elements of the causes of action that Plaintiffs have alleged.

The inquiry on a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) concerns whether the district court has the statutory or constitutional power to adjudicate the case. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000.) While "[a] plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists," *id.*, the preliminary showing that must be made by the plaintiff is not meant to be overly burdensome. *Cromer Fin. v. Berger*, 137 F.Supp.2d 452, 467 (S.D.N.Y. 2001). Rather, "the standard is a 'modest' one, allowing for subject matter jurisdiction so long as 'the federal claim is colorable.'" *Id.*(citation omitted); *see also, Terra Securities ASA Konkursbo v. Citigroup, Inc.*, 688 F.Supp.2d 303, 308 (S.D.N.Y. 2010). As more fully set forth below, Plaintiffs have stated a colorable claim under 42 U.S.C. § 1983, 42 U.S.C. § 1988, 29 U.S.C. § 151 *et. seq.*, and the United States Constitution, including but not limited to, the Supremacy Clause of the United States Constitution, Art. VI, cl. 2.

Consideration of a Rule 12(b)(6) motion is limited to the factual allegations in the complaint and documents either attached to or incorporated by reference in the complaint. *Marketxt Holdings Corp. v. Engel & Reiman, P.C.*, 693 F.Supp.2d 387, 392 -393 (S.D.N.Y.

2010); *see also*, *Dangler v. New York City OTB Track Betting Corp.*, 193 F.3d 130, 138 (2d Cir. 1999); *Newman & Schwartz v. Asplundh Tree Expert Ins. Co.*, 102 F.3d 660,662 (2d Cir. 1996).

Here, Defendant City has submitted the Declaration in Support of Marla G. Simpson, Director of the Mayor's Office of Contract Services ("MOCS") and Defendant BCTC has submitted the Affidavit in Support of Gary LaBarbera, President of the BCTC. Defendants have also submitted voluminous exhibits, including documents not identified in the Complaint.<sup>13</sup> If this Court considers Defendants' extrinsic submissions, Fed. R. Civ. P. 56 requires that the instant motion be treated as a summary judgment motion, giving the opposing party the opportunity to conduct necessary discovery. *See Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991). However, at this pleading stage, Plaintiffs have not yet had an opportunity to conduct any discovery. Defendants, on the other hand, control and have access to, all of the underlying information, including the details of the meetings and negotiations that occurred between the City and the BCTC leading to the enactment of the City PLAs, and information supporting the PLA studies which neither Defendant has chosen to proffer with their respective motions.

Defendants also have exclusive access to the underlying informational data and statistics referenced in their respective motions, as well as other evidence relevant to Plaintiffs' case. Defendants' selective attachment of documents is highly improper and prejudicial to the Plaintiffs. While, the five City PLAs and some of the PLA studies are referenced in the Complaint, the Court should not transform this motion into one for summary judgment. Without

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<sup>13</sup> Both the City and BCTC submit a study and analysis entitled "NYC DEP Various Projects, Economic Benefits of Utilizing a Project Labor Agreement," dated December 21, 2009 by LiRo Program and Construction Management, P.C. (the "DEP PLA study")(See Simpson Decl., Ex. T; LaBarbera Appendix, Ex. I.) However, as more fully set forth in the Ennis Declaration, the DEP PLA study and documents concerning the HPD PLA were not provided prior to the commencement of this action.

access to additional discovery, the Plaintiffs lack sufficient notice to allow them to contest the Defendants' disclosures properly.

Even without any discovery, Plaintiffs have demonstrated that genuine issues of material fact exist concerning whether the City PLAs provide any actual benefits or “cost savings” as Defendants contend. (*See Tuerck Aff.*) Therefore, the existence of such issues of material fact preclude the granting of summary judgment to Defendants even if the court were to convert their motions to dismiss into motions for summary judgment pursuant to Fed. R. Civ. P. 12(d). *See Fed. R. Civ. P. 56* (providing for the granting of summary judgment only when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”)

Similarly, while courts evaluating Rule 12(b)(1) motions “may resolve the disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits.” *Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir.2000), where jurisdiction is “so intertwined with the merits that its resolution depends on the resolution of the merits,” the court should use the standard “applicable to a motion for summary judgment” and dismiss only where “no triable issues of fact” exist. *London v. Polishook*, 189 F.3d 196, 198-99 (2d Cir.1999) (citation omitted). Here, whether the City PLAs are preempted by the NLRA is a question properly before this Court. However, as previously set forth, the existence of issues of material fact preclude summary judgment.

## POINT II

### **PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS AGAINST THE CITY AND BCTC**

An organization generally may have standing to vindicate its own interests or to bring claims on behalf of its members. *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d

Cir.1998). The Supreme Court has said that an organization suffers sufficient injury to confer Article III standing when its activities are “perceptibly impaired” because its resources are diverted to fighting a challenged practice. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). In *Havens*, the Supreme Court determined that a housing organization’s ability to provide counseling and referral services for low-and moderate-income homeseekers was “perceptibly impaired” where it had to divert its resources to fight a discriminatory practice. *Id.* By conferring standing on the organization, the Court concluded that “[s]uch concrete and demonstrable injury to the organization's activities-with the consequent drain on the organization's resources-constitutes far more than simply a setback to the organization's abstract social interests. *Id.* Similarly, in *Padberg v. McGrath-McKechnie* 203 F.Supp.2d 261, 274 (E.D.N.Y. 2002), the court concluded that an organization had standing to challenge a City policy because the policy forced the organization to divert resources from other policy priorities. *Id.*, 203 F.Supp.2d at 275.

Here, the City’s PLAs have unquestionably diverted resources away from BIECA’s and UECA’s other policy priorities. The object and purpose of both BIECA and UECA is, *inter alia*, to further the interests of its members in any way related to the construction industry. (Cplt., ¶¶5, 9.) By imposing the City PLAs, BIECA and UECA members are unable to bid on City public works projects. Both organizations have been forced to divert significant resources away from other priorities to challenge the unlawful PLAs and to protect the interests of its members. As a result of this “opportunity cost,” both BIECA and UECA have suffered sufficient injury to confer standing on their own behalf.

### POINT III

#### **THE CITY PLAs CREATE POLICY AND ARE TANTAMOUNT TO REGULATION**

The City's PLAs are preempted by the National Labor Relations Act ("NLRA") because by entering into the PLAs, the City has engaged in conduct "tantamount to regulation." *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 289, 106 S.Ct. 1057, 1062 (1986). Based on the size and scope of the PLAs at issue, including those seeking to cover current and future projects, the illusory nature of any presumed cost-savings and the failure to cite to any history or labor unrest or other unique basis to impose PLA at the expense of competitive bidding, the City PLAs are not a narrowly focused exercise of proprietary function. Rather, the City PLAs promote an impermissible labor policy, favoring BCTC unions to the detriment of non-BCTC unions, non-union contractors and the City taxpayers who will ultimately pay higher construction costs.

#### **A. Federal Preemption Under the NLRA**

The U.S. Supreme Court has recognized "two discrete and complementary theories of preemption under the NLRA." *Healthcare Ass'n of New York State, Inc. v. Pataki*, 471 F.3d 87, 94 (2d Cir. 2006). The first, and older theory, known as Garmon preemption after *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), protects the NLRB's primary jurisdiction to determine conduct "that the NLRA protects, prohibits, or arguably protects or prohibits." *Gould*, 475 U.S. at 286, 106 S.Ct. 1057 at 1061. Garmon preemption is designed to prevent states "from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA and "from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Id.* By protecting the NLRB's primary jurisdiction to decide what conduct is protected or prohibited in labor-management relations under §7 or § 8 of the NLRA, Garmon preemption "assures a coherent

national labor policy.” See *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985).

A second preemption doctrine protects against state interference with policies that Congress intended to be left unregulated by the NLRA. *Machinist* pre-emption, articulated by the Supreme Court in *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976), protects the use of “economic weapons” by employers and unions free from government interference.

The rationale behind *Machinists* preemption is that government interference with these economic weapons would upset the delicate balance of interests established in the NLRA. See *id.* at 149-50, 96 S.Ct. 2548. In the design and enactment of the NLRA, Congress assumed that employers and unions would engage in economic self-help to the extent that such conduct is not expressly prohibited. *Id.* at 146-47, 96 S.Ct. 2548.

#### **B. “Market Participant” Doctrine**

Federal labor preemption under the NLRA was revisited in 1986 when the Supreme Court decided *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282, 287, 106 S.Ct. 1057, 1061 (1986). In *Gould*, plaintiff filed an action claiming that a Wisconsin statute barring repeat violators of the NLRA from doing business with the State was federally preempted. Wisconsin asserted that its statutory scheme escaped preemption because it was an exercise of the State's spending power rather than its regulatory power. The Supreme Court rejected Wisconsin's argument that by using its spending power as a “market participant,” it could necessarily escape any potential conflict with the NLRA.

That Wisconsin has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict when ‘two separate remedies are brought to bear on the same activity,’ (citation omitted.) To uphold the Wisconsin penalty simply because it operates through state purchasing decisions therefore would make little sense. ‘It is the conduct being regulated, not

the formal description of governing legal standards, that is the proper focus of concern.’ (citation omitted.) *Id.*, 475 U.S. at 289, 106 S.Ct. at 1062.

*Gould* made it clear that in the exercise of its purchasing decisions as a “market participant,” a state could not overtly assume a role Congress preserved for the NLRB. *Gould* is also significant for the proposition that a state cannot escape scrutiny under federal preemption principles by simply exercising its spending power. Rather, it is the objective effects of the state’s conduct as a “market participant” that is the proper focus of a preemption analysis.

Here, the City contends that the “categorization” of its conduct as “proprietary” in the enactment of the PLAs is sufficient to end the inquiry under federal preemption principles. (See City’s Memorandum of Law, p. 8.) However, as set forth in *Gould* the City’s argument is legally unsupportable.

### C. Project Labor Agreements

A PLA is a prebid or “prehire” contract between a construction project owner and a labor union (or unions), establishing the union as the collective bargaining representative for all persons who will perform work on the project. *See generally, New York State Chapter, Inc., v. New York State Thruway Authority, v. Dormitory Authority of the State of New York*, 88 N.Y.2d 56, 643 N.Y.S.2d 480 (1996) (“*Thruway Authority*”).

Generally, an agreement between an employer and a labor organization to exclude any other employer's products or services from being used is an unfair labor practice. 29 U.S.C. § 158(b)(4)(B); 158(e). 29 U.S.C. § 158 (“Section 8(e)”) reads in pertinent part:

It shall be an unfair labor practice for any labor organization to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or other-wise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or heretoeafter containing such an agreement shall be to such extent unenforceable.

However, in 1959, Congress amended the ban of so-called “hot cargo” agreements under the NLRA to explicitly permit employers in the construction industry - but no other employers - to enter into prehire agreements. The 1959 amendment added a “construction industry proviso” to subsection 8(e), which permits a general contractor's prehire agreement to require an employer not to hire other contractors performing work on that particular project site unless they agree to become bound by the terms of that labor agreement. *Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.* (“*Boston Harbor*”), 507 U.S. 218, 230, 113 S.Ct. 1190, 1197 (1993). Section 8(f) contains a final proviso that permits employees, once hired, to utilize the NLRB election process under §§ 9(c) and (e) of the Act, 29 U.S.C. §§ 159(c) and (e), if they wish to reject the bargaining representative or to cancel the union security provisions of the prehire agreement. *See NLRB v. Iron Workers*, 434 U.S. 335, 345, 98 S.Ct. 651, 657, 54 L.Ed.2d 586 (1978).

In *Boston Harbor*, the Supreme Court acknowledged that “the exceptions provided for the construction industry in §§ 8(e) and (f), like the prohibitions from which they provide relief, are not made specifically applicable to the State”. This is because the State is excluded from the definition of the term “employer” under the NLRA, see 29 U.S.C. § 152(2), and because the State, in any event, ‘is acting not as an employer but as a purchaser in this case.’ *Boston Harbor*, 507 U.S. at 231, 113 S.Ct. at 1198. Nevertheless, while not expressly applicable to a government entity acting as a “purchaser,” the Court in *Boston Harbor* reasoned that by enacting the construction industry proviso and authorizing certain project labor agreements, “Congress intended to accommodate conditions specific to that industry” without “depending upon the public or private nature of the entity purchasing contracting services.” *Id.* Therefore, the Court concluded that “[t]o the extent that a private purchaser may choose a contractor based upon that

contractor's willingness to enter into a prehire agreement, a public entity as purchaser should be permitted to do the same.” *Id.*

While the use of PLAs by public entities was not expressly permitted by Congress under the construction industry proviso, the Supreme Court in *Boston Harbor* reasoned that if PLAs were otherwise available to private employers in the construction industry, they should be available to public entities as well. However, the Court was mindful of the fact that when used by a public entity, a PLA could still violate NLRA preemption principles. Therefore, the Supreme Court recognized the important NLRA preemption principles articulated in *Garmon* and *Machinists* and asked “whether a State may act without offending the pre-emption principles of the NLRA when it acts as a proprietor and its acts therefore are not ‘tantamount to regulation,’ or policy-making.” *Id.*(citation omitted.) By answering in the affirmative, the *Boston Harbor* Court articulated an important distinction “between government as regulator and government as proprietor” in the context of PLAs. *Id.*, 507 U.S. at 227, 113 S.Ct. at 1196.

In *Boston Harbor*, the Massachusetts Water Resources Authority (MWRA), the state agency responsible for water-supply services, sewage collection, and treatment and disposal services for the eastern half of Massachusetts, was ordered by the District Court of the First District of Massachusetts to clean up the Boston Harbor after a lawsuit filed by the United States charged the agency with a violation of the Federal Water Pollution Control Act. *Id.*, 507 U.S. at 221, 113 S.Ct. at 1192. The cleanup project was expected to cost \$6.1 billion over 10 years and the District Court ordered the MWRA “to proceed without interruption, making no allowance for delays from causes such as labor disputes.” *Id.* To that end, MWRA, at the suggestion of its project manager, negotiated a project labor agreement with the BCTC to ensure labor stability over the life of the project. *Id.*, 507 U.S. at 221, 113 S.Ct. at 1193.

In distinguishing between proprietary action that is immune from preemption and impermissible attempts to regulate through state spending power, the Court in *Boston Harbor* focused on whether, by entering into a project labor agreement, MWRA was engaged in proprietary conduct as measured by comparison with the typical behavior of private parties in similar circumstances. The Court observed that acting under a court order to complete the project within a set time frame, MWRA “was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost” and was therefore legitimately “acting in the role of purchaser of construction services, acts just like a private contractor would act.” *Id.*, 507 U.S. 218, 232, 113 S.Ct. 1190, 1198–1199.

However, while a public entity may act “just like a private contractor would act” as a purchaser of construction services, the Court in *Boston Harbor* recognized an important conceptual distinction. Unlike public entities, private actors are not subject to federal preemption under the NLRA. *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc.* 475 U.S. 282, 290, 106 S.Ct. 1057, 1063 (1986)(the NLRA protects a range of conduct against state but not private interference.) Therefore, while private actors are free to “regulate” as they please by engaging in such conduct as boycotting suppliers, the Court in *Boston Harbor* observed that:

States have a qualitatively different role to play from private parties. When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as regulator of private conduct, the State is more powerful than private parties. These distinctions are far less significant when the State acts as a market participant with no interest in setting policy. *Id.* 507 U.S. 218, 229, 113 S.Ct. 1190, 1197.

Accordingly, while private actors are free to “regulate” in the role of a purchaser of construction services, public entities must avoid the inference of a regulatory impulse. The *Boston Harbor* Court concluded that the narrow scope of the challenged project labor agreement

defeated an inference that its primary purpose was to impermissibly regulate through state spending power. As the Court observed, “the challenged action in this litigation was specifically tailored to one particular job, the Boston Harbor cleanup project.” *Id.* Under these circumstances, the Court concluded that “[t]here is therefore no basis on which to distinguish the incentives at work here from those that operate elsewhere in the construction industry, incentives that this Court has recognized as legitimate.” *Id.*

*Boston Harbor* recognized the delicate balance that must be struck between the preemption principles under the NLRA and the realities of a public entity’s need to interact in the marketplace for the procurement of goods and services. When a public entity acts in a manner that is narrow in scope and limited in purpose, its behavior is consistent with other market participants and such action does not constitute regulation subject to preemption. However, “when a state attempts to use its spending power in a manner ‘tantamount to regulation,’ such behavior is still subject to preemption.” *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.*, 180 F.3d 686, 691 (5<sup>th</sup> Cir. 1999).

Following *Boston Harbor*, courts have focused on a two-part test to distinguish “between proprietary action that is immune from preemption and impermissible attempts to regulate through the spending power.” *Id.* This test was articulated by the Fifth Circuit in *Cardinal Towing* as follows:

First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? *Id.*

The Fifth Circuit observed that based on the Supreme Court’s analysis in *Boston Harbor*, “[b]oth questions seek to isolate a class of government interactions with the market that are so

narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.” *Id.*

In *Cardinal Towing*, plaintiff challenged a city’s action in contracting for non-consensual towing services where police tows were requested. According to the plaintiff, the city’s ordinance and bid specification contained a number of requirements that were preempted under federal law. The city argued that its ordinance and contract specifications were designed for limited procurement purposes and were not intended to regulate the conduct of others. Therefore, the city maintained that its “market participation” did not preempt federal law. *Id.*, 180 F.3d at 691.

The Fifth Circuit agreed with the city. Applying its two-pronged test, the court first determined that the scope of the ordinance and contractual specifications were related to the city’s narrow proprietary interest in efficient non-consent towing. *Id.*, 180 F.3d at 693. Next, the court determined that the scope of the ordinance and contractual specifications were sufficiently limited to the city’s action. Finally, citing *Boston Harbor*, the court observed that the contract specifications did not apply to all city contracts going forward, but only to a single contract for police tows. Taken together, the Fifth Circuit concluded that the city’s conduct reflected a narrowly focused exercise of its proprietary function that decisively foreclosed any inference “that the City sought to change the tow truck industry as a whole, let alone influence society at large.” *Id.*, 180 F.3d at 694.

The Second Circuit and other courts in this jurisdiction have favorably recognized the two-part test articulated in *Cardinal Towing*. See *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002)(applying *Boston Harbor* and *Cardinal Towing*’s two-part test to determine whether local school board acted in its proprietary capacity or was preempted from entering into

lease with telecommunications company); *Healthcare Ass'n of New York State, Inc. v. Pataki*, 471 F.3d 87, 109 (2d Cir. 2006)(applying *Cardinal Towing's* two-part test to determine with state is acting as a market participant in preemption analysis); *NextG Networks of New York, Inc. v. City of New York* 2004 WL 2884308, 4 -5 (S.D.N.Y. 2004)(same.)

Here, Defendants have failed to satisfy either prong of the *Cardinal Towing* test.<sup>14</sup> First, Defendants contend that the PLAs satisfy the first prong of *Cardinal Towing* because they provide substantial cost savings (City Memo in Support, pp. 14-15); (BCTC Memo in Support, p. 10) However, as detailed in the Affidavit of Professor David Tuerck, PhD., such cost savings are speculative and unsubstantiated and do not support the conclusion that the City would realize any economic benefit from the PLAs.

For example, in order to produce the desired results – i.e. evidence of cost savings - the PLA studies rely on the same flawed and unsupported methodology that only BCTC contractors historically bid on and perform City work. (Tuerck Aff., ¶¶ 13-18.) The PLA studies further conclude that by obtaining certain concessions from the BCTC unions under the City PLAs, the City saves money. (*Id.*, ¶17.) However, none of the PLA studies address the question of whether the PLAs offer any real cost savings when compared to work performed in the absence of PLAs. (*Id.*, ¶19.) As more fully set forth in the Tuerck Affidavit, the presence of the City

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<sup>14</sup>The City argues that it is only required to satisfy either the first or the second prong of *Cardinal Towing's* “market participant” preemption analysis. (City Memo of Law, p. 14.) However, other than a single Ninth Circuit decision, *Johnson v. Rancho Santiago Cnty. College Dist.*, 623 F.3d 1011 (9th Cir. 2010), the City has failed to cite to any other authority to support this proposition. The City’s reliance on *Johnson* is misplaced. First, no other court in the Second Circuit has adopted the Ninth Circuit’s interpretation of the two-pronged test in *Cardinal Towing* as an “either or” proposition. Second, the *Johnson* court acknowledges that the only other decision that supports its interpretation of *Cardinal Towing* was reversed by the Supreme Court and then vacated by the Ninth Circuit. See *Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1084 (9th Cir.2006) (en banc), *rev'd on other grounds sub nom. Chamber of Commerce v. Brown*, 554 U.S. 60, 128 S.Ct. 2408, 171 L.Ed.2d 264 (2008) and *vacated by* 543 F.3d 1117 (2008). The City has not cited to any other authority to support its position, and no other courts have utilized such a narrow interpretation of *Cardinal Towing*. In any event, the *Johnson* court concluded that both prongs of the *Cardinal Towing* test were satisfied. *Id.*, 623 F.3d at 1024.

PLAs will artificially reduce the qualified bidding pool by eliminating Plaintiffs and other non-BCTC contractors from competing for City work. (*Id.*, ¶¶ 21-28.) Thus, by reducing competition, PLAs actually increase construction costs.

By artificially limiting the universe of contractors who perform City work to BCTC contractors, the authors of the PLA studies give false and unwarranted credit to the PLAs for concessionary cost savings that would have been realized in the absence of a PLA through the competitive bidding process. (*Id.*, ¶¶ 39-52; Cplt., ¶ 46.) For example, certain union concessions that the PLA studies contend would result in cost savings with a PLA would actually be available to the City in the absence of a PLA, if BIECA contractors were able to bid on City work. (*Id.*) The speculative nature of the “cost savings” attributed to the City PLAs is further evidenced by the fact that neither the PLAs nor the supporting studies attach or include the actual contracts referenced therein. Thus, the size, scope and specifications of these contracts remain unclear and in the absence of such information, it is pure speculation to determine any presumed cost savings for a specific trade. Additionally, of the six PLAs that have been identified, the PLA for Various City Agencies, HPD PLA and the DEP PLA do not specify any of the projects to be covered by those PLAs. However, based on the relatively low estimated value and scope of the work of some “representative” contracts, the City fails to offer any factors that would require the presence of a PLA at all. (*Id.*, ¶¶ 53-57.)

The treatment of the Wicks Law is also entirely one-sided under the PLA studies, which fail to consider the well recognized arguments that the Wicks Law does not increase costs. (*Id.*, ¶¶ 58-63.) Additionally, based on the unspecified size and scope of some of the contracts covered by the PLAs, it is unclear whether Wicks Law requirements apply. Finally, while each PLA study contends that the PLAs will result in “labor harmony,” no evidence of any history of

labor unrest on work covered by the PLAs has been presented. In short, Defendants have failed to make any case for adopting the PLAs necessary to satisfy the first prong in *Cardinal Towing*.

Next, both Defendants contend that because the PLAs represent a narrow procurement or spending goal, they satisfy the second prong of *Cardinal Towing*. (See City Memo in Support, p. 15; BCTC Memo in Support, p. 10). However, whether the PLAs represent a “narrow spending decision” or “narrow procurement goal” is not dispositive of the issue. Instead, Defendants must demonstrate that the scope of the City PLAs is narrowly limited and focused on the City’s proprietary interest to defeat an inference of regulation.

Here, by the City’s own admission, these PLAs are “among the largest of such agreements in the United States.” (Cplt., ¶ 24.) A review of the size and scope of the City PLAs supports this statement, where the three renovation and rehabilitation PLAs cover countless contracts of an unspecified nature (PLA for Various City Agencies; DEP PLA and HPD PLA); two of the new construction PLAs cover multiple new constructions of an unspecified nature (DDC PLA and DSNY PLA); and the remaining DPR PLA covers a project of a similarly unspecified nature. The City PLAs are not sufficiently limited to particular work, nor are they limited to a specific project. Taken together, the City PLAs do not constitute a narrowly focused exercise of the City’s proprietary function to avoid the inference of unlawful labor regulation.

The City contends that “[b]ecause the PLAs do not seek to affect any contracts beyond the City public works projects to which they attach, they are of appropriately narrow scope and thus not regulatory.” (City Memo of Law, p. 15.) However, whether the City PLAs impact contracts beyond city contracts is not dispositive under *Cardinal Towing*. Instead, the test is whether the PLAs are narrowly tailored to the specific projects in question to avoid the inference

of regulation. Here, the characteristically broad and non-specific City PLAs fail to satisfy the second prong of *Cardinal Towing*.

In an effort to deflect attention from the multitude of projects covered by the City PLAs, the City argues that the “number” of projects is not the proper focus of the inquiry under *Boston Harbor*. However, in *Boston Harbor*, the fact that the PLA “was specifically tailored to one particular job, the Boston Harbor cleanup project,” supported the Court’s conclusion that no regulatory inference could be drawn from the state’s conduct. *Boston Harbor, supra*, 507 U.S. 218, 232, 113 S.Ct. 1190, 1198 – 1199. Unlike the single-project PLA in *Boston Harbor*, the scope of the City PLAs, covering a multitude of projects and broad spectrum of work, call into question the proprietary nature of the City’s action.

The cases relied upon by Defendants to support their argument that the City PLAs are not subject to NLRA preemption are distinguishable, since, unlike the instant matter, the PLAs in those cases were sufficiently narrow in scope and purpose. For example, in *Johnson, supra*, the court upheld a challenge to a single prehire agreement “covering the single project of improving campus facilities.” *Id.*, 623 F.3d at 1028. In *Northern Illinois Chapter of Associated Builders and Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005), a “project-specific” prehire agreement was upheld against NLRA challenge. In *Colfax Corporation v. Illinois State Toll Highway Authority*, 79 F.3d 631, 634 (7th Cir. 1996), the court upheld a PLA focused on the specific project of asbestos removal from Illinois Tollways and maintenance buildings. Also distinguishable from the present matter is *Master Builders of Iowa, Inc. v. Polk County*, 653 N.W.2d 382 (Iowa 2002). There, the lone project subject to the challenged PLA was the renovation and construction of the Iowa Events Center. *Id.*

Defendants' reliance on *Building & Construction Trades Department v. Allbaugh*, 353 U.S. App. D.C. 28, 295 F.3d 28 (D.C. Cir. 2002) is also misplaced. *Allbaugh* concerned a challenge to an Executive Order issued by President George W. Bush, making it unlawful for all federally funded projects to require or prohibit PLAs. The court in *Allbaugh* reasoned that by enacting the Executive Order, the government was only acting as a private actor in procuring construction services and thus, was not exempted under *Boston Harbor*. However, the *Allbaugh* court ignored the important conceptual distinction recognized by the Supreme Court in *Boston Harbor*, that unlike public entities, private actors are not subject to federal preemption under the NLRA. Therefore, contrary to the holding in *Allbaugh*, a state does not always act as a market participant when it acts like a private owner. Otherwise, the state would be permitted to regulate within a protected zone because a private actor may do so.

Here, the City PLAs produce no real cost savings, lack specificity and in most instances, are not project specific. They were negotiated, recommended and adopted collectively, favoring and promoting BCTC union labor. Based on the foregoing, the City PLAs are tantamount to regulation and therefore are preempted by the NLRA.

**D. BCTC Has Acted "Under Color of State Law" In Violation of § 1983**

A private actor acts under color of state law when the private actor "is a willful participant in joint activity with the State or its agents." *Ciambriello v. County of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002), citing, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) quoting, *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966). "Joint action" may be established where "the private citizen and the state official share a common unlawful goal; the true state actor and the jointly acting private party must agree to deprive the plaintiff of rights guaranteed by federal law." *Bang v. Utopia Restaurant*, 923 F.Supp. 46, 49 (S.D.N.Y.1996) (holding that private citizen who acted in

concert with police to perpetrate false arrest could be held liable under § 1983). Facts showing an agreement and concerted action will support a § 1983 conspiracy claim. *See Ciambriello*, 292 F.3d at 324 -325.

For example, in *Gibbs-Alfano v. Ossining Boat & Canoe Club, Inc.*, 47 F.Supp.2d 506 (S.D.N.Y. 1999), the court denied defendant's motion to dismiss a § 1983 claim, finding that defendant boat club acted "under color of state law" when it discriminated against plaintiff since an agreement between the defendant boat club and the Town of Ossining, which allowed the defendant the use of the town's property, created a "mutually beneficial relationship." *Id.*, 47 F.Supp.2d at 512. The *Gibbs-Alfano* court also found that the defendant boat club performed "a public function" because its license with the town expressly stated that the boat club operated "for the accommodation of the public. . .". *Id.*, 47 F.Supp.2d at 513.

Here, Plaintiffs have successfully stated a § 1983 claim against the BCTC. The City and the BCTC entered into the City PLAs providing BCTC signatory unions with "virtual monopolistic power" over billions of dollars worth of public works projects in an unlawful attempt to regulate labor relations in the construction industry in New York City. Therefore, like the defendant in *Gibbs-Alfano*, the BCTC is performing a "public function," by controlling billions in public works project. The Complaint sufficiently details how negotiations between the City and the BCTC led to the enactment of the City PLAs, which are unprecedented in size and scope [Cplt., ¶17], limit participation to BCTC signatory unions [*id.*, ¶ 26], and impose mandatory terms and conditions which effectively eliminate from the competitive bidding process other qualified non-BCTC contractors. (*id.*, ¶¶28-39.) The Complaint further details how the City PLAs have benefitted both Defendants by permitting the City to unlawfully interfere with labor policy under the pretext of presumed cost-savings and "labor harmony" [*id.*,

¶¶40-57] and by giving the BCTC and its member unions an enormously unfair and unlawful competitive advantage over non-BCTC unions and their members. (*Id.*, ¶ 70.) Thus, the Plaintiffs have stated a cognizable §1983 claim against the BCTC.

**E. Plaintiffs' Claims Are Not Preempted**

The BCTC's argument that Plaintiffs' claims must fail because (1) prehire agreements used by public owners are lawful under *Boston Harbor* and because (2) an order deeming the City PLAs unlawful is itself, preempted by the NLRA (see BCTC Memo of Law, p. 15-16), fundamentally misconstrues the applicable law.

First, *Boston Harbor* does not stand for the proposition that *all* prehire agreement used by public entities are lawful. Instead, *Boston Harbor* strikes a delicate balance between the competing interests of NLRA preemption under *Garmon* and *Machinists* and a public entity's need to interact in the marketplace for the procurement of goods and services. In order to ensure that a government's behavior as a market participant does not conflict with these well-settled preemption principles, courts have adopted the two-part test articulated in *Cardinal Towing* and discussed *infra*. Therefore, contrary to BCTC's contention, a public entity's use of a prehire agreement in a particular circumstance is not a foregone conclusion and is subject to judicial scrutiny.

Second, BCTC incorrectly asserts that Plaintiffs seek protection from all prehire agreements in violation of §§8(f) and 8(e) of the NLRA. (BCTC Memo of law, p. 15.) In fact, Plaintiffs do not seek protection from all prehire agreements, just those that, like the PLAs in question, violate the standard articulated in *Boston Harbor*. Plaintiffs do not seek to challenge the use of every PLA; instead, Plaintiffs have specifically challenged the six unlawful PLAs enacted between the City and BCTC.

Accordingly, Plaintiffs' claims are not preempted by the NLRA.

## POINT IV

**THE CITY PLAS VIOLATE NEW YORK STATE LAW****A. The Court Should Exercise Supplemental Jurisdiction**

It is a fundamental principle that federal district courts have “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” *James v. Bauet*, 2009 WL 3817458, \*2 (S.D.N.Y. Nov. 11, 2009), *quoting*, 28 U.S.C. § 1331; *see also*, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312, 125 S.Ct. 2363, 2367 (2005) (discussing 28 U.S.C. § 1331 and stating that “[t]his provision for federal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law ( e.g., claims under 42 U.S.C. § 1983).”

In a federal-question case, the district court has the discretion to exercise supplemental jurisdiction over all claims that are “so related to [the claims within the court's original jurisdiction] that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). This condition is satisfied when the claims all “derive from a common nucleus of operative fact,” such that a party “would ordinary be expected to try them all in one judicial proceeding.” *Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir.2003) (citation omitted). The first question, whether the claim forms “part of the same case or controversy” as the federal claim, is the functional equivalent of the “common nucleus of operative fact” test laid out in *Gibbs*. *See Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 704 (2d Cir.2000) (applying the *Gibbs* “common nucleus” test); *see also*, *Naftchi v. New York Univ.*, 14 F.Supp.2d 473, 492 (S.D.N.Y.1998) (effect of section 1367(a) was to codify the “common nucleus” test set forth in *Gibbs* ); Essentially, supplemental jurisdiction will be found where the state and federal claims arise from the same basic facts.

The standard set forth in 28 U.S.C. § 1367 has been “construed generously.” *Smylis v. City of New York*, 983 F.Supp. 478, 484 (S.D.N.Y.1997), and federal courts have found that a “loose factual connection is generally sufficient.” *Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995). In *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 125 S.Ct. 2611, 2613 (2005), the Supreme Court rejected the narrow contention that federal court may only exercise supplemental jurisdiction over the relevant state law claims if the federal court has original jurisdiction over each and every single claim in the complaint.

In exercising the Supreme Court’s liberal approach, courts in the Second Circuit have found that where the relevant evidence concerning the federal claim is essentially the same as that concerning the state claim, the court will have supplemental jurisdiction over the state claim, since they are treated as “part of the same case or controversy.” *Lederer v. BP Products North America*, 2006 WL 3486787, \*8 (S.D.N.Y. 2006) (granting supplemental jurisdiction over state hostile work environment claim, which arose from the same facts and events as the Americans with Disabilities Act claim); *see also In re Air Crash at Belle Harbor, NY, on November 12, 2001*, WL 21032034, 5 -6 (S.D.N.Y. 2003) (court had supplemental jurisdiction over state law claims, since they arose from the same facts as claims brought under the Warsaw Convention).

Here, Plaintiffs have stated a cognizable claim under § 1983, invoking this Court’s original jurisdiction. This Court may also exercise its supplemental jurisdiction over Plaintiffs’ state law claims, since they arise from the same facts and circumstances as Plaintiffs’ claims under the NLRA. While the City contends that “Article 78 claims” should not be heard in federal court, the evidence supporting both the federal and state claims is the same.

Significantly, courts in this Circuit have held that when a claim is brought pursuant to a federal law, and not under N.Y. C.P.L.R. § 7804(b), “whether New York courts have exclusive

jurisdiction over Article 78 proceedings is irrelevant.” *James*, 2009 WL3817458 at 2 (holding that the Court had subject matter jurisdiction over the claims plaintiff brought under 42 U.S.C. § 1983, and that federal courts are not stripped of their jurisdiction to hear federal question cases simply because the plaintiff may have been able to file a parallel Article 78 in New York state court); *see also, Acista v. City of New York* 2004 WL 691270, 4 (S.D.N.Y. March 31, 2004) (plaintiff’s failure to commence an Article 78 proceeding prior to filing the federal action did not deprive district court of its jurisdiction to hear claims brought under federal law).

Here, Plaintiffs have brought a federal claim under the NLRA over which this Court has original jurisdiction. Therefore, Plaintiffs were not required to commence a proceeding pursuant to N.Y. C.P.L.R. § 7804(b). The cases relied on by the City are distinguishable because they do not address the issue of whether a court with original jurisdiction over a federal claim can also exercise supplemental jurisdiction over a related state claim.

For example, in *Cartagena v. City of New York*, 257 F.Supp.2d 708, 710 (S.D.N.Y. 2003), a district court declined to exercise supplemental jurisdiction over a state claim in the absence of a related § 1983 claim. Similarly, in *Blatch ex rel. Clay v. Hernandez*, 360 F.Supp.2d 595, 637 (S.D.N.Y.2005), the court dismissed a claim for review of an agency’s practice of entering into settlements with unrepresented mentally disabled persons in the absence of any basis in federal law for the review of the alleged practice. Unlike the cases relied upon by the City, Plaintiffs have presented a basis in federal law for the court’s review of the challenged PLAs. Defendant’s reliance on *Brown v. Tomcat Electrical Security, Inc.*, 2007 WL 2461823, 3 (E.D.N.Y. 2007) is also misplaced. In *Brown*, the district court declined to exercise supplemental jurisdiction over a state prevailing wage claim where the state statute provided its

own procedural remedy. Here, there is no procedural remedy provided under Section 222.

Accordingly, Plaintiffs state law claims should be maintained.

**B. Defendants Have Violated New York's Public Bidding Laws**

New York has a multitude of procurement statutes applicable to public entities, but the underlying purpose is uniform: to assure prudent use of public moneys and to facilitate the acquisition of high quality goods and services at the lowest possible cost (see, e.g., General Municipal Law § 100-a). General Municipal Law § 103(1), which requires all public works contracts to be awarded to the “lowest responsible bidder,” [*id.*] and similar legislative enactments requiring competitive bidding “evinced a strong public policy of fostering honest competition in order to obtain the best work or supplies at the lowest possible price.” *Associated Builders and Contractors, Inc. v. City of Rochester*, 67 N.Y.2d 854, 855, 492 N.E.2d 781, 782, 501 N.Y.S.2d 653, 654 (1986), quoting, *Jered Contr. Corp. v. New York City Tr. Auth.*, 22 N.Y.2d 187, 192-193, 292 N.Y.S.2d 98, 239 N.E.2d 197 (1968.) In *Jered*, the New York Court of Appeals identified the intent of competitive bidding statutes as follows:

In addition, the obvious purpose of such [competitive bidding] statutes is to guard against favoritism, improvidence, extravagance, fraud and corruption. They are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest (internal quotation omitted.) *Jered*, 22 N.Y.2d at 192, 239 N.E.2d at 200, 292 N.Y.S.2d at 102-103.

**C. Thruway Authority and the “More than a Rational Basis” Standard**

Based on these well settled principles underlying the competitive bidding, PLAs have somewhat of a tortured history in New York State. As the Court of Appeals determined in *New York State Chapter, Inc. v. New York State Thruway Authority*, 88 N.Y.2d 56, 67, 666 N.E.2d 185, 189, 643 N.Y.S.2d 480, 484 (1996) (“*Thruway Authority*”), PLAs are “neither absolutely prohibited nor absolutely permitted in public construction contracts,” and “will be sustained for a

particular project where the record supporting the determination to enter into such an agreement establishes that the PLA was justified by the interests underlying the competitive bidding laws.” *Id.*, 88 N.Y.2d at 67. The central purpose and intent of New York’s competitive bidding laws was summarized by the Court as follows:

(1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts. *Id.*, 88 N.Y.2d 68.

*Thruway Authority* was decided shortly after the U.S. Supreme Court’s decision in *Boston Harbor* and addressed the issue of whether a public authority can enter into a PLA in light of New York’s competitive bidding laws. While the Court in *Thruway Authority* recognized that “PLAs have an anticompetitive impact on the bidding process,” it also acknowledged that “[b]ecause in particular instances there are, however, also efficiencies to be gained, PLAs have been utilized in major construction projects such as the Boston Harbor, the Cleveland sports complex and the Massachusetts Central Artery/Third Harbor Tunnel.” *Id.*, 88 N.Y.2d at 65-66 (internal citations omitted.)

Balancing these competing interests, the Court in *Thruway Authority* determined that “more than a rational basis must be shown” by a public authority to justify the adoption of a PLA [*id.*, 88 N.Y.2d at 69] and adopted the following standard:

The public authority’s decision to adopt such an agreement for a specific project must be supported by the record; the authority bears the burden of showing that the decision to enter into the PLA had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes. Judicial review, although limited, is not without importance in that it safeguards the interests protected by the competitive bidding mandate. PLAs may not be approved in a pro forma manner. *Id.*, 88 N.Y.2d at 69.

Based on the “more than rational basis” standard articulated in *Thruway Authority*, a PLA adopted by a public entity will only be sustained where the record supporting the determination

to enter into such an agreement establishes that the PLA was justified by the interests underlying the competitive bidding laws. *Id.*, 88 N.Y.2d at 65.

At issue in *Thruway Authority* were challenges to two separate PLAs. The first was a PLA adopted by the New York State Thruway Authority (“NYSTA”), covering a four-year project to refurbish the Tappan Zee Bridge--the largest such construction project since the Bridge was built. The second was a PLA adopted by the Dormitory Authority of the State of New York (“DASNY”), covering various modernization projects on the campus of the Roswell Park Cancer Institute for the Department of Health, spanning a period of five years. Under the standard articulated above, the Court of Appeals concluded that the Thruway Authority had met its burden but DASNY did not.

Finding in favor of NYSTA’s PLA, the Court of Appeals determined that the factors underlying NYSTA’s justification for the PLA - including the size and complexity of the project, cost savings and NYSTA’s desire to avoid labor unrest – were supported by the record. For example, the Court noted that a significant portion of the work involved deck replacement, which required reducing the number of lanes available to traffic while work was in progress. *Id.*, 88 N.Y.2d at 69. The Court determined that efficient completion of the project was important, in order to protect “a major revenue-producing asset, maximize public safety, and minimize inconvenience to the traveling public.” *Id.* Additionally the NYSTA presented evidence of a prior labor dispute on another Tappan Zee project wherein the Bridge itself was picketed and the State Police had to insure the safety of workers. The NYSTA was also able to present evidence that 20 of the 23 major construction projects performed on the Tappan Zee since it was built involved union contractors amounting to more than 90% of the total dollar volume of work on the Bridge. *Id.*, 88 N.Y.2d at 69 -70. Based on this evidence, the NYSTA was able to

demonstrate significant cost savings resulting from union concessions. The Court of Appeals concluded that

The Thruway Authority's detailed focus on the public fisc--both cost savings and uninterrupted revenues--the demonstrated unique challenges posed by the size and complexity of the project, and the cited labor history collectively support the determination that this PLA was adopted in conformity with the competitive bidding statutes. *Id.*, 88 N.Y.2d at 71.

By contrast, the Court of Appeals struck down DASNY's PLA based on the absence of projected cost savings, any history of labor unrest or any exceptional or unique features of the project that would necessitate a PLA. *Id.*, 88 N.Y.2d at 74-75.

New York courts have continued to apply the "more than a rational basis" standard articulated in *Thruway Authority* to determine the validity of PLAs. For example, in *Empire State Chapter of Associated Builders and Contractors, Inc. v. City of Oswego*, 239 A.D.2d 875, 875, 659 N.Y.S.2d 672, 673 (4th Dep't. 1997), a court invalidated a PLA where the City of Oswego failed to demonstrate any detailed projection of cost savings as a result of the PLA or any unique feature of the project that necessitated a PLA. The court further observed that the record failed to demonstrate a history of labor unrest that would threaten the success of the project and found no other basis sufficient to impose a PLA. The City's general concern that the project be completed in a timely manner to comply with funding requirements and deadlines imposed by the New York State Department of Environmental Conservation, without more, was not a sufficient basis upon which to impose this "exceptional specification" of a PLA. *Id.*, 659 N.Y.S.2d at 674, quoting, *Thruway Authority, supra*, 88 N.Y.2d at 74.

In *Nelcorp Elec. Contracting Corp. v. County of Broome*, 2008 WL 615075, 5 (Sup. Ct. 2008), another court applying *Thruway Authority's* "more than a rational basis" standard struck down a PLA where the County's conclusory analysis failed to provide the requisite in-depth study and analysis to support a PLA. The County also failed to set forth any evidence that the

PLA would result in actual cost savings, or that the project had a unique history or complexity which would justify sidestepping the provisions of the competitive bidding statute. While the County's report did make reference to avoiding labor unrest such as strikes, lockouts, and picketing and identified at least one prior instance of picketing, the court determined that "this passing reference to past picketing does not in and of itself support the conclusion that labor unrest rises to the level necessary to support the need for a PLA." *Id.*, 2008 WL 615075, 5. The court concluded that the PLA in question resulted in simply "undercutting competition in favor of unions" and instead of "protecting the public fisc," the PLA actually engaged in "favoritism of union over non-union labor." *Id.*, 2008 WL 615075, 6.

More recently, in *L & M Bus Corp. v. New York City Dept. of Educ.*, 2009 WL 4911623, 1 (1st Dept. 2009), the First Department applied the same standard articulated in *Thruway Authority* to invalidate an employee protection provision (EPP) contained in a Department of Education bid. An EPP requires any contract vendor who needs new employees to hire workers laid off by a competitor at the worker's same rate of pay and to maintain welfare and pension contributions.

The First Department held that the Supreme Court properly struck the employee protection provisions on the ground that respondents failed to demonstrate a rational relationship between the EPPs and the public interest promoted by the competitive bidding statute. The court found nothing in the record to support Respondents' assertion that the EPPs would avoid strikes, or whether it would provide cost-savings.

Here, Defendants have failed to satisfy the "more than a rational basis" standard for the six PLAs in question. First, none of the evidence submitted by Defendants demonstrates a unique challenge posed by the size or complexity of any of the covered projects. To the

contrary, the projects all appear to be strikingly ordinary, commonplace and utterly void of any exceptional features to justify a PLA. None of the work covered by the City PLAs can be described as “major construction projects” such as those contemplated by the Court in *Thruway Authority*, 88 N.Y.2d at 65-66, and *Boston Harbor*. Based on the limited information provided, it appears that at least some of the projects only involve the work of a few trades. Second, other than vague and general references, Defendants have failed to identify any history of labor unrest that would delay or threaten the success of any City project to warrant a PLA. Third, as detailed herein and in the accompanying Affidavit of Professor Tuerck, Defendants’ purported “cost savings” is dubious at best, as Plaintiffs have identified numerous flaws in Defendants’ “boilerplate” PLA studies.

The City PLAs are also not limited to specific projects in violation of the standard set by *Thruway Authority* and its progeny. As detailed above, the three renovation and rehabilitation PLAs cover countless contracts of an unspecified nature (PLA for Various City Agencies; DEP PLA and HPD PLA) and two of the new construction PLAs cover multiple new constructions of an unspecified nature (DDC PLA and DSNY PLA). The remaining DPR PLA covers a project of a similarly unspecified nature.

In the absence of any factors demonstrating the unique or complex nature of the projects, evidence of labor unrest or verifiable cost savings, the type of “garden variety” construction and renovation work covered by the City PLAs offers no justification to impose the “exceptional specification” of a PLA.

#### **D. N.Y. Labor Law § 222**

The enactment of N.Y. Lab. Law § 222 in 2008 is a codification of the same standard applied by the Court of Appeals in *Thruway Authority* to determine the validity of a PLA.

Section 222 provides in pertinent part that, a public entity “may” require a PLA if it:

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[D]etermines that its interest in obtaining the best work at the lowest possible price, preventing favoritism, fraud and corruption, and other considerations such as the impact of delay, the possibility of cost savings advantages, and any local history of labor unrest, are best met by requiring a project labor agreement. *Id.*, 2(a).

Therefore, like *Thruway Authority*, section 222 requires a public entity to insure that its decision to enter into the PLA has as its purpose and effect, the advancement of the interests embodied in the competitive bidding statutes. Indeed, the language incorporated into section 222 by the New York State Legislature mirrors the well-settled principles underlying New York's competitive bidding laws articulated in *Thruway Authority*:

(1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts. *Thruway Authority*, 88 N.Y.2d 68.

Next, the amendment to Section 222 also embodies *Thruway Authority's* "more than a rational basis" standard by requiring a public entity to determine whether the same factors exist to justify a PLA. For example, in upholding a PLA, the *Thruway Authority* Court determined that the efficient completion of the Tappan Zee Bridge project was important to minimize the impact of delay on revenue generated by the Bridge and any inconvenience to the traveling public. *Thruway Authority*, 88 N.Y.2d at 69. The Court also found that the NYSTA had presented evidence of a labor dispute on a prior Tappan Zee project and had also demonstrated how it could achieve significant cost savings resulting from union concessions where union contractors had in fact performed 90% of the Tappan Zee Bridge work. *Id.*

Each of these same factors found determinative by the Court of Appeals in *Thruway Authority* in applying a "more than a rational basis" standard – impact of delay, cost savings and history of labor unrest – are incorporated into Section 222.

Contrary to Defendants' assertions, Section 222 does not signal any intent by the New York State Legislature to "relax" or modify the Court of Appeals' decision in *Thruway Authority*

or to otherwise relieve a public entity from the burden of protecting the goals of competitive bidding laws by demonstrating a “more than a rational basis” for the adoption of a PLA. Nothing in the plain language of Section 222 alters prior caselaw. For example, while the City contends that Section 222 “is a significant departure” from *Thruway Authority* [City Memo of Law, p. 20], it cites to no authority for this self-serving proposition. Notably, neither Defendant cites to any language in the legislative history to suggest that Section 222 was amended to address any issues or concerns arising from *Thruway Authority* or its progeny. Instead, the primary purpose of the amendment of Section 222 was to reform what is commonly referred to as “Wicks Law” by increasing the threshold amount of contracts that trigger Wicks Law requirements and by offering government entities an opportunity to avoid Wicks Law requirements by using a PLA. *See e.g., Empire State Chapter of Associated Builders and Contractors, Inc. v. Smith*, 2010 WL 4702280, 2 (N.Y.Sup. 2010)( discussing Section 222 amendments to Wicks Law).

Wicks Law requires a government entity undertaking a public works project to prepare separate bid specifications for (1) plumbing and gas fitting; (2) steam heating, hot water heating, ventilating and air conditioning apparatus; and, (3) electric wiring and standard illuminating fixtures. McKinney's General Municipal Law § 101(1)(a-c). The underlying intent of Wicks Law is to prevent fraud and corruption in the public bidding process.<sup>15</sup> The 2008 amendment to Section 222 increased the threshold amount of contracts subject to Wicks Law. For example, in New York City, the threshold amount was increased from \$50,000 to \$3 million dollars. N.Y. Lab. Law § 222(e). Section 222's amendment also allows a public entity who utilizes a PLA to avoid the separate bid requirements of Wicks Law. *Id.*, § 222(b).

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<sup>15</sup> *See, e.g.,* Assembly Debate Transcripts, p. 114, City Memo of Law Appendix 2.

In the absence of any express statutory language or legislative history indicating a contrary intent, Section 222 should be applied consistently with the “more than rational basis” standard articulated by the Court of Appeals in *Thruway Authority*. See *In re Worldcom, Inc.* 2003 WL 21498904, 3 (S.D.N.Y. 2003) (“The absence of any language that illustrates an effort to overrule past cases militates against finding that the amendment supersedes past case law.”) See also, *L & M Bus Corp., supra*, 2009 WL at 1 (decided after the amendment to section 222, applying *Thruway Authority* standard to invalidate an employee protection provision (EPP) contained in a Department of Education bid.)

#### POINT V

#### **PLAINTIFFS’ CROSS-MOTION FOR LEAVE TO AMEND THE COMPLAINT SHOULD BE GRANTED**

Plaintiffs seek leave to amend their Complaint to include the following: (1) additional allegations that BIECA and UECA have been perceptibly impaired, and therefore have the requisite standing to pursue their claims under § 1983; (2) the HPD PLA, which was executed by the City and BCTC after Plaintiffs filed their Complaint; and (3) any and all future PLAs that may be adopted by the City in violation of Plaintiffs’ rights under Federal and New York State law.

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, leave to file an amended complaint should “be freely given when justice so requires.” Fed.R.Civ.P. 15(a)(2). While, “it is within the sound discretion of the court whether to grant leave to amend.” *John Hancock Mut. Life Ins. Co. v. Amerford Int’l Corp.*, 22 F.3d 458, 462 (2d Cir.1994), citing, *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962) leave to amend should generally be granted. As the Supreme Court has stated:

In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies

by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, be 'freely given.' *Foman*, 371 U.S. at 182.

Leave to amend a complaint should be granted so long as the proposed amended pleading demonstrates at least "colorable grounds for relief." *Ryder v. Merrill Lynch*, 748 F.2d 774, 783 (2d Cir. 1984) (proposed amended pleadings made out colorable claim for fraud in the inducement.) The "colorable grounds requirement mandates that a district court may not deny a motion for leave to amend a pleading when said pleading is sufficient to withstand a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *Margel v. E.G.L. Gem Lab Ltd.* 2010 WL 445192, 4 (S.D.N.Y. 2010) (leave to amend granted on breach of contract claim sufficient to survive a motion to dismiss) (internal citation omitted)

Here, Plaintiffs seek to amend their Complaint to provide additional facts concerning the injury suffered by the Plaintiffs as a result of having to divert their limited resources away from their object and purpose to pursue the within action. For example, the City PLAs have caused BIECA to divert its resources from negotiations with Local 363, representation of its members in arbitration grievance proceedings brought by Local 363, and monthly informational meetings. (See Proposed Amended Complaint, ¶¶ 9-11, Ennis Decl., Ex. 16.) The City PLAs have also caused UECA to divert resources away from its other priorities and associational business. (*Id.*, ¶¶ 15-16.) Based on the foregoing, Plaintiffs have standing to bring an action under section 1983. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)(organization "perceptibly impaired" by challenged act has standing under § 1983.)

Additionally, Plaintiffs seek to amend their Complaint to challenge the unlawful HPD PLA enacted by Defendants after the Complaint was filed on October 21, 2010 and any future

PLAs that violate federal and state law. Plaintiffs challenge the HPD PLA on the same grounds it challenges the other five City PLAs.

Defendants will not be prejudiced by the proposed amendments to Plaintiffs' Complaint. In *Rodriguez v. Mount Vernon Hosp.*, 2010 WL 3825715, 2 (S.D.N.Y. 2010), the court granted the plaintiff's motion to amend the complaint for a second time in the absence of prejudice, finding that the two complaints were substantially similar to one another and the second amended complaint was filed in response to the defendants' motion to dismiss before any discovery commenced. Here, Plaintiffs' proposed Amended Complaint is substantially similar to the Complaint in that it contains only a few additional facts and no new claims for relief. Additionally, the request to file the proposed Amended Complaint is being made while motions to dismiss are pending and before any discovery has commenced.

In summary, the proposed Amended Complaint alleges a cognizable claim under section 1983, and in the absence of any prejudice to the Defendants, leave to amend should be granted.

Plaintiffs' cross-motion for leave to amend its Complaint should be granted.

### **CONCLUSION**

The City's adoption of the PLA's has had a profound impact on the construction industry in New York City. Based on the size and scope of the multi-project PLAs at issue, the illusory nature of any presumed cost-savings and the failure to cite to any history of labor unrest or other unique basis to warrant coverage by a PLA, the City PLAs do not promote any legitimate proprietary need. Rather, the City PLAs, which are neither narrowly focused nor have a limited proprietary purpose, promote an impermissible labor policy which favors BCTC unions to the detriment of non-BCTC unions and their contractors, in violation of the preemption principles of the NLRA and in violation of the competitive bidding statutes in New York State.

The lynchpin of the City's argument for the adoption of the PLAs is that they will result in construction cost savings. However, genuine factual issues exist; even without the benefit of any discovery, that undermines the conclusions set forth in these PLA studies. These issues include the reliance on flawed methodology, resulting in speculative and illusory cost savings. The legal issue of whether the City was acting as a market participant or was using its spending power to promulgate labor policy through the enactment of these PLAs should not be decided solely on the written submission of the parties at this stage of this extremely important litigation.

The Defendants want to summarily dismiss this case without affording Plaintiffs any discovery or an opportunity to fully present its evidence in support of its claims. The rights of the Plaintiffs and the interest of the construction industry and taxpayers of New York City have been adversely impacted by the Defendants' unlawful actions and deserve a full and fair opportunity to be vindicated.

Accordingly, for the reasons set forth herein, this Court has subject matter jurisdiction over the federal claims and supplemental jurisdiction over the state law claims; the complaint sets forth a claim upon which relief can be granted and there are genuine issues of material fact

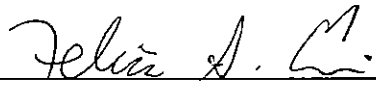
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that are in dispute and therefore, Defendants motions should be denied in their entirety and Plaintiffs cross motion should be granted.

Respectfully submitted,

Dated: New York, New York  
March 4, 2011

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