UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HUMAN SERVICES COUNCIL OF NEW YORK Plaintiff, versus The CITY OF NEW YORK, Defendant.	:	21-cv-11149-PGG

REPLY DECLARATION OF MICHELLE JACKSON

MICHELLE JACKSON, declares under penalty of perjury pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Executive Director of the Human Services Council of New York ("HSC"). I am also an attorney admitted to practice law in the State of New York, and I submit this reply declaration in connection with HSC's motion to preliminarily enjoin the enforcement of Local Law 87. The City's opposition papers do not undermine the points that I made in my opening declaration. Many of the deficiencies in the City's arguments are apparent from my prior declaration and the Declaration of Claude M. Millman, dated March 25, 2022 (which I adopt here and append without exhibits as Exhibit A).

The City Ignores HSC's Role

2. While the City incorrectly argues in its opposition papers that HSC has not addressed the particular experiences of its members, it ignores the length and breadth of my service at HSC and the depth of my personal knowledge of the City's procurement and budget practices and familiarity with the HSC members, outlined in my opening declaration. I have personal knowledge of such matters from my years of experience at HSC, extensive dealings with the City as the representative of the City's human services providers, and frequent communications with HSC's members.

3. While the City implies that individual human service providers should speak for themselves, the City is well aware that the nonprofits partially funded by the City fear confrontations with the City and with DC37, the powerful labor union that represents most of the City's direct workforce. This concern has been exacerbated by the union's public pronouncement that "the Human Services Council has filed a lawsuit challenging Local Law 87 in Federal District Court in New York, Human Services Council of New York v. City of New York, 1:21-cv-11149-PGG" and that "any such litigation is fundamentally anti-union." (NYC Central Labor Council's Resolution in Support of NYC Local Law 87, dated February 28, 2022, submitted by DC37 available at https://www.nycclc.org/sites/default/files/attached- files/resources/NYC%20CLC%20Executive%20Board%20Resolutions/finalnycclcresolutioninsupportoflocallaw87-laborpeaceagreements-adopted022822.pdf). (Our litigation is not, in fact, "anti-union.") While it is therefore difficult to identify specific nonprofits, I have sufficient personal knowledge to address the issues on this motion.

HSC Did Not Delay

4. Contrary to the City's claim, HSC did not delay in filing this action or motion. After Local Law 87 was enacted, the Mayor's Office advised me that it would be promulgating rules and that implementation of the Law would be delayed. When we were later informed that no such rules would be forthcoming and saw that the City was preparing to move forward, we filed our lawsuit. With our lawsuit filed, we tried to ascertain the City's timing. The City's approach to timing was clarified in February 2022, when it issued "FAQs" about its intentions in that regard. As it became clear that the statute's effect would primarily begin with the contracts starting on July 1, 2022, HSC, in February 2022, immediately filed its motion for preliminary relief. Since the Court scheduled a conference with the parties for May 2022, it appeared that the Court would be positioned to issue timely preliminary relief based on full briefing of the issues.

The March "FAQs" Were Not Promulgated As Rules and Are Not Contract Provisions

5. On the day that the City was required to file its opposition to HSC's motion for a preliminary injunction, the City issued responses to purported "Frequently Asked Questions" (the March "FAQs"). The FAQs were not promulgated as City rules (as required by the City's Administrative Procedure Act or CAPA) and, to my knowledge, they have not been incorporated into City contracts. When I recently checked, the City had not published the FAQs online. They do not appear to have been broadly distributed within the City's procurement community.

6. After HSC received the FAQs (they were attached to the City's papers), HSC wrote to the City seeking changes and asking that some aspects of the FAQs be made binding on the City. A copy of HSC's letter to the City is attached as Exhibit B. On April 7, 2022, the City responded to the letter flatly rejecting all of HSC's requests in its letter.

The City's Rejection of HSC's Request Undermines its Claim of "Market Participation"

7. While the City argues that it enacted Local Law 87 as a "market participant," its reaction to our letter (Exhibit B) belies that. For example, any suggestion that the City should be able to interfere with the nonprofits' labor relations because the City is "paying for" that labor is wrong. As the declaration of Claude M. Millman (Exhibit A) explained, the City does not pay the nonprofits for costs related to union organizing, negotiating collective bargaining agreements, or complying with collective bargaining agreements. In rejecting HSC's suggestions in its letter (Exhibit B), the City refused to pay for any such costs. In demanding that nonprofits negotiate with unions, and then refusing to pay for any resulting costs, the City is not acting like a private market participant. It is acting like a labor regulator.

The March "FAQs" Have Not Mitigated the Imminent Harm

8. The FAQs do not resolve the issues that HSC raised in its opening papers. Here are just a few examples of the ways in which the FAQs have failed to address the imminent harm faced by HSC and its members.

9. The FAQs do not restrict the so-called "labor peace agreements" to employees "paid for" by the City. Accordingly, the "spillover" issues that HSC raised in its opening papers remain.

10. In that regard, HSC pointed out in its opening papers that most of the people who work for nonprofits on City contracts are not "paid for" by the City. In most instances, the City does not pay all of a nonprofit's costs associated with City work. Moreover, nonprofits usually have multiple funding streams that include federal, state, and private funds. Finally, the workers who perform City contract work for nonprofits often perform similar work for

different funders. For example, day care workers often care for multiple children, under multiple funding streams. These phenomenon is so important that the City's "fiscal manual" for human services contains elaborate processes for "cost allocation," which are often the subject of extensive audits.

11. Therefore, the FAQs' assurance that a "labor peace agreement" "only" has to apply "to employees directly rendering human services in performance of a City Service Contract" is hollow: such employees will not generally be "paid for" with City dollars.

12. The FAQs do not redress the problem that was raised in our Complaint and motion with regard to the many ways in which nonprofits may be deemed in "material breach" of a contract, notwithstanding their diligence. The FAQs merely attempt to mitigate the "remedy" for such a breach that the City, upon a first violation, might impose on the nonprofits.

13. In response to HSC's list of the many circumstances where a nonprofit, through no fault of its own, can be forced into "breach" by a union leader, the City argues that the nonprofits' services will not be disrupted in such situations because the City can consider the nonprofits' "good faith" efforts to comply before "assessing an appropriate remedy" for the breach. This argument does not fairly describe the predicament faced by the nonprofits. Indeed, under the Law, it is quite easy for a labor union leader to intentionally (or even unintentionally) throw service delivery into disarray.

14. Indeed, the City ignores all of the Law's "shalls," and the fact that the "good faith" reference in the Law merely relates to the City's inquiry in "assessing an appropriate remedy" for the "breach" which the Law states will always be "material." The "shalls" start with whether the City must conduct an "investigation." The Law says that if the City Comptroller believes

that there has been a violation ***or*** receives "a verified complaint in writing from an interested party" (which would presumably include a union or competitor), "the comptroller ***shall*** conduct an investigation to determine the facts relating thereto. Based upon such investigation, the comptroller ***shall*** report the results of such investigation to the contracting agency." Under City procurement practice, the mere commencement of such an "investigation," will lead to devastating consequences jeopardizing service delivery. The City has historically declined to do business with organizations under "investigation." The City also claims the contractual power to "suspend" any aspect of a contract for whatever period it wishes, at any time, without reason. Given the reference in the Law to "the sums withheld at the commencement of the investigation," it is apparent that the mandatory Comptroller investigation will have immediate impacts on nonprofits without regard to what factors that the City might later consider in "assessing an appropriate remedy" for the "breach." Accordingly, the continuity of City services will be jeopardized by a union leader's interference.

15. The City's argument also ignores the automatic debarment provision, which is highly likely to disrupt services, particularly given the City's historic failure to "register" contracts on time. The Law says that if a nonprofit is "in two instances within any consecutive six year period" found to have "failed to comply with the requirements of" the Law, then the nonprofits (and its principals and officers) "***shall*** be ineligible to submit a bid or proposal on or be awarded any city service contract for a period of five years from the date of the second disposition." Significantly, this provision is triggered by a finding of "noncompliance." Thus, the FAQs' provisions allowing the City to consider "good faith" in "assessing an appropriate

remedy" for the first "breach," is of little help to service continuity when a union leader triggers two breaches.

16. The City's description of "good faith efforts" in the FAQs is also so vague as to add further confusion and uncertainty. While the City suggests that it will consider whether the union leader "fails to respond to a Contractor or Subcontractor's good faith attempts to initiate negotiations," it offers no guidance as to what "good faith attempts" constitute and means that the City investigators and adjudicators will necessarily be inserted into the nonprofits' labor relations.

Elements of the March "FAQs" Have Contributed to the Imminent Harm

17. Many aspects of the FAQs have made matters worse. To begin with, there is widespread confusion in the government procurement and nonprofit communities about what is going on. The City is starting to prepare the documents for the contracts that are set to start on July 1, 2022. The confusion created by the Law, sudden appearance of the FAQs, and unduly emboldened union leaders, is generating questions from HSC's membership, and an avalanche of questions and confusion will soon follow. HSC's mission is threatened with derailment by the need for this litigation and its members' questions. On top of all this, the City procurement officials could not be more confused. Some officials have demanded that HSC members sign Local Law 87 certifications, well before contracts are ready to be signed. Other officials have sought to apply the Law to nonprofits' contracts that are explicitly excluded by the Law. While many questions remain about the FAQs themselves, they clearly pose new problems for HSC and its members.

18. First, the FAQs make matters worse by changing the meaning of the statutory phrase "labor peace agreement." The Law says that a "labor peace agreement" is an agreement between an employer and a union in which the parties "agree to the uninterrupted delivery of services" that the nonprofit is contractually obligated to provide to the City and "refrain from actions intended to or having the effect of interrupting such services." The FAQs, however, indicate that the City will expect nonprofits to also accept demands from union leaders (who do not represent the nonprofits' employees) for "(i) alternate procedures related to recognizing the labor organization for bargaining purposes [*i.e.,* procedures distinct from those in the NLRA], (ii) [restrictions on the nonprofits'] public statements, (iii) [union leader] workplace access [i.e., free space for union leaders to use at the nonprofits' facilities], (iv) the provision [by nonprofits to union leaders] of employee [personal] contact information; and (v) a process for the productive resolution of disputes."

19. Second, the FAQs make it quite likely that nonprofits will be forced to negotiate with labor unions well before the nonprofits have binding contracts with the City. Local Law 87 requires that nonprofits submit to the City "attestations" signed by union leaders "[n]o later than 90 days after the award or renewal of a city service contract." The FAQs define "award" and "renewal" as the date that a contract is signed. Human services contracts, however, are not binding on either party on the date that the contracts are "signed" because the City Charter (and the contract documents) say that such contracts cannot be "implemented" until they are "registered" by the City Comptroller, which may occur more than 90 days after the contract is signed.

20. Third, the FAQs make matters worse by asserting that disputes about compliance with the Law will be ***adjudicated by union members***. The FAQs state that, in lieu of adjudication by the Contract Dispute Resolution Board, contractors will be limited to "a hearing" before the City's Office of Administrative Trials and Hearings. "Hearing Officers" at OATH are members of a union, the UFT, which is a labor union that can invoke the statute.

21. Fourth, the FAQs trigger subcontractor obligations upon the City's approval of the subcontractor. Since this might actually occur before a nonprofit signs a contract (and certainly before it is registered), the FAQs suggest that the City is attempting to regulate such entities before they are even legally "subcontractors."

22. Fifth, while the FAQs state that the certification of compliance with the Law only requires the CEO's business address, that is not clear on the form that the City has issued. As a result, the City is obviously setting nonprofits up for union action at the CEOs' homes.

23. Sixth, the FAQs place no time limits or restrictions on union leaders' expressions of interest in organizing. The FAQs suggest that the nonprofits are subject to the negotiation-reporting requirements regardless of how long ago the nonprofits' were approached by a union leader, and regardless of whether the workers have repeatedly rejected union representation.

24. Seventh, the FAQs' immunization of employers that have collective bargaining agreements supports the conclusion that the City's concern is not labor unrest (which could theoretically flow from situations where there are multiple unions) but rather establishing New York as a "union town."

The City's Safety Net is at Risk

25. HSC is not opposed to union organizing efforts, but Local Law 87 places the City's safety net at risk. Nonprofits are fearful of the abuses that the Law permits and, indeed, encourages. Nonprofits are fearful of losing their NLRA rights and rights to oppose Local Law 87 through the certifications that the City is now asking them to sign. Some nonprofits plan to walk away from City funds if the Law is not enjoined, thereby depriving the City of needed human services. The Law will not foster "labor peace" or "service continuity." It will fracture the safety net upon which millions of people depend.

I declare under penalty of perjury that the statements above are true and correct.

Dated: New York, New York
April 8, 2022

/s *Michelle Jackson*
MICHELLE JACKSON