UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELISA W., *et al*.,	:	Case No. 1:15-cv-5273 (LTS)(HBP)
Plaintiffs,	:	
-against-	:	
THE CITY OF NEW YORK, *et al*.,	:	
Defendants.	:	

OBJECTIONS OF THE LEGAL AID SOCIETY, LAWYERS FOR CHILDREN, INC., AND THE CHILDREN'S LAW CENTER OF NEW YORK TO THE PROPOSED SETTLEMENT

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INTRODUCTION

These Objections are filed on behalf of three organizations: The Legal Aid Society, Lawyers For Children, Inc., and The Children's Law Center of New York (together, the "Children's Advocates"). The Children's Advocates represent the vast majority of children in the New York City foster care system. For decades, the Children's Advocates have represented children in individual Family Court proceedings, brought class action litigations, and conducted extensive advocacy with the City and State in order to improve foster care in New York City. The Children's Advocates are intimately familiar with the needs of foster children in New York City.

The Children's Advocates submit these Objections to the Consent Decree (the "Proposed Settlement") put forth by Class Counsel and three defendants – the State of New York, the New York State Office of Children and Family Services ("OCFS") and OCFS's Acting Commissioner (collectively, the "State Defendants").

The Children's Advocates oppose the Proposed Settlement because it does not remedy the State Defendants' alleged deficiencies and yet provides them with sweeping immunity from liability for an extraordinary period of seven years or more. The Proposed Settlement would provide no added value to the putative class of all children who are or will be in New York City foster care because: (a) it fails to meaningfully address the Amended Complaint's allegations of deficient oversight against the State Defendants, instead focusing on deficiencies in NYC Administration for Children's Services ("ACS") practices; (b) it is duplicative of OCFS's NYC Regional Office ("NYCRO"), which is already assigned to monitor ACS's performance; (c) it gives OCFS sole discretion to name the monitor and determine his or her criteria in evaluating ACS, rendering any likely relief biased; and (d) it lacks public transparency with respect to the Monitor or Research Expert's work, which is particularly troublesome since Plaintiffs' counsel

has no regular contact with the foster care system. In exchange for the Monitor and Research Expert, the Class is asked to accept an unprecedented seven-year covenant not to sue and release of claims. Because the Class would be adversely affected by this agreement, the Children's Advocates ask this Court to reject the Proposed Settlement, and direct that discovery proceed against the State Defendants so that meaningful relief can be achieved against the State Defendants.

THE CHILDREN'S ADVOCATES

The Children's Advocates are three not-for-profit law firms that represent the vast majority of children in foster care in New York City in Family Court proceedings concerning the children's placement in foster care. Practicing in all five boroughs, in every Family Court in the City, the Children's Advocates are intimately familiar with the complexities and challenges of the child welfare system. Every day, the Children's Advocates interact with children, case planners, parents, foster parents, kinship caretakers, lawyers, judges and the many others involved in the system, and every day, they advocate zealously for their foster child clients – the putative class in this case.

In addition to their work in the Family Courts, the Children's Advocates have a long history of litigating against and negotiating with ACS and OCFS to improve the foster care system. The Children's Advocates' extensive experience in bringing and settling class action lawsuits on behalf of children in foster care includes the excellent results achieved in *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986) (addressing inequities in the process by which ACS assigned children to foster care agencies); *Marisol A. v. Giuliani*, 185 F.R.D. 152, 170 (S.D.N.Y. 1999), *aff'd, Joel A. v. Giuliani*, 218 F.3d 132 (2d Cir. 2000) (addressing virtually every aspect of New York City's foster care system); *Nicholson v. Scoppetta*, 344 F.3d 154 (2d. Cir. 2003) (addressing ACS's treatment of domestic violence victims and their children); *A.M. v.*

Mattingly, Stipulation and Order of Settlement, No. 10 Civ. 02181 (E.D.N.Y. March 14, 2011) (remedying ACS's practice of permitting foster children to languish in restrictive, acute care psychiatric hospitals although medically ready for discharge); *D.B. v. Richter*, Index No. 402759/11 (N.Y. Sup. Ct.) (ending ACS's practice of discharging foster youth to homelessness) and other cases. In sum, the Children's Advocates have an unparalleled depth of knowledge about and experience with New York City's foster care system and the children who come into contact with that system. The Children's Advocates, and their extensive advocacy work for children in foster care in New York City, are more fully described in the accompanying Motion to Intervene for Purposes of Objecting to the Proposed Settlement.

The Children's Advocates submit these Objections for the Court's consideration as interveners to this proceeding with organizational standing to object to the Proposed Settlement.[1] Given that the putative class members are minors who are unlikely or unable to voice their own objections, and that most class members are clients of the Children's Advocates, who are well aware of their clients' needs, the Children's Advocates submit that these Objections should be given considerable weight.

BACKGROUND

In order to appropriately assess the Proposed Settlement, it is necessary to understand the realities of New York City's foster care system – realities that are seriously misrepresented in the Amended Complaint. The thrust of the Amended Complaint is that children are spending too long in foster care, but neither the Amended Complaint nor the Proposed Settlement considers *why* that is so.

[1] The Children's Advocates refer the Court to their Memorandum of Law in Support of the Motion to Intervene for a more detailed discussion of standing.

Because of a paradigmatic shift away from foster care – driven, in part, by the New York Court of Appeals' 2004 decision in *Nicholson v. Scoppetta*[2] – the number of children in foster care in New York City has hit an historic low, falling from over 21,000 children in March 2003[3] to fewer than 10,000 children as of February 2016.[4] *Nicholson* clarified that children should not be removed from their homes absent a determination that they are at imminent risk of harm that cannot be mitigated by reasonable efforts on the part of child protective services. The Court specifically recognized that Family Courts must balance the risk posed to the child against the harm removal might cause, and determine what is in a child's best interest.[5] Family Courts now very carefully consider the trauma of removing a child from his or her family, and attempt to implement services or court-ordered supervision that prevents the need for placement in foster care. The *Nicholson* case had the salutary effect of dramatically increasing the number of "purchased preventive services" cases, cases which are intended to prevent Family Court-ordered removals of children from their homes by providing supportive services to families.[6]

In *Nicholson*'s aftermath, there have been notable changes in both the number of children in foster care in New York City and the length of time those children spend in care. Fewer children now enter the foster care system in New York City, but the smaller cohort of families

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[2] *Nicholson v. Scoppetta,* 3 N.Y.3d 357 (2004). *Nicholson* was decided in response to certified questions from the United States Court of Appeals for the Second Circuit.

[3] Citizen's Committee for Children, Foster Care Population, *available at* http://data.cccnewyork.org/data/map/28/foster-care-population#28/a/2/49/1/a (last visited June 20, 2016).

[4] NYC Administration for Children's Services, Data / Policy, *available at* http://www1.nyc.gov/site/acs/about/data-policy.page (last visited June 20, 2016).

[5] *Nicholson,* 3 N.Y.3d, at 378.

[6] As of March 2016, there were more than 24,000 purchased preventive services cases open in New York City – a number almost two and a half times larger than the total number of children in foster care. *See* http://www1.nyc.gov/site/acs/about/data-policy.page (last visited June 20, 2016). In calendar year 2015, the Family Court removed children from their homes in only 25.2% of the cases filed by ACS; supervision was court-ordered in 62.7% of cases filed. *See* NYC Administration for Children's Services, Flash Report, *available at* http://www1.nyc.gov/assets/acs/pdf/data-analysis/2016/Flash_Indicators.pdf (April 2016).

whose children enter the system often have greater needs than those who are successfully diverted. And because of those greater needs, those children often remain in foster care for a longer period of time so that they or their families can receive the supportive services necessary for reunification. For example, a parent may have significant mental health issues, substance abuse issues or cognitive impairments (as may a child). It is often not possible for a Family Court judge, or any of the parties, to determine quickly whether such a parent can benefit from services sufficiently to appropriately care for their child(ren). Allowing additional time to provide supportive services to the parent is time well-spent, particularly when – as is usually the case – the child wants to reunite with his or her parent. These practices – which successfully maintain family integrity, reduce the foster care population, and benefit children and families – skew statistics regarding permanency for foster children in New York City as compared to other jurisdictions.[7]

In addition, it is important to note that delays in the system are often caused by factors that are out of ACS' control. For example, in New York City Family Courts parents and children are each represented by their own counsel, and represented vigorously. Many other jurisdictions lack such representation. This essential protection of constitutional due process rights can make for protracted litigation in some instances. Thus, even in cases where ACS is in compliance with statutory and regulatory mandates, the children may remain in foster care longer than in other jurisdictions because cases in New York City Family Courts are adversarial. Where

[7] *See* Amended Complaint ¶¶ 245, 248 (citing federal statistics reflecting that New York City takes longer than many other jurisdictions to reunify children with family or to finalize adoptions of children who cannot be returned to their families). These statistics also do not reflect New York City's high rate of placing children who must be removed from their families into kinship foster care (foster homes where the foster parent is related to the child). In those cases, the statutory time limits for filing petitions to terminate parental right do not apply. *See* NY Soc. Servs. Law § 384-b.

the parent or the child litigates against ACS, proceedings may take longer, and the Court's orders may alter the trajectory of the case.

Moreover, New York City's Family Courts are under-resourced and overburdened, with too few judges handling too many cases, causing inevitable delays in adjudication. Finally, a dearth of affordable housing and lack of drug treatment and other services for low income clients can further delay resolution of cases. Simply put, there are long waiting lists for services and not enough quality providers to serve the families who need them. Unfortunately, the relief in the Proposed Settlement neither takes into account the potential justifications for delay nor alters any of the poverty-related issues and conditions described above which impact a child's length of stay in foster care.

The factors described above shed some light on the complexity of New York City's child welfare system. To enhance OCFS's oversight of this complex system, the New York City Regional Office (NYCRO) of OCFS was created in 1999 as part of the settlement of *Marisol A. v. Giuliani,*[8] a lawsuit, like this one, predicated upon broad allegations of: (1) ACS failure to provide appropriate services and placements to children in foster care; and (2) OCFS failure to appropriately oversee ACS. The purpose of the NYCRO is to fulfill the "statutorily mandated function of monitoring and supervising New York City's child welfare system."[9] The NYCRO was not a temporary remedy, but exists today in largely the same form as when it was created.

The Proposed Settlement, if approved, will waste resources by imposing a short-term, duplicative monitor which will do nothing to improve the current NYCRO while hampering future reform efforts by barring suits seeking systemic relief for a minimum of seven years. The

[8] *Marisol A. v. Giuliani*, 185 F.R.D. 152, 170 (S.D.N.Y. 1999), *aff'd Joel A. v. Giuliani*, 218 F.3d 132 (2d. Cir. 2000).

[9] State Settlement § I.1., *Marisol A. v. Giuliani*, No. 95 CV 10533 (1998); *Marisol A.,* 185 F.R.D. at 159.

resources that the State Defendants would be obligated to expend under the Proposed Settlement would be better spent on increasing support to Family Court judges, and improving housing, drug treatment and other services upon which foster children and their families rely.

THE PROPOSED SETTLEMENT

The Proposed Settlement between the State Defendants and the Plaintiff Children provides that the Commissioner of OCFS will hire a Monitor who will review ACS's foster care system in New York City, report findings, make recommendations, and issue quarterly reports for a period of three years.[10] The Proposed Settlement directs the Monitor's review to include the foster care placement process, the causes of maltreatment of children in care, the availability and appropriateness of services in New York City, and the recruitment of a variety of foster parents and a "sufficient array of placements."[11] In addition, the Proposed Settlement requires ACS to hire a Research Expert to conduct individual case reviews to ensure compliance with state and federal laws, as well as regulations and policy.[12] The Research Expert is directed to issue individual case reports and aggregate reports.[13] The Proposed Settlement also requires ACS and/or foster care agencies to implement corrective action plans, should the Monitor or Research Expert find that ACS or the foster care agencies are not substantially following the relevant law, regulations, or polices.[14]

The Proposed Settlement, as described above, fails to address any of the underlying allegations of wrongdoing by the State Defendants – *i.e.*, the failure to adequately monitor ACS's provision of foster care services to children in New York City.

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[10] Consent Decree § 6.1

[11] *Id.*, § 6.2.1

[12] *Id.*, § 7.1

[13] *Id.*, §§ 7.4, 7.5

[14] *Id.*, §§ 6.5.2, 7.4.2

ARGUMENT

I. THE SETTLEMENT SHOULD BE SUBJECTED TO HEIGHTENED SCRUTINY

In order to approve a class action settlement, a court must determine that the settlement is fair, adequate and reasonable.[15] In evaluating the Proposed Settlement, this Court must consider a number of factors, including "(1) the complexity, expense and likely duration of the litigation, … (2) the reaction of the class to the settlement, …[and] (3) the stage of the proceedings and the amount of discovery completed…."[16] Where, as here, the Proposed Settlement has been reached before discovery has even begun, the Court should subject the Proposed Settlement to heightened scrutiny. "When settlement occurs early in the case, the parties have less information on the strengths and weakness of the claims, and thus the court and class members may be hampered in their ability to determine the fairness of the settlement."[17] In addition, when settlement negotiations precede class certification and approval for settlement and certification are sought simultaneously, the court should take a particularly rigorous look at the terms of the settlement to ensure that the interests of all class members are protected. Because the Proposed Settlement is not in the interests of the class, and therefore is not "fair, reasonable and adequate," as required by F.R.C.P Rule 23(e)(2), it should not be approved by this Court.[18]

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[15] Fed. R. Civ. P. 23(e)(2); see also *Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1072,1078 (2d Cir.1995) ("The ultimate responsibility to ensure that the interests of class members are not subordinated to the interests of either the class representatives or class counsel rests with the district court.")

[16] *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

[17] *Polar International Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 113 (S.D.N.Y 1999); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods Liab. Litig.,* 55 F.3d 768, 814 (3d Cir. 1995) (finding that the court did not have enough exposure to the merits of the case to enable it to evaluate the fairness of the settlement because "with little adversarial briefing on either class status or the substantive legal claims, the district court had virtually nothing to aid its evaluation of the settlement terms").

[18] *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986) ("The district court must, of course, ensure that . . . class members' interests were represented adequately"); *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.,* 504 F.3d 229, 245 (2d Cir. 2007).

II. PROPOSED MONITOR AND RESEARCH EXPERT PROVIDE NO CLASS BENEFIT

A. The Settlement Precludes Any Possibility of Reforming Harmful State Practices

The Amended Complaint alleges that the State Defendants have failed in their obligations to appropriately and effectively oversee ACS. Yet, the Proposed Settlement does nothing to effect lasting change in the way the State Defendants carry out those obligations, and does not even require the Monitor to review OCFS practices. Instead, the Proposed Settlement requires that a Monitor and Research Expert be hired only to review **ACS** files and make recommendations for **ACS** – not the State Defendants – to take corrective action, if any. Because the Proposed Settlement does not address the operations or practices of OCFS or its NYCRO, when the settlement ends (if not before), the Monitor and the Research Expert will be gone, and nothing will have been done to remedy OCFS's allegedly faulty oversight practices.

B. An Additional Monitor Would Negatively Affect the Work of NYCRO and ACS

As stated above, OCFS was required to create the NYCRO to oversee the work of ACS as part of the settlement of *Marisol A v. Giuliani.*[19] Under the terms of the Proposed Settlement in this case, the Monitor and Research Expert are charged with doing the exact same work the NYCRO is already mandated to do. For example:

> (i) The Monitor is to be retained "to review and evaluate alleged systemic issues within the foster care system in New York city that reflect widespread and/or ongoing substantial noncompliance with federal and State statutes, regulations and policies relating to the safety, permanency and well-being of foster children."[20] Similarly, the NYCRO is charged with reviewing ACS records "to determine ACS's compliance with applicable laws and reasonable case work practice," and to address substantial non-compliance.[21]

[19] 185 F.R.D. at 159

[20] Consent Decree § 6.1.1.

[21] *Marisol* State Settlement Agreement §§ 18-21; *see Marisol A.,* 185 F.R.D. at 159-160.

(ii) The Research Expert is "to conduct reviews of case records of children in the custody of the Commissioner of ACS to determine compliance with relevant federal and State laws, regulations and policies."[22] Yet, the NYCRO already undertakes "case record review[s] of ACS records . . . to determine ACS's compliance with applicable laws and reasonable case work practice."[23]

(iii) Based upon the Research Expert's individual case reports, ACS will be required to determine "what corrective action, if any, is necessary" to address significant failures to comply "with any relevant federal and State statutes, regulations and/or policies."[24] However, under the current structure,

"[i]f, after completing its case record review(s), OCFS determines that ACS is in substantial non-compliance with applicable laws, regulations and/or reasonable case work practice, OCFS shall direct ACS to take Corrective Action[,]" overseen by the NYCRO, "designed to improve ACS's performance in the specific areas of non-compliance."[25]

Because the Proposed Settlement's Monitor and Research Expert will be charged with doing the same work that OCFS's NYCRO is already doing – gathering documents, conducting case record reviews, and making recommendations for corrective action to ACS – the creation of these duplicative positions does nothing to achieve the purpose of this lawsuit *vis a vis* the State Defendants' long term oversight of ACS, but rather could complicate, burden and delay NYCRO's monitoring of ACS and ACS's own efforts to continually improve its work.

In *Marisol*, Judge Ward addressed the issue of duplicative monitoring measures by approving the parties' request to consolidate the *Marisol* Advisory Panel with a panel that had been previously created in *Wilder v. Bernstein*.[26] In so doing, Judge Ward noted that, "the continued existence of the *Wilder* Settlement Panel would cause ACS to be scrutinized by two panels, at the same time, with overlapping jurisdictions. Such a system would be impracticable and unmanageable, with the possibility of conflicting recommendations regarding similar subject

[22] Consent Decree § 7.1.1.

[23] Marisol State Settlement Agreement § 18.

[24] Consent Decree §§ 7.4.2, 7.4.1.

[25] Marisol State Settlement Agreement §§ 7, 21.

[26] 645 F. Supp. 1292 (S.D.N.Y. 1986).

matter."[27] Similarly, in this case, the duplicative efforts of the NYCRO on the one hand and the proposed Monitor and Research Expert on the other, would almost certainly multiply the burden of investigative paperwork and reporting, without commensurate benefit to the class. It defies logic to think that a single individual could effectively replace an entire office of more than one hundred monitors and investigators. A settlement predicated upon this "relief" is neither fair, reasonable, nor adequate.

C. The Role of the Monitor is Vague and Ill-Conceived

This lawsuit alleges that OCFS has not appropriately or effectively monitored the work being done by ACS. Yet, inexplicably, to resolve that claim, the parties decided to give OCFS the "sole discretion" to hire another Monitor.[28] Further, the parties give OCFS the sole power to choose the criteria for the Monitor's review.[29] Given OCFS's allegedly deficient track record in implementing effective monitoring, it strains credulity that this Proposed Settlement will achieve meaningful relief for the Class.

The Proposed Settlement provides virtually no guidance to the Monitor regarding his or her areas of focus. It offers three short paragraphs on the Monitor's "Duties." The Proposed Settlement provides:

> The Monitor will observe, review, report findings and make recommendations regarding the safety, permanency and well-being of foster children in the foster care system in New York City. This will include, but not be limited to, the implementation and effectiveness of the [Improved Outcomes for Children] initiative. The Monitor's assessment of the foster care system…shall include…(a) the placement process …(b) the causes of maltreatment of children in foster care…, if any, and ways to lower the rate of such maltreatment, (c) the availability and appropriateness of services in the foster care system…and (d) recruitment of an appropriate and sufficient array of placements, including

[27] 185 F.R.D. 152, 167.

[28] Consent Decree §§ 6.1.3.

[29] Consent Decree §§ 6.1.1, 6.2.2.

potential permanent families, for children in the foster care system in New York City.[30]

The Monitor is charged with reviewing virtually every aspect of the foster care system – a system that is incredibly complex and that encounters practically every social problem our society confronts. Yet, a single person is assigned this Herculean task, even though there has been no discovery to help that person understand the system. This stands in sharp contrast to the settlement in *Marisol*, which was approved, in part, because it named the five foster-care experts who would serve as the Advisory Panel, investigating various aspects of ACS practice and preparing a series of reports regarding its findings and recommendations for reform. This Panel was highly credentialed,[31] and specifically approved by Judge Ward as a group of "nationally respected child welfare experts."[32] In addition, the Advisory Panel had the benefit of over 100,000 pages of discovery documents and extensive expert reports because extensive discovery had already occurred prior to approval of the settlement.[33] The settlement in *Wilder v. Bernstein* also reflected a recognition of the magnitude of the task of monitoring New York City's foster care system: it included an expert consultant, a three-member Settlement Panel, and support staff to monitor compliance with the settlement.[34]

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[30] Consent Decree § 6.2.1.

[31] The *Marisol* Advisory Panel members were (i) Judith Goodhand, former Director of Cuyahoga County Department of Children and Family Services in Cleveland, Ohio; (ii) Paul Vincent, former Director of the Division of Family and Children's Services of the Alabama Department of Human Resources; (iii) Carol Williams Spigner, former Associate Commissioner in the Children's Bureau of the Administration for Children and Families in the United States Department of Health and Human Services; (iv) Douglas Nelson, President of The Annie E. Casey Foundation and (v) John Mattingly, Senior Program Associate of The Annie E. Casey Foundation.

[32] *Marisol A.*, 185 F.R.D. at 157.

[33] *Id*. at 163.

[34] *Id.* at 156.

The *Wilder* and *Marisol* settlements also set forth many more detailed requirements for reform than the Proposed Settlement with the State Defendants.[35] For example, the state settlement agreement in *Marisol* required, in addition to the creation of the NYCRO to enhance oversight of ACS, numerous changes to OCFS's internal policies and procedures.[36] Other settlements in cases involving child welfare reform include similarly detailed requirements,[37] as do other injunctive remedies of systemic litigations.[38] The 2015 consent decree reached in the lawsuit challenging staff brutality on Rikers Island, for example, is a sixty-three page document mandating highly specific changes to the New York City Department of Correction's policies and protocols.[39] The consent decree put into place a monitor to oversee these reforms, and set out a detailed methodology for the monitor to follow, including periodic visits and tours of the facility, inmate interviews, and other protocols.[40]

Here, the Proposed Settlement provides no specificity in the way the research is to be conducted, the method by which cases are to be reviewed or the criteria by which assessments are to be made. The only thing made clear by its very absence is that the Monitor is not expected to review OCFS's oversight practices. While the Proposed Settlement does provide that the

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[35] *See* Marisol A., 185 F.R.D. at 166 (discussing the *Wilder* settlement); ; *Marisol A. v. Giuliani*, State Settlement Agreement at 9-17, 95 Civ. 10533 (S.D.N.Y. 1998).

[36] *Marisol* State Settlement Agreement ¶¶ 8, 10-17, 22-24; *Marisol A.*, 185 F.R.D. at 159-160.

[37] *See, e.g., D.G. v. Yarborough*, Compromise and Settlement Agreement, No. 08-Civ-074 (N.D. Okla. Jan. 4, 2012) (listing fifteen specific performance areas for improvement and naming an independent panel of three people to implement reforms); *Kenny A. v. Deal*, No. 02-cv-1686, Consent Decree at 31-38 (N.D. Ga. 2005) (requiring thirty one specified outcome oriented changes by Georgia's child protective agency within specified timeframes, and naming an accountability panel to monitor progress); *Juan F. v. Malloy*, No. H-89-859 (D. Conn. 1989) (mandating specific changes, including training programs, hiring protocols, and changes in policy, to be overseen by a monitoring panel established in the settlement agreement).

[38] *See, e.g., Floyd v. City of New York*, No. 08 Civ.1034 (SAS), Opinion and Order (S.D.N.Y. Aug. 12, 2013) (detailing reforms to New York Police Department's policies and practices regarding stop and frisk); *Nunez v. City of New York*, No. 11 Civ. 5845 (LTS)(JCF), Consent Judgement (S.D.N.Y. Oct. 21, 2015) (detailed settlement involving treatment of inmates).

[39] *See Nunez* Consent Judgment.

[40] *See id.*

Monitor "will coordinate and consult with ACS, the voluntary agencies, and any task-force or similar group convened by ACS and advocacy organizations, to review and reform agency practice in relation to the foster care system in New York City,"[41] this consultation provision does not mitigate the complete divestment of authority to the OCFS-appointed Monitor. Because the State Defendants have the "sole discretion" to hire the Monitor and ACS Defendants are charged with hiring the Research Expert, there is good reason to be skeptical that the Monitor and Expert will, in fact, be impartial evaluators or will develop sound methodology for reviewing ACS's performance.

We are hard-pressed to find any other case in which a court has approved a class action settlement that imposed such ill-defined obligations upon the defendants. Where, as here, those obligations are imposed in exchange for sweeping, long-lasting releases from liability before any discovery has been conducted, the settlement is not fair, adequate and reasonable.

D. The Lack of Transparency of the Monitor's Reports Undermines the Relief

It is also troublesome that the Proposed Settlement does not provide any public transparency with regard to the performance of the Monitor or the Research Expert. There is no public reporting requirement and the mechanism for input by other stakeholders is grossly deficient.

Public reporting requirements are extremely common and can be found in consent decrees from jurisdictions across the country, including in systemic litigations involving child welfare.[42] In this case, it is particularly important that the reports be made public because

[41] Consent Decree § 6.2.3.

[42] *See e.g.*, *Marisol A. v. Giuliani*, Settlement Agreement with City at ¶ 13-15, 95 Civ. 10533 (S.D.N.Y. Dec. 1, 1998) (initial reports shall be released to the Parties and to the Court and thereafter may be made public); *Brian A. v Halsam*, April 2015 Modified Settlement Agreement and Exit Plan at 5, No. 3:00-0445 (M.D. Tenn., Apr. 4, 2015) (all reports are to be made public); *Juan F. v. Malloy,* No. H-89-859 (D. Conn. 1991) (reports posted publically on the State of Connecticut's website at http://www.ct.gov/dcf/cwp/view.asp?a=2569&q=314492); *Olivia Y. v.*

releasing the reports only to Plaintiffs' counsel leaves the assessment of whether the reports fairly and accurately reflect any changes that occur within ACS to Plaintiffs' counsel. Plaintiffs' counsel – unlike the Children's Advocates and other interested advocates – has no regular contact with the foster care system and no means to determine whether the reports include an accurate assessment of the ways in which the system is – or is not – working.

In sum, because the Proposed Settlement gives OCFS unilateral discretion in the selection of the Monitor, and provides no specificity regarding his or her duties, no specificity in the way the work is to be done, and no transparency with respect to any work that is done, the plaintiff class will not benefit from this provision of the Proposed Settlement.

III. THE RELEASE OF CLAIMS AND COVENANT NOT TO SUE ARE UNDULY LONG AND OVERLY BROAD

The Proposed Settlement inappropriately immunizes the State Defendants by requiring the Class to agree to a release of claims ("Release") and covenant not to sue ("Covenant") that are of impermissibly broad scope and unduly long duration. The Covenant contains sweeping language that appears to shield the State Defendants from virtually any action related to OCFS's role in the foster care system for a period of at least seven years.[43] The Covenant would preclude any Class member from bringing any action against OCFS:

> for injunctive or declaratory relief based on any alleged facts or causes of action, statutory, or constitutional claim set forth in the Amended Complaint…or for any class or individual claim(s) that allege system-wide violations arising out of such claim(s) and fact(s) alleged in the Amended Complaint....[44]

Barbour, Modified Settlement Agreement and Reform Plan at 47, 04-Civ-251 (S.D. Miss. 2012) ("The reports of the Monitor shall be public documents"); *Charlie & Nadine H. v. Christie*, Modified Settlement Agreement at 29, No. 99-3678 (D.N.J. July 18, 2006) ("The reports of the Monitor shall be made public documents."); *Janine B. v. Doyle*, Modified Settlement Agreement, No. 93-C-0487 (E.D. Wisc. Nov. 14, 2003).

[43] Consent Decree §§ 3.2, 20.1.

[44] Consent Decree § 20.1.

This prohibition on claims would last for the period of the "duration" and "implementation" of the Settlement – a period that, under the Proposed Settlement, will last for at least seven years.[45]

A. The Covenant Protects Defendants for an Impermissibly Long Time

A seven year covenant not to sue is excessive[46] and wholly inappropriate in the context of the Proposed Settlement. Many civil rights settlements – particularly those that address deficiencies in child welfare systems – do not include any covenant not to sue the defendants.[47] The Second Circuit, when faced with objections to the covenant not to sue in *Marisol* (there called a "release"), determined that the covenant in that case was reasonable because it was "extremely limited in scope" and "reasonably brief."[48] The *Marisol* covenant lasted for only two years, allowed the Plaintiffs to pursue a class action for systemic relief of any outstanding violations at the end of the two-year period, *and allowed them to rely on evidence from the effective period of the agreement* in doing so.[49] The Second Circuit found the "practical effect of the limited release is the same as if the settlement had merely stayed the [objector/intervenor]

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[45] Consent Decree § 3.2.

[46] *See, e.g., Marisol A. v. Giuliani*, Settlement Agreement at 24, 95 Civ. 10533 (S.D.N.Y. Dec. 1, 1998) (two year covenant in settlement of class action on behalf of youth in foster care); *Nunez v. City of New York*, Consent Judgment at 61, No.11 Civ. 05845 (S.D.N.Y. Oct. 21, 2015) (covenant ends when NYC Department of Correction found in substantial compliance for 24 months in staff brutality class action); *D.G. v. Yarborough*, Compromise and Settlement Agreement at 10-11, No. 08-Civ-074 (N.D. Okla. Jan. 4, 2012) (covenant not to sue ends either after monitor's final report – 5 years after the date of settlement - or after two years of continuous good faith efforts toward the settlement agreement targets in child welfare class action); *Juan F. v. Malloy*, Revised Exit Plan at 3, No. H-89-859 (D. Conn. July 11, 2006) (covenant not to sue in effect for at least six months prior to asserting compliance in child welfare class action); *Kenny A. v. Deal*, Consent Decree at 42-43, No. 02-Civ-1686 (N.D. Ga. Oct. 28, 2005) (covenant not to sue ends after substantial compliance for three consecutive six-month reporting periods in child welfare class action).

[47] *See, e.g., A.M. v. Mattingly*, Stipulation and Order of Settlement, No. 10 Civ. 02181 (E.D.N.Y. March 14, 2011) (settling class action regarding discharge planning for foster children in psychiatric hospitals); *J.G. v. Mills*, Stipulation and Order of Settlement, No. 04 Civ. 5415 (E.D.N.Y. Feb. 14, 2011) (settling class action regarding the DOE's provision of educational services to children on discharge from delinquency placement and OCFS oversight). Notably, Federal Court in South Carolina just approved a similar suit regarding the child welfare system in that state. The settlement did not contain a covenant not to sue. *Michelle H. v. Haley* Docket No. 2:15-cv-00134-RMG (S.D.S.C. 6/3/16).

[48] *Joel A. v. Giuliani*, 218 F.3d 132, 142 (2d Cir. 2000).

[49] *Id.*

action for a reasonably brief period in order to allow an attempt to achieve an administrative solution that would moot the *Joel A.* and *Marisol* claims."[50] No such provision allowing reliance on evidence during the seven year effective period exists here.

Incredibly, the Monitor and the Research Expert are not even assured to be in place for the duration of the Covenant. The Monitor and Research Expert must be retained immediately, but the Proposed Settlement does not require that they be maintained throughout the effective period of the agreement. As to the duration of the Research Expert, the Proposed Settlement provides "[t]he parties will meet every two years after the effective date of this Consent Decree to determine whether the Expert continues to be effective regarding his or her ability to carry out the duties set forth in this section."[51] Similarly, as to the Monitor, the Consent Decree provides "[t]he parties will meet in three years … and then every two years thereafter during the duration of the Consent Decree to determine whether the Monitor continues to be effective regarding his or her ability to carry out the duties set forth in this section."[52] The Proposed Settlement appears to contemplate that if the parties agree that the Monitor or Research Expert no longer "continues to be effective," either one could then be discharged. Moreover, an agreement to discharge the Monitor or Research Expert would be made without consultation with the Children's Advocates or parents' advocates, or any other stakeholders, even though Plaintiffs' counsel lacks experience or ongoing contact with the New York City foster care system.

Implementation of the Monitor and Research Expert is the sole benefit that the class receives in exchange for the broad Release and Covenant. A settlement that allows the Monitor and Research Expert to be dispensed with after three years, while the Covenant would last for at

[50] *Id.*

[51] Consent Decree § 7.6.

[52] Consent Decree § 6.6.1.

least another four years or more, is patently unfair to the Class. Such a scheme immunizes the State Defendants while leaving the Class with no recourse to address ongoing harm.

B. The Proposed Settlement Impermissibly Prohibits Bringing Claims With Respect to Facts That Might Occur in the Future

In general, a court should not approve a covenant that prohibits legal claims based upon facts or circumstances occurring after the effective date of the settlement, unless such claims are identical to the claims addressed by the proposed settlement. "The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented *as long as the released conduct arises out of the 'identical factual predicate as the settled conduct*.'"[53] Absent such factual identity, future claims cannot be negotiated away in a consent decree.[54]

Where, as here, the conduct the Proposed Settlement is intended to address is so broadly defined as to be virtually limitless, such a covenant is wholly inappropriate. The Covenant is not limited to claims related to the facts alleged in the Amended Complaint, but would also apply to any claim based on any statute or regulation set forth in the Amended Complaint.[55] The statutory and constitutional claims asserted in the Amended Complaint include causes of action based on the 1st, 9th, and 14th Amendments of the United States Constitution, the Adoption Assistance and Child Welfare Act of 1980, the Adoption and Safe Families Act of 1997, the New

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[53] *Wal-Mart Stores, Inc. v Visa U.S.A., Inc.*, 396 F3d 96, 107 (2d Cir. 2005) (quoting *TBK Partners, Ltd. v. W. Union Corp.,* 675 F.2d 456, 460 (2d Cir.1982)) (emphasis added).

[54] *See, e.g.*, *National Super Spuds Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 18 (2d Cir. 1981) ("If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such action ordinarily should not be able to do so either."); *Authors Guild v. Google*, *Inc.*, 770 F. Supp. 2d 666, 676-77 (S.D.N.Y. 2011) (holding that settlement that "would release Google (and others) from liability for certain *future* acts. . .exceeds what the court may permit under Rule 23"); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 986 F.Supp. 2d 207, 236 (E.D.N.Y. 2013) (noting that a settlement agreement "appropriately limit[ed] future damages claims based on pre-settlement conduct" rather than releasing liability for claims based on "new conduct.").

[55] Consent Decree § 20.1.

York State Social Services Law and Regulations, as well as contract law. This is, in general, the universe of provisions governing children's placement in foster care. As a result, the Covenant would prohibit essentially *any constitutional or statutory claim* against the State Defendants related to any aspect of New York City foster care pertaining to any actions that occurred in the past or might occur during the next seven years, or more.

Such a broad covenant is not generally permissible under Second Circuit precedent.[56] In barring *all* claims for systemic or injunctive relief related to foster care placement (even those arising from facts that are not alleged in the Amended Complaint), the Proposed Settlement would preclude children from addressing systemic problems not addressed in the Amended Complaint or the Consent Decree. For example, there could arguably be no suit challenging the State Defendants' failures to ensure that children in foster care obtain appropriate medical care or educational services, or that youth who are aging out of foster care be provided with appropriate housing, or that the State Defendants comply with their obligations to ensure that severely physically disabled or mentally ill children in New York City foster care or those who are suffering from terminal illnesses be provided with particularized services to address their needs. Similarly, under this Covenant, there can be no suit to address particular practices and procedures relating to OCFS oversight of ACS, such as delays in approving policies governing ACS practice, or deficiencies in NYCRO's operations. There are no factual allegations in the Amended Complaint that relate to children in these circumstances or to these aspects of OCFS

[56] *National Super Spuds Inc. v. Mercantile Exchange*, 660 F.2d 9, 18 (2d Cir. 1981); *In re Auction Houses Antitrust Litig.,* 42 Fed. Appx. 511 (2d Cir. 2002); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982); *Flood v. Carlson,* 2015 WL 4111668, No. 14 Civ. 2740 (S.D.N.Y. July 6, 2015); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 107 (2d Cir. 2005), *cert. denied* 54 U.S. 1044 (2005); *The Authors Guild v. Google, Inc.,* 770 F. Supp. 2d 666 (S.D.N.Y. 2011); *Camacho v. Ess-a-Bagel, Inc.,* 2014 WL 6985633, No. 05 Civ 8136 (S.D.NY. 2014); *See In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 248 (2d Cir. 2011).

operations. Yet, the broad language of the Release and Covenant would arguably preclude actions to enforce the rights of those children.

The Second Circuit's holding in *Joel A.* recognized a limited exception to the factual identity requirement that is not applicable here. The *Joel A.* plaintiffs sought to intervene in *Marisol*, asserting that the plaintiffs lacked standing to bring claims relating to bias-related violence experienced in foster care, and therefore lacked authority to settle such claims.[57] In response to that argument, the Second Circuit noted that there was no danger that the *Marisol* plaintiffs would sacrifice the claims of the *Joel A*. objectors for their own benefit and concluded that because the *Marisol A*. settlement required that class members forego only class actions seeking systemic relief for the "relatively brief time" of two years, the absence of a common factual predicate was immaterial.[58]

In this case, the Covenant contains none of the hallmarks that allowed Judge Ward and the Second Circuit to find that the *Marisol* covenant was fair and reasonable. The Covenant does not operate for a "reasonably brief period" and it *bars*, rather than delays, claims that arise during the effective period of the agreement. The *Marisol* settlement agreements narrowed the terms of the covenants not to sue by limiting them to the claims contained in the pre-trial order issued some three years after the complaint was filed. Thus, the *Marisol* class members would be permitted to bring systemic litigation at the end of the effective period based upon facts and events during the settlement period that related to the claims in the complaint that had not been included in the pre-trial order.[59] In this case, there has been no narrowing of the claims raised in the Amended Complaint through discovery, and unlike the *Marisol* plaintiffs, the Class in this

[57] *Joel A*., 218 F.3d at 142.

[58] *Id.* at 143.

[59] Marisol City Settlement Agreement ¶ 42; State Settlement Agreement ¶ 41.

case would be precluded from refiling to remediate any issues that arise during the effective period of the agreement and relate in any way to the claims in the Amended Complaint.[60]

IV. THE PROPOSED SETTLEMENT SHOULD NOT BE APPROVED UNTIL DISCOVERY HAS PROCEEDED

It is too early to approve the Proposed Settlement in this case because this Court has not had the opportunity to ensure that the claims have been adequately explored or tested. As noted above, no discovery has taken place. Indeed, the paucity of the record in this case is particularly apparent when compared to the record in *Marisol*.[61] There, before the district court approved wide-ranging relief to redress systemic problems in New York City's child welfare system, extensive discovery took place before a settlement was reached, which included "over 200 deposition days, over 10,000 pages of documents provided by the City and the State, and the exchange of extensive expert reports."[62] Conducting such discovery was crucial to the determination of whether the settlement was fair and reasonable -- even for a trial judge who, the Second Circuit noted had "two decades of experience in matters regarding New York City's child welfare system [which] make him uniquely qualified to determine the reasonableness of the settlement achieved."[63] Not only was the settlement in *Marisol* informed by years of vigorous discovery, but the settlement was negotiated with the assistance of local children's advocates, who had extensive experience with New York City's child welfare system.

The importance of engaging in discovery to fully explore the deficiencies as alleged in the Amended Complaint is particularly pronounced here. Indeed, the lack of discovery helps to explain the misdirected scope of the Proposed Settlement. As previously mentioned, the

[60] Consent Decree § 20.2.

[61] *Marisol A. v. Giuliani,* 185 F.R.D. 152 (S.D.N.Y. 1999).

[62] *Id.* at 159 (noting that plaintiffs had agreed not to commence systemic actions relating to claims set forth in the July 16, 1998 Pre-Trial Order).

[63] *Joel A. v. Giuliani,* 218 F.3d at 139.

Proposed Settlement fails to identify or address any specific shortcomings in OCFS's oversight of ACS, the alleged basis for OCFS's liability.

Requiring that discovery proceed before a Proposed Settlement is approved will enable the parties and the Court to determine whether, in fact, the oversight provided by OCFS is deficient and to identify appropriate remedies tailored to address those specific deficiencies. It is worth noting that the Amended Complaint alleges that the State Defendants fail to provide to provide New York City with a sufficient number of Family Court judges and does not provide existing Family Court judges with sufficient resources, including referees or law clerks with social work experience. Incredibly, the Proposed Settlement leaves these allegations entirely unaddressed. Without discovery, it is not possible to determine whether, in fact, these allegations are true and what, if any, consequences such alleged failures have on the foster care system. At this very early juncture in the case, it is simply impossible to determine whether a settlement that fails to address these issues is fair, adequate or reasonable.

In our work as Children's Advocates, we have identified a number of shortcomings in the ways in which OCFS oversees ACS. If addressed, those shortcomings could lead to meaningful, long-term reform of OCFS practices and, by extension, ACS practices and outcomes. For example, as Children's Advocates, we have encountered lengthy delays – at times delays of years – in OCFS's approval of proposed ACS policies. This ongoing problem might well be addressed through this lawsuit, since these proposed policy changes are intended to improve the foster care system. However, such relief is not provided for in the Proposed Settlement, which does not offer a single specific and long-term reform to how OCFS engages in its oversight responsibilities. Without the benefit of discovery to allow the parties to identify deficiencies and

appropriately tailor the relief, OCFS will be immunized from suit and the OCFS failures the Amended Complaint alleges will persist unabated.

Because the onerous burden of the Release and Covenant does not provide a reasonable quid pro quo for the illusory benefit of the remaining terms of the Proposed Settlement, this Court should decline to approve the Proposed Settlement.

CONCLUSION

Based on all of the Objections set forth above, the Court should disapprove the Proposed Settlement as not fair and beneficial to the Class.

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Respectfully submitted,

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