EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELISA W., by her next friend, Elizabeth Barricelli, *et al.*, Plaintiffs, -against- THE CITY OF NEW YORK, *et al.*, Defendants.	15 Civ. 5273 (LTS) (HBP)

BROOKLYN DEFENDER SERVICES, THE BRONX DEFENDERS, CENTER FOR FAMILY REPRESENTATION INC., AND NEIGHBORHOOD DEFENDER SERVICE OF HARLEM'S OBJECTION TO THE PROPOSED CLASS ACTION SETTLEMENT WITH OCFS

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Brooklyn Defender Services, The Bronx Defenders, Center for Family Representation Inc., and Neighborhood Defender Service of Harlem (collectively, the "Parent Advocates") respectfully submit this objection to the proposed settlement ("Proposed Settlement") described in the Amended Consent Decree, dated April 15, 2016 (the "Consent Decree").[1]

PRELIMINARY STATEMENT

The Parent Advocates object to the Proposed Settlement because it will extinguish substantial rights in exchange for a vague and illusory remedy that does not, in our experience, clearly address the actual challenges facing families in the foster care system or promote preservation of families whenever possible.

While parents and their representatives are not members of the proposed class, parents have a fundamental and constitutionally recognized right in the preservation of their families, and this right is intertwined with the rights of children in foster care. The Parent Advocates are public interest organizations that provide quality legal and social work advocacy to indigent parents in child neglect and abuse proceedings, serving more than 5,000 New York City families annually. The Parent Advocates also devote substantial time and resources to reform efforts directed at improving the foster care system for New York City families.

Far from having abused or abandoned their children, the majority of parents in foster care proceedings love their children and are charged with neglect because of their poverty, homelessness, intellectual and physical disabilities, mental health issues, and substance abuse issues. (*See* Gottlieb Decl. ¶ 14.) The families who come before the Family Court—a

[1] All mentions of the "Gottlieb Declaration" refer to the Declaration of Professor Christine Gottlieb in Support of the Parent Advocates' Motion to Intervene and Objection to the Proposed Settlement. All mentions of the "Shapiro Declaration" refer to the Declaration of Lauren Shapiro in Support of the Parent Advocates' Motion to Intervene and Objection to the Proposed Settlement.

disproportionate percentage of whom are persons of color—are facing issues rooted in poverty and unequal access to the private resources and services upon which most families depend during a crisis. (*Id*. ¶ 15.)

Preservation (or re-unification) of families is the paramount goal whenever possible. Not only does federal law require it, but New York law expressly provides that "[t]he state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home." Moreover, decades of social science research have proven that separation of families is not a policy that promotes the long-term stability and well-being of children whose families find themselves impacted by child welfare and the family court. (*Id*. ¶¶ 20-30.) In the overwhelming majority of cases in which children are removed from their parents, the children can be safely returned if the family receives social services such as housing assistance, mental health treatment, substance abuse counseling and other supportive services. (*Id.* ¶ 16.)

In the Proposed Settlement, the Public Advocate and 19 children have appointed themselves representatives of all present and future New York City foster children, and seek to resolve serious allegations of wrongdoing by OCFS, the state agency with responsibility for the City's foster children. Among other allegations, the Named Plaintiffs allege that OCFS routinely violates foster children's constitutional and statutory rights by, among other things, failing to ensure that the services necessary for reunification are timely provided so that children can return to their parents. The complaint also alleges that OCFS fails to ensure that caseworkers are adequately trained and supervised, have manageable caseloads, and regularly meet with foster children and their parents, and more generally fails adequately to protect children from maltreatment while they are in foster care. If true—and no discovery has been conducted to

ascertain whether they are true—these allegations are very serious and any class-wide settlement of those claims must be subject to significant scrutiny.

The Consent Decree does not withstand that scrutiny.

As a threshold issue, the Proposed Settlement does not clearly set out the goals and objectives of the Monitor and the Research Expert—the two new positions that it creates. The metrics and criteria that will govern the roles of the Monitor and Research Expert are only vaguely described, and it is impossible to decipher what policy agenda the Monitor and Research Expert will advance, or what practices and procedures they will seek to change. The vagueness of the mandate of the Monitor and Research Expert makes it impossible to assess what corrective actions, if any, the settlement will actually promote—leaving the Parent Advocates gravely concerned that parents potentially will lose important rights that they currently have, or that New York's prevailing emphasis on reunification will be replaced by speed to adoption. (*Id*. ¶¶ 31-33.) The fundamental lack of clarity about the goals and mandate of the Monitor and Expert require that the Proposed Settlement be rejected.

In addition, while the Consent Decree proposes to resolve grave claims of wrongdoing, it does not require OCFS to correct any of the infractions that have been identified. (*See, e.g.*, Shapiro Decl. ¶¶ 12-14.) The Consent Decree does not require OCFS to put additional or timely services in place for the benefit of children and their families. It does not require additional training or supervision of caseworkers, require OCFS to reduce caseworker caseloads, or require caseworkers to meet regularly with foster children and their parents. And it does not identify any concrete measures that OCFS will take to ensure that caseworkers are making efforts toward timely family reunification. This lack of articulated and substantive reform—

coupled with the vagueness of the mandate of the Monitor and Research Expert—renders the Proposed Settlement inadequate.

The Proposed Settlement raises other significant concerns. The Consent Decree's broad release and covenant not to sue prevent settlement class members from bringing any lawsuit against OCFS seeking systemic reform for seven years. The duration of this covenant not to sue is unprecedented among prior foster care-related settlements.

It is also concerning that the Consent Decree was agreed upon before any discovery had taken place. In fact, the settling parties rushed into settlement immediately after the lawsuit was filed, without conducting any discovery that would allow them, or the Court, to weigh the merits of Plaintiffs' claims, or, importantly, explore the most effective remedies for the alleged constitutional and statutory violations. As a result, neither the parties nor the Court have an evidentiary basis on which they can vet the adequacy of the settlement terms. This counsels strongly against approving the settlement.

Finally, it is striking that the Proposed Settlement has been met with strong objections by advocates that, unlike the Plaintiffs' counsel, are involved, day-to-day, in the foster care system. The three organizations who represent nearly all NYC foster care children, the Legal Aid Society, Lawyers for Children Inc., and the Children's Law Center of New York, object to this settlement. The four Parent Advocates, who represent the vast majority of parents with children in foster care, also object. And ACS, which will be required to actually implement much of OCFS's unilateral settlement, objects as well. Not only should these organizations' experience and knowledge entitle their opinions to significant weight, but their objections should stand as placeholders for the stakeholders that they represent—children in foster care and their families. Bluntly put, 19 children (whose parents and Family Court lawyers have not endorsed

this lawsuit) and the Public Advocate (who is not charged with overseeing the foster care system) should not be permitted to substitute their judgment concerning what is best for the entire foster care system over those who are in the best position to inform efforts at reform.

BACKGROUND

Before conducting any formal discovery, the Named Plaintiffs announced an agreement to settle all claims against OCFS on behalf of a proposed class of "all children who are now or who will be in the foster care custody of the Commissioner of ACS during the duration of this Consent Decree." (Consent Decree § 5.2.)[2] The duration of the Consent Decree is seven years following the day that it is approved by the Court. (*Id.* § 3.) The Consent Decree thus applies to the approximately 10,000 children currently in NYC foster care, as well as thousands of as-yet-unknown children who will enter foster care over the next seven years. (*Id.*; Am. Compl. ¶ 192.)

Proposed Remedies. The Consent Decree's substantive reforms are found in Sections 6 and 7, and essentially require OCFS to create two positions: a Monitor and a Research Expert. The role of the Monitor—who is selected by OCFS in its sole discretion (Consent Decree § 6.1.3)[3]—is to "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." (*Id.* § 6.2.1.) The Consent Decree identifies four non-exhaustive general areas for the Monitor to focus its efforts: (1) the foster care placement process; (2) the causes of maltreatment of children in foster care; (3) the availability and appropriateness of services in the foster care system; and (4) the recruitment of an appropriate and sufficient array of foster care placements.

[2] The settling parties first filed a consent decree on October 20, 2015. (ECF No. 50.) The settling parties amended the consent decree on January 20, 2016 and again on April 15, 2016—also without the benefit of discovery. (ECF Nos. 96-1, 150-1.) The term "Consent Decree" is used to refer to the April 15, 2016 version of the consent decree.

[3] Plaintiffs' counsel and the Public Advocate are permitted to "comment" on the selection, and OCFS agrees to "give due weight" to those comments. (*Id.*)

(*Id*.) The Consent Decree does not elucidate what measures the Monitor will use to conduct its evaluation, what goals the Monitor will seek to achieve, or any other information about the Monitor's substantive focus. Rather, the guiding principles used by the Monitor to perform its assessments will be developed only after the Consent Decree goes into effect. (*Id.* § 6.2.2.) The duration of the Monitor is 3 to 7 years, depending on future discussions among the parties. (*Id*. § 6.6.1.)

The Consent Decree also requires OCFS to direct ACS to retain a Research Expert. ACS is charged with selecting this individual, and ACS's selection is subject to approval by OCFS following a process of reaching consensus with plaintiffs' counsel and the Public Advocate. (*Id*. § 7.2.) The Research Expert is charged with conducting "case record reviews of a statistically significant sample of the case records of children" in foster care in New York City, starting with the "case records of the nineteen named plaintiffs," in order "to determine whether the case records show significant compliance by ACS . . . with the relevant federal and State" law. (*Id*. § 7.3.1.) The Consent Decree does not specify the substantive issues that the Expert will analyze, or the goals and objectives of that review. Rather, like the Monitor, the Research Expert's protocols and methodology will be developed only after final approval of the Consent Decree. (*Id*. § 7.3.2.) The duration of the Expert is 2 to 7 years, depending on future discussions among the parties. (*Id*. § 7.6.)

Both the Monitor and Research Expert will provide periodic reports describing their assessments and findings to ACS and OCFS. (*Id*. §§ 6.4, 7.5.) The Monitor's and Research Expert's reports may include findings or recommendations, but OCFS need not accept or adopt them. (*Id*. §§ 6.5.1, 7.4.5, 7.5.3.) Rather, the Consent Decree deposits the authority to effect substantive reform with OCFS, which can compel (or not, if OCFS so chooses) ACS to

undertake "corrective action plans" when OCFS determines that ACS is not in substantial compliance with state or federal law. (*Id*.) The Consent Decree does not identify any reforms or other changes that OCFS must make to ensure that it or ACS is, in fact, in compliance with state or federal law.

Releases By Class Members. In exchange for the Monitor and Expert, settlement class members must agree to a broad release of all claims against OCFS. The release covers "any and all claims . . . whether known or unknown . . . from the beginning of time through the effective date of the Court's Consent Decree . . . involving, concerning, arising from or in any way relating to any claim contained within the Amended Complaint." (*Id*. § 10.2.) As amended at the preliminary approval hearing, the release does not include claims for damages or injunctive relief based on personal injury, but releases any claims that would have a broader or systemic impact. (*Id*. § 10.3.)

Covenant Not To Sue. Settlement class members also covenant not to bring certain types of claims for the seven-year duration of the Consent Decree. These covenants must be read in conjunction with the releases described above because they prevent claims—***including claims that have not been released***—from being asserted, which effectively expands the releases given by class members.

- For claims that presently exist, there is a broad covenant not to sue. Class members agree for the seven-year period not to sue (a) "for injunctive or declaratory relief based on any alleged facts or causes of action . . . set forth in the Amended Complaint", or (b) "for any class or individual claim(s) that allege system-wide violations arising out of such claims(s) and fact(s) alleged" in the complaint. (Consent Decree § 20.1.) While this provision is unclear, it appears to broadly preclude all claims for injunctive or declaratory

relief based on conduct alleged in the complaint, and precludes both class and individual claims (including monetary damages claims) that allege system-wide violations identified in the complaint.

- For claims that arise after execution of the Consent Decree, class members agree not to bring any "class-wide or systemic claims arising from facts and/or circumstances" during the seven-year duration of the Consent Decree that "relate factually or legally to the claims" in the complaint. (Consent Decree § 20.2.) Class members retain the limited right to bring claims for damages and/or equitable relief limited to what is necessary to protect that one individual child. (*Id.*) All claims that have the potential to effect systemic change in the foster care system are barred for seven years.

ARGUMENT

Federal Rule of Civil Procedure 23 requires that class settlements be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Malchman* v. *Davis,* 706 F.2d 426, 433 (2d Cir. 1983) (same). Courts must "act[] as the protector of the rights" of absent class members who will be bound by the settlement, and they have "a fiduciary responsibility to ensure that the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately." *Blatch* v. *Hernandez*, No. 97-cv-3918, 2008 WL 4826178, at *2 (S.D.N.Y. Nov. 3, 2008) (Swain, J.) (quotation marks omitted); *see also Polar Int'l Brokerage Corp.* v. *Reeve*, 187 F.R.D. 108, 112 (S.D.N.Y. 1999) (court is the "protector of the rights of absent class members."). Where, as here, the "settlement class is [to be] certified after the terms of settlement have been reached," the Court must be particularly cautious and "require a clearer showing of a settlement's fairness, reasonableness and adequacy" than if the settlement were reached after class certification. *Polar Int'l Brokerage Corp.*, 187 F.R.D. at 113 (quotation marks omitted).

Courts in the Second Circuit balance the nine *Grinnell* factors to determine whether a proposed class settlement meets the requirements of Rule 23: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing remedies; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best possible recovery; and (9) the range of reasonableness of the settlement to a possible recovery in light of all the attendant risks of litigation. *City of Detroit* v. *Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974).[4] "The weight given to any particular factor varies based on the facts and circumstances of the case," and a handful of factors weighing against settlement can be enough to tip the scales and require the Court to exercise its duty to protect absent class members by rejecting the settlement. *Authors Guild* v. *Google Inc.*, 770 F. Supp. 2d 666, 674 (S.D.N.Y. 2011) (rejecting class settlement where "[o]nly two of the *Grinnell* factors weigh[ed] against approval of the settlement.").

I.
THE PROPOSED SETTLEMENT IS NOT FAIR, REASONABLE, AND ADEQUATE

The Proposed Settlement between the class of children and OCFS does not satisfy the *Grinnell* factors and should not be approved. The Proposed Settlement resolves serious allegations of OCFS wrongdoing, on an undeveloped record, with broad releases and a seven-year covenant not to sue. In exchange, the class obtains a Monitor and Research Expert with a

[4] Some courts have held that the final three *Grinnell* factors are not relevant where, as here, the action seeks only injunctive relief. Other courts have held that some combination of the eighth and ninth factors should be considered "as part of a larger determination of whether the settlement is reasonable." *Padro* v. *Astrue*, No. 11-CV-1788, 2013 WL 5719076, at *7 (E.D.N.Y. Oct. 18, 2013) (considering eighth and ninth factors); *People United for Children, Inc.* v. *City of New York*, No. 99-cv-648, 2007 WL 582720, at *4 (S.D.N.Y. Feb. 26, 2007) (considering eighth factor). In any event, this Court need not decide here whether *Grinnell* factors 8 and 9 are relevant to non-monetary settlements because the objections raised by the Parent Advocates are also properly evaluated within *Grinnell* factors 4, 5, and 6.

mandate so vague that it cannot properly be scrutinized by the Court. Further, the Proposed Settlement does not contain relief that is tailored to the problems identified in the complaint (which themselves have not been tested through discovery). Under factors 4, 5, 7, 8 and 9, the settlement does not pass muster. These shortcomings are only exacerbated by the fact that the Settlement was reached without any discovery (factor 3) and over the objections of child and parent representatives who are immersed daily in the foster care system (factor 2).

A. The Consent Decree Does Not Clearly Set Out the Goals and Objectives of the Monitor and Expert, and Its Vagueness Is An Independent Ground to Reject the Settlement

Any Proposed Settlement should spell out its goals and objectives so that class members and their representatives do not need to guess what will be implemented. The vagueness of the Consent Decree is itself a reason to deny approval. Further, the Parent Advocates are gravely concerned that, by failing to spell out in any detail the areas in which the Monitor and Research Expert will focus their efforts, the Consent Decree leaves open the possibility that the Monitor and Research Expert will focus on goals and objectives that do not further family reunification, or that otherwise harm parents.

As described in the expert declaration of Professor Gottlieb, over the past several decades, New York has worked harder than many other jurisdictions to prioritize family reunification as a goal following foster care, as well as foster care prevention. (*See* Gottlieb Decl. ¶¶ 20-30.) From 1992 to the present day, the number of children in foster care has fallen by 80 percent. (*Id*. ¶ 21.) There are several reasons supporting New York's decision to prioritize family reunification following foster care. Most fundamentally, parents have a constitutionally recognized liberty interest "in the care, custody, and control of their children." *See Troxel* v. *Granville*, 530 U.S. 57, 65 (2000); *see also Moore* v. *City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely

because the institution of the family is deeply rooted in this Nation's history and tradition."). Federal legislation, in the form of the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), also emphasizes, where possible, reuniting children in foster care with their families as quickly as possible. (Gottlieb Decl. ¶¶ 23-24.) Likewise, "New York has long embraced a policy of keeping biological families together." *Nicholson* v. *Scoppetta*, 820 N.E.2d 840, 848-49 (N.Y. 2004) ("[W]e acknowledge the Legislature's expressed goal of placing increased emphasis on preventive services designed to maintain family relationships rather than responding to children and families in trouble only by removing the child from the family.") (quotation marks omitted). New York law expressly recognizes that it "is generally desirable for the child to remain with or be returned to the birth parent because the child's need for a normal family life will usually best be met in the home of its birth parent, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered." N.Y. SSL 384-b(1)(a)(ii). Therefore, "[t]he state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home." N.Y. SSL 384-b(1)(a)(iii).

But reunification of families was not always recognized as the prevailing goal in New York. (*See* Gottlieb Decl. ¶¶ 20-30.) This perspective has its roots in the decades preceding AACWA, during which cities (including New York) viewed adoption, not family reunification, as the permanency goal that was in a child's best interest following foster care. The passage of the Adoption and Safe Families Act of 1997, which mandates that an agency explore the termination of parental rights if a child has been in foster care for 15 out of 22 months, gave the pro-adoption perspective new life, but failed to change New York's focus on reunification as the primary goal for children in foster care. (*Id*.) While many states changed

their substantive law to make it easier to terminate parental rights in the wake of the AACWA, New York chose not to do so. (Gottlieb Decl. ¶¶ 23-25.)

Regardless of whether the Consent Decree represents a continuation of New York's family preservation policies or a transition to a more pro-adoption system (which the Parent Advocates would vigorously oppose), the class and their parents have a right to know that *before* the settlement is approved, as part of the fairness hearing process. *See Martens* v. *Smith Barney, Inc.*, 181 F.R.D. 243, 269 (S.D.N.Y. 1998) (rejecting settlement where the court "cannot declare its duty to evaluate the settlement complete before the parties more meaningfully clarify what it does.").[5] But the Consent Decree leaves the specifics for some future date when OCFS will "develop the criteria by which the Monitor will review and evaluate the alleged systemic issues within the foster care system in New York City" and when it will approve the Research Expert's "proposed research protocols and methodology, including the method for determining the sample of cases to be reviewed." (Consent Decree §§ 6.2.2, 7.3.2.)[6]

The Parent Advocates are concerned that given this lack of direction, the Monitor and Research Expert will fail to develop assessments that will help reunify families as required by New York law. This concern is buttressed by the failure of the Consent Decree to expressly endorse a policy and practice of reunification whenever possible. (Gottlieb Decl. ¶¶ 32-34, 42-44.) Not only does the Consent Decree fail to emphasize reunification, but certain provisions of the Consent Decree and the Complaint also focus on "permanency"—a watchword for those who

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[5] In *Martens*, the vagueness of the settlement was deemed troubling in light of the fact that the court would not have jurisdiction to resolve disputes relating to the defendants' obligations under the settlement. Although the Court here has continuing jurisdiction, it has no role in approving the Monitor's review criteria or the Research Expert's research protocols—over which OCFS has sole approval authority. (Consent Decree §§ 6.2.2, 7.3.2, 13.) Given the Court's lack of involvement in these critical aspects of the settlement, "[t]he [C]ourt's fiduciary duty to unnamed class members [should] prevent[ ] it from risking an end to its settlement review before a centerpiece of that settlement is meaningfully well-defined." *Martens*, 181 F.R.D. at 268-69.

[6] *See also* Consent Decree § 7.4.7 ("Plaintiff children's counsel, the Public Advocate, and the Commissioner of OCFS will work collaboratively to determine the mechanism by which the adequacy of the Expert's review of individual cases is to be assessed by plaintiff children and the Public Advocate.").

believe that child welfare policy should be aimed more aggressively at adoption—and criticize OCFS and ACS for failing to file more termination of parental rights proceedings. (Gottlieb Decl. ¶¶ 40-41.) The vagueness of the Proposed Settlement—coupled with pro-adoption language and the glaring omission of reunification as an express goal—raises questions about its goals and objectives that should be addressed and vetted before (and not after) Court approval.

B. The Consent Decree Fails Adequately To Compensate Settlement Class Members For the Significant Rights They Are Releasing

"In deciding whether to approve a proposed class settlement, the most significant factor for the district court is the strength of the claimants' case balanced against the settlement offer." *Plummer* v. *Chemical Bank*, 668 F.2d 654, 660 (2d Cir. 1982); *see also In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009) ("Because the purported benefits to the class do not warrant settlement approval, the court denies final approval of the proposed settlement."). By this metric, the settlement fares poorly. The Consent Decree fails to provide meaningful benefits to the settlement class or even address the problems identified by the Named Plaintiffs themselves, in favor of installing a Monitor and Research Expert with troublingly ill-defined roles. Moreover, the Consent Decree contains broad releases and a covenant not to sue that would hamstring any future reform efforts for seven years. Given these unfavorable terms—negotiated by the Public Advocate and 19 children on behalf of thousands others, and without the benefit of any discovery—the Court cannot be "assured that the settlement secures an adequate recovery for the class in return for the surrender of the class members' rights to litigate against the defendants," Newberg on Class Actions § 13:49 (5th ed.), and the Court should reject the Consent Decree.

1. The Remedies Conferred by the Settlement Do Not Address the Identified Violations of Law

The Consent Decree fails substantively to address the OCFS conduct that Plaintiffs themselves allege comprise constitutional and statutory violations of the rights of foster children. If the allegations are true—and as discussed below, certain of the allegations are consistent with the Parent Advocates' own experiences—then children, as well as their parents, are suffering significant deprivations of their rights.[7] But the Consent Decree completely fails to address these alleged violations and is, therefore, not fair, reasonable, and adequate.

For instance, and of particular importance to the Parent Advocates, Plaintiffs allege that OCFS fails to ensure that the services necessary for reunification are timely provided so that children can quickly return to their parents. In particular, the complaint alleges that it takes longer to return children in foster care to their parents in the City (median of 12.6 months) than in the rest of New York State (median of 10.8 months). (Am. Compl. ¶ 245.) In the Parent Advocates' experience, what prevents children from being reunified with their families is often ACS's failure to provide timely, properly tailored, and effective services. (Shapiro Decl. ¶ 12.) For instance, if a child is removed from his or her family because of lack of housing, ACS is required to provide the parent with assistance securing adequate housing. (*Id*.) Similarly, if a child is removed based on allegations of mental health issues or substance abuse by the parents, ACS must assist the parents in finding and referring the parents to proper treatment programs. (*Id*.) Delays in the provision of services such as these (and others described in the Shapiro Declaration) dramatically and unnecessarily extend the duration of foster care, to the detriment of NYC families and children.

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[7] The Parent Advocates assume the truth of the allegations in the Amended Complaint solely for the purposes of this Objection. The Parent Advocates reserve the right to challenge these factual allegations, particularly since the settling parties have not yet presented the Court with a factual or evidentiary basis to support the settlement, and their motion for approval is not due to be filed until July 15, 2016.

The complaint also alleges that OCFS and ACS fail to ensure that caseworkers are adequately trained and supervised, have manageable caseloads, and regularly meet with foster children and their parents. (*See, e.g.*, Am. Compl. ¶¶ 277-292.) The complaint further alleges that ACS often fails to involve parents in case planning and service planning for their children, citing data from the federal government finding that ACS had adequately assured family involvement in case and services planning in only 45% of cases—below the national standard of 95%. (*Id*. ¶ 308.)

Again, in the Parent Advocates' experience, the quality of care received by children in foster care, and the ability of parents to be involved during foster placements, is dramatically impacted on an individual basis by the caseworkers. For instance, it is not uncommon for caseworkers to fail to promptly explore the possibility of kinship placements. (Shapiro Decl. ¶ 12; *see also* Gottlieb Decl. ¶ 47.) Another unnecessary burden is placed on families when a parent is unable to enjoy regular visits with his or her child because a caseworker fails to follow ACS's policies on visitation, including where the caseworker refuses to schedule visits around the parent's work schedule so that the parent does not lose his or her employment. (Shapiro Decl. ¶ 12; *see also* Gottlieb Decl. ¶ 42.) These are just a few of the ways in which an individual case worker can have an incalculable impact on a family's experience with foster care.

The Consent Decree fails to address these and other substantive problems. It enjoins no harmful or unlawful conduct, it sets no goals or benchmarks for OCFS (or ACS) to strive for in improving foster care in the City, and it establishes no remedial policies or procedures for OCFS (or ACS) to adopt. For instance, although the Named Plaintiffs complain of unmanageable caseworker caseloads, the Consent Decree does not institute guidelines that

would reduce those loads. While Named Plaintiffs complain that services necessary for reunification are not provided as required, the Consent Decree does not require OCFS to develop a corrective action plan to ensure that children and families are provided with appropriate and timely services.

In these respects, the Consent Decree also differs materially from an earlier New York settlement, reached in *Marisol A. ex rel. Forbes* v. *Giuliani*, 185 F.R.D. 152 (S.D.N.Y. 1999). Where this Consent Decree simply establishes a Monitor and Research Expert to gather data and address certain undefined issues, in *Marisol*, OCFS agreed to specific remedial measures: establishing a new regional office in New York City, subject to specific staffing requirements and functional responsibilities; improving the State's child abuse/neglect hotline, including by conducting a review and evaluation of its policies regarding educational neglect, clarifying domestic violence policies, spot checking telephone calls to ensure they were being handled properly, developing and implementing an advertising program for the hotline, and "continu[ing] to make reasonable efforts towards the goal of answering all calls within one minute"; making reasonable efforts to develop and implement a state-wide computer system to collect child welfare information; assisting with improving ACS's training curriculum for caseworkers and supervisors; and undertaking case record reviews covering nine specific areas of the City's foster care program. *See Marisol A. ex rel. Forbes*, 185 F.R.D. at 159-60; *see also* Settlement Agreement at §§ I, IV–X, XII, *Marisol A. ex rel. Forbes* v. *Giuliani*, No. 95-cv-10533 (S.D.N.Y. Dec. 2, 1998), ECF No. 312.

By contrast, the Consent Decree here almost seems unfinished. It simply creates two positions—a Monitor and Research Expert—whose goals and objectives are unspecified, and who do not actually have the power to implement change. It is unclear how the

responsibilities of these new positions actually differ from the responsibilities of the OCFS Commissioner herself—whose job is to oversee the agency and ensure the welfare of all foster children. Creating these two new positions likely will, however, pave the way for additional recordkeeping and other bureaucratic demands that the Monitor and Research Expert will require of ACS case workers, which will necessarily divert limited resources away from foster children and their families—to their detriment. (Gottlieb Decl. ¶¶ 53-54; Shapiro Decl. ¶ 15.)

Finally, the Consent Decree appears to create at least one new problem for parents: OCFS and ACS currently require that parents be provided notice of and an opportunity to attend case planning meetings with their advocates. These meetings are tremendously important, and at them, ACS and the family make crucial decisions concerning the child's permanency goal, as well as developing a timeline, list of services, and an overall case plan to achieve that permanency goal. *See* N.Y. SSL 409-e(2). But under the Consent Decree, when the Research Expert finds substantial non-compliance in connection with its case reviews of certain children in foster care, it may ask ACS to develop a corrective action plan for the child—with no guarantee that the child's parents will be involved. (Consent Decree § 7.4.6.) The Parent Advocates are concerned that the current policy of including parents in decision-making could (inadvertently or advertently) be undermined if the Court approves this settlement. (Gottlieb Decl. ¶¶ 43-45.)

For the reasons discussed above, the relief provided by the Proposed Settlement is not clearly tailored to the violations of law pleaded in the complaint, and does not clearly address the complex and varied problems that face children (and parents) in the foster care system. *See, e.g., In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 422-23 (N.D. Cal. 2009) (rejecting class settlement that did "not require [defendant] to adopt any new [permanent]

security measures to remedy the problems giving rise to the lawsuit," and where if the court dismissed plaintiffs' claims, then the "class would end up essentially in the same situation it would be if final settlement approval were approved: with nothing."); *Cochran* v. *Zeon D.P.*, 638 F. Supp. 2d 759, 762 (W.D. Ky. 2009) (rejecting class settlement where "[a]s to well over three-quarters (3/4) of the Class, the Proposed Class Settlement provides no benefits and extracts potentially significant concessions.").

Because the settlement does not actually address the wrongs alleged in the Complaint, class members are "better off retaining their legal rights to maintain suit rather than accepting the settlement"—counseling against approval of the settlement. *Polar Int'l Brokerage Corp.* v. *Reeve*, 187 F.R.D. 108, 114 (S.D.N.Y. 1999).[8]

2. The Releases and Covenant Not to Sue Forfeit Significant Rights by Class Members and Will Hinder Future Reform Efforts

Although the Consent Decree provides little if any ascertainable benefit to the settlement class, it will cost them dearly. Not only would the settlement class members broadly release their claims, but the Consent Decree's covenant not to sue would stymie any real reform efforts during the seven-year duration of the settlement.

As described *supra* pp. 7-8, under the releases and covenant not to sue, class members forfeit all existing injunctive and declaratory relief claims—whether individual or

[8] *See also Graff* v. *United Collection Bureau, Inc.*, 132 F. Supp. 3d 470, 480 (E.D.N.Y. 2016) ("[W]here there are no [ ] measurable benefits to class members," it "raises questions about the adequacy and reasonableness of the settlement."); *cf. D.S. ex rel. S.S.* v. *New York City Dep't of Educ.*, 255 F.R.D. 59, 78 (E.D.N.Y. 2008) ("The proposed settlement offers immediate and critical relief to the class," not because the settlement created a monitor (which it did), but because "defendants [also] agree[d] to an injunction preventing them from" engaging in the wrongful conduct alleged in the complaint); *Monaco* v. *Carpinello*, No. 98-cv-3386, 2007 WL 1174900, at *8 (E.D.N.Y. 2007) (approving settlement when "legal protections conferred on the class by the settlement correspond closely with the relief sought in the complaint and the equitable relief they sought and would likely have received had they been successful at trial."); *Marisol A. ex rel.* v. *Giuliani*, 185 F.R.D. 152, 164 (S.D.N.Y. 1999) ("The Court finds that even assuming that plaintiffs had a strong chance of success at trial with respect to liability, the relief granted by the Settlement Agreement is sufficiently favorable to weigh in favor of approval."); *L.J. ex rel. Darr* v. *Massinga*, 699 F. Supp. 508, 516 (D. Md. 1988) (approving settlement that "provides plaintiffs with substantially all the equitable relief they requested from the court in their complaint" and was "comprehensive in scope.").

class-wide—arising from the conditions of foster care, as well as all claims arising from system-wide violations. It is difficult to conceive what existing claims remain viable given the breadth of this release. For future claims, class members forfeit all rights to assert claims with any class-wide or systemic impact.

These releases and covenant not to sue would effectively prevent—for a period of seven years—all litigation by foster children against OCFS aimed at fixing systemic problems in the City's foster care system. This is an enormous right to forfeit, for the reasons described in the child advocates' objection. (*See* Objections of The Legal Aid Society, Lawyers for Children Inc., and the Children's Law Center of New York to the Proposed Settlement.) At the preliminary approval hearing, Plaintiffs emphasized that the breadth of the release is cabined because class members' rights to file individual claims for future injuries are preserved. (Tr. 11:12-19.) But the option to sue for *individual* relief offers little protection to Settlement Class Members because, as a practical matter, foster children—minors who largely come from poor, underrepresented communities—will not bring these claims. Nor do the non-profit organizations who often represent them have the means to file thousands of individual actions.[9] For all intents and purposes, by barring the use of class actions and systemic injunctive and declaratory relief actions, the Consent Decree closes the courthouse doors—and any reform efforts at a system-wide level—for seven years.

In addition, given the Monitor and Research Expert's vague mandate, the release and covenant not to sue raise serious concerns over the Consent Decree's "distributional

[9] This is why class action litigation is so valuable: "[C]lass actions provide a method of protecting the rights of those who would not realistically bring individual claims for practical reasons, such as cost of prosecution or ignorance of their rights." 1 McLaughlin on Class Actions § 1:1 (12th ed.) ("As one court colorfully put it, class actions can be the Colt pistol of the little folks, *i.e.,* in appropriate cases, they provide the key to the Temple of Justice for those who could not possibly afford an individual action against an economically advantaged defendant.") (quotation marks omitted). *See* Newberg on Class Actions § 1:9 (5th ed.) ("Put simply, it is less expensive and time consuming to process one class action than many individual actions."); *see also id.* ("The class action device also advances administrative efficiency by reducing the risk of inconsistent adjudications.").

fairness." *Parker* v. *Time Warner Ent.*, 239 F.R.D. 318, 338 (E.D.N.Y. 2007) ("Although the *Grinnell* factors do not mention distributional fairness, the notion inheres to the nature of the class action and, when relevant, has provided a basis upon which to reject unfair settlement proposals."). "The total lack of value exchanged for a release of claims is a strong indicator that a settlement is unfair, at least with respect to those disadvantaged members of the class." *Id.* at 337. In the present case, for example, the child who is maltreated in foster care and the child who is not receiving proper mental health services while in foster care both release their claims against OCFS and covenant not to sue. But if the Monitor and Research Expert focus their assessments and recommendations on maltreatment and do not address the provision of mental health services—a possibility that is entirely possible given the vague terms of the Consent Decree—then the child in need of the mental health services will have released his or her claims in exchange for a "total lack of value." *Id*.

3. The Duration of the Settlement Is Both Unprecedented and Unjustified

The breadth of the releases and covenant not to sue is exacerbated by the unprecedented proposed duration of seven years. The duration of this settlement and its covenant not to sue is far in excess of the norm. Based on a review of 21 similar foster care consent decrees, the average duration was approximately four years.[10] Of those consent decrees

[10] Four of the twenty-one settlements contain covenants not to sue. Of these four, two have a set duration of between two or three years, and two must be terminated by court order, which may be issued as soon as 1.5 or 3.5 years have passed. *See* Settlement Agreement at §§ XIX & XXI, *Marisol A.* v. *Giuliani*, No. 95-cv-10533 (S.D.N.Y. Dec. 2, 1998) (2 years); Settlement Agreement at §§ VIII(E) & IX(C), W.R. v. DCF, No. 02-cv-429 (D. Conn. Aug. 8, 2007) (3 years); Consent Decree at § 19, *Kenny A. ex rel. Winn* v. *Perdue*, No. 1:02-cv-1686 (N. D. Ga. Oct. 28, 2005) (may be terminated upon court order as early as 18 months after effective date); Settlement Agreement at §§ XI & XII(F), *Charlie H.* v. *Whitman*, No. 99-cv-3678 (D.N.J. Sept. 2, 2003) (may be terminated by court order as early as 3.5 years after effective date).

Seventeen of the twenty-one settlements do not contain covenants not to sue, and the average duration of their remedial measures is 3.5 years. Some of these settlements terminate automatically. *See* Settlement Agreement at ¶¶ 4–5, *David C.* v. *Huntsman*, No. 2:93-cv-00206-TC (D. Utah. May 11, 2007) (1 year); Settlement Agreement at § VI, Ward v. Kearney, No. 98-cv-7137 (S.D. Fla. Jun. 26, 2000) (18 Months); Settlement

that contained covenants not to sue, **all** were shorter (at most four years) than the Consent Decree here. The Parent Advocates could not locate any precedent for the seven year duration of the covenant not to sue in the Proposed Settlement.

Nor does the Consent Decree offer any justification for such an unusually long covenant not to sue. To the contrary, when measured against the lifespan of the Consent Decree's remedial relief, the covenant not to sue is far too lengthy. The Monitor and Research Expert terms may expire after two to three years, respectively, depending upon future discussions among the settling parties. (Consent Decree §§ 6.6.1, 7.6.) It is therefore possible that the covenant not to sue will exceed the terms of the Monitor and Research Expert. There is no rationale for a covenant not to sue that may well extend beyond any remedial measures.

Moreover, it bears noting that the settlement class includes future, as-yet-unidentified foster children. We cannot predict what new socioeconomic changes, changes in prevailing law, or other factors may change over the next seven years—and yet future and

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Agreement at ¶ 30, *Katie A.* v. *Bonta*, No. cv-02-05662-JAK-AJW (C.D. Cal. Dec. 5, 2011), ECF No. 779. (3 years); Settlement Agreement at § XII, *Angela R.* v. *Clinton*, No. 91-cv-415 (E.D. Ark. Oct. 14, 1994) (5 years); Settlement Agreement at § II(1), *Eric L.* v. *Morton*, No. 1:91-cv-376-M (D.N.H. Sept. 1, 1997) (5 years); Settlement Agreement at §XIV, J.K. v. Eden, No. 91-cv-261 (D. Ariz. Mar 1, 2001) (6 years); Settlement Agreement at § VIII(1), *Braam* v. *State of Washington*, No. 98-2-01570-1 (Wash. Jul. 31, 2004) (7 years). Some of these settlements terminate upon issuance of a court order, upon a finding that the remedial measures have been satisfied. Settlement Agreement at § XVIII (c), *Dwayne B.* v. *Granholm*, 2:06-cv-13548 (E.D. Mich. Jul. 3, 2008) (may be terminated upon court order as early as 18 months after effective date); Modified Settlement Agreement at § V(a), *Jeanine B.* v. *Walker*, No. 93-c-0547 (E.D. Wis. Dec. 3, 2002) (may be terminated by court order as early as 2 years after effective date); Settlement Agreement at ¶ 2.15 (a), *D.G.* v. *Yarbrough*, No. 08-cv-074-GKF-FHM (N.D. Okla. Feb 2, 2012), ECF No. 778 (may be terminated by court order as early as 2 years after effective date); *Lashawn A.* v. *Dixon*, No. 1:89-cv-01754 (D.D.C. Nov. 18, 1993) (setting a 2 year period for completion of remedial measure); Settlement Agreement at § XVIII(C), *Brian A.* v. *Sundquist*, No. 3-00-0445 (M.D. Tenn. Jul. 27, 2001) (may be terminated upon court order as early as 4.5 years after effective date); Settlement Agreement at § VII (c), *Olivia Y.* v. *Barbour*, No. 3:04-cv-00251 (S.D. Miss. Jan. 4, 2008) (may be terminated upon court order as early as 5 years after effective date); Consent Decree at ¶ 58*, Felix* v. *Waihee*, No. 1:93-cv-00367 (D. Haw. Oct. 25, 1994) (may be terminated by court order as early as 5 years after effective date); Consent Decree at ¶ 74, *B.H.* v. *Suter*, No. 88-cv-5599 (N.D. Ill. Dec. 20, 1991) (may be terminated by court order as early as 8 years after effective date). Several other settlements did not contain end dates and thus appear to require further court proceedings to address termination. *G.L. By & Through Shull* v. *Zumwalt*, 564 F. Supp. 1030, 1043 (W.D. Mo. 1983) (no specified end date); Consent Decree at § XXV(L), *Juan F.* v. *Malloy*, No. 2:89-cv-00859-SRU (D. Conn. Jan. 7, 1991) (no specified end date).

current class members will be unable to bring claims for systemic relief under the Proposed Settlement for an extended period.

C. Settlement is Premature in Light of the Absence of Any Factual Discovery or Evidentiary Basis for the Settlement

The Court also should reject the Consent Decree because the settling parties reached this agreement without conducting *any* discovery whatsoever and were, thus, in the dark about the underlying factual strength of the Named Plaintiffs' claims. *See Grinnell*, 495 F.2d at 463 (directing courts to consider "the stage of the proceedings and the amount of discovery completed"). Class action settlements at the early stages of litigation pose "serious risks to absent class members that their released claims have been undervalued when class counsel accepts an early payout." *Wilson* v. *DirectBuy, Inc.*, No. 3:09-cv-590, 2011 WL 2050537, *4-5 (D. Conn. May 16, 2011). "[A]n approval of class action settlement offer by a lower court [will] be overturned if that court acted without knowledge of sufficient facts concerning the claim." *Grinnell*, 495 F.2d at 462; *see also Plummer* v. *Chemical Bank*, 668 F.2d 654, 660 (2d Cir. 1982) (affirming district court's denial of settlement because "the facts were insufficiently developed to enable it intelligently to make such an appraisal.").

Here, the settling parties failed to develop a factual record which could support the proposed—or, indeed, any—settlement. The formal discovery process has been nonexistent. The settling parties have made no document productions, responded to no interrogatories, and conducted no depositions. There has also been no expert discovery to explore, to the extent violations of law are established, what the remedies for those violations should be. The settling parties acknowledge that no formal discovery has occurred but nonetheless claim they properly relied on a "public report[ ]" and "data collected and maintained by" OCFS and the Federal government.

Without discovery, neither the settling parties nor the Court can reliably weigh the relative strength of the class members' claims to determine whether the settlement is in the interest of the settlement class and, in particular, the absent settlement class members over whose rights the Court must be particularly protective. *See Manual for Complex Litig.* 4th ed. § 30.45 (discussing problems of early settlements without discovery). Likewise, the settling parties and the Court have no evidentiary basis on which they can weigh the likely effectiveness of the remedial measures that the Consent Decree proposes—the Monitor and Expert—to address the wrongdoing alleged in the complaint.

In short, "given the relatively early stage of the proceeding, the parties, the objectors, and the court are not in a good position to evaluate the strength of the claims released and the value of the settlement to the class." *Wilson* v. *DirectBuy, Inc.*, No. 3:09-cv-590JCH, 2011 WL 2050537, at *10 (D. Conn. May 16, 2011) (rejecting class settlement even though there had been some limited "confirmatory discovery").[11]

D. Objections, Including By Organizations Representing the Vast Majority of Settlement Class Members and Their Parents, Strongly Warn Against Approval of the Settlement

The strong negative reaction and widespread resistance to the settlement by the public interest organizations on the frontlines of the City's foster care system weigh heavily against approving the settlement. *Grinnell*, 495 F.2d at 463 (directing courts to consider "the reaction of the class to the settlement"). This factor is among the most important for courts to consider. *See* 2 McLaughlin on Class Actions § 6:10 (12th ed.) ("Many courts have stated that the reaction of the class should be accorded the greatest weight in the fairness review.").

[11] *See* Laura Nahmias, *City foster care leader takes over amid problems, politics-infected lawsuit*, Politico (Oct. 29, 2015) (discussing that the "Cuomo administration – locked in a broader running feud with City Hall – reached a quick, highly unusual settlement with the plaintiff[.]").

Seven public interest organizations have voiced strong disapproval of the Consent Decree and raised serious concerns about its terms. These organizations are the legal representatives and advocates for the vast majority of children in the City's foster care system and their parents. Given the representative role of these organizations, their objections are "placeholder[s] for many absent class members' objections." *Cf. Wilson* v. *DirectBuy, Inc.*, No. 3:09-cv-590, 2011 WL 2050537 (D. Conn. May 16, 2011) (objections by attorneys general were "placeholders" for absent class member objections); *see also Figueroa* v. *Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1328 (S.D. Fla. 2007) (objection to settlement agreement by attorneys general "representing hundreds of thousands, if not millions, of eligible class members" counsel against approving the settlement); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 813 (3d Cir. 1995) (finding "indications that the class reaction to the suit [involving allegedly defective pickup trucks] was quite negative" even though the "absolute number of objectors was relatively low" when "[t]he seemingly low number of objectors includes some fleet owners who each own as many as 1,000 trucks.").

This reasoning applies with particular force here. The class is, by definition, comprised of children with little ability to appreciate the tradeoffs of the settlement and their right to make an objection. That these children are in foster care only further complicates their ability to mount any meaningful challenge to a settlement such as this.

In short, deference to representative organizations is especially warranted here, and this factor strongly counsels against approving the Consent Decree.

CONCLUSION

For the reasons stated, the Consent Decree is not fair, reasonable, and adequate under Rule 23 of the Federal Rules of Civil Procedure, and the settling parties' motion for final approval of the Consent Decree should be denied.

Dated: New York, New York
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