99-7218

Marisol A. v. Giuliani

CW-NY-001-005

✓ pb 4/26/01

May 14, 1999

To be argued by:
MARCIA ROBINSON LOWRY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOEL A., MICHAEL D., ERIC R., DAVID S., MAXX S., and RAY D.,

Intervenor-Plaintiffs-Appellants,

MARISOL A., by her next friend, Rev. Dr. James Alexander Forbes, Jr., by her next friend Raymunda Cruz, LAWRENCE B., by his next friend, Dr. Vincent Bonagura, THOMAS C., by his next friend, Dr. Margaret T. McHugh, SHAUNA D., by her next friend, Nedda de Castro, OZZIE E., by his next friends, Jill Chaifetz and Kim Hawkins, DARREN F., DAVID F., by their next friends, Juan A. Figueroa and Rev. Marvin J. Owens, BILL G., VICTORIA G., by their next friend, Sister Dolores Gartanutti, BRANDON H., by his next friend, Thomas H. Moloney, STEVEN I., by his next friend, Kevin Ryan, WALTERS., by his next friends, W.N. and N.N., grandparents, RICHARD S., by their next friends, W.N. and N.N., grandparents, DANIELLE J., by her next friend, Angela Lloyd, on their own behalf and behalf of and all others similarly situated,

Plaintiffs-Appellees,

v.

RUDOLPH W. GIULIANI, Mayor of the City of New York, MARVA LIVINGSTON HAMMONS, Administrator of the Human Resources Administration and Commissioner of the Dept. of Social Services of the City of New York, GEORGE E. PATAKI, Governor of the State of New York, JOHN JOHNSON, Commissioner of the New York Office of Children and Family Services fka Commissioner of the Dept. Social Services of the State of New York, NICHOLAS SCOPPETTA, in his official capacity as Commissioner of the New York City Administration for Children's Services,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLEES MARISOL A., ET AL.

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PRELIMINARY STATEMENT

This appeal represents the culmination of Marisol v. Giuliani, a class action lawsuit which after almost three years of hotly contested litigation has resulted in a uniquely constructive settlement that provides the substantial likelihood of fundamental reform of New York City's historically destructive child welfare system. Building on the City and the State Defendants' expressed commitment to significantly change the manner in which they have operated, while providing extensive oversight and the intensive scrutiny, guidance, assistance and assessments of some of the nation's most skilled child welfare experts, the settlement ensures that New York's child welfare system is brought into compliance with the law, and finally fulfills its obligations to protect all children for whom it is responsible. Either the harms identified by this lawsuit will be corrected, or the Defendants will be brought back to court, with the documentation to support a far more intrusive remedy.

The only roadblock to this settlement is presented by Appellants (the "Joel A. Objectors"), six members of the plaintiff class, who on the eve of the Marisol settlement fairness hearing suddenly filed a separate lawsuit and proposed to undo in its entirety Plaintiffs' settlement with the City and State of New York. They seek to unravel this hard-fought settlement because they disagree with the settlement's approach, and because they want to bring their own class action lawsuit, even though they have long known they were Marisol class members, and, indeed, had actual notice that their claims were included within Marisol but declined an explicit invitation to participate in the Marisol suit. (JA 1224).[1] They seek to press their proposed class action at the expense of the settlement, despite the fact that their suit addresses one of the issues -- the absence of appropriate placements for youngsters in foster care -- addressed by Marisol, for the same period covered by Marisol, and seeks relief that has been addressed by the settlement.

The district court considered the Joel A. Objectors' arguments at length, rejected them in turn, and approved the settlement as fair, reasonable, adequate and likely to achieve real reform. Distorting key provisions of the Marisol settlement, the Joel A. Objectors incorrectly label its wide-ranging relief as "illusory," and exaggerate as "oppressive" its modest, partial limitations on related class action litigation during the two-year settlement period. They urge this Court to find that the experienced district court judge, who presided over the nearly three years of Marisol litigation, and more than 20 years of other, related child welfare litigation, abused his discretion in approving the settlement and should be reversed, and that

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[1] Numbers in parentheses refer to pages of the Joint Appendix.

the settlement should be set aside.

Some counsel for the Marisol plaintiff class, unlike the Joel A. Objectors' counsel, have had decades of experience representing thousands of children in institutional child welfare litigation, an assessing system-wide relief in New York City and around the country, and other plaintiffs' counsel have extensive experience in individual family court proceedings. These counsel recognized that this approach offers a far better likelihood of accomplishing speedy, meaningful and effective relief for the children in the class than would a long trial, followed by a protracted appeal and the uncertain scope of a court-ordered remedy. It was not an abuse of discretion for the district court, which likewise has decades of experience with the complexities and frustrations of enforcing court-ordered relief in the child welfare field, to have agreed.

ISSUES PRESENTED

1. Did the district court act within its discretion in approving a settlement in a New York City child welfare class action lawsuit which provides meaningful system-wide relief that is fair, reasonable and adequate, particularly since this relief is more favorable than the relief that likely would have been awarded after trial?

2. Did the district court act within its discretion in approving a settlement in a New York City child welfare class action lawsuit, when as part of the settlement Plaintiffs agreed to bring only individual equitable relief and damages claims regarding new facts or circumstances arising during the two year duration of the settlement, in order to allow the child welfare system to institute system-wide reforms?

3. Did the district court act within its discretion in approving a settlement in a New York City child welfare class action lawsuit, when as a part of the settlement Plaintiffs agreed to release Defendants from class action equitable claims arising out of the same set of facts as the claims in the lawsuit, in order to allow the child welfare system to institute system-wide reforms?

4. Did the district court act within its discretion in approving a settlement in a New York City child welfare class action lawsuit when the three certified

subclasses were adequately represented by the Named Plaintiffs, the settlement fairly provides equal relief among the subclasses, and this Court has already held that there was no antagonism among different groups of class members?

STATEMENT OF THE CASE

A. The Marisol Complaint

The Marisol class action litigation was filed in the wake of years of chaos and systemic dysfunction in the New York City child welfare system, and after years of enforcement activity in a separate class action, Wilder v. Bernstein, 78 Civ. 957 (RJW). The Wilder consent decree sought to reform one piece of the child welfare system, concerning placements and evaluations of children in care. Years of court-monitored implementation in Wilder led the Marisol Plaintiffs -- whose counsel are also lead counsel in Wilder -- to conclude that separate components of the New York City's child welfare system could not be fixed in a vacuum and that only relief which addressed system-wide flaws could achieve results for children.

Accordingly, the Marisol Complaint, filed on December 4, 1995, details how the multiple legal violations by New York City's child welfare agency (the Administration for Children's Services, hereinafter, "ACS") flowed directly from ACS' failure to maintain adequate staffing, sufficient training, reasonable caseloads, appropriate supervision, and the necessary range of placements, services, and accountability to ensure that children receive necessary protection, planning, and services and move through the system in accordance with their plans.

The Marisol Complaint also named as a defendant New York State officials who by law are charged with supervising localities which are delegated child welfare responsibilities. The ensuing litigation made clear that one key reason for the City's ongoing failures in child welfare was the State's failure to meet its oversight responsibilities. Improving state oversight, therefore, became, for the Marisol Plaintiffs, a crucial piece of a comprehensive reform effort.

B. Marisol Class Certification

On June 18, 1996, the district court issued a comprehensive opinion which, inter alia, granted Plaintiffs' motion for class certification. (JA 190-253). Marisol A. v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996). On that same day the district court certified the following plaintiff class:

> All children who are or will be in the custody of the New York City Administration for Children's Services ("ACS"), and those children who, while not in the custody of ACS, are or will be at risk of neglect or abuse and whose status is known or should be known to ACS.

(JA 241).

On September 26, 1997, this Court affirmed the Marisol class certification. Marisol A., 126 F.3d 372 (2d Cir. 1997). In its decision, the Court considered all factors for class certification under Fed. R. Civ. P. 23 (a) and (b)(2), and found, inter alia, that the Named Plaintiffs adequately represent the class and that the different members of the class do not have divergent interests. Id. at 378. In its appeal, Defendants alleged that the interest of one part of Plaintiffs' class -- children in the custody of the child welfare system -- are opposed to the interest of another part of the class -- children who are not in the system. This Court explicitly disagreed, stating, "[p]laintiffs seek broad based relief which would require the child welfare system to dramatically improve the quality of all its services, including proper case management. In this regard, the interests of the class members are identical." Id.

On February 3, 1998, Plaintiffs moved for certification of the following three subclasses:

Subclass I: Children whom the defendants know or should know have been abused or neglected/maltreated by virtue of a report of abuse or neglect/maltreatment.

Subclass II: Children in families in which there is an open indicated report of abuse or neglect.

Subclass III: Children in the custody of the Administration for Children's Services.

See Plaintiffs' Memorandum in Support of Motion to Certify Subclasses, February 3, 1998, p. 6-9 (setting forth the proposed subclasses and the shared factual situations, legal claims, deficiencies and Named Plaintiffs associated with each subclass).

The subclasses track the three major stages in a child's journey through the child welfare system and by identifying and categorizing claims, the subclasses accomplish the purposes for subclasses identified by this Court.[2] On April 23, 1998, the district court certified the three subclasses proposed by Plaintiffs. (JA 424-26). The Joel A. Objectors did not appeal the certification of subclasses, or the adequacy of the class representatives.

C. Other Relevant Court Proceedings

On May 12, 1997, Plaintiffs moved the district court to enjoin the harmful practice of allowing numerous children in the certified plaintiff class to spend their nights, often repeatedly, on the floor of the ACS Pre-Placement Office. After hearings[3] and the issuance of a Temporary Restraining Order,[4] the parties entered into a "So-Ordered" Stipulation to resolve the problem. Interim Stipulation and Order Concerning overnights at Pre-Placement, July 16, 1997 ("Interim Stipulation and Order"). On January 19, 1998, the City Defendants moved to dismiss the Pre-Placement claims and vacate the Interim Stipulation and Order. (JA 254-269).

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[2] The subclasses also track the three subject areas selected for review by the court-appointed expert panel that conducted extensive reviews of ACS and contract agency case records and issued a report in each of these areas.

[3] See Transcripts of Hearings before Hon. Robert J. Ward, May 13, 1997, 2:15 p.m. and May 14, 1997, 10:00 a.m.

[4] See Amended Order to Show Cause, May 14, 1997.

Like the Joel A. Objectors on this appeal, City Defendants argued that the court lacked Article III jurisdiction to hear the Pre-Placement claims, on the basis that no Named Plaintiff had standing to raise such claims, since no Named Plaintiff had been placed in Pre-Placement overnight.

On May 26, 1998, the district court denied Defendants' motion to dismiss the Pre-Placement claims, finding that the Named Plaintiffs had standing to and did assert claims relating to placement issues.[5] (JA 470-488).

D. Pre-Trial Proceedings and Settlement Negotiations

After almost three years of vigorously litigated discovery, including a court-ordered three-part case record review, hundreds of deposition days, over 100,000 pages of documents produced and hundreds of pages of experts' reports, culminating in 2,877 pages of proposed findings of fact submitted by Plaintiffs (JA 1156, n. 4; JA 1420-21), on the eve of the July 27, 1998 trial date set by the district court (Fourth Amended Scheduling Order, June 1, 1998), the parties began settlement negotiations. The trial was postponed and extensive, contentious negotiations continued during a four month period.

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[5] The court also re-examined its earlier finding that the Named Plaintiffs were adequate representatives of the class under Rule 23(a), and held that the Named Plaintiffs were appropriate representatives with regard to the Pre-Placement issues. (JA 485, n.3).

On December 2, 1998, two settlement agreements were filed with the court: one between Plaintiffs and City Defendants, and one signed by Plaintiffs and State Defendants (collectively referred to as "the settlement")(separately referred to as the "City Agreement" and the "State Agreement," respectively). Plaintiffs' counsel met with, discussed and shared drafts of the settlement proposals with the Next Friends of the Named Plaintiffs, who ultimately approved the final settlement. (JA 1163).

E. The Settlement

1. The City Agreement

The City Agreement affords the plaintiff class a unique and immediate opportunity to have privately funded, nationally respected experts accepted by both parties scrutinize the current functioning of all of the core areas of ACS operations with full cooperation of City Defendants.[6] This Panel will issue recommendations, monitor and assess ACS progress toward implementing these recommendations or otherwise achieving necessary reform, as well as provide expert assistance to the

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[6] The City Agreement specifies the key areas of ACS operations that the Panel will review (JA 734-735 at ¶11), and also gives the Panel authority to review all other activities or programs that "directly affect those subject matter areas" (JA 735 at ¶12), leaving the Panel with the virtually unfettered discretion to use their expertise fully.

City. If the City is unable or unwilling to make good faith efforts at reform, as assessed by the Panel based on, among other things, timely implementation of the Panel's recommendations or the effectiveness of its reform efforts (JA 737 at ¶20), the plaintiff class will use the Panel's findings as presumptive evidence of liability and to propose a remedy to the court that will be tailored to the precise causes of the City's failures.

The Advisory Panel and its staff have already begun studying virtually every area of ACS operations. (JA 734-737, at ¶¶7-17; JA 740-744 at ¶¶ 30-34). Based upon its evaluations, the Panel is issuing a series of public Initial Reports, which will include analysis and recommendations, in each area.[7] The Panel will then monitor ACS's performance in these areas, and will issue periodic, public progress reports. (JA 737-739 at ¶¶ 19-25).

If, during the course of its work, the Advisory Panel finds that ACS is not acting in good faith to make necessary efforts toward reform, then the Plaintiffs will have the option of initiating a trial in the subject area to which the "absence of good faith" finding relates, and seeking any relief that Plaintiffs consider

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[7] The Panel's Second Report, addressing placement problems including those set forth in the Joel A. Complaint, is due to be released by the end of May, 1999.

appropriate.[8] The Advisory Panel's reports and its members' testimony are admissible in such a proceeding, and their findings will constitute prima facie evidence of the City Defendants' absence of good faith. (JA 739-740 at ¶¶26-29).

If the Advisory Panel does not make an "absence of good faith" finding, the City Agreement and the court's jurisdiction will terminate on December 15, 2000. (JA 745 at ¶39).

2. The State Agreement

The State Agreement also provides very substantial benefits to the plaintiff class because the State is required to exercise strong, well-defined supervisory oversight over ACS.

The State Defendants' New York State Office of Children and Family Services ("OCFS," formerly the Department of Social Services) is required to transform the current Metropolitan Regional Office ("MRO") from an office responsible for several counties in addition to all of New York City, to a New York City Regional Office ("NYCRO"), and must significantly increase the NYCRO

[8] As part of this "good faith" determination, the City Agreement explicitly authorizes the Panel to assess whether ACS is implementing any or all of the Panel's recommendations, the speed with which such recommendations are being implemented, whether the City is meeting the Panel's proposed timetables, and whether the City's efforts are "actually effective in bringing about reform." (JA 737-738 at ¶ 21).

staff. (JA 758-61 at ¶¶ 1-7). OCFS must review fatalities of children known to ACS, issue timely reports of these reviews, address and remedy the present backlog of incomplete reports (JA 761- 63 at ¶¶ 8-9), and when necessary, OCFS must demand and monitor corrective action from ACS.

The State Central Register ("SCR," or, the child abuse "hotline") must evaluate several specified policies, make reasonable efforts to ensure that calls are not improperly screened out and that all calls are answered quickly, and implement a program to inform the public about the SCR. (JA 763-66 at ¶¶ 10-17). OCFS must also conduct unprecedented case record reviews to evaluate ACS's performance in nine critical areas of its operation (JA 766-68 at ¶¶ 18-21), and if the record reviews reveal substantial noncompliance, OCFS must require ACS to implement corrective action plans when necessary. (JA 767-68 at ¶ 21). OCFS must make reasonable efforts to implement an accurate, reliable statewide child welfare computer system, to support and monitor case practice, and must implement a training program for using the system. (JA 768-69 at ¶¶ 22-24). Finally, OCFS must and evaluate the training of New York City child protective services caseworkers and supervisors (JA 770 at ¶ 26), and conduct audits of congregate care facilities. (JA 771 at ¶ 28).

To ensure compliance with the State Agreement, OCFS must furnish

Plaintiffs with relevant documents, and meet with Plaintiffs periodically to review compliance. (JA 771-72 at ¶¶ 29-31). Should there be noncompliance, the Plaintiffs can seek court enforcement of the Agreement. (JA 773 at ¶ 34).

F. Dismissal of the Wilder Case

The Wilder consent decree, which first went into effect in the late 1980's, provided that all children in ACS custody were to be placed on a first come, first served basis according to their needs, without regard to race or religion, and required that all children receive evaluations of their service needs no later than 30 days of their entry into foster care. A key element in the Marisol settlement is the opportunity and the pressure that it creates, for the first time, for New York City to provide its child welfare services in a coordinated, well-managed way, so that children under ACS supervision can receive "broad based relief which would dramatically improve the quality of all its services, including proper case management,"[9] rather than have these services continue to be organized as a series of piecemeal responses to varying child welfare crises. Consistent with this approach, the main protections of the Wilder consent decree have been incorporated into the Marisol City Agreement, for reassessment by the Marisol

[9] Marisol A., 126 F.3d at 378.

Advisory Panel. The goal is to ensure that the Wilder protections are implemented in a meaningful way, as they have not been thus far, and in a manner consistent with other aspects of the child welfare system.

The Panel has the authority to modify the ways in which these Wilder protections are being implemented and to assess whether they are being implemented in good faith. In the absence of such good faith, Plaintiffs can move directly for judicial enforcement of these protections.[10] (JA 742 at ¶ 31).

G. The Joel A. Objectors' Complaint and their Objections to the Settlement

On January 15, 1999, the last day upon which interested parties could file comments upon or objections to the Marisol settlement (JA 1413), the Joel A. Objectors -- members of Marisol subclass III -- filed a putative class action lawsuit against the Marisol Defendants in which they seek to represent a class of "young people in the defendants' custody and care who either identify themselves as lesbian, gay, bisexual, or transgendered, or have not so self-labeled but are experiencing feelings of same-sex attraction or gender atypicality, or who are

[10] If the Panel substantially modifies a Wilder Obligation, Plaintiffs also have to establish that the modification is consistent with Wilder Obligations as a predicate to judicial enforcement, although the Panel's findings are still prima facie evidence of the City's absence of good faith. (JA 742 at ¶ 31.b.).

questioning or confused about their sexual orientation or gender." (JA 801). On the same day, the Objectors filed objections to the Marisol settlement.

In their brief, the Joel A. Objectors assert, inter alia, that Defendants cause the putative class injury by placing them "in hostile environments that disrupt critical developmental processes," by "failing to protect Class members from bias-related violence, harassment, and abuse," and by "routinely discriminating against Class members in the provision of existing services offered to children in the defendants' care and custody." (Obj. Br. at 19).

The Marisol Plaintiffs do not dismiss the egregious treatment experienced by the members of the putative Joel A. class. They firmly believe, however, that many children in placement, with many different, individual needs, are harmed by inappropriate placements and that the settlement reached in Marisol offers the best chance for meaningful system-wide child welfare reform in New York City -- reform that will benefit all members of the Marisol class, including the Joel A. Objectors. Indeed, the remedy the Joel A. Objectors seek in their Complaint is relief that the Marisol Plaintiffs sought in theirs, and what they seek in their settlement: safe and appropriate placements according to each foster youth's specific needs, and adequate training for those with supervisory responsibility over foster children. (JA 875-876).

H. The Decision Below Approving the Settlement

On March 31, 1999, pursuant to Fed. R. Civ. P. 23(e), the district court approved the settlement and, in accordance with it, dismissed the claims raised in Marisol subject to the court's continuing jurisdiction and dismissed Wilder (JA 1453) the court found that the settlement "provide[s] substantial relief to the plaintiff class." (JA 1417).

The court emphasized that the settlement "touch[es] on almost all, if not all, of the City and State functions involving the New York City child welfare system," that the City Agreement "provides unfettered access to ACS personnel and records," and provides for a "streamlined procedure for the plaintiff class to return to this Court." (JA 1424) The court found that Plaintiffs' counsel in Marisol "had first-hand knowledge of what approaches do and do not improve the New York City child welfare system," (JA 1427), and concluded that the settlement is fair, reasonable and adequate under the standards set forth by this Court in City of Detroit v. Grinnell Corporation, 495 F.2d 448 (2d Cir. 1974). (JA 1426).

STANDARD OF REVIEW

It is well-settled that a district court's decision to approve a proposed settlement of a class action will be overturned only if the district court abused its discretion. In re Ivan F. Boesky Sec. Litig., 948 F.2d 1358, 1368 (2d Cir. 1991); Grant v. Bethlehem Steel Corp., 823 F.2d 20, 22 (2d Cir. 1987). In evaluating a settlement,

> great weight is accorded [the trial judge's] views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.

Grinnell, 495 F.2d at 454 (citation omitted). See also Grant, 823 F.2d at 23; TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 463 (2d Cir. 1982). As a result, courts of appeal should accord a district court's disposition of a proposed class action settlement "considerable deference," especially in light of the public policy favoring settlements. Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983).

Particular deference is owed to a district court's decision where the trial judge's experience has given him an unusually high degree of knowledge. See Twelve John Does v. District of Columbia, 117 F.3d 571, 576 (D.C. Cir. 1997). The Honorable Robert J. Ward, who approved the settlement on appeal, has overseen this case since its inception in 1995. This case was related to two child welfare institutional reform cases that were also before Judge Ward: Wilder v. Bernstein, 78 Civ. 957 (S.D.N.Y.), over which Judge Ward presided for almost twenty years, and Jesse E. v. New York City Dep't. of Social Serv., 90 Civ. 7274 (S.D.N.Y.), over which Judge Ward has presided since 1990. Both cases resulted in consent decrees, and Judge Ward has been involved in extensive implementation activities in these cases. See, e.g., Wilder v. Bernstein, 499 F. Supp. 980 (S.D.N.Y. 1980); Wilder v. Bernstein, 645 F. Supp. 1292, 1354 (S.D.N.Y. 1986), aff'd, 848 F.2d 1338, 1350 (2d Cir. 1988); Wilder v. Bernstein, 153 F.R.D. 524, 526 (S.D.N.Y. 1994), appeal dismissed, 49 F.3d 69, 70 (2d Cir. 1995).

Judge Ward's two decades of extensive experience presiding over matters regarding the New York City child welfare system in all likelihood render him the most knowledgeable district court judge in New York on matters regarding this system. Judge Ward is thus particularly, and perhaps uniquely, qualified to determine whether the settlement is fair, reasonable and adequate. Accordingly, this district court's approval of the settlement should be afforded even greater deference than that which is typically afforded to the district courts.

SUMMARY OF ARGUMENT

The Joel A. Objectors seek to pursue a class action in the district court, which the overall settlement between Plaintiffs and City and State Defendants bars during a two-year period. Therefore, the Objectors ask this Court to find that the district court abused its discretion in approving the settlement, and to set the settlement aside. Although Objectors acknowledge they are members of the Marisol class and seek safe and appropriate placements as do other Marisol class members, they nevertheless request to have the settlement set aside based on several intertwined but unsupportable arguments: 1) that the settlement is "illusory;" 2) that their rights were violated when Named Plaintiffs agreed to the settlement's terms and released claims; and 3) that there is a conflict among class members. All of these arguments appear to be based on the Objectors' dissatisfaction with the terms of the settlement.

First, as experienced class counsel has determined and the district court has found, the settlement provides substantial benefits for Plaintiffs. In Plaintiffs' view, the settlement provides an extraordinary opportunity for an experienced expert panel to recommend specifically what the City needs to remedy legal violations, to assess whether the City is doing that or otherwise accomplishing reform and to guide the City in doing so. If the City fails at instituting real reform, the Panel's work provides prima facie evidence that will be admitted at trial. In Plaintiffs' judgment, this agreement and process will lead to either true system-wide reform or a far more speedy adjudication of liability and a more targeted, effective judicial remedy.

Second, there is no support for the Objectors' attack on the adequacy of class representation or their position that they were entitled to separate representation during the settlement process -- an argument that is nothing more than a veiled attempt to attack the terms of the settlement itself.[11]

Finally, Objectors seek to support their attack on the adequacy of class representation by saying that there is conflict among class members, because some of the Joel A. Objectors have been placed in such inappropriate and poorly supervised facilities that they have been attacked by other class members. However, when City Defendants' failure to protect children and provide appropriate placements and supervision results in harm to some, this does not create a conflict among class members any more than the administrator of an

[11] By their logic, all children with particular needs -- the pregnant teenagers, the young mothers, the physically handicapped, in addition to the gay, lesbian and transgendered Plaintiffs they seek to represent -- would likewise have been entitled to separate representation during the settlement negotiations. This is the very antithesis of the purpose of Fed. R. Civ. P. 23.

overcrowded, poorly-run institution creates a conflict because some of its residents harm others. A conflict among class members is created when some members benefit from the relief more than others, not when some victimize others; such a conflict is the opposite of what the Marisol settlement will achieve.

Objectors' primary objection, of course, is that regardless of the merits of the Marisol Settlement, they want to be able to pursue not only individual damage and injunctive actions, which they are free to do, but their own class action. In order to do so they must ask this Court to set aside the Marisol settlement, because it bars such class actions during the two year period of the Advisory Panel's work. The district court properly found that the provision imposing a two year hold on new class actions strikes a reasonable balance. (JA 1444).

Accordingly, this Court should find that the district court acted correctly and well within its discretion in approving the Marisol settlement as fair, reasonable and adequate for all class members and subclasses, and affirm the decision of the district court, which will permit the best hope for reforming the City's child welfare system to go forward.

ARGUMENT

The Joel A. Objectors boldly assert that "institutional values" embodied in the class action procedure would be threatened if the Marisol settlement is approved. (Obj. Br. at 30). In fact, the opposite is true. The Marisol settlement is the sound, carefully balanced product of a rigorous, almost three year litigation governed by class action rules, negotiated by Plaintiffs' counsel with vast experience in the field and supervised and approved by a district judge with similar experience. By contrast, the Joel A. Objectors' last-minute, uninformed attacks upon this settlement are based on distortions of the settlement's terms and misinterpretations of applicable case law. If the Marisol settlement could be undone by such flawed arguments, it would cripple the utility of the class action procedure for Plaintiffs in the future.

I.

THE DISTRICT COURT PROPERLY APPLIED ESTABLISHED STANDARDS IN FINDING THE MARISOL SETTLEMENT TO BE FAIR, REASONABLE AND ADEQUATE

The Marisol Plaintiffs ask this Court to apply well-accepted precedent and affirm the district court's approval of the settlement of this action. In summary, "[o]verall the court has a duty to determine whether the settlement is fair, reasonable and adequate." 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 11-41 at 11-91 (3d ed. 1992 and Supp. 1995) (citations omitted). There is usually an initial presumption in favor of the fairness of a class action settlement negotiated by counsel for the class when settlement was reached by arms-length bargaining, sufficient discovery has been completed to permit intelligent analysis of the case, the settlement proponents are experienced in similar litigation, and the number of objections are not large compared to the size of the class as a whole. Newberg at 11-88, 11-91.

The United States Supreme Court has stated that "[c]ourts judge the fairness of a proposed compromise [in a class action suit] by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981). The Second Circuit has particularized this duty and approved a district court's consideration of the following criteria:

(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 risk of establishing liability;

(5) the risks of establishing damages [or harm]; [and]

(6) the risks of maintaining the class action through the trial.

City of Detroit v. Grinnell, 495 F.2d at 463 (citations and three additional criteria, applicable only to damages actions, omitted). The Second Circuit subsequently summarized the essence of the Grinnell factors, stating that

> [t]he trial judge determines fairness, reasonableness and adequacy of a proposed settlement by considering (1) the substantive terms of the settlement compared to the likely result of a trial, and (2) the negotiating process, examined in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves.

Malchman v. Davis, 706 F.2d 426, 433 (2d Cir. 1983) (citations omitted).

The district court in this case expressly applied each of this Circuit's Grinnell factors in ruling that the Marisol settlement was fair, reasonable and adequate, and found:

-- the case presented many unsettled and complex legal issues, the trial would be "extremely costly" and was expected to last at least five months, and the expense would not end with the trial (Grinnell Factor No. 1) (JA 1417-1419);

-- the mere three objections raised,[12] out of a plaintiff class of 100,000 was evidence of the settlement's fairness (Grinnell Factor No. 2) (JA 1420);

-- the case had proceeded through 200 days of depositions, discovery of 100,000 pages of documents and exchange of expert reports, and

[12] Only one of the three objections is the subject of this appeal.

reached the eve of trial, so that counsel had "a thorough understanding of the complexity of the issues and the strengths and weaknesses of their claims and defenses" (Grinnell Factor No. 3) (JA 1420-21);

-- "[P]laintiffs would present a compelling case," but Defendants would also "present factual and legal arguments . . . sufficient to cause serious deliberation by the Court" (Grinnell Factor No. 4) (JA 1421-22);

-- "the Settlement Agreements [are] more favorable to the plaintiff class than any relief that the Court would have unilaterally ordered," (JA 1423) and, "it is not clear, nor has any person objecting to the Settlement Agreements suggested, that an alternative remedy would be more appropriate" (Grinnell Factor No. 5)(JA 1422-23);

-- it was unlikely that the Marisol class would be decertified during or after trial (Grinnell Factor No. 6)(JA 1425); and

-- beyond merely accepting that the settlement was negotiated by experienced counsel at arms-length, the court stressed that "[s]ome of the attorneys in Marisol have appeared before this Court for more than twenty years in conjunction with child welfare cases." (Malchman Factor No. 2)(JA 1427).

The Joel A. Objectors do not at all dispute five of these points.[13] This is understandable, since the Objectors are in no position to assess the relative strengths of the parties' evidence, whereas the district court had, through almost

[13] The Joel A. Objectors do address Grinnell Factor No. 2, but minimize the significance of the limited number of objections to the settlement, by noting that the class consists of children. (Obj. Br. at 57). This ignores the fact that there is a large group of child welfare advocates who could have been expected to object to the Marisol settlement if the Joel A. Objectors' arguments had merit. (JA 1376).

three years of motions and arguments, become intimately familiar with the merits of this case.

As a result of these undisputed findings, the Marisol settlement is entitled to a particularly strong presumption of fairness, reasonableness and adequacy. The Joel A. Objectors do not come close to overcoming this presumption in their unavailing attacks upon the nature of the uniquely constructive relief awarded in the settlement and the entirely appropriate process by which the settlement was reached.

II.

THE PLAINTIFF CLASS RECEIVED SUBSTANTIAL, TANGIBLE BENEFITS FROM THE SETTLEMENT

The Joel A. Objectors, in alleging that the settlement provides Plaintiffs with only speculative or illusory relief, criticize the merits of both parts of the Marisol settlement -- the City's agreement to open its child welfare agency to an Advisory Panel to spur reform, and the State's agreement to significantly increase its oversight of the City's child welfare activities. Especially when these elements are viewed as parts of a comprehensive reform effort, it is evident that the district court correctly rejected the Joel A. Objectors' arguments and found that the settlement "provide[s] substantial relief to the plaintiff class." (JA 1417).

A. The City Agreement Benefits All Class Members by Providing a Unique Opportunity to Spur the City to Make Reforms or Face Prima Facie Evidence of the Need for a More Intrusive Remedy

The Joel A. Objectors argue that it was an abuse of discretion for the district court to approve the City Agreement, because it offers only "speculative" relief in exchange for supposedly onerous restrictions on future lawsuits.[14] (Obj. Br. at 53). In fact, the City Agreement provides very substantial benefits to the plaintiff class, affording them a unique and immediate, independently-funded examination of city operations by nationally respected experts, coupled with the ability to use the experts' findings as prima facie evidence in securing judgment and a more intrusive remedy if the City fails to make necessary efforts to achieve reform on its own.

The Advisory Panel's specific responsibility under the City Agreement is to assess ACS' operations in the key areas of child welfare practice -- including the area of placement which is the gravamen of Objectors' Complaint -- to develop specific recommendations about what ACS needs to do to achieve good child welfare practices in those areas, (the key areas are described at JA 734-735), and to monitor ACS' progress in reforming those areas. In monitoring and performing its assessment, the Panel will have complete access to whatever ACS information,

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[14] As to the allegations that the restrictions are "onerous," see Point III, supra.

documents and personnel interviews it requests. Because all of the members of the four-person Panel have been administrators in public child welfare systems (JA 1152-1153), they are in a unique position to not only knowledgeably evaluate the current functioning of the New York City child welfare system, but also to fully understand what can and cannot be done in systems committed to reform.

The Joel A Objectors assert that the relief provided is illusory because the Advisory Panel is not authorized to compel the City to take any particular action.[15] (Obj. Br. at 54). This conclusion is based on a fundamental disagreement about the process of institutional reform, and how to accomplish the goals of the lawsuit.[16]

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[15] The Objectors' argument that the benefits provided by the City Agreement are illusory because there is nothing in the Agreement that compels the Advisory Panel to perform its agreed upon function is meritless. Both parties consented to the Agreement based on representations made by the Panel that it would perform the duties set out in the Agreement. (See JA 733 at ¶ 5). The court approved the City Agreement based on further representations, made by the Panel in open court, that its members intend to fully comply with the Agreement. (JA 1374-1375).

[16] Crafting an effective remedy requires judgment concerning what forces are most likely to secure relief for the clients, subject to the scrutiny and approval of the district court judge. In this instance, experienced class counsel made such judgments in a complex situation, based on a wide range of factors, and the district court approved them, a choice with which the Joel A. Objectors disagree, presumably preferring a more traditional approach. However, this kind of a disagreement is not a basis on which this Court should find that the district judge abused his discretion. For, although the Wilder settlement imposed mandatory, legally enforceable terms which presumably the Joel A. Objectors would have preferred, the district court found in that case that the requirements of the Wilder

(continued...)

There is no question that the Panel will be in a far better position to design more effective remedies with the cooperation of the City Defendants, which this settlement assures at least in the initial stages, than would Plaintiffs' experts or, most likely, even a court-appointed expert. There is also no question that if the City is committed to implementing the Panel's recommendations voluntarily and fully, and develops the capacity to do so, it can provide effective and speedier relief than can be obtained under the coercive and externally-imposed authority of a court order. But Plaintiffs would have made a bad bargain had they been willing to rely exclusively on the City's voluntary activities, which they have not. Instead, the Settlement provides Plaintiffs with a very powerful alternative mechanism.

The Panel has authority to assess whether the City is acting in good faith, which it will determine by looking at 1) whether the City is implementing its recommendations, 2) whether it is doing so within the timetable the Panel has proposed, and 3) whether the City's reform efforts "are actually effective in bringing about reform." (JA 737-738 at ¶ 21). If the Panel finds, in its expert opinion, that the City is failing in more than one respect -- that is, for example, that

[16](...continued)
settlement had never been implemented, despite repeated enforcement efforts by plaintiffs. Wilder v. Bernstein, No. 77 Civ. 953 (RJW), slip op. at 11-14 (S.D.N.Y. July 1, 1998).

it is both failing to implement the Panel's recommendations and failing to do so on the specific schedule set by the Panel -- then the Panel will make an absence-of-good-faith finding. Such a finding by the Panel enables the Plaintiffs to return to court for a liability finding in the particular areas affected, applying the facts as determined by the Panel to the court's previous legal rulings which established a broad range of legal rights for Plaintiffs. Under such circumstances the Panel's findings constitute admissible, prima facie, evidence. Moreover, should that circumstance occur, the Panel will be in a position to present information to the court concerning precisely what the City has failed to do, and how it can be done, making an effective remedy far more likely. See, e.g., Halderman v. Pennhurst School and Hospital, 610 F. Supp. 1221, 1231 (D.C. Pa. 1985).

The fact that the appellants do not understand the power of such a remedy does not make it illusory. Far from it, the City Agreement provides ample benefits to Plaintiffs because it moves Plaintiffs to the remedy stage years earlier than after a lengthy trial and likely appeal, while leading to one of two beneficial results. Either the Advisory Panel will provide the pressure to address fundamental problems, and the guidance and concrete expertise that the City has lacked, with the result that this dysfunctional system will finally begin to serve children properly, or, if the City remains resistant to fundamental reforms, the Plaintiffs can return to court and present to the court a plan -- the Panel's plan -- to reform the agency directly under the court's supervision. The fact that counsel for several individual class members disagree with an approach chosen by experienced class counsel and approved by an experienced judge reflects only that there is disagreement, not an "illusory" settlement.

In a separate argument, the Objectors assert that the district court abused its discretion by approving the City Agreement because the Agreement "imposed onerous restrictions on the class members' ability to obtain relief from certain injuries . . . . without providing complementary injunctive protection." (Obj. Br. at 57). However, Objectors point to no case law that in fact holds that a settlement is per se unreasonable if it releases prospective claims without providing an injunction. The Objectors' reliance on In re Brand Name Prescription Drugs Antitrust Litig., 1996 WL 167347 (N.D. Ill. April 4, 1996), is unavailing. In Brand Name Prescription Drugs, the district court held that a settlement was unfair, not because it included an overly broad release without providing injunctive relief, but because the settlement contained no provision or commitment on the part of the settling defendants to act in accordance with the law. Id. at *7. In contrast, the City Agreement obligates the City Defendants to make a good faith effort to reform the system or it will find itself back in court defending against prima facie evidence of illegal conduct.

Even if, as the Objectors maintain, there were a rule of law that a settlement releasing claims for future injuries is per se unreasonable in the absence of an injunction, such a rule was not violated in this case. Under the settlement, all class members retain the right to bring an individual injunctive action. The settlement's prohibition, for a limited two year period, of class action suits or suits seeking system-wide relief does not, even in the absence of an injunction, provide Defendants with license to inflict future injuries. See Part III, supra.

The Objectors' final assertion is that the district court abused its discretion by concluding that "the Settlement Agreements [are] more favorable to the plaintiff class than any relief that the Court would have unilaterally ordered." (JA 1423). The Objectors assert that instead, the court should have "identified the legal rights being violated by the City Defendants," and "ordered the City Defendants to devise a program to cure these violations." (Obj. Br. at 58). This position, however, demonstrates the Objectors' disagreement with the settlement and their complete lack of familiarity with, or understanding of, existing child welfare reform efforts. Instead of a settlement such as the Objectors advocate, where the City must take specific actions without any assistance in determining how to comply, the City Agreement takes an innovative approach that builds on ACS' stated commitment to reform and forcefully guides it with expert assistance and the power of the court behind the experts. The opinion of experienced counsel regarding whether a settlement is fair and reasonable is entitled to great weight by a court in determining whether to approve the settlement. See Cotton v. Hinton, 599 F.2d 1326, 1330 (5th Cir. 1977); In re Michael Milken and Assoc. Securities Litig., 150 F.R.D. 57, 68 (S.D.N.Y. 1993). Plaintiffs' counsel strongly believe this settlement is the best possible means of achieving real reform in this jurisdiction concerning a system as historically dysfunctional as ACS. The district court did not abuse its discretion when it accorded Plaintiffs' counsels' opinions the appropriate weight and approved the settlement.

B. The Settlement Also Benefits All Class Members By Ensuring Concrete Improvements in the State's Vital Oversight Activities

The Objectors also claim that the State Agreement "fails to provide any direct, concrete or reasonably certain relief to members of Marisol Subclass Three." (Obj. Br. at 60; see also Obj. Br. at 16-17). The Objectors' summary dismissal of the State Agreement is easily refuted as it wholly ignores two of the key aspects of relief mandated by the settlement that are perhaps most direct, concrete and certain.

After two years of discovery, the Marisol Plaintiffs concluded that state oversight was crippled by a lack of staff and institutional commitment. To remedy this critical institutional deficiency, the initial provisions of the State Agreement contain specific, concrete requirements. The larger Metropolitan Regional Office ("MRO") is to be replaced by a New York City Regional Office ("NYCRO") which is to be responsible for only the five counties of New York City. The staffing at the new NYCRO will be increased to at least 41 full time employees. On all child welfare matters, the Director of the NYCRO is to report directly to the Commissioner of OCFS and not, as previously had been the case, to a number of the Commissioner's deputies. Also, for the first time in the history of the State child welfare system, the NYCRO's Director, will have initial responsibility for the development and organization of the NYCRO's annual budget. (JA 758-61).

Discovery also revealed that individual reports of fatalities occurring among New York City children and annual cumulative reports of such fatalities -- which enable the State to determine why a particular death occurred so that the conditions that caused the death could be corrected to prevent future deaths -- were not being prepared as required by statute. The State Agreement provides that all past due fatality reports are to be prepared by a specific date and all subsequent reports are to be prepared in adherence to the statutory due dates, and OCFS, for the first time, must when necessary direct ACS to adopt corrective action, which will be monitored by the NYCRO. (JA761-63). Requiring timely and prompt completion of investigations of the most egregious failures of the child welfare system -- child fatalities -- in order to prevent them in the future, is surely direct, concrete and fully certain relief.

The Joel A. Objectors also improperly minimize the significance of the case record reviews -- a widely accepted technique for evaluating the day-to-day performance of child welfare bureaucracies in protecting and serving children -- ignoring that, absent the Marisol settlement, the State would have no obligation to conduct any case record reviews. Under the settlement, it will conduct reviews covering nine separate categories of children, including five which concern, in whole or in part, the subclass of children that includes the Joel A. Objectors. (JA 766-67 at ¶¶ 18-21).

To ensure that the State Defendants will comply with the State Agreement, the Agreement establishes formal monitoring procedures, guaranteeing Plaintiffs' counsel access during the two-year term of the Agreement to the ongoing operations of OCFS and the NYCRO, and providing Plaintiffs with extensive written documentation. If the Plaintiffs determine that the State Defendants have failed to comply with any of the provisions of the State Agreement, then Plaintiffs can return to the district court to seek judicial enforcement. (JA 771-772 at ¶¶ 29-

30).

The detailed provisions in the State Agreement, which were based upon critical deficiencies in the State's monitoring of child welfare activities in New York City, are precisely the opposite of what the objectors dismissively characterize as "illusory."

III.

THE SETTLEMENT'S RELEASES AND COVENANTS NOT TO SUE ARE LIMITED AND A REASONABLE EXCHANGE FOR THE SUBSTANTIAL RELIEF OBTAINED BY THE CLASS, AND PLAINTIFFS CLEARLY HAD FULL AUTHORITY TO AGREE TO THESE PROVISIONS

The Joel A. Objectors, having ignored an invitation to participate in the Marisol litigation while it was still in litigation, now seek to preserve the opportunity to proceed with their own belatedly filed separate class action without being fettered by any restrictions occasioned by the Marisol settlement. As a result, they criticize as "oppressive" the terms of the settlement's release and covenant not to sue provisions, and assert that the Named Plaintiffs had no authority to enter into any agreement concerning Joel A. Objectors' claims. In fact, however, nothing in the Marisol settlement prevents the Joel A. Objectors or any other gay or lesbian youth, or any other Marisol class member for that matter, from seeking individual relief for harms suffered as a result of failures in the child welfare system. The restrictions merely, and reasonably, limit new class actions or claims for system-wide relief during the two year period in which the Panel is working with the City to ensure coordinated reform of all aspects of the system and during which the City is fully opening up its child welfare records and staff to the Advisory Panel. Moreover, as the Joel A. Objectors have long known, their claims are clearly encompassed within the Marisol lawsuit, giving the Named Plaintiffs the authority to enter into appropriate releases with respect those claims.

A. The Settlement Permits Every Class Member to Pursue Any and All Individual Legal Claims, and its Restriction on Class Actions and Claims for System-Wide Relief While the Advisory Panel Has Full Access to the City Child Welfare System Strikes a Reasonable Balance

The Joel A. Objectors' contention that the settlement bars claims based on events that occur in the future and, therefore, "effectively license[s] the City and State Defendants to commit systemic violations of Marisol Class members' legal rights over the next two years" (Obj. Br. at 41) is no more than hyperbole attempting to bolster an unsupportable argument.

During this period that the City opens its records to full examination by the Advisory Panel and record reviews by the State, Plaintiffs may not commence a new class action or other action seeking "system-wide" relief. However, not all claims are barred. All individual class members may, during the two year settlement period, continue to bring suits for damages or for individual equitable relief, including prospective claims based upon bias-related injuries. Moreover, individuals such as the Joel A. Objectors have the right to press the Advisory Panel to address their concerns, and the Marisol Plaintiffs retain the right to seek a judgment and relief if the Advisory Panel finds that the City failed to act in good faith to implement the Panel's recommended reforms, further minimizing the effect of the limited restrictions on some types of lawsuits.

Additionally after the two year period expires, any type of claim, including a class action or suit requesting systemic relief, may be brought. Crucially, the City Agreement does not prevent Plaintiffs from offering into evidence facts, events, actions or omissions which may have occurred prior to December 15, 2000, if they do bring class action or systemic claims arising after December 15, 2000. (JA 747). These carefully crafted provisions hardly grant the City a license to break the law, but rather take concrete steps toward ensuring compliance with long-ignored laws.

The cases cited by the Objectors do not support their argument. Each involves a situation in which people were foregoing any and all avenues of judicial relief for prospective claims for all time, in contrast to the covenants in this case which do not preclude individual injunctive actions for non-systemic relief, and only bar class action and systemic claims for a two-year period of time. See, e.g., Adams v. Philip Morris, Inc., 67 F.3d 580, 582 (6th Cir. 1995) (release waived all present and future claims for all time); Williams v. Vukovich, 720 F.2d 909, 926 (6th Cir. 1983) (consent decree waived all prospective rights under Title VII); United States v. Allegheny-Ludlum Industries, 517 F.2d 826, 854 (5th Cir.), cert. denied, 425 U.S. 944 (1975) (noting that a release cannot preclude a suit for all forms of appropriate relief for injuries caused by future acts); J.A. Shults v. Champion Int'l Corp., 821 F. Supp. 520, 524 (E.D. Tenn. 1993)(settlement released "all future claims, demands, rights of action and causes of action of every kind, whether arising in law or equity"); Great Northern Associates, Inc. v. Continental Casualty Co., 192 A.D.2d 976, 977 (3rd Dep't 1993) (contract term released defendants from any liabilities that may be incurred at any time in the future). The proposition that public policy may prohibit full waivers of all future discrimination claims, see Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974), is simply beside the point with respect to the settlement at issue here, since this settlement plainly does not eliminate class members' ability to bring suits to remedy future violations of their rights.

Lastly, the Objectors contend that the members of the Joel A. putative class are in "desperate circumstances," and that class action is the *only* vehicle to address their situation. (Obj. Br. at 27). However, certification is not an entitlement, see generally General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 160 (1982), and there is no guarantee that a class defined as vaguely as that proposed by the Joel A. Objectors -- which includes any youth in the New York City foster care system who is questioning or confused about his or her sexual orientation or gender (JA 801) -- would be certified so as to provide the relief the Objectors seek. Additionally, there is nothing in the settlement that precludes the individual Joel A. Objectors from presently pursuing their claims and seeking the immediate individual relief that they request.

There can be no doubt that in some situations class action lawsuits can be the best vehicle with which to challenge systemic deficiencies in a governmental agency. However, that is not the situation here, where there is a major initiative underway to develop and coordinate well-planned child welfare services for all class members, not just for the groups that attract counsel. The "inherent nature of a compromise is to give up certain rights or benefits in return for others." McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 429 (7th Cir. 1977). It is not only reasonable, but consonant with public policy, for the parties to agree that during this period of unrestricted agency access and cooperation while Defendants are admittedly working on a wide variety of reform initiatives under the guidance and intense scrutiny of an expert panel, the Defendants should not be subject to other system-wide lawsuits based on the very same failures raised in the Marisol litigation by Marisol class members. It was not an abuse of discretion for the district court, with all of its informed experience, to have determined that this settlement, with its bargained-for exchanges, was reasonable in all respects, in light of all of the built-in protections and benefits the settlement provides.

B. The Subclass III Named Plaintiffs Had The Authority To Release the Joel A. Objectors' Claims, Since They Arose Out of The Same Facts As Those Pled in the Marisol Complaint, and There is No Material Conflict Among Subclass III or Any Other Members of the Marisol Plaintiff Class

Aside from their facial attack upon the breadth of the settlement's releases and covenants not to sue, the Joel A. Objectors argue that the Named Plaintiffs lacked the authority to enter into a settlement in which these provisions apply to the bias-related claims they now assert in their separate lawsuit -- including, apparently, claims predating the Marisol settlement. (See Obj. Br. at pp. 44-51). The Objectors also claim that they were inadequately represented during the settlement negotiations, and suggest that they should have been separately represented at the negotiations because the Joel A. members of Subclass III are victimized by other Subclass III members. Under well-established law governing class action lawsuits, these arguments are meritless and indeed misperceive the causes of the harm when inappropriately placed or poorly supervised young class members victimize other class members.

1. **The Subclass III Named Plaintiffs Had Ample Authority to Release Claims Arising Out of the Same Facts as Those Pled in the Marisol Complaint**

The Joel A. Objectors are class members of Marisol Subclass III, which includes "children in the custody of the Administration for Children's Services." (JA 440). The Objectors assert that when the Named Plaintiffs for Subclass III released legal claims for harms suffered by the Joel A. Objectors that were not pled in the Complaint and that the Named Plaintiffs could not have individually asserted, this violated the Objectors' right to due process and to adequate representation under Fed. R. Civ. P. 23.

However, it is axiomatic that a class representative, in settling a case, may release claims predicated on the same facts as those underlying the claims set forth in the class action complaint even if those claims were not, in fact, pled in that class action. TBK, 675 F.2d at 460-61; see also Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1563-64 (3d Cir.), cert. denied, 513 U.S. 986 (1994); In re Baldwin-United Corp., 770 F.2d 328, 336 (2d Cir. 1985); National Super Spuds, Inc. v. New York Mercentile Exchange, 660 F.2d 9, 21 n.7 (2d Cir. 1981); Robertson v. National Basketball Association, 622 F.2d 34, 35 (2d

Cir. 1980); In re Brand Name Prescription Drugs Antitrust Litig., 1996 WL 167347, at *2; Whitford v. First Nationwide Bank, 147 F.R.D. 135, 142 (W.D.Ky. 1992); In re Washington Public Power Supply System Sec. Litig., 720 F. Supp. 1379, 1413 (D. Ariz. 1989), aff'd, 955 F.2d 1268, cert. denied, 506 U.S. 853 (1992); Bernstein v. Mediobanca Banca di Credito Finanziario-Societa Per Azioni, 78 F.R.D. 1, 4-5 (S.D.N.Y. 1978).

While absent or unnamed class members have a right to adequate representation before a settlement that binds them is entered, In re Agent Orange Product Liability Litig., 996 F.2d 1425, 1435 (2d Cir. 1993), this right is generally violated only when a class representative procures better settlement terms for herself by bargaining away claims held by some absent class members that are not common to the class, and thus could not have been brought by the named representative. See National Super Spuds, 660 F.2d at 17-18. That is not the case here.

In TBK Partners, a federal shareholder class and derivative action, the trial court approved a settlement which barred members of the class from bringing any claims related to the federal action. TBK Partners, 675 F.2d at 459. Minority shareholders appealed the approval of the settlement on several grounds, including the fact that the settlement released state law appraisal claims that had not been raised and could not have been raised in the context of the federal class action. This Court affirmed the approval of the settlement, finding that release of the state law appraisal claims was justified and did not unfairly penalize any particular class member or group of class members when those claims arose out of the same factual predicate as the federal claims. Id. at 462.

The Joel A. Objectors contend that this settlement unjustly deprives them of their right to assert the following claims: That Defendants, by not creating appropriate placements for lesbian, gay, bisexual or transgendered youth, have failed to protect these youth from bias-related verbal and physical abuse (JA 803-804); that the putative Joel A. class suffers harm as a result of Defendants' failure to "train those charged with the care and protection of children to cope with the developmental obstacles they face because of their sexuality and gender atypicality" (JA 804-805); and that City Defendants make biased placement and service decisions towards the putative class members that cause them to suffer harm. (JA 805).

However, the factual predicate of the Objectors' claims is the same as that underlying some of the claims brought by the representatives of Subclass III -- that they were emotionally and physically harmed by: (1) Defendants' failing to develop a sufficient range of different types of placements to meet the needs of children in custody, causing many children to be placed inappropriately (JA 153 at ¶ 240); (2) Defendants' placing children with caretakers who have not been appropriately trained (JA 154 at ¶ 246); (3) Defendants' failing to ensure that foster children's mental health needs are addressed (JA 155-57 at ¶¶ 249-259); (4) Defendants' failing to ensure that private agencies providing residential care for children such as the Joel A. Objectors are monitored, retain staff that are trained, and provide services in accordance with minimally accepted professional standards (JA 167 at ¶ 296); and, (5) Defendants' failing to develop, implement and maintain sufficient training curricula, programs, procedures and requirements necessary to ensure that Plaintiffs are treated in accordance with their legal rights. (JA 634).

Thus, because the gravamen of the Joel A. Objectors' legal claims, although premised in part on different legal theories, rests on the same factual bases as the claims asserted by the relevant subclass representatives in the Marisol litigation, the named plaintiff representatives were well within their authority in entering into a settlement that precluded the Joel A. Objectors from bringing their suit as a class action. As this Court has recognized, "in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action." TBK Partners, 675 F.2d at 460.

The fact that the interests of adolescents in appropriate placements, services and protection in foster care were represented in the Marisol litigation is further demonstrated by Plaintiffs' Proposed Findings of Fact regarding the lack of appropriate placements for all teenagers and pre-teens, including pregnant young women and gay and lesbian youth.[17] Indeed, one of the individual case histories developed in detail by Plaintiffs concerned a youth, Charles R., who was repeatedly beaten by other foster children.[18] Additional Findings of Fact demonstrate that Plaintiffs specifically addressed the severe placement problems of gay and lesbian youth that form the basis of the claims alleged in the Joel A. Complaint.[19] The lack of adequate placements for youth, including gay and lesbian youth, was also addressed in Plaintiffs' May, 1997 motion for a temporary restraining order regarding overnight placements at ACS' Pre-Placement Center,

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[17] See, e.g., Plaintiffs' Proposed Findings of Fact, facts IV.A.1.aa. and IV.A.3.c.; IV.A.b. and IV.A.1..a; IV.A.3.k., l and m; and IV.A.3.mm. (JA 495-96).

[18] See, e.g., Plaintiffs' Proposed Findings of Fact, XI.B.2.b.21; 33; 41.5; and 132; XI.B.2.c.223.

[19] See, e.g., Plaintiffs' Proposed Findings of Fact, facts IV.A.3.vv. and ww.; IV.A.3.bbb; V.A.l.c.(56); V.A.g.; and VI.A.1.b.(5). (JA 495-500).

and at a May, 1998 contempt hearing. (JA 1236; JA 1244-45; JA 1258-61; JA 1270; JA 1276-77).

The City Defendants moved to dismiss the claims regarding the Pre-Placement Center on the same legal grounds that the Joel A. Objectors assert here -- that there was no named plaintiff who had standing to bring the Pre-Placement Center claims because none of the class representatives had been placed at the Pre-Placement Center overnight. (JA 258). The district court rejected that argument, holding that "there is no requirement that the harm to the named plaintiff be identical to that of each member of the class" and that "because the named Plaintiffs allege harm resulting from inappropriate placements maintained by ACS, and the Pre-Placement Center is such a placement" the Named Plaintiffs were adequate to raise the claims. (JA 483-485). Thus, the question of whether a class representative who suffers from a specific injury as a result of an inadequate placement -- such as a teen mother who is unnecessarily separated from her infant because there are not enough placements that can accommodate both the mother and child -- can raise a claim on behalf of a class member who suffers a different specific harm resulting from a placement problem-- such as bias-related victimization because of the lack of appropriate placements for gay youth -- has been settled in the affirmative by the district court in this case.[20]

The Joel A. Objectors rely heavily upon National Super Spuds, 660 F.2d 9,

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[20] The Objectors' argument that the Named Plaintiffs did not have "standing" to release the bias-related claims is predicated on a misunderstanding of the application of the standing requirement in the class action context. Standing is a jurisdictional question that focuses on the party bringing the suit, see Warth v. Seldin, 422 U.S. 490, 498 (1975), and is satisfied if that party has "allege[d] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984) (citation omitted). In the class action context, the named plaintiffs must first demonstrate that, as individuals, they have a live case or controversy; and second, that there is a sufficient nexus between the claims of the named plaintiffs and those of the class at large to meet the commonality, typicality and adequacy of representation requirements of Rule 23. See Sosna v. Iowa, 419 U.S. 393, 402-03 (1975). There is simply no requirement that the named representative have *individual* standing to bring all of the claims asserted by each class member as long as the named representatives' claims are typical of those asserted by the unnamed class members. See Allee v. Medrano, 416 U.S. 802, 819 n.13 (1974); In re Scott Paper Co. Securities Litigation, 142 F.R.D. 611, 614 (E.D.Pa. 1992); Alfus v. Pyramid Technology Corp., 764 F. Supp 598, 606 (N.D. Cal. 1991); Haroco Inc. v. American Nat. Bank and Trust Co. of Chicago, 121 F.R.D. 664, 668 (N.D. Ill. 1988).

The Objectors have not claimed, nor would there be a basis to claim, that the Named Plaintiffs lacked individual standing. Thus, Objectors' standing argument must rest on an assertion that the claims of the named representatives were not related to those asserted in the Joel A. Complaint. As is discussed in text, the Objectors assert claims regarding placement, training and policy issues, which are not simply related to, but, in fact, are the same concerns raised by the Subclass III representatives. Just as the district court in this case was "not persuaded that in order to have standing plaintiffs must have named plaintiffs in each and every placement that they allege is harmful" (JA 484), this Court should not be persuaded that to have standing the Named Plaintiffs must have endured every variation of harm suffered by class members as a result of Defendants' failure to provide adequate placements and training.

in support of their contention that the Named Plaintiffs for Subclass III could not release bias-related claims currently pled in the Joel A. Complaint. However, National Super Spuds, is readily distinguishable because in that case the named plaintiffs procured a better settlement for themselves by releasing claims unrelated to claims alleged in the complaint and to which they did not have a personal stake.

Not only do the Objectors' claims arise from the same facts as those asserted in the Marisol Complaint, but the relief sought by all members of Subclass III, including the Joel A. Objectors, is virtually the same. Indeed, the Advisory Panel will examine the lack of adequate placements for all adolescents -- including, among others, gay and lesbian youth -- and work with ACS to ensure that the City is making a good faith effort to provide safe, appropriate environments for these adolescents (JA 734-735), as well as for other class members for whom appropriate placements and well-trained staff have not been provided. Since all class members are treated identically by the settlement, in that all share equally in the privileges and remedies provided, there is not the concern, present in National Super Spuds, that the Named Plaintiffs bargained away the claims of unnamed class members to procure better settlement terms for themselves. See National Super Spuds, 660 F.2d at 16. In fact, Judge Ward stated that no such unfair bargaining had taken place. (JA 1371).

The named representatives for Subclass III had authority to release the claims asserted by the Joel A. Objectors and did not achieve a better bargain for themselves by agreeing to the covenants and releases. Therefore, the district court's determination that the named representatives adequately represented Subclass III should be affirmed.

2. There is No Material Conflict Among Members of Subclass III Because All Members, Including the Joel A. Objectors, Share the Same Interest

Also without merit is the Joel A. Objectors' assertion that the Named Plaintiffs could not adequately represent the Objectors' interests and that the Objectors should have been separately represented because of antagonism among members of Subclass III, based on the assertion that non-gay class members are the perpetrators of much of the abuse and victimization endured by the Objectors. Carrying their argument to its logical conclusion, Objectors actually want each "subclass" within a subclass -- that is, the pregnant teenagers, the emotionally disturbed youngsters, the physically disabled, indeed any children with special placement and treatment needs -- to have separate named plaintiff representation. This is unnecessary, there is simply no material antagonism between the Subclass III members. Furthermore, if the Joel A. Objectors' proposition -- that they should have been separately represented because they are victims of violence perpetrated by fellow class members -- were in fact true, then it would also be true that in a prison reform case, named plaintiffs representing a class of all incarcerated individuals could not assert the class-wide constitutional right to be protected from violence perpetrated by fellow inmates in that class. Clearly that is not the law. See, e.g., Fisher v. Koehler, 692 F. Supp. 1519, 1521 (S.D.N.Y. 1988).

A named plaintiff is deemed to adequately represent a class when he or she does not have interests that are antagonistic to those of other class members. See Amchem Products, Inc. v. Windsor, 117 S.Ct. 2231, 2251 (1997); In re Joint Eastern and Southern Dist. Asbestos Litig., 78 F.3d 764, 778 (2d Cir. 1996); In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 291 (2d Cir. 1992), cert. denied, 506 U.S. 1088 (1993). When class members or subclass members all share a common interest, no antagonism is deemed to exist. See, e.g., In re Drexel Burnham, 960 F.2d at 291; Malchman v. Davis, 761 F.2d 893, 900 (2d Cir. 1985), cert. denied, 475 U.S. 1143 (1986); In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 208 (5th Cir. 1981); Lyons v. Scitex Corp., 987 F. Supp. 271, 275 (S.D.N.Y. 1997); O'Brien v. National Property Analysts Partners, 739 F. Supp. 896, 903 (S.D.N.Y. 1990).

The Plaintiffs in Subclass III all share a common interest -- the right to appropriate placements, trained caseworkers and policies, procedures and practices aimed at ensuring children in foster care remain free from emotional or physical harm. Nowhere is it suggested that the Named Plaintiffs for Subclass III did not work to further this shared interest. That Joel A. Objectors might be victimized by their peers or ACS staff while in Defendants' care is undeniably tragic, and Defendants have an obligation to ensure that such victimization does not occur. See, e.g., Camp v. Gregory, 67 F.3d 1286, 1293 (7th Cir. 1995), cert. denied, 517 U.S. 1244 (1996); Doe v. New York City Dep't of Social Services, 649 F.2d 134, 141 (2d Cir. 1981). However, the Defendants' obligation to ensure the custodial children are protected enures to every member of Subclass III, and all members of this subclass share an interest in having this obligation enforced.

The Objectors' attempt to liken the relationship between class members in Marisol to the antagonistic relationship between class members in Amchem, 117 S.Ct. at 2251, is unavailing. In Amchem, the Supreme Court held that the named plaintiffs in a class action asbestos injury suit could not adequately represent the single class because of the existence of competing interests in that class between members who were currently suffering from asbestos related medical injuries, whose goal was to receive immediate large payments, and members who had been exposed to asbestos but who had not yet suffered any medical injury, whose interest was in ensuring a large, future fund. Amchem, 117 S.Ct. at 2251. This case is clearly distinguishable from Amchem because, as has been demonstrated, the interests of the Subclass III members, including the Joel A. Objectors, far from being inexorably opposed, are in fact the same.

As this Court has recognized, "[i]n the end, the question whether named plaintiffs are adequate class representatives is one committed to the sound discretion of the district court." Malcham, 761 F.2d at 899-900. In this case, the district court rightly concluded that the named representatives fairly represented the subclass to which the Joel A. Objectors are members, and who all share the same interests. (JA 1442). See, e.g., Wilder v. Bernstein, 645 F. Supp. at 1312.

IV.

IN APPROVING THE SETTLEMENT, THE DISTRICT COURT SUFFICIENTLY EVALUATED THE ADEQUACY OF REPRESENTATION OF ALL CLASS MEMBERS

The Joel A. Objectors assert that the district court abused its discretion by failing to abide by what they portray as a general directive by the Supreme Court in Amchem that there be "structural assurances of fair and adequate representation for . . . diverse groups of individuals affected" by the settlement. (Obj. Br. at 38, quoting Amchem, 117 S.Ct. at 2251). According to the Objectors, such an assurance could not be accomplished without the court making an explicit finding that "each Subclass received adequate representation vis-a-vis the other Subclasses." (Obj. Br. at 38). This is a red herring. Nothing in Amchem requires a court in this type of case to make such specific findings when approving a settlement. In any event, the district court conducted a searching inquiry throughout this litigation and prior to approving the settlement and has repeatedly found that the Named Plaintiffs' representation of the entire class, including each subclass, was fully adequate.

The Amchem case concerned a completely different procedural and factual context than the one at present. In Amchem the parties negotiated a nationwide settlement creating a single, fixed fund which would provide the exclusive remedy for all asbestos claimants and potential claimants for all time. The parties then presented to the court, simultaneously, a complaint, answer, proposed settlement, and, solely for settlement purposes, a joint motion to certify a single class consisting of everyone in the United States who had been exposed (or whose relative had been exposed) to asbestos from a particular manufacturer but who had not filed any lawsuits as a result. This proposed class included those who knew they had been exposed to asbestos and had identifiable injuries, and those who were completely unaware of such exposure and for whom the extent of any future injuries was unknown and unknowable. Nine people who knew they had been exposed to asbestos but had not yet filed lawsuits were proposed as named plaintiffs, and counsel for the plaintiffs who had pending asbestos lawsuits purported to represent this class.

The Supreme Court understandably refused to uphold class certification in these circumstances. The Court held, first, in evaluating the certification of a class at the time of settlement, a court must apply a heightened level of scrutiny in ensuring that all Fed. R. Civ. P. 23 requirements are met, especially that the named plaintiffs adequately represent the class. The reasoning behind this is that otherwise there would be no structural assurance -- that would exist had there been a class certification analysis prior to settlement -- that the named plaintiffs share a common interest with absent class members and therefore can fairly enter into a settlement agreement that will bind them. 117 S.Ct. at 2248.

Applying this heightened scrutiny in Amchem, the Court found that the proposed class was not adequately represented, because it included members who were currently injured, who had an interest in immediate, large payments, and members who had not yet suffered injury, who had an obvious conflicting interest in smaller immediate settlement payments and a large future settlement fund. Id. The Court held that the class representatives for that class could not simultaneously advocate on behalf of both of these competing interests, id., which was demonstrated by the fact that the settlement favored the named plaintiffs who had already suffered asbestos-related injuries, at the expense of the interests of the absent class members who had not yet suffered from such injuries.

Given the extraordinarily irregular procedures presented in Amchem, it is arguable whether the decision has any relevance to Marisol, where Plaintiffs proceeded in the traditional sequence: first with class certification, then subclass certification, then completion of discovery, and on the eve of trial, a settlement.

While it is well-established that prior to approving a settlement, a court has a fiduciary duty to ensure that the interests of all class members were adequately represented during the settlement negotiations and that no interests were improperly compromised, the district court here amply fulfilled its duty. See Grant, 823 F.2d at 22; see also Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078 (2d Cir. 1995).

Many searching inquiries into the adequacy of the Named Plaintiffs occurred in this case: when the district court certified the class (JA 241-251); when this Court affirmed the class certification, Marisol A., 126 F.3d 372 (2d Cir. 1997); when the district court later certified the subclasses (JA 437-438); and again, when the district court issued its Opinion and Order concerning the Named Plaintiffs' standing to bring claims regarding the Pre-Placement Center. (JA 475-488). In each instance, the Named Plaintiffs were found adequate to protect the interests of the unnamed class members. Moreover, the court clearly considered the adequacy of the Named Plaintiffs when it stated that no claims of any subclass had been unfairly traded during settlement negotiations (JA 1371), and that the representatives of Subclass III had adequately represented the members of that subclass. (JA 1440-1442).

In addition, by finding it "unlikely that the class would have been decertified during or after trial," the court necessarily found that the Named Plaintiffs remained adequate representatives of the class through pre-trial settlement negotiations. (JA 1425). Nothing in Amchem suggests that where these searching inquiries have occurred in accordance with regular class certification and other procedures throughout the pendency of a class action lawsuit, a more searching finding must be made to ensure procedural safeguards during settlement negotiations.

Additionally, the Joel A. Objectors have failed to demonstrate that there was any antagonism among the subclasses or that the terms of the settlement make distinctions among the subclasses, which the Court in Amchem suggested also gives rise to greater judicial review of the adequacy of Named Plaintiffs. In fact, in affirming class certification, this Court conclusively rejected the argument that there was a conflict among class members, concluding instead that the Plaintiffs all share the same interest in an improved child welfare system. Marisol A., 126 F.3d at 378.[21]

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[21] This Court directed that the district court certify subclasses, not because there was any conflict among class members that required individualized representation, but rather as a mechanism for clarifying and categorizing claims

(continued...)

All of the cases cited by the Objectors involved some irregularity in settlement, none of which is present here, that served to trigger the need for heightened scrutiny, including: disproportionate allocation of settlement benefits to named plaintiffs; allegations that class counsel sacrificed the class' interest to assure sizable attorney's fees; and the absence of subclasses where antagonism among class members was sufficiently apparent to raise the prospect that some class members' interests might have been unfairly sacrificed. See, e.g., Holmes v. Continental Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983); Plummer v. Chemical Bank, 668 F.2d 654, 656 (2d Cir. 1982); In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1125-30 (7th Cir. 1979), cert. denied, 444 U.S. 870 (1979).

In contrast, the record here establishes that the settlement was negotiated by experienced counsel at arms-length, after almost three years of vigorous and contentious litigation. Objectors' unsupported suggestion that subclass representatives may not have been apprised of the course of negotiations -- a new argument not raised below -- is simply wrong. During settlement negotiations,

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(...continued)
and so that Defendants would be sufficiently apprised of what they were to defend against. Marisol A., 126 F.3d at 378-79.

Plaintiffs' counsel met with, discussed and shared drafts of settlement papers with the Next Friends of the Named Plaintiff class members, all of whom approved the settlement. (JA 1163).

The district court satisfactorily fulfilled its obligation to consider all factors relevant to whether the settlement was fair, reasonable and adequate, including whether Subclass III was adequately represented. See Malchman, 706 F.2d at 433; In re Warner Communications Securities Litigation, 798 F.2d 35, 37 (2d Cir. 1986); Handschu v. Special Servs. Div., 787 F.2d 828, 833 (2d Cir. 1986); E.E.O.C. v. Hiram Walker & Sons, Inc., 768 F.2d 884, 891 (7th Cir. 1985), cert. denied, 478 U.S. 1004 (1986); Whitford, 147 F.R.D. at 140. Because, as this Court found, there was no conflict of interest among class members, and because the terms of the settlement treat all class members equally, there was simply no need for the district court to conduct an even more scrupulous inquiry and make further findings regarding whether each subclass received adequate representation vis-a-vis the other subclass, given the record in this case. Throughout the course of this litigation, the district court made appropriate findings which cumulatively support its approval of the settlement, and then made further detailed and appropriate, through and searching findings when directly addressing approval of the settlement. The district court's approval of the settlement should not be disturbed.

CONCLUSION

After presiding over vigorously contested litigation for more than three years, the district court acted wholly within its discretion in approving the settlement reached by the parties. The six Joel A. Objectors, however, wish to proceed with their own class action, on some of the same issues that have been resolved by this lawsuit. They ask this Court to set aside the agreement because it bars new class actions for the next two years, even though all individual equitable and damage lawsuits are not affected.

The Marisol parties believe this settlement offers the best opportunity to bring a historically destructive child welfare system into conformance with the law, and to bring about significant and long-lasting benefits for all New York City children affected by this system. The district court has agreed. Plaintiffs urge this Court to affirm the decision of the district court and to allow this settlement to go forward, so that New York City children May finally begin to have the protection and services to which the law entitles them.

Dated: New York, New York
May 14, 1999

Respectfully submitted,

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Certificate of Compliance

I, Marcia Robinson Lowry, attorney of record for Plaintiffs-Appellees Marisol A., et al., do hereby certify that the foregoing brief complies with the type-volume limitation as set forth in Federal Rule of Appellate Procedure 32(a)(7). The total number of words in the brief is 13,922.

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