# 99-7218

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Intervenor-Plaintiffs-Appellants,

MARISOL. A, by her next friend, Rev. Dr. James Alexander Forbes, Jr., by her next friend Raymond 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, on their own behalf and behalf of and all others similarly situated, WALTER S., 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,

Plaintiffs-Appellees,

-against-

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 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 THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR STATE DEFENDANTS-APPELLEES**


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## Preliminary Statement

Intervenor-plaintiff (the "Joel A. plaintiffs"), a group of lesbian, gay, bisexual or transgendered youth in the New York City foster care system, appeal from a judgment and order of the United States District Court for the Southern District of New York (Ward, J.), approving separate class action settlement agreements between, the named plaintiffs ("the Marisol A. plaintiffs") and respectively, the City defendants and the State defendants.[1] They contend that the settlement agreements impose "oppressively overbroad restrictions on the class members' rights of access to the courts" in exchange for "illusory relief." (Appellants' Brief, ["App. Br."] p. 2).

## Questions Presented For Review

1. Whether the district court abused its discretion in rejecting the Joel A. plaintiffs' contention that the Marisol A. plaintiffs lacked standing to adequately represent their concerns, when the issues of standing and adequacy had already been resolved against them and were law of the case.

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[1] The State defendants are Governor George Pataki and John Johnson, Commissioner of the New York State Office of Children's Services ("State defendants"). The City defendants are Rudolph Giuliani, Mayor of the City of New York and Nicholas Scopetta, Commissioner of the New York City Administration for Children's Services ("City defendants").

2. Whether the district court abused its discretion in rejecting the Joel A. plaintiffs' challenge to the substance of the State settlement Agreement ("State Agreement") when the court found that they "d[id] not indicate how the State Agreement is illusory." (JA 1438)

3. Whether the district court abused its discretion in rejecting the contention of the Joel A. plaintiffs that the covenant not to sue in the State Agreement is unfair and oppressive when the covenant does not preclude individual suits for damages or equitable relief, and does not preclude class action equitable claims indefinitely, but only during a two year moratorium.

## Statement of the Case

### 1. The Marisol A. Litigation

Plaintiffs, through their "next friends", commenced this action ("Marisol A.") on September 13, 1995 against City and State defendants alleged to be responsible for the operation and oversight of the child welfare system in New York City. They sought relief on behalf of a class of children who allegedly have been deprived of their rights under the Due Process Clause of the United States Constitution, 42 U.S.C. § 1983, the Child Abuse Prevention and Treatment Act ("CAPTA"), the Adoption Assistance and Child Welfare Act, the Early Periodic Screening Diagnostic and

Treatment Act, the Americans with Disabilities Act ("ADA") and numerous other federal and state statutes.[2] Plaintiffs moved for class certification on September 14, 1995. The lawsuit and ensuing events were well publicized. (JA 1200-22).

The class as certified consists of "all children who are or will be in the custody of the New York City Administration for Children 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 or should be known to ACS." This Court sustained the certification of the class on September 26, 1997, but recommended the certification of Sub-classes. Marisol A. v. Giuliani, 126 F.3d 372 (2nd Cir. 1997).

The subsequently certified Sub-classes were defined as: (a) Sub-class 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, (b) Sub-class II - Children in families in which there is an open indicated report of abuse or neglect, (c) Sub-class III - Children in the custody of the Administration for Children's Services (JA 424-27).

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[2] We respectfully refer the Court to the district court's March 31, 1999 opinion for a fuller description of the litigation. (JA 1389-1448).

In July 1998, counsel for the Joel A. plaintiffs were formally informed of the ongoing Marisol A. litigation, advised of the potential to resolve their claims within it, and invited by plaintiffs' counsel to participate (JA 1224). They refused.

On the eve of a July 27, 1998 trial date, and after over two years of extensive pre-trial proceedings, the Marisol A. plaintiffs commenced settlement discussions. The discussions were well publicized and the trial was adjourned five times over a four month period (JA 69-71, 1219-20). Ultimately, the State and City settlement agreements at issue on this appeal were filed in the district court on December 2, 1998 (JA 1386). Notice of the settlement agreements was widely disseminated in December, 1998 (JA 782-84), and the district court held a fairness hearing on January 22, 1999.

2. The Joel A. Complaint

On January 15, 1999, only one week prior to the fairness hearing, the Joel A. plaintiffs filed their class action complaint in the district court on behalf of a proposed class in the New York City foster care system defined as "young people in the defendants' custody and care who either identify themselves as lesbian, gay, bisexual, or transgendered, or who have not self-labeled but are experiencing feelings of same-sex attraction or gender atypicality,

or who are confused about their sexual orientation or gender." (JA 801).

The Joel A. plaintiffs challenge the propriety of their placements and the adequacy of the services that ACS has provided to them (JA 800-912). They allege that State defendants violated their rights under 42 U.S.C. § 1983, the Due Process and Equal Protection Clauses of the United States Constitution, the Adoption Assistance and Child Welfare Act ("AACWA"), and the Early and Periodic Screening, Diagnosis and the Treatment program of the Federal Medicaid Act ("the Medicaid Act"). They seek damages and systemic equitable relief to protect them from alleged abuse and harassment because of their sexual orientation, to provide services, to provide adequate training to staff, and to provide proper placements (JA 874-76).

At the fairness hearing held by the district court, the Joel A. plaintiffs appeared and objected to the settlement agreements (JA 1350-85). At the conclusion of the hearing, the district court stated that it would approve the settlement agreements, that the parties should settle a judgment, and that a written opinion would follow (JA 1383). The Joel A. plaintiffs filed their notice of appeal on February 17, 1999 (JA 1386). The opinion approving the settlement agreements was issued and the

order and judgment dismissing the lawsuit was filed on March 31, 1999 (JA 1389-1452).

3. Relevant Terms of the State Settlement Agreement

The State Agreement requires the State defendants to undertake a host of corrective initiatives:

(1) The New York State Office of Children and Family Services ("OCFS") must establish and a staff regional office devoted primarily to monitoring and supervising ACS's provision of child welfare services within New York City ("NYCRO") (JA 758-60).

(2) OCFS has agreed to issue timely individual and annual fatality reports as required by Social Services Law § 20. These reports must be reviewed with ACS, and OCFS will direct corrective action that it deems appropriate (JA 761-63).

(3) OCFS must develop and implement a campaign to advertise the State Central Register ("SCR"), which is the child abuse/neglect hotline. Additionally, it must evaluate its policies regarding educational neglect; clarify its policies to SCR personnel regarding the acceptance of reports of domestic violence; continue to spot-check telephone calls to assure that calls are not screened out inappropriately; and continue to make reasonable efforts toward a goal of answering all calls within one minute (JA 763-65).

(4) OCFS must undertake one or more reviews of ACS case records in seven[3] areas to determine if ACS is complying with applicable laws and reasonable case work practice. If warranted by the findings of the case record reviews, OCFS will direct ACS to take corrective action designed to improve ACS's performance (JA 766-68).

(5) OCFS must continue to audit licensed congregate foster care facilities to review compliance with applicable regulations (JA 77).

(6) OCFS must use reasonable efforts to develop and implement a state-wide computer system to track important milestones for each child welfare case. OCFS also has agreed to develop and implement a computer training program and to provide plaintiffs with updates on its progress (JA 760-69).

(7) OCFS will monitor the training of child protective services caseworkers and supervisors and will establish procedures for evaluating ACS's current curriculum for such training. It has

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[3] (1) Child protective services cases; (2) open indicated cases; (3) cases receiving protective supervision in the home; (4) cases receiving mandated preventive services; (5) cases of children in placement for more than four years; (6) cases of children in placement with goals of returning home, adoption, or independent living; and (7) frequency of visitations to the home and child during investigations and while in custody.

agreed to recommend changes in training and to periodically discuss the status of risk assessment, as well as general compliance with the terms of the agreement with plaintiffs' counsel (JA 770-71).

The State Agreement is to remain in effect for 21 months (or in some instances 24 months) after the entry of an order of approval. Upon approval it provides for the dismissal with prejudice of all claims raised or which could have been raised in the Complaint and Pre-trial Order dated July 16, 1998, except that plaintiffs retain the right to seek judicial enforcement to the extent that State defendants fail to comply with the terms of the agreement (JA 774).

The State Agreement further provides that during its duration plaintiffs shall not sue the State defendants in a class action, or in an action for injunctive or declaratory relief, based upon any statutory or constitutional claim set forth in the Pre-trial Order, or for any individual claim(s) alleging systemic violations arising out of such claims based upon new facts and circumstances that occur during the duration of the agreement (JA 776).

Nevertheless, any individual class member is permitted to file an action on his own behalf for the purpose of seeking damages

and/or equitable relief necessary and appropriate to protect his rights.

4. The District Court's Opinion

In a well-informed decision, the district court (Ward, J.) summarized the history of the Marisol A. litigation, and the 26- year-old Wilder litigation(JA 1389-1448); summarized the City and State Settlement Agreements (JA 1401-11); and summarized the settlement approval process (JA 1411-15).

The court then evaluated the sufficiency of the settlement by employing six of the nine "Grinnell factors" (JA 1417) that it found to be applicable to the case, concluding that the State Agreement satisfied all six factors (JA 1416-17).

First, the court found that "this is a complex case involving many difficult and unsettled legal questions" in which plaintiffs asserted numerous federal and state law violations "raising concerns across the spectrum of child welfare issues" (JA 1417-18). It further found that the parties had incurred substantial expenses and that a trial would be extremely lengthy and costly with additional time needed to fashion a remedy if the plaintiffs prevailed (JA 1417-19).

Second, the court found that after a widely disseminated notice to the class, only eight comments were received and only

three raised objections to the settlement agreements. The court regarded the small number of objections as evidence that the agreements were fair, reasonable and adequate (JA 1419-20).

In considering the third through sixth Grinnell factors--including the stage of the proceedings and the risks of establishing liability and remedies, the court found that counsel had sufficient information to fully understand the complexity of the issues, the strengths and weaknesses of their respective cases, and the risks of going forward. The court noted that no person objecting to the settlement agreements suggested that an alternative remedy would be more appropriate (JA 1423), and concluded:

> with the beneficial terms of the Agreements and safeguards in place should the City or State fail to comply, the Court believes that these voluntary Settlement Agreements are more favorable then any remedy that could have been imposed by the Court at the end of a trial. Therefore, this factor weighs heavily in favor of the Court finding the Settlement Agreements to be fair, reasonable, and adequate (JA 1425).

The Joel A. plaintiffs filed the only substantive objections to the agreements claiming that they provided only "illusory relief". The court rejected this contention, finding "nothing about the terms of the Settlement Agreements to be

illusory" and further that the Joel A. plaintiffs "do not indicate how the State Agreement is illusory" (JA 1438).

In addition, the court rejected the contention that the covenants not to sue and the releases in the Settlement Agreements were "unfair and oppressive." After giving these provisions careful consideration, it found that because they provided an "Open door policy," that is, a means for individual plaintiffs to seek redress for their specific injuries, it was reasonable for the agreements to require a limitation on class action suits during their duration while the parties work together to develop a better child welfare system (JA 1440).

The Joel A. plaintiffs' final objection was that since none of the named Marisol A. plaintiffs were gay, lesbian, bisexual or transgendered, they could not adequately represent their concerns. The court found, however, that these plaintiffs were included within the Marisol Sub-class III and were, in fact, adequately represented. The court characterized this objection as a belated attempt to challenge the adequacy prong of class certification, and noted that this issue had been resolved and affirmed by this Court. Marisol A. v. Giuliani, 929 F.Supp. 662 (S.D.N.Y. 1996), aff'd, 126 F.3d 373 (2d Cir. 1997). While recognizing that the Joel A. plaintiffs have concerns regarding

their sexual orientation, the court noted that "there are numerous children who have specific concerns regarding personal characteristics, attributes, conditions, or life positions such as teenagers with young children, or children who face difficulties in placement due to race or religion." It found, however, that the named plaintiffs in Marisol A. adequately represent all of these children and have standing to do so (JA 1440-42).

Concluding that the State Agreement was fair, reasonable and adequate, the district court approved the agreement (JA 1448).

## Summary of the Argument

The district court's approval of the State Agreement is entitled to deference. The district court was in a unique position to evaluate the fairness, adequacy and reasonableness of the State Agreement given its extensive familiarity with this and related cases challenging various aspects of the New York City child welfare system. The court carefully and properly considered the relevant Grinnell factors and concluded that the settlement was a product of arms-length negotiation and that it provided a more favorable remedy than that which could have been imposed after a trial.

The Joel A. plaintiffs' challenge to the named plaintiffs' representation of the members of Sub-class III is both

baseless and untimely. This Court has affirmed the adequacy of representation. Similarly, the standing issue has already been decided by the district court. Both matters are law of the case. Moreover, even if this challenge was not barred, it is untimely. The Joel A. plaintiffs were or should have been well aware of this ongoing, well-publicized litigation. They had more than an ample opportunity to participate in the litigation at an earlier stage and to raise their objections.

In all events, the contentions of the Joel A. plaintiffs regarding adequacy of representation and standing are baseless. They have failed to produce any relevant authority to demonstrate how the district court erred: (1) in its application of any of the relevant Grinnell factors, or (2) in its finding that the Marisol A. plaintiffs were adequate class representatives including the claim that the named Marisol A. plaintiffs failed to pursue this litigation vigorously on behalf of members of Sub-class III.

Similarly, the Joel A. the district court properly found that the Joel A. plaintiffs had failed to indicate how the State Agreement is "illusory". Their "Amended Memorandum in Support of Motion to Intervene and Objections to Proposed Class Action Settlement" does not indicate the contrary and supports the district court's conclusion.

Finally, the Joel A. plaintiffs' characterization of the State Agreement's release and covenant not to sue provisions as "onerous" and "exculpatory" is meritless. The State Agreement provides for the dismissal of all claims with prejudice that were or could have been raised by the Marisol A. plaintiffs, which is nothing more than the recognition of the res judicata effect generally given to settlement agreements. Furthermore, it places a two- year moratorium on class action and systemic lawsuits so that the State defendants can carry out their obligations under the agreement without the added burdens of addressing class action litigation. Importantly, the State Agreement does not preclude any of the Joel A. plaintiffs from filing suit, as they have already, to redress their individual injuries.

## ARGUMENT

### THE DISTRICT COURT'S FINDING THAT THE STATE AGREEMENT IS FAIR, ADEQUATE AND REASONABLE IS ENTITLED TO DEFERENCE

Fed. R. Civ. P. 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court." Although Rule 23(e) does not establish a specific standard by which to evaluate a proposed settlement, the universally applied standard is whether the settlement is fair, adequate and

reasonable. See, County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1323 (2d Cir. 1990).[4]

On this appeal, this Court's review is limited to determining whether the district court abused its discretion in approving the State Agreement. See, Handshu v. Special Services Division, 787 F.2d 828, 833 (2d Cir. 1986); In re Warner Communications Securities Litigation v. Warner Communications, 798 F.2d 35. Moreover, where, as here, the district court "approves a settlement based upon well-reasoned conclusions, arrived at after a comprehensive consideration of the relevant factors,the settlement is entitled to deference upon review." Id. (citing City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)}.

The district court in this case was in a unique position to evaluate the State Agreement with an informed understanding of its terms. Judge Ward has presided over litigation raising issues related to the New York City child welfare system for over twenty years (JA 1394-96). A review of the court's comprehensive opinion

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[4] Rule 23(e) does not give the court "the power... to modify a proposed consent decree and order its acceptance over either party's objection." Evans v. Jeff D., 475 U.S. 717, 726-27 (1986); see also Huertas v. East River, 813 F.2d 580, 581 (2d Cir. 1987). The settlement must stand or fall as a whole. Cotton v. Hinton, 559 F.2d 1326,1333 (5th Cir. 1989); In re Warner Communications Securities Litigation v. Warner Communications, 798 F.2d 35, 37 (2d Cir. 1986).

approving the State Agreement demonstrates that it carefully considered the relevant Grinell factors and correctly reasoned that the objections of the Joel A. plaintiffs were baseless.

**A. Prior Determinations Of The Adequacy of Class Representation And Standing To Raise The Classwide Issues Sought To Be Raised By The Joel A. Plaintiffs Should Not Be Disturbed**

The Joel A. plaintiffs argue on this appeal, as they did below, that because none of the Marisol A. named plaintiffs are gay, lesbian, bisexual or transgendered, and have not been denied a safe placement because of bias-related victimization and discrimination, they cannot and did not adequately represent the Joel A. plaintiffs' concerns in reaching agreement with the State defendants. For the same reasons, they also argue that the Marisol A. plaintiffs lack standing to represent them. These arguments were rejected below and similarly should be rejected by this Court. The Joel A. plaintiffs' failiure to challenge the district court's prior approval of class certification which was approved by this court renders that determination law of the case. Moreover, the Joel A. plaintiffs eleventh-hour objections should be rejected as untimely and without merit.

**(i) It is the law of the case that the Marisol A. plaintiffs adequately represent the class and have standing to do so.**

The district court correctly reasoned that by challenging the State Agreement on the ground that the existing named plaintiffs cannot adequately represent their concerns, the Joel A. plaintiffs are attempting to circumvent the law of this case (JA 1441). Marisol v. Giuliani, 126 F.3d (2d Cir. 1997). A determination of the adequacy of representation is a matter left to the sound discretion of the district court. Malchman v. Davis, 761 F.2d 893, 899 (2d Cir. 1985), cert.denied, *sub nom*, Mountain Plains Congress of Seniors Organization v. Malchman, ____ U.S. ____ (1986). Moreover, a decision made at a previous stage of the litigation which could have been challenged in an ensuing appeal, but was not, becomes law of the case and the parties are deemed to have waived the right to challenge that decision. See, County of Suffolk v. Stone & Webster Engineering Corp., 106 F,3d 1112, 1117 (2d Cir. 1997); Fogel v. Chestnutt, 668 F.2d 100, 109 (2d Cir. 1981), cert. denied, 459 U.S. 828 (1982). Consequently, the Joel A. plaintiffs'challenge to adequate representation is foreclosed.

Judge Ward was not required to revisit the issue of standing at the fairness hearing. He long ago rejected arguments similar to those that the Joel A. plaintiffs make here (see App. Br. pp. 46-47). For example, he rejected the City defendants'

argument in their motion to vacate the Interim Stipulation and Order concerning Overnights at Pre-placement, that because none of the Marisol A. named plaintiffs had ever stayed in overnight pre-placement, they lacked standing to raise the claim on behalf of those who had (JA 470-88).

The court found that the Marisol A. plaintiffs had standing to represent all members of the class who alleged injuries resulting from an inappropriate placement (JA 479). It further decided that the harm from inappropriate placements need not be identical for each class member (JA 483). Nor is there a requirement that plaintiffs must have a named plaintiff in each and every placement that they allege is harmful (JA 484). The fact that the named plaintiffs "suffered the same general injury suffered by all the class members,...[is] sufficient to confer standing on them to represent all members of the class." Id. (citing Selzer v. Board of Education, 112 F.R.D. 176, 183 (S.D.N.Y. 1986).

The district court previously held that the Marisol A. plaintiffs had standing to represent claims regarding similar placements and placements where they ultimately could be assigned (JA 484). That holding, which was wholly supported by counsel for the class in the district court, is law of the case. See Virgin Atlantic Airways, Ltd. V. National Mediation Bd., 956 F.2d 1245,

1255 (2d Cir. 1992) ("where litigants have battled for the court's decision, they should neither be required, nor without good reason to battle for it again [citations omitted]") Accordingly, because the Joel A. plaintiffs are indisputably members of Sub-class III and they are alleging an injury which can be traced to their allegedly inappropriate placements, they may not relitigate the issue of standing.

**(ii) The Joel A. Plaintiffs have been inexcusably dilatory in raising their objections**

As the record shows, the Joel A. plaintiffs had ample opportunity to intervene in this lawsuit long before the fairness hearing in January 1999. They have been in the care of ACS for periods ranging between four and eleven years. (JA 827-51). Indeed, Mr. Douglas Lasdon, one of the counsel for the Joel A. plaintiffs (JA 1345), was aware of the issues confronting his clients as early as the summer of 1994 (JA 900-05). Moreover, the Joel A. plaintiffs should have been aware of the pendency of this well-publicized lawsuit when it was filed in December 1995 (JA 1204-1217). Nevertheless, they waited until the eleventh hour to seek to intervene, and failed to present good reason to the district court for their undue delay in coming forward:

> The Court:... All of the support in your complaint seems to date back four or five years ago.
>
> Mr. Falcone: Your Honor, we conducted interviews with expert witnesses. We read a number of articles. We were drafting the complaint. We were interviewing kids in the system.
>
> The Court: You say there was an emergency and you lie back and you do nothing, absolutely nothing to bring the matter to the court's attention. You wait, you wait, you wait, and when you are good and ready, you come here with a complaint and now claim the building's on fire.... (JA 1373).

In addition, despite the Joel A. plaintiffs' repeated references to "severe and irreparable harm", (App. Br. p. 12), "continuing devastation", (Id. at p.12) and "desperate circumstances of the Class members," (Id. at 27), it remains unclear why they did not come forward earlier. They knew that this class action might resolve many of their claims and were advised of the potential problems of proceeding on their own behalf because Marisol A. sub-class III encompasses the needs of gay and lesbian foster children (JA 1170-1172). They were encouraged to participate in this litigation and even had planned to file their own suit much earlier (JA 1349). Moreover, the trial was adjourned five times over a four-month period so that the well publicized

settlement negotiations could continue. In fact, even after coming forward, the Joel A. plaintiffs have not sought any type of preliminary injunctive relief from the district court to address each of their allegedly "desperate" situations.

Given the length of time that has passed from the time that the Joel A. plaintiffs were aware of the pendency of this lawsuit, and their failure to participate at an earlier stage, "an inference of a deliberate strategy of tactical disruption and delay seems inexorable." See In re Ivan Boesky Securitites Litigation, 948 F.2d 1358 (2d Cir. 1991).

**(iii) Even if the Joel A. Plaintiffs' objections are timely, they lack merit**

The Joel A. plaintiffs' contention that the district court failed to ensure that unnamed class members were vigorously represented during the course of the settlement negotiations are without merit. However, they have failed to support that contention factually, and their reliance upon Justice Ginsburg's concurring opinion in Matsushita v. Electrical Industrial Co. v. Epstein, 516 U.S. 367, 395 (1996) and other case law is misplaced.

In Matsushita, the federal district court declined to certify a class and dismissed the complaint. Contemporaneously, a settlement was reached in a related state court action. The

question presented was whether a federal court could withhold full faith and credit from the state court judgment approving the class action settlement which included a global release. Justice Ginsburg, who was concerned about collusion, stated only that since the state court never made a finding regarding adequate representation, the question was left unresolved and open for airing on remand.

Here, however, the district court determined adequacy of representation twice--once at the time the class was certified and again at the time of the fairness hearing. The court specifically found that all sides vigorously litigated the case up to the filing of the Pre-trial Order and that the State Agreement was not the product of collusion, but was negotiated at arms length (JA 1426).

Similarly, the Joel A. plaintiffs' reliance upon Plummer v. Chemical Bank, 668 F.2d 6543, 658 (2d Cir. 1982), Papilsky v. Berndt, 466 F2d 251, 260 (2d Cir. 1972), and National Superspuds, Inc. v. New York Merchantile Exchange, 660 F.2d 9 (2d Cir. 1981), is misplaced. In Plummer, the district court found that the settlement was deficient under the Grinnell criteria and it was uncertain about the adequacy of representation. In Papilsky, there was compelling evidence that the representation was not vigorous because the plaintiffs failed to answer interrogatories. Finally,

in National Superspuds, counsel for the class members who had liquidated contracts conceded that the class did not purport to represent claims of objectors based upon unliquidated contracts. Given that limitation, even if the case had been tried, the judgment would not have bound claims based upon unliquidated contracts.

None of the foregoing circumstances can be found here, where all relevant Grinnell factors were met, the distrcit court found that class representation was vigorous at all times, and the allegations of Marisol A. Sub-class III members regarding inappropriate placements, lack of services and lack of monitoring and supervision by State defendants are substantially identical to those of the Joel A. plaintiffs in their complaint.

The Joel A. plaintiffs also rely on Amchem Products v. Windsor, 521 U.S. 591 (1997), a products liability suit. In that case the Supreme Court affirmed the disapproval of a class action settlement because class representation was inadequate from the outset and because the district court had never separately considered the diverse and overlapping interests of the class or the adequacy of representation of the class prior to approving the settlement. In fact the class action settlement was presented to the district court as a *fait accompli* and was submitted

contemporaneously with the pleadings and the motion for class certification, causing the Supreme Court to observe that "the action was never intended to be litigated." Id. at 601.

By contrast, the motion for class certification in this case was filed shortly after the commencement of the lawsuit, decided by the district court in 1996, and affirmed by this Court in 1997. Moreover, the State Agreement was not presented to the district court until December 2, 1998, well after the completion of discovery and the submission of a Pre-trial Order.

The Joel A. plaintiffs further argue (App. Br. 34) that the structure of the State Agreement does not show that the interests of Sub-class III were adequately represented; that separate counsel was not appointed to represent subclass III; that Judge Ward did not make findings regarding whether the members of sub-class III were adequately represented during the settlement negotiations; and that the district court erroneously shifted the burden of proof regarding the fairness of the settlement to the Joel A. plaintiffs.

Contrary to their contentions, however, the Joel A. plaintiffs do not provide any authority which demonstrates that it is an abuse of discretion for a district court to approve a settlement which is not structured to separately address the claims

of a subclass if it is satisfied, as it was here, that the overall settlement addresses the claims of the subclass. In its review of the State Agreement, the district court was well aware of the claims that the settlement was intended to reach. In fact, its decision approving the creation of subclasses sets forth a detailed description of the claims of each subclass and the named plaintiffs who represent each subclass (JA 424-427).

Similarly, the Joel A. plaintiffs do not cite any authority that requires each subclass to be represented by separate counsel. Nor do they contest, except in conclusory terms, the district court's finding that Sub-class III was adequately represented by plaintiffs' counsel during the settlement negotiations. The mere fact that their current counsel do not agree with the terms reached by class counsel, is not sufficient to justify a finding that the Joel A. plaintiffs lacked adequate representation.

**B. The Relief Provided By The State Agreement Is Intended To Benefit All Marisol A. Class Members And the Joel A. Plaintiffs Have Not Demonstrated That It is "Illusory"**

The Joel A. plaintiffs contend that the relief provided by the State Agreement is "illusory" (App. Br. p. 28), but the district court correctly rejected that claim.

The Marisol A. plaintiffs alleged that the State defendants violated the Due Process Clause of the United States Constitution and the AACWA by failing to oversee, train, enforce, monitor and supervise the City defendants' operation of their local child welfare system in a variety ways including the monitoring and oversight of assessments, planning, services, and appropriate placements. The State Agreement addresses these claims by providing State oversight in each of the areas where it allegedly was deficient.

Nonetheless, the Joel A. plaintiffs assert that the State Agreement "fails to provide any direct, concrete or reasonably certain relief to members of Marisol Subclass Three." (App. Br. p. 60.) They further contend that the district court erred when it observed that they had failed to indicate how the State Agreement was illusory, id. , and in support of this contention they refer this Court to pages 11-12 of their Amended Memorandum in Support of Motion to Intervene and Objections to Proposed Class Action Settlement ("Plaintiffs' Memorandum in Support") (doc. no. 212). Id. However, a review of that document supports the district court's conclusion that they failed to indicate how the State Agreement was "illusory."

Indeed, at page 12 of that Memorandum, the Joel A. plaintiffs acknowledge that the State Agreement provides that OCFS "among other things, oversee, monitor, supervise, review, evaluate, discuss, recommend, issue reports, provide information, advertise, implement a state wide computer system, and even, after completing case record reviews and determining that ACS is in 'substantial non-compliance with applicable laws, regulations, and/or reasonable case work practice... direct ACS to take Corrective Action designed to improve ACS's performance in the specific areas of non-compliance'". Plaintiffs' memorandum in support, p. 12.(doc. no.212). Given this admission, it is difficult to understand how the Joel A. plaintiffs can claim that the State Settlement is illusory.

Their complaint that the twenty-one months required to complete the case record reviews is too long does not support a claim that the State Agreement is "illusory"; it merely demonstrates a disagreement with one term of the agreement. Moreover, although the Joel A. plaintiffs complain that nothing in the State Agreement obligates State defendants to take any action to address the "severe and irreparable harm to which both the *Joel A.* Class and the *Marisol A.* Class are now subjected on a daily

basis," (id.), they do not explain specifically how the terms of the State Agreement fail to address that harm. In fact, it is the intent of the parties that the State Agreement will do exactly that (JA 1158-60).

**C. The Provisions In The State Agreement Finally Resolving Certain Classwide Claims And Provision Creating A Moratorium On The Filing Of New Classwide Or Systemic Relief Claims Does Not Deprive The Joel A. Plaintiffs Of Their Right To Redress Any Alleged Harm To Them Or To Any Other Individual Marisol A. Class Members**

The Joel A. plaintiffs correctly state that the State Agreement's covenant not to sue and release provisions preclude them from filing a class action or from seeking systemic relief based upon new facts or circumstances during the two year duration of the State Agreement.(App. Br. at 39) They contend, however, that the provisions are not fair or reasonable because they compromise their rights to obtain relief from violations of "vital legal interests" (App. Br. p. 38), and "effectively license the City and State defendants to commit systemic violations of Marisol A class members legal rights over the next two years" (App. Br. p. 41). These allegations are baseless.

First, the "release" in the State Agreement, at Paragraph ¶ 36, is intended to reflect the res judicata effect of the State Agreement upon the class claims resolved by that agreement and nothing more. This provision is not novel. It is well settled that a final consent decree is entitled to res judicata effect. See Amalgamated Sugar Co. v. NL Industries, Inc., 825 F.2d 634 (2d Cir. 1987), cert.denied sub nom, Rothenberg v. Amalgamated Sugar Co., 484 U.S. 992 (1988). " There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 874 (1984).

Moreover, unlike J.A. Shults v. Champion Int'l Corp., 821 F. Supp. 520 (E.D. Tenn. 1993), relied upon by the Joel A. plaintiffs, the "release" in the State Agreement does not resolve any class action claim or claim for systemic relief in perpetuity. Nor does the State Agreement provide a "waiver of future civil rights violations," as the Joel A. plaintiffs intimate. (App. Br. p. 42.) The State Agreement provides a two-year moratorium on class action lawsuits. If the alleged class or system-wide violations in Marisol A. continue to occur after twenty-four months, a new class action can be filed.

Moreover, the State Agreement does not bar claims raised by the individually named Joel A. plaintiffs for monetary damages and injunctive relief if that relief is tailored to their individual injuries. The Joel A. plaintiffs are entitled to pursue individual claims in their current lawsuit if those claims are not jurisdictionally barred or time barred.

Finally, the Joel A. plaintiffs argue that the permissive aspects of the State Agreement are inadequate because "the 100,000 indigent children who comprise the Marisol class obviously will not be able to engage counsel with the resources to prosecute any matter requiring, for example, extensive discovery or expert analysis and opinion." (App. Br. p. 51). They are wrong, however, on two counts. First, there is no evidence that all members of the Marisol A. class are indigent. Second, even if some members are indigent, there are counsel, including current Joel A. plaintiffs counsel, who have been willing to assist them. The record shows that Legal Aid's Juvenile Rights Division represents the overwhelming majority of children in cases before the New York City Family Court involving child abuse and neglect, terminating of parental rights, status offenses, delinquency and other proceedings affecting children's rights and welfare (JA 1329). The Legal Aid Society's representation of children continues without interruption

as long as the children remain in the system (JA 1330). Moreover, Children's Rights, Inc. and Lawyers for Children, counsel for Marisol A. class members, and other children's rights groups stand ready, as they always have, to represent all children who need assistance.

The reluctance of the State defendants to settle this class action without a promise that they would not be sued again by this class before they had an opportunity to fulfill their obligations under the State Agreement is perfectly logical. There would have been no incentive to settle if, as soon as the State Agreement was signed, the same defendants could be sued again by members of the same class. The intent was to allow OCFS an opportunity to devote its time to compliance activities, not to more litigation.

## CONCLUSION

**FOR ALL OF THE FOREGOING REASONS, THE ORDER AND JUDGMENT OF THE DISTRICT COURT APPROVING THE STATE AGREEMENT ON THE GROUNDS THAT IT IS FAIR, REASONABLE AND ADEQUATE SHOULD BE AFFIRMED IN ALL RESPECTS**

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May 17, 1999

Respectfully submitted,

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## Certificate of Compliance

I, JUDITH T. KRAMER, attorney of record for State Defendants Appellees Governor George Pataki and Commissioner John Johnson, 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 foregoing brief is 6740.

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