UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF OBJECTING TO THE PROPOSED SETTLEMENT

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The Legal Aid Society, Lawyers For Children Inc. and The Children's Law Center of New York (together the "Children's Advocates") submit this Memorandum in support of their Motion to Intervene in the above matter for the purpose of participating in the proceedings related to the Court's review of the settlement proposed by Class Counsel and the State of New York, the New York State Office of Children and Family Services ("OCFS") and OCFS' Acting Commissioner (the "Proposed Settlement"). Attached as Exhibit A are the Children's Advocates' Objections to the Proposed Settlement. The Children's Advocates additionally submit the Affirmations of Tamara A. Steckler, Karen J. Freedman and Karen P. Simmons in support of their Motion to Intervene. The Children's Advocates respectfully request that they be permitted to speak at the Fairness Hearing on August 5, 2016.

BACKGROUND

The Children's Advocates are three institutions that have successfully represented children in the New York City foster care system in Family Court, in appeals, and in class action litigation for over five decades and are considered the gold standard of child representation nationwide. The model and work accomplished by these offices is replicated across the country. Affirmation of Karen J. Freedman ("Freedman Aff."), ¶¶ 5-11; Affirmation of Tamara A. Steckler ("Steckler Aff."), ¶¶ 4-5; Affirmation of Karen P. Simmons ("Simmons Aff."), ¶¶ 5-6. Together, the Children's Advocates represent the vast majority of children in foster care. Freedman Aff., ¶ 12; Steckler Aff., ¶¶ 15-17; Simmons Aff. ¶ 6. As such, they are intimately familiar with the complexities and challenges of the foster care system. The Children's Advocates' extensive work on behalf of children in foster care enables them to present to this Court an independent view that uniquely and truly represents the interests of the putative class in this action.

A. The Legal Aid Society of New York

The Legal Aid Society ("LAS") was originally founded in 1876 and adopted its present name in 1911. Steckler Aff., ¶ 3. LAS's mission is to represent low-income individuals and families throughout New York City. *Id.* At present, LAS has some twenty-seven (27) branch offices and almost a thousand lawyers serving that mission. *Id.* LAS's three practices represent almost 300,000 New Yorkers per year.

LAS' Juvenile Rights Practice ("JRP") was established in 1962 as the Juvenile Rights Division ("JRD"), simultaneously with the creation of the New York City Family Court. *Id.*, ¶ 4. JRP was the first organization in the country to represent the interests of children in a juvenile court, and it has served as the premier model for the development of similar programs nationwide. *Id.* At present, JRP's 360 lawyers, social workers, paralegals and support staff actively represent approximately 34,000 children each year in New York City's Family Court. *Id.*

In addition, JRP has developed several related practice areas that enhance its ability to represent its clients. *Id.*, ¶ 5. JRP's Juvenile Services Unit, staffed by more than fifty (50) social workers, provides assistance with the educational, developmental, familial, social and psychological problems which render the legal concerns of its juvenile clients more complex. *Id.*, ¶ 6. JRP's Kathryn A. McDonald Education Advocacy Project provides early intervention, special education, general education and school suspension advocacy for children who are involved in child protective cases, juvenile delinquency cases and "persons in need of supervision" cases in Family Court. *Id.*, ¶ 8. JRP's Appeals Unit represents JRP clients in their appeals from Family Court proceedings, numbering approximately 280 appeals each year. *Id.*, ¶ 7. Through its robust appellate advocacy, the Appeals Unit has played a key role in the development of the law affecting children and families throughout New York State. *Id.*

JRP additionally has litigated landmark class actions on behalf of children to reform the child welfare and juvenile justice system through its Special Litigation and Law Reform Unit ("SLLRU"). *Id.*, ¶ 9. Examples include *A.M., et al. v. Mattingly*, 10 Civ. 2181 (E.D.N.Y.), which remedied a pattern of children in foster care languishing in restrictive, acute care psychiatric hospitals although medically ready for discharge by establishing institutional procedures to ensure that New York City's Administration for Children's Services ("ACS") and its contracted foster care agencies promptly secure appropriate placements for those children; *J.G., et al. v. Mills, et al.,* 04 Civ. 5415 (E.D.N.Y.), which ensured that children leaving juvenile justice placement or detention would promptly be enrolled in appropriate New York City Department of Education schools and receive any special education services to which they were entitled; *D.B., et al. v. Richter*, Index No. 402759/11 (N.Y. Sup. Ct.), which addressed the problem of youth being discharged from foster care to homelessness by establishing mechanisms to ensure that ACS and its contracted foster care agencies assist youth to secure stable housing prior to discharge and supervise discharged youth until they turn 21; *G.B., et al. v. Carrión, et al.*, 09 Civ. 10583 (S.D.N.Y.), which ended the improper use of physical restraints and inadequate mental health services in several NYS OCFS juvenile facilities; *John F. v. Carrión*, Index No. 407117/07 (N.Y. Sup. Ct.), which ended the indiscriminate shackling of youth by OCFS during transport to and from court; *Alexander A., et al., v. Novello, et al.*, 210 F.R.D. 27 (E.D.N.Y. 2002), which required reasonable promptness of placement in residential treatment facilities for children with psychiatric disabilities; *Carlos T. v. Reinharz*, Index No. 404514/98 (N.Y. Sup. Ct.), which ended NYC Corporation Counsel's practice of repeatedly summonsing to court children who had not been formally charged; *Jamie B., et al., v. Hernandez, et al.*, Index No. 401872/98 (N.Y. Sup. Ct.), which addressed non-secure detention capacity; *Jesse E. v. N.Y.C. Dept. of Soc. Servs, et al.*, 90 Civ. 7274 (S.D.N.Y.), which enforced statute and regulation

requiring that siblings in foster care be placed together in the same home unless contrary to their best interests; *Doe v. N.Y.C. Dept. of Soc. Servs.*, 670 F. Supp. 1145 (S.D.N.Y. 1987), which ended practice of overnighting children who had been removed from their homes in city offices. Steckler Aff., ¶ 10.

In *Nicholson v. Williams*, a case which dramatically altered the landscape of child welfare in New York, JRP and Lawyers for Children (LFC) were appointed by the court to represent a subclass of children after the court determined that subclasses were necessary to avoid possible conflicts of interest between the plaintiff mothers and children. *Nicholson v. Williams,* 205 F.R.D. 92 (E.D.N.Y. 2001) (challenging pattern of removing children from their mothers based solely on allegations that mother was victim of domestic violence). The Court in *Nicholson* recognized JRP and LFC as the authoritative legal representatives for youth in care and whose presence in the case was necessary to ensure that the Court heard from the children. Steckler Aff., ¶ 11. JRP has also been appointed to represent plaintiff children in federal cases concerning the due process rights of kinship foster families. *See, e.g., A.C. v. Mattingly*, 07 Civ. 3308 (S.D.N.Y.).

In *Marisol A. ex. Rel. Forbes v. Guiliani*, the Court granted the Juvenile Rights Practice amicus status. *Marisol A. ex. Rel. Forbes v. Guiliani,* 185 F.R.D. 152 (S.D.N.Y. 1999). In *Wilder v. Bernstein*, the court permitted The Legal Aid Society-Juvenile Rights Division and Lawyers For Children to intervene as of right for the limited purpose of arguing the scope of a stipulation of settlement at a contempt proceeding. *Wilder v. Bernstein*, No. 78 CIV. 957 (RJW), 1994 WL 30480, *4 (S.D.N.Y. Jan. 28, 1994). Steckler Aff., ¶ 12.

LAS has been widely acknowledged for its work on behalf of children in foster care. This recognition includes, but is not limited to:

- New York State Bar Association's Howard A. Levine Award for Excellence in Child Welfare (JRP managers have won this award numerous times);

- New York State Bar Association's Award for Outstanding Achievements in Promoting Standards of Excellence in Mandated Representation;
- New York City ACS's LGBTQ Foster Care Leader;
- National Association of Counsel for Children's Outstanding Legal Advocacy Award; and
- The New York City Bar Kathryn A. MacDonald Award for Excellence in Service to Family Court (JRP staff and managers have won this award numerous times).

Steckler Aff., ¶ 15.

Tamara Steckler, JRP's Attorney-in-Charge, is a member of the NYC Administration for Children's Services Family Court Advisory Committee and co-chair of ACS's Family Resources Sub-Committee, Juvenile Justice and Child Welfare Advisory Council. She is also a member of the New York State Permanent Judicial Commission on Justice for Children; the New York State Bar Association's Task Force on Family Court and their Committee on Children and Families; the American Bar Association's Right to Counsel Group; the Family Courts of New York City's Executive Committee for Child Welfare; the New York City Juvenile Justice Advisory Council; the New York City Task Force on Disproportionate Minority Contact in Juvenile Justice; the New York State Committee on Disproportionate Minority Contact; a Statewide Multidisciplinary Child Welfare Collaborative; a steering committee member of the National Association of Public Defenders and chair of their Juvenile Justice Committee; an advisory board member and co-chair of the National Juvenile Defender Center, Northeast Regional Center; a board member of the National Juvenile Defender Center; and a former board member of the National Association of Counsel for Children. She is a former member of the New York State Task Force on Orders of Protection for Juveniles; Governor Patterson's Task Force on Transforming Juvenile Justice; and Chief Judge Kaye's New York State Task Force on the Future of Probation. Finally, she was a Clinical Professor of the Children's Rights Law Clinic at New York University Law School. Steckler Aff., ¶ 14.

B. Lawyers For Children Inc.

Lawyers For Children Inc. ("LFC") is a not-for-profit law firm that specializes in representing children in the New York City foster care system. Freedman Aff., ¶ 5. Every child represented by LFC is assigned an attorney and a licensed social worker in order to most effectively develop and represent a position based upon the child's wishes, legal interests and (depending upon the age and maturity of the child) best interests. LFC currently employs twenty-eight lawyers and twenty-two social workers. Freedman Aff., ¶¶ 3, 6.

For over twenty-five years, LFC has been awarded annual contracts by the New York State Office of Court Administration, pursuant to which LFC is assigned to represent individual foster care children in proceedings before the New York Family Court. *Id*., ¶ 6. Over this period, LFC has represented more than 30,000 children in the New York foster care system. LFC is currently representing approximately 3,000 such children.

LFC has also engaged in class action litigation and the negotiation of reform on behalf of children in foster care in New York City. *See Marisol A. v. Giuliani*, 95 Civ. 10533 (S.D.N.Y.) (addressing virtually every aspect of New York City's foster care system); *Nicholson v. Scoppetta*, 344 F.3d 154 (2d Cir. 2003) (addressing ACS's treatment of children whose mothers are victims of domestic violence); and *D.B. v. Richter*, Index No. 402759/11 (N.Y. Sup. Ct.) (ending ACS practice of discharging foster youth to homelessness). Freedman Aff., ¶ 10. LFC and its Executive Director have also received many awards and acknowledgements for their work on behalf of children in foster care. LFC and/or its Executive Director have received:

- New York State Bar Association's Howard A. Levine Award for Excellence in Child Welfare
- New York State Bar Association's Citation for special Achievement in Public Service
- New York State Bar Association's Award for Outstanding Achievements in Promoting Standards of Excellence in Mandated Representation

- American Bar Association's Hodson Award
- New York City ACS's LGBTQ Foster care Leader, Outstanding Community-Based Organization Award
- National Association of Counsel for Children's Outstanding Legal Advocacy Award
- Association of Family and Conciliation Courts' Innovative Program Award
- CUNY's HOPE (Hands on Promoting Excellence) New York Award

Id., ¶ 11.

C. The Children's Law Center of New York

The Children's Law Center of New York ("CLC") is a not-for-profit law firm founded in 1997. Simmons Aff., ¶ 5. Since 1997, CLC's child advocate attorneys have been dedicated to representing children in a wide range of court proceedings, including custody, guardianship, visitation, domestic violence, paternity, child support, and child protective cases. *Id.* Practicing throughout New York City, CLC staff are intimately familiar with the complexities and challenges of the child welfare system. *Id.* ¶ 11.

Since 1997, CLC has been awarded annual contracts by New York State's Office of Court Administration, pursuant to which it is assigned to represent individual children in proceedings before the New York City Family Court. *Id.* ¶ 10. In December of 1997, CLC began accepting cases in the Brooklyn Family Court. *Id.* ¶ 6. In its first fiscal year, CLC represented over 2,000 children. *Id.* Since then, CLC has expanded its operations to Queens, the Bronx, and Staten Island, providing a strong and effective voice to over 100,000 children since its inception. *Id.* Each child represented by CLC is assigned an attorney who works collaboratively with a social worker team member, who work together to represent the child's wishes and legal interests. *Id.* ¶ 10. CLC is currently representing 7,400 children in the New York Family Courts with over fifty percent of our client actively involved with ACS and 500 in the child welfare system. *Id.* ¶ 10.

Several special projects at CLC address the needs of particularly vulnerable populations within the foster care system. *Id.*, ¶ 7. CLC's "Broken Adoptions Project" ("BAP") seeks to highlight the number of children who do not find true "permanency" after a foster care adoption. *Id.* BAP has studied adoption finalizations and presented its findings in numerous articles and presentations. *Id.* BAP has worked with over 150 youth that have been impacted by a broken adoption. *Id.* BAP has been awarded the New York Bar Foundation Grant of Columbia Law School in 2015 and 2016, the Viola W. Bernard Grant in 2015, and the Public Interest Law Foundation Grant in 2014 and 2015. *Id.* CLC also has a Helpline that is regularly contacted by youth that are no longer in their adoptive homes. *Id.*

The expertise of CLC staff is well-recognized. *Id.*, ¶ 9. This past fall, CLC spearheaded a day-long symposium at New York Law School addressing the complex issues surrounding "broken adoptions" – the too common phenomenon of children returning to foster care following an adoption. *Id.* More than 250 people attended the symposium in person, while another 800 tuned in through a live webcast. *Id.*

D. <u>The Children's Advocates' Work With Children in Foster Care</u>

Advocates in the New York City Family Courts operate in an adversarial system in which all parties – children,[1] parents, and the City of New York – are entitled to counsel and are zealously represented. Attorneys for children are mandated to advocate directly for the child's *expressed wishes*, unless a child is not capable of expressing a preference or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions, or the child's articulated position would place the child at imminent risk of serious

[1] N.Y. Fam. Ct. Act §§ 242, 249(a), 1016, 1090(a)

harm.[2] Ultimately, it is the Family Court judge who decides what outcome is in the best interests of the children who are under his or her jurisdiction. Steckler Aff., ¶ 19.

This representation affords children robust due process protections as compared to other jurisdictions.[3] Because New York State assigns lawyers to represent children in Family Court rather than relying upon Guardians Ad Litem who substitute their own judgment about what is in a child's best interest, cases in our jurisdiction are often heavily litigated and can take longer to reach adoption or reunification. Steckler Aff., ¶ 18. The Children's Advocates request evidentiary hearings, engage in motion practice, and argue for court orders in order to effectuate our client's objectives. *Id.* In many instances, additional time spent under Family Court jurisdiction can ensure that a child will return home safely. *Id.*

Our social workers and advocates attend meetings at foster care agencies and in schools. Steckler Aff., ¶ 20. We visit clients in their homes, at the ACS Children's Center, in foster care placements, in kinship placements, or congregate care settings in order to understand their needs, their families and their legal positions. *Id.* We understand the children in Family Court better than any other party in the system, and judges look to us for unique and genuine insight into the child's perspective. We are an indispensable part of the Family Court process. Steckler Aff., ¶ 21.

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[2] Rules of the Chief Judge, §7.2; *see also N.Y.S.B.A. Standard A-1*; *see also N.Y.S.B.A. Standard A-3* (attorney "must not substitute judgment and advocate in a manner that is contrary to a child's articulated preferences," except when "[t]he attorney has concluded that the court's adoption of the child's expressed preference would expose the child to substantial risk of imminent, serious harm and that this danger could not be avoided by removing one or more individuals from the home, or by the provision of court-ordered services and /or supervision," or "[t]he attorney is convinced that the child is not competent due to an inability to understand the factual issues involved in the case, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions"). Like § 7.2 of the Rules of the Chief Judge, the N.Y.S.B.A. Standards recognize that even when the attorney determines that the child lacks capacity, the attorney must communicate the child's expressed wishes to the court "unless the child has expressly instructed the attorney not to do so." *N.Y.S.B.A. Standard A-3*.

[3] For comprehensive information regarding the approaches taken by other states, see Koh Peters, How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study, 6 NEV. L.J. at 1074-1081.

E. System-Wide Advocacy by the Children's Advocates

The Children's Advocates often work collaboratively with New York City and State. Collectively we sit on numerous boards and committees, and participate in workgroups to advocate for youth involved in the child welfare and juvenile justice systems. Steckler Aff., ¶ 14. At the same time, as reflected above, we do not shy away from litigating when necessary to protect our clients' interests. We consider our ability to effectuate system-wide change through litigation to be an essential component of our representation and our ability to advance our clients' interest on a systemic level will be severely restricted if the Court approves the Proposed Settlement. *Id.*, ¶ 24.

ARGUMENT

Rule 24 of the Federal Rules of Civil Procedure allows interested parties in an action to intervene. Rules 24(a) and (b), respectively, allow interested parties to intervene (1) as of right or (2) by permission of the court. Courts broadly interpret Rule 24 in favor of intervention. *Degrafinreid v. Ricks*, 417 F. Supp. 2d 403, 407 (S.D.N.Y. 2006); *Miller v. Silbermann*, 832 F. Supp. 663, 673 (S.D.N.Y. 1993).

I. PARTIES MAY INTERVENE FOR THE PURPOSE OF RESPONDING TO A PROPOSED SETTLEMENT

It is well established that courts have discretion to permit parties to intervene for limited purposes, including for the limited purpose of participating in the court's review of a proposed settlement. For example, in *Wilder v. Bernstein*, 645 F. Supp. 1292, 1350 (S.D.N.Y. 1986), nineteen volunteer child care agencies were permitted to intervene to object to an initial proposed settlement and assisted in the crafting of a later settlement that was approved by the court. There, Judge Ward noted that the practice of limited intervention is useful in that it enables the court to hear from parties that have a relevant interest and are also independent of the settlement that the court is considering:

> The intervening agencies, as nonparties vis-a-vis the underlying constitutional claims in the lawsuit, are the sole participants in this litigation who have been in a position to address freely and undistractedly the child care concerns that were prompted by the original settlement proposal. At the same time, their direct participation in the New York City foster care system, and their ongoing contact with the children in care, give them the ability and incentive to comment authoritatively on the likely impact of the settlement on agency administrators and clinicians and on the children they serve. The Court benefited immeasurably from the intervenors' initial insights into the operation of the child care system from the voluntary agency's perspective. The drafters of the original settlement undeniably benefited from the intervenors' constructive criticism and suggestions.

Id.

Similarly, in a later decision in the *Wilder* case, the court permitted The Legal Aid Society-Juvenile Rights Division and Lawyers For Children to intervene as of right for the limited purpose of arguing the scope of a stipulation of settlement at a contempt proceeding. *See Wilder v. Bernstein*, No. 78 CIV. 957 (RJW), 1994 WL 30480, *4 (S.D.N.Y. Jan. 28, 1994).

Other courts similarly recognize the propriety of limited intervention in a variety of contexts, including for the purpose of objecting to a settlement. Limited intervention has been utilized by Courts of Appeals in the Second Circuit,[4] the Third Circuit,[5] the Sixth Circuit,[6] the Seventh Circuit,[7] the Ninth Circuit[8] and other District Courts.[9] As the Third Circuit noted in

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[4] *See Kirkland v. New York State Dep't of Corr. Servs*, 711 F.2d 1117, 1124 (2d Cir. 1983) (affirming the District Court's ruling that "the intervenors are permitted to intervene for the sole purpose of objecting to the settlement."); *cf.*, *Ionian Shipping Co. v. British Law Ins. Co.,* 426 F.2d 186, 191-92 (2d Cir. 1970) (recommending that, on remand, the District Court consider an application for limited intervention).

[5] *Harris v. Pemsley*. 820 F.2d 592, 603 (3rd Cir. 1987) (noting that limited intervention is appropriate where "third parties can contribute to the court's understanding of the consequences of the settlement proposed by the parties").

[6] *United States v. City of Detroit*, 712 F.3d 925, 927 (6th Cir. 2013) (reversing a denial of an intervention motion, noting that "[w]hile concerns of delay and re-litigation are serious, they can be alleviated by limiting the scope of intervention instead of outright denial").

[7] *See Jessup v. Luther*, 227 F.3d 993, 998 (7th Cir. 2000) (''[E]very court of appeals to have considered the matter has come to the conclusion that Rule 24 is sufficiently broad gauged to support a request of intervention for the purposes of challenging confidentiality orders.").

[8] *Van Hoomissen v. Xerox Corporation*, 497 F.2d 180, 181 (9th Cir. 1974) ("The district court's discretion, at least under Rule 24(b), to grant or deny an application for permissive intervention includes discretion to limit intervention to particular issues.'')

[9] *See*, *Bridgeport Guardians v. Delmonte*, 227 F.R.D. 32, 35 (D. Conn. 2005) ("Most commonly, district courts use this power to limit participation by the intervenor to certain issues or for certain purposes."); *Armstrong v. O'Connell*, 75 F.R.D. 452 (E.D. Wisc. 1977)(''The Court will accordingly order that . . . intervention be limited to

Harris v. Pemsley, 820 F.2d 592, 602 (3d Cir. 1987), limited intervention enables the Court to hear knowledgeable and independent views that will assist its review of a proposed settlement:

> [W]e think it was entirely appropriate for the district court to permit the District Attorney to be heard on the terms of the consent decree, however his status may be otherwise legally characterized. Indeed, permitting persons to appear in court, either as friends of the court or as interveners for a limited purpose, may be advisable where third parties can contribute to the court's understanding of the consequences of the settlement proposed by the parties.

Here, the Children's Advocates would similarly enable the Court to consider the impact of the Proposed Settlement on the putative class with the benefit of the Children's Advocates' extensive knowledge and experience of the foster care system. The Children's Advocates' perspective, as the individuals who represent the vast majority of the putative class—and eleven of the nineteen named plaintiffs—offer invaluable insight into the complexities of the foster care system and how the Proposed Settlement fails to remedy the allegations of wrongdoing in the Amended Complaint. These complexities are evidenced by the discrepancies between the Plaintiffs' facts in them Amended Complaint and the Plaintiffs' positions in Family Court. Accordingly, the Children's Advocates' motion for limited intervention in *Elisa W.* should be granted.

II. THE CHILDREN'S ADVOCATES ARE ENTITLED TO INTERVENE AS OF RIGHT

Rule 24(a)(2) states, in pertinent part, that a party may intervene as of right if that party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impeded the movant's ability to protect its interest, unless existing parties adequately represent that interest." Courts have interpreted Rule 24(a) to include four requirements for intervention as of right:

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prospective participation in proceedings in this case relating to a remedial decree..."); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308 (D. Conn. 2009) (allowing intervention for the limited purpose of intervenors seeking modification of a confidentiality order); *Diversified Grp., Inc. v. Daugerdas*, 217 F.R.D. 152 (S.D.N.Y. 2003) (allowing intervention for the limited purpose of intervenors seeking to unseal documents covered by a protective order)

> [A]n applicant must (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action.

Brennan v. N.Y.C. Bd. of Ed., 260 F.3d 123, 128 (2d Cir. 2001) (allowing intervention under Rule 24(a) where intervenor's objected to a settlement agreement). The Children's Advocates satisfy all four requirements.

A. The Children's Advocates Motion is Timely Filed

In considering the timeliness of a motion to intervene, courts consider "(1) how long the [movant] had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the [movant] if the motion is denied; and (4) any unusual circumstances mitigating for or against a finding of timeliness." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994).

Timeliness is not an issue here. The Children's Advocates' objections have been presented to the Court along with their intervention motion by the specified deadline in the Notice of Settlement. Intervention for the limited purpose of objecting to the Proposed Settlement will cause no delay or prejudice to the parties and there are no unusual circumstances against a finding of timeliness. Thus, the Children's Advocates motion to intervene is timely.

B. The Children's Advocates Have An Interest In The Action

In order to establish an interest sufficient to intervene as of right, a movant must establish that the interest asserted is "direct, substantial and legally protectable." *Brennan*, 260 F.3d at 128;*Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990). In determining whether a movant seeking to intervene as of right has demonstrated the requisite interest in the subject matter of the action, courts should define "interest" broadly. *See Rolle v. New York City Housing Auth.*, 294 F. Supp. 574 (S.D.N.Y. 1969); *Norwalk CORE v. Norwalk Bd. of Ed.*, 298 F. Supp. 208 (D. Conn. 1968) (same).

In the present case, the Children's Advocates have a direct, substantial and legally protected interest in the outcome of this action. The Children's Advocates are the principal advocates on behalf of most children in the foster care system in New York City. Freedman Aff., ¶ 12; Steckler Aff., ¶¶ 15-17. As attorneys, social workers and advocates for children in foster care, the Children's Advocates represent the interests of their clients in Family Court, appellate proceedings, and in impact litigation and other legislative and policy advocacy activities. Freedman Aff., ¶¶ 5-10; Steckler Aff., ¶¶ 5-9. Their work is devoted to furthering the interests of children in New York City foster care; they meet regularly with their clients to solve problems and obtain relief, and also meet with countless other individuals and entities involved in the system to seek system-wide reforms in the foster care system. Freedman Aff., ¶¶ 12-14; Steckler Aff., ¶¶ 15-17. As the principal practitioners in New York City's foster care system, the Children's Advocates have a significant interest in ensuring that any settlement in this action is carefully tailored to address the underlying allegations of wrongdoing by the State Defendants.

C. The Children's Advocates' Interests Will Be Impaired By The Proposed Settlement

The Proposed Settlement, as detailed in the Objections to the Proposed Settlement, will severely impair the Children's Advocates' primary mission of advocating and solving problems on behalf of their young clients, who are members of the putative class. Most significantly, the extremely broad Covenant Not to Sue in the Proposed Settlement impairs the Children's Advocates' interest in advocating on behalf of children in foster care by prohibiting essentially any systemic constitutional or statutory claim against State Defendants related to foster care for at least seven years. This provision deprives the Children's Advocates of a powerful tool that allows them to effectuate meaningful reform. Freedman Affidavit, ¶ 17; Steckler Aff., ¶ 9-11; Simmons Aff., ¶ 16.

D. The Children's Advocates Interests Are Not Adequately Protected By Any Party To The Action

The Proposed Settlement fails to adequately represent the interests of the Children's Advocates and the children that they regularly represent in Family Court. Class Counsel cannot allege that they have the knowledge that is acquired by actively participating in New York City Family Court proceedings. The Children's Advocates interact with their clients, judges, lawyers, case planners, foster parents, biological parents, kinship caretakers and others in the child welfare system on a regular basis. Freedman Aff., ¶¶ 12-14; Steckler Aff., ¶¶ 15-17; Simmons Aff., ¶ 11. As such, they are intimately familiar with the complexities and challenges of the child welfare system. Freedman Affidavit, ¶ 12; Steckler Aff. 15; Simmons Aff. ¶ 11. Permitting the Children's Advocates to express their views as to the deficiencies of the Proposed Settlement given their extensive experience and knowledge of the child welfare system would enable the Court to make a fully informed decision as to whether the Proposed Settlement is truly "fair, adequate and reasonable." Accordingly, the Children's Advocates should be permitted to intervene to express their views as to the significant deficiencies of the Proposed Settlement.

III. THE CHILDREN'S ADVOCATES HAVE STANDING TO OBJECT TO THE PROPOSED SETTLEMENT

The Children's Advocates have clear standing to intervene for the limited purpose of objecting to the Proposed Settlement. *See Nnebe v. Daus*, 644 F.3d 147, 156-158 (2d Cir. 2011) (reversing district court's ruling that the New York Taxi Workers Alliance lacked standing to intervene in a lawsuit challenging New York City's procedures for suspending the taxi licenses of drivers who had been arrested). "[O]nly a 'perceptible impairment' of an organization's activities is necessary for there to be an 'injury in fact.'" *Nnebe v. Daus*, 644 F.3d 147, 157 (2d

Cir. 2011) (citing *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993)). Here, the Children's Advocates easily satisfy this standard.

Indeed, this Court has specifically permitted organizations to intervene for the limited purpose of objecting to a settlement. As noted above, Judge Ward permitted foster care agencies to intervene to object to the proposed settlement in *Wilder*. 645 F. Supp. at 1350. He notably also permitted The Legal Aid Society-Juvenile Rights Division to intervene as of right in a similar context (to argue the scope of a settlement stipulation). *Wilder v. Bernstein*, 1994 WL 30480 at *4.

The Children's Advocates, as explained above, are deeply involved in New York City's foster care system and advocate on behalf of children in foster care every day, in a variety of contexts. Their work will be significantly impacted by the Proposed Settlement. In particular it will be severely impaired by the Covenant Not to Sue. As noted above, this provision has the effect of prohibiting the Children's Advocates from bringing any systemic constitutional or statutory claims against State Defendants related to foster care for at least seven years, depriving the Children's Advocates of one of their most effective means of achieving reform. This impact is substantial and certainly at least a "perceptible impairment." *See Ragin*, 6 F.3d at 905.

IV. THE CHILDREN'S ADVOCATES' ADDITIONALLY SATISFY THE REQUIREMENTS FOR PERMISSIVE INTERVENTION

Assuming *arguendo* that the Children's Advocates are not allowed to intervene as of right, they should be allowed to intervene pursuant to Rule 24(b)(1)(B), which states, in pertinent part, that a party should be allowed to intervene by permission when that party "has a claim or defense that shares with the main action a common question of law or fact." To qualify for permissive intervention a movant must show that: (1) intervention is timely; (2) there is no undue delay or prejudice to the parties; and (3) there is a question of law or fact in common with the

original claim. *U.S. v. Columbia Pictures Indus., Inc.*, 88 F.R.D. 186, 189 (S.D.N.Y. 1980). The Children's Advocates meet all three requirements.

As described above, the Children's Advocates' intervention motion is timely and causes no undue delay or prejudice to the parties, thereby satisfying the first and second requirements. The Children's Advocates' Objections to the Proposed Settlement clearly raise factual and legal questions common to those raised in the *Elisa W.* case, satisfying the third requirement. The Objections to the Proposed Settlement highlight the Children's Advocates' serious concerns regarding the exceptionally long duration of the Covenant Not to Sue and the duplicative work of the Monitor and Research Expert in the Proposed Settlement. Thus, their intervention would satisfy Rule 24(b)(1)(B)'s requirement of "a common question of law or fact."

V. THE CHILDREN'S ADVOCATES SHOULD ALTERNATIVELY BE GRANTED *AMICUS CURIAE* STATUS

Should the Children's Advocates' motion to intervene be denied, the Children's Advocates respectfully request that the Court grant them *amicus curiae* status and consider their Objections to the Proposed Settlement on that basis.

CONCLUSION

For all the foregoing reasons, the Court should grant the Children's Advocates' motion to intervene for the limited purpose of objecting to the Proposed Settlement.

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Respectfully submitted,

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