UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELISA W. et al.,

Petitioners, No. 21-2262

v.

THE CITY OF NEW YORK et al.,

Respondents.

MEMORANDUM OF LAW FOR STATE RESPONDENT SHEILA J. POOLE IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL PURSUANT TO RULE 23(f)

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PRELIMINARY STATEMENT

Plaintiffs—nineteen children who were previously (but are no longer) in foster care in New York City—sought to certify a class of all children who are or will be in the New York City foster care system, based on their claims that unspecified deficiencies in the City's and State's caseworker training, case planning, and placement matching systems, among others, have harmed all children in custody by delaying petitions for terminations of parental rights (TPRs), delaying adoptions, and permitting continued maltreatment by both birth and foster parents.

The U.S. District Court for the Southern District of New York (Wood, J.) denied Plaintiffs' motion for class certification, finding that, despite two and a half years of discovery, Plaintiffs still had not met their burden to identify either (1) common questions, proof of which are amenable to classwide treatment and whose answers will drive the resolution of the litigation; or (2) named Plaintiffs whose claims are typical of the claims of all children in the class. Plaintiffs now seek the extraordinary remedy of interlocutory review under Rule 23(f). This Court should deny their motion.

BACKGROUND

On July 8, 2015, Plaintiffs brought this putative class action seeking declaratory and injunctive relief against the City of New York ("City Defendant"), Gladys Carrión, then Commissioner of the New York City Administration for Children's Services (ACS), in her official capacity, and ACS; and Sheila J. Poole, then Acting Commissioner of the New York State Office of Children and Family Services (OCFS), in her official capacity ("State Defendant"), OCFS, and the State of New York.[1] (*See* Compl., ECF No. 1.) The only remaining defendants are the City Defendant and the State Defendant, and this brief is filed solely on behalf of the State Defendant.

Plaintiffs were from the outset a diverse group. Among many other differences, their time in ACS's custody varied from ten months to thirteen years; their "permanency goals" (i.e., objectives for ultimate, permanent custody) ranged from reunification to adoption; and they were

[1] Ms. Poole has since been appointed Commissioner. The claims against Ms. Carrión and ACS were dismissed. (*See* Op. & Order, ECF No. 278.) Plaintiffs voluntarily dismissed OCFS and the State of New York. (*See* Notice of Partial Voluntary Dismissal Without Prejudice Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), ECF No. 343.)

subject to varying decisions made by nearly a dozen different "Contract Agencies," which are nonprofit organizations that provide the day-to-day casework for children in foster care on behalf of ACS. (*See* City Defs.' Mem. in Opp. to Mot. for Class Certification at 5–7, ECF No. 205.) Plaintiffs brought a sweeping set of claims against the City Defendant and the State Defendant asserting (1) various substantive due process violations (Counts One and Two); (2) violations of federal and state law, including the Adoption Assistance and Child Welfare Act of 1980, as amended by the Adoption and Safe Families Act of 1997, 42 U.S.C. § 670 et seq., and the New York Social Services Law (Counts Three and Four); and (3) breach of contract, as third-party beneficiaries of contracts between ACS and its Contract Agencies (Count Five).[2] Rather than targeting any specific legal defect in the City Defendant's administration of foster care in New York City, or the State Defendant's supervision thereof, Plaintiffs instead asserted that there were "structural and systemic deficiencies" leading to myriad legal violations. (Am. Compl. ¶ 229, ECF No. 91.)

[2] Counts Three, Four, and Five are against the City Defendant only. (*See* Am. Compl., ECF No. 91.)

In 2016, before conducting any discovery, Plaintiffs moved to certify a class of "children who are now or will be in the foster care custody of the Commissioner of ACS." (Mem. Order Denying Class Cert. at 1, ECF No. 282.) The district court (Swain, J.) denied certification without prejudice, reasoning, in part, that "the very breadth of the common questions framed by Plaintiffs . . . undermines Plaintiffs' ability to demonstrate that certification of a broad unitary class of children who are or will be in foster care is appropriate." (*Id.* at 3.) The district court also directed Plaintiffs to identify "appropriate" subclasses. (*Id.*)

After two and a half years of fact discovery, including 24 depositions and the production of over 29,000 documents by the State Defendant, Plaintiffs moved for certification of an identical class—"children who are now or will be in the foster care custody of the Commissioner of ACS" (Mem. of Law in Supp. of Renewed Mot. for Class Cert. ("Cert. Br.") at 4, ECF No. 440)—as well as two subclasses: (1) "all children who have been in ACS custody for more than two years and whose cases require 'special scrutiny' pursuant to ACS policy" ("Special Scrutiny Subclass"); and (2) "all children for whom Contract Agencies failed to assess and document compelling reasons every three months to justify the decision

not to file a [TPR] petition after the children had been in care for 15 of the prior 22 months" ("Compelling Reasons Subclass"). (*Id.* at 4–5.)

The district court (Wood, J.) denied certification, holding that "Plaintiffs have not met their burden to demonstrate that there are questions of law or fact common to the class, nor have they made an adequate showing that the claims of the named Plaintiffs are typical of the claims of the class." (Op. & Order Denying Renewed Mot. for Class Cert. ("Order") at 16, ECF No. 542.) Plaintiffs now seek leave to pursue an interlocutory appeal of this certification order pursuant to Federal Rule of Civil Procedure 23(f).

REASONS TO DENY THE MOTION

Rule 23(f) allows permissive interlocutory appeals of orders denying class certification, but only if the movant first demonstrates either:

> (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution.

In re Sumitomo Copper Litig., 262 F.3d 134, 139 (2d Cir. 2001); *accord Hevesi v. Citigroup Inc.*, 366 F.3d 70, 76 (2d Cir. 2004) (quoting

Sumitomo). This Court reviews "both the lower court's ultimate determination on certification, as well as . . . its rulings [whether] the individual Rule 23 requirements have been met," for abuse of discretion. *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 34 (2d Cir. 2009).

For the reasons given below, Plaintiffs fail both to make a "substantial showing that the district court's decision was questionable" and to identify any "legal question about which there is a compelling need for immediate resolution." *See Sumitomo*, 262 F.3d at 139.

POINT I

PLAINTIFFS HAVE NOT MADE A SUBSTANTIAL SHOWING THAT THE DISTRICT COURT'S CERTIFICATION DENIAL IS QUESTIONABLE

A. The District Court's Thorough Opinion Correctly Reasoned That Plaintiffs Failed to Establish Commonality or Typicality.

In denying certification of a class of all current and future foster children in New York City, the district court correctly concluded that Plaintiffs had failed to satisfy both the commonality and typicality requirements.

The court identified three reasons that Plaintiffs failed to establish commonality: (1) their proposed "common" questions were "too broad and

generalized" under the standard set forth in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (Order at 17); (2) by their own admission, Plaintiffs' injuries flowed not from "unitary, non-discretionary policies" of the Defendants but rather from individual, case-specific departures from policy by myriad actors (*id.* at 18); and (3) the involvement of New York State's Family Court system, a separate New York State entity, "create[d] 'dissimilarities within the proposed class' that 'impede the generation of common answers'" (Order at 19 (quoting *Wal-Mart*, 564 U.S. at 350).) The district court's determination was fully consistent with controlling case law and the record before it.

In *Wal-Mart*, the Supreme Court held that parties seeking certification "must be prepared to prove that there are *in fact* . . . questions of law or fact" common to the class, including proof that class members "have suffered the same injury" as a result of some policy or decision applicable to all class members. 564 U.S. at 350 (quotation marks omitted); *accord Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 80 (2d Cir. 2015). The driving inquiry is not simply whether the plaintiffs can identify common legal questions or certain factual similarities; rather, it is whether, at base, the plaintiffs' claims "depend

upon a common contention" that has the capacity "to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (quotation marks omitted).

Here, the district court correctly concluded that, as applied to the sweeping class that Plaintiffs sought to certify, the extraordinarily broad systemwide practices identified in Plaintiffs' papers were not the types of unitary policies that could give rise to common injuries or generate common answers applicable to all class members. *See id.* (holding injury in class action context "does not mean merely that [plaintiffs] have all suffered a violation of the same provision of law"). To take one example, Plaintiffs argued that there was a common question regarding ACS's allegedly inadequate training of Contract Agency caseworkers and OCFS's alleged failure to require "that ACS implement training requirements for its Contract Agencies caseworkers." (Cert. Br. at 22, 45; *see* Mot. for Permission to Appeal ("CA2 Mot.") at 7–8.) Yet Plaintiffs offered no proof linking these asserted deficiencies to any actual injuries suffered by Plaintiffs or other prospective class members.

Instead, Plaintiffs made only the conclusory assertion that lack of adequate training by ACS (and supervision of the same by OCFS) placed

all children "at risk of being assigned to a caseworker who ACS did not ensure received adequate and appropriate training." (Cert. Br. at 55.) But the problem with this argument is that it does not address the complex web of causes that affect every foster child's individual welfare—including causes that may supersede any effect of purportedly inadequate training, such as delays in adoption or continued maltreatment by birth parents. For example, as the court below correctly observed, every foster child's case is affected not only by "case-specific" policy departures by "individual case workers" or "individual Contract Agencies" but also by decisions from individual judges in New York State's Family Court system. (Order at 19.) Indeed, the district court observed that, in at least four of the named Plaintiffs' cases, delays in permanent placements stemmed from protracted litigation in family court, rather than from any action or decision by ACS or OCFS. (*See id.*) Such significant "'dissimilarities within the proposed class'" defeat commonality by "'imped[ing] the generation of common answers.'" (*Id.* (quoting *Wal-Mart*, 564 U.S. at 350).)

For similar reasons, the district court also correctly found that Plaintiffs had failed to satisfy the typicality requirement. (*See id.* at 21–

23.) Specifically, the named Plaintiffs, all of whom had spent extended time in the foster care system, were unrepresentative of all children in foster care, as unrebutted evidence demonstrated their cases were more complex than those of children with briefer stays in the system. (*Id.* at 22.) Additionally, many injuries suffered by the named Plaintiffs, including delays in permanency, were traceable not to classwide policies of Defendants but instead to child- and family-specific circumstances, including birth parents' delays in receiving mental health or drug treatment services from third-party providers. (*Id.* at 22–23.) The atypicality of the named Plaintiffs' cases thus further supports the district court's denial of certification here.

B. Plaintiffs' Contrary Arguments Are Meritless.

Plaintiffs claim that the district court's certification order is "questionable" for three reasons: (1) the order misapplied *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372 (2d Cir. 1997) (per curiam); (2) the district court's discussion of commonality supposedly ignored several system-wide practices of ACS identified by Plaintiffs; and (3) the district court failed to "consider or address" Plaintiffs' two proposed subclasses. (*See* CA2 Mot. at 1–2.) None of these grounds accurately characterizes

the district court's certification order, let alone constitutes the required "substantial showing that the district court's decision is questionable." *See Hevesi*, 366 F.3d at 76.

1. The district court did not err by distinguishing *Marisol A.* or out-of-circuit foster care cases.

The district court correctly concluded that *Marisol A.* did not compel certification of Plaintiffs' broad class here. Plaintiffs far overstate the holding of *Marisol A.*, a pre-*Wal-Mart* case this Court took pains to confine to its facts.[3] Indeed, the *Marisol A.* court observed that the district court's certification order there "stretche[d] the notions of commonality and typicality," and instead held merely that, at the pretrial "stage of the

[3] *Marisol A.* involved particularly disturbing allegations of maltreatment. For example, after regaining custody from ACS, the lead plaintiff's mother "confined Marisol to a closet for several months, deprived her of sustenance resulting in her eating her own feces and plastic garbage bags to survive, and both physically and sexually abused her to the point of injury." *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 670 (S.D.N.Y. 1996); *see S.M. ex rel. King v. City of New York*, No. 20-cv-5164, 2021 WL 3173456, at *5 (S.D.N.Y. July 26, 2021) (acknowledging maltreatment in *Marisol A.* was "seemingly more graphically disturbing than the abuse S.M. alleges"). By contrast, Plaintiffs here have acknowledged OCFS's numerous initiatives and programmatic improvements related to its oversight of ACS. (*See* State Def.'s Mem. of Law in Opp. to Renewed Mot. for Class Cert. ("State Opp.") at 30, ECF No. 497.)

litigation, [this Court saw] no basis for finding that the district court abused its discretion." *Marisol A.*, 126 F.3d at 377; *see id.* (cautioning that district court acted "near the boundary of the class certification device"). That decision's deference to the district court's discretionary grant of class certification at the pretrial stage does not warrant overriding the district court's discretion here to deny certification after years of discovery. *Cf. National Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n*, 898 F.3d 243, 256 & n.86 (2d Cir. 2018) ("Whether a district court 'abused its discretion' is a case-specific and often fact-intensive inquiry," which permits different "discretionary call[s]" in "similar situation[s].").

Moreover, *Marisol A.*'s reasoning actually undermines rather than supports Plaintiffs' arguments for class certification here under the *Wal-Mart* standard. The *Marisol A.* court reasoned that the plaintiffs' common question—i.e., "whether . . . defendants have injured all class members by failing to meet their federal and state law obligations"—would prejudice defendants and render the case nonadministrable. *Marisol A.*, 126 F.3d at 377 (quotation marks omitted). The court

accordingly remanded for the district court to divide the certified class into subclasses to facilitate discovery and trial.[4]

Here, Plaintiffs' common question for the State Defendant—i.e., "whether OCFS effectively exercises adequate and meaningful oversight over ACS and the Contract Agencies" (Cert. Br. at 53)—raises the same problems of prejudice and administrability that *Marisol A.* identified. Plaintiffs have never specified how "the same conduct or practice by the [State Defendant] gives rise to the same kind of claims from all class members," *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 137 (2d Cir. 2015) (quotation marks omitted), when it is undisputed that OCFS supervises dozens of governmental and nonprofit actors. *Marisol A.*'s holding that the plaintiffs' proposed question there was too broad for class administration (without dividing the proposed class into subclasses) thus supports the district court's conclusion here that Plaintiffs' similarly sweeping claim against the State Defendant cannot pass muster under

[4] Indeed, for this reason, the district court observed that, "in light of *Wal-Mart*, 'it is highly doubtful that the class certified in *Marisol A.* would be certified today.'" (Order at 23 n.10 (quoting *Taylor v. Zucker*, No. 14-cv-5317, 2015 WL 4560739, at *11 (S.D.N.Y. July 27, 2015) alteration marks omitted).)

Rule 23. (Plaintiffs' proposal to divide this general class into subclasses is discussed further below.)

Nor was it "questionable" for the district court to conclude that certain out-of-circuit decisions certifying classes of foster children post-*Wal-Mart* were factually distinguishable. Contrary to Plaintiffs' reading, the district court did not hold, as a matter of law, that the risk of harm from a common policy or practice could *never* support class treatment. (*See* CA2 Mot. at 13–15.) Rather, as the district court correctly reasoned, the out-of-circuit cases were simply distinguishable on their key facts. *First*, the classes certified in those cases "encompass[ed] a subset of the foster care system . . . and thus [were] narrower than the class that Plaintiffs seek to certify here," which includes all current and future foster care children in New York City (Order at 23 n.10). *Cf. M.D. v. Perry*, 294 F.R.D. 7, 18 (S.D. Tex. 2013) (certifying class of children in State's Permanent Managing Conservatorship program and three subclasses of children defined by placement type). *Second*, the district court observed that "cross-jurisdictional comparisons to other foster care systems" were of "limited" persuasive value, in light of distinctive features of New York's system, including New York law's expressed

preference for family integrity; the "complex interplay" among the State, the City, and the Contract Agencies; and the central role of New York State's Family Court system. (Order at 23 n.10.) The district court's distinguishing of these out-of-circuit decisions provides no basis for questioning its denial of class certification here.[5]

2. The district court did not ignore Plaintiffs' examples of common practices.

Plaintiffs next argue that the district court "ignor[ed]" their evidence of "class-wide practices." (CA2 Mot. at 2.) On appeal, however, Plaintiffs identify only system-wide policies *of ACS* that the district court purportedly ignored; they do not identify any system-wide policy *of OCFS*. (*See id.* at 15–21.) Plaintiffs have thus identified no basis to question the district court's denial of class certification as to the claims against the State Defendant. *See* Fed. R. Civ. P. 23(c)(1)(B); *St. Stephen's School v. PricewaterhouseCoopers Accts. N.V.*, 570 F. App'x 37, 39 (2d Cir. 2014) ("[A] district court must provide sufficient factual findings on

[5] *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237 (5th Cir. 2018), offers very limited substantive analysis of the class certification question. Instead, the Fifth Circuit reviewed the certification order posttrial and found Texas's "Rule 23-specific arguments . . . waived for failure to adequately brief them." *Id.* at 270.

Rule 23 requirements as they pertain to the claims asserted against each defendant to demonstrate compliance with the law in deciding to certify.").

Nor would any such argument compel interlocutory review by this Court. Again, Plaintiffs identified only one common question of fact as to the State Defendant: "whether OCFS effectively exercises adequate and meaningful oversight over ACS and the Contract Agencies." (Cert. Br. at 53.) Plaintiffs reasoned that this question satisfied Rule 23(a)(2) because "[e]ach child in the Class is or will be in the same foster care system that suffers from OCFS's oversight failures." (*Id.*) For reasons already discussed, this broad question does not satisfy the strictures of Rule 23(a)(2) as explained in *Wal-Mart*. Indeed, it is functionally indistinguishable from the common question the Supreme Court found deficient in *Wal-Mart*, which was "whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies . . . that may have worked to unlawfully discriminate against them in violation of Title VII." 350 U.S. at 347. Plaintiffs' proffered uniform practice identifies only an alleged common legal violation by OCFS—not common practices that give rise to common factual or legal answers.

As to ACS, for the reasons set forth in greater detail by the City Defendant, the district court did not "ignor[e] the numerous common questions" raised by Plaintiffs. (*See* CA2 Mot. at 17.) Instead, the district court appropriately concluded that the questions were "not amenable to classwide treatment and do not generate common answers apt to drive the resolution of this litigation." (Order at 17.) As the district court explained, "That children may suffer an injury relating to a delay in permanency, an instance of inadequate case worker training, or an ill-conceived placement, does not mean that all foster care children's claims can be resolved in one stroke." (Order at 18.)

3. Plaintiffs forfeited any argument that the two subclasses satisfy Rule 23(a) or (b).

Plaintiffs also fault the district court for "ignor[ing] Plaintiffs' proposed subclasses entirely other than listing them while describing Plaintiffs' motion in 'Procedural History.'" (CA2 Mot. at 22.) But the district court did not abuse its discretion on this front because Plaintiffs entirely failed to brief the issue below, focusing their class certification arguments on their general class alone. Indeed, although the State Defendant specifically flagged Plaintiffs' failure to brief this issue (*see*

State Opp. at 32 (observing Plaintiffs failed to address Rule 23 factors for subclasses)), Plaintiffs' reply still failed to provide a substantive defense of their proposed subclasses. Instead, Plaintiffs' reply merely (1) inserted the term "subclasses" into the headings and parentheticals of their brief (*compare* Cert. Br. at i, *with* Reply Br. in Supp. of Renewed Mot. for Class Cert. ("Reply") at i, ECF No. 533); (2) argued that their moving brief's statement of facts satisfied their burden of persuasion (*see* Reply at 6); and (3) explained that their motion contained exhibits that included proof of the subclasses' numerosity, without explaining which parts of those exhibits supported the subclasses specifically (*see id.* at 8 nn.14–15). *See Tardif v. City of New York*, 991 F.3d 394, 404 n.7 (2d Cir. 2021) ("[I]ssues raised for the first time in a reply brief are generally deemed waived." (quotation marks omitted)).

This Court should not permit Plaintiffs to argue in support of their proposed subclasses for the first time on appeal. Because Plaintiffs did not demonstrate below, and the district court's certification order accordingly does not analyze, whether the subclasses satisfy the Rule 23(a) and (b) factors, this Court would be required to consider fact-intensive questions of commonality and typicality without the benefit of

a fully developed record or the district court's reasoning. Such an exercise would waste, rather than conserve, judicial resources. *See* Fed. R. Civ. P. 23(f), advisory committee notes (observing Rule 23(f) was designed to address reviewability concerns "at low cost").

In any event, the district court's decision not to certify the subclasses was not "questionable." *Sumitomo*, 262 F.3d at 139. For example, Plaintiffs do not satisfy commonality because they propose the same "common question" as to the State Defendant for both the general class and the two subclasses. (*See* Reply at 21.) That common question was rejected by the district court for failing to satisfy Rule 23(a)(2) as explained in *Wal-Mart*. Moreover, the subclasses are not ascertainable because they are defined by reference to subjective criteria. (*See* State Opp. at 34–38.) With respect to the Special Scrutiny Subclass, for example, neither Plaintiffs nor the policy document they reference defines the term "special scrutiny." Nor do Plaintiffs propose any standards that a factfinder could apply to ascertain a given child's membership in this subclass. (*See id.* at 35–36.) Likewise, with respect to the Compelling Reasons Subclass, neither Plaintiffs nor the underlying law defines the term "compelling reason." (*See id.* at 36–37.) While state

law lists five examples of "compelling reasons" that justify not filing a TPR petition, that list is nonexclusive. *See* N.Y. Social Services Law § 384-b(3)(l)(ii). Plaintiffs offer no administratively feasible way to determine whether reasons documented in a particular child's case file are "compelling" or not.[6]

POINT II

PLAINTIFFS IDENTIFY NO COMPELLING QUESTION OF LAW THAT WOULD WARRANT INTERLOCUTORY REVIEW

Plaintiffs' motion does not address the second recognized ground for Rule 23(f) review: a "legal question about which there is a compelling need for immediate resolution." *Sumitomo*, 262 F.3d at 139. At most, Plaintiffs argue at various points that the district court's certification order "implicates a [compelling] legal question" (CA2 Mot. at 10) about whether "evidence of policies or practices that expose all class members to the *risk* of harm can support class certification" (*id.* at 15.) To the

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[6] The State Defendant maintains that both the general class and the subclasses cannot be certified for additional reasons, including that (1) named Plaintiffs do not adequately represent the proposed general class (*see* State Opp. at 26–27); and (2) Plaintiffs did not satisfy Rule 23(b)(2), *see, e.g.*, *Reynolds v. Giuliani*, 506 F.3d 183 (2d Cir. 2007) (*see* State Opp. at 30–32).

extent these glancing arguments preserve the issue, *cf. Gross v. Rell*, 585 F.3d 72, 95 (2d Cir. 2009) (noting that "[m]erely mentioning the relevant issue . . . is not enough"), Plaintiffs have failed to establish this factor, too.

As explained above, the district court's denial of class certification did not rest on any categorical rejection of class certification based on "risk of harm." Indeed, several district courts within this circuit have found that, when plaintiffs properly support their class certification motions with evidence of common practices and common injuries, a systemic "risk of harm" can support class certification.[7] The district court did not quarrel with this premise. To the contrary, the district court denied class certification because of the unusual circumstances of this case—including Plaintiffs' sweeping class definition, their extraordinarily broad and undifferentiated claims, and the undisputed diversity of foster children's experiences in New York City. The district court's application of well-settled class certification principles to the distinct

[7] *See, e.g.*, *V.W. ex rel. Williams v. Conway*, 236 F. Supp. 3d 554, 575 (N.D.N.Y. 2017) (individualized special education services); *McGee v. Pallito*, No. 04-cv-335, 2015 WL 5177770, at *5 (D. Vt. Sept. 4, 2015) (prison conditions); *Butler v. Suffolk Cnty.*, 289 F.R.D. 80, 98 (E.D.N.Y. 2013) (prison conditions).

facts of this case does not raise any broader legal question that warrants this Court's immediate review.

By contrast, cases in which courts have granted interlocutory appeal under Rule 23(f) typically involve more broadly applicable questions of law that would affect class actions generally. For example, courts have granted Rule 23(f) review to decide (1) whether a plaintiff must demonstrate compliance with the Rule 23 factors by a preponderance of the evidence, or need make only "some showing" that they are met, *Teamsters Loc. 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 201 (2d Cir. 2008); (2) whether the fraud-on-the-market doctrine, which enables class plaintiffs to establish the reliance element of securities fraud, may be extended from issuer statements to research analyst opinions, *see Hevesi*, 366 F.3d at 80 & n.9; and (3) whether expert reports "provide a credible basis for class certification," provided only that their methodology is not "fatally flawed," *In re Visa Check/ MasterMoney Antitrust Litig.*, 280 F.3d 124, 134–35 & n.3 (2d Cir. 2001) (quotation marks omitted), *abrogated on other grounds by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006). All of these appeals

involved discrete legal issues that would affect not only the particular case, but others as well.

By contrast, Plaintiffs' purported "legal question" here is simply another way of asking whether Rule 23(a)(2) is satisfied in their particular case. Thus, Plaintiffs' petition more closely resembles the situation in *Hevesi*, where this Court rejected an attempt by one group of defendants to secure interlocutory review by "contriv[ing]" a per se rule intended to match the district court's discretionary decisions about lead plaintiff appointments to "one of the categories identified in *Sumitomo*." *Hevesi*, 366 F.3d at 82–83. The *Hevesi* court held that Rule 23(f) review was not warranted because those defendants identified neither "a novel or unsettled question *of law*" nor "substantial legal argument[s] in support of such a *per se* rule." *Id.* (quotation marks omitted). Likewise, Plaintiffs here seek to shoehorn the district court's discretionary determination about commonality into a broad rule respecting "evidence of policies or practices that expose all class members to the *risk* of harm," while marshaling no substantive legal arguments in support of such a rule. Plaintiffs fail to meet *Sumitomo*'s second prong.

POINT III

THE CERTIFICATION ORDER WILL NOT ESCAPE REVIEW

Finally, interlocutory review is not proper here because Plaintiffs can pursue the denial of class certification from a final judgment. *See Sumitomo*, 262 F.3d at 139 (holding movant must show that "the certification order will effectively terminate the litigation"). Plaintiffs acknowledge that the "threat of mootness . . . effectively terminates the practical ability for [them] to obtain relief." (Mot. at 9.) Dismissal on mootness grounds, however, would permit Plaintiffs to appeal the merits of the certification order under the final judgment rule. Alternatively, if dismissal were denied, Plaintiffs identify no other reason, such as litigation costs, that would prohibit them from prosecuting the action on an individual basis and appealing the certification order after trial. (*See* CA2 Mot. at 8.)

CONCLUSION

For the foregoing reasons, the motion should be denied.

Dated: New York, New York
October 7, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27 and 32 of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this document, the document contains 4,772 words and complies with the typeface requirements and length limits of Rules 27(d) and 32(a)(5)-(6).

/s/ Oren L. Zeve