UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELISA W., by her next friend, Elizabeth Barricelli, *et al*.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, *et al*.,

Defendants.

15 Civ. 5273 (LTS) (HBP)

MEMORANDUM OF LAW IN OPPOSITION TO STATE DEFENDANT'S MOTION TO DISMISS

Respectfully submitted,

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PRELIMINARY STATEMENT

Letitia James, the Public Advocate for the City of New York ("Plaintiff James" or "the Public Advocate"), joins the next friends of 19 children ("Named Plaintiff Children") in the care and custody of New York City's Administration of Children's Services in suing to bring systemic reform to the New York City child welfare system. Defendant Sheila Poole ("Defendant Poole") is Acting Commissioner of the New York State Office of Children and Family Services, the state agency responsible for overseeing New York City's child welfare system. After a year and a half of litigation, Defendant Poole has moved to dismiss Plaintiff James, arguing that this Court lacks subject matter jurisdiction because the Public Advocate does not have capacity to sue Defendant Poole. Defendant Poole's motion to dismiss fails: the Court has subject matter jurisdiction; Plaintiff James has capacity to sue to address systemic failings in city services; and Defendant Poole has waived this affirmative defense by raising it after active participation over the course of a year and a half of litigation.[1]

STATEMENT OF FACTS

The Public Advocate is an independently elected citywide official whose mandate is to oversee the provision of services by city agencies. The New York City Charter charges the Public Advocate with receiving and attempting to resolve individual complaints, and with identifying systemic problems and recommending changes to address those problems. N.Y.C., N.Y., Charter § 24(f)-(i). Since the office was created in 1989, child welfare and the inadequacies of the child welfare system have been a persistent focus. (Decl. of Jennifer Levy ¶¶ 7–17 (hereinafter "Levy Decl."), ECF No. 121.)

[1] Plaintiff James joins the memorandum of law submitted by the 19 plaintiff children ("Named Plaintiff Children") insofar as it addresses Defendant Poole's motion to dismiss all claims brought under the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670, *et seq.* ("AACWA"), but submits this separate memorandum of law to address Defendant Poole's motion to dismiss Plaintiff James for lack of capacity.

On July 8, 2015, Plaintiff James and ten children in foster care filed a complaint alleging that New York City's foster care system fails to ensure the safety, permanency and well-being of all children in its custody, fails to comply with the state and federal law governing the system, fails to protect the constitutional rights of the children in the system and subjects far too many of these children to harm and the risk of harm. (Compl., July 8, 2015, ECF No. 1.) On December 29, 2015, Named Plaintiff Children and Plaintiff James filed an Amended Complaint adding additional named plaintiffs. In the Amended Complaint, Plaintiff James asserts a claim against the State of New York, the New York State Office of Children and Family Services ("OCFS"), and Sheila Poole, Acting Commissioner of OCFS, in her official capacity, under AACWA. (Am. Compl., Dec. 29, 2015, ECF No. 91).

Over a two-year period before filing the Amended Complaint, the Office of the Public Advocate had received more than 500 complaints regarding the Administration for Children's Services. (Am. Compl. ¶ 174). Defendant Poole's continued failure to adhere to federal law forced the Office of the Public Advocate to expend resources attempting to resolve those claims and investigating the failure of the child welfare system. (Am. Compl. ¶¶ 172–80, 349).

On January 25, 2017, Plaintiff James and Named Plaintiff Children submitted a notice of voluntary dismissal to the Orders and Judgments Clerk, via email, voluntarily dismissing the State of New York and the OCFS without prejudice. The notice of voluntary dismissal was so ordered by this Court on January 26, 2017, and filed on January 27, 2017. (Notice Voluntary Dismissal, Jan. 27, 2017, ECF No. 343). On January 26, 2017, Defendant Poole filed a partial motion to dismiss the amended complaint. (Notice Partial Mot. to Dismiss, Jan. 26, 2017, ECF No. 340.).

ARGUMENT

Defendant Poole's Motion to Dismiss pursuant to Rule 12(b)(1) fails because capacity to sue is not a jurisdictional issue and because Plaintiff James has Article III standing. (*See* Part I.) Should this Court convert the 12(b)(1) motion into a motion under Rule 12(b)(6), Defendant Poole's motion still fails because maintaining suit is squarely within the responsibilities entrusted to Plaintiff James under the New York City Charter (*see* Part II.A) and, in any event, Defendant Poole has waived its argument concerning the lack of capacity by raising it for the first time 18 months into this litigation (*see* Part II.B).

I. DEFENDANT POOLE'S MOTION TO DISMISS PLAINTIFF JAMES PURSUANT TO RULE 12(b)(1) FAILS BECAUSE THE COURT HAS SUBJECT MATTER JURISDICTION.

Defendant Poole has moved this court to dismiss Plaintiff James, pursuant to Rule 12(b)(1), arguing that the Court lacks subject matter jurisdiction because Plaintiff James lacks capacity to bring suit.[2] The State confuses capacity, which is not required for subject matter jurisdiction to exist, with Article III standing, which is required for subject matter jurisdiction. *See Manhattan Review LLC v. Yun*, 16 Civ. 0102, 2016 U.S. Dist. LEXIS 108760, at *8 (S.D.N.Y. Aug. 15, 2016); *Hoskinson v. High Gear Repair, Inc.*, 2013 U.S. Dist. LEXIS 110852, at *13 (D. Kans. Aug. 7, 2013) ("While Defendant attempts to frame the issue in terms of Plaintiff lacking Constitutional Article III standing—the type of standing required for the Court to have subject matter jurisdiction, the Court finds that the standing issue is more appropriately addressed as a question of legal capacity rather than constitutional standing.").

[2] The State mentions lack of standing but makes no argument that Plaintiff James, in fact, lacks standing. It is unclear what, precisely, is the basis for the Defendant's assertion that Plaintiff James lacks standing. Failure to raise an argument in an opening brief forfeits the right to raise it in the reply. *See United States v. Brennan*, 650 F.3d 65, 136-137 (2d Cir. 2011); *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("[W]e have concluded that merely incorporating by reference an argument presented to the district court, stating an issue without advancing an argument, or raising an issue for the first time in a reply brief likewise did not suffice").

Because the Court plainly has subject matter jurisdiction, the Court should deny the motion to dismiss pursuant to Rule 12(b)(1).

The question of whether a party has capacity has no bearing on whether this Court has subject matter jurisdiction over the instant action. *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 936 (2d Cir. 1998) ("Lack of capacity is generally not considered jurisdictional and is therefore waived if not specifically raised."); *see also Windbourne v. E. Air Lines, Inc*., 479 F. Supp. 1130, 1155-1156 (E.D.N.Y. 1979), *rev'd on other grounds* ("[C]ases have expressly rejected the notion that lack of capacity rises to the level of a subject matter jurisdictional defect."). In reaching this conclusion, courts in the Second Circuit have noted that the Rules of Civil Procedure require that lack of capacity be "raised by a specific negative averment," and that the defense of lack of capacity is waivable, unlike subject matter jurisdiction. *Windbourne*, 479 F. Supp. at 1155-1156; *Manhattan Review LLC*, 2016 U.S. Dist. LEXIS 108760 *9-10.

Because capacity is not a requisite to subject matter jurisdiction, courts in this circuit have held that lack of capacity should be raised by answer or by motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 296 n.1 (2d Cir. 1965) ("Although the defense of lack of capacity is not expressly mentioned in rule 12(b), the practice has grown up of examining it by a 12(b)(6) motion when the defect appears upon the face of the complaint."); *Manhattan Review LLC*, 2016 U.S. Dist. LEXIS 108760, *9-10.

The cases relied upon by Defendant Poole for the contention that lack of capacity is a jurisdictional defect are unavailing. Defendant argues that "Rule 12(b)(1) requires dismissal when the Court lacks subject matter jurisdiction, such as when the plaintiff lacks capacity or

standing" and cites *Cortlandt St. Recovery Corp. v. Hellas Telecomms.*, 790 F.3d 411 (2d Cir. 2015) for this proposition. This misstates the holding of *Cortlandt Street Recovery*, which involved a motion to dismiss, pursuant to Rule 12(b)(1) for lack of constitutional standing. *Id*. at 417. There is no reference to the concept of capacity anywhere in *Cortlandt St. Recovery Corp*. The other case relied upon by Defendant Poole, *Cherry v. Hillside Manor Rehab. & Extended Care*, makes plain that whether a court has subject matter jurisdiction over a case, and whether a party has legal capacity are separate inquiries. No. 06-CV-3296, 2008 U.S. Dist. LEXIS 48235, at *16-17 (E.D.N.Y. June 23, 2008). Thus, Defendant Poole's argument that a lack of capacity is grounds for a Rule 12(b)(1) motion to dismiss fails.

Although Defendant Poole refers to "capacity or standing," the brief contains no argument that the plaintiffs in this case do not satisfy the requirements of Article III standing. (Def. Br. at 8-10.) Plaintiff James has standing. The requirements of Article III standing are met where an entity diverts resources to address the issues complained of in the suit. *Nnebe v. Daus*, 644 F.3d 147, 156–58 (2d Cir. 2011) (holding that an alliance of taxi workers showed Article III standing because the unconstitutional conduct of the defendant forced it to expend resources on advocacy and counseling). This Article III standing test has been applied to claims under AACWA. *New York State Citizens' Coal. for Children v. Velez*, 629 Fed. Appx. 92, 93-94 (2d Cir. 2015). In the Amended Complaint, Plaintiff James sufficiently alleges that she has diverted resources to resolve the hundreds of complaints that her office receives about the treatment of children in a foster care system overseen by Defendant Poole. (Am. Compl. ¶¶ 172–80, 349.) If State Defendant better exercised their oversight of AACWA's enforcement, the impact on the child welfare system in New York City would be broad and long-lasting, and the Public

Advocate's duties of oversight may be turned to other agencies. (*See* Levy Decl. ¶ 19.) The Article III standard is met.

Moreover, no party has suggested that the Named Plaintiff Children lack standing. When more than one party asserts identical claims, only one of those parties need establish constitutional standing for the court to hear and decide the merits of that claim. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("It is clear that members of the Union, one of whom is an appellee here, will sustain injury by not receiving a scheduled increase in benefits. This is sufficient to confer standing under § 274(a)(2) and Article III. We therefore need not consider the standing issue as to the Union or Members of Congress.") (internal citations omitted); *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007) (adjudicating challenge under the Clean Air Act after finding that "at least one petitioner ha[s] standing"); *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("The Court of Appeals did not determine whether the other plaintiffs have standing because the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) ("[F]or each claim, if constitutional and prudential standing can be shown for at least one plaintiff, [the court] need not consider the standing of the other plaintiffs to raise that claim."). Thus, the Article III standing of the Named Plaintiff Children satisfies the constitutional and jurisdictional requirements.

The Court thus has subject matter jurisdiction to hear this case and should deny Defendant Poole's motion to dismiss pursuant to Rule 12(b)(1). *See Johnsrud v. Carter*, 620 F.2d 29, 32-33 (3d Cir. 1980) (reversing the district court's grant of motion to dismiss where the

district court had "confused the issue of subject matter jurisdiction with the separate and distinct issue of whether the complaint stated a cause of action").[3]

II. IF THE COURT CONVERTS DEFENDANT POOLE'S MOTION INTO A RULE 12(b)(6) MOTION FOR FAILURE TO STATE A CLAIM, DEFENDANT POOLE'S MOTION STILL FAILS.

Plaintiff James has stated a claim upon which relief can be granted. She has capacity to bring the instant action and, in any event, Defendant Poole waived the defense by failing to raise it at an earlier stage in the proceedings.

A. Plaintiff James Has Capacity To Sue.

Defendant Poole argues that "[i]t is plain that the Public Advocate of the City of New York has no authority here to sue Defendant Poole." (Def. Br. at 8). To the contrary, Plaintiff James is well within her legal authority to bring suit to protect the rights of her constituents who have been harmed by the actions and failures of the agency directed by Defendant Poole.

Rule 17(b) of the Federal Rules of Civil Procedure provides that capacity should be determined in accordance with the relevant state's law. Under New York law, capacity for a government agency to sue "may be inferred as a necessary implication from the agency's powers and responsibilities." Such an implication "may be inferred when the agency in question has functional responsibility within the zone of interest to be protected," provided there is no "clear legislative intent negating review," (the "*Community Board 7* test"). *Cmty Bd. 7 v. Schaffer*, 84 N.Y.2d 148, 156 (N.Y. 1994) (citing *Matter of City of N.Y. v. City Civ. Serv. Comm'n*, 60 N.Y.2d

[3] Defendant Poole has argued that Plaintiff James has the burden on this motion to dismiss because "'a plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of evidence that it exists.'" (Def. Br. at 6 (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d. Cir. 2000)). If, however, the Court elects to convert Defendant Poole's motion into a 12(b)(6) motion for failure to state a claim upon which relief can be granted, the burden is on the defendant as moving party. *See Johnsrud*, 620 F.2d at 33 ("[T]he district court has fused the two distinct concepts and dismissed the complaint for lack of subject matter jurisdiction because it failed to state a claim. In so doing, the court in effect shifted to the plaintiffs the burden which properly was the [defendant's] on a motion to dismiss under Fed. R. Civ. P. 12(b)(6).").

436, 443–44 (N.Y. 1983)); *see also Silver v. Pataki*, 96 N.Y.2d 532, 537 (N.Y. 2001); *Matter of City of N.Y.*, 60 N.Y.2d at 444.

The Public Advocate's claims satisfy the *Community Board 7* test. Contrary to Defendant Poole's argument that the "Charter does not grant the Public Advocate any capacity" (Def. Br. at 9), the Public Advocate has been found numerous times to have capacity to sue to fulfill her Charter obligations. *Green v. Safir*, 174 Misc. 2d 400, 405–06 (N.Y. Sup. Ct. 1997), *aff'd.*, 255 A.D.2d 107 (N.Y. App. Div. 1998) ("petitioner has the capacity to institute litigation"), *lv. denied,* 93 N.Y.2d 882 (N.Y. 1999); *Green v. Giuliani*, 721 N.Y.S.2d 461, 467 (N.Y. Sup. Ct. 2000) ("The Public Advocate is an independently elected official with capacity to sue."); *Matter of Long Island Coll. Hosp.*, 980 N.Y.S.2d 276, 2013 WL 5575873, at *3 (N.Y. Sup. Ct. 2013) ("Although the City Charter does not specifically authorize the Public Advocate to commence litigation, the right to bring suit to implement the power set forth in the Charter has been recognized as implied from the functional responsibility of the [Public Advocate]." (Internal quotation marks omitted)); *Matter of James v. Fariña*, 53 Misc. 3d 704, 707 (N.Y. Sup. Ct. 2016) ("Petitioner is a citywide elected official charged with monitoring, investigating and reviewing the actions of City agencies. . . . Petitioner also has the capacity to sue." (Internal punctuation omitted)); *Matter of James v. City of N.Y.*, 53 Misc. 3d 821, 825-26 (N.Y. Sup. Ct. 2016) (finding capacity to pursue an Article 78 action against the New York City Department of Education).

The Public Advocate's charter obligations are three-fold: (1) to investigate agency wrongdoing, as in *Green v. Safir*, 174 Misc. 2d 400; (2) to increase transparency, as in *Matter of Thomas v. New York City Dept. of Educ.*, 145 A.D.3d 30 (N.Y. App. Div. 2016) (Public Advocate intervened in litigation to ensure that School Leadership Team meetings are open to

the public); and (3) to attempt to resolve constituent complaints, as in *Matter of James v. City of N.Y.*, 53 Misc. 3d 821. This case falls into the third category: it is an attempt to resolve hundreds of complaints that indicate that children in foster care in New York City are maltreated at unacceptably high rates and languish for years without returning to their families or being adopted.

As set forth below, Plaintiff James has functional responsibility within the zone of interests to be protected by this litigation (*see* Part II.A.1) and there is no clear legislative intent negating a finding capacity to sue (*see* Part II.A.2). Her claims therefore satisfy the *Community Board 7* test for capacity to sue.

1. The Public Advocate Has Functional Responsibility Within the Zone of Interests To Be Protected by Her Claim Against State Defendant.

The Public Advocate has a broad mandate to oversee the provision of services to New York City residents. She is charged by the New York City Charter with investigating and attempting to resolve individual complaints and with recommending systemic reforms when problems are recurring or citywide. N.Y.C., N.Y., Charter § 24(f). The Charter also authorizes the Public Advocate to obtain information and records where the Public Advocate deems such information "necessary to complete the investigations, inquiries and reviews required by" the Charter. N.Y.C., N.Y., Charter § 24(j). And, the Charter charges the Public Advocate to act as a "Charter watchdog," and authorizes her to inquire into "any alleged failure of a city officer or agency to comply with any provision of the Charter." N.Y.C., N.Y., Charter § 24(i).

The New York City Charter charges the Administration for Children's Services and its commissioner with "providing suitable and appropriate care for children who are in the care, custody, or guardianship of the commissioner." N.Y.C., N.Y., Charter § 617(3). From the time Plaintiff James took office, on January 1, 2014, until the date the Amended Complaint was

filed, on December 28, 2015, she received 559 complaints about the Administration for Children's Services. (Am. Compl. ¶ 174.) The Public Advocate's Office expended resources investigating those complaints and attempting to resolve them. (Levy Decl. ¶¶ 3-5, 19). Many of the complaints were unable to be resolved, because the problems were systemic in nature. (*Id.* at ¶ 4). The claim Plaintiff James asserts here, under AACWA, is aimed squarely at ensuring that the state agency overseeing the Administration for Children's Services enforces federal standards that would ensure the "suitable and appropriate care" of children in foster care, as the New York City Charter requires. *See* N.Y.C., N.Y., Charter § 617(3).

The Public Advocate's capacity maps onto her authority under the City Charter. A recent case is instructive. In *Matter of James v. City of New York*, the court considered whether the Public Advocate had the capacity to sue where it is necessary to fulfill her Charter mandate, including to resolve complaints involving city services. 53 Misc. 3d at 825-26. The Public Advocate brought suit to enforce a provision of the New York City Administrative Code that requires the City to provide air conditioning on buses that transport children with disabilities in warm weather. *Id.* at 823. In determining that the Public Advocate had capacity to sue to vindicate the rights of her constituents, the court pointed to the Public Advocate's "role and responsibility" and her mandate, which "include[d] an obligation to explore a serious health problem affecting disabled children of the City and attempt, with the help of the Court, to remedy that problem."[4] *Id.* at 825-26.

Here, the Public Advocate seeks to fulfill her mandate to ensure that the Charter requirement—that children in foster care be provided with "suitable and appropriate care"—is

[4] The City has sought leave to appeal the IAS Court's decision in that case, which was granted. The case now awaits briefing at the Appellate Division of the New York Supreme Court.

met. Because Public Advocate James is functionally responsible for the oversight of services, she satisfies the first prong of the *Community Board 7* test.

Defendant Poole's arguments to the contrary are unavailing. Defendant Poole argues that the responsibilities granted to the Public Advocate do not provide a basis for inferring capacity, first because "the Public Advocate was created to be a watchdog over City government; Defendant Poole is not part of the city government." (Def. Br. at 9 (internal quotation marks omitted) (emphasis in original)). The only case that has squarely considered this argument does not support Defendant Poole's argument. In *Matter of Long Island College Hospital*, then-Public Advocate Bill de Blasio argued that his capacity to intervene in a case involving the closure of a state hospital was derived from his duty to "stand[] up for the delivery of key services—such as health care—to all New Yorkers." 980 N.Y.S.2d 276, 2013 WL 5575873, at *3 (N.Y. Sup. Ct. 2013).[5] Although the proceeding sought approval of the dissolution of assets of a state entity, the Public Advocate argued that the closure of a state hospital would have "a profound impact on the city services provided by the New York City Fire Department . . . and the New York City Health and Hospitals Corporation." *Id.* at *6. The court agreed that this was sufficient, finding that the capacity to intervene could be implied from the "functional responsibility of the Public Advocate." *Id.*

Defendant Poole relies upon *Madison Square Garden L.P. v. N.Y. Metro. Transp. Auth.* and *Matter of James v. Donovan* to support her argument that the Public Advocate may not sue non-city agencies. Both cases are easily distinguished.

[5] In an unreported decision in a related case, the court's narrow decision held that the Public Advocate lacked standing to bring an Article 78 suit challenging the New York State Department of Health's decision to approve the closure of the same hospital. *In the Matter of de Blasio v. State Univ. of New York*, No. 13007/13 (N.Y. Sup. Ct. Sept. 12, 2013).

In *Madison Square Garden, L.P. v. N.Y. Metro. Transp. Auth.*, then-Public Advocate Betsy Gotbaum sought to annul the state's selection of a developer and development plan for state land, which was unrelated to effectuation of any city agency's charter obligations. 19 A.D.3d 284, 285 (N.Y. App. Div. 2005). The court held that the Public Advocate lacked capacity to bring that suit, rejecting the Public Advocate's argument that, in her duty as "'watchdog' over city government," she had capacity to sue over state decision-making related to state land. *Id.* In contrast, in this case a state agency exerts control over the effectuation of the city agency's charter obligations, over which the Public Advocate has oversight. Public Advocate James' lawsuit is limited to the ways in which a state actor has exercised its authority over a city agency and city services.

In *James v. Donovan*, the Supreme Court Appellate Division in the Second Department concluded that the Public Advocate did not have capacity to sue the District Attorney for Richmond County because the New York City Charter expressly exempts from the Public Advocate's oversight district attorneys' "criminal law-related prosecutorial responsibilities." 130 A.D.3d 1032, 1035 (N.Y. App. Div. 2015). There are no provisions of the Charter that exempt children in foster care from the oversight of the Public Advocate. To the contrary, the child welfare system is squarely within the Public Advocate's mandate. (*See* Levy Decl. ¶¶ 7-17).

Defendant Poole also argues that "the claims Plaintiff James raises here have no relation to her authority," arguing instead that the Public Advocate is limited to suing to gain access to information. (Def. Br. at 10). New York courts have held otherwise. As described above, the recent decision in *Matter of James v. City of New York*, held that the Public Advocate has capacity to sue as a part of her attempts to resolve constituent complaints. 53 Misc. 3d at

825-26. *See also Matter of James v. Fariña*, 53 Misc. 3d at 707 (finding that the Public Advocate has capacity to sue seeking a judicial inquiry into the City's failure to track special education services in schools); *Matter of Thomas*, 145 A.D. 3d at 36 (recognizing that the Public Advocate intervened without objection in a case concerning the New York City Department of Education's violation of the Open Meetings Law).

In *Green v. Safir*, the New York Supreme Court upheld the right of then-Public Advocate Mark Green to sue the police commissioner for access to review Police Department disciplinary files. 174 Misc. 2d at 405-06. The Public Advocate sought these records, pursuant to a provision in the Charter that authorized him to "have timely access to those records and documents of city agencies which the public advocate deems necessary to complete the investigations, inquiries and reviews required by this section." *Id.* at 404 (citing N.Y.C., N.Y., Charter § 24(j)). That provision also provides that in the event the agency does not comply, "the public advocate may request an appropriate committee of the council to require the production of such records and documents." *Id*. In reasoning that the Appellate Division of the Supreme Court subsequently upheld as "cogent," the trial court held that "this subdivision is clearly permissive and there is nothing to indicate that application to the City Council is the exclusive means by which the Public Advocate can obtain data denied him by a City agency." *Id.* at 405; *Green v. Safir,* 255 A.D.2d at 384. The reasoning is instructive: an express non-judicial remedy does not preclude a finding that capacity is implicit in the Charter. Here, where the Charter has granted the Public Advocate powers to advocate for systemic reforms, the absence of an express grant of capacity does not preclude a finding that the Public Advocate has capacity to sue.

The Public Advocate is not the first city official to be held to have capacity to sue in the absence of an express grant in the Charter of that power. For example, the New York City

Comptroller—the independently-elected official with responsibility over the City's finances and contracts—is not expressly granted the power to sue by the Charter provisions governing his office. Nevertheless, the Comptroller has been held to have capacity to sue. *See Comptroller of the City of N.Y. v. Mayor of the City of N.Y.*, 7 N.Y.3d 256, 258 (N.Y. 2006); *see also Comptroller of City of N.Y. v. Dep't of Fin. of the City of N.Y.*, 996 N.Y.S.2d 864 (N.Y. Sup. Ct. 2014) (granting Comptroller's motion to compel compliance with a subpoena seeking tax records). This is particularly relevant, because the Public Advocate was created—as discussed *infra*—to serve as a counterpart to the Comptroller in overseeing the affairs of the City.

2. There Is No "Clear Legislative Intent" To Negate a Finding That the Public Advocate Has Capacity To Sue.

The *Community Board 7* test requires that there be no clear legislative intent "not to authorize" an entity to bring a judicial action. 84 N.Y.2d at 158. The Office of the Public Advocate, was given its current mandate by the Charter revisions of 1989. (Decl. of Harriet Michel, ECF No. 121-13). At the time of the 1989 Charter revisions, the Public Advocate was known as the City Council President.[6] *See id.* at 10. The City Council President had been given the power to act as ombudsman in 1975. *See* Mark Green & Laurel W. Eisner, *The Public Advocate for New York City: An Analysis of the Country's Only Elected Ombudsman*, 42 N.Y.L. Sch. L. Rev. 1093, 1095 (1998). When the office's powers were enhanced in the 1989 Charter revisions, the resulting office was seen as the "services" analogue to the comptroller, with similar responsibilities over a different but equally important realm. *Id.* at 1102.

The records of the 1989 Charter Revision Commission "contain no hint that the Commission . . . intended to bar the council president from turning to the courts for relief."

[6] The title of the office remained City Council President until 1993, when it was changed to Public Advocate. *See* N.Y.C., N.Y., Local L. No. 19 (1993).

Green & Eisner, *supra*, at 1130 n.181. The City Council President had, in fact, been relying on the courts to pursue her mandate for years prior to the 1989 Charter revisions. In at least one case, the City Council President sued to vindicate the rights of constituents, who themselves asserted claims under 42 U.S.C. § 1983. *See State Cmtys. Aid Assn. v. Regan*, 492 N.Y.S.2d 497 (N.Y. App. Div. 1985) (City Council President was co-plaintiff in action involving the delivery of Home Energy Assistance Payments to constituents); *see also Golden v. Koch*, 49 N.Y.2d 690, 693 (N.Y. 1980) (City Council President was plaintiff in declaratory judgment action seeking determination concerning Mayor's power to vote on budget modifications).

Prior litigation by the City Council President weighs in favor of a finding of capacity, because under New York law, legislators are "presumed to be aware of the law in existence at the time of an enactment and to have abrogated the common law only to the extent that the clear import of the language of the statute requires." *B&F Bldg. Corp. v. Liebig*, 76 N.Y.2d 689, 693 (N.Y. 1990) (citation omitted). In light of the City Council President's practice of litigating in her official capacity, the 1989 Charter Revision Commission's silence is strong evidence that there was no "clear legislative intent" to bar the Public Advocate—or her antecedent office, the City Council President—from litigating cases that fall within her official mandate so as to effectuate her functional responsibilities under the Charter.

B. Defendant Poole Has Forfeited the Defense of Lack of Capacity.

Defendant Poole reached a proposed settlement agreement with Plaintiff James in the summer and fall of 2015. Prior to reaching settlement, Defendant Poole engaged in extensive negotiations with plaintiffs. (Decl. of Julie A. North, ECF No. 225). In the settlement agreement, Defendant Poole asserted defenses—including sovereign immunity—but did not contest or otherwise raise the capacity of Plaintiff James. (Consent Decree, ECF No. 96-1). Indeed, the settlement agreement expressly contemplates enforcement of the agreement in court

by the Public Advocate. (Consent Agreement §§8.3, 14, ECF No. 96-1). An attorney for Defendant Poole argued in favor of the Plaintiffs' motion for preliminary approval of the class settlement (Tr. of Conference, Apr. 5, 2016, ECF No. 151 at 11-13, 19-20), and in favor of the Plaintiffs' motion for final approval of the settlement. (Tr. of Fairness Hr'g, Aug. 5, 2016, ECF No. 267 at 39-43). Officials who report to Defendant Poole submitted affidavits to the Court in support of Plaintiffs' motion for preliminary and final approval of the settlement. (Decl. of Lee Dorrance Prochera, ECF No. 113-1; Decl. of Laura Velez, ECF No. 225-1; Decl. of Rebecca Ann Colman, ECF No. 225-2; Supp'l Decl. of Lee Dorrance Prochera ECF No. 225-3; Decl. of Sonia Kruppenbacher Meyer, ECF No. 225-4). Taken together, these appearances and written submissions constitute a year and a half of very active participation by Defendant Poole prior to raising this defense. Most importantly, Defendant Poole took steps to preserve some defenses in the settlement agreement that she entered into, but she did not preserve her defense of lack of capacity and, to the contrary, expressly contemplated enforcement of the agreement in federal court by the Public Advocate. Defendant Poole has thus forfeited her defense that Plaintiff James lacks capacity.[7]

Lack of capacity is waived if not asserted. *Allan Applestein TTEE FBO D.C.A. Grantor Trust v. Province of Buenos Aires*, 415 F.3d 242, 245 (2d Cir. 2005); *see also* Fed. R. Civ. P. 9(a) (requiring that a party who wishes to raise the issues of another party's capacity to sue or be sued do so "by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge"); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1295 (3d ed. 2004).

[7] Defendant Poole asserts that she has not waived this defense as "subject matter jurisdiction is not waivable." (Def. Br. at 10 n.5). However, because lack of capacity is not jurisdictional, see *supra*, this argument fails. The case cited by Defendant Poole is unavailing: *Motorola Credit Corp. v. Uzan*, 274 F. Supp. 2d 481, 493 (S.D.N.Y. 2003) (finding that lack of standing—not capacity—is jurisdictional and therefore non-waivable).

While raising the defense in initial responsive pleadings is essential to preserving it, "active participation" may forfeit affirmative defenses, even when they have been properly raised in an answer or motion to dismiss. Rule 12(h) of the Federal Rules of Civil Procedure requires a party to raise an affirmative defense by the initial responsive pleading.[8] Rule 12(h) sets the minimum required for a waiver, but courts have found that it does not preclude a finding that a defense raised in an initial responsive pleading was forfeited by the party's actions in litigation. *See Yeldell v. Tutt*, 913 F.2d 533, 538 (8th Cir. 1990) ("We believe, however, that 'this rule sets only the outer limits of waiver; it does not preclude waiver by implication.'" (citing *Marquest Med. Prods. v. EMDE Corp.*, 496 F. Supp. 1242, 1245 n.1 (D. Col. 1980))); *Peterson v. Highland Music*, 140 F.3d 1313, 1318 (9th Cir. 1998) ("Rule 12(h)(1) specifies the minimum steps that a party must take in order to preserve a defense. It does not follow, however, that a party's failure to satisfy those minimum steps constitutes the only circumstance under which the party will be deemed to have waived a defense. Most defenses, including the defense of lack of personal jurisdiction, may be waived as a result of the course of conduct pursued by a party during litigation.").

In some instances, courts have concluded that an affirmative defense was forfeited even where the defendant has not yet made a responsive pleading. For example, in *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*, the Fifth Circuit Court of Appeals considered an appeal of a default judgment, where an attorney had entered a notice of appearance and negotiated a

[8] Although capacity is not expressly mentioned in Rule 12(h), Wright & Miller have grouped capacity with affirmative defense for analyzing when a waiver occurs:

> [A]lthough an objection to a party's capacity, authority, or legal existence is not technically speaking an affirmative defense, it can be analogized to an affirmative defense and treated as waived if not asserted by motion or responsive pleading, subject, of course, to the liberal pleading amendment policy of Rule 15. Early waiver is necessary to give meaning to the requirement in Rule 9(a) that these matters must be put in issue by a "specific denial."

5A Charles Alan Wright & Arthur R. Miller, *Fed. Practice and Procedure* § 1295 (3d ed. 2004).

settlement, before the court entered a notice of default judgment. 811 F.2d 278, 281-282 (5th Cir. 1987). The Court of Appeals found that, although the defendants had not filed a pleading before the default judgment was entered, they had waived the affirmative defense of lack of personal jurisdiction by their conduct—*i.e.*, by appearing in court, negotiating the settlement, and otherwise litigating the matter actively. *Id*. *See also Trs. of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731 (7th Cir. 1991) (holding that defendant had waived affirmative defense of insufficient service of process, by participating in post-default-judgment proceedings for years without raising the defense).

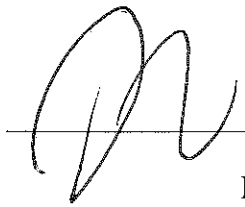
Here, multiple attorneys have put in notices of appearance. (Notice of Appearance by Jennifer C. Simon on behalf of Sheila Poole, ECF No. 111; Notice of Appearance by Antoinette W Blanchette on behalf of Sheila Poole, ECF No. 131; Notice of Appearance by Samantha Leigh Buchalter on behalf of Sheila Poole, ECF No. 338). Attorneys for Defendant Poole have filed motions for adjournment. (Letter Mot. to Adjourn Conference, ECF No. 45; Consent Letter Mot. to Adjourn Conference, ECF No. 122; Consent Letter Mot. to Adjourn Conference, ECF No. 272; Consent Letter Mot. to Adjourn Conference, ECF No. 292; Consent Letter, ECF No. 305). As noted above, attorneys for Defendant Poole have argued before the Court in favor of approval of her settlement agreement with Plaintiff James and Named Plaintiff Children and officials who report to Defendant Poole have submitted affidavits in support of that settlement agreement. Indeed, the settlement agreement expressly contemplates judicial enforcement thereof by Plaintiff James and fails to preserve the lack of capacity defense—though it preserves other defenses. (Consent Decree §§ 8.3, 14, ECF No. 96-1).

CONCLUSION

For the foregoing reasons, Plaintiff James requests that the Court deny Defendant Poole's motion to dismiss.

Dated: New York, NY
February 13, 2017

Respectfully submitted,



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