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 (KMW) (SLC)

STATE DEFENDANT'S SURREPLY MEMORANDUM OF LAW IN FURTHER OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION

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Pursuant to the Court's Order dated March 21, 2021, ECF No. 530, Defendant Sheila Poole, sued in her official capacity as Commissioner of the New York State Office of Children and Family Services ("State Defendant"),[1] respectfully submits this surreply memorandum of law, together with the Declaration of Samantha L. Buchalter dated April 8, 2021 ("Second Buchalter Decl."), in response to the Reply Memorandum in Support of Plaintiffs' Renewed Motion for Class Certification, ECF No. 533 ("Pl. Reply").

I. Plaintiffs Fail to Counter Arguments Against Certification of the General Class

Plaintiffs improperly frame certification of the General Class as a foregone conclusion. According to Plaintiffs, even though the New York City foster care system involves case-specific, individualized decisions by multiple actors, many of which are non-parties, their proposed General Class must be certified because that Class is system-wide. See Pl. Reply at 12-13, 15, 39. To that end, Plaintiffs claim to have identified "the following *city-wide practices* affecting the proposed Class: . . . OCFS's failure to exercise meaningful oversight over ACS and the Contract Agencies."[2] Id. at 5-6. Yet by tying their class definition to system-wide claims,

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[1] All abbreviations used herein are the same as those used in State Defendant's Memorandum of Law in Opposition to Plaintiffs' Renewed Motion for Class Certification, ECF No. 497 ("State Defendant's Opposition" or "State Def. Opp.").

Plaintiffs repeatedly and incorrectly refer to State Defendant as "the State." See, e.g., Pl. Reply at 12, 15, 19 n.36, 21, 22, 27 n.48, 40. The State of New York is no longer a party to this litigation. ECF No. 343. Plaintiffs also incorrectly conflate the City Defendant and State Defendants. Compare Pl. Reply at 25 n.44 (referring to "Defendants' strategy of filing 'surprise' expert reports with its briefs, prompting the need for additional discovery") with ECF No. 500 (regarding City Defendant's expert reports). In response to the Amici Brief, ECF No. 531, Plaintiffs claim they "are pursuing claims in this case" relating to "the 'state's routine failure to [provide reunification] services to parents in a timely manner,'" Pl. Reply at 20 n.37, but those "claims" are actually asserted as to alleged acts by City Defendant, Pl. Mem. at 28-29. In any event, Plaintiffs miss the significance of Amici's filing: that Plaintiffs ignore the foster care system's complexities in an attempt to obtain certification of an overly broad General Class.

[2] Plaintiffs incorrectly state that they "assert on behalf of the Class that ACS's and OCFS's practices violate several provisions of New York State Social Services Law (Fourth Cause of

Plaintiffs highlight the very issue with the General Class: its overbreadth. See State Def. Opp. at Points I, II. Plaintiffs do not—and cannot—point to any Second Circuit case that supports certification of such a broad class.[3] See Pl. Reply at 13 n.25, 25.

Plaintiffs instead attempt to distinguish the one Second Circuit case directly on point: Taylor v. Zucker, in which the Chief District Judge of the Southern District of New York stated that "it is highly doubtful that" a class with the same class definition as the General Class "would be certified" post-Wal-Mart. Taylor v. Zucker, 2015 WL 4560739 (S.D.N.Y. Jul. 27, 2015), at *11; accord Order Denying Class Cert. at 3. Plaintiffs claim that Taylor is distinguishable because Plaintiffs "do not challenge any individual decisions made by caseworkers, private agencies or Family Court Judges. Rather, Plaintiffs' claims against State Defendant challenge OCFS's system-wide practice of failing to oversee ACS." Pl. Reply at 15. However, that very system involves, like the systems in Wal-Mart and Taylor, "hundreds of independent decisions regarding different individuals." See State Def. Opp. at 18-19 (quoting Taylor, 2015 WL 4560739, at *9). The General Class, which inherently subsumes those various decisions and decision-makers, is too broad to be certified. See id. at Points I, II.

Action)," id. at 5, 14 n.26—a claim they do not in fact assert. See Am. Compl., ECF No. 91, ¶¶ 350-51. Regardless, any such claims would be barred by the Eleventh Amendment. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99-100 (1984).

[3] The cases that Plaintiffs do cite are distinguishable. See State Def. Opp. at 16 n.12. As to Connor B. ex rel. Vigurs v. Patrick, 272 F.R.D. 288 (D. Mass. 2011), Plaintiffs misquote the class certified, obfuscating that it is narrower than the General Class. Compare id. at 291 (defining the class as "all children who are now or will be in the foster care custody of the Massachusetts Department of Children and Families as a result of abuse or neglect" (emphasis added)) with Pl. Reply at 7 n.12 (quoting the West Headnotes).

Moreover, unlike New York State, Massachusetts has a foster care system that is State-administered and children in that system are placed in the custody of a State agency. See Connor B., 272 F.R.D. at 291. By arguing that this distinction "is unavailing," Pl. Reply at 25 n.45, Plaintiffs miss the point: that OCFS is in a significantly different position with respect to the putative class members than a State agency that administers foster care directly.

Plaintiffs also try to dismiss State Defendant's arguments as "go[ing] to the merits of Plaintiffs' claims, not to the existence of common issues amenable to class-wide adjudication." Pl. Reply at 3; accord id. at 7, 22, 40. Nonetheless, Plaintiffs themselves acknowledge that "[m]erits questions may be considered to the extent . . . that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Id. at 7 (quotation omitted); accord In re IPO, 471 F.3d at 42. Moreover, the "Statement of Facts" in Plaintiffs' moving brief demonstrates that Plaintiffs base their own arguments on what is inherently a merits argument. See Pl. Mem. at 5-46; Pl. Reply at 21, 22.

Indeed, Plaintiffs essentially argue that because they took "extensive discovery," they have met their burden for class certification,[4] see id. at 2, 3, 6, 12, 21; Pl. Mem. at 5, 48, 59—never mind that Plaintiffs often misconstrue that very discovery, see, e.g., State Def. Opp. at 6 n.5-6, 7, 9, 9 n.7-8, 13 n.10, 14 n.11. What Plaintiffs ignore is that the Court rejected the exact General Class definition Plaintiffs currently use not only because the case was "pre-discovery" and "the record was not fully developed," Pl. Reply at 3, but on substantive grounds that Plaintiffs cannot and have still not rectified. State Def. Opp. at 13-14. In the face of State Defendant's opposition brief, Plaintiffs have still failed to demonstrate that the Named Plaintiff Children's alleged injuries "are attributable to faulty management and oversight of the foster care system and thus are central common factual issues that can be addressed with the sort of 'one-stroke' determination that is contemplated by the class action mechanism." Order Denying Class

[4] Illogically, Plaintiffs simultaneously complain that they did not receive certain class-wide discovery. Pl. Reply at 27 n.48. Not only is this claim false, see Letter dated October 6, 2017, attached as Exhibit H to the Second Buchalter Decl., but it was also rejected by the Magistrate Judge, see ECF No. 398 (upholding State Defendant's objection to producing documents related to congregate care). Moreover, Plaintiffs never pursued resolution of the alleged discovery dispute regarding "the effectiveness of this new Placement Module." Pl. Reply at 19 n.36.

Cert. at 2-3 (quoting Wal-Mart, 564 U.S. at 350).

Rather than addressing significant deficiencies in the overbroad General Class—for example, that the Named Plaintiff Children were only placed in 11 of the 26 Contract Agencies included in the General Class and that none of the Named Plaintiff Children were placed in congregate care—Plaintiffs instead erroneously try to shift their burden onto State Defendant. Pl. Reply at 28. In any event, Plaintiffs ignore the distinctions between Contract Agencies and between congregate care and foster boarding homes.[5] See State Def. Opp. at 24-25 (citing City Opp. at 36-40, 42-45); 18 N.Y.C.R.R. Parts 442, 447-49, 451 (applying to different types of congregate care); id. Parts 443, 446 (applying to different types of family foster boarding homes); cf. id. § 430.11 (setting forth standards for appropriate level of placement).

With respect to Rule 23(b)(2), Plaintiffs again erroneously try to shift their burden onto State Defendant. Pl. Reply at 40 ("The fact that State Defendant cannot 'imagine' a specific injunction at this pre-merits stage should not bar certification of Plaintiffs' class."). Moreover, Plaintiffs misunderstand the applicability of Reynolds to the instant motion. State Defendant is not arguing for summary judgment on liability at this time based on Reynolds's holding that a State agency is not strictly liable for a locality's actions. Rather, that holding undermines Plaintiffs' proposition that certification of a class against City Defendant necessarily mandates certification of a class against State Defendant. And Plaintiffs have failed to show that there is a connection between the alleged injuries of the putative class members and OCFS's oversight, such that an injunction would remedy those alleged injuries. See State Def. Opp. at Point II.

[5] That Plaintiff Elisa W. was placed in a congregate care facility after voluntarily electing to return to the New York City foster care system is irrelevant because Plaintiffs fail to make any showing of commonality or typicality based on that fact. See id. at 28.

II. Plaintiffs Cannot and Do Not Remedy their Failure to Demonstrate that the Subclasses Meet the Requirements of Rule 23

Plaintiffs also fail to demonstrate that all elements of Rule 23 are met as to the Subclasses, see State Def. Opp., Point III, and cannot now rectify this failure in their Reply Brief: "as the party seeking class certification, [the plaintiff] bears the initial burden on both those elements [of class certification] and cannot solely wait to respond to deficiencies [the defendant] raises in its opposition." Royal Park Investments SA/NV v. U.S. Bank Nat'l Ass'n, 324 F. Supp. 3d 387, 395 (S.D.N.Y. 2018); see also State Def. Opp. at 34 (collecting cases).

Moreover, Plaintiffs' overdue attempt to fill the gaps in their moving brief fails. Plaintiffs' insertion of the term "Subclasses" into the headings and parentheticals is ineffectual. See, e.g., Pl. Reply at 24, 39. In addition, Plaintiffs' citation to numbers set forth in the alleged Statement of Facts of their moving brief, id. at 7-8, itself reveals that they made no argument as to numerosity of the Subclasses in their moving brief. See State Def. Opp. at 33 (citing Pl. Mem. at 48-49). And Plaintiffs make no argument regarding commonality or adequate representation among the Subclasses as to State Defendant, see Pl. Reply at 9-23. Finally, Plaintiffs' conclusory statement that "the Subclasses are also sufficiently ascertainable" because they "are based on objective, administrable criteria," id. at 8, wholly fails to address any of the arguments to the contrary raised by State Defendant.[6] See State Def. Opp., Point III(B).

CONCLUSION

For the reasons set forth above, and in State Defendant's Opposition, the Court should deny Plaintiffs' Renewed Class Certification Motion and grant such other and further relief as the Court deems just and proper.

[6] Contrary to Plaintiffs' contention, id., courts have required ascertainability for classes certified under Rule 23(b)(2). See, e.g., Charron, 269 F.R.D. at 229; Spagnola, 264 F.R.D. at 97.

Dated: New York, New York
April 8, 2021

Respectfully submitted,

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