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)

NAMED PLAINTIFF CHILDREN'S MEMORANDUM OF LAW IN OPPOSITION TO CITY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

CRAVATH, SWAINE & MOORE LLP
Julie A. North
J. Wesley Earnhardt

825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
Email: jnorth@cravath.com
Email: wearnhardt@cravath.com

A BETTER CHILDHOOD INC.
Marcia Robinson Lowry
1095 Hardscrabble Road
Chappaqua, New York, NY 10514
(844) 422-2425
Email: mlowry@abetterchildhood.org

Attorneys for Plaintiffs Elisa W., by her next friend, Elizabeth Barricelli; Alexandria R., by her next friend, Alison Max Rothschild; Thierry E., by his next friend, Amy Mulzer; Lucas T., Ximena T., Jose T. C. and Valentina T. C., by their next friend, Rachel Friedman; Ayanna J., by her next friend, Meyghan McCrea; Olivia and Ana-Maria R., by their next friend, Dawn Cardi; Xavion M., by his next friend, Michael B. Mushlin; Dameon C., by his next friend, Reverend Doctor Gwendolyn Hadley-Hall; Tyrone M., by his next friend, Bishop Lillian Robinson-Wiltshire; Brittney W., by her next friend, Liza Camellerie; Mikayla G., by her next friend, Amy Mulzer; Myls J. and Malik M., by their next friend, Elizabeth Hendrix; and Emmanuel S. and Matthew V., by their next friend, Samuel D. Perry, individually and on behalf of a class of all others similarly situated

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PRELIMINARY STATEMENT

Ten minor children in the foster care custody of the Commissioner of New York City's Administration for Children's Services ("ACS") (the "Named Plaintiff Children") filed this putative class action on behalf of a class of similarly situated children against the City and State Defendants[1] in July 2015. On December 28, 2015, Named Plaintiff Children filed both an Amended Complaint that added nine additional plaintiff children and a motion to certify the class. At the time they filed for class certification, the 19 Named Plaintiff Children had languished in foster care custody for an average of over four years. In the nine months from the time they filed for class certification until the Court decided the motion on September 27, 2016, however, almost a third were discharged by ACS from foster care. City Defendant now moves to dismiss six Named Plaintiff Children and prevent them from representing a putative class on the grounds that their individual substantive claims are moot. City Defendant's motion should be denied because the six Named Plaintiff Children's claims are not moot and, even if they were, Supreme Court precedent provides they may still seek class certification and represent the transitory class of children in the foster care system whose substantive claims remain.

First, Named Plaintiff Children's claims satisfy an exception to the mootness doctrine because they are "capable of repetition, yet evading review". Children in foster care in New York have a high rate of reentry into care and an even higher rate of trial discharge failure. It is therefore reasonable to expect that the six Named Plaintiff Children at issue here may reenter care in the future. Named Plaintiff Children's claims evade review for similar reasons. The six Named Plaintiff Children at issue here are a case in point—all were in (or in and out of)

[1] As used herein "City Defendant" refers to the City of New York whereas "State Defendants" refers to the State of New York, The New York State Office of Children and Family Services ("OCFS") and Sheila J. Poole, in her official capacity as Acting Commissioner of OCFS.

foster care for years before the present suit was initiated, yet all were discharged by ACS before the Court could decide Named Plaintiff Children's initial motion for class certification.

Second, even if the six Named Plaintiff Children could not reasonably be expected to reenter foster care themselves, under Supreme Court precedent they are able to assert class claims on behalf of the children who are currently in foster care because the claims of children in the foster care system are "inherently transitory". Although the class has not yet been certified, the Named Plaintiff Children's claims will relate back to the date of the filing of the complaint once certification is approved.

Third, dismissal of the six Named Plaintiff Children's claims would be inconsistent with the policies that underlie the mootness doctrine and would complicate rather than streamline discovery. Permitting City Defendant to use mootness as a shield will only provide an incentive for City Defendant to continue to delay the litigation of class certification and eliminate additional named plaintiffs before class certification can be decided. Serially dismissing named plaintiffs likewise will not streamline discovery as City Defendant suggests. Instead, it will require Named Plaintiff Children to add representative plaintiffs to ensure the claims of an inherently transitory population can remain before this Court until a renewed class certification motion can be decided.

STATEMENT OF FACTS

Named Plaintiff Children do not have reason to dispute that the six allegedly moot Named Plaintiff Children have been discharged from ACS custody. (*See* Def.'s Rule 56.1 Statement of Facts, ECF No. 300.) That does not mean, however, that there are no disputed material facts relevant to City Defendant's motion. There are numerous material facts not included in City Defendant's Rule 56.1 Statement of Facts that are necessary to the Court's

determination of the motion for summary judgment. Those facts are set forth herein and cited in Named Plaintiff Children's argument below. When the Court resolves all ambiguities and draws all reasonable inferences in the light most favorable to Named Plaintiff Children, City Defendant's motion for summary judgment must be denied.

Named Plaintiff Children filed their Amended Complaint on December 28, 2015, alleging that City and State Defendants are violating federal and State law by failing to ensure that the constitutional and statutory rights of foster children in New York City are protected. (*See* Am. Compl., ECF No. 91.) They filed a motion for class certification that same day. (*See* Pls.' Am. Mot. Class Certification, ECF No. 87.) City Defendant in its opposition to the motion for class certification and at oral argument consistently represented to the Court that the allegations in the Amended Complaint and the Class Certification Motion were inconsistent with the Named Plaintiff Children's case files. (*See* Defs.' Mem. Opp'n to Pls.' Mot. Class Certification, ECF No. 205 ("[Named Plaintiff Children] have drastically misstated and misrepresented critical facts upon which their claims for class certification depend. . . ."); Hr'g Tr., 29:18-20; 30:19-21, Aug. 5, 2016, ECF No. 267 ("[City Defendant learned that there were fundamental factual errors in the representations being made in the complaint." . . . "[T]he facts of those cases are completely different in many of these instances from the facts as asserted in the complaint."). While the motion for class certification was pending, six of the 19 Named Plaintiff Children were discharged from ACS custody. Those children were all discharged within a six-month span from March to September 2016. On September 27, 2016, the Court denied the motion for class certification because Named Plaintiff Children failed to meet their evidentiary burden affirmatively demonstrating compliance with Federal Rule of Civil Procedure 23. (Mem. Order, Sept. 27, 2016, ECF No. 282.) Importantly, this denial was without prejudice

to allow renewal of the motion after Named Plaintiff Children have an opportunity to take discovery to gather the evidentiary support the Court held was required.

City Defendant delayed producing the case files to Named Plaintiff Children, refused to produce them on a rolling basis as ordered by Magistrate Judge Pitman on May 27, 2016 (*see* Hr'g Tr. 50:1-2, ECF No. 165), and finally produced them by June 29, 2016 in such disarray that Named Plaintiff Children have had to expend significant time and resources to review the files. After thousands of hours of review, Named Plaintiff Children can affirm that the case files support the allegations in the Amended Complaint and demonstrate that ACS repeatedly failed to protect the safety and well-being of the Named Plaintiff Children. The case files of the six Named Plaintiff Children the City Defendant seeks to dismiss demonstrate that the children were in and out of ACS custody for an average of seven and a half years before their recent discharge. The case files also confirm that all would adequately represent a class of children whom ACS repeatedly failed to protect from harm while they were in its custody:

1. Elisa W.

Elisa first came to the attention of ACS when she was four weeks old. (Ex. A-1, at NYC_00041813.) When Elisa was born, she was living with her fourteen–year-old mother in a shelter with Elisa's maternal grandmother. (*Id.*) A shelter employee contacted the State Central Registry hotline to report that Elisa's maternal grandmother had left Elisa, her mother and her other children alone and without food while she was out all night drinking. (Ex. A-1, at NYC_00041813-815.) Elisa and her mother were remanded to foster care, but subsequently were discharged back to the maternal grandmother's care. (Ex. A-1, at NYC_00041816; Ex. A-2, at NYC_00004895.) While living in the maternal grandmother's home, Elisa's mother was abused by her father and other relatives. (Ex. A-2, at

NYC_00004897.) Elisa and her mother then re-entered foster care and were placed in a mother-baby foster home when Elisa was three years old. (Ex. A-2, at NYC_00004893, NYC_00004895, NYC_00004898.) Later that year, ACS filed a neglect petition against Elisa's mother, alleging that she had thrown an object at her, as well as kicked, hit and cursed at her. (Ex. A-3, at NYC_00005082.) Elisa and her mother were subsequently separated and moved to new placements. (Ex. A-4, at NYC_00004696.)

When Elisa was five, she was moved to a new placement because her mother was continuously harassing Elisa's foster parent. (Ex. A-5, at NYC_00004699.) Elisa was then removed from her subsequent placement after her caseworker found she was poorly dressed, had dirty hair, appeared underweight and had been made to sleep on the floor. (Ex. A-8, at NYC_00004856.) At yet another placement when she was 11 years old, Elisa's foster parent hit her in the eye, and her school social worker made a report to the State Central Registry. (Ex. A-1, at NYC_00041889; Ex. A-9, at NYC_00006428.) Even though the foster parent admitted to hitting Elisa, Elisa was not removed from the home. (Ex. A-1, at NYC_00041940.) When she was 12 years old, the same foster parent was reported for hitting her and for failing to intervene to protect Elisa when the foster parent's biological daughter hit her. (Ex. A-1, at NYC_00041937.)

Elisa was not freed for adoption until she was nine years old and had been in the custody of ACS for over seven years. (Ex. A-6, at NYC_00007041.) By the time she was 12, Elisa had been in 14 separate placements. (Ex. A-7, at NYC_00016595.) At age 15, Elisa was transferred to a new Contract Agency[2] and was put in three additional placements within six

[2] In New York City's foster care system, the City Defendant contracts with 28 contract agencies (individually a "Contract Agency") to provide the day-to-day care for the thousands of children in foster care. The Commissioner of ACS, Gladys Carrion, in her official capacity,

months, one of which only lasted for two weeks. (Ex. A-10, at NYC_00007007.) At one of these three placements her school guidance counselor reported that her foster parent had refused to feed her for two days. (Ex. A-1, at NYC_00041833.) At a permanency hearing when she was 17, Elisa expressed her frustrations with her years in care and stated that she had been "trying so hard all my life, and all I ask is just to live with someone in my family". (Ex. A-11, at NYC_00065089, NYC_00065092.) Elisa signed herself out of foster care effective September 3, 2016.

2. Alexandria R.

Alexandria first came to the attention of ACS in May 2003 when she was four months old after her mother was involved in a physical fight with a neighbor. (Ex. B-1, at NYC_00034857.) Despite Alexandria's maternal great-grandmother's desire to serve as a kinship resource, Alexandria and her two older siblings were removed from her home and placed in a non-kinship placement after ACS could not locate the appropriate records necessary to place the children with their great-grandmother. (Ex. B-1, at NYC_00034895, NYC_00034903 ("[T]he case is being held up for kinship because it is not being found, in the system."), NYC_00034994, NYC_00035011.)

Alexandria returned to her mother's care on May 2006, but subsequent incident reports demonstrate that there were ongoing issues in the home. (*See* Ex. B-2, at NYC_00036869 (report made to the State Central Registry alleging that Alexandria's mother and stepfather had untreated mental health issues and that they had failed to address Alexandria's older sister's medical concerns), NYC_00036824, NYC_00036829 (an anonymous source

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retains legal custody over all children in foster care in New York City at all times and is ultimately responsible for the health, safety and well-being of these children.

described the mother as "constantly beating the 5 year old girl").) During this time, the family received monthly visits from a family services worker who failed to enter regular notes about her visits with the family until the children were removed for a second time, more than 15 months later. (Ex. B-2, at NYC_00036957-959 (caseworker notes all entered on Aug. 20, 2007 despite describing events months earlier), NYC_00036965; Ex. B-3, at NYC_00034631.)

When Alexandria and her siblings reentered care on August 10, 2007 after reported abuse, caseworkers observed "old and new bruises" on the children's legs and back. (Ex. B-2, at NYC_00036966; Ex B-3, at NYC_00034640-641.) After Alexandria had been in foster care for approximately one month, her older sister reported that her foster mother had slapped Alexandria. (Ex. B-4, at NYC_00256514.) The Contract Agency, however, determined there was "nothing they can do because the[re] were no bruises on the child". (*Id*.) After two months, Alexandria was moved to a new foster home. (Ex. B-5, at NYC_00257094.)

Alexandria moved through multiple placements, including several hospitalizations in psychiatric hospitals. In total, Alexandria was put in 11 separate placements between August 2007 and November 2011. (*See, e.g.,* Ex. B-6, at NYC_00256814; Ex. B-7, at NYC_00256817; Ex. B-8, at NYC_00256819; Ex. B-9, at NYC_00256820; Ex. B-10, at NYC_00256821; Ex. B-11, at NYC_00256822; Ex. B-12, at NYC_00256827.) These placements included multiple homes where she stayed for only a few months, a home where she remained for eight months despite the Contract Agency having serious concerns about the quality of care, and three hospitalizations. Alexandria was first hospitalized in July 2008, at age five (Ex. B-4, at NYC_00256541), and she remained in the hospital despite being medically cleared for discharge because the Contract Agency refused to disclose plans regarding Alexandria's mental health treatment. (Ex. B-13, at NYC_00034461.) During her third hospitalization, Alexandria was

observed to be "heavily medicated" with "slowed speech" and delayed answers to her caseworker's questions. (Ex. B-4, at NYC_00256720; Ex. B-14, at NYC_00248803; Ex. B-15, at NYC_00256993; Ex. B-16, at NYC_00257115.)

Alexandria also experienced abuse and neglect during her multiple foster care placements. Following her first hospitalization, Alexandria was placed with a family friend of her mother in a home with 10 other children. (Ex. B-15, at NYC_00256993.) A Contract Agency case planner from Alexandria's Contract Agency expressed concerns in an email to the caseworker about whether this foster parent would be "capable of caring for all those children". (Ex. B-17, at NYC_00256951.) Alexandria remained in this foster home for approximately two years. On several occasions, the caseworker who visited the home noted that it was overcrowded and untidy. (Ex. B-4, at NYC_00256609, NYC_00256619.)

In August 2010, after three years in care, her mother beat her with a belt buckle on a visit at the foster mother's home while the foster mother observed. Her caseworker observed that Alexandria had "multiple bruises on several areas of her body". (Ex. B-18, at NYC_00257106.) The incident was characterized by the Office of Special Investigations as a "brutal[ ] beating" by her mother. (Ex. B-19, at NYC_00256962-963.) Alexandria's foster mother was charged with Endangering the Welfare of a Child, and her mother was arrested for Second Degree Assault as a result of this incident. (*Id.*) The Office of Special Investigations mandated that the foster home be closed, but also discovered that Alexandria and her siblings had not received the Bridges To Health Services[3] ("B2H") that they needed "immediately". (Ex.

[3] Bridges to Health ("B2H") is a New York State Community-based Medicaid services program for children in foster care with mental health and developmental disabilities or health care needs. *See* Home and Community-Based Services Waiver Program "Bridges to Health" (B2H), New York State Office of Children and Family Services, http://ocfs.ny.gov/main/b2h/Default.asp (last visited Dec. 2, 2016).

B-19, at NYC_00256964.) The Contract Agency did not submit a referral for B2H until September 24, 2010, after Alexandria had been in care for over three years. (Ex. B-20, at NYC_00256862.)

In November 2011, Alexandria was moved to the home of her current adoptive parents. (Ex. B-21, at NYC_00009938.) While she initially displayed self-harming behaviors in this home, including "bang[ing] her head . . . for [] three hours straight", she ceased her intense tantrums and self-injurious behaviors after approximately six months in this home. (Ex. B-4, at NYC_00256725, Ex. B-21, at NYC_00009938.) Alexandria's goal was first changed to adoption after she had been in care for approximately 28 months. (Ex. B-2, at NYC_00037158.) A Termination of Parental Rights ("TPR")[4] petition was not filed until January 20, 2011, after Alexandria had been in care for approximately 41 months. (Ex. B-2, at NYC_00026968.) On May 22, 2012, over a year after the TPR was filed, the TPR proceeding was withdrawn, and Alexandria's mother stipulated to a "suspended judgment". (Ex. B-22, at NYC_00027887.) The suspended judgment expired in July 2014 and Alexandria's goal changed back to return to parent. Alexandria did not become freed for adoption until October 28, 2015—over 84 months after she entered foster care. (Ex. B-23, at NYC_0026816.) She was not adopted until nearly a year after she became freed, on September 13, 2016.

3. Olivia and Ana-Maria R.

Olivia and Ana-Maria first came to the attention of ACS in January 2011, after a hotline call reported that the mother was abusing drugs. (Ex. C-1, at NYC_00054548.) After a

[4] Under state law, a Termination of Parental Rights ("TPR") must be filed if a child remains in foster care for 15 out of the last 22 months absent a "compelling reason" for that child to continue in foster care. N.Y. Soc. Serv. Law §384-b(3)(l)(i), ("[W]henever: the child shall have been in foster care for fifteen months of the most recent twenty-two months . . . the authorized agency having care of the child shall file a petition [to terminate parental rights].").

second report of a domestic dispute, the children were temporarily cared for by their maternal great-grandmother. (Ex. C-1, at NYC_00054496, NYC_00054520.) ACS then filed a neglect case and moved the children to a non-kinship foster placement. (Ex. C-1, at NYC_00054519, NYC_00054522.)

Olivia and Ana-Maria have exited and reentered foster care due to failed attempts at reunification. Following their initial placement in a non-kinship foster home, the children were discharged from foster care and returned to their mother on the condition that she enter a domestic violence shelter with the children. (Ex. C-1, at NYC_00054523.) Within three weeks, however, the mother was dismissed from the facility for failure to comply with the shelter's curfew, refused to disclose her and the children's location to the ACS worker and disappeared. (Ex. C-1, at NYC_00054524-527, NYC_00054696.) The children were found in New Jersey with their paternal grandfather approximately three months later. (Ex. C-1, at NYC_00054496; Ex. C-2, at NYC_00011568.) They were placed back into foster care in a non-kinship home on June 8, 2011. (Ex. C-1, at NYC_00054696; Ex. C-2, at NYC_00011568.)

The children were returned again, this time through a trial discharge, to their mother on March 5, 2012 after no caseworker from the Contract Agency was present at the court date regarding the mother's application for a trial discharge—something the Family Court Judge noted was "incredibly irresponsible" on the part of the Contract Agency. (Ex. C-1, at NYC_00054805; Ex. C-3, at NYC_00024536; Ex. C-4, at NYC_00023932.) A little over one month later, on April 13, 2012, the mother contacted the Contract Agency caseworker and informed her that she could no longer handle the children. (Ex. C-4, at NYC_00023932.) The caseworker at the time noted that the mother was no longer receiving therapy, despite it being a condition of her trial discharge. (Ex. C-6, at NYC_00024497-498.) The Contract Agency

caseworker had been unaware that the mother had not attended therapy for over a month, and was also unaware that she had moved. (Ex. C-1, at NYC_00024497; Ex. C-6, at NYC_00024503.) Despite these lapses, the Contract Agency caseworker represented that the trial discharge was going well. (Ex. C-5, at NYC_00024486.) Within two months the mother returned the children to their previous foster placement and the children were subsequently moved to an out-of-home placement. (Ex. C-12, at NYC_00024211; Ex. C-8, at NYC_00008475.)

Prior to the trial discharge the girls were receiving speech therapy, occupational therapy, physical therapy, and special instruction. (Ex. C-9, at NYC_00024573; Ex. C-10, at NYC_00024261-262.) The children received none of these services when they were returned to their mother on the trial discharge in March 2012. Further, once they were returned, they still did not receive any of their services for a year and a half. (Ex. C-12, at NYC_00024211.) By November 2013, the Family Court noted that the Contract Agency had done "no follow through whatsoever as to the continuation of those services" and by May 2015 when the girls had still not received any services, the Court stated that the Contract Agency's conduct was "ridiculous". (Ex. C-7, at NYC_00024013-014; Ex. C-12, at NYC_00024210.) As of July 9, 2015 the B2H services were still not in place. (Ex. C-13, at NYC_00024002.)

On August 8, 2013, the Contract Agency documented that they would not be filing a TPR because the mother was "making significant progress towards the permanency goal of return to parent". (Ex. C-14, at NYC_00008312.) However, by February 6, 2014, the compelling reason documented for not yet having filed a TPR was that the Contract Agency was "considering filing a TPR". (Ex. C-15, at NYC_00008308.) Subsequently, the TPR petition was filed on March 14, 2014 and the children were freed for adoption in August 2015. (Ex. C-12, at

NYC_00024010-011; Ex. C-16, at NYC_00268703.) Olivia and Ana-Maria were adopted on June 14, 2016. (Ex. C-17, at NYC_00268458; Ex. C-18, at NYC_00268739.)

4. Xavion M.

Xavion entered foster care when he was approximately two weeks old (Ex. D-1, at NYC_00017987.) His older brother, six-years-old, and sister, five-years-old, had been placed in care approximately five months before his birth due to Xavion's father physically abusing the children and Xavion's mother leaving the children alone in the home for an entire night and morning. (Ex. D-2, at NYC_00057381, NYC_00057394.) After his older brother and sister entered care, they disclosed that Xavion's father had also sexually abused Xavion's five-year-old sister. (Ex. D-3, at NYC_00046390.)

Xavion was initially placed with a kinship foster parent. (Ex. D-3, at NYC_00046391.) He was then moved to a non-kinship placement, and was joined in this placement by his older biological sister. (Ex. D-3, at NYC_00046974.) His sister had serious mental health issues that manifested in aggressive behavior. At one point, she dragged three-year old Xavion along the cement while at a playground, which resulted in injuries to his face and eye. (Ex. D-3, at NYC_00046983.) Xavion's foster parent reported that the sister would "frequently hit" Xavion and hid knives under her bed. (Ex. D-3, at NYC_00046987.)

After Xavion had been in care for approximately three and a half years, the Family Court Legal Services attorney assigned to his case made a motion to hold the mother in contempt of court for facilitating contact between Xavion and his father in violation of the order of protection. (Ex. D-4, at NYC_00018555, NYC_00018557.) The court granted the motion and ordered that his mother be incarcerated for 30 days. (Ex. D-5, at NYC_00017672.) The

mother continuously denied that she had ever permitted any of her children to have contact with Xavion's father.

When Xavion had been in care for nearly five years, the court ordered that Xavion's Contract Agency file a petition to terminate his mother's parental rights. (Ex. D-3, at NYC_00047352.) The Contract Agency never filed such a petition. (Ex. D-3, at NYC_00047354, NYC_00047447.) Instead, the agency granted the mother unsupervised visits, in violation of a court order which only permitted the mother to have sandwich visits.[5] (Ex. D-6, at NYC_00007190, Ex. D-7, at NYC_00019370-371.) His foster parent told Xavion's caseworker that when Xavion had unsupervised time with his mother and siblings he had behavior problems in school and would act out in an aggressive manner. (Ex. D-3, at NYC_00047443, NYC_00047466; NYC_00047501.) His foster parent repeatedly expressed concerns that if Xavion was returned to his mother, he would re-enter foster care. (Ex. D-3, at NYC_00047443.) Xavion subsequently was trial discharged to his mother's care without his required medication or Medicaid cards, without the mother having child care arrangements or arrangements to get him to and from school and with insufficient clothing (Ex. D-8, at NYC_00007139), and despite ACS's previous concerns about his mother's concern for the well-being of her children given the allegations that his mother permitted contact with Xavion's abusive father. Xavion was permanently discharged to his mother's care on or around March 31, 2016.

[5] "Sandwich visits" refer to a visit in which a parent receives unsupervised time between a period of supervised visitation both before and after the unsupervised time.

5. Dameon C.

Dameon first came to the attention of ACS when he was approximately one week old. Because Dameon's mother was incarcerated at the time of Dameon's birth, she had given guardianship of Dameon to her paramour. (Ex. E-1, at NYC_00040848, NYC_00040852.) After a week, an anonymous reporter alleged that the paramour was mentally ill and using drugs, and had left Dameon unsupervised for three days. (Ex. E-1, at NYC_00040842.) The paramour already had a lengthy ACS record and criminal history including the previous removal of four of her children. (Ex. E-1, at NYC_00040842, NYC_00040849, NYC_00040853.) Based on these allegations, ACS first sought to remand Dameon to foster care. (Ex. E-2, at NYC_00021576-577.) Two weeks after seeking the remand, however, ACS requested that the Family Court approve a plan to discharge Dameon from foster care and place him in the custody of this same paramour, who was unable to be licensed as a foster parent due to her own extensive abuse and neglect history. (Ex. E-3, at NYC_00021578.) The Family Court Judge hearing the case noted that she was "quite surprised that [ACS would] even make this request and stated that she couldn't 'imagine approving such an application'". (Ex. E-3, at NYC_00021578.) Instead Dameon was placed in a non-kinship foster home, despite the fact that his older sister was at the time placed with a kinship resource. (*See, e.g.*, Ex. E-4, at NYC_00021758.)

When Dameon was approximately six months old, his Contract Agency allowed him to return to his mother on a trial discharge basis while she was living in a mother-child drug treatment program. (Ex. E-5, at NYC_00021436.) When his caseworker attempted to visit Dameon and his mother, the caseworker found that his mother had actually left Dameon in the care of his former non-kinship foster parent. (Ex. E-1, at NYC_00040975.) Dameon's mother's trial discharge was terminated after approximately seven months, when Dameon's mother

prematurely signed herself out of her drug treatment program. Dameon was officially returned to his non-kinship foster parent following the failed trial discharge. (Ex. E-1, at NYC_00040979.) Dameon's goal remained to return to parent; however, his Contract Agency failed to run a criminal background check on residents living with Dameon's mother and did not request to see the lease on the location where his mother was living with her paramour. (Ex. E-6, at NYC_00021711, NYC_00021716-717.) During a Family Court hearing, the Judge questioned why the Contract Agency caseworker had failed to obtain a full clearance of the house and adjourned the hearing to allow the caseworker to get the necessary checks in order. (Ex. E-6, at NYC_00021721-722, Ex. E-7, at NYC_00021734.) Three weeks later, the Family Court noted that the Contract Agency caseworker had provided "nothing except what [the Court] already had". (Ex. E-7, at NYC_00021739.)

Dameon's mother repeatedly relapsed throughout the years he was in care. (*See generally* Ex. E-8, at NYC_00065051-053.) Despite his mother's relapses, Dameon's mother's rights were not terminated until Dameon had been in care for over four years. (Ex. E-8, at NYC_00065070.) Dameon was finally adopted on August 2, 2016.

ARGUMENT

City Defendant seeks to dismiss the claims of the six Named Plaintiff Children because they have been discharged from ACS custody. The six Named Plaintiff Children's claims for prospective injunctive relief against ACS are moot, according to City Defendant, because they will not be affected by the relief. (*See* Def.'s Mot. Summ. J. 1-2, ECF No. 298 ("Def.'s Mot.").) That is incorrect. The six Named Plaintiff Children's claims are not moot because they are subject to well-established exceptions to the mootness doctrine, and even if they

were moot, Supreme Court precedent provides they may still seek class certification and represent a transitory class of children in the foster care system whose substantive claims remain.

I. THE CLAIMS OF THE SIX NAMED PLAINTIFF CHILDREN ARE NOT MOOT BECAUSE THEY ARE CAPABLE OF REPETITION YET EVADING REVIEW

While the mootness doctrine generally dictates that claims are moot once a plaintiff no longer has a legally cognizable interest in the outcome of a case, the doctrine has a number of exceptions. *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994) ("The mootness doctrine is riddled with exceptions. . . ."). One exception that has been recognized by the Supreme Court as applicable in both individual and class action cases is that a plaintiff's claim will not be deemed moot despite the fact that it is not currently "live" if it is "capable of repetition, yet evading review". *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) ("When the claim on the merits is 'capable of repetition, yet evading review' the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation."). A claim is capable of repetition, yet evading review where (1) "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration", and (2) "there is a reasonable expectation that the same complaining party would be subjected to the same action again". *Rastelli v. Warden, Metro. Corr. Ctr.*, 782 F.2d 17, 20 (2d Cir. 1986) (internal quotations omitted). A "reasonable expectation" of repetition, however, does not mean repetition is probable: "[W]e have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable." *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988) (internal citation omitted); *see also Geraghty,* 445 U.S. at 398 (articulating "capable of repetition" standard as requiring that "the litigant faces *some* likelihood of becoming involved in the same controversy in the future" (emphasis added)). The six Named Plaintiff Children satisfy that standard.

First, despite their discharge from ACS, the six Named Plaintiff Children's claims are repeatable because they face some likelihood of reentering foster care in the future. The rate of reentry into the foster care system in New York State is high, with 10% of children in 2015 reentering care within one year of a permanent discharge.[6] The rate of failed trial discharges is even higher—"approximately one-quarter of trial discharges fail and the child returns to care". (*See* Ex. F, at NYC_00230488.) The six Named Plaintiff Children's case files bear this out as they evidence frequently disrupted placements, multiple failed trial discharges and instances of entering, exiting and reentering care. Half of the six Named Plaintiff Children—Alexandria, Ana-Maria and Olivia—have already reentered foster care at least once after failed attempts to return to their parent's care. *See supra*. ACS recently decided to permanently discharge Xavion to his mother despite her repeated violation of court orders designed to protect Xavion, and over the reservations of Xavion's foster parent who expressed concern that Xavion would reenter care. *See supra*. In view of the history described in Xavion's case file, it is frankly incredible that City Defendant disputes that there is a reasonable expectation Xavion may return to foster care in the future.

The final Named Plaintiff Child at issue, Elisa, voluntarily signed herself out of care after 15 years of failed placements, but she retains the option to sign herself back into care at any point until she turns 21, a fact that OCFS affirmatively informs youth who have signed themselves out before age 21. *See* OCFS Admin Directive, 11-OCFS-ADM-02.[7] There are

[6] Annual Progress and Services Report, New York State Office of Children and Family Services 15-02 (June 2015), *available at* http://ocfs.ny.gov/main/reports/2016%20NYS%20APSR.pdf.

[7] Administrative Directive 11-OCFS-ADM-02, New York State Office of Children and Family Services (Mar. 3, 2011), *available at* http://ocfs.ny.gov/main/policies/external/OCFS_2011/ADMs/11-OCFS-ADM-02%20Re-

multiple reasons—psychological, financial and otherwise—that she might do so. Numerous courts reviewing analogous situations have found a claim is capable of repetition, yet evading review where, as here, a plaintiff has the ability to reenter or reapply for education, public assistance or similar government benefits. *See, e.g.*, *Robidoux v. Celani*, 987 F.2d 931, 939 (2d Cir. 1993) (allowing claims by applicants for food stamps whose claims were processed already to remain in the action where the plaintiffs could reapply for benefits); *Heldman ex rel. T.H. v. Sobol*, 962 F.2d 148, 157 n.9 (2d Cir. 1992) (holding that a 19-year-old student who was not currently enrolled in school had claims that were "capable of repetition, yet evading review" because he was entitled to a free appropriate public education and could reenter school up until he reaches 21).

Second, the six Named Plaintiff Children's claims evade review because while it may take many months or even years to certify a class and litigate the merits of Named Plaintiff Children's claims, the foster care system is by definition intended to be temporary, children enter and exit the foster care system with some frequency, and when a child may be permanently discharged is uncertain. Systemic litigation of the scope at issue here is frequently litigated for years. *See Marisol A. ex rel. Forbes v. Giuliani,* 185 F.R.D. 152 (S.D.N.Y. 1999) (representing a class of all children in foster care in New York, the parties reached a settlement after four years of litigation); *Danny B. ex rel. Elliott v. Raimondo*, 784 F.3d 825, 830 (1st Cir. 2015) (ongoing action alleging similar claims on behalf of a class of foster children litigated for over nine years such that "[b]y the time that the trial commenced on November 12, 2013, the claims of all but two of the named plaintiffs . . . had been rendered moot through aging or adoption."). It can

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entry%20into%20Foster%20Care%20by%20Former%20Foster%20Care%20Youth%20between%20the%20Ages%20of%2018%20and%2021.pdf.

therefore be expected that children in a temporary foster care system would be discharged from that system over the course of a lengthy class action litigation. That reality is demonstrated by the fact that all six of the allegedly moot Named Plaintiff Children were discharged from care in the nine months between filing the Amended Complaint and the Court's decision denying class certification despite the fact that they had been in ACS custody for many years.

City Defendant claims that Named Plaintiff Children cannot say their claims evade review because they were in foster care for "at least four years" prior to being discharged by ACS. (Def.'s Mot. at 5.) This is a remarkable argument. *First*, it is tantamount to an admission that City Defendant does not adhere to the federal and State laws designed to ensure that foster care is safe and temporary. *See* 42 U.S.C. § 671(14) (requiring the State to have a plan which "provides [ ] specific goals [to address] . . . the maximum number of children . . . who, at any time during such year, will remain in foster care after having been in such care for a period in excess of twenty-four months"); N.Y. Soc. Serv. Law § 384-b(3)(l)(i) ("[W]henever: the child shall have been in foster care for fifteen months of the most recent twenty-two months . . . the authorized agency having care of the child shall file a petition [to terminate parental rights]."). *Second*, City Defendant relies on its failure to adhere to federal and State law to try to insulate itself from litigation that seeks to address that very failure, *i.e.*, the length of time that foster children in New York City spend in care.[8]

[8] City Defendant's citation to *Carson P. ex rel. Foreman v. Heineman*, 240 F.R.D. 456 (D. Neb. 2007), for the proposition that claims against a foster care defendant cannot be transitory where plaintiffs allege they languished in foster care for years is inappropriate. In *Foreman*, the court found the former foster care plaintiffs' claims were moot not because of an inconsistency in plaintiffs' pleadings, but because "by operation of law and based solely on their age" the named plaintiffs could not be in the state's foster care legal custody again. *Id*. at 511. None of the Named Plaintiff Children have reached 21—the age at which Named Plaintiff Children could no longer reenter care.

The fact that Named Plaintiff Children have languished in foster care for years and have bounced in and out of care without permanent placement in violation of federal and State law and their constitutional rights makes it more, rather than less, likely that their claims evade review.

II. THE SIX NAMED PLAINTIFF CHILDREN MAY CONTINUE TO ASSERT CLAIMS ON BEHALF OF THE PUTATIVE CLASS BECAUSE THEIR CLAIMS ARE INHERENTLY TRANSITORY

Even if this Court finds the six Named Plaintiff Children's individual claims are not "capable of repetition" and are therefore moot, they may still seek to assert claims on behalf of others in the putative class because the claims of children in the foster care system are inherently transitory. As City Defendant acknowledges, where the claims a named plaintiff seeks to prosecute are inherently transitory, the mootness of the named plaintiff's individual claim prior to class certification will not extinguish his ability to continue to seek to represent the class. If the class is ultimately certified, the class claims will relate back to the filing of the complaint. (*See* Def.'s Mot. at 6-7.) This principle was first articulated in *Gerstein v. Pugh*, 420 U.S. 103 (1975). As later described by the Supreme Court in *United States Parole Commission v. Geraghty*:

> "*Gerstein* was an action challenging pretrial detention conditions. The Court assumed that the named plaintiffs were no longer in custody awaiting trial at the time the trial court certified a class of pretrial detainees. There was no indication that the particular named plaintiffs might again be subject to pretrial detention. Nonetheless, the case was held not to be moot because:
>
> 'The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the

> class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.'"

445 U.S. at 399 (citing *Gerstein*, 420 U.S. at 110 n.11). Whether a class claim is inherently transitory therefore turns on: (a) whether there is uncertainty with respect to the time in custody such that it is not clear whether a named plaintiff's individual claim will survive long enough for class certification to be decided; and (b) whether there is a constant class of persons suffering the alleged harm regardless even if a named plaintiff's individual claims may become moot. *Id.*[9]

Here, as in *Gerstein*, "[i]t is by no means certain that any given individual named as plaintiff, w[ill] be in [ACS] custody long enough for a district judge to certify the class." *Gerstein*, 420 U.S. at 110 n.11. As set forth above, the foster care system is intended to be transitory. *See supra* Section I. In the nine months from the time Named Plaintiff Children filed their motion for class certification to the time of the Court's decision in September 2016, almost a third of the 19 Named Plaintiff Children were discharged from ACS custody. Indeed, after an

[9] City Defendant's position that Named Plaintiff Children must show that their claims are "so inherently transitory that the Court *could not* rule on a motion for class certification" before discharge (Def.'s Mot. at 7 (emphasis added)) is an unduly strict reading of the exception. While the Supreme Court in *Geraghty* describes the exception as applicable where claims are "so inherently transitory that the trial court will not even have time to rule on a motion for class certification" (445 U.S. at 399), that language does not supplant the Supreme Court's articulation of the standard in *Gerstein,* which the *Geraghty* Court also quotes. Moreover, courts, including the Second Circuit, have applied the exception consistent with *Gerstein* in circumstances where the length of an individual claim is uncertain rather than necessarily so short it could not possibly still be pending long enough for review of class certification. *See, e.g.*, *Comer*, 37 F.3d at 799 (refusing to dismiss claims in a class action that had been pending for over two years because "the nature of the population of a public housing market" dictates that "the claims are transitory in some sense"); *Amador v. Andrews*, 655 F.3d 89, 101 (2d Cir. 2011) (finding that the claims of inmates in Department of Corrections custody were inherently transitory where the "odds of an inmate being able to complete the grievance procedure and litigate a class action while still incarcerated were rather small" despite the "range of terms of imprisonment").

average of seven and a half years in the foster care system, the six Named Plaintiff Children were discharged in the six-month period from March to September 2016. These Named Plaintiff Children, like the named plaintiffs in *Gerstein*, were discharged for a variety of reasons—adoption; permanent return to the child's parent; voluntary discharge—and the timing of their discharge could not be anticipated (at least by Named Plaintiff Children). Named Plaintiff Children are now undertaking discovery to obtain the evidence the Court requires to support a renewed motion for class certification, a task that has been made difficult and time-consuming by City Defendant's efforts to block discovery at every opportunity. Once Named Plaintiff Children are able to take the necessary discovery, they will promptly renew their motion, which presumably will again be challenged. Thus, it will almost certainly be many more months before the Court rules on a renewed motion for class certification.

In view of the recent discharge in quick succession of the six Named Plaintiff Children, there is a real risk that none of the Named Plaintiff Children will be in ACS custody at that time. But there can be no question that there is a constant class of children—thousands in number—who will continue to be harmed by City Defendant's failure to ensure their safety and well-being even if all Named Plaintiff Children are discharged. *Gerstein*, 420 U.S. at 110 n.11 ("Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain."); *see also Monaco v. Stone*, 187 F.R.D. 50, 61 (E.D.N.Y. 1999) (finding that claims were inherently transitory given the "fluidity of the proposed class of individuals" where "the identity of the individuals involved may change, [but] the nature of the harm and the basic parameters of the group affected remain constant"); *Comer*, 37 F.3d at 799 (finding that due to the nature and fluidity of the public housing population class certification relates back to the original filing despite the court denying an earlier motion for class certification). This

uncertainty with respect to individual claims, but certainty with respect to class claims, is precisely the situation the Supreme Court in *Gerstein* found justified maintaining named plaintiffs' claims until class certification could be decided.

City Defendant also argues that even if Named Plaintiff Children's claims are inherently transitory, they cannot invoke the exception because the motion for class certification was denied; thus their claims must be evaluated as individual claims, not class claims. (Def.'s Mot. at 7.) That is incorrect. The Supreme Court has made clear that "the timing of class certification" is not "the critical factor" in deciding whether an exception to the mootness doctrine should apply. *Geraghty*, 445 U.S. at 398 (noting that the Supreme Court has in multiple cases "clearly demonstrate[d] that timing is not crucial"). City Defendant has failed to cite to any controlling case law that requires a pending class certification motion in order to apply the relation back doctrine, and several cases within the Second Circuit have concluded that there is no such requirement. *See Mental Disability Law Clinic v. Hogan*, No. 06-CV-6320, 2008 WL 4104460, at *10 (E.D.N.Y. Aug. 29, 2008) ("[T]here is no requirement in the Second Circuit that a representative's claim must be live at the time that the motion to certify is filed. . . . [N]either [*Comer* nor *Robidoux*] explicitly premised its holding that the relation-back doctrine was applicable on the fact that the motion for class certification had been filed prior to the claims becoming moot"); *German ex rel. German v. Fed. Home Loan Mortg. Corp.*, 896 F. Supp. 1385, 1395 (S.D.N.Y. 1995); *Crisci v. Shalala*, 169 F.R.D. 563, 567 (S.D.N.Y. 1996) ("Relation back is also appropriate where, as here, the claims of the named plaintiff have become moot before a motion for class certification is filed 'so long as a justiciable controversy existed some time prior to class certification.'"); *Butler v. Suffolk Cty.*, 289 F.R.D. 80, 92 n.5 (E.D.N.Y. 2013) ("[I]t is the date of the complaint, not the date of the certification motion, that is relevant" to determine if

a plaintiff has a live claim). The only requirement is that the representative party must have a live claim at the time the action is filed to avoid dismissal. City Defendant concedes each of the six Named Plaintiffs had live claims at the time the Amended Complaint was filed. Their claims therefore may relate back to the filing of the complaint even if Named Plaintiff Children's renewed motion for class certification has not yet been filed. [10]

III. DISMISSAL OF THE SIX NAMED PLAINTIFF CHILDREN'S CLAIMS WOULD BE INCONSISTENT WITH THE POLICIES UNDERLYING THE MOOTNESS DOCTRINE AND WOULD COMPLICATE RATHER THAN STREAMLINE DISCOVERY

The Supreme Court has noted in a number of its cases, such as *Gerstein* and *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326 (1980), that address mootness in the class action context, that they "demonstrate the flexible character of the Art. III mootness doctrine". *See Geraghty*, 445 U.S. at 400; *see also Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (noting that "in the absence of a class action" exceptions to the mootness doctrine were more "limited"); *Etuk v. Slattery*, 936 F.2d 1433, 1441 (2d Cir. 1991) (recognizing that a "'flexible' approach to the mootness doctrine is warranted" in the class action context). To the extent there is any question

[10] City Defendant does not, and cannot, argue that Named Plaintiff Children did not show reasonable diligence in bringing their motion for class certification or in seeking discovery to gather the supporting evidence this Court has said it will require for a renewed motion for class certification. *See Eckert v. Equitable Life Assurance Soc'y of U.S.*, 227 F.R.D. 60, 63-64 (E.D.N.Y. 2005) (holding that where a plaintiff's failure to file a motion for class certification was not due to "undue delay" the court retains subject matter jurisdiction despite the plaintiff's failure to move for class certification"). Named Plaintiff Children filed their Amended Motion for Class Certification on December 28, 2016—the same day that they filed the Amended Complaint. In addition, Named Plaintiff Children plan to file a renewed motion for class certification once they have received the necessary discovery to be able to meet their evidentiary burden. Any delay in filing this motion is directly attributable to City Defendant's failure to provide the Named Plaintiff's case records in a organized manner and its ongoing refusal to produce ESI—the delay is not due to Named Plaintiff Children. *See Schaake v. Risk Mgmt. Alts., Inc.,* 203 F.R.D. 108, 112 (S.D.N.Y. 2001) (finding the case was not moot where the plaintiffs had not moved for class certification while "awaiting the relevant discovery" from the defendant).

whether the Named Plaintiff Children's claims are moot, a flexible approach should be adopted to avoid wasting the parties' and the Court's resources.

City Defendant takes the position that since the Court denied the motion for class certification, all of the Named Plaintiff Children are pursuing only individual claims. (Def.'s Mot. at 7.) City Defendant's argument that Named Plaintiff Children currently have only individual claims that may at any moment be mooted and dismissed highlights the risk of dismissing the six Named Plaintiff Children before there is an opportunity for the Court to address a renewed motion for class certification. In the event all of the Named Plaintiff Children are discharged before a renewed motion can be heard—an eventuality that is in large part in City Defendant's control as the entity responsible for both the care of Named Plaintiff Children and for providing Named Plaintiff Children with the discovery necessary to renew their class certification motion—City Defendant presumably will seek to dismiss the entire action as moot. That would be both wasteful and unjust. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191–92 (2000) (noting that "by the time mootness is an issue . . . [t]o abandon the case . . . may prove more wasteful than frugal").

Moreover, while City Defendant suggests dismissal of the six Named Plaintiff Children will streamline discovery, it will have the opposite effect. (Def.'s Mot. at 2 ("The dismissal of mooted Plaintiffs' claims will have a significant effect on the scope of discovery regarding both those six children and the voluntary agencies in whose care they were placed.").) Allowing City Defendant to serially dismiss named plaintiffs will require Named Plaintiff Children to add representative plaintiffs to ensure the class claims remain before this Court until a renewed class certification motion can be decided. The continual dismissal and addition of named plaintiffs will be wasteful, cause delay and unduly complicate discovery.

CONCLUSION

For the foregoing reasons, Named Plaintiff Children respectfully request that the Court deny City Defendant's Motion for Partial Summary Judgment.

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by
Marcia Robinson Lowry
A Better Childhood, Inc.
1095 Hardscrabble Road
Chappaqua, NY 10514
(844) 422-2425
mlowry@abetterchildhood.org

CRAVATH, SWAINE & MOORE LLP
by
Julie A. North
J. Wesley Earnhardt
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
jnorth@cravath.com
wearnhardt@cravath.com

Attorneys for Plaintiffs Elisa W., by her next friend, Elizabeth Barricelli; Alexandria R., by her next friend, Alison Max Rothschild; Thierry E., by his next friend, Amy Mulzer; Lucas T., Ximena T., Jose T. C. and Valentina T. C., by their next friend, Rachel Friedman; Ayanna J., by her next friend, Meyghan McCrea; Olivia and Ana-Maria R., by their next friend, Dawn Cardi; Xavion M., by his next friend, Michael B. Mushlin; Dameon C., by his next friend, Reverend Doctor Gwendolyn Hadley-Hall; Tyrone M., by his next friend, Bishop Lillian Robinson-Wiltshire; Brittney W., by her next friend, Liza Camellerie; Mikayla G., by her next friend, Amy Mulzer; Myls J. and Malik M., by their next friend, Elizabeth Hendrix; and Emmanuel S. and Matthew V., by their next friend, Samuel D. Perry, individually and on behalf of a class of all others similarly situated