UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents, guardians and next friends of Bradley J. Jensen, et. al, Plaintiffs, vs. Minnesota Department of Human Services, an agency of the State of Minnesota, et. al., Defendants.	Court File No.: 09-CV-1775 DWF/BRT **SETTLEMENT CLASS MEMORANDUM OF LAW IN OPPOSITION TO STATE OF MINNESOTA AND MINNESOTA DEPARTMENT OF HUMAN SERVICES MOTION (DOC. 741) TO ALTER OR AMEND JUNE 17, 2019 ORDER (DOC. 737)**

Introduction

The Settlement Class submits this Memorandum of Law in opposition to the State of Minnesota and Minnesota Department of Human Services' (collectively, "DHS") Motion (Doc. 741) to Alter or Amend the Court's June 17, 2019, Order (Doc. 737). In its Order, the Court reviewed DHS submissions and found non-compliance and insufficient reporting in several critical areas. For example, the Court stated:

- Defendants provide little detail regarding the total number of reports, the basis of any emergency, an assessment of any trends, or an explanation on how Defendants quantify known use of prohibited restraint or techniques by a third party. Thus, the Court cannot conclude whether Defendants have complied with the obligations set forth in the Agreement. Order (Doc. 737) at 24

- The dispute about scope on the use of prohibited restraints must be resolved before the Court can confirm whether compliance must be

> further investigated and reviewed by a Subject Matter Expert or the Court Monitor."). *Id.* at 30.
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> - The Court also concludes that external investigation and review is necessary to ensure that Defendants have complied with certain ECs relating to staff training."). *Id.* at 31
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> - After insufficient verification in the Gap Report, the Court recommended that an Independent Subject Matter Expert 'provide feedback to DHS on its staff training curriculum,' and to assess whether training is appropriately standardized across divisions throughout DHS. While Defendants did not appoint a Subject Matter at that time, the Court now directs them to do so. *Id.* at 33
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> - The Court also finds that additional verification and review is necessary regarding the number of treatment homes needed to satisfy the Agreement. *Id*. at 33.
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> - The Court requires additional information before it can determine whether the goals set forth in the March 2019 Revision to the Olmstead Plan (Doc. No. 725), are acceptable under the Agreement's requirements."). *Id.* at 35
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> - Before and after this Court's jurisdiction was affirmed, Defendants continued to submit the required Compliance Reports; however, these reports no longer drew conclusions as to whether each EC was satisfied."). *Id.* at 18-19.

The Court also ordered the parties to meet and confer on the scope of the Agreement relating to prohibited restraints and the Positive Supports Rule and report to the Court by August 15, 2019, to schedule additional briefing on these issues. Order (Doc. 737) at 39. Addressing jurisdiction, the Court held:

> The Court's jurisdiction over this matter was scheduled to end on December 4, 2019. However, as set forth above, the Court requires additional information to determine whether issues of noncompliance remain. Pursuant to the Settlement Agreement § XVII.B, and the Eighth

> Circuit's ruling that this Court may extend its jurisdiction as it deems 'just and equitable,' the Court's jurisdiction is extended to September 15, 2020."

Id. at 36.[1] The Court added, "Pursuant to ongoing reporting requirements, this date will allow the Court to review Defendants' August 31 Compliance Report and Olmstead Quarterly Report." *Id*. at n. 40.

[1] *See also* Order (Doc. 136) Ex. A (Doc. 136-1) (settlement agreement) at 39 ("The Court shall retain jurisdiction over this matter for two (2) years from its approval of this Agreement for the purposes of receiving reports and information required by this Agreement, or resolving disputes between the parties to this Agreement, or as the Court deems just and equitable."). The court-ordered settlement also requires DHS to establish "substantial compliance with this Agreement and the policies incorporated herein." *Id*. at 12 ("Every three (3) months, the external reviewer shall issue a written report informing the Department whether the Facility is in substantial compliance with this Agreement and the policies incorporated herein. The report shall enumerate the factual basis for its conclusion and may make recommendations and offer technical assistance. Throughout the years the Court has required DHS to establish substantial compliance with the Agreement. *See e.g.* Order (Doc. 634) at 23-24 ("At this juncture, it is unlikely that the DHS will remedy the community noncompliance and also achieve substantial compliance with the Comprehensive Plan of Action, the Olmstead Plan, and the Rule 40 Modernization by December 4, 2014."); Order (Doc. 578) at 3 ("The External Reviewer function will continue to be governed by the provisions of the Jensen Settlement Agreement, the CPA, and prior orders of the Court."); Order (Doc. 327) ("The Court Monitor shall serve for as long as necessary for Defendants to achieve substantial compliance."); Order (Doc. 212) at 6 ("The external reviewer function, as set forth in the Stipulated Class Action Settlement Agreement at paragraph VII.B (External Reviewer) will be subsumed within the Monitor's role as originally set forth in the Court's July 17, 2012 Order, at which time the Court appointed David Ferleger as the Court's independent consultant and monitor. The Monitor will independently investigate, verify, and report on compliance with the Settlement Agreement and the policies set forth therein on a quarterly basis. Those quarterly reports shall inform the Court and the parties whether the Monitor believes, based upon his investigation, without relying on the conclusion of the DHS, that Defendants are in substantial compliance with the Settlement Agreement and the policies set forth therein. The Court expects the reports to set forth the factual basis for any recommendations and conclusions.")

Argument

Disappointed by the Court's June 17, 2019, Order (Doc. 737), DHS challenges the Court's authority to extend jurisdiction "as it deems just and equitable" – authority expressly affirmed by the Eighth Circuit[2] and admitted by DHS and its counsel – rather than focusing its efforts to comply with the Jensen settlement agreement and Comprehensive Plan of Action (collectively "Agreement") and related Orders. DHS Disappointment with the Court's Order is not a legal basis for relief from it.

The motion is a "knowing sophistry" – knowing there is no basis under Rule 59 to amend or alter the Order, DHS simply wants the Court to reconsider its decision extending jurisdiction. As such, the motion is nothing more than a motion to reconsider. *See In re Nash Finch Co. Secs. Litig.*, 338 F. Supp. 2d 1037, 1038, n.1 (D. Minn. 2004); *BBCA, Inc. v. United States*, 954 F.2d 1429, 1431-32 (8th Cir. 1992) ("[T]he substance of a motion rather than the form of a motion is controlling."); *Fargas v. United States*, Civ. No. 12-2165, 2014 WL 25461 (D. Minn. Jan. 2, 2014); *Schwarz Pharma, Inc. v. Paddock Labs., Inc.*, Civ. No. 05-832, 2006 WL 3359336, at *1 (D. Minn. Nov. 20, 2006) ("The practice of this district is to utilize Rule 59(e) motions to address mechanical changes to a judgment, such as correcting a dollar amount that was incorrectly entered, and not to request the Court to reconsider the substance of a ruling. In this district, the vehicle to correct substantive errors is to ask leave to bring a motion to reconsider pursuant to Local

[2] *Jensen v. Minnesota Department of Human Services*, 897 F.3d 908, 916 (8th Cir. 2018) ("We conclude . . . this provision permits the district court to extend its jurisdiction as it 'deems just and equitable.'").

Rule 7.1…"); Local Rule 7.1(j) ("Except with the court's prior permission, a party must not file a motion to reconsider. A party must show compelling circumstances to obtain such permission. A party who seeks permission to file a motion to reconsider must first file and serve a letter of no more than two pages requesting such permission."). [3]

Moreover, "Rule 59(e) motions serve a limited function of correcting manifest errors of law or fact or to present newly discovered evidence. Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment." *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006); *see also Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998). In determining whether to grant a motion under Rule 59(e), a district court exercises broad discretion. *Id.* A manifest error of law is created by a disregard, misapplication, or

[3] In addition to mislabeling its request, DHS erroneously asserts the Court's Order is appealable, ignoring the Eighth Circuit's decision affirming the Court can "extend its jurisdiction as it deems just and equitable." *Jensen,* 897 F.3d at 916. This Court's authority to extend jurisdiction "as it deems just and equitable" is the law of the case. *Id.; Alexander v. Jensen-Carter,* 711 F.3d 905, 909 (8th Cir. 2013) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.") citing *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). This principle applies to the Eighth Circuit's decision in this matter. *Alexander*, F.3d 905 at 909. *See also Morris v. American Nat'l Can Corp*., 988 F.2d 50, 52 (8th Cir.1993); *Minneapolis Cmty. Dev. Agency v. Buchanan*, 268 F.3d 562, 566 (8th Cir.2001); *Sandy Lake Band of Miss. Chippewa v. United States*, 714 F.3d 1098, 1102 (8th Cir. 2013). The Court's Order is also not a final order from which DHS can appeal. *See U.S. v. Haynes*, 793 F.3d 901, 902 (8th Cir. 2015); *Powell v. Georgia-Pacific Corp.,* 90 F.3d 283, 284 (8th Cir. 1996); *Liddell v. Board of Educ.*, 693 F.2d 721, 723 (8th Cir. 1981); *see also* 28 U.S.C. §1291(a) (identifying limited class of interlocutory appealable orders, none of which apply to this case). Further, *Auto Services Co. Inc. v. KPMG, LLP*, 537 F.3d 853 (8th Cir. 2008), cited by DHS, is distinguishable as it did not involve post-judgment enforcement proceedings as here. *KPMG* is inapposite.

failure to recognize controlling precedent, not by the disappointment of the losing party. *See Lang v. City of Minneapolis*, Civil No. 13-3008, 2015 WL 5157504 *2 (D.Minn. 2015); *ProGrowth Bank, Inc. v. Wells Fargo Bank, N.A.*, Civ. No. 07-1577, 2007 WL 4322002, at *5 (D. Minn. Dec. 5, 2007). Relief under Rule 59(e) is granted only in "extraordinary" circumstances. *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986).

There is nothing extraordinary or compelling here. Under the Agreement, jurisdiction can be extended "as the Court deems just and equitable." *Jensen*, 897 F.3d 908 at 916.

At the April 16, 2019, status conference, moreover, DHS counsel expressly agreed the Court can extend jurisdiction as it deems just and equitable:

> THE COURT: Or the Eighth Circuit focused on the -- in terms of extending jurisdiction, that or just and equitable in terms of extending jurisdiction.
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> MR. IKEDA: Although, Your Honor, respectfully I think the just and equitable really goes to -- what the question before the Eighth Circuit was whether you had jurisdiction going forward.
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> THE COURT: True.
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> MR. IKEDA: And the Court agreed with your reading of the -- of what is a contract, which is to say that you could keep the case as long as you -- as long as it was just -- in your mind, just and equitable.

April 16, 2019, Tr. (Doc 740) at 133; *see gen. id.* (extensive discussion on the record between the Court and counsel for parties regarding authority to extend jurisdiction and standard governing compliance).

It is the Court, not DHS, that determines whether DHS has complied with the Agreement. *See* Order (Doc. 707) at 6 ("the Court must evaluate Defendants' compliance to assess the impact of the Jensen lawsuit on the well-being of its class members and to determine whether the Court's jurisdiction may equitably end"). Faced with DHS delay and refusal to implement the settlement,[4] the Court acted within its jurisdiction to order compliance. Over the years, the Court has provided DHS with abundant opportunities to submit information for the Court's independent determination on compliance. *See e.g.* Order (Doc. 707) at 4 ("The Agreement incorporates a Comprehensive Plan of Action ("CPA"). The CPA, sets forth Evaluation Criteria ("EC") and accompanying Actions: The ECs set forth the outcomes to be achieved and are enforceable."); *Id.* n.2 ("The ECs were developed by the Court Monitor and the parties and approved by the Court as part of the Comprehensive Plan of Action ("CPA"). The CPA "serve[s] as both a roadmap to compliance and as a measuring stick for compliance."); (Doc. 604) at p. 5 ("Adopted by the Court amid continued compliance concerns, and without objection from any party (Doc. No. 284), the court-ordered

[4] *See* Order (Doc. 634) at 23-24 ("At this juncture, it is unlikely that the DHS will remedy the community noncompliance and also achieve substantial compliance with the Comprehensive Plan of Action, the Olmstead Plan, and the Rule 40 Modernization by December 4, 2014."); Order (Doc. 340) at 6 ("The Court can no longer tolerate continued delay in implementation of the Settlement Agreement. Adherence to the Court's Orders by the DHS officials and staff at all levels is essential, not discretionary. The interests of justice and fairness to each Class member and similarly situated individuals requires no less."); Order (Doc. 233) at 7 ("In lieu of contempt and other sanctions at this time, the Court requires Defendants to fulfill their obligations in a timely manner for the Court's review and approval").

Comprehensive Plan of Action (CPA) is the roadmap to compliance. It includes verbatim, modified, restated and, in some cases, expanded Settlement Agreement requirements, and additional relief. These are embodied in more than 100 Evaluation Criteria (EC). The Evaluation Criteria are enforceable and set forth 'outcomes to be achieved.'")[5]

Despite its failed appeal on the same jurisdictional issue, multiple notifications and warnings from the Court reserving its right to extend jurisdiction to ensure compliance, abundant opportunities to be heard and submit Court-ordered information and reports, and a record years long showing non-compliance, DHS again attempts to challenge the Court's authority to exercise its jurisdiction over the parties. The Court justly and equitably extended its jurisdiction over the parties until September 15, 2020, identifying in detail its rationale for the extension. *See gen.* Order (737).[6] The Court has repeatedly

[5] *Id.* at 17 ("Before the CPA, Defendants operated without any plans to implement the lean Settlement Agreement. The Court's and Court Monitor's urgings that an implementation plan be advanced were not heeded, even as Defendants were struggling toward compliance. The Court then ordered Defendants to submit implementation plans but the submissions were inadequate as they acknowledged. Without objection, the Court ordered the Court Monitor to finalize implementation planning. The Court Monitor chose to engage independent professionals in developmental disabilities to work directly with Defendants' program and administrative professionals; for days, they worked through each Evaluation Criterion to articulate the implementation components including the Actions. The CPA was approved by Plaintiffs and the Consultants and then adopted by the Court.")

[6] The Court reviewed the information submitted by the parties and concluded an extension of jurisdiction is necessary to ensure DHS compliance with the Agreement. Order (Doc. 737) at 38. The Court also noted that prior to the April 16, 2019, status conference, it issued an Order (Doc. 707) advising of the need to determine whether the Court's jurisdiction may equitably end:

> On January 4, 2019, the Court issued an Order requesting a comprehensive Summary Report to evaluate Defendants' overall compliance with the Agreement in lieu of the scheduled reporting requirements.19 (Doc. No. 707.) The Court explained, "the Court must evaluate Defendants' compliance to assess the impact of the *Jensen* lawsuit on the well-being of its class members and to determine whether the Court's jurisdiction may equitably end."

Order (Doc. 737) at 19. DHS claims it has fully complied with the Agreement despite direct contravention in the record and Court Orders. *Compare* (Doc. 740) at 18 (Ikeda: "the uncontroverted evidence in the record is that the Department has complied with all its obligations") *with* Order (Doc. 737) at 18, 19, 24, 30, 31, 33, 35. *See also* Tr. (Doc. 740) at 27 (DHS identifying mechanical restraint annual number not met), *id*. at 93 (DHS referencing 617 mechanical restraint reports and acknowledging 2018 total not met); DHS 2019 July 18, 2019, Maltreatment Investigation Memorandum (use of restraint chair on individual with developmental disabilities in violation of Minnesota statutes and rules) https://webcache.googleusercontent.com/search?q=cache:iEvoQWejPHEJ:https://www.dhs.state.mn.us/main/idcplg%3FIdcService%3DGET_FILE%26dID%3D155168%26dDocName%3DLLO_449552%26allowInterrupt%3D1+&cd=1&hl=en&ct=clnk&gl=us&client=firefox-b-1-d; DHS October 17, 2018, DHS Maltreatment Investigation Memorandum https://www.dhs.state.mn.us/main/idcplg?IdcServi%20ce=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=LLO_445865; December 23, 2014, DHS Statement of Need and Reasonableness, Proposed New Permanent Rules Governing Positive Supports, and Prohibitions and Limits on Restrictive Interventions at 40, https://www.leg.state.mn.us/archive/SONAR/SONAR-04213.pdf ("the Department agreed more broadly in the Comprehensive Plan of Action to prohibit restraint and seclusion in all licensed facilities and settings to the CPA," and to "[a]bide by the Rule 40 Advisory Committee Recommendations."); April 1 and April 3, 2019, Consultant letters to the Court (Doc. 726 and Doc. 727) (highlighting concerns with DHS positions on the use of restraint, and inadequate lack of reporting on this important issue); State Ombudsman for Mental Health and Developmental Disabilities March 25, 2016, letter to Court at 3 ("[O]f all mechanical restraints, the restraint chair represents some of the most traumatizing experiences of mechanical restraints. It is the concern of the OMHDD that if we use the strict interpretation of the DHS regarding MN Rules 9455.0060 Subd. 2, any facility or program, whether operated by DHS or licensed or certified by DHS, could argue similar reasons why they could use any of the prohibited practices as long as they articulate a reason not contained in that section of the rule."); *see gen*. Class Counsel April 10, 2019, letter to Court (Doc. 730). The conclusory and contradictory statements from DHS are not the measure for compliance. Rather, the Court must independently determine whether DHS has complied with the Agreement. *See* Order (Doc. 737) at 19;

advised the parties, in its many Orders, communications, conferences, mediation, through the Court Monitor, and during oral argument that it may exercise its right to extend jurisdiction to ensure compliance. *See e.g*. Order (Doc. 587) ("The Court reserves the right to exercise its continuing jurisdiction to ensure that compliance with the Settlement Agreement is verified going forward."); Order (Doc. 544 at 8; Doc. 545 at 6) ("Based on all of the above and the current status of this matter, and pursuant to the Settlement Agreement § XVIII.B and the Court's September 3, 2014 Order (Doc. No. 340), the Court's jurisdiction is extended to December 4, 2019. The Court expressly reserves the authority and jurisdiction to order an additional extension of jurisdiction, depending upon the status of Defendants' compliance and absent stipulation of the parties.); Order (Doc. 340); Order (Doc. 551) ("The Court has since extended its jurisdiction on three occasions, most recently extending its jurisdiction to December 4, 2019. The Court is hopeful that substantial compliance with the Jensen Settlement Agreement will be achieved by this date."); Order (Doc. 223 at 3) ("expressly reserve[ing] the authority and jurisdiction to order an additional extension of jurisdiction, depending upon the status of compliance by the Defendants with the specific provisions of the Settlement Agreement, absent stipulation of the parties.").

Order (Doc. 211) ("The Monitor will independently investigate, verify, and report on compliance.... [w]ithout relying on the conclusion of the DHS....").

The Eighth Circuit also identified the Court's multiple notices to the parties, and their conduct, regarding the extension of jurisdiction:

> On August 27, 2013, the district court, with the consent of the parties, entered an order extending its jurisdiction for an additional year beyond the original termination date (until December 4, 2014). The district court stated that it 'expressly reserve[d] the authority and jurisdiction to order an additional extension of jurisdiction, depending upon the status of compliance by the Defendants with the specific provisions of the Settlement Agreement, absent stipulation of the parties.' Neither party objected to the extension of jurisdiction or the court's reservation of authority.
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> About a year later, on September 3, 2014, MDHS was still not in compliance. The district court determined that it could "no longer tolerate continued delay in the implementation of the Settlement Agreement" and that "[a]dherence to the Court's Orders by the [M]DHS officials and staff at all levels [wa]s essential, not discretionary." The court then extended jurisdiction for another two years (until December 4, 2016) "based on the significant delays in implementation as well as the noncompliance with the Settlement Agreement." It further noted that "the extension of jurisdiction may be considered a sanction related to the circumstances described in [its] Order." Neither party objected.
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> Litigation proceeded for another year and a half. On February 22, 2016—after mediation conducted by Magistrate Judge Becky R. Thorson was concluded—the district court established a "schedule for compliance reporting." In its order, the court extended its jurisdiction for three more years (until December 4, 2019). The district court also "expressly reserve[d] the authority and jurisdiction to order an additional extension of jurisdiction, depending upon the status of Defendants' compliance and absent stipulation of the parties." Again, neither party objected.
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> * * *
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> Both parties have proceeded—both before and after December 4, 2014—as though the district court has properly retained jurisdiction. The district court extended its jurisdiction three times, and neither party objected. Nor did either party object to the district court's orders expressly reserving the authority to extend its jurisdiction again. Indeed, in 2015 and 2016—after the date that MDHS now asserts jurisdiction ceased—the parties filed

> reports and letters with the court, and responded to the reports filed by the Court Monitor. And, also during that time, MDHS filed a motion seeking "an order granting relief from a particular provision in the Stipulated Class Action Settlement." The next day, the Jensen class filed a memorandum in opposition to that motion. In none of these filings did either party question the court's jurisdiction to grant or deny the relief sought, or to monitor compliance with the terms of the Agreement. Not until more than two years after it now claims jurisdiction ceased did MDHS express any objection to the district court's continued jurisdiction.

Jensen, 897 F.3d at 911-12, 915.

Conclusion

On this substantial record, the DHS motion should be denied in its entirety. The motion is an improperly filed request for reconsideration on an issue already litigated and determined in this matter. It is the law of the case. The Court properly exercised its discretion to extend jurisdiction as it deems just and equitable. The Court has taken measured steps over the years, appointing a court monitor as requested by DHS to help with settlement implementation after DHS failed to appoint an external reviewer in violation of the Agreement,[7] offering guidance and encouragement, setting mediation sessions, and issuing detailed Orders governing the implementation process, including

[7] *See* Order (Doc. 737) at 25 ("As noted above, David Ferleger was initially appointed as Court Monitor, at least in part, because Defendants failed to engage an External Reviewer to meet reporting requirements."); Order (Doc. 159) at 11-12 ("Appointment of an independent advisor, consultant, or monitor is appropriate in light of the nature and complexity of the Defendants' obligations under the court-approved Settlement Agreement, the fact that Defendants admit they are already in non-compliance with an important element of their obligations (appointment of the 'external reviewer'), the gaps and deficiencies in the Defendants' May 14 and July 9, 2012 compliance reports, the failure to file required reports by the External Reviewer, the compliance deficiencies raised by Plaintiffs' Class Counsel, and the special expertise required for effective review of the systemic elements of the Settlement Agreement.").

approval of a Comprehensive Plan of Action, Olmstead Plan, work plans, and many other substantial efforts to encourage DHS compliance and providing notice to DHS on multiple occasions that it may extend its jurisdiction to ensure compliance. *See gen.* Order (Doc. 737) (summarizing the Court's efforts over many years). Rather than re-treading failed positions and causing further delay, DHS should be working to comply with the Agreement and the Court's Orders.

The Court's authority to extend jurisdiction "as it deems just and equitable" is expressly stated in the Agreement, affirmed by the Eighth Circuit, admitted by DHS and its counsel, and confirmed by DHS conduct over many years.[8] The DHS motion should be denied in its entirety.

[8] *Jensen*, 897 F.3d at 915 ("Both parties have proceeded … as though the district court has properly retained jurisdiction." "MDHS identifies no evidence indicating that it would not be reasonable for the parties to agree to a preliminary time frame for the court's jurisdiction while, at the same time, including a fail-safe provision that allowed flexibility if compliance with the Agreement took longer than originally expected."); Order (Doc. 674) at 15 ("[T]he parties' subsequent conduct throughout this litigation demonstrates that the parties intended for the Court to retain jurisdiction as it deems just and equitable."); Order (674) at 11 ("The Court is also mindful of Defendants' repeated delays in compliance throughout this litigation's lengthy history that led the Court to extend its jurisdiction on multiple occasions.")

Respectfully submitted,

O'MEARA, LEER, WAGNER & KOHL, P.A.

Dated: August 2, 2019

/s/ Shamus P. O'Meara

Shamus P. O'Meara (#221454)
7401 Metro Boulevard, Suite 600
Minneapolis, MN 55439-3034
(952) 831-6544

SETTLEMENT CLASS COUNSEL