UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents, guardians, and next friends of Bradley J. Jensen; James Brinker and Darren Allen, as parents, guardians, and next friends of Thomas M. Allbrink; Elizabeth Jacobs, as parent, guardian, and next friend of Jason R. Jacobs; and others similarly situated,

Plaintiffs,

vs.

Minnesota Department of Human Services, an agency of the State of Minnesota; Director, Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Clinical Director, the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Douglas Bratvold, individually and as Director of the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Scott TenNapel, individually and as Clinical Director of the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; and the State of Minnesota,

Defendants.

CIVIL FILE NO. 09-CV-01775 (DWF/BRT)

MEMORANDUM IN SUPPORT OF STATE DEFENDANTS' MOTION TO STAY PENDING APPEAL

INTRODUCTION

Defendants Minnesota Department of Human Services, an agency of the State of Minnesota, and the State of Minnesota ("Defendants") submit this memorandum in support of their motion requesting a stay or suspension of their obligations under the Court's December 5, 2011 order (Doc. 136), and as modified and expanded by subsequent orders, as well as a continued stay of the Court Monitor's duties, during the pendency of the appeal they filed with the Eighth Circuit Court of Appeals. Doc. 639. Defendants should not have to continue the obligations imposed pursuant to the Court's orders while the issue of whether the Court even has jurisdiction is considered by the Eighth Circuit. To do otherwise will subject Defendants to substantial burden and expense, which will likely be unrecoverable if Defendants prevail on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

I. PLAINTIFFS' CLAIMS.

On July 30, 2009, Plaintiffs filed their Amended Complaint in this matter, alleging a number of constitutional, statutory, and common law claims. Each of these claims arose from the alleged use of seclusion and mechanical restraint at a single DHS facility, Minnesota Extended Treatment Options ("METO"). Doc. 3, p. 48.

II. THE SETTLEMENT AGREEMENT.

On December 5, 2011, the Court entered an order approving the Settlement Agreement negotiated and entered into by the parties. *See* Doc. 136 (the Court's final approval order); 136-1. The Settlement Agreement provided for the closure of METO and governed the use of restraint and seclusion at successor facilities. It also addressed

transition planning for class members and training and practices at METO successor facilities. Doc. 136-1, pp. 6-15. In addition, the Settlement Agreement contained a number of "System Wide Improvements," including: (1) three provisions addressing the expansion of Community Support Services; (2) requirements that the State develop a plan to consider amendments to Minnesota Rules 9525.2700-2810 consistent with *Olmstead v. L.C.*, 527 U.S. 582 (1999); and (3) provisions addressing the Minnesota Security Hospital and the Anoka Metro Regional Treatment Center. *Id.* at 20-21. The Settlement Agreement also required reporting to the Court for the duration of the Court's jurisdiction regarding the use of restraint and the appointment of an external reviewer, paid by DHS, to monitor the use of restraint and make quarterly reports to the Court. *Id.* at 9–13. The Settlement Agreement "constitutes a single, integrated, written contract expressing the entire agreement of the parties relative to the subject matter hereof." Doc. 136-1, p. 42. Upon approval of the Agreement, the Court dismissed Plaintiffs' claims with prejudice. Doc. 136, p. 3.

By its plain language, the Settlement Agreement, as incorporated in the Final Approval Order, provided that Court would retain jurisdiction over the matter for two years and for three purposes: (1) receiving reports and information required by the Settlement Agreement; (2) resolving disputes between the parties; or (3) as the Court otherwise deems just and equitable. Doc. 136-1, p. 39. This agreement is set forth in section XVIII.B of the Agreement (the "Jurisdiction Clause"):

> [t]he 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.

Doc. 136-1, p. 39. The parties agreed to one condition under which the Court's oversight could be extended: if, after a meet and confer process, Plaintiffs believed that Defendants had engaged in a pattern of substantial non-compliance with policy, then Plaintiffs could "file a motion with the Court to extend the reporting requirements to the Court under [the Settlement Agreement] for an additional one (1) year." *Id*. (emphasis added); *see also* Docs. 279, 279-1 (order and amended Attachment A). The parties agreed that with the conclusion of the Court's jurisdiction the Settlement Agreement itself would terminate. *Id*. at 40.

III. THE COURT EXTENDED ITS JURISDICTION.

In an order dated July 17, 2012, the Court acknowledged that under the Final Approval Order it would " 'retain jurisdiction over this matter for two (2) years from approval of this Agreement' both to receive reports and information and also 'as the Court deems just and equitable.' " Doc. 159, p. 4 & n.11.

One year later, the Court extended its jurisdiction over this matter for one year based on the Settlement Agreement's provision permitting a single, one-year extension. Doc. 223, p 3. The Court, however, also purported to "expressly reserve[] 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." *Id*. The Court did not identify a source of authority for a potential future extension of its jurisdiction.

Despite its July 2012 order construing the Settlement Agreement to provide for at most three years' jurisdiction (Doc. 159, p. 4), the Court has since twice extended its jurisdiction—first to December 4, 2016 and then to December 4, 2019—eight years after the case was dismissed. Doc. 340, p. 14; Doc. 545, p. 6. The Court changed the way it interpreted the Settlement Agreement, reading it as "provid[ing] that the Court's jurisdiction would be determined 'as the Court deems just and equitable.' " Doc. 340, p. 9; *see also* Doc. 545, p. 6. As the Court has since acknowledged, this construction is directly at odds with its initial interpretation that the Settlement Agreement conferred jurisdiction " 'for two (2) years from approval of this Agreement' both to receive reports and information and also 'as the Court deems just and equitable.' " Doc. 159, p. 4 & n.11; Doc. 638, p. 7 n.7.

IV. THE COURT APPOINTED A MONITOR AND EXPANDED DEFENDANTS' OBLIGATIONS.

On July 17, 2012, in response to "compliance concerns raised by Plaintiffs," the Court appointed an independent monitor "to investigate potentially conflicting information, provide a coherent and complete presentation, and make recommendations to the Court." Doc. 159, pp. 9–11. The Court ordered the parties to "cooperate fully" with the Court Monitor and "provide him with access to the facilities, services, programs, data, and documents relevant to the Settlement Agreement." *Id*. at 13–14.

The Court has since considerably expanded Defendants' obligations and the duties of the Court Monitor. On April 25, 2013, the Court issued an order that refused to accept the parties' stipulation "to limit the role of the [Court Monitor]" and directed the Court Monitor to "independently investigate, verify, and report on compliance with the Settlement Agreement and the policies set forth therein on a quarterly basis." Doc. 212, p. 6. The Court required Defendants to comply with a detailed and time-consuming periodic status report protocol, which Defendants must comply with to this day. *Id.* at 6-8. And on September 3, 2014, the Court found that "a more substantial role is necessary" for the Court Monitor (Doc. 340, p. 10), giving the Court Monitor numerous additional duties and powers, including the power to "issue reports on compliance and other issues in this case at his discretion." Doc. 340, pp. 11-14.

With this expanded authority, the Court and Court Monitor required Defendants to submit a proposed Rule 40 Implementation Plan for the review and approval of the Court and Court Monitor (Doc. 223, p. 45); report weekly to the Court Monitor concerning discharge of an individual from a DHS-operated facility (Doc. 309); "examine the deep learning which may be needed to bring understanding of this litigation and the nature of compliance with court orders, and to act upon the results of that examination" (Doc. 273, p. 2); and comply with additional reporting requirements not set forth in the Settlement Agreement (*see, e.g.*, Doc. 551, pp. 9–10). Defendants must convene weekly meetings to review proposed admissions to more restrictive settings and discuss diversion strategies and transition planning. Doc. 283, p. 23. And within one business day of any incident of manual or mechanical restraint, Defendants must report to the Office of Health Facility

Complaints, the Ombudsman for Mental Health and Developmental Disabilities, DHS Licensing, the Court Monitor and the DHS Internal Reviewer, the client's legal representative or family, the client's case manager, and Plaintiffs' counsel. *Id.* at 11–12.

The Court has also ordered Defendants to undertake extensive reporting on the Settlement Agreement and the *Olmstead* Plan. *See* Docs. 544, 545. With regard to the Settlement Agreement, Defendants must submit annual and semi-annual Comprehensive Plan of Action reports addressing 103 evaluation criteria. Doc. 545, pp. 3–4. And under the Court's February 22, 2016 order, Defendants must also submit quarterly or annual status reports both on progress toward the *Olmstead* Plan's annual objectives and in four broad topic areas comprising 34 discrete measurable goals. Docs. 544 ¶¶ 1–4, 544-1. The Court further ordered Defendants' counsel to attend biannual status conferences, in June and December, "to facilitate the Court's continued oversight of the *Olmstead* Plan's implementation" and to discuss topics on an agenda issued by the Court prior to each conference. Doc. 544, p. 7. Defendants must also attend biannual status conferences "to facilitate the Court's continued oversight of the Defendants' compliance with the [court-ordered Comprehensive Plan of Action] and the *Jensen* Settlement Agreement." Doc. 545, p. 5.

V. COMPLIANCE WITH THE COURT'S ORDERS HAS IMPOSED A SUBSTANTIAL BURDEN ON THE STATE.

Defendants have now paid the Court Monitor over one million dollars in fees and expenses. *See* Docs. 182, 191, 218, 221, 234, 252, 260, 267, 277, 291, 307, 316, 331, 339, 345, 367, 380, 394, 406, 436, 474, 485, 518, 527, 546, 557, 570) (ordering checks

issued to the Court Monitor for a combined total of $1,018,995.24, with yearly totals as follows: $11,362.23 (2012); $269,054.19 (2013); $346,757,45 (2014), $357,985.73 (2015); $33,835.64 (2016)).[1]

The reporting obligations imposed by the Court are extensive and costly. With regard to Settlement Agreement compliance alone, the Department of Human Services' Jensen/Olmstead Quality Assurance and Compliance Office ("JOQACO") compiles annual and semi-annual reports, which are due on February 28 or 29, March 31, and August 31. *See* Doc. 545, pp. 3–4; Booth Aff. ¶ 2. JOQACO develops the compliance reports based on information submitted and verified by the program areas as well as JOQACO's independent compliance monitoring and verification activities. Booth Aff. ¶ 3. Six JOQACO staff members participate in the development of these reports, spending an estimated total of 3300 hours—or 3.25 full-time employees—on report development activities per six-month period. *Id*. (estimate based on 3.25 FTEs attached to report development activities). Report development activities include review of data and supporting documentation submitted to JOQACO by program areas, data analysis, on-site visits, interviews of Department staff and external parties, other data verification activities, and report drafting and review. The estimated salary cost to the Department or these activities is $145,000 per six-month period. *Id.*

[1] As part of discussions regarding his budget in early 2013, the Court Monitor filed with the Court a document criticizing Defendants' proposed $144,000 annual cap on his compensation as "insufficient" and lacking a basis. Doc. 208, pp. 2-3.

The actual burden to the State is substantially higher, however, as the above figures do not account for the efforts of Department staff outside JOQACO—including staff from program areas necessary for report development. For example, the Community Support Services ("CSS") Director, Minnesota Life Bridge Manager, Executive Director of Forensic Services, Executive Medical Director for Direct Care and Treatment, and Deputy Senior Counsel all serve as Responsible Parties for specified Evaluation Criteria and are responsible for assuring that required data is gathered, verified and submitted to JOQACO. Booth Aff. ¶ 4. In addition, multiple staff from affected program areas are involved in gathering and verifying data submitted to JOQACO, including the Minnesota Life Bridge Community Residential Supervisors, Minnesota Life Bridge Clinical staff, CSS Mobile Team Managers, the CSS Data Analyst, CSS Clinicians, and the Minnesota Security Hospital Social Worker Supervisor. Booth Aff. ¶ 5. Other Department staff, including three attorneys from the Compliance Office, review draft reports and provide legal and compliance support to JOQACO relating to report development. Booth Aff. ¶ *Id*.

Preparing for and attending Court-ordered status conferences further strains State resources. The Court's *Olmstead* conference agendas to date have required Defendants to address a broad range of topics, including details of the Olmstead Subcabinet reports,[2] administrative issues with the reporting process, amendments to the *Olmstead* Plan, and the amendment process itself. Doc. 568, p. 4; Doc. 619, pp. 3–4. And at the Settlement Agreement status conferences, the Court has directed Defendants to address issues including DHS's organizational structure, its verification process for ensuring reporting accuracy, and its progress toward specific evaluation criteria identified by the Court. Doc. 568, pp. 3–4; Doc. 608.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 62(c) provides for a stay of an order or judgment so that a party may meaningfully exercise its right of appeal. Rule 62(c) states that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." "The purpose of a stay is to preserve the status quo of the parties." *Asarco LLC v. NL Indus.*,

[2] In 2013, the Governor ordered the creation of a subcabinet to develop and implement a comprehensive *Olmstead* plan that uses measurable goals to increase the number of people with disabilities who receive services that best meet their needs in the most integrated setting and is consistent with the United States Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999). *See* Exec. Order No. 13-01, 37 Minn. Reg. 1153 (Feb. 4, 2013).

Inc., No. 4:11–CV–00864–JAR, 2013 WL 43614, at *3 (E.D. Mo. Mar. 11, 2013). The Court considers four factors in deciding whether to issue a stay:

1. whether the applicant will be irreparably injured absent a stay;

2. whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

3. whether issuance of the stay will substantially injure the other parties interested in the proceeding; and

4. where the public interest lies.

See Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

"Ultimately, [the Court] must consider the relative strength of the four factors, 'balancing them all.'" *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011). For instance, "'[c]lear evidence of irreparable injury should result in a less stringent requirement of certainty of victory; greater certainty of victory should result in a less stringent requirement of proof of irreparable injury.'" *Id.* (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 388 (7th Cir. 1984) (citation omitted). Application of these factors requires a stay or suspension of all of the Defendants' obligations pursuant to the Court's jurisdiction over this matter—including its reporting duties and the *Jensen* and *Olmstead* status conferences—as well as the continued stay of the Court Monitor's duties, pending resolution of Defendants' appeal.

ARGUMENT

I. THE COURT'S ORDERS SUBJECT DEFENDANTS TO IRREPARABLE HARM IF THEY ARE NOT STAYED OR SUSPENDED PENDING APPEAL.

Denial of this motion would irreparably harm Defendants. It is the "quintessential form of prejudice" when denial of a stay would effectively deprive a party of its right to appeal. *In re Country Squire Assoc. of Carle Place, L.P.*, 203 B.R. 182, 183 (B.A.P. 2d

Cir. 1996) (quoting *In re Advanced Min. Sys., Inc.*, 173 B.R. 467, 469 (S.D.N.Y. Oct. 5, 1994)). Accordingly, "de facto deprivation of the basic right to appeal" constitutes a "strong showing of irreparable harm." *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 240 F. Supp. 2d 21, 22-23 (D.D.C. 2003). Indeed, many courts have concluded that the effective loss of appellate rights alone constitutes per se irreparable harm. *CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC*, 2013 WL 3288092, at *6-7 (E.D.N.C. Jun. 28, 2013) (citing *In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 347-49 (S.D.N.Y. 2007); *In re Permian Producers Drilling, Inc.*, 263 B.R. 510, 522 (Bankr. W.D. Tex. 2000); *Country Squire*, 203 B.R. at 183). "[W]here the denial of a stay pending appeal risks mooting any appeal of significant claims of error, the irreparable harm requirement is satisfied." *Adelphia*, 361 B.R. at 348 (emphasis in original).

A party can be effectively deprived of its appellate rights by being forced to spend money it would have no way to recover in the event of success on appeal. Accordingly, "[t]he threat of unrecoverable economic loss . . . does qualify as irreparable harm" (emphasis added). *Iowa Util. Bd. v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996); *see also Twin Cities Galleries, LLC v. Media Arts Grp., Inc.*, 431 F. Supp. 2d 980, 984 (D. Minn. 2006) (being "required to invest significant time, costs and resources" that may prove to be superfluous if a party prevails on appeal constitutes irreparable harm); *Illinois Bell Tel. Co. v. Hurley*, 2005 WL 735968, at *7 (N.D. Ill. Mar. 29, 2005) (even quantifiable monetary losses constitute irreparable harm when "there is no entity against which [the stay movant] could recover money damages").

The Court's orders in this matter, including its order finding potentially indefinite jurisdiction, will require Defendants to incur substantial burden and expense before they obtain appellate review. These orders explicitly require Defendants to submit *Jensen* compliance reports on August 31, February 28, and March 31, and *Olmstead* Plan reports on May 31, August 31, November 30, and February 28[3]—well before Defendants are likely to obtain review. Doc. 544, p. 5; Doc. 545, pp. 3–4. The orders also require Defendants to appear at biannual status conferences in connection with both the *Olmstead* and *Jensen* reporting obligations.[4] Doc. 544, p. 7; Doc. 545, p. 5.

Absent a stay or suspension of the Court's Order, the State would incur significant unrecoverable monetary loss. As noted, compliance with the Court's *Jensen* reporting requirements in this case consumes 3300 person-hours, or the equivalent of 3.25 full-time employees, every six months, at an approximate salary cost of $145,000. Defendants have also to date paid more than one million dollars to the Court Monitor, and it is possible Defendants will incur additional expenses in this regard. Apart from costs and disbursements, Defendants will not be able to recover their expenditures if they prevail on appeal and thus will have no way to recover these funds. *See Iowa Utilities Bd. v.*

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[3] Although Defendants may continue to publicly report on *Olmstead* Plan progress if proceedings in this Court are stayed, Defendants should not be compelled to report to the federal court by order. *See, e.g.*, *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006); *Angela R. v. Clinton*, 999 F.2d 320, 326 (8th Cir. 1993).

[4] In addition to the upcoming December 8, 2017 status conference (*see* Doc. 654), the Court has also ordered Defendants to appear for a case management conference on October 30, 2017 (*see* Doc. 652).

F.C.C., 109 F.3d 418, 426 (8th Cir. 1996) (for purposes of motion for stay pending appeal, threat of unrecoverable economic loss qualifies as irreparable harm where appellant could not bring suit to recover economic losses even if challenged FCC rules were overturned on appeal).

II. DEFENDANTS ARE LIKELY TO SUCCEED ON THE MERITS.

Defendants are likely to succeed on the merits of their appeal, as the Settlement Agreement unambiguously provides that the Court's jurisdiction ended, at the latest, on December 4, 2014. Doc. 136-1, pp. 38-39; Doc. 136, p. 2.

This Court's jurisdiction over this matter is governed solely by the terms of the Settlement Agreement. *See Miener v. Missouri Dept. of Mental Health*, 62 F.3d 1126, 1127 (8th Cir. 1995); *Roberts v. Ocwen Loan Servicing*, LLC, 617 F. App'x 613, 614 (8th Cir. 2015) (dismissing a federal action to enforce settlement agreement when brought outside that agreement's 60-day jurisdiction retention period); *4:20 Commc'ns, Inc. v. Paradigm Co.*, 336 F.3d 775, 778 (8th Cir. 2003) (dismissing federal action to enforce settlement agreement when brought outside that agreement's 90-day jurisdiction retention period). That Agreement is a contract, governed by the contractual law of Minnesota. *See American Prairie Constr. Co. v. Hoich*, 594 F.3d 1015, 1023 (8th Cir. 2010); *Sheng v. Starkey Labs., Inc.*, 53 F.3d 192, 194 (8th Cir. 1995) ("Settlement agreements are governed by basic principles of contract law.").

Under Minnesota law, where contract language is clear and unambiguous, there is no room for interpretation or construction. *Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc.*, 65 F.3d 1427, 1436 (8th Cir. 1995). In determining whether a contract term

is ambiguous, contract language must be given its plain and ordinary meaning. *See Hartford Fire Ins. Co. v. Clark*, 562 F.3d 943, 946 (8th Cir. 2009); *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998); *Barry v. Barry*, 78 F.3d 375, 382 (8th Cir. 1996). Minnesota courts construe contracts as a whole, harmonizing all clauses. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990). They do not read portions of the contract in isolation, *River Valley Truck Ctr., Inc. v. Interstate Companies, Inc.*, 704 N.W.2d 154, 163 (Minn. 2005), and avoid interpretations that will render a provision meaningless or lead to a harsh and absurd result. *Chergosky*, 463 N.W.2d at 526; *Brookfield Trade Ctr.*, 584 N.W.2d at 394.

A. The Settlement Agreement Unambiguously Provided That The Court May Retain Jurisdiction Through December 2014 At The Latest.

The plain language of the Settlement Agreement's Jurisdiction Clause unambiguously provided for only two years of district court jurisdiction, with an option to extend that jurisdiction for a single year upon Plaintiffs' motion and proof of substantial noncompliance. To arrive at the ambiguity the Court identified in the Jurisdiction Clause, it disregarded the clause's most natural, straightforward reading as informed by multiple controlling principles of Minnesota contract interpretation.

"When a written contract is clear and unambiguous, the parties' intent will be determined by the plain language of the contract, and the court may not modify, rewrite, or limit its effect by a strained construction, or speculate as to the parties' unexpressed intent." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, No. A06-2227, 2007 WL 4237504, at *1 (Minn. Ct. App. Dec. 4, 2007) (citing *Travertine Corp. v. Lexington-Silverwood*,

683 N.W.2d 267, 271 (Minn. 2004)). The Jurisdiction Clause plainly limits the Court's jurisdiction to a two-year period following its approval:

> 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. Should Plaintiffs believe a pattern or practice of substantial non-compliance with Attachment A exists, the State and Plaintiffs shall meet and confer in an effort to resolve any such concerns . . . . Should Plaintiffs continue to believe a pattern and practice of substantial non-compliance with Attachment A exists, Plaintiffs may, within thirty (30) days thereafter, file a motion with the Court to extend the reporting requirements to the Court under this Agreement for an additional one (1) year.

Doc. 136-1 at 39.

Here, the punctuation unambiguously denotes three *purposes* for the Court's continued jurisdiction: "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." Doc. 136; 136-1, p. 39, Section XVIII.B (emphasis added). The Court's interpretation cannot account for the first comma in this series, as by the Court's reading there are but two purposes for which it may retain jurisdiction: (1) receiving reports and information and (2) resolving disputes between the parties. This reading is erroneous. *See, e.g.*, B. Garner, *Garner's Modern English Usage* 748 (4th ed. 2016) ("[T]he comma separates items . . . *in a list of more than two*.") (emphasis added); B. Garner, *The Redbook: A Manual on Legal Style* § 1.6(a) (3d ed. 2013) ("Use commas to separate words or phrases *in a series of three or more*.") (emphasis added); *see also Kansas City Life Ins. Co. v. Wells*, 133 F.2d 224, 227 (8th Cir. 1943) ("[T]he court in interpreting a contract cannot ignore either the punctuation or the grammatical construction of the

language used."); *Econ. Premier Assur. Co. v. W. Nat. Mut. Ins. Co.*, 839 N.W.2d 749, 758 (Minn. Ct. App. 2013) (considering placement of commas in determining plain meaning of contested contract language); *Metalmasters of Minneapolis, Inc. v. Liberty Mut. Ins. Co.*, 461 N.W.2d 496, 501 (Minn. Ct. App. 1990); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 161 (2012). Nothing in the Jurisdiction Clause's plain language suggests a link between this third and final "purposes" clause and the length of the Court's jurisdiction.

The Court's finding of ambiguity is also contrary to the series-qualifier canon, under which a term is presumed to modify the entire series it follows or precedes. *See In re Estate of Pawlik*, 845 N.W.2d 249, 252 (Minn. Ct. App. 2014) ("[W]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.") (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)); Scalia & Garner, *Reading Law* at 147 ("When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series."). Under the Court's construction, the phrase "for purposes of" would modify only "receiving reports and information" and "resolving disputes between the parties," but ignore the third clause "or as the Court deems just and equitable"—which would instead be inexplicably linked to the sentence's first clause, some 21 words distant. *See* Doc. 638, p. 11.

In addition, the Court's finding of ambiguity impermissibly renders superfluous the parties' agreed-upon process to extend the Court's jurisdiction for a potential third

year. In evaluating the meaning of a contract, Minnesota courts presume that the parties intended the language used to have effect, and avoid interpretations that render a contractual provision meaningless. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525-26 (Minn. 1990); *see also Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979) (citations omitted) (to the extent possible, courts must give effect to the intent of the parties, which is to be ascertained "not by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning" based on the contract's overall purpose). But interpreting the Jurisdiction Clause to permit the Court to maintain jurisdiction for any period it "deems just and equitable" renders meaningless the clause's explicit limitations on the term of the Court's jurisdiction. In drafting the Settlement Agreement, the parties set forth a specific procedure by which Plaintiffs could request a single, one-year extension of Defendants' reporting obligations if, after meeting and conferring with Defendants, they "continue to believe a pattern and practice of substantial non-compliance" with the facility's policy on therapeutic intervention and emergency manual restraint. Doc. 136-1, p. 39. The Court's interpretation ignores this provision.

Finally, the Court itself agreed with Defendants' position in July 2012, stating in its order appointing the Court Monitor that "the [Final] Approval Order provides that the 'Court shall retain jurisdiction over this matter for two (2) years from approval of this Agreement' both to receive reports and information and also 'as the Court deems just and equitable.'" Doc. 159, p. 4. Neither party claimed this interpretation was incorrect. The

Jurisdiction Clause unambiguously provides for at most three years of district court jurisdiction, and the Court's order to the contrary is likely to be reversed on appeal.

B. Even If The Settlement Agreement Was Ambiguous, The Court Erred In Concluding It Retained Jurisdiction As It Deems Just And Equitable.

Even if the Court properly found the language of the Settlement Agreement to be ambiguous, its interpretation of the Jurisdiction Clause remains erroneous.

1. The Court erroneously concluded that the parties' post-agreement conduct demonstrated the intent to provide for indefinite jurisdiction.

First, in concluding that the Jurisdiction Clause allowed it to retain jurisdiction as it deemed just and equitable, the Court erroneously concluded that the parties' post-agreement conduct supported that construction. Under Minnesota law, contracts must be interpreted to give effect to the mutual intention of the parties at the time of contracting. *Loftness Specialized Farm Equip., Inc. v. Twiestmeyer*, 818 F.3d 356 (8th Cir. 2016); *Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 298 Minn. 428, 433, 215 N.W.2d 473, 476 (1974). Accordingly, the parties' post-agreement conduct may be considered only to the extent it is probative of the parties' intent when the agreement was formed. *See Teachout v. Wilson*, 376 N.W.2d 460, 463 (Minn. Ct. App. 1985).

Here, the parties' post-agreement conduct demonstrates that they understood the Jurisdiction Clause to provide for only two years of jurisdiction over the Settlement Agreement. The best evidence of the parties' intent at the time of contracting is reflected in the Court's order of July 17, 2012 noting that under the Settlement Agreement it would " 'retain jurisdiction over this matter for two (2) years from approval of this Agreement'

both to receive reports and information and also 'as the Court deems just and equitable.' " Doc. 159, p. 4 & n.11. This is the first order to apply the language at issue in this appeal, and the Court invoked that clause as authority to exercise its jurisdiction for *purposes* it deemed just and equitable without suggesting that the clause gave it authority to extend the *term* of its jurisdiction. *Id.*[5]

2. The Court's interpretation of the Jurisdiction Clause impermissibly creates an absurd result.

Second, the Court's conclusions regarding the parties' intent create an absurd result. Under Minnesota law, where contract language is susceptible to different constructions, courts should reject a construction that would lead to an absurd result. *Chergosky*, 463 N.W.2d at 526; *Employers Mut. Liab. Ins. Co. of Wis. v. Eagles Lodge of Hallock, Minn.*, 282 Minn. 477, 479-80, 165 N.W.2d 554, 556 (1969); *Burnett v. Hopwood*, 187 Minn. 7, 14, 244 N.W. 254, 257 (1932). Here, Defendants would not reasonably have agreed to terms under which the Court could extend its jurisdiction—and Defendants' reporting obligations—indefinitely. Some of the chief goals of settlement are to avoid protracted court involvement and provide finality and certainty to the parties. *See, e.g., Gibson v. Clean Harbors Envtl. Servs., Inc.*, 840 F.3d 515, 523 (8th Cir. 2016); *Sheng v. Starkey Laboratories, Inc.*, 117 F.3d 1081, 1084 (8th Cir. 1997); *Ehrheart v.*

[5] That Defendants did not immediately object to the Court's assertion of continued jurisdiction in August 2013 is not probative of their intent in December 2011. Lack of subject matter jurisdiction cannot be waived. *See In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304 (8th Cir. 1994).

Verizon Wireless, 609 F.3d 590, 595 (3d Cir. 2010). With no limiting principle beyond what the Court "deems just and equitable," the parties could not reasonably have intended that the Settlement Agreement be construed to confer upon the Court potentially indefinite jurisdiction. The Settlement Agreement provides for no factual showing or other mechanism by which Defendants could ever terminate their obligations.[6]

Had the parties intended that the Settlement Agreement be so construed, they could easily have done so clearly. *See, e.g.*, *Brookfield Trade Ctr.*, 584 N.W.2d at 395 (rejecting strained interpretation of contract, where parties could have expressed same intent clearly); *Emergency Medical Care, Inc. v. Marion Memorial Hosp.*, 94 F.3d 1059, 1062 (7th Cir. 1996) (same). Accordingly, even if the Court of Appeals concludes the Jurisdiction Clause is ambiguous, it is likely to reverse the Court's interpretation.

3. The Court's interpretation of the Jurisdiction Clause impermissibly creates an unlawful result, violating principles of federalism and separation of powers.

Defendants are also likely to prevail on appeal based on binding principles of federalism and separation of powers. Minnesota law provides that "[w]here there is a choice between a construction of illegality and one of legality, in the absence of proof of a purpose to the contrary, an intended contractual course of legality is to be presumed." *Hart v. Bell*, 23 N.W.2d 375, 379 (Minn. 1946); *see also Inv'rs Syndicate v. Baskerville*

[6] In the absence of the Settlement Agreement specifying any such showing, the Court has placed the burden on Defendants to show "substantial compliance" with every term of the agreement, a burden which appears nowhere in the agreement itself.

Bros. Holding Co., 274 N.W. 627, 629 (Minn. 1937) (applying "presumption that the parties intended their contract to be legal and binding"); *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977) ("Since a general rule of construction presumes the legality and enforceability of contracts . . . ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable.") (citing 6A A. Corbin, Contracts §§ 1499, 1533 (1962)). The Court's interpretation of the Settlement Agreement results in an agreement that violates principles of federalism and separation of powers.

The Supreme Court has repeatedly held that a federal district court may not interfere with state operations unless absolutely necessary to remedy an ongoing violation of law. The Supreme Court has noted the "sensitive federalism concerns" implicated by "institutional reform litigation," or litigation based on federal statutory or constitutional claims that results in a district court "micromanag[ing] the day-to-day operation" of "areas of core state responsibility." *Horne v. Flores*, 557 U.S 433, 448 & n.3 (2009). In *Horne*, pursuant to a consent decree, "[f]or nearly a decade, the orders of a federal district court [had] substantially restricted the ability of the State of Arizona to make basic decisions regarding educational policy, appropriations, and budget priorities." *Id*. at n.3. The Supreme Court noted that "[f]ederalism concerns are heightened where . . . a federal court decree has the effect of dictating state or local budget priorities" because "[s]tates and local governments have limited funds." *Id*. at 448; *see also Stanley v. Darlington Cty. Sch. Dist.*, 84 F.3d 707, 716 (4th Cir. 1996) ("It would be an unfathomable intrusion

into a state's affairs—and a violation of the most basic notions of federalism—for a federal court to determine the allocation of a state's financial resources.").

The Supreme Court has also repeatedly recognized the importance of deference to the judgments of state officials in administering state programs and laws. "Where . . . the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (citations omitted). "It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). As a consequence, "[a] federal court may not lightly assume [the] power" to "assert control over the operation of . . . a major component of [] state government." *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006) (citing *Angela R. v. Clinton*, 999 F.2d 320, 326 (8th Cir.1993) ("Federal courts operate according to institutional rules and procedures that are poorly suited to the management of state agencies.")).

The Court's interpretation of the Jurisdiction Clause and its repeated, *sua sponte* extensions of its own jurisdiction contravene these principles. As noted above, this case arose from allegations of unconstitutional restraint at a single DHS facility. *See supra* at p. 3. As discussed, the plain language of the Jurisdiction Clause conferred upon the Court a two-year period of jurisdiction for limited purposes, which could be extended to

three years only upon *Plaintiffs'* showing of "substantial noncompliance" with a single term of the Settlement Agreement related to restraint protocol. Doc. 136-1, p. 39.

In the nearly six intervening years, the Court has misconstrued the Settlement Agreement and conferred upon itself and the Court Monitor a micromanagerial role over a substantial portion of DHS. Rather than tying the possibility of limited continuing jurisdiction to *Plaintiffs'* showing "substantial noncompliance" with the restraint protocol incorporated into the Settlement Agreement (*see* Doc. 136-1, pp. 39, 54-64), the Court has now made it clear that jurisdiction will continue indefinitely at the Court's sole discretion, until Defendants meet a burden to show "substantial compliance" with each of 103 "evaluation criteria" derived by the Court Monitor from the Settlement Agreement. *See, e.g.*, Doc. 212, p. 6; Doc. 223, p. 8; Doc. 340, p. 14 ("The Court Monitor shall serve for as long as necessary for Defendants to achieve substantial compliance."); Doc. 551 (repeatedly stating Defendants must "achieve compliance"); Doc. 604, pp. 2 ("'assess[ing] substantial compliance'" by court order), 10-132. Nowhere, however, does the Settlement Agreement require Defendants to meet any burden in order to end court jurisdiction; both the words "substantial compliance" and Defendants' burden to meet that standard are imposed by the Court.

Similarly, the Court and Court Monitor purport to require Defendants' compliance with requirements that do not exist within the Settlement Agreement. *See, e.g.*, Doc. 551, pp. 9-10 (requiring DHS to provide to the Court additional information on certain 911 calls, when the Settlement Agreement (Doc. 136-1, p. 11) requires only that a form be filled out and provided to the external reviewer); Doc. 395 (Court Monitor exercising

editorial control over DHS websites and PowerPoint presentations); Doc. 136-1, pp. 16-18; Doc. 388 (Court Monitor evaluating DHS compliance with expressly non-binding "goals and objectives" set forth in the Settlement Agreement); Doc. 551, pp. 12-15 (order setting forth additional reporting requirements on those non-binding terms).

Indeed, in expanding the Settlement Agreement beyond its terms, the Court has exercised control over DHS that would not be permitted even upon an actual finding of liability. *See Milliken v. Bradley*, 418 U.S. 717, 743-44 (1974) (a court "in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution" and not create "operational problems" that require the Court to act as a "de facto 'legislative authority.'"); *see also Kendrick v. Bland*, 740 F.2d 432, 438-39 (6th Cir. 1984) (A district court "breach[es] fundamental principles of federalism and exceed[s] its authority" when it orders a remedy that is not the "least intrusive available."); *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (warning of the "natural tendency to believe that [one's own] individual solutions to often intractable problems are better and more workable than those persons who are actually charged with and trained in running of a particular institution under examination.").

The Court's interpretation of the Jurisdiction Clause is of a piece with these prior decisions, and threatens to indefinitely perpetuate federal control over a substantial portion of DHS' operations and budget. Even if ambiguous, the Jurisdiction Clause may

not be construed to create such an unlawful result, and Defendants are likely to prevail on appeal.[7] *Hart*, 23 N.W.2d at 379.

III. PLAINTIFFS WOULD NOT BE HARMED BY A STAY.

Nor would Plaintiffs be harmed by a stay. Although onerous, the obligations imposed on Defendants do not directly accrue to Plaintiffs' benefit. If Defendants are unsuccessful on appeal, the temporary cessation of the Court's orders will likely have little impact on Plaintiffs whatsoever; indeed, Plaintiffs' complaint in this case was about the alleged improper use of restraints at a single DHS facility, which Plaintiffs do not seriously contend are continuing. *See, e.g.*, Doc. 604, p. 9. Moreover, there can be little prejudice to Plaintiffs given that they could not have anticipated that the reporting requirements would extend beyond three years based on the plain language of the Settlement Agreement.

[7] Even if the Court were not required to presume the legality of an ambiguous contract, its interpretation of the Jurisdiction Clause independently fails to consider or give effect to the binding principles of federalism and separation of powers discussed above. As noted, these principles place fundamental limits on the ability of a federal court to dictate the operation of state government. In ignoring them, the Court impermissibly granted itself powers that the Constitution does not allow. *Horne*, 557 U.S at 448; *Elizabeth M.*, 458 F.3d at 784; *Lewis*, 518 U.S. at 349. For this reason, too, the Court's order is likely to be reversed.

IV. THE PUBLIC INTEREST FAVORS A STAY OR SUSPENSION OF THE COURT'S ORDER.

As discussed, the extensive obligations imposed on Defendants under the Court's continued jurisdiction intrude on the State's responsibility to set public policy and administer its own law. As the United States Supreme Court has recognized, remedies in institutional reform cases such as this one can "raise sensitive federalism concerns" because they "commonly involve[] areas of core state responsibility." *Horne*, 557 U.S. at 448; *see also, e.g.*, *Rizzo*, 423 U.S. at 378 ("[F]ederal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'"); *Elizabeth M.*, 458 F.3d at 784. The Court's orders in this case interfere with the State's responsibility of caring for individuals with a disability when it monitors the minutiae of the Department's administration of matters beyond the case itself, which involved the use of restraint at a single DHS-operated facility. *See* Doc. 58-2 (Second Amended Complaint).

Those orders also implicate separation of powers concerns, imposing obligations well beyond those contemplated by the parties.[8] *See Bacon v. City of Richmond*, 475 F.3d 633, 638 (4th Cir. 2007) ("Preserving the link between remedies and violations

[8] The Court and Court Monitor have required Defendants to comply with numerous conditions not found in the Settlement Agreement, including "examin[ing] the deep learning which may be needed to bring understanding of this litigation" (Doc. 273, p. 2), providing the Court additional information on certain 911 calls (Doc. 551, pp. 9-10), allowing the Court Monitor editorial control over DHS websites and presentations (Doc. 395), and satisfying expressly non-binding "goals and objectives" identified in the Settlement Agreement (Docs. 388, 551).

[furthers] an important separation of powers principle, ensuring that court edicts are grounded in the requirements of law and not in notions of judicial policy."). These concerns are heightened given the substantial expense imposed by the Court's orders. *See Horne*, 557 U.S. at 448 (federalism concerns are heightened where "a federal court decree has the effect of dictating state or local budget priorities").

Indeed, the federal courts have specifically recognized that the public interest is furthered where, as here, a stay prevents added cost to the public. *See James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544-45 (8th Cir. 1982) (holding that "granting the stay serves the public interest by avoiding delay that would inevitably add to the cost of the project, requiring greater expenditures from the public treasury."); *see also Twin Cities Galleries, LLC v. Media Arts Grp., Inc.*, 431 F. Supp. 2d 980, 984 (D. Minn. 2006) (holding that "[r]equiring the parties, their respective counsel and the AAA to expend time, energy and resources in proceeding with an arbitration that may ultimately prove futile if respondents are successful on appeal is not in the public interest").[9]

[9] It should also be noted that the requested stay cannot be conditioned on the issuance of a bond. *See, e.g., McClatchy Newspapers v. Cent. Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982) (holding Rule 62(c) only authorizes the imposition of conditions "to preserve the status quo while the case is pending in [an] appellate court"); *Omnioffices, Inc. v. Kaidanow*, 201 F. Supp. 2d 41, 43-44 (D.D.C. 2002) ("[P]osting bond is meaningless" in cases involving non-monetary judgments because it "does not protect the rights of the non-moving party.").

The Court's continuing jurisdiction requires Defendants to spend a significant amount of public resources. As discussed, Minnesota taxpayers have now paid the Court Monitor over one million dollars in fees and expenses, while compliance reporting alone consumes over 3300 hours over a six-month period, accounting for 3.25 full-time employees.[10] *See* Factual Background, section V, *supra*. These expenditures are also likely irretrievable, as they are likely to be spent or encumbered before the issuance of an appellate order, under the Court's timelines. Doc. 545 at 3–4. Nor can Defendants likely recover the time and resources that will be committed to preparing for and attending both the multiple *Jensen* and *Olmstead* status conferences that will occur before the Court of Appeals renders a decision.

[10] Again, this figure excludes reporting from the *Olmstead* Subcabinet.

CONCLUSION

In light of the foregoing, the Court should stay Defendants' obligations under the Settlement Agreement and this Court's subsequent orders, and continue the stay of the duties of the Court Monitor, during the pendency of the appeal of the Court's June 28, 2017 Order.

Dated: October 20, 2017.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

James and Lorie Jensen, et al.,

Plaintiffs,

vs.

Minnesota Department of Human Services, et al.,

Defendants.

Case No. 09-cv-01775 DWF/BRT

LR 7.1(f) CERTIFICATE OF COMPLIANCE REGARDING STATE DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO STAY PENDING APPEAL

I, Scott H. Ikeda, certify that the:

☒ Memorandum titled: Memorandum in Support of Defendants' Motion to Stay Pending Appeal

complies with Local Rules 7.1(f) and 7.1(h).

☒ I further certify that, in preparation of this document, I used Microsoft Word Version 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

☒ I further certify that the above document contains 7,528 words.

Dated: October 20, 2017.

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