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 BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR STAY [DOC. 655]**

INTRODUCTION AND BACKGROUND

The Settlement Class opposes the defendants' Motion for Stay (Doc. 655). Numerous orders and directives over many years have focused on trying to compel the defendants' compliance with the Settlement Agreement. There is objective information from the Court, Court Monitor, Consultants and defendants themselves showing the Settlement is not finished and that class members continue to suffer abuse and neglect at state licensed facilities. *See* Class Counsel Letter to Court (Doc. 661); O'Meara Decl Exs. A-E (listing substantiated abusive and neglect of class members in 2017). Rather than completing the Settlement, however, Defendants have chosen the tactic of claiming the Court has no jurisdiction and that their obligations must be ignored. Defendants' meritless position is asserted with unclean hands in derogation of their obligations to citizens with developmental disabilities they are contractually bound to protect.

A stay "is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009). "It is instead an exercise of judicial discretion and the propriety of its issue is dependent on the circumstances of the particular case." *Id.* As the moving party, defendants "bear[] the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34. Defendants present a misleading view of the plain terms of the Settlement Agreement in a strained attempt to avoid jurisdiction and their obligations to vulnerable citizens. The Settlement plainly commends this Court with jurisdiction. Defendants cannot sustain their burden, and the Court should deny the motion in its entirety and allow the settlement to proceed to conclusion.

THERE IS A LONG HISTORY OF INFORMAL COMMUNICATIONS, LETTERS, CONFERENCES AND REPORTING ON NON-COMPLIANCE OVER SEVERAL YEARS

For many years, the parties' operated under an informal arrangement to address issues involving the settlement's implementation, including stated concerns and responses regarding compliance with the settlement. *See* (Doc. 250-2) Ex. 27 (listing 145 Settlement Class requests to DHS regarding the settlement implementation from January 1, 2012, to November 29, 2012, and DHS responses). The parties approached the Court as part of chambers conferences, and in letters and e-mails, to address the apportioned settlement funds, preservation of class member eligibility for governmental benefits, and concerns and discussions involving the implementation of the settlement.[1] The Court

[1] *See, e.g.*, (Doc. 158) ("I respond to the Court's June 26, 2012, letter requesting the parties' position regarding the implementation of the Settlement Agreement and external reviewer position, we enclose a copy of Advocate Concerns re. Implementation of Jensen Settlement, e-mailed to Mr. Alpert on June 19, 2012, and our June 19 and July 5, 2012, e-

also provided suggestions to the parties to assist the settlement's implementation, including appointing an Independent Court Monitor (Doc. 147) after defendants introduced David Ferleger to the Court during the settlement negotiations. Order (Doc. 159) at 13 n.20 ("Mr. Ferleger is familiar to the parties and the Court; as noted above, he was introduced to the Court by Defendants' counsel during the Settlement Agreement negotiation process and attended the settlement approval hearing.") The parties responded and agreed to the monitor's involvement.[2] After the monitor was appointed

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mails responding to the Minnesota Department of Health's June 8 and June 29, 2012 e-mails (also enclosed) pertaining to the MDH draft report to the Court regarding the Minnesota Specialty Health System – Cambridge ("Cambridge") facility which is the successor to the Minnesota Extended Treatment Options Program.); (Doc. 158-1) (Advocate Concerns Regarding Implementation of Jensen Settlement); (Doc. 158-2) (July 5, 2012, e-mail to DHS counsel; (Doc. 171) (Objection to Defendants' September 17, 2012 Status Report to the Court; (Doc. 171-2) (July 20, 2012, e-mail from Settlement Class Counsel to Court Monitor re. settlement implementation concerns); (Doc. 250) at 2 (November 27, 2012, Settlement Class Letter to the Court; (Doc. 250-1, Ex. 26) ("The issues relating to DHS non-compliance with the Settlement Agreement have existed for months. They are ongoing, requiring extensive monitoring and comprehensive responses, meetings and interaction between the parties and with the Court Monitor) (citing Doc. 158, 158-1, 158-2, 171, 171-1, 171-2, 179, 180, emails to chambers, October 4, 2012 letter to DHS counsel notifying DHS of the Settlement Class's position regarding DHS non-compliance with the Settlement Agreement and a possible Motion to Enforce the Agreement); (Doc 250-1) at 38 (January 9, 2012, Class Counsel e-mail to Defendants' counsel) ("Steve, In follow up to our recent discussions, here's a list of deadline and other issues to be completed from the Settlement Agreement. Can you please follow up with me on the items referenced. If I have missed some dates/items please advise."); *Id*. at 42 (February 8, 2012, DHS counsel e-mail to Class Counsel) ("Shamus: Here is the status of the items you identified. I highlighted the provision related to the External Reviewer as there has been a delay in getting that position filled. Please let me know if you have any other questions.") (Doc 250-1) Ex. 22, 23, 28, 30.

[2] *See* May 5, 2012, Settlement Counsel letter to Court ("Thank you for your May 4 letter suggesting the appointment of David Ferleger as a monitor to aid the parties in the implementation of the settlement. We agree with the Court's suggestion to appoint Mr. Ferleger as a monitor as the Court has described. We suggest that a status conference be

(Doc. 159) there were numerous meetings and communications between the parties and monitor involving their positions on compliance with the settlement,[3] as well as required

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scheduled to bring the Court current on several items regarding the settlement, and the role of Mr. Ferleger. Thereafter, we suggest that Mr. Ferleger be provided a written update by the parties on the current status of the implementation of the agreement, and then a chambers conference be scheduled with the Court, counsel, and Mr. Ferleger to discuss Mr. Ferleger's monitoring role. For background, I enclose our February 10 update to the Court following the Court's request for an update on the implementation of the Settlement provisions. This update includes our January 9 and 10 update requests to DHS (in the first attachment), and Steve Alpert's February 8 e-mail providing status on settlement provisions. Apart from many ongoing substantive communications and conferences regarding the process for apportioned settlement funds and eligibility issues and concerns, our February 10 e-mail appears to be the most current written update to the Court regarding the implementation of settlement provisions. Since these updates, the parties, with assistance from Colleen Wieck and Ann Barry, have been communicating on the external reviewer selection process (we understand a revised RFP was sent out in late April), and the third party expert provision process. The parties have also been in communication on efforts to eliminate the term "mental [*****]" and other offensive terms in DHS documents. The Rule 40 and Olmstead committees are also now in place and meeting on a regular basis.")

[3] *See, e.g.*, October 5, 2012 Letter to Court Monitor ("The Settlement Class believes DHS is in substantial non-compliance with the Settlement Agreement and is engaging in the use of Chemical Restraint at the MSHS-Cambridge facility in violation of the Settlement Agreement as identified by the Ombudsman for Mental Health and Developmental Disabilities in its September 27, 2012, report on the MSHS Cambridge facility."); (Doc. 250-1) at 21 ("We have asked but have not received a listing of the type of restraint and seclusion and other aversives used on people with developmental disabilities at DHS facilities. We were told at a prior party meeting that DHS did not know what kind of aversives each facility was using or the frequency of use but that DHS would get us that information. It has not been provided and no one has bothered to give us any update on efforts to procure this information. We are learning, independent of DHS, about the use of 'restraint chairs' and other aversives and DHS trainings on the use of restraints and aversives."); (Doc. 250-1) at 18-19 ("It has come to our attention that DHS may have trainings and/or an online training catalogue involving the use of handcuffs, restraints, and a restraint chair. . . . We urge that the Monitor conduct and immediate and complete investigation of this issue. We request copies of all documents obtained relative to this issue."); (Doc. 233-4) at 5.

reports to the Court by defendants and responses to those reports.[4] Mr. Ferleger issued numerous reports.[5] "[W]ith few exceptions his findings and recommendations have

[4] *See* (Doc. 165) at 13, 27 (September 17, 2012, DHS Status Report) ("Emergency use of restraint not reported to all parties within the prescribed 24-hour period"; "The External Reviewer is not in place."); (Doc. 171) October 4, 2012, Class Counsel Letter Objection to Defendants' September 17, 2012 Status Report to the Court (Doc.165) (concerns raised regarding chemical restraint, PRN, and ongoing concerns involving implementation of Jensen Settlement); (Doc. 180) at 41 (November 19, 2012, DHS Status Report (training has not been completed).

[5] *See e.g.*, (Doc. 175) at 12-20 (Independent Consultant and Monitor First Quarterly Report to the Court) ("The monitor concludes that Defendants are not in compliance with the training requirements [of the Settlement Agreement]"); (DHS statements about completed training are false); (Doc. 198) (January 23, 2013, Court Monitor's Response to Court (expressing overall concern regarding lack of compliance; (Doc. 217) at 18, 61 (June 11, 2013, Court Monitor Status Report on Compliance ("The Court Was Not Informed that MSHS-Cambridge Operated Without a Department of Health License for 10 Months."); (Doc. 263) at 7 (December 31, 2013, Court Monitor Report to the Court) ("The Plan does not provide any suggestions for the State's demonstration of sufficient substantial compliance to enable the Court to relinquish active jurisdiction."); (Doc. 313) (June 20, 2014, Court Monitor Report to the Court: Community Compliance Review) (listing several noncompliance areas); (Doc. 233) (August 6, 2014, Court Monitor Report at 7 ("In many of its action steps, the Plan falls short of stating measurable goals."); (Doc. 347) at 6 (October 17, 2014, Behavioral Intervention Devices & Practices: Achieving Compliance in Community Programs) ("The Settlement Agreement in this litigation forbids the use of restraints and other aversive practices on people with developmental disabilities (with the exception of manual restraint) at the MSHS Cambridge and all its successor facilities. In addition, the settlement requires an expansion of such restrictions through modernization of Rule 40 to comport with "best practices." DHS accepted the Rule 40 Advisory Committee report with a commitment to extend the facility based restrictions state-wide. The Comprehensive Plan of Action adopted by the Court this year establishes that the new rule will forbid mechanical, behavioral and other restraints and aversive practices, with regard to all individuals with developmental disabilities, regardless of where they are served. The Department has committed that "DHS will prohibit procedures that cause pain, whether physical, emotional or psychological, and establish a plan to prohibit use of seclusion and restraints for programs and services licensed or certified by the department."); *Id* at 8 ("DHS has received 12,121 Behavior Intervention Report Forms (BIRF) between July 1, 2013 and September 19, 2014, from 398 providers; the reports document that 40 persons were mechanically restrained, and 70 persons put into seclusion during that period.

generally been received by the parties with little or no objection." (Doc 340); Order (Doc. 551) at 18 ("Over the years, the Court has assigned various duties to the Court Monitor in order to promote compliance with the Jensen Settlement Agreement. Many of these duties evolved through the agreement and cooperation of the parties."); (Doc. 254), at p. 2, n.2 (November 26, 2013, Independent Consultant and Monitor Report to the Court, Comprehensive Plan of Action) ("Reports filed by Court Monitor describe non-compliance, unchallenged by Defendants.")[6] The monitor's reports and ongoing non-compliance by defendants prompted formal action from the Court to address settlement

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Unfortunately, the thousands of BIRF reports have received little but aggregate computation before the Court Monitor began this investigation."); at 13 ("For restraints used under "Positive Supports Treatment Plan, there were 1,056 uses of mechanical restraint are reported."); at 14 ("There is significant use of prone restraint (forcibly holding someone facedown) in Minnesota community programs."); (Doc 355) (November 4, 2014, Court Monitor Letter to DHS (finding noncompliance with DHS not reviewing BIRFs for manual, chemical, timeout penalty or 911 calls; 33 prone restraints); (Doc. 356) (November 6, 2014 Court Monitor Report, Comments and Expectations: DHS Diversion from Institutionalization ("DHS has not begun any specific needs assessment under CPA EC 88, according to its compliance updates to the Court."); (Doc. 381) (January 28, 2015 Court Monitor Report to the Court: Community Compliance Review: DHS Follow-up (6 class members reviewed; no individualization, professional standards not met); (Doc. 565) at 2 (May 11, 2016, Court Monitor Report to the Court: Comprehensive Plan of Action) ("DHS does not yet demonstrate the existence of internal verification mechanisms to audit compliance with Evaluation Criteria 93 and 98.")

[6] *Id.* ("Months before his June 11, 2013 *Status Report on Compliance*, the Court Monitor expressed concern. *See, e.g.*, Monitor's Response to Court's January 23, 2013 Letter at 4-6 (Feb. 4, 2013) (Doc. No. 198) (stating areas of non–compliance, including those conceded by Defendants). Multiple areas of serious non-compliance documented in the June 11, 2013 Status Report on Compliance were conceded by DHS. *See* DHS June 4, 2013 letter attached to the Status Report. *See also* findings by the Court of non-compliance, indifference and concealment at hearing on sanctions on June 25, 2013.")

compliance.[7] There are many other reports, communications and Orders over the past six years documenting defendants' ongoing non-compliance with the settlement. *See* (Doc.

[7] *See e.g.*, Order (Doc. 179) at 1 (ordering status conference to discuss "Defendants' readiness to be evaluated for compliance by the Independent Consultant and Monitor with regard to the Evaluation Criteria drawn from the Settlement Agreement, and Defendants' proposed timetable for readiness for such evaluation…"); Order (Doc. 211) at 10 ("Given the Court's continued concern with Defendants' compliance with the Settlement Agreement, as the Court noted in its December 19, 2013 Order, the Court expressly reserves the right to request the assistance of the United States Department of Justice Civil Rights Division with respect to compliance issues with the Settlement Agreement and the orders of this Court."); Order (Doc. 212); Order (Doc. 224) at 10 ("Defendants are not free to defer or to pick and choose which provisions and directives of the Settlement Agreement to comply with."); Order (Doc. 233) ("The Court remains concerned with the status of compliance or noncompliance by the Defendants with the provisions of the Stipulated Class Action Settlement Agreement") ("The Court, having been advised by the Court Monitor that the parties have agreed that the Court's retention of jurisdiction over the above-entitled matter may be extended for an additional year to December 4, 2014, beyond the current December 4, 2013 date, pursuant to Section XVIII.B. of the Settlement Agreement, the Court hereby extends its jurisdiction over this matter to December 4, 2014. However, the Court expressly reserves 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. 266) at 3 ("Defendants conceded that they were unable to produce adequate implementation plans as to the first two elements (a plan for the Settlement agreement's then existent provisions and MSHS-Cambridge closure and a plan for the Rule 40 modernization."); Order (284) at 3 ("given the continued concerns of the Court relating to the status of the case and ongoing concerns with noncompliance of the Settlement Agreement by the Defendants"); Order (Doc. 297) at 2-3 ("Recalling that this litigation was initiated after the 2009 public exposure of inappropriate and abusive force at MSHS-Cambridge's predecessor METO, the Court is extremely disappointed that, more than two years after the approval of the Settlement Agreement, for some employees, safety is equated with "a show of force, power and control" in a "legacy of the old institutional way and not the direction we [DHS] are headed." "This state of affairs is fraught with risk to the safety of clients and staff alike."); Order (Doc. 340) ("DHS has repeatedly failed to comply with these obligations." "[T]the Court respectfully directs the DHS to comply with the terms of the Court's Orders."); Order (Doc. 344) ("The Court finds that the Proposed Olmstead Plan contains significant shortfalls that require modification to comply with the comprehensive standards articulated in the Settlement Agreement and in subsequent Court Orders and Court Monitor Reports. The Court emphasizes two particular areas of concern: (1) the

634) at 7-18 (Settlement Class Brief Pursuant to Doc 626, 630 -- Defendants' Documented Non-Compliance and Related Court Orders).

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lack of measurable goals; and (2) the lack of accurate reporting."); Order (Doc. 378); Order (Doc. 400) at 2 ("The Court encourages Defendants to review the requirements set forth in Olmstead v. L.C., 527 U.S. 582 (1999), and in the numerous prior orders of this Court."); at 5 ("[D]efendants' request needlessly delays closure on final approval of the Olmstead Plan. The Court reminds Defendants of their promise to "develop and implement a comprehensive Olmstead Plan" more than three years ago at the time of the Settlement Agreement. Defendants have failed to meet previous Olmstead Plan filing deadlines, resulting in revised deadlines and additional delays. The Court encourages Defendants to timely fulfill their obligations under the Settlement Agreement.") (internal citations omitted); Order (Doc. 429-1) at 3 ("The original Olmstead Plan deadline was not met."); at 8 ("The current revised Plan does not comply with the Court's order of March 19, 2015…"); at 9 ("The first Plan deadline was missed and the Court granted an extension."); at 11 ("The Subcabinet was unable to revise the Plan according to the March 19, 2015 Order by the March 20, 2015 deadline."); Order (Doc. 435) at 6 ("After carefully reviewing the Proposed Olmstead Plan, the Court concludes that the Proposed Olmstead Plan does not comply with the comprehensive standards and requirements set forth in the Settlement Agreement, Olmstead v. L.C., 527 U.S. 581 (1999), and in numerous prior orders of this Court."); at 7 ("The Court has repeatedly expressed its concerns regarding Defendants' pattern of noncompliance with the terms of the Settlement Agreement that were announced at the Final Approval Hearing before this Court on December 1, 2011, and reaffirmed in this Court's numerous subsequent orders"); Order (Doc. 545) ("Both parties seek an Order from the Court establishing a schedule for compliance reporting with respect to the Stipulated Class Action Settlement and the Comprehensive Plan of Action"); at ¶13 ("The Court will convene bi-annual status conferences with Defendants' Counsel, Plaintiffs' Class Counsel, and the Consultants to facilitate the Court's continued oversight of the Defendants' compliance with the CPA and the Jensen Settlement Agreement."); Order (Doc. 551); Order (Doc. 578) at 5 ("[T]he Court will require DHS to focus its efforts on compliance with the Jensen Settlement Agreement and the CPA, verification of those efforts, and preparation of the next Compliance Update Report due to the Court on August 31, 2016. In this report, in addition to the compliance update on relevant ECs as required by the established reporting schedule, DHS must report on the issues and concerns recently raised by the Court and the Court Monitor, including the issues addressed in Defendants' Verification Report."); 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. The Court will continue to carry out its oversight responsibility as the Workplans are updated to oversee the State's efforts in following through on the commitments it has made.")

THE DEFENDANTS ENDORSED AND THE COURT APPROVED THE COMPREHENSIVE PLAN OF ACTION FOR THE IMPLEMENTATION OF THE SETTLEMENT

As the Court is fully aware, a Comprehensive Plan of Action (CPA) was developed as part of the implementation process, endorsed by defendants, and approved by the Court. (Doc. 271) at 2 ("The Court Monitor respectfully recommends for adoption by the Court the attached Comprehensive Plan of Action ("CPA"). The Plan is endorsed by the Department of Human Services."); Order (Doc. 283) (approving CPA). The CPA includes objective Evaluation Criteria (EC) that must be met by defendants as part of the agreed upon, court-ordered process for implementation of the settlement.

The November 26, 2013, Independent Consultant and Monitor Report to the Court, Comprehensive Plan of Action (Doc. 254) states:

> On August 28, 2013, in lieu of contempt and other sanctions for established and conceded non-compliance, the Court required the Department of Human Services (DHS) to submit plans for implementation. DHS had not adopted such planning despite almost a year of urging by the Court, and the Court's repeated concerns about DHS' delays and non-compliance.
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> The Court characterized the "plan" to consist of three elements: 1) a plan for the Settlement Agreement's Evaluation Criteria and the MSHS-Cambridge closure, 2) a plan for the Rule 40 modernization, and 3) the Olmstead Plan. Each of these is an element of a tripartite "Comprehensive Plan of Action," parts one and two of which are attached here.
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> The implementation plans, which are subject to the Court's review and approval, are an element of the "heightened supervision" the Court found to be appropriate for two reasons: "compliance continues to be insufficient and Defendants have not established a comprehensive implementation plan." Essentially a remedy, further relief or sanction for non-compliance,2 the plans will provide an enforceable roadmap3 toward an end to active judicial oversight over DHS.
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> After Defendants' concededly unsuccessful efforts to produce adequate implementation plans under the August 28, 2013 Order, the Court ordered the

> Court Monitor to finalize the plans.4 Rather than relying on Defendants to establish plans voluntarily, the Court thus determined that it must intervene and mandate what is to be done to bring about compliance.
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> In ordering the implementation plans, the Court expressed the hope that this would avoid "an order to show cause or contempt proceedings so that the resources of all parties concerned can be focused on individuals with developmental disabilities in the communities within which they are living or hope to be living."

Id at 2-3 (quoting Order of August 28, 2013 at 15).[8]

SETTLEMENT CLASS OCTOBER 7, 2013, MOTION FOR SANCTIONS AND RELATED COURT ORDERS

On October 7, 2013, following comprehensive informal communications between the parties since January 2012, and after several Orders relating to non-compliance and directives involving the court monitor, the Settlement Class filed a Motion for Sanctions (Doc. 233) "to hold the State Defendants accountable for their bad-faith conduct and lack of candor to the Court, Court Monitor, consultants and Settlement Class" including DHS's admitted non-compliance by knowingly operating the Cambridge facility without a license. The memorandum in support (Doc. 232) stated:

> The State Defendants' willfully and intentionally acted in substantial non-compliance with the Settlement Agreement and violated Minnesota law when they failed to obtain proper licensing for Cambridge. The State Defendants' then engaged in bad faith conduct when they knowingly misrepresented to the Court and Settlement Class Counsel the status of their compliance with the licensing provision of the Settlement Agreement."); ("The State Defendants have acted in bad faith through their overall abuse of the judicial process, by defrauding the Court, and by hampering the implementation of the Court approved Settlement

[8] Any position now taken by DHS that it is not required to comply with the CPA is simply wrong and fails to understand the significant record of non-compliance and failures by defendants that forced Court action to develop the CPA when DHS refused to provide adequate plans.

> Agreement to the detriment of Plaintiffs and the entire Settlement Class. The State Defendants' bad faith, contemptuous conduct may be properly sanctioned, including the award of attorneys' fees.

Id at 27-28; *see also* Def. Mem. Opp. at 10 (Doc. 241) ("DHS regrets that it did not inform the Court, Monitor, or Plaintiffs' counsel about the lapse, and considers it to be a mistake.")

The Court's December 17, 2013, Order (Doc. 259) granted the motion, and reserved ruling on the type of sanctions pending defendants' status of their compliance and status of the settlement implementation plan ordered by the Court:

> [T]he Court finds and concludes that the DHS violated the Settlement Agreement when it failed to obtain the required license for Cambridge. This violation is anything but a trivial or unimportant matter. For example, Cambridge residents and their families were entitled to have a facility which complied with fundamental legal requirements. This Court is more than a mere bystander to this very important Settlement Agreement where all parties promised to improve the quality of life for individuals with disabilities. The Court further finds that the DHS consciously concealed and misled the Plaintiffs and the Court with regard to the lack of licensure, or if not consciously concealed and misled, was indifferent to both the violation and the expectation of candor with all parties, including the Court; conceding the violation once reported by the Court Monitor does not mitigate this in any way. The licensing issue was treated in a cavalier manner to the extent that the issue was not immediately forwarded to the appropriate superiors and acted upon. Moreover, once the Legislative Auditor's report draft was received at the DHS, the DHS and its counsel should have immediately brought the noncompliance and the status of the nonlicensure to the parties' and Court's attention.
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> Whether the lapses by the DHS were due to conscious concealment or indifference, the Court needs additional information at this time to decide what sanction, including any financial sanction, if any, would be appropriate under the circumstances. As the Court noted and ruled off the bench, **it will await the report from the Court Monitor on the current status of compliance and on Defendants' cooperation with the implementation plan required under the Order of August 28, 2013 to make its final decision on appropriate sanctions**. (Doc. No. 224; *see also* Doc. Nos. 237 & 248.)

Doc. 259.

In its September 3, 2014, Order (Doc. 340) the Court again ruled on defendants' noncompliance:

> The Court's December 17, 2013 Order reserved the issue of additional sanctions pending review and scrutiny of Defendants' compliance with the existing Orders of the Court, including the implementation plan required pursuant to the Court's August 28, 2013 Order as well as the Stipulated Class Action Settlement Agreement, which was approved and adopted by the Court in its December 5, 2011 Order. While asserting progress and promising improvements, the DHS does not contest the Court Monitor's findings of non-compliance with regard to adequacy of care and planning for clients who have moved from the Minnesota Extended Treatment Option ("METO") or Minnesota Specialty Health Systems ("MSHS")-Cambridge facilities into the community.
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> The Plaintiff Class also accepts the Court Monitor's findings of non-compliance and requests the Court "to direct DHS compliance on transition and person-centered support and services." The Plaintiff Class argues that "we are now faced with continuing, fundamental non-compliance by DHS with important aspects of the Settlement as bluntly set forth by the Court Monitor in his Community Compliance Review." The Plaintiff Class requests the Court to do the following: (1) require "[i]mmediate remedial action" requiring "a comprehensive person-centered planning process for all affected class members which should include the counties being held accountable"; (2) "consider extending its jurisdiction over the Settlement by a sufficient time period to ensure sufficient compliance"; and (3) "consider converting the status of the Court Monitor to a Special Master for the transition and person-centered compliance areas of the Settlement."
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> 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.
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> In refraining from issuing contempt and other punitive sanctions for the most recently established non-compliance, at least at this time, the Court acknowledges the Court Monitor's report of recent positive developments and the DHS' recognition "that it must do more to ensure that the counties comply with the court's mandates." However, the Court is obligated to take some action with the objective of increasing the Court Monitor's responsibilities to: (1) oversee Defendants and ensure their accountability; and (2) expedite prompt and

meaningful compliance. Consequently, the Court will extend its jurisdiction for a period of at least two additional years.

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Extending the term of the Court's jurisdiction is clearly necessary based on the significant delays in implementation as well as the non-compliance with the Settlement Agreement. **The Court concludes that at least a two-year extension is necessary in order for the Court to oversee and direct the DHS to accelerate its efforts to comply with the Settlement Agreement and to fulfill the promises and proclamations made by the DHS at the time of the fairness hearing when the Settlement Agreement was approved by the Court.**

The Court Monitor has continued to serve the Court, pursuant to the Court's July 17, 2012 Order, in substantial part because of the noncompliance of the DHS. With few exceptions, his findings and recommendations have generally been received by the parties with little or no objection. The Court Monitor's role has been to "assist and inform the Court on the implementation of the Settlement Agreement's requirements" and to report, monitor, and make recommendations to the Court and the parties. (Doc. No. 159 at 12.) Given the record since that appointment, and the circumstances described in the Court Monitor's *Community Compliance Review*, the Court finds that a more substantial role is necessary.

Regarding the DHS' failure to ensure licensure of MSHS-Cambridge, the Court, in its December 17, 2013 Order, "reserve[d] ruling on what sanctions are appropriate" pending receipt of information on the DHS' compliance with implementation plans. (Doc. No. 259 at 7.) **While the extension of jurisdiction may be considered a sanction related to the circumstances described in this Order, the Court also reserves the right to entertain a motion by the Plaintiff Class to recover attorney fees that have been incurred directly related to the non-compliance of the DHS** as well as to evaluate an increased role for the Minnesota Governor's Council on Developmental Disabilities as well as the Office of the Ombudsman for Mental Health and Developmental Disabilities. The Court will also consider whether any additional funding will be necessary given justifiable reliance by a number of individuals, including the Court Monitor and the DHS officials, on these two offices.

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The Court Monitor shall serve for as long as necessary for Defendants to achieve substantial compliance. However, it is expected that Defendants will substantially comply with the Court's Orders by December 4, 2016. Pursuant to the Settlement Agreement § XVIII.B and § XVIII.E, and the Court's August 28, 2013 Order, the

> Court's jurisdiction is extended to December 4, 2016, and the Court expressly reserves the authority and jurisdiction to order an additional extension of jurisdiction, depending upon the status of the Defendants' compliance and absent stipulation of the parties.

Order of Sept. 3, 2014 (Doc. 340) (emphasis added) (internal citations omitted).

The Court reiterated the authority of the monitor to mandate action from defendants, but despite direct Court orders to comply with the settlement, the non-compliance continued. The court was again forced to address defendants' conduct, extending jurisdiction until December of 2019. Order (Doc 545) at 1, 3, 6.

COURT DENIES DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

During a status conference on March 24, 2017, regarding defendants' implementation of the *Olmstead* Plan, defendants raised a jurisdictional objection, arguing that the Court has been without jurisdiction since 2014. The Court ordered briefing on the issue, and on June 28, 2017, the Court denied defendants' objection. *See* Order (Doc. 638).

The Court first explained the basis for its retained jurisdiction was founded on two principles:

> First, the Court provided that the [Settlement] Agreement was "expressly incorporated herein" and attached the Agreement to the [final approval] order. (*Id.* at 2.) Second, the Court expressly retained jurisdiction over the Agreement as follows:
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> > [I]t is hereby ordered that the parties are directed to consummate the Agreement in accordance with its terms, and this Court hereby reserves continuing jurisdiction for the time period set forth in the Agreement to enforce compliance with the provisions of the Agreement and the Judgment, as well as ensuring proper distribution of Settlement payments.

> (*Id.*) Under *Kokkonen* and relevant Eighth Circuit caselaw, the Court plainly retained ancillary jurisdiction to enforce the Agreement through this order. *See Kokkonen*, 511 U.S. at 381; *W. Thrift & Loan Corp.*, 812 F.3d at 724.

Order (Doc. 638), at p. 7. The Court then explained that the parties did not appear to dispute the basis for jurisdiction, but did dispute the "scope of the Court's retained jurisdiction." *Id.*

The Court indicated that the determination of the disputed issue turned on the interpretation of the Settlement Agreement, which contains the following provision:

> 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.
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> * * *
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> Should Plaintiffs believe a pattern and 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. The meet and confer shall be held no later than sixty (60) days prior to the two year anniversary of the Court's approval. 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.

Id., at p. 9.[9] The dispute centers on the length of time the Court may retain jurisdiction. Defendants contend jurisdiction may be retained no more than 3 years, while the

[9] On January 11, 2011, defendants' counsel provided a redlined version of the draft Settlement Agreement which added the words, "for two (2) years from its approval of this Agreement" to subpart B of the Dismissal and Retention of Jurisdiction section at issue, and provided no further changes to this jurisdiction provision. *See* O'Meara Decl., at Ex. F.

Settlement Class contends the Settlement Agreement terms permit ongoing court jurisdiction. *Id*., at 10.

The Court analyzed the Settlement Agreement, and determined the salient provision was ambiguous and that review of extrinsic evidence was appropriate. *Id*., at p. 13. Based on extensively reviewed evidence, the Court determined the parties intended the Court to exercise jurisdiction "as it deems just and equitable":

> In light of this procedural history and the parties' actions throughout this litigation, the Court finds that the parties intended the Court to retain authority to exercise jurisdiction as it deems just and equitable. In particular, neither Plaintiffs nor Defendants objected to the Court's continuing jurisdiction after the Court issued orders extending its jurisdiction pursuant to § XVIII.B. Similarly, neither party objected when the Court repeatedly "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." (*See, e.g.*, Doc. No. 544 at 8.) No objections were raised concerning the Court's orders that indicated an interpretation of the "just and equitable clause" consistent with Plaintiffs' proposed interpretation. Further, notwithstanding Defendants' current argument that § XVIII.B plainly contemplates jurisdiction ending no later than December 4, 2014, the parties have acted for many months—in fact, years—since this date as if the Court had jurisdiction. Indeed, in February 2016, Plaintiffs and Defendants each proposed detailed reporting schedules contemplating periodic and annual reporting obligations into the future when jurisdiction had at that time been extended to only December 4, 2016.
>
> In short, the parties' actions demonstrate their mutual intent regarding the Court's continuing jurisdiction over this case. The parties' consistent recognition of the Court's jurisdiction throughout the extensive and complex procedural history of this matter since December 4, 2014 cannot be reconciled with the narrow interpretation of § XVIII.B Defendants now propose. As the Court previously concluded, the Agreement's jurisdictional provision is reasonably susceptible to both meanings proposed by the parties. In light of the extrinsic evidence, and particularly the parties' post-agreement conduct, however, the Court finds that Plaintiffs' proposed interpretation reflects the parties' intent.

Id., at p. 21-22.

Defendants subsequently appealed the Court's Order, and now request the Court enter a stay of their voluntary obligations under the Settlement Agreement. *See* Motion (Doc. 658).

ARGUMENT

A. Standard of Analysis

Defendant seeks a stay pursuant to Federal Rule of Civil Procedure 62(c), which states in pertinent part:

> While 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.

Fed.R.Civ.P. 63(c). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433, 129 S. Ct. 1749, 1760, 173 L. Ed. 2d 550 (2009). "It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Id.* (internal quotations, citations and brackets omitted). The moving party "bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 434. "[B]ecause the burden of meeting the standard is a heavy one, more commonly stay requests will be found not to meet this standard and will be denied." 11 Wright & Miller, *Fed. Prac. & Proc. Civ*. § 2904 (3d ed.) (cases cited therein).

The determination of whether to grant a stay is determined by an evaluation of four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

(2) whether the applicant will be irreparably injured absent a stay;
(3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
(4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119, 95 L. Ed. 2d 724 (1987). "The first two factors of the traditional standard are the most critical." *Nken*, at 434; *see also Karsjens v. Jesson*, 2015 WL 7432333 (D.Minn. Nov. 23, 2015) ("As the moving party, Defendants bear the heavy burden to prove all four factors, and the first two factors are the most critical."). "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) (internal quotations and citations omitted).[10]

As a threshold matter, defendants' stay request should also be summarily denied based on defendants' own argument that the "purpose of a stay is to preserve the status quo." *See Defendants' Brief* [Doc. 658], at p. 10-11 (citing *Asarco LLC v. NL Indus.*, 2013 WL 943614, at *3 (E.D. Mo. Mar. 11, 2013)). Status quo means the "situation that currently exists." Black's Law Dictionary (10th ed. 2014). The current situation is the

[10] Rule 62(c) applies only to cases involving an injunction. *Liberty Mutual v. Clemens Coal*, 2017 WL 4758948, *2 (D.Kan. Oct. 20, 2017) ("The plain language of Rule 62(c) indicates that a court may issue a stay under this rule only while an appeal is pending and only if the order or judgment appealed from is an injunction."). "The determination of whether an order is an injunction depends upon the substantial effect of the order rather than its terminology." *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir. 1982). Many orders direct a party to take or not take action, but "not all such orders qualify as injunctions . . ." *Auer v. Trans Union, LLC*, 834 F.3d 933, 936 (8th Cir. 2016). Here, the applicable court action involved approval of a voluntary settlement agreement. *See* Order Approving Settlement [136]. Defendants cannot invoke Rule 62(c) because they have failed to demonstrate that it applies.

ongoing compliance with the Settlement Agreement, including defendants' reporting obligations and ongoing work to implement the terms of the Settlement as directed by the Court. The status quo is not to abandon the work of the last six years.

Even on the substance of the motion, defendants have failed to satisfy the heavy burden required for the issuance of a stay.

B. Defendants Failed to Satisfy the Heavy Burden for a Stay.

1. Defendants have failed to show a strong likelihood of success on the merits.

The mere possibility of success is insufficient. *Nken*, at 434. The movant must present "a strong showing" that it is likely to succeed on the merits. *Hilton*, at 776. The Eighth Circuit considers this first factor to be "the most important factor." *Brady*, at 789. Defendant hinges its entire jurisdictional argument – including this motion - on the placement of a comma in the Settlement Agreement. For years it has been undisputed that the Court may exercise jurisdiction over the settlement to the extent it "deems just and equitable." Now, in a brash attempt to abandon the citizens of Minnesota they are charged to serve, defendants contend jurisdiction is absent. Defendants are wrong.

After years of non-compliance, much of it admitted, defendants resort to the tactic of objecting to the Court's power to sanction rather than concentrating on correcting their conduct. As noted above, the record over the years is replete with Court orders, Court Monitor reports, defendants' admissions and other evidence showing a continued pattern of non-compliance by defendants that directly led to the Court's actions to enforce the settlement and its related Orders. The Court is authorized to sanction defendants for their

conduct. *Chambers*, 501 U.S. at 42–47. The passage of time cannot be used as an excuse for non-compliance. The Court has sought to encourage defendants' compliance, monitor it, mediate implementation issues, receive and act on defendants' requests, meet with the parties and consultants, exercise patience, and ultimately sanction defendants for their continued defiance of the settlement and related Court Orders. Authorized to address defendants' conduct, the Court has taken action, providing specific guidance, directives and Orders to correct the noncompliant conduct and implement the settlement.

The Court's jurisdiction is present and authorized by the Settlement Agreement, which expressly incorporated its continued jurisdiction into the Court's final order:

> 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.

Final Approval Order (Doc. 104) Ex. A, XVIII.B (emphasis added); *Id*. at Order (Settlement Agreement "expressly incorporated herein"). *See Kokkonen*, 511 U.S. at 80–81; *Gilbert*, 216 F.3d at 699–700 (retaining jurisdiction over settlement).

The parties' intentional use of a comma followed by the disjunctive "or" in the clause: *", or as the court deems just and equitable"* clearly authorizes the Court's retention of jurisdiction over the settlement "as it deems just and equitable," not just for two years. *Withrop v. Eaton Hydraulics*, 361 F.3d 465, 470 (8th Cir. 2004) (Minnesota law) (finding two independent clauses in a contract where the clauses were "separated by a comma and the disjunctive 'or'"); *Cummins Law v. Norman Graphic.*, 826 F. Supp. 2d 1127, 1129 (D. Minn. 2011) (Minnesota law) (rejecting argument that two clauses

separated by "or" did not have separate significance and stating disjunctive clauses must be interpreted to give effect to each separated clause).[11] This provision was negotiated as part of the settlement in recognition of the risk of non-compliance and delay after final approval of the settlement, particularly with the complexities involved and need for coordination of multiple state agencies in the implementation process for modification of Rule 40 and related rulemaking, and the development and implementation of the, statewide Olmstead Plan. *See* Decl. O'Meara [Doc. 635].

In addition, the Court has already construed this clause. In its September 3, 2014, Order (Doc. 340) the Court stated:

> The Settlement Agreement provides that the Court's jurisdiction would be determined "as the Court deems just and equitable." (Doc. No. 104 at 39.) Last year, the Court extended its jurisdiction over this case for one year to December 4, 2014, "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." (Doc. No. 223 at 3.) "Extending the term of the Court's jurisdiction is clearly necessary based on the significant delays in implementation as well as the non-compliance with the Settlement Agreement. "The Court concludes that at least a two-year extension is necessary in order for the Court to oversee and direct the DHS to accelerate its efforts to comply with the Settlement

[11] *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979) (The word "or" is disjunctive in nature and ordinarily indicates an alternative between different things or actions; terms or phrases separated by "or" have separate and independent significance.); *U.S. v. Lara-Ruiz,* 681 F.3d 914, 919 (8th Cir. 2012) (finding multiple independent clauses separated by commas and the last clause separated from previous clauses by the disjunctive "or"); *State v. FreeEats.com*, 712 N.W.2d 828, 834 (N.D. 2006) ("Coupled with the comma preceding "or," which indicates a separate clause, the statutory language clearly creates two distinct and independent phrases."); *U.S. v. Mosby*, 60 F.3d 454, 457 (8th Cir. 1995) ("The import of the disjunctive is well established. Terms connected by "or" normally are read to have separate meanings."); *Loughrin v. U.S.*, 134 S. Ct. 2384, 2390 (2014) (ordinary use of the term "or" between two categories is "almost always disjunctive"); *Zanghi v. Greyhound*, 651 N.Y.S.2d 833 (4th Dep't 1996).

> Agreement and to fulfill the promises and proclamations made by the DHS at the time of the fairness hearing when the Settlement Agreement was approved by the Court. "While the extension of jurisdiction may be considered a sanction related to the circumstances described in this Order, the Court also reserves the right to entertain a motion by the Plaintiff Class to recover attorney fees that have been incurred directly related to the non-compliance of the DHS as well as to evaluate an increased role for the Minnesota Governor's Council on Developmental Disabilities as well as the Office of the Ombudsman for Mental Health and Developmental Disabilities.

Order (Doc. 340) at 10. *See also* September 21, 2016, Order (Doc. 594) at 2, n.1 ("The State Defendants' primary argument is that the Court lacks jurisdiction over any placement of W.O. outside of MSH."); ("The State Defendants made a similar jurisdiction argument in their July 11, 2016 submission to the Court (Doc. 585), which was considered and rejected by the Court when it issued its July 22, 2016 Order."); Order (Doc. 159) at 4 ("The 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.'") (emphasis added); Order **(**Doc. 233) at 1-3 (extending jurisdiction until December 4, 2014, upon parties' agreement and pursuant to Section XVIII.B. of the settlement, reserving authority for an additional jurisdiction extension "depending upon the status of compliance by the Defendants with the specific provisions of the Settlement Agreement."); *see Stewart,* 225 F.Supp.2d at 8 (parties' agreement extended jurisdiction during settlement implementation); *Brass Smith v. RPI.*, 827 F. Supp. 2d 377, 382 (D.N.J. 2011) ("A federal court may also extend the jurisdictional time frame within the order of dismissal if the parties so desire."); *Queens Syndicate v. Herman*, 691 F. Supp. 2d 283, 289 (D. Mass. 2010) (authority to extend period of retained jurisdiction); *Thompson v.*

U.S. Dept. of Hous., 404 F.3d 821, 827 (4th Cir. 2005) (federal courts frequently extend court order deadlines based on a finding that the defendant had not fulfilled, or cannot fulfill, its obligations prior to expiration of the order). *See also* Fairness Hearing, tr. at 75 ("And of course, by the agreement, the Court, by an agreement of all of the parties, the Court does reserve continuing jurisdiction for a minimum of a two-year period to enforce compliance with the provisions of the Agreement and the Judgment…")

The Court was well within its authority to interpret this contract term. *John Morrel v. Local Union*, 913 F.2d 544, 564 (8th Cir. 1990); *Boston Sci. v. Sprenger*, 903 F. Supp. 2d 757, 761–65 (D. Minn. 2012) (interpreting settlement). Based on the foregoing, the Court has properly interpreted the Settlement Agreement, and defendants have failed to demonstrate a strong showing of success on the merits. Based on this factor alone, the Court should deny the motion.

2. Defendant has failed to demonstrate irreparable harm.

"Simply showing some possibility of irreparable injury fails to satisfy the second factor." *Nken*, at 434 ("the 'possibility' standard is too lenient" (quoting *Winder v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). Defendants' untenable argument centers upon a claimed deprivation of the right to an appeal should the stay not be granted. The pending appeal with the Eighth Circuit belies that argument. Even if the appeal fails, defendants remain liable under state law for breach of contract, meaning its obligations under the agreement remain regardless of the presiding court. Defendants further contend they be forced to expend funds "that may prove superfluous" should it prevail on appeal, yet fully admit they may continue its reporting obligations regardless

of this outcome of this case. *See* Defendant's Brief [Doc. 658], at p. 13 n.3. Defendants voluntarily agreed to settle this matter, which originated from the admitted use of restraints including metal handcuffs and leg shackles and seclusion, and its own non-compliance has unnecessarily caused this matter to drag on. A stay is not warranted where the applicant's unclean hands has warranted sanctions they now seek to escape. *Precision Instrument Mfg Co. v. Automotive Maintenance Machinery*, 324 U.S. 806, 815 (1945) (doctrine of unclean hands is a maxim "far more than mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief . . .").

Defendants have failed to demonstrate they will suffer irreparable harm.

3. Issuance of a stay will substantially injure interested parties.

The third factor is whether the issuance of a stay will substantially injure parties interested in these proceedings.[12] *Nken*, at 434. It will.

There exists a very real danger that if granted a stay and left on their own defendants will continue its delay and noncompliance and may no longer honor settlement obligations, even perhaps continuing to roll back agreed upon protections. *See, e.g.,* Doc 586 (referencing use of variances to the Positive Supports Rule to allow for

[12] Defendants focus only on the injury to "Plaintiffs," but the standard applies to "other parties interested in the proceeding." *Nken*, at pl 434. There can be no doubt that the vulnerable citizens of Minnesota protected by the *Olmstead Plan* and the terms of the *Jensen* settlement are interested in these proceedings and are at grave risk of substantial injury should a stay issue. *See also* 11 Wright & Miller, *Fed. Pract. & Proc.* § 2904 and n. 23 (stays commonly denied in actions involving public benefits).

mechanical restraint and other abuses on people with developmental disabilities), at p. 12 ("DHS failure to clarify and provide guidance by its internal enforcement division points up a critical danger to people with developmental disabilities in this state, leaving facilities, and families, without clear, direct guidance needed to avoid misinterpretation about the PSR, increasing the risk the using of prohibitive abusive procedures on vulnerable citizens. This DHS inaction further supports Court involvement and active monitoring to ensure that the CPA is properly implemented, and the PSR properly enforced by DHS.")

There is a significant backdrop of noncompliance and delay caused by defendants clearly demonstrated in the six year record since the approval of the settlement agreement. Mindful of this record, the Court should exercise its sound discretion and continue enforcing its orders to implement the settlement agreement "as the Court deems just and equitable" and avoid additional delay in the delivery of justice pursuant to the parties' agreement. *See, e.g.*, Order (Doc. 340) ("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."); *Robinson Rubber Prods. Co., Inc. v. Hennepin Cty.*, Minn., 927 F. Supp. 343, 348 (D. Minn. 1996) (the public interest favors the enforcement of the United States Constitution); *Ecolab, Inc. v. FMC Corp.*, No. 05-CV-831, 2007 WL 1582677 (D. Minn. 2007) ("Courts have denied motions to stay when 'there is an

inexplicable or unjustified delay in seeking re-examination' or when it appears that a stay 'will serve simply to delay proceedings.")

The State's Ombudsman remains involved in protecting our vulnerable citizens, along with the executive director of the Minnesota Governor's Council on Developmental Disabilities, serving as Consultants in this matter, have a much different view of defendants' remaining settlement obligations. The Independent Court Monitor, moreover, appointed by the Court after ongoing noncompliance by the defendants, has identified many areas of noncompliance. *See* Class Counsel Letter to Court (Doc. 661) at 4; O'Meara Decl Exs. A-E (listing substantiated abuse and neglect of class members in 2017).

4. The public interest weighs heavily against issuance of a stay.

The final issue requires examination of "where the public interest lies." *Nken*, at 434. The public interest, in this case, lies in allowing this Court to continue its work in correcting Defendant's noncompliance and implementing the settlement for the benefit of the vulnerable citizens of the State. *See, e.g., Cruz v. Dudek*, 2010 WL 4284955 , at *16 (S.D. Fla. Oct. 12, 2010) (stating there is strong public interest under *Olmstead* to eliminate discrimination from segregation of persons with disabilities).

Defendants argue that principles of federalism favor issuance of a stay. Those concerns are without merit because defendants voluntarily entered into the Settlement Agreement, did not object to the Court's approval of the Settlement Agreement, and cannot reasonably suggest it did not recognize its obligations under the Settlement Agreement. Principles of federalism are not implicated in this proceeding.

In a stunning display of self-interest and ignorance of the record, moreover, defendants request a stay because they say it will prevent more costs. There can be no doubt that protecting Minnesota's vulnerable citizens strongly favors the public interest. *See Olmstead v. L.C.* 527 U.S. 581 (1999); *Cruz*, at *16. In fact, it is also the defendants' stated duty to protect vulnerable adults:

> Ensuring the Minnesotans we care for are treated with respect and dignity is a key element of our agency's mission. Practices around seclusion and restraint have not always been consistent with these principles. The Minnesota Department of Human Services, as an agency with responsibilities in the administration and oversight of services, and as a provider of services, is committed, in words and in actions, to achieving these goals. To that end, it is our goal to prohibit procedures that cause pain, whether physical, emotional or psychological, and prohibit use of seclusion and restraints for all programs and services licensed or certified by the department. It is our expectation that service providers will seek out and implement therapeutic interventions that reflect best practices. We commit not only to following legal and regulatory requirements limiting the use of seclusion and restraint as a provider of service, but also to creating a broader culture that honors the trust placed in us both as a provider and as a department responsible for the administration and oversight of many of the services that support citizens. Such a culture will help the agency and providers regulated by the agency adapt to best practices that continue to evolve over time.

DHS Commissioner, *DHS Respect and Dignity Practices Statement* (June 20, 2013), http://mn.gov/dhs/media/news/news-detail.jsp?id=252-73196. *See also* Minnesota DHS, Adult Protective Services Unit (2014) ("It is the policy of the state of Minnesota to provide safe environments and services for vulnerable adults and to provide protective services for vulnerable adults who have been maltreated."), http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=id_005710; (Doc. 136) (Final Approval Order for Stipulated Class Action Settlement Agreement, Exhibit A, Stipulated

Class Action Settlement Agreement) at 3 ("The State of Minnesota further declares, as a top concern, the safety and quality of life of the Residents of the Facility. The State agrees that its goal is to provide these residents with a safe and humane living environment free from abuse and neglect."); at18 ("The State and the Department shall develop and implement a comprehensive Olmstead plan that uses measurable goals to increase the number of people with disabilities receiving services that best meet their individual needs and in the "Most Integrated Setting," and is consistent and in accord with the U.S. Supreme Court's decision in Olmstead v. L.C., 527 U.S. 582 (1999).")

The protection and proper treatment of people with disabilities is at the heart of the issues before the Court. Defendants have great responsibility to act to ensure the safety of people with disabilities and help them "to be loved, appreciated, respected and productive." *See MN DHS Guidelines to the Investigation of Vulnerable Adult Maltreatment, Appendix V Common Courtesies when Interacting with People with Disabilities* at 196 (Dec. 2010); DHS Statement of Need and Reasonableness, Proposed New Permanent Rules Governing Positive Supports, and Prohibitions and Limits on Restrictive Interventions at 2, 16.. ("any use of an aversive or deprivation procedure diminishes the quality of life of a person. This is consistent with fulfilling a major focus of the Jensen Settlement Agreement. Consistent with current best practices, aversive or deprivation procedures are now generally considered to be a form of abuse. It is necessary and reasonable that the rule recognize the broad objective of eliminating aversive and deprivation procedures in Minnesota licensed social services.")

Defendants remain tellingly silent on how the vulnerable adults currently protected by the settlement will continue to be protected under a stay. The state of Minnesota and its Department of Human Services should be articulating precisely how they will protect our vulnerable citizens rather than seeking to ignore their needs and support. In addition, when it comes to added costs, hundreds of thousands of dollars in time and resources have been expended by the Consultants, Court, Court Monitor, Class Counsel and multiple agencies by defendants' admitted, court-documented and ongoing failures to comply with the Settlement. *See* Order (Doc. 526) (awarding Class Counsel $50,000 in negotiated attorneys fees from defendants for settlement implementation period including fees for Motion for Sanctions (Doc. 230)); Order (Doc. 209) (awarding Class Counsel $85,000 in negotiated attorneys fees from defendants in connection with efforts to monitor, enforce and otherwise ensure that Class Members receive the non-monetary benefits obtained by the Settlement Agreement); (Doc. 249) at 5 n. 6 ("Between January 1, 2012 through January 31, 2013, Settlement Class Counsel expended approximately 975 hours on issues of DHS non-compliance, far exceeding the $85,000 in negotiated attorney's fees.").

This matter long ago could have been concluded had defendants simply chosen to competently and meaningfully live up to their promises. As the Court appropriately observed, "[m]ultiple admonitions to the DHS have been insufficient to secure effective action by the DHS to close the significant gaps between its stated intentions and actions" Order (Doc. 340) at 7. "Continued implementation delays can no longer be tolerated. More importantly, the dignity, quality of life, and best interests of every Class Member

and similarly situated individuals with disabilities hinge on fulfillment of the promises made by Defendants at the fairness hearing in this matter." *Id.* at 7-8.

Further, as noted by the *Nken* Court, the propriety of issuance of a stay "is dependent on the circumstances of the particular case." 556 U.S. at 433. Here, as explained above in detail, the basis for the Court's continued exercise of jurisdiction is based on defendants' own continued and ongoing noncompliance with the Settlement Agreement. Here, defendants want to be released from their settlement obligations as a reward for failing to comply with the settlement based on an untenable appeal over which the Eight Circuit itself lacks jurisdiction. This Court should invoke the doctrine of judicial estoppel to bar defendants from pursuing a stay. "Judicial estoppel is an equitable doctrine, invoked by a district court at its discretion." *Capella University v. Executive Risk Specialty Ins. Co.*, 617 F.3d 1040, 1051 (8th Cir. 2010). Courts review three factors under this doctrine:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id.

As the Court identified in its Order (638), the parties have consistently sought the Court's involvement since approval of the Settlement Agreement, and by their actions

"intended the Court to retain authority to exercise jurisdiction as it deems just and equitable." *Id.*, at p. 21. The Court should not allow defendants' to suddenly reverse their position, and seek an unfounded rejection of their settlement obligations. Defendants' conduct further shows they have unclean hands in presenting this motion. *Precision Instrument Mfg Co. v. Automotive Maintenance Machinery*, 324 U.S. 806, 815 (1945) (doctrine of unclean hands is a maxim "far more than mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief . . .").

The public interest weighs heavily against issuance of a stay.

5. If a stay is issued, it must be upon a bond or other terms securing the Settlement Class' rights.

If a stay does issue, it must be "on terms for bond or other terms that secure" the rights of the Settlement Class and those protected under the Settlement Agreement. Fed. R.Civ.Proc. 62(c);[13] *see also* 11 Wright & Miller, *Fed.Pract. & Proc.* § 2904. In the event of a stay, the Court should conduct further proceedings for the determination of appropriate security for the protection of persons at risk by defendants' conduct.

[13] Defendants cite inapposite case law in opposition to the need for appropriate security, including a case that addresses Rule 62(d). *See* Defendants' Brief [658], at p. 28, n. 9 (citing *Omnioffices v. Kaidanow*, 201 F.Supp.2d 41, 43-44 (D.D.C. 2002) (noting the motion was before the Court on "plaintiff's motion pursuant to Federal Rule of Civil Procedure 62(d) . . ."). Further, despite defendants' representation, the *Omnioffices* Court's comments as to the usefulness of a bond was in relation to Rule 62(d), *not* Rule 62(c). In connection with Rule 62(c), the Court in *Omnioffices* also acknowledged the D.C. Circuit's criticism of stays "granted in cases involving appeals from non-monetary judgments." *Id.*, at 43. The Court reviewed the difference between Rules 62(c) and 62(d), and upon analysis of the Rule 62(c) factors in that non-monetary case, denied the request for a stay. *Omnioffices*, thus, supports denial of stay, not issuance.

Appropriate security may include alternative reporting, informal conferences with the court during the pendency of the appeal, or development of further action plans. Overall, however, the equities do not favor a stay, and the protections of the Settlement Agreement would be unnecessarily jeopardized.

CONCLUSION

Based on the foregoing, the Settlement Class respectfully requests the Court deny Defendant's Motion for a Stay [Doc. 655].

Respectfully submitted,

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

Dated: November 6, 2017

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