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)

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

INTRODUCTION

Plaintiffs' brief opposing this motion largely recites allegations regarding years-old purported noncompliance with Defendants' expanding obligations under the parties' 2011 Settlement Agreement, which the Court held was not material to its analysis of whether it has jurisdiction. Doc. 638 at 14 n.15. While long on discussion of years-old conduct, Plaintiffs' brief is short on legal analysis of the factors the Court must consider in determining whether to grant a stay. Properly applied, those factors require that this matter be stayed pending a decision by the Eighth Circuit on Defendants' appeal of the Court's Jurisdiction Order.

ARGUMENT

I. UNDER THE APPLICABLE FACTORS, THE COURT SHOULD STAY THIS MATTER PENDING THE OUTCOME OF DEFENDANTS' APPEAL.

A. Defendants are likely to succeed on the merits.

The most important factor in determining whether to grant a stay pending appeal is the likelihood of success on the merits. *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011); *Shrink Mo. Gov. PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998); *S & M Constructors, Inc. v. The Foley Co.*, 959 F.2d 97, 98 (8th Cir. 1992). Plaintiffs' arguments on this factor have no merit.

Plaintiffs first mistakenly assert that Defendants "hinge[] [their] entire jurisdictional argument . . . on the placement of a comma in the Settlement Agreement."[1] Plaintiffs' Br. at 19. Putting aside the fact that punctuation is a permissible indicator of meaning, *see Kansas City Life Ins. Co. v. Wells*, 133 F.2d 224, 227 (8th Cir. 1943), and that the "million-dollar comma" is so well documented as to have become a cliché, *see, e.g.*, *O'Connor v. Oakhurst Dairy*, 851 F.3d 69, 70 (1st Cir. 2017); *United States v. Mottolo*, 605 F. Supp. 898, 904 (D.N.H. 1985); *Ex parte State Dep't of Revenue*, 683 So. 2d 980, 981 (Ala. 1996), Plaintiffs' characterization ignores eight pages of substantive analysis on the series-qualifier canon, the purpose and context of the Jurisdiction Clause within the Settlement Agreement as a whole, this Court's previous interpretation of the Agreement, the absurd result of Plaintiffs' preferred interpretation, and binding principles of federalism and separation of powers. *See* Defendants' Br. at 17–25.

[1] Plaintiffs also dispute the definition of the "status quo" for purposes of this stay motion. Plaintiffs' Br. at 18–19. The status quo is the "last uncontested status which preceded the pending controversy." *Minnesota Min. & Mfg. Co. v. Meter for & on Behalf of N. L. R. B.*, 385 F.2d 265, 273 (8th Cir. 1967); *see also First-Citizens Bank & Tr. Co. of N. Carolina v. Outsource Servs. Mgmt.*, No. CIV. 12-1734 ADM/FLN, 2012 WL 3136924, at *1 (D. Minn. Aug. 1, 2012); *Lieving v. Cutter Assocs., Inc.*, 2010 WL 428800, at *4 n.1 (D. Minn. Feb. 1, 2010) (citing *Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 893 (1st Cir. 1988)). The parties have never agreed on the Court's jurisdiction past December 2014, nor could Defendants have waived the issue. Accordingly, the "last uncontested status" is the status prior to the Court's Final Approval Order incorporating the Settlement Agreement.

Puzzlingly—and after again returning to the well of Defendants' purported noncompliance—Plaintiffs instead purport to cite authority that the word "or" is disjunctive and that disjunctive clauses must be interpreted to give effect to each separated clause. Plaintiffs' Br. at 20–21. Indeed, the authorities Plaintiffs cite support Defendants' position that the most natural reading of the word "or" in the Jurisdiction Clause was to denote three distinct purposes for which the Court may exercise its up-to-three-year jurisdiction: (1) to receive reports and information required by the Settlement Agreement; (2) to resolve disputes between the parties; and (3) for other purposes the Court deems just and equitable. *Withrop v. Eaton Hydraulics*, 361 F.3d 465, 470 (8th Cir. 2004) (recognizing that a contract identified "alternative nonpayment default triggers" separated by "or"); *Cummins Law v. Norman Graphic.*, 826 F. Supp. 2d 1127, 1129 (D. Minn. 2011) (recognizing that a contract identified two types of contingency fee payments separated by "or"). Plaintiffs, in contrast, read the Jurisdiction Clause as identifying the period of the Court's jurisdiction (two years), two alternative purposes for which the Court may exercise that jurisdiction (receiving reports and resolving disputes), and then an alternative period of jurisdiction ("as the Court deems just and equitable").[2]

[2] Although not part of the record on appeal, Exhibit F to the Declaration of Shamus O'Meara further supports Defendants' interpretation. This redlined draft of the Settlement Agreement demonstrates that the Jurisdiction Clause originally provided no time limitation on the Court's jurisdiction:

> The Court shall retain jurisdiction over this matter 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.

(Footnote Continued on Next Page)

Nor have Defendants ever argued that no effect should be given to the "just and equitable" language. Rather, Defendants agree with the Court's assessment, articulated in its order of July 17, 2012, that the Court could exercise its two-year jurisdiction for such purposes as it deemed just and equitable. *See* Defendants' Br. at 19–20.

B. Defendants Will Be Irreparably Harmed If A Stay Is Not Granted.

In addressing the chance of irreparable harm, Plaintiffs first mistakenly assert that Defendants cannot be deprived of the right to appeal because there is currently an appeal pending before the Eighth Circuit. As set forth in Defendants' initial brief, however, Defendants may be *effectively* deprived of their appellate rights if they incur expenses that they would have no way to recover in the event of a successful appeal. *See* Defendants' Br. at 12. Defendants will incur substantial additional expenses in complying with Court-imposed reporting obligations during the pendency of their appeal. *See id*, Defendants' Br. at 13. Because there is no entity against which Defendants may pursue a claim for money damages to compensate them for these expenses, the element of irreparable harm is satisfied. *See 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); *Illinois Bell Tel. Co. v. Hurley*, 2005 WL 735968, at *7 (N.D. Ill. Mar. 29, 2005). Plaintiffs cite no authority to the contrary.

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O'Meara Decl. Ex. F, pp. 29–30. Defendants then proposed that a two-year limitation be added to the clause. *See id*. The parties could not have contemplated that the "just and equitable" clause was related to the period of the Court's jurisdiction, because as originally drafted the Agreement placed no limits on that period whatsoever. *See id*.

Plaintiffs also mischaracterize Defendants as representing that they "fully admit [they] may continue [their] reporting obligations regardless of [the] outcome of this case." Plaintiffs' Br. at 24–25. In fact, Defendants represented that they "may continue to publicly report on *Olmstead* Plan progress if proceedings in this Court are stayed." Defendants' Br. at 13 n.3. Defendants have not represented that they would continue the onerous *Jensen* reporting, which consumes 3300 person-hours every six months, at an approximate salary cost of $145,000. *Id*. at 13.

Finally, Plaintiffs fundamentally misconstrue the scope of the parties' Settlement Agreement by stating that "[e]ven if the appeal fails, [D]efendants remain liable under state law for breach of contract, meaning [their] obligations under the agreement remain regardless of the presiding court." Plaintiffs' Br. at 23. The Settlement Agreement unambiguously provides that with the conclusion of the Court's jurisdiction the Settlement Agreement itself will terminate. Doc. 136-1, p. 39.

C. A Stay Would Not Substantially Injure Other Interested Parties And Is Favored By Principles Of Federalism And Separation Of Powers.

Addressing the final factors this Court must consider, Plaintiffs speculate that a stay would "substantially injure" vulnerable citizens of the State, and that public policy therefore weighs against granting a stay. Plaintiffs' Br. at 24–31.

As Plaintiffs note, however, the State maintains independent of this case a strong policy of protecting vulnerable adults and has recognized an objective of eliminating aversive and deprivation procedures in Minnesota licensed social services. See Plaintiffs'

Br. at 27–28. Plaintiffs give no reason to conclude that these policies would be reversed should the Court stay Defendants' settlement obligations in this matter pending appeal.

Instead, Plaintiffs rely entirely on baseless speculation that Defendants would somehow jettison their own policies and ignore their legal obligations without this Court's oversight. But current law specifically prohibits license holders from using mechanical or manual restraints, seclusion, or any other aversive or deprivation procedures "as a substitute for adequate staffing, for a behavioral or therapeutic program to reduce or eliminate behavior, as punishment, or for staff convenience." Minn. Stat. § 245D.06; Minn. R. 9544.0060. In addition to these protections, any person aggrieved by the improper use of aversive or deprivation procedures may seek relief under the numerous constitutional, statutory, and common-law theories set forth in Plaintiffs' complaints in this matter.

The public interest does not favor continued federal court control over DHS's operations and budget; indeed, it requires the opposite. *See Horne v. Flores*, 557 U.S 433, 448 & n.3 (2009); *Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("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."); *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.")).[3] These foundational principles weigh in favor of a stay.[4]

II. SHOULD THE COURT GRANT DEFENDANTS' MOTION, DEFENDANTS SHOULD NOT BE REQUIRED TO POST A BOND.

The purpose of a bond under Federal Rule of Civil Procedure 62 is to protect the rights of a judgment creditor. *Omnioffices, Inc. v. Kaidanow*, 201 F. Supp. 2d 41, 44 (D.D.C. 2002); *Berberena-Garcia v. Aviles*, 258 F.R.D. 42, 43 (D.P.R. 2009). Where, as here, an appellant seeks a stay of nonmonetary judgment, courts have recognized that payment of a bond serves little purpose.[5] *See, e.g., Omnioffices,* 201 F. Supp. 2d at 43-44; *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 926 F.Supp. 888, 890 (D.S.D. 1996). Should the Court grant a stay, Defendants should not be required to post a bond.

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[3] In addition, as noted in Defendants' opening brief, the public interest favors a stay when it would prevent added costs to the public, as it would here. *See* Defendants' Br. at 27–29.

[4] Finally, Plaintiffs seem to suggest that public policy weighs against a stay because Defendants should be judicially estopped from asserting the Court's lack of jurisdiction (Plaintiffs' Br. at 30–31) but cite no evidence for the proposition that Defendants ever construed the Settlement Agreement's Jurisdiction Clause differently than they do now. In any event, Defendants have extensively set forth in prior briefs that objections to jurisdiction cannot under any circumstances be waived, (*see* Doc. 631 at 13–15), and Plaintiffs' estoppel argument is simply another attempt to circumvent that rule.

[5] *Omnioffices* involved the question whether the appellant was entitled to a stay as of right under Rule 62(d) in an appeal of a declaratory judgment. That the case may be distinguishable on this ground does not undermine the general point that a bond serves little purpose in the case of a nonmonetary judgment. Nor does *Omnioffices* "support[] denial of a stay." Plaintiffs' Br. at 31 n.13. As Plaintiffs note, the court decided the case "upon analysis of the Rule 62(c) factors," and the facts of the case, which involved allegations of improper debt–equity conversion, were entirely different from the case at bar. *Id*. *See Omnioffices*, 201 F. Supp. 2d at 44.

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: November 9, 2017.

Respectfully submitted,

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