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)

STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR APPOINTMENT OF AN INDEPENDENT REVIEWER AND SANCTIONS AGAINST DEFENDANTS

INTRODUCTION

Despite using the word "non-compliance" twenty-three times in the nineteen page brief supporting their Motion for Appointment of Independent Reviewer and Sanctions Against Defendants ("Motion"), Plaintiffs point to nothing after 2014 that the Court found constituted "non-compliance" with the Settlement Agreement. Plaintiffs otherwise point, apparently arguing frivolity, to State Defendants' ("Defendants") positions underlying two appellate proceedings—one in which the Court and the Eighth Circuit held the operative SA language was ambiguous, and one in which the Eighth Circuit already denied a motion for fees in which Plaintiffs argued the appeal was frivolous. Finally, Plaintiffs allege that "vitriolic" statements by a DHS in-house attorney about the case, made to an unspecified person, somehow justify sanctions.

Plaintiffs do not acknowledge or contend with the fact that *all* of the conduct they complain about is considered in the Court's September 4, 2020 order ending jurisdiction ("Order"). Throughout, Plaintiffs include no discussion of the applicable legal standards, no argument that any of the conduct they vaguely reference warrants sanctions under those legal standards, and no argument the Court decided the Order incorrectly. Nor do any of Plaintiffs' requests have merit, even if Plaintiffs had included legal argument to that effect: the relief the Motion requests is instead barred by, among other things, the reasonable and non-frivolous positions Defendants have taken, Plaintiffs' delay in seeking sanctions, the Court's prior orders, and the SA itself. The Court should deny the Motion.

FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background of this case has been set forth extensively in prior briefing. *E.g.*, Doc. 631, 759. As the Court knows, Defendants' obligations in this matter are governed by the Settlement Agreement ("SA") (Doc. 136-1) and the later-adopted Comprehensive Plan of Action (Doc. 283), which includes 103[1] "Evaluation Criteria" ("EC"). The following discussion includes additional facts pertinent to the Motion.

I. Compliance And Reporting Prior To The Summary Report.

On May 14, 2012, Defendants submitted a report on the status of compliance with the Agreement, acknowledging certain areas of noncompliance. *See* Doc. 159 at 4–5. On July 17, 2012, in response to "compliance concerns raised by Plaintiffs," the Court found a need for "a process to investigate potentially conflicting information, provide a coherent and complete presentation, and make recommendations to the Court." Doc. 159, pp. 9-10. The Court found that "[a]ppointment of an independent advisor, consultant, or monitor is appropriate in light of the nature and complexity of the Defendants' obligations under the court-approved Settlement Agreement." *Id*. at 11. The Court appointed David Ferleger as Court Monitor and ordered the parties to "cooperate fully" with him, and "provide him with access to the facilities, services, programs, data, and documents relevant to the Settlement Agreement." *Id*. at 13–14. The Court gave the

[1] The CPA includes ECs numbered through 104, but there is no EC 97. *See* Doc. 283, p. 30.

Court Monitor "ex parte access to the parties, their counsel and to the Court," and granted him the power to "convene meetings, meet relevant individuals and groups, attend case-related court proceedings and review pleadings, motions, and documents submitted to the court." *Id*. at 14. On April 25, 2013, the Court ordered that the Court Monitor also take on the role of External Reviewer under the Settlement Agreement, as Defendants had not yet engaged an External Reviewer. Doc. 165 at 27; Doc. 212 at 6.

On June 11, 2013, the Court Monitor submitted a report identifying certain areas of noncompliance, including the unlicensed operation of Minnesota Specialty Health Systems–Cambridge for a period of 10 months. Doc. 217 at 18, 44–45. In October 2013, Plaintiffs moved for sanctions based on Defendants' alleged noncompliance. *See* Doc. 232. The Court granted the motion but reserved ruling on the appropriate sanctions. Doc. 259. Subsequent reports submitted by Defendants and the Court Monitor in 2014 identified areas of incomplete compliance, including with regard to individualized transition planning and supports. *See* Docs. 289, 299, 327, 328. Following these reports, Plaintiffs requested that the Court rule on their sanctions motion; in response, the Court extended its jurisdiction to December 2016 and increase the Court Monitor's oversight duties. Doc. 340 at 8–9, 40. A November 20, 2015 order adopted the parties' settlement of related attorney fees claims (*see* Doc. 524) and prohibited Plaintiffs from seeking additional fees except for "proven intentional and willful conduct which constitutes substantial non-compliance with the Settlement Agreement after [that date]:

> Plaintiffs and the Settlement Class are not permitted to make any further request or claim for reimbursement of attorneys' fees, costs, and disbursements, through the final disposition of the Settlement Agreement or the above-captioned matter, whichever comes later, except for requests or claims for reimbursement of attorneys' fees, costs, and disbursements incurred from the date of this Order *due to proven intentional and willful conduct which constitutes substantial non-compliance with the Settlement Agreement after the date of this Order*.

Doc. 526, p. 3 (emphasis added).

In October 2014, the Court Monitor opined that DHS did not comply with the Settlement Agreement with regard to two individuals and made several recommendations, including that Defendants enlist an external expert to assist with person-centered planning and implementing positive supports. Doc. 347 at 54–57. The Court incorporated these recommendations in a December 5, 2014 Order, and thereafter approved the appointment of Dr. Gary LaVigna as external expert. Doc. 368; Doc. 377.

Defendants continued reporting throughout 2014 and 2015. *E.g.*, Docs. 328, 396. Although the Court Monitor opined from time to time that Defendants' compliance reports included inaccurate or unverifiable information (*see* Docs. 374, 388, 414), Defendants contested these determinations (*see* Docs. 372, 393, 429), and the Court made no finding that Defendants had violated the SA or CPA. Instead, the Court stayed both Defendants' and the Court Monitor's reporting obligations and the parties participated in mediation. Doc. 462 at 2.

Defendants' reporting obligations resumed following mediation, while nearly all of the Court Monitor's duties were stayed. *See* Doc 544; Doc. 545; Doc. 551 at 3, 24; Doc. 737 at 13. Defendants' subsequent reports indicated compliance with all ECs

reported on.[2] *See* Docs. 553-1, 589, 614-1, 621, 643, 676, 683, 700, 710, 763, 814, 826, 876.

On September 29, 2016, the Court directed the Court Monitor to review Defendants' August 2016 report as well as previous reports covering ECs not covered in

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[2] On May 25, 2018, the email address at the Minnesota Department of Health ("MDH") Office of Health Facility Complaints ("OHFC") to which Minnesota Life Bridge ("MLB") had sent DHS-3654 forms (documenting manual restraint) returned an email as undeliverable. Declaration of Margaret Fletcher-Booth, Ph.D ("Booth Decl."), ¶ 4; Declaration of Mark Brostrom ("Brostrom Decl."), ¶¶ 2, 5. On May 29, 2018, MLB staff contacted DHS' Quality Assurance and Disability Compliance Services ("QADC") about this issue. Declaration of Maggie Friend, Ex. 1. On May 31, 2018, DHS' Director of QADC obtained a substitute OHFC contact. Booth Decl., ¶ 4. Due to human error, however, the substitute contact was either not conveyed to MLB, or MLB did not add this contact to its email distribution list for these forms, although MLB staff continued to indicate on the forms that they had been sent to OHFC because they understood the email template contained the required recipients. *Id*.; Brostrom Decl., ¶ 7. As a result, forms from May 25, 2018 through September 24, 2020 (the date on which the Director of QADC learned of the error) erroneously were not sent to OHFC but indicated otherwise. *Id*.; Booth Decl., ¶ 5. On September 28, 2020, all forms from May 2018 through September 28, 2020 were sent to OHFC. Brostrom Decl., ¶ 9. During the subject time, the forms were sent to the other recipients required by the CPA, including the Minnesota Office of the Ombudsman for Mental Health and Developmental Disabilities, the DHS Licensing Division, the Court Monitor and the DHS Internal Reviewer, the individual's legal representative and/or any designated family member, and the individual's case manager. Booth Decl., ¶ 2. They were not sent to Plaintiffs' counsel because he asked, on July 14, 2015, not to receive them. *Id*. at ¶ 9 & Ex. 1. DHS Licensing Division (which received the forms) licenses MLB, not MDH. Booth Decl., ¶¶ 2, 7; Brostrom Decl., ¶ 11. Between May 25, 2018 and September 24, 2020, no member of the distribution list for these forms notified MLB or QADC that OHFC was not included as a recipient. Booth Decl., ¶ 8; Brostrom Decl., ¶ 10. To the knowledge of MLB's Operations Manager, OHFC did not contact MLB during that time to inquire why it was no longer receiving the forms. Brostrom Decl., ¶ 8. In addition, *Jensen* Internal Reviewer Dr. Daniel Baker reviews every instance of restraint use at MLB on an ongoing and continuing basis. Doc. 746, ¶ 2. While Defendants do not believe this constitutes "substantial non-compliance" (or lack of "substantial compliance") with the SA and CPA, they wanted to inform the Court of this oversight in an abundance of caution.

the August 2016 report. Doc. 595 at 2–3. While the Court Monitor indicated areas of noncompliance (Doc. 604), Defendants objected to these findings as inconsistent with the enforceable requirements of the Settlement Agreement or the applicable standards for compliance. *See* Doc. 606-2. Defendants also provided clarifications with respect to certain ECs and identified certain areas for improvement in their reporting. *See id*. Following a status conference, the Court ordered Defendants to incorporate these clarifications and areas of improvement in their reporting and again stayed the Court Monitor's duties. Doc. 612 at 3. The Court made no finding that Defendants failed to comply with any provision of the Settlement Agreement. *See id*.

While Defendants' reports for some time thereafter did not include explicit conclusions on whether each EC was satisfied, the substance of all subsequent reports indicated that all ECs were satisfied. *See* Docs. 621, 643, 676, 683, 700, 710, 763, 814, 826, 876. Plaintiffs never provided any evidence contradicting the reports or brought any motion alleging noncompliance. In sum, the Court has not found noncompliance since December 5, 2014—nearly six years ago. The Court declined subsequent invitations by the Court Monitor to do so, instead staying the Court Monitor's duties as of late 2016.

As of at least as early as mid-2017, the Court began referencing its interest in determining how to equitably terminate its jurisdiction in this matter. *See, e.g.*, Doc. 638, p. 24 (directing the parties to "discuss the essential steps that remain in Defendants' implementation of the [SA and CPA] before the Court can equitably terminate its jurisdiction over this matter."). After repeatedly submitting reports showing compliance, with no contrary evidence submitted by Plaintiffs, in 2018 Defendants began asking the

Court to specify the circumstances under which the case would end.[3] Doc. 690 (asking the Court to "add an agenda item [for the July 12, 2018 status conference] to address the applicable legal standard the Court is using to determine the circumstances under which it will end its involvement in this matter, including what specific actions remain outstanding."); Doc. 731, p. 2; . While repeatedly acknowledging the importance of this issue (*see* Doc. 691, pp. 2, 5-6; Doc. 693, p. 3; Doc. 733, pp. 2, 6) the Court never addressed it.[4]

II. The Summary Report.

On January 4, 2019, the Court issued an order stating that, "[a]s the December 4, 2019 [then-end-of-jurisdiction] date approaches, the Court must evaluate Defendants' compliance to assess the impact of the *Jensen* lawsuit on the well-being of its class members and to determine whether the Court's jurisdiction may equitably end." Doc. 707, p. 6. The Court required Defendants to submit "a Summary Report in lieu of the Semi-Annual and Annual Compliance Reports required pursuant to the Reporting

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[3] During the period between when they began reporting compliance and the Court's order for the Summary Report (discussed further below), Defendants argued that the Court's jurisdiction had expired under the terms of the SA. *See* Doc. 631. The Court held that the relevant term of the SA was ambiguous, but that extrinsic evidence supported Plaintiffs' interpretation that the Court could retain jurisdiction as it deemed "just and equitable." Doc. 638, pp. 11, 14-15. The Eighth Circuit—after denying three attempts by Plaintiffs to dismiss the appeal for lack of jurisdiction—agreed with the Court that the SA was ambiguous and that extrinsic evidence supported Plaintiffs' interpretation. *Jensen v. Minnesota Dep't of Human Servs.*, 897 F.3d 908, 914 (8th Cir. 2018).

[4] Instead, the Court ultimately denied Defendants' request for this information on June 17, 2019, holding it was "premature" until Plaintiffs filed an enforcement action (which they never did). Doc. 737, p. 37.

Order," and set forth the required contents of the report. *Id*. at 6-12. The Court stated that "[i]t is the Court's intent that the Summary Report serve as a tool to facilitate an equitable end to the Court's jurisdiction over this matter." *Id*. at 12.

Defendants filed the Report on March 20, 2019. *See* Docs. 709-724. The Summary Report itself is 225 pages long, and reports compliance with each of the ECs in the CPA. Doc. 710. It is accompanied by 28 pages of affidavits verifying the information reported therein, *see* Doc. 714, as well as supporting exhibits including 1,270 pages documenting, to the extent possible, the status of each *Jensen* class member. Docs. 720-722. Creation of the Summary Report and its supporting documentation consumed about 2,700 hours of Defendants' employees' time, Doc. 745, p. 1, or about 1.25 times the length of a full-time work year.

In response to the Summary Report, Plaintiffs did not raise any concern about the Court's intent to evaluate whether the case should end. In fact, Plaintiffs' response to the Summary Report agreed with the Court's approach, stating that Defendants "have the affirmative obligation to establish that they are have [sic] complied with the court-ordered Settlement, CPA and related Court orders, as determined by the Court in its sole discretion." Doc. 730, p. 2. Nor did Plaintiffs present any evidence that any of the factual statements in the Summary Report were wrong or that the Summary Report's representations were somehow unreliable generally. *See* Doc. 730. Plaintiffs instead raised a purely legal issue, arguing that the SA and CPA require Defendants to completely eliminate their use of mechanical restraint on people with developmental disabilities, apparently even when necessary to prevent serious injury to self or others.

See, e.g., id. at 3-16. On notice of the Court's intent to evaluate ending the case, this was *the only area* in which Plaintiffs asserted continuing noncompliance. *Id*. Plaintiffs asked the Court to re-involve the Court Monitor "on this aspect of the [SA] and CPA" and for an evidentiary hearing about mechanical restraint. *Id*. at 3-4, 16.

III. The Court's Post-Summary Report Order And Dr. Lavigna's Reviews Of Minnesota Life Bridge.

Having reviewed the Summary Report and responses thereto, the Court issued an order on June 17, 2019. Doc. 737. In it, the Court identified "several issues in need of further investigation and review" relating to some ECs. *Id*. at 24-34. For two of these areas, the Court in part granted Plaintiffs' request for further independent review, declining to re-engage the Court Monitor but directing Defendants to facilitate a review by an Independent Subject Matter Expert [("ISME")] in order "to demonstrate that they have indeed developed the external review mechanisms 'to provide independent and objective assurance, advisory, and investigative services to the Department in relation to the Jensen Settlement Agreement.'" *Id*. at 25 (citation omitted), 31. These areas included ISME review of compliance with ECs 5-40, relating to use of prohibited techniques at Minnesota Life Bridge homes ("MLB"), and review of ECs 54-56, relating to staff training at MLB. *Id*. at 24-27, 31-33. The Court also said it needed further briefing on remaining issues surrounding the use of mechanical restraint (including ECs 99-104), *see id*. at 39, and following that briefing the Court also ordered review of

that subject at FMHP and AMRTC, as discussed further below. Doc. 779, pp. 16-17.[5] The June 17, 2019 order also denied Plaintiffs' request for an evidentiary hearing. Doc. 737, p. 37.

Finally, the order—entered more than 15 months ago—explicitly told Plaintiffs that if they wanted additional Court action on *any* aspect of the SA or CPA not Court-designated for further review or supplementation, they would have to affirmatively do something: "If Plaintiffs believe the Defendants have not complied with other terms of the Agreement that are not identified for follow-up pursuant to this Order, *they must initiate an enforcement proceeding under the terms of the [SA]*." *Id*. (emphasis added).[6] Plaintiffs never did so. Plaintiffs also never expressed any dissatisfaction with the Court's decisions in that order, or the process the Court set forth.[7]

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[5] Aside from these three areas of independent review, the Court ordered Defendants to "supplement their Summary Report to present their assessment and analysis on the treatment homes." Doc. 737, p. 33. Defendants timely did so on October 15, 2019, *see* Doc. 774-1, and Plaintiffs never raised any concern about the adequacy of this supplement or compliance with any ECs to which it related.

[6] The pertinent term of the SA reads as follows: "Plaintiffs shall provide the Minnesota Attorney General's Office written notice at least twenty one (21) days prior to any filing or court hearing of any enforcement proceeding. The notice shall specify the section of the Agreement subject to the enforcement action, the factual basis for the action and the relief being sought. At least seven (7) days prior to any court hearing of an enforcement action, plaintiffs' counsel shall make a good faith effort to confer with defense counsel and resolve the matter without court action." Doc. 136-1

[7] Defendants filed a motion under Fed. R. Civ. P. 59(e) asking the Court to reconsider this order, contending that its requests for further information rested on factual misinterpretations of the Summary Report, and that the order improperly extended jurisdiction without giving Defendants notice and an opportunity to be heard. *See* Doc. 743. Plaintiffs, while opposing the motion on its merits, did not request its

(Footnote Continued on Next Page)

The reviews of MLB techniques and staff training were conducted by Dr. Gary LaVigna, who the Court had instructed Defendants to retain. Doc. 737, p. 26 n.29. First, Dr. LaVigna's MLB techniques report concluded that ECs 5-40 were (for ECs 5-24 and 28-40) "being met at an exceptionally high level," or (for ECs 25-27) "being consistently met." Doc. 775-1, pp. 7, 14. Dr. LaVigna, overall, praised the "system of excellence" present in MLB homes. *Id*. at 15. Plaintiffs did not challenge any of this report's factual findings or conclusions on compliance. Second, Dr. LaVigna's MLB staff training report concluded that ECs 54-56 "are fully met," and praised that Defendants support MLB residents in:

> enjoy[ing] an ever increasing quality of life involving, among other things, the continuing process of more choice and control over their life, always learning new skills, going to new places, meeting new people and gaining new friends, etc. That is, DHS helps them have and enjoy a lifelong process of growth and development.

Once again, Plaintiffs did not challenge any of this report's factual findings or conclusions on compliance.

IV. Dr. LaVigna's Review Of Mechanical Restraint Use At FMHP And AMRTC.

As for the third review, the Court ordered that an external reviewer "address the extent to which Defendants' use of mechanical restraint at [FMHP] and [AMRTC] reflects current best practices, specifically quantifying the type, frequency, and duration

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withdrawal or otherwise seek sanctions for its filing, on any basis. The Court denied the motion.

of mechanical restraint at each location, and identifying whether Positive Supports were attempted prior to use." Doc. 779, p. 17. The Court later appointed Dr. LaVigna to conduct this review, on Plaintiffs' nomination and over Defendants' objection. Doc. 798.

Defendants disagreed with the Court's interpretation that the SA and CPA required mechanical restraint at FMHP and AMRTC to reflect current best practices, and appealed both the order requiring the review and the later order directing Defendants to retain Dr. LaVigna to conduct the review. *See* Docs. 783, 804. Plaintiffs moved to dismiss the consolidated appeals, arguing that the underlying orders were not appealable. *Jensen et al. v. DHS et al.*, 8th Cir. Case No. 20-1399, Entry ID: 4890894. The Eighth Circuit agreed with Plaintiffs and dismissed the case. *Id*., Entry ID: 4900181. Thereafter, Plaintiffs filed a motion seeking $128,062.50 in attorneys' fees for an asserted 382 attorney and paralegal hours. *See id.*, Entry ID: 4905311 at 5. Plaintiffs requested fees for all of their claimed work, at both the district and appellate levels, from the date of Defendants' first notice of appeal (January 10, 2020) through the date of the motion (April 21, 2020). *Id*. Plaintiffs argued they were entitled to fees for their work during this span of time because Defendants' legal opposition to the ordered review of mechanical restraint use at FMHP and AMRTC was frivolous, and asserted that the Eighth Circuit had jurisdiction to give them fees for both district court and appellate work. *Id*. at 8-17; *id*., Entry ID: 4909339 at 4. Defendants opposed Plaintiffs' motion and demonstrated its appeals were non-frivolous. *Id*., Entry ID: 4908904. The Eighth Circuit denied Plaintiffs' motion. *Id*., Entry ID: 4911221.

Nothing about Defendants' appeals delayed Dr. LaVigna's review; Defendants' motions to stay the orders were denied, meaning the review went forward regardless of appellate disposition. *See* Doc. 794, 823. Defendants promptly facilitated Dr. LaVigna's review after the Court's order directing them to do so. *See, e.g., Doc.* 802, p. 2 (relaying to the Court a scheduling conflict Dr. LaVigna identified); Doc. 866 (describing how Defendants assisted Dr. LaVigna). As for the review process: Defendants asked to be present during Dr. LaVigna's Court-ordered meeting with the consultants, Doc. 802, p. 1,[8] but the Court did not grant the request. In addition, Dr. LaVigna's report says that at some point during the review process the Court "asked to have a conversation with [Dr. LaVigna] about what he was looking for and also asked [Dr. LaVigna] to meet with [the consultants] about what they would like to see." Doc. 853, p. 17. Further, Dr. LaVigna told DHS employees, on March 19, 2020, that he was expecting to see a need for "corrective action" at FMHP based on conversations with the "Ombudsman, the Judge, and lawyers." Doc. 866, p. 2. Having been excluded from Dr. LaVigna's conversation(s) with the consultants, Defendants also had not been told of any meeting between the Court and Dr. LaVigna, or of any meeting between "lawyers" and Dr. LaVigna.

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[8] In response to this request, Plaintiffs filed the first in a series of documents relaying that, according to Plaintiffs' counsel, an unspecified person told him that "a lead attorney at DHS" had expressed certain opinions about the case, which displeased Plaintiffs' counsel. Doc. 812, p. 1; *see also* Doc. 821, p. 9; Doc. 863, p. 12; *Jensen*, 8th Cir. Case No. 20-1399, Entry ID: 4905311.

Dr. LaVigna's report on mechanical restraint use was filed on June 30, 2018. Doc. 853. The report concludes there exists "very strong evidence that best practices are being followed at an extremely high level." Doc. 853, p. 4. Overall, then, Dr. LaVigna's three recent reviews either explicitly evaluated compliance with relevant ECs (in the case of his MLB reports) or provided opinions dispositive, in the Court's view, of others (in the case of his mechanical restraint report). This means that between the three, there has been recent independent review relating to ECs 5-40, 54-56, and 99-104, or a total of 45 of 103 ECs. As for the rest, the Court concluded in its June 17, 2019 order that (with the exception of needing one supplement, which Defendants provided) the Summary Report provided sufficient information to evaluate Defendant's compliance with the SA and CPA. Plaintiffs never objected to or challenged the Court's approach.

V. The Court's Order Ending The Case.

On September 4, 2020, the Court issued an order ("September 2020 Order") discussing Dr. LaVigna's mechanical restraint report and "address[ing] Defendants' overall compliance with the Stipulated Class Action Settlement Agreement . . . and the Court's jurisdiction over the matter." Doc. 879, p. 2. After reviewing Dr. LaVigna's conclusions that mechanical restraint use at FMHP and AMRTC reflects current best practices, the Court stated that "Defendants have now provided all of the additional information the Court required [following the Summary Report]" and found "that Defendants have substantially complied with all requirements, and that the Court's jurisdiction over this matter may at last come to an end." *Id*. at 13-14. The Court ordered that it had "no legal basis to continue its jurisdiction over this matter" and that

jurisdiction "shall end, as scheduled, on October 24, 2020." *Id*. at 15. The Court also expressed that it views some of Defendants' litigation conduct as coming "at the expense of making meaningful lasting improvements in the lives of people with disabilities" and that Defendants should instead have "directed their litigious energy into implementing the [SA and CPA]" in order to "establish[] a national model," but—with the exception of an order in late 2016 simply affirming that David Ferleger would continue as Court Monitor, *see* Doc. 593, p. 4—the Court did not rely for this statement on any document post-dating December 5, 2014. Doc. 879, pp. 15-16 n.26.

VI. Plaintiffs' Motion For Sanctions.

On September 22, 2020, about a month before the end of the Court's jurisdiction, Plaintiffs filed their Motion for Appointment of Independent Reviewer and Sanctions Against Defendant ("Motion"). Doc. 881, 884. In it, Plaintiffs ask the Court to reverse the Order, extend jurisdiction, and make Defendants pay for yet another external reviewer to continue to evaluate compliance with the SA and CPA, apparently indefinitely. Doc. 884, pp. 18-19. Plaintiffs also ask the Court to compel Defendants to send $100,000 each to various organizations due to Defendants' asserted "ongoing non-compliance," "delay," and "vindictive statements." *Id*.

STANDARD OF REVIEW

Plaintiffs primarily seek sanctions under the Court's inherent power. "Exercise of the Court's inherent authority requires a finding of bad-faith conduct or conduct otherwise amounting to abuse of judicial process. *See Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 751 (8th Cir. 2004); *Jaquette v. Black Hawk Cty., Iowa*, 710 F.2d 455, 462

(8th Cir. 1983)" While the Court has inherent power to sanction both litigants and counsel to preserve the dignity of the Court, *see United States v. Afremov*, 611 F.3d 970, 977 (8th Cir. 2010), it must wield this authority with "restraint and discretion" and consistent with the requirements of due process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45, 50 (1991); *see also Harlan v. Lewis*, 982 F.2d 1255, 1262 (8th Cir. 1993). Exercise of the Court's inherent authority to award attorneys' fees requires a finding of bad-faith conduct amounting to willful abuse of judicial process. *See Stevenson*, 354 F.3d at 751; *Jaquette*, 710 F.2d at 462. Conduct that results even from poor judgment or negligence does not meet this high standard. *See United States v. Monson*, 636 F.3d 435, 444 (8th Cir. 2011).

ARGUMENT

I. PLAINTIFFS' VAGUE MOTION DOES NOT DEMONSTRATE ANY CONDUCT WARRANTING SANCTIONS.

While repeatedly complaining generally about Defendants' conduct "over many years," *see* Doc. 884, pp. 7 (referencing "[t]he record over many years"), 9 (referencing "noncompliance and delay over many years"), 10 (Defendants rejected their "obligations over ten prolonged years"), 14 (referencing "work over 10 years . . . dealing with unprecedented ongoing non-compliance and delay"), Plaintiffs have not identified any legal position taken by Defendants that is not consistent with existing law or a reasonable extension thereof, much less constituting abuse of the judicial process.

Nor, to the extent Defendants can discern what Plaintiffs rely upon, does the record support any such finding. Regarding Defendants' interpretation of the SA's

jurisdictional provision, in affirming the Court's extension of June 28, 2017 Order extending jurisdiction, the Eighth Circuit expressly concluded that the jurisdictional provision of the SA is ambiguous—a conclusion shared by this Court. *Jensen v. Minnesota Dep't of Human Servs.*, 897 F.3d 908, 914 (8th Cir. 2018); *Jensen v. Minnesota Dep't of Human Servs.*, No. CV 09-1775 (DWF/BRT), 2017 WL 2799153, at *6 (D. Minn. June 28, 2017). In fact, the Eighth Circuit in that matter rejected jurisdictional arguments almost identical to those raised by Plaintiffs in connection with Defendants' recent consolidated appeals, holding that the Court's order was appealable under the collateral order doctrine because it was "conclusive," resolved matters separate from the merits of the case, and would otherwise be "effectively unreviewable." *Jensen*, 897 F.3d at 912.

Plaintiffs also appear determined to reassert—yet again—that Defendants improperly argued the SA and CPA do not require complete elimination of mechanical restraint. *See* Doc. 884, pp 12-13. But the Court already disagreed with Plaintiffs, and interpreted the SA and CPA to allow mechanical restrain use "reflect[ing] current best practices." Doc. 779, p. 12. Moreover, while the Eighth Circuit granted Plaintiffs' motion to dismiss Defendants' 2020 consolidated appeals of the Court's interpretation on this point, the Eighth Circuit made no suggestion that the appeals were frivolous. Indeed, Plaintiffs moved for attorneys' fees on the ground that Defendants' appeal *was* frivolous, and the Eighth Circuit denied the motion. *See* Appellees' Motion for Attorneys' Fees, *Jensen et al. v. DHS et al.*, 8th Cir. Case No. 20-1399, Entry ID: 4905311; Order Denying Motion for Attorneys' Fees, *Jensen et al. v. DHS et al.*, 8th Cir. Case

No. 20-1399, Entry ID: 4911221; Fed. R. App. P. 38. Having lost the motion, Plaintiffs cannot obtain a second bite at the apple in this Court. *See South Central Enters., Inc. v. Farrington*, 829 F.2d 651, 655 (8th Cir. 1987) (law of the case doctrine requires that decision in a former appeal be followed in subsequent proceedings in appellate or lower court unless evidence subsequently introduced is substantially different). Indeed, multiple federal circuit courts have recognized that it is inappropriate for a district court to impose sanctions based on pursuit of a frivolous appeal. *See Conner v. Travis Cty.*, 209 F.3d 794, 801 (5th Cir. 2000) (given availability of sanctions under the Rules of Appellate Procedure, "no benefit accrues" from allowing district courts to impose sanctions for frivolous appeals); *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 146 (2d Cir. 2012) ("[A] rule permitting a district court to sanction an attorney for appealing an adverse ruling might deter even a courageous lawyer from seeking the reversal of a district court opinion.") (quoting *Cheng v. GAF Corp.*, 713 F.2d 886, 892 (2d Cir. 1983)); *Webster v. Sowders*, 846 F.2d 1032, 1040 (6th Cir. 1988) (trial judge cannot sanction a party or lawyer for taking an appeal); *see also Grid Sys. Corp. v. John Fluke Mfg. Co., Inc.*, 41 F.3d 1318, 1319 (9th Cir. 1994) (party's litigation conduct before another court cannot form basis for sanctions under 28 U.S.C. § 1927); *In the Matter of Case*, 937 F.2d 1014, 1023 (5th Cir. 1991) (same).

Nor were the 2020 consolidated appeals frivolous. In responding to Plaintiffs' motion to dismiss, Defendants identified the applicable legal standards and precedents and argued that the Court's December 18, 2019 and February 13, 2020 Orders were appealable both as injunctions and under the collateral order doctrine**.** *See Jensen et al. v.*

DHS et al., 8th Cir. Case No. 20-1399, Entry ID: 4908904. The mere fact that these arguments were not successful does not render them frivolous. *See, e.g.*, *Meyer v. U.S. Bank Nat. Ass'n*, 792 F.3d 923, 928 (8th Cir. 2015); *Dillon v. Brown Cty., Neb.*, 380 F.3d 360, 365 (8th Cir. 2004), and Plaintiffs' memorandum includes no substantive analysis of the issue. Nor do Plaintiffs include any evidence or legal argument—as opposed to unsupported, conclusory assertions—that any of this conduct, or even any years-old "noncompliance," was motivated by bad faith or negatively affected the dignity of the judicial process under the applicable standard for exercise of the Court's inherent power.[9] Plaintiffs also, again aside from conclusory assertions, do not demonstrate that Defendants multiplied proceedings "unreasonably and vexatiously," as required for a fee award under Section 1927.[10]

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[9] Plaintiffs apparently concede that they do not allege any present substantial noncompliance with the SA, and to the extent the Court reads the Motion as asking for sanctions to enforce any present substantial noncompliance with the SA, it would be procedurally barred. As noted, the SA requires Plaintiffs to give 21 days' notice of any enforcement proceeding, and to provide the factual and legal basis Plaintiffs rely upon, to the Defendants' counsel. Doc. 136-1, p. 39. Plaintiffs did not do so.

[10] In fact, almost the sole evidence Plaintiffs reference for their apparent belief that Defendants' conduct is sanctionable appears to be the Court's comments at the end of the Order. Doc. 884, pp. 5-7, 15. Those comments, however, did not conclude Defendants took any frivolous position or took any position for the purpose of multiplying proceedings or delaying the case. Instead, that part of the order criticized Defendants for using "litigation tactics" rather than channeling "litigious energy" into the creation of whatever the Court views as a "national model." Doc. 879, pp. 15-16.

II. PLAINTIFFS' MOTION IS BARRED BY THE DOCTRINE OF LACHES.

Plaintiffs' motion is also barred by the doctrine of laches. Laches bars a claim where the claimant unreasonably and inexcusably delays in asserting the claim and the party against whom the claim is asserted is prejudiced as a result. *See Greater St. Louis Const. Laborers Welfare Fund v. Park-Mark, Inc.*, 700 F.3d 1130, 1136 (8th Cir. 2012); *Whitfield v. Anheuser-Busch, Inc.*, 820 F.2d 243, 245 (8th Cir. 1987). The doctrine is properly invoked to bar sanctions based on years-old conduct. *See, e.g., Derek & Constance Lee Corp. v. Kim Seng Co.*, 467 F. App'x 696 (9th Cir. 2012) (holding that district court properly denied civil contempt sanctions where plaintiff failed to act for more than a year despite belief that defendant was violating injunction).

Here, although Plaintiffs do not identify the specific conduct they believe meets the legal standard for imposing sanctions, Plaintiffs' motion explicitly admits it is based on alleged past noncompliance with the parties' Settlement Agreement, and allegedly "frivolous appeals, letters and motions," filed by Defendants "over many years." Doc. 884, pp. 7, 12.[11] Plaintiffs offer no justifiable reason for their delay in bringing the

[11] As discussed, Plaintiffs identify no Court findings of substantial noncompliance more recent than 2014. *See supra* at 7. In addition, the Motion cannot be based on anything recent: as also discussed, Plaintiffs already asked the Eighth Circuit to sanction Defendants for any allegedly frivolous behavior occurring from the filing of their notice of appeal on January 10, 2020 through the date of that appellate motion, April 21, 2020, and the Eighth Circuit denied relief. *See supra* at 13. As noted above, this decision is now law of the case. Nor do Plaintiffs appear to allege that any of Defendants' actions post-dating April 21, 2020 meet the high standard for invoking the Court's inherent power to impose sanctions parties for conduct amounting to bad faith or abuse of process.

present motion. Rather than asking the Court to use its inherent sanctioning power to remedy conduct that "abuses the judicial process in some manner," *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 458 F.3d 733, 739 (8th Cir. 2006), Plaintiffs ask the Court to endorse a scheme in which litigants actually *intentionally decline to challenge* allegedly abusive conduct during the pendency of a case, lying in wait to seek sanctions for "many years" of accumulated grievances only at the end. Doc. 884, pp. 7, 9. The Court should not reward this behavior.

III. TO THE EXTENT THE MOTION SEEKS SANCTIONS FOR FRIVOLOUS FILINGS, IT IS AN IMPROPER ATTEMPT TO CIRCUMVENT FED. R. CIV. P. 11.

Federal Rule of Civil Procedure 11 specifically provides for sanctions for any pleading, motion, or paper that is presented for improper purpose or is not warranted by existing law or "a nonfrivolous argument for extending, modifying, or reversing existing law." Fed. R. Civ. P. 11(b). To obtain sanctions under Rule 11, a party must first serve a motion identifying the purported sanctionable conduct with specificity and may not file the motion if the challenged filing or representation is withdrawn within 21 days. The purpose of the 21-day safe harbor is to encourage parties to regulate themselves and resolve disputes without court involvement. *See Ridder v. City of Springfield*, 109 F.3d 288, 294 (6th Cir. 1997); Fed. R. Civ. P. 11, Advisory Committee Notes (1993 Amendments) ("[A] party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation."). Rule 11's safe harbor is mandatory; failure to comply with the Rule's

procedural requirements precludes the court from imposing the requested sanctions. *See Gordon v. Unifund CCR Partners*, 345 F.3d 1028, 1030 (8th Cir. 2003); *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995).

Plaintiffs did not contemporaneously seek sanctions under Rule 11 for any allegedly frivolous appeal, letter, motion, or other filing. Plaintiffs made no attempt to conserve judicial resources by providing Defendants the required 21-day safe harbor. Plaintiffs' sanctions motion thus represents an end-run around Rule 11's safe harbor requirement, and prejudices Defendants by depriving them of an opportunity to withdraw any allegedly frivolous filing. "When there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power" unless the court is satisfied "neither the statute nor the Rules are up to the task." *Chambers*, 501 U.S. at 50. Plaintiffs make no argument that Rule 11 (or section 1927) could not have addressed any allegedly sanctionable conduct referenced in the Motion. The Court should not reward this behavior either.

IV. ALLEGED STATEMENTS BY DEFENDANTS' IN-HOUSE COUNSEL DO NOT JUSTIFY SANCTIONS.

The alleged statements by DHS in-house counsel also cannot form a basis for an award of sanctions, for at least three reasons. First, the statements, even assuming Plaintiffs accurately relay them, were allegedly made to nonparties by DHS in-house counsel who has not appeared in this matter. Doc. 884 at 10–11. Such statements do not constitute sanctionable "litigation conduct" as they involved no representations to the

Court or other abuse of judicial process. *See Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 458 F.3d 733, 739 (8th Cir. 2006) (court's inherent power to sanction is limited to conduct that "abuses the judicial process in some manner"). The alleged statements merely recount counsel's alleged opinions of the case and do not suggest any attempt to threaten or otherwise improperly influence the Court's consultants.

Second, the alleged "vindictive" statements are also presented through multiple levels of hearsay, as they involve (1) statements purportedly attributed to litigation counsel by (2) DHS in-house counsel as relayed to (3) the court consultants, who (4) apparently repeated the statements to Plaintiffs' counsel; Plaintiffs include no evidence or argument the Court may consider these statements. *See* Fed. R. Evid. 801, 802; *Phan v. Trinity Reg'l Hosp.*, 3 F. Supp. 2d 1014, 1018 (N.D. Iowa 1998) ("Hearsay generally is not admissible unless it falls within exceptions identified by the Federal Rule of Evidence."). None of these allegations were subject to cross-examination or—with the exception of counsel's own declaration relaying double or triple hearsay—were even attested to under oath. Such statements are not properly considered in imposing sanctions—particularly given the procedural protections necessary for the imposition of significant noncompensatory awards. *See Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186, 197 L. Ed. 2d 585 (2017); *Mackler Prods., Inc. v. Cohen*, 146 F.3d 126, 130 (2d Cir. 1998).

Finally, sanctioning Defendants for these alleged statements would violate the First Amendment: even if relayed accurately, the statements are simply opinions about

the case. "[A] fundamental principle of First Amendment jurisprudence is that all [expressive conduct and speech] is presumptively protected against government interference and restraint." *In re White*, No. 2:07CV342, 2013 WL 5295652, at *37 (E.D. Va. Sept. 13, 2013). "Only in limited and defined circumstances, such as when the expression is judicially determined to be a 'true threat' or an incitement to imminent lawlessness, does the expression lose its protected status." *Id*. (citations omitted). "[T]he law gives '[j]udges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions.'" *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (quoting *Bridges v. California*, 314 U.S. 252, 289, 62 S. Ct. 190, 206, 86 L. Ed. 192 (1941) (Frankfurter, J., dissenting)). Plaintiffs do not acknowledge that the Constitution protects speech—even speech Plaintiffs' counsel does not like—nor do they make any argument the law allows speech protections to be overridden in this instance.

V. THE COURT SHOULD OTHERWISE DENY PLAINTIFFS' REQUESTS TO APPOINT ANOTHER EXTERNAL REVIEWER AND EXTEND ITS JURISDICTION AGAIN.

A. The Court's Inherent Authority To Issue Sanctions Does Not Allow Appointment Of An External Reviewer Or Extension Of Jurisdiction.[12]

Again, aside from a request solely for attorneys' fees under 28 U.S.C. § 1927, Plaintiffs only ask for relief under the Court's inherent authority to assess sanctions for conduct that abuses the judicial process. "Over the years, the Supreme Court has found inherent power to include the ability to dismiss actions, assess attorneys' fees, and to impose monetary or other sanctions appropriate 'for conduct which abuses the judicial process.'" *Harlan v. Lewis*, 982 F.2d 1255, 1259 (8th Cir. 1993) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991)). Plaintiffs cite no authority for the proposition that a Court can use its inherent sanctions power to provide what is essentially substantive relief against Defendants, such as reversing its own Order ending the case.

[12] While the Motion eventually seems to ask for an indefinite extension of jurisdiction to facilitate continued oversight of additional external review, the beginning of the Motion seems to ask the Court to issue an order that would bind Defendants' after termination of the Court's jurisdiction. The SA, however—with a few exceptions including only terms that have time-lapsed, and a reservation that releases remain effective—states that it "shall terminate at the same time as the court's jurisdiction ends." Doc. 136-1, p. 40. Plaintiffs do not explain the legal basis for requesting that the Court issue an order intended to have effect after its jurisdiction ends, or for requesting that the Court order continued compliance with settlement requirements that will have terminated.

B. The Court Already Granted In Part And Denied In Part Plaintiffs' Request For Further External Review, And Set Forth A Mandatory Procedure For Plaintiffs To Follow If They Wanted Additional Review; That Decision Is Law Of The Case.

As discussed above, *see supra* at 8-11, beginning in January 2019 the Court explained to the parties that it intended to use the Summary Report to determine whether this case should end. In response to the Summary Report, Plaintiffs asked for additional external review, specifically through reengagement of the Court Monitor, a request the Court explicitly considered and granted in part by ordering review relating to ECs 5-40, 54-56, and 99-104. Doc. 737. The Court denied the external review request as to other ECs, however, and clearly told Plaintiffs that if they "believe the Defendants have not complied with other terms of the Agreement that are not identified for follow-up pursuant to this Order, they must initiate an enforcement proceeding under the terms of the [SA]." *Id*. at 37. That was 15 months ago. Plaintiffs never expressed dissatisfaction with this ruling and never brought an enforcement action.

Accordingly, the Court has already denied Plaintiffs' request for the additional external review Plaintiffs believe supports a jurisdiction extension, and the Court should not reverse that decision. "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). "This principle applies to both appellate decisions and district court decisions that have not been appealed." *Alexander v. Jensen-Carter*, 711 F.3d 905, 909 (8th Cir. 2013). While a court has the power to revisit its prior decisions, "as a rule courts should be loathe to do so in the absence of extraordinary

circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Plaintiffs do not acknowledge that the Court has already decided this issue, or attempt to demonstrate that any circumstance has changed or arisen that might justify revisiting the Court's decision—much less an "exceptional" one.

C. Because The Motion Argues The Court Should Reverse Its Own Order, Plaintiffs Were Required To Move To Alter Or Amend The Order Under Rule 59(e), But Cannot Satisfy That Rule's Requirements.

Granting Plaintiffs' requests for extension of jurisdiction and further external review would reverse the Court's recent Order, which holds that jurisdiction will end on October 24, 2020 without further external review. Doc. 879, p. 17. The standard imposed by Rule 59(e)—under which Plaintiffs did not move—is the only avenue by which Plaintiffs may request this relief. "[A]ny motion that draws into question the correctness of the judgment is functionally a motion under Civil Rule 59(e), whatever its label." *Quartana v. Utterback*, 789 F.2d 1297, 1300 (8th Cir. 1986) (quoting 9 Moore's Federal Practice, ¶ 204.12[1] (2d ed. 1985)). "Rule 59(e) motions," however, "serve a limited function of correcting 'manifest errors of law or fact or to present newly discovered evidence.' Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment." *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir.2006) (internal quotations omitted).

The Motion does not acknowledge it asks the Court to reverse itself, much less acknowledge the Rule 59(e) standard or attempt to satisfy it. Plaintiffs do not even assert that the Order contains any error of law or fact, much less show a "manifest" error of either kind; in fact, the Motion relies heavily on comments contained at the end of the very Order the effects of which Plaintiffs try to reverse. *See* Doc. 884, pp. 15-17. This is insufficient to warrant relief. *See, e.g., Eagle v. Henry*, No. 4:09-CV-0320 (BSM), 2009 WL 4609851, at *1 (E.D. Ark. Dec. 2, 2009) ("Although [the plaintiff] repeatedly asserts that the court erred in finding that his clearly established rights were not violated by defendants, he points to no specific mistakes or manifest errors of law that satisfy Rule 59(e) or 60(b)."). Plaintiffs' requests for an extension of jurisdiction and further external review must be denied as a meritless, improperly brought Rule 59(e) motion.

VI. THE COURT SHOULD OTHERWISE DENY PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES, UNDER EITHER ITS INHERENT POWER OR SECTION 1927.

A. Plaintiffs' Claim For Attorneys' Fees Violates This Court's Order Of November 20, 2015.

On November 12, 2015, the parties jointly moved for an order resolving the attorneys' fees portion of Plaintiffs' October 7, 2013 motion for sanctions (Doc. 230). *See* Doc. 525. In the same motion, Plaintiffs agreed that they would not "make any further request or claim" for future attorneys' fees except for fees incurred as a result of proven intentional misconduct constituting substantial noncompliance with the Settlement Agreement. Doc. 525 at 2–3.

> On November 20, 2015, the Court granted the parties' motion, ordering that:
>
> > Plaintiffs and the Settlement Class *are not permitted* to make any further request or claim for reimbursement of attorneys' fees, costs, and disbursements, through the final disposition of the Settlement Agreement or the above-captioned matter, whichever comes later, *except for requests or claims for reimbursement of attorneys' fees, costs, and disbursements incurred from the date of this Order due to proven intentional and willful conduct which constitutes substantial non-compliance with the Settlement Agreement* after the date of this Order.
>
> Doc. 526 at ¶ 3 (emphasis added).

Plaintiffs' sanctions motion violates this Order, seeking an award of $100,000 in attorneys' fees but failing to identify any substantial noncompliance with the Settlement Agreement after November 20, 2015. Nor does the record support any such finding. While Plaintiffs' memorandum is long on hyperbole, Plaintiffs do not identify how any alleged noncompliance amounts to "substantial noncompliance" with the parties' Settlement Agreement or the 103 ECs set forth in the Comprehensive Plan of Action. *See* Doc. 284; *see also* SUBSTANTIAL, Black's Law Dictionary (11th ed. 2019) ("Containing the essence of a thing"). Defendants have demonstrated substantial compliance for years. The Court Monitor has not made findings of noncompliance since 2016 (*see* Doc. 606-2), while the Court has not done so since at least 2014.[13]

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[13] The Court's December 5, 2014 Order incorporates recommendations from the Court Monitor's October 2014 Report, which found noncompliance with regard to two individuals. *See* Doc. 368. While Plaintiffs quote the Court's September 4, 2020 Order, which characterizes its September 21, 2016 Order as "reaffirming Ferleger as Court Monitor due to continuing issues of noncompliance," the September 21, 2016 Order makes no finding of noncompliance. *See* Doc. 593. Rather, it simply notes that the parties were unable to agree to the appointment of a local Court Monitor and asserts a (Footnote Continued on Next Page)

Further, while the Court's Order of June 17, 2019 designated specific subjects for independent review and directed Plaintiffs to "initiate an enforcement proceeding under the terms of the Settlement Agreement" if they believed that Defendants had not complied with other terms of the Agreement, Plaintiffs did not do so. Doc. 737 at 37. And although Plaintiffs have repeatedly mischaracterized the SA as barring all use of mechanical restraint (*see* Doc. 730 at 3–16; Doc. 753 at 4–6), the Court has expressly rejected that contention, concluding that the SA's and CPA's provisions relating to Prohibited Techniques apply only to defined "Facilities." *See* Doc. 779 at 11–12. On this record, there is no basis to conclude that Defendants have engaged in "proven intentional and willful conduct which constitutes substantial non-compliance with the Settlement Agreement." Doc. 526 at ¶ 3.

B. Attorneys' Fees Are Inappropriate Under Section 1927.

28 U.S.C. section 1927 permits an award of attorneys' fees only against counsel who "so multiplies the proceedings in any case unreasonably and vexatiously"; it does not permit the imposition of sanctions against a party. *See 1507 Corp. v. Henderson*, 447 F.2d 540, 542 (7th Cir. 1971) (section 1927 "does not authorize ordering recovery of costs from a party, but only from an attorney or otherwise admitted representative of a

(Footnote Continued from Previous Page)

"continued need for ongoing monitoring of Defendants' compliance with the *Jensen* Settlement Agreement and CPA." *Id*. at 3–4. Likewise, while Plaintiffs characterize the Court's Order of March 4, 2020 as concluding that "continued DHS noncompliance supports DHS payment for expansion of [the] court monitor's role" (Doc. 884, p. 8), the March 4 Order also identifies only historical instances of noncompliance.

party"); *see also Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1293 (9th Cir. 2015). Plaintiffs, however, have not moved for sanctions against Defendants' counsel. *See* Doc. 881; *see also* Doc. 884, pp. 18–19 (enumerating requested sanctions "against DHS"). Plaintiffs solely seek sanctions under Section 1927 against "Defendants State of Minnesota and Minnesota Department of Human Services." Doc. 881 at 1. Because section 1927 does not permit imposition of sanctions against Defendants, and because Plaintiffs have not moved for sanctions against counsel, section 1927 cannot provide grounds for Plaintiffs' requested relief.

Further, even if section 1927 were applicable to Plaintiffs' motion, as with the Court's inherent authority, such sanctions require a showing of bad faith on the part of the attorney asked to be sanctioned. *See Nat'l Ass'n for Advancement of Colored People-Special Contribution Fund v. Atkins*, 908 F.2d 336, 340 (8th Cir. 1990). The Motion, however—in making no mention of a sanction on an attorney for any party—also includes no argument that a party's attorney did something sanctionable, or why. In any event, as discussed above, Plaintiffs fail to identify evidence of any conduct by Defendants meeting this high standard.

VII. THE COURT SHOULD OTHERWISE DENY PLAINTIFFS' REQUEST THAT THE *CY PRES* FUND, THIRD-PARTY ORGANIZATIONS SELECTED BY THE COURT, THE MINNESOTA GOVERNOR'S COUNCIL ON DEVELOPMENTAL DISABILITIES, AND THE OFFICE OF THE OMBUDSMAN FOR MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES RECEIVE $100,000 EACH.

A court's authority to impose monetary sanctions under its inherent authority is generally limited to the award of compensatory relief. While courts have affirmed the imposition of "relatively mild" noncompensatory fines,[14] serious noncompensatory awards are punitive in nature and require that the party sanctioned receive the procedural protections appropriate to a criminal case. *See Goodyear Tire & Rubber Co.*, 137 S. Ct. at 1186; *see also Mackler Prods., Inc.*, 146 F.3d at 130. Indeed, the Eighth Circuit has noted that a district court's inherent power to impose sanctions "is similar to the court's other powers to impose sanctions, but it is both broader in that it may reach more litigation abuses and narrower in that it *may only be for attorney's fees*." *United States v. Gonzalez-Lopez*, 403 F.3d 558, 564 (8th Cir. 2005).

A sanction is compensatory only if it is "calibrate[d] to [the] damages caused by the bad-faith acts on which it is based." *Goodyear Tire & Rubber Co.*, 137 S. Ct. at 1182. Plaintiffs' list of requested awards, however, is untethered from even the

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[14] *See Harlan*, 982 F.2d at 1262 (affirming imposition of "relatively mild" $5,000 monetary sanction for defense counsel's unauthorized ex parte communications with treating physicians); *Miranda v. Southern Pacific Transportation Company*, 710 F.2d 516, 520–21 (9th Cir. 1983) (holding that court could impose "relatively mild" noncompensatory fine of $250 in order to vindicate local rules); *see also Mark Indus. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 733 (9th Cir.1995) (authorizing non-compensatory damages under district court's inherent authority but stating that an appropriate award would be "at most, $5,000").

pretense of compensatory relief—seeking $100,000 each for Plaintiffs' counsel, donations to unidentified third-party organizations chosen by the Court, the Governor's Council on Developmental Disabilities, the Office of the Ombudsman for Mental Health and Developmental Disabilities, and unspecified measures to "facilitate access to justice and improve the lives of people with developmental disabilities and their families." Doc. 884, p. 18.[15] Plaintiffs fail to identify or attempt to set forth any evidence demonstrating that these parties (to the extent they are even identified) incurred damages in these amounts as a result of any alleged misconduct by Defendants.[16] Plaintiffs otherwise do not cite a single case establishing that a court may its inherent sanctioning power to order what are essentially donations to third party organizations. *See* Doc. 884,

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[15] Further, employees of the Governor's Council on Developmental Disabilities or the Office of the Ombudsman for Mental Health and Developmental Disabilities are state employees, voluntarily participated in this case in their official capacities, and have presumably already been compensated for that involvement by their state salaries. Plaintiffs cite no evidence, and make no argument, that either organization lost money as a result of this case. Further, even if this relief were not otherwise barred, it would violate state law by essentially reappropriating DHS money to other state agencies. *See* Minn. Stat. §§ 16A.139 (state agencies may not use money for a purpose other than that for which the money was appropriated); 471.59, 16B.37 (setting forth limited circumstances under which inter-agency appropriation transfers may occur, none of which pertain here). Finally, while Plaintiffs' counsel seem to believe they are aligned with the consultants and entitled to seek money on their behalf, Plaintiffs do not say whether the consultants asked them to do so. Neither the consultants nor their organizations are parties to this action, and Defendants have no information suggesting that Plaintiffs' counsel represents them.

[16] While Plaintiffs' request for attorneys' fees is otherwise discussed above, this argument applies there as well: Plaintiffs do not support that request with any explanation or evidence of which costs are allegedly attributable to which allegedly sanctionable conduct.

pp. 15-17. Because the requested relief is not allowed under the Court's inherent authority, Plaintiffs' requested monetary sanctions must be denied in full.

CONCLUSION

In light of the foregoing, Defendants respectfully ask the Court to deny Plaintiffs' Motion.

Dated: September 29, 2020.

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)

LOCAL RULE 7.1(f) CERTIFICATE OF COMPLIANCE REGARDING STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR APPOINTMENT OF AN INDEPENDENT REVIEWER AND SANCTIONS AGAINST DEFENDANTS

I, Scott H. Ikeda, certify that the:

☒ Memorandum titled: State Defendants' Response To Plaintiffs' Motion For Appointment Of An Independent Reviewer And Sanctions Against Defendants

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-referenced State Defendants' Response contains 9,407 words.

Dated: September 29, 2020

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