April 15, 2019

## **ECF Filed With Permission**

The Honorable Donovan W. Frank
United States District Court - District of Minnesota
Warren E. Burger Federal Building
316 North Robert Street
St. Paul, MN 55101

Re: Jensen et al v. Minnesota Department of Human Services et al

Court File No. 09-CV-1775 (DWF/BRT)

Dear Judge Frank:

On behalf of the Settlement Class, we write in opposition to the April 12, 2019, letter from the State and DHS (<u>Doc. 731</u>), filed two business days prior to the Court's April 16, 2019, Biannual Reporting Conference, and after the Court already set and distributed the conference agenda. Order (<u>Doc. 729</u>)

The letter does not state it is filed with the Court's permission as required by the ECF filing procedures. ("You must obtain the judge's permission to file any letter except when authorized under Local Rule 7.1 and Local Rule 7.3.") It is also late, filed over three weeks after defendants' March 20, 2019, court-ordered submission deadline for the April 16 conference. (Doc. 707) at 13. See also Order (Doc. 400) ("Defendants should have sought clarification of the Court's Order immediately, as consistent with standard practice, rather than two days before the filing deadline. The Court views Defendants' request for an extension of time to be an unjustified variance from standard practice and to be disrespectful to the Court and all interested parties in light of the Court's established deadlines."). The April 12 letter should be stricken from the record.

If the letter is permitted to be filed, the Court should deny the agenda request to discuss the "applicable legal standard" for compliance. This issue has been repeatedly addressed before the Court, including the July 12, 2018, Biannual Status Conference, (<u>Doc. 691</u>) at 5-6, and in several court orders.

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The April 12 letter is another attempt to obfuscate and further delay justice, over 7 years after the Jensen Class Action Settlement was approved by the Court. (Doc. 136). The State and DHS continue a disturbing pattern of delay and blaming others, rather than focusing on their own conduct, through failed jurisdiction challenges and other misguided contentions. *See* (Doc. 707) at 6 ("Defendants took the position that, due to their appeal to the Eighth Circuit regarding this Court's jurisdiction and because Plaintiffs had not established "substantial noncompliance with the [Jensen Settlement Agreement]," no essential steps remained and no related deadlines were necessary.").

Further attempts by the State and DHS to delay this case and the clear mandates for court-ordered compliance with the Settlement, Comprehensive Plan of Action and all related orders should not be permitted. (Doc. 707) at 6, 13 ("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," and to "identify strengths and weaknesses to ensure that systems are in place to ensure that Jensen's legacy is not left an empty promise."); 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) at 7 ("In lieu of contempt and other sanctions at this time, the Court requires Defendants to fulfill their obligations in a timely manner for the Court's review and approval"); Order (Doc. 467) ("In staying the reporting requirements, the Court released DHS from cumbersome reporting, but did not release DHS from complying with the Settlement Agreement and this Court's Orders.")

Notably, the April 12 letter fails to mention the many orders over the past 7 years comprehensively addressing State and DHS noncompliance, the standard for their compliance, and the Court's specific direction for compliance. See e.g. Order (Doc. 704) at 4) ("The Agreement incorporates a Comprehensive Plan of Action ("CPA"). The CPA, sets forth Evaluation Criteria ("EC") and accompanying Actions: The ECs set forth the outcomes to be achieved and are enforceable." "Compliance with an EC will be deemed to have been achieved if the EC's Actions are taken."); Order (Doc. 545) (schedule and reporting requirements); (Doc. 233) at 1-3; (Doc. 136-1) at 12 (requiring "substantial compliance with this Agreement and the policies incorporated herein"); (Doc. 578) at 3 ("[T]he Court Monitor will continue to fill the External Reviewer role for the purposes previously established by agreement of the parties."); Order (Doc. 551) ("The Court is hopeful that substantial compliance with the Jensen Settlement Agreement will be achieved by this date."); Order (Doc. 327) ("The Court Monitor shall serve for as long as necessary for Defendants to achieve substantial compliance."); Order (Doc. 634) at 23-24; (Doc. 435) ("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. (See, e.g., Doc. No. 188; Doc. No. 205, Doc. No. 212, Doc. No. 223, Doc. No. 259, Doc. No. 368, Doc. No. 400.);

Order (Doc. 259) ("The Court finds and concludes that Plaintiffs' Motion for Sanctions is GRANTED."); Plaintiff Mem. Law (Doc. 232) at 27-28 ("The State Defendants' willfully and intentionally acted in substantial noncompliance with the Settlement Agreement"); (Doc. 263) at 7 ("The Plan does not provide any suggestions for the State's demonstration of sufficient substantial compliance to enable the Court to relinquish active jurisdiction."); Order (Doc. 340) at 9 ("[T]he 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." "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's orders mandating compliance and extending jurisdiction due to ongoing noncompliance by the State and DHS did not stop them from contending the Court cannot hold them accountable. For example, the Court's Notice of Case Management Conference (Doc. 652), directed the parties to "file a letter setting forth the parties' positions on what essential steps remain in Defendants' implementation of the Agreement, and when those steps should occur between now and December 4, 2019, when this Court's jurisdiction is currently scheduled to end," and to include "a recitation of the current reporting schedule and a proposal for any adjustment to the remaining reporting deadlines." (Doc. 652) at 3. Rather than complying with the Court's order, the State and DHS instead responded: "State Defendants believe that no essential steps remain and no related deadlines are necessary because the Court lacks jurisdiction over this matter and the Settlement Agreement has expired"; "Again, State Defendants' position is that no further reporting is necessary or proper given the Court's lack of jurisdiction"; "Finally, consistent with their view that the Court lacks jurisdiction over this matter and that the Settlement Agreement has expired, State Defendants propose that all current reporting deadlines be stricken." (Doc. 663) at 1, 2 n.1, 3. See also Order (Doc. 707) at 6.

Ultimately, the Eighth Circuit Court of Appeals, in its July 26, 2018, decision on defendants' misguided jurisdiction appeal, rejected such inappropriate positions. The 8<sup>th</sup> Circuit expressly ruled the Settlement "permits the district court to extend its jurisdiction as it 'deems just and equitable.'" *Jensen v. Minn. Dept. of Human Services*, 897 F.3d 908, 916 at 6. (8th Cir. 2018). The decision also noted defendants' repeated noncompliance as an important basis for the extension of the Court's jurisdiction, which was extended three times either through the parties' consent, or through the Court order without objection.<sup>1</sup>

<sup>1</sup> *Id.* at 911-912 ("On August 27, 2013, the district court, with the consent of the parties, entered an order extending its jurisdiction for an additional year beyond the original termination date (until December 4, 2014). The district court stated that it 'expressly reserve[d] the authority and

Notably, the 8th Circuit also stated:

MDHS asserts that it "would not have reasonably agreed to terms under which the district court could extend its jurisdiction . . . indefinitely" and that such an interpretation is therefore absurd. We see no reason why this is so. MDHS identifies no evidence indicating that it would not be reasonable for the parties to agree to a preliminary time frame for the court's jurisdiction while, at the same time, including a fail-safe provision that allowed flexibility if compliance with the Agreement took longer than originally expected.

And, we note, MDHS's interpretation would mean that the Jensen class entered a settlement agreement that dismissed their claims against MDHS with prejudice, yet placed no obligation on MDHS to comply with the terms of the Agreement beyond the initial two-year term—a result that the Jensen class might find absurd.

Id. at 915; n. 6 (emphasis added).

Rather than filing letters requesting redundant agenda items and advocating for ways to avoid their compliance, just as they did with their failed jurisdiction argument, the State and DHS should focus on the orders specifically directing them to comply, including all of the information required by the court-ordered CPA Evaluation Criteria and other directives of the Court.

jurisdiction to order an additional extension of jurisdiction, depending upon the status of compliance by the Defendants with the specific provisions of the Settlement Agreement, absent stipulation of the parties.' Neither party objected to the extension of jurisdiction or the court's reservation of authority. About a year later, on September 3, 2014, MDHS was still not in compliance. The district court determined that it could 'no longer tolerate continued delay in the implementation of the Settlement Agreement' and that "[a]dherence to the Court's Orders by the [M]DHS officials and staff at all levels [wa]s essential, not discretionary.' The court then extended jurisdiction for another two years (until December 4, 2016) 'based on the significant delays in implementation as well as the non-compliance with the Settlement Agreement.' It further noted that 'the extension of jurisdiction may be considered a sanction related to the circumstances described in [its] Order.' Neither party objected. Litigation proceeded for another year and a half. On February 22, 2016—after mediation conducted by Magistrate Judge Becky R. Thorson was concluded—the district court established a 'schedule for compliance reporting.' In its order, the court extended its jurisdiction for three more years (until December 4, 2019). The district court also "expressly reserve[d] the authority and jurisdiction to order an additional extension of jurisdiction, depending upon the status of Defendants' compliance and absent stipulation of the parties. Again, neither party objected.")

The conduct and promises of the State and DHS are at issue over 7 years after this landmark class action settlement solely due to their noncompliance with the Court's orders. If the State and DHS continue blaming others, including the Court and Settlement Class, and continue their pattern of seeking to avoid their court-ordered responsibilities this Court should continue to exercise its discretion to extend jurisdiction in this matter "as it deems just and equitable." *Jensen v. Minnesota Dept. of Human Services*, 897 F.3d 908, 916 at 6 (8th Cir. 2018).

Thank you.

Respectfully submitted,

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

/s/ Shamus P. O'Meara

Shamus P. O'Meara SPO:tls