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,

v.

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 No. 09-1775 (DWF/BRT)

ORDER

Shamus P. O'Meara, Esq., and Mark R. Azman, Esq., O'Meara Leer Wagner & Kohl, PA, counsel for Plaintiffs.

Scott H. Ikeda, Aaron Winter, Anthony R. Noss, and Michael N. Leonard, Assistant Attorneys General, Minnesota Attorney General's Office, counsel for State Defendants.

INTRODUCTION

This matter is before the Court on State Defendants' Motion to Stay Pending Appeal. (Doc. No. 655.) Plaintiffs oppose Defendants' motion. (*See* Doc. No. 667.) For the reasons set forth below, Defendants' motion is denied.

BACKGROUND

On June 28, 2017, the Court issued an order in response to Defendants' objection to the Court's continued jurisdiction. (Doc. No. 638.) The Court concluded that it presently retains jurisdiction based on the parties' Stipulated Class Action Settlement Agreement ("Agreement") and directed that "all reporting obligations previously imposed shall remain in place." (*Id.* at 23.) The Court also ordered the parties to "meet and confer to discuss the essential steps that remain in Defendants' implementation of the Agreement before the Court can equitably terminate its jurisdiction over this matter." (*Id.* at 23-24.) For brevity, the Court incorporates the more thorough discussion of the procedural background relevant to Defendant's jurisdictional objection outlined in the Court's June 28, 2017 Order. (*See id.* at 2-4.)

On July 26, 2017, Defendants filed a Notice of Appeal of the Court's June 28, 2017 Order. (Doc. No. 639.) On October 20, 2017, Defendants filed a Motion to Stay Pending Appeal. (Doc. No. 655.) In particular, Defendants seek "an order staying their obligations related to the parties' Settlement Agreement and the Court's subsequent

orders" and also request that the Court "continue the current stay of the Court Monitor's duties" while their appeal is pending with the Eighth Circuit Court of Appeals. (*Id.* at 1.) The parties submitted briefing on Defendants' motion, and the Court has taken the matter under advisement without a hearing. (*See* Doc. Nos. 658, 667, 669.)

DISCUSSION

I. Legal Standard

Pursuant to Federal Rule of Civil Procedure 62(c), a "court may suspend, modify, restore, or grant an injunction" pending the matter's resolution on appeal. *See* Fed. R. Civ. P. 62(c). "A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case." *Scripps-Howard Radio, Inc. v. F.C.C.*, 316 U.S. 4, 10-11 (1942) (citations omitted); *see also Nken v. Holder*, 556 U.S. 418, 433 (2009). A court considers four factors in determining whether to grant a motion to stay: "(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 (1987); *see also Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011). The moving party bears the heavy burden to establish that a stay should be granted in light of these four factors, and "[t]he first two factors . . . are the most critical." *See Nken*, 556 U.S. at 433-34; *see also* 11 Charles Alan Wright, *et al.*, Federal Practice and Procedure § 2904 (3d ed. April 2017 Update) ("[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." (footnotes omitted)). "Ultimately, [the court] must consider the relative strength of the four factors, balancing them all." *Brady*, 640 F.3d at 789 (quotation marks and citation omitted).

Defendants argue that the four stay factors warrant the imposition of a stay with respect to their reporting obligations, the Court's Biannual Status Conferences, and monitoring efforts by the Court Monitor. Plaintiffs, on the other hand, argue that Defendants have not met their burden to justify a stay and ask the Court to deny Defendants' motion.[1]

A. Likelihood of Success on the Merits

The Court first considers whether Defendants have "made a strong showing that [they are] likely to succeed on the merits." *Hilton*, 481 U.S. at 776. "It is not enough that the chance of success on the merits be better than negligible. . . . [M]ore than a mere possibility of relief is required." *Nken*, 556 U.S. at 434 (quotation marks and citations omitted). The Eighth Circuit has described this factor as "[t]he most important" for the

[1] Plaintiffs also argue in a footnote that Rule 62(c) does not apply because the Court's Order Approving Settlement is not an injunction. Rather, Plaintiffs contend, "the applicable court action involved approval of a voluntary settlement agreement." (Doc. No. 667 at 18 n.10.) However, Defendants seek to stay their obligations under the Agreement as well as the Court's subsequent orders. The Court's orders adopting the Comprehensive Plan of Action and directing Defendants to follow specific reporting schedules, for example, are plainly injunctive in nature and direct Defendants to undertake specific actions to facilitate the Agreement's implementation. (*See* Doc. Nos. 284, 544, 545.) Thus, the Court concludes that Rule 62(c) properly applies to Defendants' Motion to Stay Pending Appeal.

court's consideration. *Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998); *see also Brady*, 640 F.3d at 789.

Defendants contend that they have a likelihood of succeeding on the merits of their appeal to the Eighth Circuit because "the Settlement Agreement unambiguously provides that the Court's jurisdiction ended, at the latest, on December 4, 2014." (Doc. No. 658 at 14.) Defendants challenge the Court's finding of ambiguity within the Agreement, suggesting that the Court "disregarded the clause's most natural, straightforward reading." (*Id.* at 15.) Defendants argue that the Court's reading fails to account for a comma in the Agreement that indicates a list of three purposes for the Court's retention of jurisdiction. Further, Defendants assert that the Court's reading violates the series-qualifier canon and the canon against surplusage. Defendants also contend that the Court has already adopted Defendants' proposed interpretation in a July 17, 2012 Order.

Even if the jurisdictional provision is ambiguous, Defendants argue, the Court erred in determining that the Agreement supports the Court's continued jurisdiction "as it deem[s] just and equitable." (Doc. No. 658 at 19.) Defendants suggest that the parties' post-agreement conduct supports Defendants' interpretation as expressed in the Court's July 17, 2012 Order, and note that their subsequent failure to object to the Court's extension of jurisdiction occurred nearly two years after the parties entered into the agreement. Finally, Defendants argue that the Court's interpretation creates an absurd result and violates federalism and separation-of-powers principles.

Plaintiffs argue that Defendants have not demonstrated a strong likelihood of

success on the merits. Specifically, Plaintiffs contend that the Court presently has jurisdiction pursuant to the Agreement and the Court's Final Approval Order. Plaintiffs suggest that the parties' punctuation usage within the jurisdictional clause "clearly authorizes the Court's retention of jurisdiction over the settlement 'as it deems just and equitable,' not just for two years." (Doc. No. 667 at 20.) According to Plaintiffs, this provision was negotiated in anticipation of possible delay in the settlement agreement's implementation. Plaintiffs also point to the Court's September 3, 2014 Order in which it construed the clause in accordance with Plaintiffs' proposed interpretation.

The Court concludes that Defendants have failed to establish a strong likelihood of success on the merits on appeal. As the Court previously determined in its June 28, 2017 Order, the Agreement is ambiguous, and the parties' subsequent conduct throughout this litigation demonstrates that the parties intended for the Court to retain jurisdiction as it deems just and equitable. (*See generally* Doc. No. 638.) The Court has thoroughly considered Defendants' jurisdictional objection and reaffirms its conclusion that it presently retains continuing jurisdiction over the Agreement's implementation. As the Court previously determined, "[t]he 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." (*Id.* at 21.)

The Court acknowledges that Defendants' jurisdictional objection presented a close question for the Court because the Agreement's "just and equitable" clause could reasonably be construed to support Defendants' proposed interpretation. However, the

Court also determined that it could reasonably be construed to support Plaintiffs' reading. It was precisely this fact which led the Court to conclude that the provision was ambiguous and thus subject to interpretation based on extrinsic evidence. In light of this evidence, the Court ultimately determined that the Agreement supported the Court's continuing jurisdiction. Although the Eighth Circuit may reach a different conclusion in resolving this close question, the Court concludes that Defendants have failed to establish a strong likelihood of success on the merits. *See In re Wholesale Grocery Prods. Antitrust Litig.*, Civ. No. 09-MD-2090, 2016 WL 6246758, at *2 (D. Minn. Oct. 25, 2016) ("As with any appeal, the Eighth Circuit may choose to disagree with this Court's conclusions . . . , but this possibility does not make it likely that Defendants will succeed on the merits of their appeal.").

B. Irreparable Harm

The Court also considers whether Defendants will be irreparably harmed absent a stay. *Hilton*, 481 U.S. at 776. As with each factor, the burden is on Defendants to establish that this factor weighs in favor of granting the motion. "[S]imply showing some 'possibility of irreparable injury' fails to satisfy the second factor." *Nken*, 556 U.S. at 434-35 (citation omitted). To establish this factor, the party seeking a stay "must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utils. Bd. v. F.C.C.*, 109 F.3d 418, 425 (8th Cir. 1996).

Defendants assert that they would be irreparably harmed if the Court declines to grant a stay. Defendants emphasize that the effective deprivation of appellate rights constitutes significant irreparable harm. According to Defendants, they will be

irreparably harmed by "incur[ring] significant unrecoverable monetary loss" before the Eighth Circuit can review the Court's June 28, 2017 Order. (*See* Doc. No. 658 at 13.) The monetary loss Defendants identify arises from three primary sources: (1) reporting expenses, (2) expenses to attend Biannual Status Conferences, and (3) potential Court Monitor expenses.

In particular, Defendants detail the alleged harm resulting from "extensive and costly" reporting requirements. (*See* Doc. No. 658 at 8.) As set forth in an Affidavit by the Director of the Jensen/Olmstead Quality Assurance and Compliance Office ("JOQACO") of the Minnesota Department of Human Services ("DHS"), Defendants submit annual and semi-annual compliance reports on February 28 or 29, March 31, and August 31. (Doc. No. 659 ("Booth Aff.") ¶¶ 1, 2.) Six staff members spend approximately 3,300 hours (equal to 3.25 full-time employees) on developing reports every six months. (*Id.* ¶ 3.) This amounts to an approximate salary cost to DHS of $145,000 every six months. (*Id.*) Staff beyond JOQACO also participate in report development. (*See id.* ¶¶ 4, 5.) Defendants also reference reporting requirements in connection with the *Olmstead* Plan and assert that "[p]reparing for and attending Court-ordered status conferences further strains State resources." (Doc. No. 658 at 10.) Finally, Defendants identify expenses previously paid for court monitoring from 2012 to 2016 totaling over one million dollars and state that such expenses could possibly be incurred going forward.

Plaintiffs dispute that Defendants have established irreparable harm. Plaintiffs suggest that Defendants have not lost their right to appeal as evidenced by their pending

appeal at the Eighth Circuit. Plaintiffs also argue that Defendants are liable for the obligations in the Agreement under state law contract principles regardless of whether this Court retains jurisdiction. In addition, Plaintiffs note that Defendants have indicated they may continue reporting even if the Court lacks jurisdiction. Finally, Plaintiffs argue that the doctrine of unclean hands should apply to prevent a stay because "[Defendants'] own non-compliance has unnecessarily caused this matter to drag on." (Doc. No. 667 at 24.)

First, the Court addresses the potential deprivation of Defendants' appellate rights. Cases cited by Defendant to support this form of irreparable harm involved circumstances in which a failure to stay the case would have certainly or very likely mooted the pending appeal. Such circumstances included, for example, a foreclosure sale, transfer of assets pursuant to a bankruptcy reorganization plan, or the disclosure of confidential information. *See, e.g.*, *CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC*, Civ. No. 5:13-278-F, 2013 WL 3288092, at *5-7 (E.D.N.C. June 28, 2013) (bankruptcy); *Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative*, 240 F. Supp. 2d 21, 22-23 (D.D.C. 2003) (document disclosure); *In re Country Squire Assocs. of Carle Place, L.P.*, 203 B.R. 182, 183 (B.A.P. 2d Cir. 1996) (foreclosure). These cases are unlike the situation here. The only circumstance under which Defendants' pending appeal would be rendered moot is if the Court terminates its jurisdiction over the Agreement's implementation. Defendants have not established, and the Court does not perceive, that

this outcome is either certain or imminent during the time period while Defendants' appeal is pending. Thus, this possibility does not establish irreparable harm.[2]

Next, the Court evaluates the monetary harm Defendants allege they will face absent a stay. The Eighth Circuit has recognized that "[t]he threat of unrecoverable economic loss" constitutes irreparable harm. *See Iowa Utils. Bd.*, 109 F.3d at 426. The primary expense Defendants highlight and substantiate in detail is reporting on compliance with the Agreement. Pursuant to the Court's previous order on reporting, the following compliance reports relating to the Agreement and the Comprehensive Plan of Action are due to the Court in 2018: two semi-annual reports due on February 28, 2018 and August 31, 2018 and one annual report due on March 31, 2018.[3] (*See* Doc. No. 545 at 3-4.) As Defendants explain, report development costs DHS an estimated $145,000 every six months. (*See* Booth Aff. ¶ 3.) Defendants do not articulate the estimated costs incurred with respect to *Olmstead* Reporting obligations or attendance at Biannual Status Conferences set by the Court. Defendants also provide only general speculation with respect to future Court Monitoring costs that might be incurred going forward.

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[2] The Court also notes that even if there were a significant risk that Defendants' appeal would be mooted in the absence of a stay, courts do not consistently find that such a result constitutes irreparable harm. *See CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC*, Civ. No. 5:13-278-F, 2013 WL 3288092, at *6 (E.D.N.C. June 28, 2013) ("The cases reveal a significant divide on the question of whether the loss of appellate rights is per se irreparable harm.").

[3] The semi-annual report due on February 28, 2018 covers the months of July through December 2017. The annual report due on March 31, 2018 covers the months of January through December 2017. (*See* Doc. No. 545 at 3-4.) Defendants do not detail how much, if any, data analysis or report drafting was completed by JOQACO with respect to these forthcoming reports prior to Defendants filing their Motion to Stay Pending Appeal on October 20, 2017.

The Court concludes that Defendants have failed to establish irreparable harm to support the imposition of a stay. To be sure, Defendants have identified certain expenditures they will incur absent a stay in light of reporting and other obligations established by the Court. However, the Court declines to conclude that these expenses constitute irreparable harm. Notably, the reporting deadlines with respect to the Agreement were imposed by the Court in response to proposals by both parties to establish a reporting schedule, and these deadlines are consistent with Defendants' own proposal. (*See* Doc. No. 545 at 2-4; *see also* Doc. No. 539 at 4.) In addition, Defendants waited nearly three months to move for a stay following their appeal of the Court's June 28, 2017 Order and submitted a semi-annual report as well as an *Olmstead* quarterly report in late August 2017, undermining Defendants' claims of irreparable harm. (*See* Doc. Nos. 639, 648, 649, 655.) The Court is also mindful of Defendants' repeated delays in compliance throughout this litigation's lengthy history that led the Court to extend its jurisdiction on multiple occasions. As this Court has previously noted, "[a] court may decline to grant a motion to stay based on claims of administrative and monetary harm where 'the principal irreparable injury which defendants claim that they will suffer . . . is injury of their own making.'" *Karsjens v. Jesson*, Civ. No. 11-3659, 2015 WL 7432333, at *6 (D. Minn. Nov. 23, 2015) (quoting *Long v. Robinson*, 432 F.2d 977, 981 (4th Cir. 1970)).

Finally, a stay "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427 (citation omitted). Even if the Court were to find that Defendants faced some degree of irreparable harm, the Court would decline

to grant a stay in this case in light of the Court's view of Defendant's likelihood of success on the merits and the totality of the circumstances.

C. Injury to Interested Parties

Next, the Court must consider whether issuance of the stay will substantially injure interested parties, including Plaintiffs. *See Hilton*, 481 U.S at 776.

According to Defendants, Plaintiffs would not suffer harm if the Court imposes a stay. Defendants suggest that "the obligations imposed on Defendants do not directly accrue to Plaintiffs' benefit," and argue that "the temporary cessation of the Court's order will likely have little impact on Plaintiffs whatsoever." (Doc. No. 658 at 26.) Defendants also dispute Plaintiffs' speculation regarding possible injury to the state's vulnerable citizens if a stay is granted.

Plaintiffs point out that this factor is not limited to potential injury to Plaintiffs alone but rather contemplates injury to other interested parties as well. According to Plaintiffs, such interested parties include "the vulnerable citizens of Minnesota protected by the *Olmstead Plan* and the terms of the *Jensen* settlement." (Doc. No. 667 at 24 n.12.) Plaintiffs argue that if a stay is granted, Defendants may disregard their obligations under the Agreement, continue to delay in their compliance efforts, and "even perhaps continu[e] to roll back agreed upon protections." (*Id.* at 24.) In light of the record of Defendants' noncompliance, Plaintiffs urge the Court to continue exercising jurisdiction to oversee the Agreement's implementation.

The Court concludes that this factor weighs neither for nor against a stay. Plaintiffs have not established that they or other interested parties would be "substantially

injure[d]" by the issuance of a stay. *Hilton*, 481 U.S. at 776. Although the Court acknowledges the history of Defendants' delay and noncompliance in implementing the Agreement, the Court is also cognizant of the numerous recent positive developments in implementation that have taken place in recent years such as the adoption and implementation of the *Olmstead* Plan and the establishment of JOQACO. Without more specific evidence of the threatened harms Plaintiffs allege on behalf of the Class and the state's vulnerable citizens with disabilities or a clear explanation of how those harms would be amplified by a stay, the Court declines to conclude that this factor weighs against a stay.[4] In light of Defendants' failure to establish irreparable harm to warrant a stay, however, the lack of demonstrated substantial injury to Plaintiffs or other interested parties does not on its own favor the imposition of a stay.

D. Public Interest

Finally, the Court considers the public interest. *Hilton*, 481 U.S. at 776.

Defendants contend that the Court's continuing exercise of jurisdiction and Defendants' ongoing obligations to the Court "intrude on the State's responsibility to set public policy and administer its own law" along with raising concerns over the separation of powers. (Doc. No. 658 at 27.) Defendants also note that the public interest supports

[4] The Court acknowledges the evidence provided by Plaintiffs demonstrating multiple instances of substantiated abuse and neglect of *Jensen* Class Members reported in 2017. (*See* Doc. No. 668 ("O'Meara Decl.") ¶¶ 2, 4-5, Exs. A, C-E.) The Court does not wish to discount the seriousness of these incidents. The Court is also mindful of Plaintiffs' identified concerns regarding continued noncompliance as outlined in Plaintiffs' October 22, 2017 letter to the Court. (*See* Doc. No. 661.) Nonetheless, the Court concludes that this evidence does not demonstrate a risk of substantial injury to Plaintiffs or other interested parties if the Court were to impose a stay of Defendants' reporting and other obligations pending appeal.

imposing a stay where it would prevent public expense and reemphasize the costs of continued compliance reporting and monitoring.

According to Plaintiffs, "[t]he 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." (Doc. No. 667 at 26.) Plaintiffs dispute Defendants' invocation of federalism concerns because this case involves a settlement agreement entered into voluntarily by the State. Plaintiffs also characterize Defendants' costs argument as "a stunning display of self-interest and ignorance of the record" and point to Defendants' own stated commitment to protect individuals with disabilities. (*Id.* at 27.) Finally, Plaintiffs ask the Court to preclude a stay through the application of judicial estoppel and the doctrine of unclean hands.

As with the third factor, the Court concludes that the public interest factor is evenly balanced. Minimizing public expense is a relevant concern when considering this factor. *See James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544-45 (8th Cir. 1982). Declining to stay this matter will require Defendants to continue their ongoing compliance and reporting obligations pursuant to the Agreement and the Court's orders, incurring public expense as outlined above. This fact weighs slightly in favor of a stay. At the same time, however, the Court has an obligation to ensure that the Agreement, entered into with an aim to improve the lives of individuals with disabilities throughout the state, is implemented fully and without delay. Considering this important public interest weighing against a stay, the Court finds that this factor is on balance neutral.

CONCLUSION

In sum, upon considering the relevant factors, the Court declines to stay this matter pending the resolution of Defendants' appeal. Defendants have failed to persuade the Court that the most important factors—likelihood of success on the merits and irreparable harm—weigh in their favor. The remaining two factors are neutral. Thus, a stay pending appeal is not warranted.

ORDER

Based upon the foregoing, and the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. State Defendants' Motion to Stay Pending Appeal (Doc. No. [655]) is **DENIED**.

Dated: February 1, 2018

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge