UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents, guardians, and next friends of Bradley J. Jensen; James Brinker and Darren Allen, as parents, guardians, and next friends of Thomas M. Allbrink; Elizabeth Jacobs, as parent, guardian, and next friend of Jason R. Jacobs; and others similarly situated,

Plaintiffs,

vs.

Minnesota Department of Human Services, an agency of the State of Minnesota; Director, Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Clinical Director, the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Douglas Bratvold, individually and as Director of the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Scott TenNapel, individually and as Clinical Director of the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; and the State of Minnesota,

Defendants.

CIVIL FILE NO. 09-CV-01775 (DWF/BRT)

REPLY IN SUPPORT OF STATE DEFENDANTS' MOTION TO ALTER OR AMEND JUNE 17, 2019 ORDER

INTRODUCTION

Aside from incorrectly arguing that Defendants' Motion[1] constitutes an improper use of Rule 59(e), Plaintiffs' Opposition does not even try to respond to the arguments Defendants actually made in their Memorandum. Plaintiffs do not attempt to rebut that Defendants were entitled to notice and an opportunity to be heard before the Court's *sua sponte* extension of jurisdiction. Plaintiffs do not attempt to argue that Defendants, prior to the June 17, 2019 Order, had notice of the Court's concerns and an opportunity to address them. Plaintiffs do not attempt to argue that there is some ambiguity regarding the Settlement Agreement's or CPA's requirements related to treatment homes or restraints. Nor do Plaintiffs attempt to rebut that the Court factually erred, as explained in the Memorandum, regarding the substance and form of Defendants' verification procedures. Defendants' Motion should be granted.

ARGUMENT

I. RULE 59(E) AUTHORIZES DEFENDANTS' MOTION TO ALTER OR AMEND THE JUNE 17, 2019 ORDER.

In the Memorandum, Defendants explained that: the June 17, 2019 Order is appealable; Rule 59(e) authorizes motions to alter or amend any appealable order; and Rule 59(e) motions are appropriately used to correct substantive manifest errors of law or

[1] "Defendants" used herein refers to the State Defendants. "Motion" herein refers to Defendants' Motion to Alter or Amend June 17, 2019 Order (Doc. 741). "Memorandum" refers to the Memorandum in Support of State Defendants' Motion to Alter or Amend June 17, 2019 Order (Doc. 743). "Opposition" refers to the Settlement Class Memorandum of Law in Opposition to State of Minnesota and Minnesota Department of Human Services Motion [] to Alter or Amend June 17, 2019 Order []" (Doc. 751).

fact, including where action is taken against a party without notice and an opportunity to be heard. Doc. 743, pp. 14-16. Plaintiffs respond that the Motion is improper under Rule 59(e), and should be treated as a procedurally noncompliant request for reconsideration under Local Rule 7.1(j), because: (1) Rule 59(e) is appropriate only to correct non-substantive, mechanical changes to a judgment; and (2) the June 17, 2019 Order is not appealable. *See* Doc. 751, pp. 4-6. Both arguments are incorrect.

A. Rule 59(E) Authorizes Review Of An Appealable Order's Substance.

The parties appear to agree, as they must under binding Eighth Circuit precedent, that Rule 59(e) motions serve to correct manifest errors of law or fact or to present newly discovered evidence. *See* Doc. 743, pp. 15-16 (Defendants citing *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006), for that proposition); Doc. 751, p. 5 (Plaintiffs citing the same case for the same proposition). But Plaintiffs contrarily argue that "'the practice in this district is to utilize Rule 59(e) motions to address mechanical changes to a judgment, such as correcting a dollar amount that was incorrectly entered, and not to request the [c]ourt to reconsider the substance of a ruling.'" Doc. 751, p. 4 (quoting *Schwarz Pharma, Inc. v. Paddock Labs., Inc.*, Civ. No. 05-832 (ADM/JJG), 2006 WL 3359336, at *1 (D. Minn. Nov. 20, 2006)). While those words do appear in *Schwarz Pharma*, the court in that case went on to note the broader Rule 59(e) standard above, and then allowed the movant to proceed with a substantive Rule 59(e) motion. *Id*. at 2. It did so even though – contrary to the situation here – the movant "raise[d] the same arguments or arguments which could have been raised" before, in that case in connection with the denial of summary judgment. *Id*.

In any event, courts in this district allow substantive Rule 59(e) motions, including many allowed by this Court. *E.g., IBEW Local 98 Pension Fund v. Best Buy Co.*, Civ. No. 11-429 (DWF/FLN), 2012 WL 5199443, at *2 (D. Minn. Oct. 22, 2012) (granting Rule 59(e) motion in part, vacating judgment, and allowing plaintiff to amend complaint); *Automated Telemarketing Servs., Inc. v. Aspect Software, Inc.*, Civ. No. 09-1308 (DWF/FLN), 2011 WL 13104398, at *3 (D. Minn. July 13, 2011) (considering Rule 59(e) argument that jury award was not supported by the evidence at trial); *ProGrowth Bank, Inc. v. Wells Fargo Bank, N.A.*, Civ. No. 07-1577 (DWF/AJB), 2007 WL 4322002, at *2-5 (D. Minn. Dec. 5, 2007) (considering arguments, in a Rule 59(e) motion, that a party did not meet its burden of proof, that movant had newly discovered evidence, and the Court "committed a clear legal error."). In addition, Plaintiff simply does not respond to the cases Defendant cited establishing that a Rule 59(e) motion is appropriate when a party was not afforded notice and an opportunity to be heard. *See* Doc. 743, pp. 16-18. Substantive motions are allowed under Rule 59(e).

B. The June 17, 2019 Order Is Appealable.

Defendants' initial Memorandum explains that the June 17, 2019 order is appealable under 28 U.S.C. § 1292(a) and under the collateral order doctrine. Doc. 743, p. 15. Plaintiffs do not appear to contest the first avenue, nor could they given the extension of the Court's jurisdiction. *See In re Fugazy Exp., Inc.*, 982 F.2d 769, 777 (2d Cir. 1992) ("An order that 'continu[es]' an injunction is one that 'extends the duration of the injunction,' that is, one entered in circumstances where, ''without such order, the injunction would stand dissolved by lapse of the time fixed in the original

order.’’’’) (internal citations omitted); *Sierra Club v. Marsh*, 907 F.2d 210, 213 (1st Cir. 1990) (“to be classified as an ‘order[ ] ... continuing’ an injunction, a ruling must have a direct and demonstrable effect on the duration of a previously-issued injunction. In other words, the later order must extend or prolong the restraint.”).

To the extent Plaintiffs argue the collateral order doctrine does not apply, they are incorrect. As the Eighth Circuit held in response to Plaintiffs’ multiple attempts to dismiss Defendants’ jurisdictional appeal, the collateral order doctrine renders post-judgment orders appealable when “(1) the decision is ‘conclusive’; (2) the decision ‘resolve[s] important questions separate from the merits’; and (3) the decision would otherwise be ‘effectively unreviewable.’” *Jensen v. Minnesota Dep’t of Human Servs.*, 897 F.3d 908, 912 (8th Cir. 2018) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009); *Alpine Glass, Inc. v. Country Mut. Ins. Co.*, 686 F.3d 874, 877 (8th Cir. 2012)). The June 17, 2019 Order would conclusively resolve the important, non-merits question of whether the Court’s jurisdiction will be extended, and there is no other event that would later cause that issue to be appealable. Accordingly, the June 17, 2019 Order is a “judgment” within the meaning of Rule 59(e). Fed. R. Civ. P. 54(a).

Other than simply asserting without explanation that “[t]he Court’s Order is . . . not a final order from which DHS can appeal,” Doc. 751, p. 5 n.3, Plaintiffs only respond by suggesting that the Eighth Circuit, when deciding that the Court could order an extension of jurisdiction as it deems just and equitable, somehow also held that Defendants can never appeal such an order. *Id*. But that holding addresses the standard the Court may apply when evaluating extensions of jurisdiction, not the appealability of a

particular order extending jurisdiction under the applicable standard. The "law of the case" on that subject is the application of the collateral order doctrine discussed above, in which the Eighth Circuit allows post-judgment appeals on important issues like this one due to the absence of any later mechanism for review. *Jensen*, 897 F.3d at 912 (8th Cir. 2018).[2]

II. PLAINTIFFS DO NOT MEANINGFULLY RESPOND TO DEFENDANTS' ARGUMENTS SUPPORTING THE MOTION TO ALTER OR AMEND.

A. Plaintiffs Do Not Rebut That Denial Of Notice And An Opportunity To Be Heard About Whether Jurisdiction Should Be Extended Is A Manifest Error Of Law.

Defendants' Memorandum discusses that parties are constitutionally entitled to notice and an opportunity to be heard before a court takes action to their detriment. Doc. 743, pp. 16-20. The Opposition does not even attempt to rebut this legal principle. *See* Doc. 751, pp. 4-14. The Opposition also does not identify any evidence that Plaintiffs requested an extension of jurisdiction, that Defendants had an opportunity to respond to any concerns raised by Plaintiffs or the consultants prior to the April 16, 2019 Status Conference, that the Court informed Defendants it contemplated an extension of jurisdiction as a result of that conference, or that the Court informed Defendants of the bases supporting an extension of jurisdiction prior to the June 17, 2019 Order. *See id*.

[2] Plaintiffs' position on the appealability of orders extending jurisdiction appears to be based on expediency rather than law. As noted in the Memorandum, Doc. 743, p. 15 n.8, Plaintiffs previously argued Defendants erred by *not* appealing such orders. *See also* Doc. 634, pp. 3 n.5 ("With rare exception, defendants have not appealed nor contested the Court's many orders . . . including orders extending jurisdiction."), 31 ("The Court's Order [regarding jurisdiction], never appealed nor contested by defendants, based on the negotiated settlement agreement, is the law of the case.").

Instead, the Opposition merely copies-and-pastes portions of various orders, sometimes years old, stating as a general matter that the Court has the authority to extend jurisdiction in this case. *Id*. at 7-12. This simply fails to respond to Defendants' argument that a court's general authority to take a particular action does not authorize that action unless parties are given notice and an opportunity to be heard first. *See* Doc. 743, pp. 17-18 (citing, for example, *First Fin. Ins. Co. v. Allstate Interior Demolition Corp*., 193 F.3d 109, 119-20 (2d Cir. 1999) ("while there is no dispute that district courts have the inherent power to grant summary judgment sua sponte, an essential limitation on that power is that it may not be exercised unless the losing party had notice that it had to come forward with all of its evidence and arguments.").

The Opposition also does not respond to Defendants' argument that they are entitled to know "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. 743, pp. 18-19. Defendants are simply trying to understand exactly what they must do in order to end the Court's jurisdiction, and the legal standard by which compliance will be judged. Without knowing the standard the Court is using *before* being asked to meet that standard, Defendants do not have required notice or a meaningful opportunity to be heard. *See, e.g., Gray Panthers v. Schweiker*, 652 F.2d 146, 168–69 (D.C. Cir. 1980) ("Without notice of the specific reasons for denial, a claimant is reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument against denial at the risk of missing the critical one altogether."); *Rodriguez v. Astrue*, No. CV 12-272 ACT,

2013 WL 12329109, at *9 (D.N.M. Sept. 12, 2013) ("Here, the due process requirements required for discontinuation of Social Security benefits were not satisfied . . . Although Plaintiff received notice of a hearing before an administrative law judge, the notice contained a regulatory and legal standard that differed from the regulatory and legal standard the ALJ ultimately used in making his determination.").[3] Based on these manifest errors of law, Defendants' motion should be granted.

B. Plaintiffs Do Not Even Attempt To Rebut That The June 17, 2019 Rests On Manifest Errors Of Fact.

Defendants' Memorandum extensively explains and documents that, contrary to the June 17, 2019 Order, the Summary Report contains the required and agreed-upon verification relating to prohibited techniques and training (Doc. 743, pp. 5-7, 9-12, 21, 23-25), and that there is no factual basis for the conclusion that the Settlement Agreement's provisions relating to restraint and treatment homes are ambiguous. *Id*. at 7-9, 12-13 It also notes that Defendants could have responded to the Court's concerns with additional argument and evidence prior to an extension of jurisdiction, had Defendants received the opportunity to do so. *Id*. at 25-26.

[3] The Court's reason for declining to address the legal standard is that "[u]ntil an enforcement proceeding is initiated [by Plaintiffs], it is premature for this Court to address the meaning of 'substantial compliance.'" Doc. 737, p. 37. The problem is that the Court continues to extend jurisdiction and express uncertainty about compliance in the absence of an enforcement proceeding from Plaintiffs (or identification of any evidence of noncompliance). Indeed, Plaintiffs explicitly (and inappropriately, *see* Doc. 743, pp. 19-20 & n.11) disclaim any responsibility to present evidence of noncompliance, instead asking the Court to search for such evidence by holding a hearing and re-engaging a court monitor. Defendants are entitled to know what standard the Court is using or will use regarding compliance and jurisdiction extensions.

The Opposition does not even try to rebut these arguments; it instead simply recites the findings Defendants claim are incorrect (Doc. 751, pp. 1-3), and recycles the same often years-old orders and arguments Plaintiffs rely upon to hide their inability to produce any evidence of present noncompliance. *Id*. at 3 n.3, 7 n.4, 7-8, 8-10 n. 6, 10, 12 n.7, 12-13. It is clear that Plaintiffs have no evidence of noncompliance, no evidence or argument supporting that the Summary Report contains deficient verification, and no response to Defendants' explanations that the plain language of the Settlement Agreement and CPA are consistent with Defendants' compliance reporting related to prohibited techniques and treatment homes. Defendants' motion should be granted for this reason as well.

CONCLUSION

In light of the foregoing, Defendants' Motion should be granted.

Dated: August 15, 2019.

Respectfully submitted,

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