STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

CASE NO. 217-2020-CV-00026

DAVID MEEHAN

v.

STATE OF NEW HAMPSHIRE,
DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.

(IN RE YDC and YDSU CONSOLIDATED LITIGATION)

REPLY TO STATE DEFENDANTS' PARTIAL OBJECTION TO PLAINTIFFS' MOTION TO SET INITIAL TRIAL DATES

Plaintiffs,[1] by and through counsel Rilee & Associates, P.L.L.C. and Nixon Peabody LLP, hereby submit this response to the State Defendants' Partial Objection to Plaintiffs' Motion to Set Initial Trial Dates:

Trial Date for David Meehan

1. Part I, Article 14, guarantees, *inter alia*, a right to "prompt justice, without delay." Article 14 is "an important substantive right," and its infringement by government is subject to intermediate scrutiny with the burden of proof on the government. *Petition of DCYF*, No. 2021-0563 (N.H. Supreme Ct. Feb. 8, 2023) (citing *Cmty. Res. for Justice v. City of Manchester*, 154 N.H. 748, 758 (2007)).

2. The Court is requested to schedule Meehan's trial date for March 2024, 13 months hence. Meehan's complaint was filed in January 2020. His case will be over four (4) years old by March of next year.

[1] For purposes of this reply, "Plaintiffs" means all Plaintiffs in this consolidated litigation represented by Rilee & Associates, P.L.L.C. and Nixon Peabody LLP.

3. At the hearing, the Court indicated that a March 2024 date was feasible, but wanted to hear from the State in writing.

4. The State has since agreed that Meehan's trial date should be set but asks for a date in June 2024. The State, without elaboration, suggests in justification of the delay that much discovery remains, the Court has yet to rule on its motions to dismiss the Master Complaint, and no motions have been filed on the short form complaints.[2]

5. None of the State's reasons support further delay. The only "delay" attributable to discovery is the State's refusal to comply with Plaintiffs' document requests, issued over a year ago. Plaintiffs have moved to compel (*see Meehan* Index No. 250), and that issue will no doubt be resolved shortly. As to Meehan's reciprocal obligations, he has already made initial disclosures and produced his medical and therapy records – he has little else to disclose.

6. The Court's generalized rulings on the Master Complaint should have no bearing on a March 2024 trial date. As to the short form complaints, Meehan's invocation of the discovery rule has already been upheld by Judge Kissinger in ruling on the State's prior motion to dismiss. In addition, the Supreme Court's decision construing the RSA 508 tolling provisions and sovereign immunity in *Petition of DCYF* earlier this month paved an even smoother path to trial for Meehan.

7. The State's request for a June 2024 trial date instead of March 2024 (four years and two months after Meehan's complaint was filed) does not rise to the level of gravity and materiality to outweigh Meehan's "important substantive" constitutional right to as prompt a trial as

[2] The State refers to the suggested date as an "aspirational trial date." Undersigned counsel once used the term "aspirational date" with Judge Joseph A. DiClerico, who replied: "It is <u>the</u> trial date. There is no such thing as an 'aspirational court order,' and me setting the trial date is an order. If there is compelling reason to change the date based on the usual criteria, I may consider changing it for good cause. Otherwise, plan to pick a jury that day."

reasonably possible. He has waited a very long time for justice and asks the Court to confirm a March 2024 trial date.

Consolidation for Trials

8. State Defendants seek to overcome Plaintiffs' "prompt justice, without delay" rights under Article 14 by hypothesizing that "[c]onsolidated cases for trial will risk confusing the jury with both overlapping and non-overlapping evidence and with difficult limiting instructions." State's Partial Objection at ¶7.

9. The State's speculation comes up short. Joint trials are routine and endorsed by courts across the nation, starting with the U.S. Supreme Court. In *Richardson v. Marsh*, 481 U.S. 200 (1987), for example, the Court noted that joint trials – even those involving a dozen or more joined parties – are often "essential" and play a "vital role" in the efficiency and fairness of the justice system. *Id.* at 209-210. Courts nationwide successfully employ careful limiting instructions to ensure individualized consideration of evidence in joint trials every day, validating "the almost invariable assumption of the law that jurors follow their instructions." *Id.*

10. It is noteworthy that *Richardson*, like so many cases, endorses liberal use of joint trials in cases involving criminal defendants, who – unlike civil litigants – enjoy fundamental 5th and 6th Amendment rights. Here, the only constitutional right at stake is Plaintiffs' right to prompt justice under Part 1, Article 14.

In New Hampshire:

> A motion to consolidate is addressed to the trial court's discretion and presents no issue of law for the Supreme Court. The motion will generally be granted if the cases involved common issues of material fact or if they turn on the same principles of law, and the court can see that the trial of [the] cases will be simplified and shortened by [consolidation] …

Gordon J. MacDonald, *Wiebusch on New Hampshire Civil Practice and Procedure* § 41 (4th Ed. Matthew Bender & Co.) (2022). *See also id.* at § 41.03 n.1. (noting that "the court has suggested that, in some cases, a state constitutional right to an order of consolidation may exist," citing Part I, Article 14 and cases). Because reported caselaw on consolidation in New Hampshire courts is spare, the developed federal law is helpful. The U.S. Court of Appeals for the First Circuit, for instance, states:

> The threshold issue is whether the [joined] proceedings involve a common party *and* common issues of fact or law. Once this determination is made, the trial court has broad discretion in weighing the costs and benefits of consolidation to decide whether that procedure is appropriate. A motion for consolidation will usually be granted unless the party opposing can show demonstrable prejudice.

Seguro de Servicio de Salud de Puerto Rico v. McAuto Systems Group, Inc., 878 F.2d 5, 8 (1st Cir. 1989) (emphasis in original; internal quotation marks and citations omitted).

11. In their Motion, Plaintiffs set out a plan to join additional plaintiffs in the Meehan trial, and a plan for successive joint trials thereafter. The plan would increase the number of plaintiffs accorded "prompt justice" rights from five to approximately 25-30 plaintiffs in a relatively short period. The Court has aptly noted that, if the cases proceed one at a time with individual juries, the Plaintiffs might be denied justice for decades. Accordingly, the constitution requires some creative thinking in delivering justice in a much shorter time.

12. The Court has already found in issuing the initial consolidation order that there are numerous substantial common issues of law. The common issues of law will be clarified in the Court's ruling on the Master Complaint before long.

13. There are also substantial common issues of fact shared among the Plaintiffs identified as joint trial participants, especially when organized along the lines of common time

periods, common policies and procedures, common facilities, and common abusers, many of whom conspired together to jointly abuse multiple Plaintiffs. It was this organizing principle that led to Plaintiffs' original proposal that certain other specified plaintiffs be part of the "first wave" of trials along with Meehan.

14. Plaintiffs recognize, however, that they are not in an ideal position to present those common issues of fact at this time because the State has delayed and refused to produce discovery in a timely manner. For instance, Plaintiffs have sought discovery of the policies governing the Sununu Center for the last 50 years, including the period of approximately 1996-2000, when Meehan (and his proposed joint Plaintiffs) were detained there. The existence of those policies, and evidence that they were routinely flouted or ignored, is a substantial common fact that, if proved, with causation and damages, practically establishes liability and endows the common plaintiffs with a right to recovery.

15. Unfortunately, through no fault of their own, Plaintiffs are hampered in making that common fact argument because the State has not yet produced (or at least not identified) its policies. Examples of common fact issues could be multiplied, but without the discovery, Plaintiffs are prejudiced in putting forth their best arguments supporting their request for joint trials under Article 14.

16. Accordingly, Plaintiffs propose that the Court's decision on joint trials be postponed for a brief period until:

- The Court issues its ruling on the Master Complaint, clarifying the common issues of law;
- The State provides the policy and procedure discovery Plaintiffs first requested more than a year ago; and

- The State provides additional requested discovery in a timely fashion that, Plaintiffs allege, will demonstrate additional common issues of fact, and the interlocking and overlapping nature of so much of the evidence.

17. To that end, Plaintiffs request that the Court set a hearing later this year to address the pending motion for consolidation. The Court is further requested to allow the parties to submit a memorandum summarizing their respective positions a week or so before that hearing.[3]

18. The State makes a final argument that the close of trial order should reflect a "bellwether" approach. Plaintiffs disagree. First, the Plaintiffs have a constitutional right to a prompt trial. They are free to waive that right, but none have, and are deferring only to their counsel on timing decisions. Additionally, the bellwether concept is not a concept consistent with that important constitutional right. Finally, the State has already set up its own "settlement" process, assigning what it considers effective values to certain harms. That process is already teaching the State and Plaintiffs about the valuation of the cases. Accordingly, the parties already have a market-style mechanism to inform their settlement decisions. A bellwether approach involving a multiplicity of juries is unlikely to add much reliable and broadly applicable information to the calculus that the ongoing settlement process does not already provide.

WHEREFORE, the Court is requested to:

A. Set trial for David Meehan in March 2024;

B. Defer ruling on the trial consolidation motion until after ruling on the Master Complaint and after the State provides overdue and soon-to-be due discovery to clarify the common issues of fact;

C. Schedule a hearing on consolidation, with memoranda submitted in advance, for sometime this summer, after the record on common issues of law and fact is better developed; and

[3] The Plaintiffs agree with the State that the initial joint trials should involve only State-facility abuse, not State contractors. None of the joint participants proposed by Plaintiffs in their motion involve contractors.

D. Such other relief as may be just and proper.

Respectfully submitted,

PLAINTIFFS

Dated: February 23, 2023

By and through counsel,

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CERTIFICATE OF SERVICE

I certify that on February 23, 2023, I am sending a copy of this document as required by the rules of the court. I am electronically sending this document through the court's e-filing system to all attorneys and to all other parties who have entered electronic service contacts (e-mail addresses) in this case.

/s/ David A. Vicinanzo
David A. Vicinanzo, Esq.