IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

M.D., by her next friend, Sarah R. Stukenberg, *et al.*,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. 2:11-CV-00084
GREG ABBOTT, in his official capacity as Governor of the State of Texas, et al.,	§	
Defendants.	§	

DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION TO SHOW CAUSE

Defendants Greg Abbott, in his official capacity as Governor of the State of Texas, Courtney N. Phillips, in her official capacity as Executive Commissioner of the Health and Human Services Commission of the State of Texas[1], and Jaime Masters, in her official capacity as Commissioner of the Department of Family and Protective Services of the State of Texas ("Defendants"), hereby file this Response in Opposition to Plaintiffs' Motion to Show Cause filed July 2, 2020 ("the Motion") [ECF 901].

The extraordinary remedy of contempt is one that should be reserved for the most recalcitrant party who refuses to change its behavior in response to a court's order. But a court should not turn to contempt as the first option whenever a party shows the slightest hint of imperfection in its performance. If that were true, institutional reform litigation that resulted in a judicial decree would require parties to immediately implement massive systemic changes in a court's order on the first day it is effective or risk contempt. That cannot be the case, especially

[1] In February 2020, Courtney N. Phillips resigned as Executive Commissioner of HHSC. HHSC's Acting Executive Commissioner is Phil Wilson.

when a party is taking good faith efforts to conform its behavior and meet the compliance obligations set forth in a court order.

Defendants' efforts since the Court's modified injunction became effective demonstrate that they are far from disobedient; instead, Defendants have taken tremendous strides to meet the compliance requirements of the Court's modified injunction, and their reasonable diligence is evidenced in this brief and the evidence referred to herein. Despite Defendants' efforts, Plaintiffs allege that Defendants should be held in contempt for failure to comply with certain provisions of this Court's modified injunction. Plaintiffs' arguments are based solely on the First Court Monitors' Report filed on June 16, 2020 [ECF 869]. But Plaintiffs' reliance on the Report is misplaced given that it offers an incomplete picture of the efforts Defendants have made to comply. As explained herein in detail, Plaintiffs have not met their burden to establish the elements of contempt. Moreover, the evidence supports that Defendants should not be held in contempt because they have exerted reasonable diligence in a good faith effort to comply with the Remedial Orders set out in the Court's November 20, 2018 Order [ECF 606], and Defendants respectfully request the Court deny Plaintiffs' motion and find that Defendants should not be held in contempt.

LEGAL STANDARD

Plaintiffs seek to hold Defendants in civil contempt, which "is coercive rather than punitive and is intended to force a recalcitrant party to comply with a command of the court." *Whitfield v. Pennington*, 832 F.2d 909, 913 (5th Cir. 1987). While federal courts "have the inherent power" to punish contempt, such powers "must be exercised with restraint and discretion" as they are "shielded from direct democratic controls." *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013) (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980)). "A court may hold a party in civil contempt only if…'the defendant has not been reasonably diligent

and energetic in attempting to accomplish what was ordered.'" *Drywall Tapers, Local 1974 v. Local 530*, 889 F.2d 389, 394 (2nd Cir. 1989) (quoting *Powell v. Ward*, 643 F.2d 924, 931 (2nd Cir. 1981)).

The elements for civil contempt are simple: (1) a court order is in effect; (2) that required certain conduct by a party; and (3) that party failed to comply with the order. *See, e.g., In re Bradley*, 588 F.3d 254, 264 (5th Cir. 2009). Plaintiffs bear the burden of proof to establish these elements by clear and convincing evidence. *Sundown Energy, L.P. v. Haller*, 773 F.3d 606, 615 (5th Cir. 2014); *Whitcraft v. Brown*, 570 F.3d 268, 271 (5th Cir. 2009); *see also Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 581 (5th Cir. 2000); *Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392, 401 (5th Cir. 1987). "Clear and convincing evidence is that weight of proof which produces in the mind of the trier of fact a firm belief or conviction ... so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of precise facts of the case." *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013) (quoting *Shafer v. Army & Air Force Exch. Serv.*, 376 F.3d 386, 396 (5th Cir.2004)).

If the elements of contempt are met, the burden shifts to the defendant "to rebut this conclusion, demonstrate an inability to comply, or present other relevant defenses.' *FDIC v. LeGrand*, 43 F.3d 163, 170 (5th Cir. 1995); *see also Whitfield v. Pennington*, 832 F.2d 909, 914 (5th Cir. 1987) (holding that the defendant may "show either mitigating circumstances that might cause the district court to withhold the exercise of its contempt power, or substantial compliance with the [] order.").

"Failure to comply consists of not taking 'all the reasonable steps within [one's] power to insure compliance with the order.'" *Dynamic Sports Nutrition, Inc. v. Roberts*, No. CV H-08-1929,

2009 WL 10711815, at *2 (S.D. Tex. July 14, 2009) (quoting *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 406 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977)). Where a party demonstrates "that it has substantially complied with the order, or has made every reasonable effort to comply," then it may defeat a claim of contempt. *Mendoza v. Regis Corp.*, No. SA01CA0937FB(NN), 2005 WL 1950118, at *3 (W.D. Tex. Aug. 11, 2005) (citing *U.S. Steel Corp. v. United Mine Workers of Am., Dist. 20*, 598 F.2d 363, 368 (5th Cir.1979); and *Vertex Distrib. Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 891 (9th Cir.1985)).

Substantial compliance occurs when the defendant has made in good faith all reasonable efforts to comply. *See United States v. Rizzo*, 539 F.2d 458, 465 (5th Cir. 1976). Substantial compliance is not determined in absolute terms; instead, it requires the responding party to show that it took "all reasonable steps within [its] power to comply" with the order at issue. *Fed. Trade Comm'n v. Hold Billing Servs., Ltd.*, No. SA98CA0629FBHJB, 2014 WL 12873039, at *19 (W.D. Tex. Apr. 4, 2014) (quoting *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 9–10 (D.D.C. 1999)); *Dynamic Sports Nutrition, Inc. v. Roberts*, No. CV H-08-1929, 2009 WL 10711815, at *2 (S.D. Tex. July 14, 2009) (holding that "[f]ailure to comply consists of not taking 'all the reasonable steps within [one's] power to insure compliance with the order.'") (quoting *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 406 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977)).

"Like 'reasonableness,' 'substantiality' must depend on the circumstances of each case, including the nature of the interest at stake and the degree to which non-compliance affects that interest." *Fed. Trade Comm'n*, 2014 WL 12873039, at *19 (W.D. Tex. Apr. 4, 2014) (quoting *Palmigiano v. DiPrete*, 700 F. Supp. 1180, 1191 (D.R.I. 1988)). A defendant who demonstrates "that they employed, in good faith, the utmost diligence in discharging their responsibilities" should not be held in contempt. *See Ruiz v. McCotter*, 661 F. Supp. 112, 117 (S.D. Tex. 1986); *see*

also Howard Johnson Co. v. Khimani, 892 F.2d 1512, 1516 (11th Cir. 1990) ("Conduct that evinces substantial, but not complete, compliance with the court order may be excused if it was made as part of a good faith effort at compliance.").

Additionally, "a present inability to comply with the order may be asserted as a defense to contempt." *In re Brown*, 511 B.R. at 849 (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983)).

As described below and supported by the evidence attached hereto, Plaintiffs have not satisfied their burden to establish each element of contempt by clear and convincing evidence. Alternatively, Defendants have substantially complied with the Remedial Orders outlined in the Motion. Therefore, Defendants request that the Court deny the Motion and decline to hold Defendants in contempt.

ARGUMENT AND AUTHORITIES

As an initial matter, Defendants note that they have filed objections to the Report, the sole source of information for the allegations set out in the Motion. *See* Defendants' Verified Objections to Monitors' Report [ECF 903] (the "Objections"). The Objections raise fundamental shortcomings of the Report, including: the failure to identify the requirements, methodology, or criteria against which the Monitors measured Defendants' actions; the failure to state, with respect to each Remedial Order addressed in the Report, whether Defendants are in compliance with or otherwise meet the requirements of the Remedial Orders; the lack of transparency regarding the methodologies employed by the Monitors and the validation efforts used to evaluate compliance with the Remedial Orders; the failure to apply a consistent or reasonable time period to the verification data used to substantiate the Monitors' findings; and the unexplained inconsistency in reliance upon objective data and subjective interviews throughout the Report. *See* Objections at

¶¶ 1-6. Defendants assert that these objections should be sustained and, as a result, the Motion should be denied because it is based on incomplete and potentially inaccurate information.

Additionally, Plaintiffs have failed to establish by clear and convincing evidence each required element for contempt. The elements for civil contempt are: (1) a court order is in effect; (2) that required certain conduct by a party; and (3) that party failed to comply with the order. *See, e.g., In re Bradley*, 588 F.3d 254, 264 (5th Cir. 2009). Here, the Motion fails to show sufficient evidence of the third element for each Remedial Order discussed herein because it solely relies on data pulled from the Report which, as discussed above and described below in more detail, is incomplete, unreasonably limited, or otherwise unreliable. Therefore, Plaintiffs have not showed the elements of contempt sufficient to shift the burden to Defendants to rebut those claims, and the Motion should be denied.

Subject to the faults with the Report outlined above, and to the extent the Court is inclined to consider the substantive merits of the Motion, the evidence also supports that with respect to each of the Remedial Orders set out in the Motion, Defendants have substantially complied with these provisions or have otherwise made every reasonable effort to comply and, therefore, should not be held in contempt. As set out herein, Defendants have made good faith efforts to comply in accordance with the timeframes required by the Court, regularly accelerating ordinary business practices beyond what is recommended by leading experts on implementation science.[2]

[2] The National Implementation Research Network (NIRN), a leading expert on implementation science especially as it applies to child welfare, has found that implementation of lasting change requires two to four years and is best accomplished in iterative phases and with clear goals and performance measures. Without this, research indicates even the best operational changes will not be effective or sustainable. *See* https://nirn fpg.unc.edu/sites/nirn fpg.unc.edu/files/resources/NIRN-Briefs-1-ActiveImplementationPracticeAndScience-10-05-2016.pdf and https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1301&context=tfr.

I. DFPS Should Not Be Held in Contempt for Remedial Order No. 3

In their Motion, Plaintiffs point to two components of the First Court Monitors' Report 2020 ("the Report") [ECF 869] to support their claim that DFPS should be held in contempt. The first concerns the Monitors' unreasonably restricted screening sample of Statewide Intake reports from July 31, 2019, through October 31, 2019, which the Monitors used to evaluate DFPS' current compliance with Remedial Order No. 3. The second concerns whether DFPS applies the proper standards to investigations of children in foster care, where both the Report and the Motion rely on incorrect provisions of the Texas Administrative Code. As detailed below, neither component justifies holding DFPS in contempt for failing to comply with Remedial Order No. 3.

A. Screening

DFPS receives reports of child abuse, neglect, and exploitation through its Statewide Intake Contact Center (Statewide Intake), and those reports are reviewed, assessed, and entered into the Information Management Protecting Adults and Children in Texas (IMPACT) case management system that DFPS programs use to document activity and events in a case. *See* Declaration of Ashland Batiste, attached hereto as Exhibit A, at ¶ 5. Following that assessment, reports that meet the definition of abuse, neglect, or exploitation that Residential Child Care Investigations (RCCI) is authorized to investigate[3] are assigned a priority based on Statewide Intake policies and guidance. *See* Exhibit A (Batiste Declaration), at ¶ 6. Those reports are then assessed by RCCI to determine the correct priority based on considerations outlined in Section 6222 of the Child Care Investigations Handbook. *See* Exhibit A (Batiste Declaration), at ¶ 7. There are three potential priorities that a report may be designated: Priority 1, meaning there is the death of a child or an

[3] RCCI is responsible for the investigation of allegations of abuse, neglect, and exploitation of children and youth in 24-hour residential child care in Texas that is subject to regulation by the Texas Health and Human Services Commission (HHSC) Residential Child Care Licensing. This includes investigations of allegations in general residential operations, which include residential treatment centers and emergency shelters, and child placing agencies, which include foster homes. *See* Declaration of Ashland Batiste, attached hereto as Exhibit A, at ¶ 4.

immediate risk of threat of serious physical or emotional harm or death of a child caused by abuse or neglect; Priority 2, meaning the child is currently safe, or the child is not at immediate risk of serious physical or emotional harm as a result of the abuse or neglect; and Priority None (PN), which is a downgrade or closure made by a supervisor or designee when the information in the report: (1) suggests that a minimum standard was violated, but not that a child was abused or neglected; or (2) indicates that there is some risk to children, but the information is too vague to determine that a child was abused or neglected. *See id.* A supervisor or designee may also close an intake report without assigning it for investigation if the information in the report clearly reflects that there is no alleged abuse or neglect or violation of law or minimum standards to investigate, clearly reflects that another DFPS division, state agency, or law enforcement has investigative jurisdiction, or the allegation has already been investigated in a closed investigation. *See id*.

In evaluating Defendants' compliance with Remedial Order No. 3, the Monitors chose 329 out of 590 Statewide Intake reports made between July 31, 2019, and October 31, 2019. *See* Report at p. 72. For reasons not explained in the Report, the Monitors chose to use only a sample of reports from July 31 through October 31, 2019 ignoring all information provided from October 31, 2019 through the submission to the Monitors on May 15, 2020, prior to the release of the First Monitor Report. *See* Report at 68; *See* Exhibit A (Batiste Declaration), at ¶ 27. Neither the Report nor the Motion offer any explanation as to why this minimal review was conducted nor how it is sufficient to show Defendants are currently in contempt, more than nine months after the most current data referenced in the Report.

The Report's application of an unreasonably restrictive sample fails to acknowledge or account for the ample evidence that DFPS acted in good faith and with great diligence in ensuring

the intake screening process is sound, including taking proactive steps to make it even more effective. Examples of these actions include:

- Establishing prioritization guidelines to promote consistency in determining a finding of PN may be appropriate. *See* Exhibit A (Batiste Declaration), at ¶¶ 10, 15.
- Centralizing the prioritization function into a screening unit in that was initially created in August 2019 and staffed and operational by February 2020 to assess Priority 1 and 2 intakes received by Statewide Intake for final priority and providing CPS caseworker and supervisor notifications as they process intakes in IMPACT 2.0. *See* Exhibit A (Batiste Declaration), at ¶¶ 17, 39.
- Implementing assessment of the screening unit by a Quality Assurance unit that conducts two monthly case reads, one of which address PN screening decisions. A quarterly report regarding the assessment of PN screening decisions will be completed in July 2020. RCCI will use the reports of the Quality Assurance Team to identify gaps and further improve policy and practice and provide further training based on any identified needs. *See* Exhibit A (Batiste Declaration), at ¶¶ 17, 47.
- Creating and revising the handbook used by the screening unit to incorporate clarifications and align current practice with policy. These revisions were completed on July 15, 2020, and members of the screening unit will be trained on those revisions by August 1, 2020. *See* Exhibit A (Batiste Declaration), at ¶ 55.

Objective data confirms that DFPS's significant efforts are yielding positive results. While the Report focuses on the Monitors' opinions regarding a small subset of intakes, an analysis of the RCCI intakes reports provided to the Monitors shows the rate of RCCI intakes downgraded to

a PN declined from 48% in August 2019 to 20% in June 2020. *See* Exhibit A (Batiste Declaration), at ¶ 63.

B. Investigations

The Motion contends that DFPS ignores state investigation standards both in whether investigations are conducted and how they take place. However, Plaintiffs are mistaken, as their Motion, like the Report, cites statutes and regulations that are not applicable to the abuse and neglect investigations discussed in the Report. Specifically, the Report purports to apply the requirements of 40 TEX. ADMIN. CODE §700.507 (e)(1)(A)-(C)[4] to Child Care Investigations (CCI), when by its plain language, that chapter applies to Child Protective Services. Moreover, § 700.507 covers a variety of different investigative responses, only one of which is addressed in (e) and, therefore, acknowledged by the Report.

Since 2017, reorganization within Defendants' structures and allocation of responsibilities as set out by the Texas Legislature have also resulted in revision of DFPS's investigative rules. For example, in compliance with state statute, DFPS has adopted consistent definitions applicable to abuse and neglect allegations to be used across its programs. *See, inter alia,* TEX. HUMAN RES. CODE § 40.042(b). These changes were implemented first in policy and field communications dated October 1, 2019, and were included in the agency's publicly adopted rules, which were proposed on March 6, 2020, in 45 Tex. Reg. 1613 et seq. and which were adopted effective July 15, 2020. *See* Exhibit A (Batiste Declaration), at ¶¶ 23, 59.

Additionally, DFPS has prepared training materials that will be rolled out in the coming months to continue reinforcing the policies and procedures in place related to abuse and neglect investigations. These activities include:

[4] As of July 15, 2020, the content of former §700.507 is found in 40 TEX. ADMIN. CODE § 707.489. While the rule language was updated, the substance of subsection (e) remains materially identical to former § 700.507.

- A breach of duty webinar that will roll out in August 2020 and provide an overview of the law, rules, and elements of abuse and neglect as they relate to breach of duty as a child-care provider. *See* Exhibit A (Batiste Declaration), ¶ 65.
- Approximately 12 hours of advanced abuse and neglect virtual training for all Residential Child Care Investigations (RCCI) staff rolling out in September 2020 that will cover: understanding and using person and operation history and systemic or ongoing deficiencies in an abuse and neglect investigation; physical abuse laws, rules, and definitions; how to obtain corroborating evidence from interviews and other interviewing techniques and skills; sexual abuse investigations; addressing injuries, whether accidental or intentionally inflicted, and abusive head trauma; restraint investigation protocol and evaluating for Neglectful Supervision or Physical Abuse; and conducting a neglectful supervision case study. *See* Exhibit A (Batiste Declaration), at ¶ 62.

In collaboration with Data and Systems Improvement, RCCI is developing an overall quality improvement process. *See* Exhibit A (Batiste Declaration), at ¶ 35. The Regional Improvement Specialist is currently working to develop the RCCI model that promotes safety decision-making. This consists of two levels: (1) is the child in this case safe; and (2) are supervisors in the aggregate making good decisions. *See id.* Along with the Quality Assurance unit's case reads for closed abuse and neglect investigations, which began in April 2020 and will be the subject of quarterly reports beginning in August 2020, DFPS will continue to demonstrate its reasonable and good faith efforts to comply with Remedial Order No. 3. *See* Exhibit A (Batiste Declaration), at ¶ 47.

DFPS has also taken steps to ensure that investigations are promptly completed. For example, as of June 2020, the number of case-carrying staff, which includes four positions related to heightened monitoring under Remedial Order No. 20, increased by 51% since September 2017. *See* Exhibit A (Batiste Declaration), at ¶ 53. Additionally, between December 2019 and April 2020, DFPS reduced RCCI caseworkers from an average investigation load of 19.9 to just 9.7. *See* Exhibit A (Batiste Declaration), at ¶ 49. DFPS also significantly reduced the backlog of investigations from 765 in January 2020 to 265 in June 2020, a 65% reduction. *See* Exhibit A (Batiste Declaration), at ¶ 52. By creating new functionality in IMPACT, DFPS is better positioned to collect data and report on the timeliness of abuse and neglect investigations. *See* Exhibit A (Batiste Declaration), as Exhibit A, at ¶ 32. DFPS will continue strengthening its caseload management practices through the Caseload Management Initiative, which was launched on June 1, 2020. *See* Exhibit A (Batiste Declaration), at ¶ 48.

The Motion also requests that RCCI investigators be trained to make determinations "using the same standards applied by CPS investigators" (referred to herein as CPI). While the Legislature has instructed DFPS to ensure consistency across investigations, applying the same standards to abuse, neglect, and exploitation of CPS investigators to RCCI investigators who investigate caregivers who are trained and regularly compensated to care for non-familial children overlooks the fact that the standards for caregivers in regulated settings generally should not be the same as those applied to a family in their own home. *See, e.g.* TEX. FAM. CODE § 261.001(1)(C) (excluding reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm from definition of physical abuse).

Similarly, the Motion seems to misapprehend the character of investigative information related to CPI determinations. Specifically, the Motions requests that these "determinations be

made publicly available to increase transparency, consistent with practices now used for [CPI] determinations." While DFPS investigative divisions have aggregate data that is made publicly available, the Motion points to no particular source of publicly available CPI dispositions. Indeed, this information is generally confidential by law, save for specific instances related to child fatalities determined to be caused by abuse or neglect. *See* TEX. FAM. CODE §§261.201, 261.203. However, some investigation-related data is already publicly available, including: Completed Residential Child Care Abuse/Neglect Investigations, broken down by DFPS region, county, fiscal year, operation type, and whether the allegation was validated; Completed Residential Child Care Abuse/Neglect Investigations, broken down by DFPS region, county, fiscal year, allegation type, allegation disposition, and operation type; Completed Residential Child Care Abuse/Neglect Investigations, broken down by DFPS region, county, fiscal year, priority, response timely, and operation type; and Residential Child Care Investigations: Abuse/Neglect Intakes that were Screened Out, broken down by DFPS region, county, and fiscal year. *See* Exhibit A (Batiste Declaration), ¶ 64.

As detailed above, DFPS has undertaken reasonable efforts in a good faith effort to comply with Remedial Order No. 3. By these actions and illustrated by the detailed evidence supporting this Response, DFPS has shown reasonable diligence and, therefore, should not be held in contempt and the relief sought by the Motion related to Remedial Order No. 3 should be denied.

II. DFPS Should Not Be Held in Contempt for Remedial Order Nos. 5 and 7

The Motion alleges that DFPS should be held in contempt for failing to comply with Remedial Order Nos. 5 and 7 because, according to the Report, Priority One investigations are timely initiated in only 68% of cases. However, DFPS has been reasonably diligent in making a good faith effort to comply with the requirements of Remedial Order Nos. 5 and 7. As the Motion acknowledges, the Report did not find in the remaining cases that DFPS failed to timely initiate a

Priority One investigation; rather, the Report found that one case had a documented approved exception and the remaining 26% lacked documentation to determine whether Priority One investigations were timely initiated. *See* Report at pp. 109, 112. In other words, the Report reflects potential issues with documentation rather than untimely initiation of investigations.

While the Report fails to address them, DFPS has undertaken substantial efforts surrounding initiating Priority One investigations. For example, in February and March 2019, DFSP developed policy and job aids to emphasize the underlying requirements regarding initiating investigations with face-to-face contact, defining exceptions to that requirement, and clarifying how to get approval for an exception, and shared this information with staff through a field communication. *See* Exhibit A (Batiste Declaration), at ¶¶ 8-9. Additionally, between February and May 2019, DFPS conducted training regarding initiating investigations. *See* Exhibit A (Batiste Declaration), at ¶ 11. DFPS developed a case reading program, completed in October 2019, that completes quarterly case reads of investigations to evaluate initiation of investigations as a quality assurance check. *See* Exhibit A (Batiste Declaration), at ¶ 12.

DFPS has taken several steps to address documentation issues, including implementing an IMPACT enhancement in December 2019 that allows documentation of initiations, including face-to-face alleged victim initiations, to be completed in IMPACT while also allowing RCCI staff to request, approve or reject, and document exceptions to face-to-face contact with alleged victims in IMPACT; at the same time, staff received a field communication with instructions regarding these changes. *See* Exhibit A (Batiste Declaration), at ¶¶ 26, 30-33.

DFPS has also created additional positions that add resources to improve timely initiation of investigations. *See* Exhibit A (Batiste Declaration), at ¶ 17. Additionally, DFPS developed a quality assurance tool, completed in October 2019, that assesses the quality of RCCI investigation

initiations. *See* Exhibit A (Batiste Declaration), at ¶ 18. On October 25, 2019, RCCI began case reading; as part of those reads, RCCI determines whether timely face-to-face contact was made to initiate an investigation and, if not, whether an exception was approved. *See* Exhibit A (Batiste Declaration), at ¶ 24. The reports generated from these case reads are shared with the Monitors, along with other reports containing detailed information regarding investigations. *See* Exhibit A (Batiste Declaration), at ¶ 27. Beginning in March 2020, Program Administrators were sent the "Face-to-Face Initiation with Victim" report to ensure staff are appropriately document investigation initiations. *See* Exhibit A (Batiste Declaration), at ¶ 44.

For the reasons described above, DFPS has undertaken reasonable efforts in a good faith effort to comply with Remedial Order Nos. 5 and 7, has shown reasonable diligence, and, therefore, should not be held in contempt.

III. DFPS Should Not Be Held in Contempt for Remedial Order No. 10

The Report concludes that 79% of Priority One and Two investigations are not completed within 30 days, and the Motion seeks to hold DFPS in contempt based on that statistic. However, the actions taken by DFPS demonstrate it has exercised reasonable diligence and taken reasonable efforts in a good faith effort to comply with Remedial Order No. 10.

Specifically, in June 2019, DFPS provided RCCI staff with a field communication and corresponding job aid with detailed instructions on documenting extension requests when an investigation cannot be completed within 30 days. *See* Exhibit A (Batiste Declaration), at ¶ 14. In September 2019, DFPS released RCCI Field Communication #014, with amended policies to require supervisor involvement within ten days of intake instead of 20 and require all investigations be staffed within 25 days of intake, which allow five days to either approve the staffing for completion by the 30-day deadline or obtain an appropriate extension. *See* Exhibit A (Batiste Declaration), ¶ 20. Supervisors also started receiving weekly reports on September 23,

2019, that serve as quick reference tools to track upcoming or overdue deadlines. *See* Exhibit A (Batiste Declaration), at ¶ 21.

Additionally, as a result of DFPS's efforts, the investigation backlog has been reduced by 65%. *See* Exhibit A (Batiste Declaration), ¶ 52. Beginning in March 2020, RCCI Supervisors also receive a weekly extension report that allows them to ensure investigators and supervisors are following DFPS policy. *See* Exhibit A (Batiste Declaration), at ¶ 45.

DFPS has undertaken reasonable efforts in a good faith effort to comply with Remedial Order No. 10 and continues to see improvement in resolving the backlog of cases. Therefore, DFPS should not be held in contempt related to Remedial Order No. 10.

IV. DFPS Should Not Be Held in Contempt for Remedial Order No. B-5

The Motion seeks to hold DFPS in contempt because the Report found that caseworkers were only be notified of ongoing abuse investigations in 50% of cases. However, the Report acknowledges that it was only considering investigations from December 2019. *See* Report at p. 134-35. It fails to account for the IMPACT enhancement put in place on December 19, 2019, which now generates an alert and automatically notifies the CPS caseworker when a child is involved in an abuse or neglect intake. *See* Exhibit A (Batiste Declaration), at ¶ 32. The intake report from May 2020 indicates that in all intakes, caseworkers received notification of the intake. *See* Exhibit A (Batiste Declaration), at ¶ 57.

DFPS is not in contempt of Remedial Order No. B-5; in fact, DFPS has implemented procedures that, as demonstrated by the evidence attached hereto, establish compliance with Remedial Order No. B-5.

V. DFPS Should Not Be Held in Contempt for Remedial Order No. 37

As the Motion notes, Remedial Order No. 37 requires that DFPS share abuse and neglect referrals with the PMC child's caseworker and the caseworker's supervisor within 48 hours of

DFPS receiving the referral; upon receipt of that information, the caseworker must review the home's referral history, assess whether there are any concerns for the child's safety or well-being, and document that assessment. The Motion seeks to hold DFPS in contempt because the Report found that in 73% of the random sample the Monitors pulled from intakes occurring in December 2019 and January 2020, the notification and home history review and assessment were not completed within 48 hours of intake. However, as detailed below, that is not what is required by Remedial Order No. 37 and cannot, therefore, support a finding of contempt.

As noted in the Objections, the Report incorrectly applies the 48-hour deadline following intake to both the notification and the home history review and assessment in analyzing the random sample pulled by the Monitors. By its plain language, Remedial Order No. 37 requires DFPS to notify the caseworker and the caseworker's supervisor about an abuse or neglect referral on a foster home that is not referred for an abuse or neglect investigation within 48 hours of the intake; upon receipt of that notification, the caseworker then conducts the home history review and assessment. Because the Report applies the wrong standard, its analysis does not support a finding of contempt as to Remedial Order No. 37. Moreover, even if it were possible to achieve, the 48-hour timeframe advocated by the Report would require a significant alteration to the process DFPS has put in place, which allows the caseworker and their supervisor no more than seven days to review the home history report and make an informed decision based on that review. *See* Declaration of Jenny Hinson, attached hereto as Exhibit B, at ¶ 39. In fact, the timeline advocated by the Report would be shorter than the 72-hour deadline to initiate Priority Two investigations that are assigned for investigations.

What the restricted sample size used in the Report fails to acknowledge is that as of July 13, 2020, DFPS has completed 750 home history reviews, which covers intakes requiring a home

history review; these reviews take place for all downgrades related to a foster home with a PMC child, without regard to whether the child is in permanent or temporary conservatorship. *See* Exhibit B (Hinson Declaration), at ¶¶ 6, 38. Under certain circumstances, such as when a foster home is closed and no children reside there or where an alleged incident occurred at a GRO or daycare, a home history review will not be required. *See* Exhibit B (Hinson Declaration), at ¶ 8.

DFPS created a specialized team within CPS to review home histories; this team was first filled with temporary staff beginning in September 2019. *See* Exhibit B (Hinson Declaration), at ¶ 10. This staff immediately went to work, receiving training and beginning to perform home history reviews. *See* Exhibit B (Hinson Declaration), at ¶¶ 13-18. Permanent staff were hired in October 2019, which was the culmination of extraordinary efforts by DFPS. *See* Exhibit B (Hinson Declaration), at ¶¶ 12, 19.

In September 2019, DFPS created a new policy for home history reviews that was published in the CPS Handbook on October 1, 2019. *See* Exhibit B (Hinson Declaration), at ¶¶ 22-24. DFPS also developed a quality assurance process for the home history reviews, which was managed by a staff of eight located within CPS and began performing reviews in December 2019. *See* Exhibit B (Hinson Declaration), at ¶¶ 25-27.

In December 2019, as the result of significant efforts by many people who had to be pulled off other projects and initiatives, DFPS rolled out an IMPACT enhancement that automated notifications when allegations of abuse and neglect were made, as well as a notification when an allegation was downgraded to PN. *See* Exhibit B (Hinson Declaration), at ¶ 28. To ensure staff were knowledgeable about the new processes, DFPS sent out communications and held webinars to disseminate information and training. *See* Exhibit B (Hinson Declaration), at ¶¶ 29-30.

DFPS's work on the home history review process continued into 2020. In January 2020, CPS rolled out tools and templates used in performing quality assurance case reads; the Monitors were provided with updates in January, as well as case read reports in February and May 2020. *See* Exhibit B (Hinson Declaration), at ¶¶ 31-34, 36. In addition to providing the Monitors with home history review records, DFPS also modified the data it produced to the Monitors in response to requests from the Monitors. *See* Exhibit B (Hinson Declaration), at ¶ 35. As DFPS implemented the home history review process swiftly in compliance with the Remedial Orders, it also addressed issues with the process and reporting system as they were identified. *See* Exhibit B (Hinson Declaration), at ¶ 37.

The Report relies on flawed analysis and cannot support a finding of contempt as to Remedial Order No. 37. Moreover, the evidence shows DFPS has undertaken reasonable efforts in a good faith effort to comply with Remedial Order No. 37 and should not, therefore, be held in contempt.

VI. DFPS Should Not Be Held in Contempt for Remedial Order No. 2

The Motion seeks to hold DFPS in contempt for failing to implement graduated caseloads for newly hired caseworkers and relevant staff, citing to the Report's conclusion that 31% of those subject to the requirements of Remedial Order No. 2 had caseloads that exceeded the standard. Specifically, under guidelines established by DFPS, newly hired caseworkers gradually work up to a full caseload over two months; under these guidelines, once a caseworker is eligible for primary case assignment, their caseload for the first month should not exceed one-third of the average caseload for their specific county, and it should not exceed two-thirds of this average for the second month; these figures represent guidelines, not caps, and some deviations were anticipated. *See* Report at p. 162; *See* Declaration of Kaysie Taccetta, attached hereto as Exhibit C, at ¶ 4. However, the Report acknowledges that its conclusions regarding graduated caseloads

are based on incomplete data, as the Monitors claimed they did not receive data permitting them to validate average daily caseloads. Moreover, the Report treats the guidelines as caps, which is contrary to the agreement reached by the parties and approved by the Court in December 2019, discussed below.

On September 30, 2019, the Monitors requested copies of DFPS's graduated caseload guidelines and any related field guidance or directives, along with a monthly data report with caseloads for all staff and a list of employees subject to graduated caseloads. *See* Exhibit C (Taccetta Declaration), at ¶ 5. DFPS began producing this information to the Monitors in November 2019. *See* Exhibit C (Taccetta Declaration), at ¶¶ 6-7.

In December 2019, Plaintiffs and Defendants reached an agreement that in lieu of performing a workload study as required by the Remedial Orders, they would agree to specific caseload guidelines that would be used to satisfy applicable caseload requirements of the Remedial Orders. *See* Agreed Motion Regarding Workload Studies in the November 20, 2018 Order [ECF 771] and corresponding order [ECF 772]. DFPS promptly developed communications and training to implement these caseload guidelines, which involved, in some cases, modifying caseload structures from some areas. *See* Exhibit C (Taccetta Declaration), at ¶ 11. DFPS held mandatory webinars for some staff in February 2020 and communicated with staff regarding the guidelines in February and March 2020, after sharing the guidelines with the Monitors and requesting feedback. *See* Exhibit C (Taccetta Declaration), at ¶¶ 10-11, 13. While these activities were taking place, staff indicated in interviews with the Monitors that when they were first eligible for primary case assignment, they generally received limited caseloads. *See* Exhibit C (Taccetta Declaration), at ¶¶ 12, 17, 20, 22.

Meanwhile, the Monitors continued to receive caseload reports. *See* Exhibit C (Taccetta Declaration), at ¶¶ 9, 14, 18, 21, 23-24. These reports evolved based on requests from the Monitors. *See* Exhibit C (Taccetta Declaration), at ¶¶ 15-16, 19, 23. Since DFPS provided the March 2020 caseload report in May, it has provided the Monitors with specific information regarding the number of days each caseworker is above the graduated caseload guidance. *See* Exhibit C (Taccetta Declaration), at ¶ 23. Additionally, beginning in July 2020, staff were alerted that newly hired caseworkers would be assigned six children as the standard in the first month of eligibility and 12 in the second month; these graduated caseloads are based on the agreed caseload guidelines approved by the Court in December 2019 and, therefore, meet even the more mechanical requirements of Remedial Order No. 2 advanced by the Motion. A written broadcast of this change will be distributed by the end of July 2020. *See* Exhibit C (Taccetta Declaration), at ¶ 25.

DFPS has exercised reasonable diligence in bringing newly hired caseworkers' caseloads within the standards set out in Remedial Order No. 2 and should not, therefore, be held in contempt.

VII. DFPS Should Not Be Held in Contempt for Remedial Order Nos. 24, 28, and 30

Remedial Order Nos. 24, 28, and 30 relate to documentation regarding allegations of sexual abuse involving a PMC child. The Motion seeks to hold DFPS in contempt because, according to the Report, 9% of on-site and IMPACT files did not flag a child as a sexual abuse victim or aggressor and child-on-child allegations did not appear to be properly documented.

Sexual abuse is a serious concern, and one DFPS has taken detailed and prompt action to address even before the Fifth Circuit's July 2019 mandate. In fact, DFPS commenced efforts to address issues surrounding sexual abuse allegations and documentations in 2016, even before the Remedial Orders were issued. In November 2016, DFPS provided CPS conservatorship administrators a lit of children with a characteristic of "sexually acting out" and instructed them to review each child's case to determine whether the child met the definition of sexually aggressive

or sexual behavior problem; DFPS also developed a computer-based training for staff surrounding child sexual aggression issues. *See* Declaration of Carol Self, attached hereto as Exhibit D, at ¶ 3. Then in December 2016, DFPS modified a "sexually acting out" indicator in IMPACT to identify whether the child demonstrated a "sexual behavior problem" or "child sexual aggression," while also updating the Placement Summary form to include information about a child's sexual aggression or sexual behavior issues. *See* Exhibit D (Self Declaration), at ¶ 3.

Between February and March 2017, CPS published a new policy and resource guide requiring documentation of children's sexually aggressive behaviors in the child's case record, placement summary form and common application. *See* Exhibit D (Self Declaration), at ¶ 3. In April 2019, DFPS launched IMPACT 2.0, which replaced the "Child Sexual Aggression" Person Characteristic with a designated "Child Sexual Aggression" page to document a child's history of being sexually aggressive, as well as prefilled information from the new Child Sexual Aggression IMPACT page into the application for placement and Child Plan of Service; staff were notified about these changes by email. *See* Exhibit D (Self Declaration), at ¶¶ 4, 5. Then in August 2019, the Placement Summary form was updated to include a child's sexual victimization history, and DFPS established a new team of CPS case readers to monitor and evaluate whether children's sexual victimization and/or sexual aggression histories were appropriately documented and communicated to the child's caregiver. *See* Exhibit D (Self Declaration), at ¶¶ 4, 6, 8.

On November 1, 2019, DFPS provided the Monitors with a report that included the results of a sample of case reads with a history of sexual victimization, child sexual aggression (CSA) and/or child sexual behavior problem indicator that reviewed whether this information was being documented appropriately and provided to caregivers at placements. *See* Exhibit D (Self

Declaration), at ¶ 11. This report is provided to the Monitors on a quarterly basis. *See* Exhibit D (Self Declaration), at ¶ 11.

In December 2019, the new IMPACT 2.0 Sexual Victimization History page deployed, and the Application for Placement (formerly the Common Application) and Attachment A were populated with information from the Child Sexual Aggression, Sexual Victimization History and Human Trafficking IMPACT pages. *See* Exhibit D (Self Declaration), at ¶ 29. Following the December 2019 IMPACT 2.0 deployment, CPS staff manually entered information into the new Sexual Victimization History page that was previously contained in the Special Handling box, to ensure children's histories were comprehensively documented within the new IMPACT page and that those children who were victims of child sexual aggression would be included in any future data reports. *See* Exhibit D (Self Declaration), at ¶ 30. Between November 2019 and June 2020, DFPS issued several broadcast emails to staff concerning the newly deployed IMPACT functionality, which included a job aid and PowerPoint presentation. *See* Exhibit D (Self Declaration), at ¶¶ 28, 30, 31, 36. Also during this time period, DFPS provided interactive webinar training opportunities to ensure staff were trained on these changes, as well as open question-and-answer sessions with staff. *See* Exhibit D (Self Declaration), at ¶¶ 37, 42.

In addition, DFPS has also instituted procedures to evaluate and improve caseworkers' documentation of children's sexual victimization and aggression histories. Specifically, between January 2017 and April 2019, CPS state office staff reviewed child sexual aggression and victimization information in legacy IMPACT (the system in place prior to being upgraded to IMPACT 2.0) each month to ensure children's case records were appropriately documented and provided technical assistance to CPS CVS program administrators. *See* Exhibit D (Self Declaration), at ¶ 3. This quality assurance practice continues through the use of the CPS CVS

Quality Assurance Team, which conducts quarterly case reads to evaluate compliance with documentation and caregiver notification requirements. *See* Exhibit D (Self Declaration), at ¶¶ 3, 6. Prior to staffing the CPS CVS Quality Assurance Team, CPS state office staff were diverted from existing job responsibilities to conduct case read reviews. *See* Exhibit D (Self Declaration), at ¶ 12.

In January 2020, DFPS provided the Monitors with copies of the IMPACT Child Victimization History Job Aid workers received concerning the IMPACT changes and PowerPoint presentation, as well as an updated list of children who had been in PMC during September through November 2019 with an indicator for whether the child had a prior confirmed sexual abuse or sex trafficking allegation, was designated as a sexual aggressor, or had been identified as having problematic sexual behavior. *See* Exhibit D (Self Declaration), at ¶¶ 34-35.

As with any new procedure, staff had to acclimate to the new Sexual Victimization History IMPACT page and corresponding documentation requirements; however, the CPS CVS Quality Assurance team's quarterly case reads inform staff development and reinforce and enhance practice. *See* Exhibit D (Self Declaration), at ¶ 32. As noted in the February 2020 case read report, which included a sample of 231 PMC cases, in almost 75% of sampled cases, the Application for Placement contained all known information regarding the child's sexual victimization history, and in almost 90% of sampled cases, the Application for Placement contained all known information regarding the child's history of sexual aggression or sexual behavior problem. *See* Exhibit D (Self Declaration), at ¶ 35. Likewise, as noted in the May 2020 case read report, which included a sample of 399 PMC cases, the Application for Placement contained all known information regarding the child's sexual victimization history and/or history of being sexually aggressive or having a sexual behavior problem in nearly 90% of sampled cases, and the Placement Summary Form 2279

contained all known information regarding the child's sexual victimization history in nearly 80% of sampled cases. *See* Exhibit D (Self Declaration), at ¶ 38. Even the Report's limited independent validation efforts concluded that: 95% of IMPACT records reviewed for children having a confirmed history of sexual abuse included information on the sexual victimization history page; 98% of IMPACT records reviewed for children having an indicator for sexual aggression included information on the child sexual aggression page; 91% of children's onsite files and IMPACT records appropriately flagged children as victims of sexual abuse or sexual aggressors; and that based on the Monitors' subsequent review in April 2020, this percentage increased to approximately 95%.[5] *See* Report at pp. 212-14.

In May 2020, DFPS and HHSC staff participated in a teleconference with members of the monitoring team to discuss the Sexual Victimization History IMPACT page and designations. *See* Exhibit D (Self Declaration), at ¶ 39. Additionally, DFPS provided the Monitors with copies of the December 2019 broadcast email to CPS and CPI staff concerning IMPACT 2.0 changes, the corresponding PowerPoint presentation, a link to the CSA Resource Guide available on the DFPS public website, and summary of training and technical assistance CVS program administrators receive from CPS CVS Quality Assurance staff, including monthly technical assistance calls, webinars, and trainings concerning sexual history documentation in IMPACT. *See* Exhibit D (Self Declaration), at ¶¶ 40-41.

On July 15, 2020, CPS policy was updated to require caseworkers to document sexually aggressive behaviors and sexual victimization histories in the Child Sexual Aggression and Sexual

[5] The Report notes on page 214 that in April 2020, the Monitors reviewed the records of the 25 children they had identified as not properly flagged as victims or aggressors. Through this follow-up review, the Monitors found the IMPACT records had been updated for 11 of the 25. By adding the 11 updated IMPACT records to the 247 records that had already been appropriately flagged at the time of the Monitors' first review, the total number of records that were appropriately flagged following the April 2020 review was 258, or ~95%.

Victimization History IMPACT pages, Placement Summary form, Child Sexual History Report Attachment A and placement summary form. *See* Exhibit D (Self Declaration), at ¶ 43. Also on July 15, 2020, DFPS published an updated CSA Resource Guide that included the IMPACT 2.0 enhancements and changes to CPS policy. *See* Exhibit D (Self Declaration), at ¶ 43.

The July 2020 case read report, which is due to the Monitors in August 2020, demonstrated continued improvements in caseworkers' documentation and notification to caregivers of children's sexual victimization and sexual aggression histories. For example, the report noted that in 90% of sampled cases, the application for placement contained all known information regarding the child's sexual aggression history. *See* Exhibit D (Self Declaration), at ¶ 48. Likewise, in 98% of sampled cases, Attachment A reflected that the caregiver received contained all known information regarding the child's sexual aggression history. *See* Exhibit D (Self Declaration), at ¶ 48. Finally, in 100% of sampled cases, children identified as sexually aggressive were appropriately designated in IMPACT, and in 93% of sampled cases, caregivers were notified through various means of children's sexual victimization and/or sexual aggression histories. *See* Exhibit D (Self Declaration), at ¶ 48.

In September 2020, DFPS plans to publish a Child Victimization Resource Guide designed to provide guidance for helping children and youth who have experienced sexual abuse receive quality services that meet their needs. *See* Exhibit D (Self Declaration), at ¶ 52. Among other information, this resource guide will include instructions for documenting incidents of sexual abuse. *See* Exhibit D (Self Declaration), at ¶ 52.

Considering these prompt, ongoing and extensive efforts to ensure that children's histories of sexual victimization, sexual aggression and/or sexual behavior problem are appropriately and

comprehensively documented, DFPS should not be held in contempt under Remedial Order Nos. 24, 28, or 30.

VIII. DFPS Should Not Be Held in Contempt for Remedial Order Nos. 25-27, 29, and 31

Remedial Order Nos. 25 through 27, 29, and 31 concern information regarding allegations of sexual abuse or sexual aggression that must be shared with the child's caregivers and documented in the child's file. In seeking contempt against DFPS, the Motion cites the Report's statistic that only 57% of direct caregivers interviewed by the Monitors indicated they had received notice that a child was identified as sexually aggressive, and only 50% indicated they received notice when a child was identified as having a history of sexual abuse. However, these conclusions are based on flawed methodology that has also been raised by Defendants in the Objections.

Specifically, the Report acknowledges that the caregivers interviewed were from GROs. *See* Report at 244-45. Pursuant to DFPS policy, notifications related to a child's sexual abuse or sexual aggression history are made directly to the GRO director or administrator, who is then responsible for ensuring this information is communicated to the child's direct caregivers. *See* Exhibit D (Self Declaration), at ¶ 51. That director or administrator is responsible for ensuring this information is communicated to caregivers. *See* Exhibit D (Self Declaration), at ¶ 51. The Report does not indicate the Monitors spoke with the directors or administrators at the facilities they visited; therefore, the Report cannot accurately assess compliance with Remedial Order Nos. 25 through 27, 29, and 31.

Moreover, DFPS has taken reasonable efforts to ensure compliance with Remedial Order Nos. 25 through 27, 29, and 31. In August 2019, DFPS created a CPS CVS Quality Assurance Team comprised of case readers to conduct quarterly reviews of case records to ensure children's histories of sexual victimization and/or aggression were appropriately documented and caregivers were notified. *See* Exhibit D (Self Declaration), at ¶ 6. In September 2019, CPS policy was updated

to require CPS and SSCCs to follow procedures in the CSA Resource Guide and document that SSCCs are contractually responsible for ensuring caregivers are aware of a child's history of sexual aggression, sexual behavior problems, or sexual victimization. *See* Exhibit D (Self Declaration), at ¶ 9.

In November 2019, CPS state office staff were temporarily diverted from their existing job responsibilities to begin conducting case-reading reviews until the new CPS CVS Quality Assurance Team could be fully staffed and trained. *See* Exhibit D (Self Declaration), at ¶ 12. These diverted staff conducted case-reading reviews to ensure children's sexual victimization and/or aggression histories were appropriately documented and that caregivers were notified. *See* Exhibit D (Self Declaration), at ¶ 12.

Also in November 2019, in accordance with the Court's November 5 Order requiring DFPS to verify that all caregivers of PMC children identified as sexually abused or sexually aggressive were notified of these children's status, DFPS made extraordinary efforts over a three-day period to notify caregivers of all children and youth in PMC with confirmed histories of sexual victimization and/or sexual aggression and verify to the Monitors that each caregiver had been notified. *See* Exhibit D (Self Declaration), at ¶ 13. These efforts included deploying caseworkers throughout the state to make telephone calls, followed up with written correspondence and, in some cases, in-person visits. *See* Exhibit D (Self Declaration), at ¶¶ 13-22. DFPS kept the Monitors apprised of these activities and responded to the Monitors' request for specific information or clarification regarding these activities. *See* Exhibit D (Self Declaration), at ¶¶ 16-17, 23-27.

To date, the CPS CVS Quality Assurance Team has completed four quarterly case read reviews. *See* Exhibit D (Self Declaration), at ¶ 44. The case read tool used by the CPS CVS Quality Assurance Team was updated to incorporate the December 2019 IMPACT enhancements, and

compliance with documentation and caregiver notification requirements are tracked via the quarterly case reviews. *See* Exhibit D (Self Declaration), at ¶ 32. During these reviews, Quality Assurance specialists evaluate whether the caseworker appropriately documented and informed caregivers of a child's sexual victimization and/or aggression history. *See* Exhibit D (Self Declaration), at ¶¶ 32, 44. As noted in the February 2020 case read report, which included a sample of 231 PMC cases, in almost 50% of sampled cases, the Placement Summary Form 2279 or equivalent SSCC form was provided to the caregiver. *See* Exhibit D (Self Declaration), at ¶ 45. However, reviewers found that in almost all cases (91%) in which the caregiver was not provided the Placement Summary Form 2279 or equivalent, the caregiver was nonetheless notified of the child's sexual victimization history, which DFPS noted through other means, such as review of documentation signed by the caregiver, review of the case record which noted the caregiver received this information, or where it was indicated the caregiver received verbal notification at the time of placement. *See id.* These findings are similar when reviewing children's sexual aggression histories – in almost 50% of cases, the Placement Summary Form 2279 or equivalent was provided to the caregiver, and in approximately 75% of cases in which the caregiver was not provided the Placement Summary Form 2279 or equivalent, the caregiver was nonetheless notified of the child's sexual aggression history. *See id.* Based on the reviewers' findings, 95% of caregivers were notified through various means of a child's sexual victimization history, and 88% of caregivers were notified through various means of a child's sexual aggression history. *See id.* Even so, DFPS continues to take steps to ensure caregivers receive all necessary information at the time of placement. For example, CPS CVS Quality Assurance Specialists have conducted one-on-one technical assistance with caseworkers, as appropriate, to assist caseworkers with documentation and ensuring caregivers are notified of the child's history. *See* Exhibit D (Self

Declaration), at ¶ 46. In instances where it was determined that the caregiver was not provided information, the Quality Assurance specialist would work with the caseworker and supervisor to contact the caregiver directly through joint calls or work with the program to ensure that the caregiver was provided the child's history. *See* Exhibit D (Self Declaration), at ¶¶ 35, 38, 46.

The May 2020 case read report yielded similar findings. This report included a sample of 399 PMC cases and found that in 53% of sampled cases, the Placement Summary Form 2279 or equivalent SSCC form was provided to the caregiver for both children having sexual victimization histories and children having sexual aggression histories. *See* Exhibit D (Self Declaration), at ¶ 47. However, reviewers found that in 87% of cases in which the caregiver was not provided the Placement Summary Form 2279 or equivalent for children having sexual victimization histories, and in 81% of cases for children having sexual aggression histories, the caregiver was nonetheless notified of the child's sexual victimization history. *See id.* Based on the reviewers' findings, 94% of caregivers were notified through various means of a child's sexual victimization history, and 91% of caregivers were notified through various means of a child's sexual aggression history. *See id.* The CPS CVS Quality Assurance specialists continue to conduct one-on-one technical assistance with caseworkers, as appropriate, to assist caseworkers with documentation and ensuring caregivers are notified of the child's history. *See id.* In instances where it was determined that the caregiver was not provided information, the Quality Assurance specialist worked with the caseworker and supervisor to contact the caregiver directly through joint calls or work with the program to ensure that the caregiver was provided the child's history. *See* Exhibit D (Self Declaration), at ¶¶ 47, 49. The policy and process of ensuring that sexual victimization and aggression history is documented and provided to caregivers, as well as needed opportunities for improved practice, are reviewed with the CPS CVS program administrators each month, and

caseworkers are subsequently provided with written resources with tips for improved documentation and step-by-step instructions for uploading placement forms into OneCase. *See* Exhibit D (Self Declaration), at ¶ 50.

The July 2020 case read report, which is due to the Monitors in August 2020, demonstrated continued improvements in caseworkers' documentation and notification to caregivers of children's sexual victimization and sexual aggression histories. For example, the report noted that in 90% of sampled cases, the application for placement contained all known information regarding the child's sexual aggression history. *See* Exhibit D (Self Declaration), at ¶ 48. Likewise, in 98% of sampled cases, the Attachment A the caregiver received contained all known information regarding the child's sexual aggression history. *See id.* Finally, in 100% of sampled cases, children identified as sexually aggressive were appropriately designated in IMPACT, and in 93% of sampled cases, caregivers were notified through various means of children's sexual victimization and/or sexual aggression histories. *See id.*

In addition to CPS's general notification policy and as noted in Sections VII and VIII, herein, CPS policy was recently updated to require caseworkers to document sexually aggressive behaviors and sexual victimization histories in the IMPACT CSA and Sexual Victimization History IMPACT pages, placement summary form, and Child Sexual History Report Attachment A. *See* Exhibit D (Self Declaration), at ¶ 43. In addition, the caseworker must notify caregivers of new information involving child sexual aggression or sexual victimization by updating the relevant IMPACT page, launching a new Child Sexual History Report Attachment A, reviewing the Attachment A with the caregiver, obtaining the caregiver's signature, uploading a signed copy into OneCase, and documenting in a contact that the information was provided to the caregiver. *See id.*

As described above, DFPS has undertaken reasonable, good faith efforts to comply with Remedial Order Nos. 25 through 27, 29, and 31, has shown reasonable diligence and, therefore, should not be held in contempt.

IX. HHSC Should Not Be Held in Contempt for Remedial Order No. 22

The Motion seeks to hold HHSC in contempt based on the Report's conclusions that it is "not consistently or effectively compiling/considering extended compliance histories in its licensing oversight." To support this, the Motion relies on inherently flawed statistics cited in the Report.

First, the Monitors apparently looked at HHSC "investigations" in their analysis of Remedial Order No. 22 when the plain language of that order expressly refers to "inspections." *See* Report at p. 266 (citing percentage of "non-abuse and neglect investigations" that did not include a completed 5-year retrospective report, analysis of "787 minimum standards investigations," and calculations based on "the investigations or inspections conducted during the period under review"). The processes and procedures for inspections conducted by HHSC differ from those for investigations. *Compare* Child Care Licensing Policy and Procedures Handbook ("LPPH") §4000 (Inspections) *et. seq. with* §6000 (Investigations) *et. seq.*; *see also* Declaration of Jean Shaw, attached hereto as Exhibit E, at ¶¶ 51-52. Neither HHSC policy nor Remedial Order No. 22 require extended compliance history ("ECH") reviews for investigations. *See* Exhibit E (Shaw Declaration), at ¶ 53. Therefore, the Report's compliance analysis is not based on the correct underlying data, rendering it incapable of supporting a finding of contempt.

There are other issues with the analysis in the Report that render it flawed. For example, the Monitors used data from October 7, 2019, through January 31, 2020, when it is undisputed that on October 7, 2019, the Court provided clarification as to the requirements for Remedial Order No. 22, including that RCCL inspectors must assess data encompassing an extended five-year

"look-back period." *See* Report at 264. In other words, the Report unreasonably assumes that HHSC was able to immediately implement the clarifications provided by the Court and fails to allow HHSC the opportunity to communicate with and train its staff on compliance with such requirements.

In fact, HHSC worked diligently and provided RCCL inspectors with access on a monthly basis to the Abuse or Neglect Report and the Corporal Punishment Report beginning in December 2019 that must be reviewed by the inspector and used to compile an operation's ECH with respect to child abuse and neglect referrals, confirmed findings of child abuse or neglect, and confirmed minimum standards citations for corporal punishment during the relevant five-year period. *See* Exhibit E (Shaw Declaration), at ¶ 54. In addition to the monthly reports, the inspector must also review the operation's history in the CLASS system for the then-current month, to ensure that any new history not included on the monthly reports are also considered as part of the assessment for the extended compliance history review. *See* Exhibit E (Shaw Declaration), at ¶ 55.

Additionally, in late November 2019, HHSC disseminated Field Communication #271 that provided instructions to RCCL inspectors for performance of ECH reviews. *See* Exhibit E (Shaw Declaration), at ¶¶ 56-57. HHSC also provided training on performing ECH reviews via a recorded webinar which all RCCL inspectors and supervisors were instructed to review, and HHSC is planning to provide additional training sessions to all RCCL inspectors/supervisors before September 1, 2020. *See* Exhibit E (Shaw Declaration), at ¶¶ 58-59. HHSC has also adopted formal policies for extended compliance history reviews for inspections; such policies were effective May 2020. *See* Exhibit E (Shaw Declaration), at ¶ 52.

Moreover, HHSC has begun efforts to enhance to its CLASS system, which is used by its inspectors to review the ECH for an operation and to document the inspector's ECH review and

assessments. *See* Exhibit E (Shaw Declaration), at ¶ 60. The enhancements, which HHSC anticipates will be implemented before September 2020, will enable HHSC's enforcement of the requirements for inspectors' documentation of their ECH reviews and will allow HHSC to track compliance by its inspectors. *See* Exhibit E (Shaw Declaration), at ¶ 61. HHSC is also exploring CLASS system enhancements that will facilitate RCCL inspectors' retrieval and review of an operation's ECH. *See* Exhibit E (Shaw Declaration), at ¶ 62.

Finally, HHSC is developing a job aid that will provide additional information and training for RCCL inspectors regarding the purpose of ECH reviews and guidance on completing assessment narratives following an ECH review. *See* Exhibit E (Shaw Declaration), at ¶ 63. HHSC anticipates the job aid will be distributed in August 2020 and will include an overview of the purposes of ECH reviews, instructions for completing the reviews, a checklist to ensure that all steps are completed, and an example of an ECH review entry. *See* Exhibit E (Shaw Declaration), at ¶ 64.

The Motion also cites to the Report's conclusion that RCCL "rarely does a five-year retrospective review before or with the inspection, making it impossible for the information to be considered in the inspection." However, the plain language of Remedial Order No. 22 provides that the ECH be considered during inspections, not before. That an ECH review is not documented before an inspection does not mean the review was not completed by the inspection date. Rather, inspectors are instructed to conduct the review prior to the inspection and have 24 hours after completing the inspection to document their review and assessment; as described above, HHSC expects to shortly implement CLASS system enhancements that will ensure such timely review and documentation. *See* Exhibit E (Shaw Declaration), at ¶¶ 60-62. Furthermore, the Report still acknowledges that in 58% of the cases, the ECH review is completed prior to or on the same day

of the initiation of the investigation. *See* Report at 267. Although the Report is unclear regarding the methodology behind this rate or the reason for the focus on investigations rather than inspections, the cited 58% rate undermines the Motion's contention that ECH reviews are "rarely" done.

The Motion relies on flawed and unreliable conclusions from the Report that have been raised by Defendants in the Objections in an attempt to hold HHSC in contempt, which cannot satisfy Plaintiffs' burden that HHSC has failed to comply with Remedial Order No. 22. Additionally, as the evidence cited above establishes, HHSC has exercised reasonable diligence in a good faith effort to comply with Remedial Order No. 22 and should not, therefore, be held in contempt.

X. Defendants Should Not Be Held in Contempt for Remedial Order No. 20

With respect to Remedial Order No. 20, both the Motion and the Report that serves as the basis for Plaintiffs' contempt claims wholly fail to acknowledge that compliance under Remedial Order No. 20 is dependent on application of the terms and requirements set out in the Court's order dated March 18, 2020 [ECF 837] (the "March 2020 Order"). Although the Motion and Report reference the March 2020 Order, both focus on data that predates the March 2020 Order and, in some cases, predates the July 2019 mandate issued by the Fifth Circuit. *See* Report at pp. 302-12. This approach is flawed because outdated data cannot serve as the basis for a contempt order that, by the plain language of Remedial Order No. 20 and the March 2020 Order, concerns requirements that were not even effective at that time. It also overlooks Defendants' significant efforts to comply prior to the March 2020 Order.

Since the March 2020 Order was issued, Defendants have worked diligently to implement the newly defined requirements applicable to Remedial Order No. 20. These actions have been well-documented in the record and are incorporated herein. *See* ECF 866 (notifying the Court that

the list of facilities Defendants determined were subject to heightened monitoring was timely submitted to the Monitors on June 5, 2020); ECF 900 (advisory and motion to modify March 2020 Order). Additionally, the analysis in the Report on which the Motion relies fails to accurately address the enforcement process upon which enforcement decisions are made.

A. Actions taken before the March 2020 Order

The Report and the Motion attempt to cast aspersions on Defendants' enforcement decisions via statistics, but the cited numbers fail to account for the underlying enforcement procedures which require Defendants to adhere to applicable statutory requirements and to provide due process rights to operations that are targeted for an enforcement action, which are discussed below.

HHSC enforcement decisions may result in the following actions: a voluntary Plan of Action; probation; an adverse action such as adverse amendment, license denial, license revocation, or involuntary or emergency suspension of a license; a judicial action; or administrative penalties. *See* Exhibit E (Shaw Declaration), at ¶ 43. While placing a facility under evaluation is no longer a valid enforcement option as of September 1, 2019, HHSC takes a facility's evaluation history over the previous two years into consideration during reviews of compliance history. *See* Exhibit E (Shaw Declaration), at ¶ 44. Enforcement actions are not progressive in nature, and HHSC may recommend or impose any action that is warranted by the risk to children at the operation. *See* Exhibit E (Shaw Declaration), at ¶ 45. This analysis involves considering several factors, including but not limited to compliance history, staffing, the nature of the risk, and the impact other factors may have on the risk. *See* Exhibit E (Shaw Declaration), at ¶ 46.

Once HHSC has assessed the risk factors, it recommends or imposes a specific enforcement action according to the following:

Enforcement Action	**What is the capability of the governing body or permit holder?**	**Limitation on using this enforcement action?**	**Can risk be mitigated while the operation continues to operate?**
Plan of Action (POA)	The governing body or permit holder has demonstrated all of the following: • the ability to identify risk; • accepts responsibility for correcting deficiencies; • willingness to comply; and • a history of maintaining corrections for ongoing compliance.	Yes. Licensing may only offer a Plan of Action as an enforcement action if the operation does not have history of a POA within the previous 12 months for similar deficiencies.	Yes. Licensing may only offer a Plan of Action as an enforcement action if the operation does not have history of a POA within the previous 12 months for similar deficiencies.
Probation	The governing body or permit holder has repeatedly demonstrated the inability to: • identify risk; and/or • make the necessary changes to address underlying issues to reduce risk. In addition, the governing body or permit holder is willing and able to make necessary corrections, with intervention from Licensing.	No. The operation may or may not have had previous enforcement actions.	Yes, by following conditions Licensing has imposed.
Adverse Amendment	The governing body or permit holder is willing and able to abide by restrictions and conditions placed on the permit.	No. The operation may or may not have had previous enforcement actions.	Yes, if the operation abides by the restrictions or conditions placed on the permit.
Denial and Revocation	The governing body or permit holder has repeatedly demonstrated the inability to: • identify risk; and/or • make the necessary changes to address underlying issues to reduce risk.	No. The operation may or may not have had previous enforcement actions.	No. Children will be at risk of harm if the operation is allowed to operate or continue to operate.

See Exhibit E (Shaw Declaration), at ¶ 47.

The target operation has certain due process rights depending on the type of enforcement action taken. For example, for an adverse amendment or license denial or revocation, the operation can request an administrative review and can also separately request a State Office Administrative Hearing (SOAH) before an administrative judge. The administrative review and SOAH hearing determine whether the adverse amendment or license revocation or denial will be upheld or overturned. *See* Exhibit E (Shaw Declaration), at ¶ 48.

Depending on the enforcement action, HHSC will also be limited by restrictions set out in the Administrative Code. For example, a plan of action may only last for six months, while the maximum probation period is 12 months. 40 TAC §745.8611(a). It appears the Report and the Motion are critical of HHSC for following applicable regulations, which cannot satisfy Plaintiffs' burden to establish noncompliance with Remedial Order No. 20. Moreover, by the definitions set out in the March 2020 Order, a significant number of facilities will be above the statewide average related to minimum standard violations, and the Report incorrectly relies on a non-existent statistical guarantee that the number of deficiencies above the state average necessarily results in child-safety concerns or other concerns necessitating intervention that are not being addressed.

Similarly, while the Report and the Motion focus on terminations of a contract for cause, DFPS has many other contract actions that can be taken to alleviate problems with facilities, including technical assistance, monetary damages, specialized monitoring, and other interventions designed to improve the quality of care provided. *See* Declaration of Audrey Carmical, attached hereto as Exhibit F, at ¶ 12. DFPS determines the proper remedial contract action based on each facility's specific circumstances and, where possible, works to identify and resolve concerns regarding child safety and well-being and contractor performance before resorting to termination. *See* Exhibit F (Carmical Declaration), at ¶ 10. However, both before and after July 2019, DFPS either terminated or did not renew a number of contracts that showed a pattern of violations. *See* Exhibit F (Carmical Declaration), at ¶ 13. Starting in Fall 2019, DFPS regularly communicated with the Monitors regarding contracted providers, including whether circumstances called for terminating contracts for cause. *See* Exhibit F (Carmical Declaration), at ¶ 17.

Defendants have also invested substantial time and effort in attempting to effectuate the remedial intent of the Court, both prior to and following the adoption of the Court's March 18

definitions. For example, in 2017, DFPS concentrated contract staff under the Deputy Commissioner and required that contractor performance be tracked using standardized and qualitative measures, while also working to implement financial incentives and remedies to promote contractor performance. *See* Exhibit F (Carmical Declaration), at ¶ 4. Then, beginning in October 2018 and continuing into 2020, DFPS began the involved process of enhancing its contract monitoring processes; these efforts included: consolidating several divisions into the Office of Data and Systems Improvement (DSI) to improve coordination, communication, and consistency across the agency around data reporting and how it is used in understanding and improving performance and outcomes; developing and implementing a strategic framework to more comprehensively review the performance measures for contracts coming up for renewal; developing a continuous quality improvement tool to stratify performance (hereinafter CQI Risk Stratification tool) across similarly situated contractors; further developing the framework for the CQI Risk Stratification tool; updating Facility Intervention Team Staffing (FITS) protocols; and commencing iterative runs of the CQI Risk Stratification tool. *See* Exhibit F (Carmical Declaration), at ¶ 5.

In January 2019, DFPS submitted an Exceptional Item Appropriations Request to obtain additional resources to strengthen contract oversight with a particular focus on residential child care contracts, which resulted in DFPS receiving funding for 18 additional staff. *See* Exhibit F (Carmical Declaration), at ¶ 6. Additionally, DFPS received funding for (a) three contract administration managers it used to provide additional intense oversight and technical assistance for new contractors during the provisional contract period, (b) one position it used to manage the Specialized Monitoring Plan team, a team responsible for monitoring contractors, and (c) two research specialists it used to analyze patters and trends to proactively identify emerging concerns

in new operations; these positions were filled between September 2019 and March 2020. *See* Exhibit F (Carmical Declaration), at ¶¶ 7-8.

B. Implementing Remedial Order No. 20 based on the March 2020 Order

Beginning in October 2019, Defendants and the Monitors began communicating regarding how to define the terms "pattern" and "heightened monitoring" as used in Remedial Order No. 20; on November 1, 2019, Defendants, pursuant to the Court's instruction, submitted its proposed definitions and a written plan related to heightened monitoring to the Monitors. *See* Exhibit E (Shaw Declaration), at ¶¶ 5-6; Exhibit F (Carmical Declaration), at ¶ 15. On February 4, 2020, the Monitors informed Defendants that they had prepared their own definitions of "pattern" and "heightened monitoring" that had already been discussed with the Court. *See* Exhibit E (Shaw Declaration), at ¶ 7; Exhibit F (Carmical Declaration), at ¶ 18. Although Defendants had not been able to provide feedback, ask questions, or otherwise discuss the Monitors' definitions before that point, they prepared a response and submitted it to the Monitors on February 19, 2020, that outlined several concerns with Monitors' definitions, including the lack of flexibility, the potential to keep facilities that had undergone substantial changes locked into the heightened monitoring process unnecessarily, and the lack of sound methodological basis for defining "high rate" based on mean performance. *See* Exhibit E (Shaw Declaration), at ¶ 8; Exhibit F (Carmical Declaration), at ¶¶ 18-19. In the same communication, Defendants also supplemented their earlier proposal to outline how existing resources, including the already-existing FITS process, could be built upon in creating a new heightened monitoring process. *See* Exhibit F (Carmical Declaration), at ¶ 20. Defendants followed up the written communication with a telephone conference with the Monitors on February 26, 2020. *See* Exhibit E (Shaw Declaration), at ¶ 9. Defendants also engaged in conversations with Oklahoma regarding its approach to heightened monitoring, while continuing

to communicate with the Monitors to reiterate concerns with the definitions they were proposing. *See* Exhibit F (Carmical Declaration), at ¶ 21.

Ultimately, the Court entered an order on March 18 adopting the definitions proposed by the Monitors. *See* ECF 837. DFPS immediately began working through the cost assumptions and calculations of estimated resources needed to implement the newly defined heightened monitoring process. *See* Exhibit F (Carmical Declaration), at ¶ 24. Similarly, HHSC evaluated the additional resources it would need and started the process of obtaining those resources, as well as provided information about cost estimates to the Court. *See* Exhibit E (Shaw Declaration), at ¶¶ 12-16. In addition to submitting requests through the appropriations process or preparing them for submission at the appropriate time, HHSC also started identifying positions and funding that could be reallocated to heightened monitoring. *See* Exhibit E (Shaw Declaration), at ¶¶ 17-18, 24-27. As a result of these efforts, HHSC was able to initially repurpose 13 full-time employment positions (or FTEs), which will be part of the total 64 FTEs that will ultimately be needed for heightened monitoring. *See* Exhibit E (Shaw Declaration), at ¶ 21. As of the filing of this Response, HHSC has reallocated 64 FTEs for heightened monitoring; while these positions are initially funded through General Revenue funding, HHSC's efforts to obtain resources through the appropriations process, including an already submitted Request to Exceed and planned exceptional item request that will be submitted to the Legislative Budget Board in the fall. *See* Exhibit E (Shaw Declaration), at ¶ 30.

Additionally, following an April 3 telephone conference with the Court, Defendants began compiling the data needed to generate the list of placements that would be subject to heightened monitoring, which they were to provide to the Monitors by June 5. *See* Exhibit E (Shaw Declaration), at ¶¶ 14-15; Exhibit F (Carmical Declaration), at ¶ 25. At the same time, per the

Court's instruction, Defendants prepared a proposed triaged approach to implementing heightened monitoring that it shared with the Monitors on June 5; however, the Monitors subsequently informed Defendants they were not authorized to discuss a triaged approach. *See* Exhibit E (Shaw Declaration), at ¶ 41; Exhibit F (Carmical Declaration), at ¶ 25. Instead, Defendants submitted their proposal to the Court on June 26. *See* ECF 900.

In the meantime, Defendants have expended significant time and resources implementing Remedial Order No. 20, including the modifications made in the March 18, 2020 order. Specifically, DSI has spent over 2,000 hours compiling and running data that took Contracts Staff over 1,280 hours to compile, while DFPS leadership and staff have spent over 150 hours in their implementation efforts. *See* Exhibit F (Carmical Declaration), at ¶ 26. DFPS' ongoing conduct with respect to Remedial Order No. 20 include posting additional jobs and working to fill those positions, performing weekly unannounced visits on the nine operations currently subject to heightened monitoring, developing safety checks and tracking systems, communicating with stakeholders, caseworkers, operations, and courts, and implementing the Associate Commissioner approval process that as necessitated 143 separate approvals between June 12 and June 21. *See* Exhibit F (Carmical Declaration), at ¶ 27.

Along with DFPS, HHSC has commenced weekly unannounced visits for the nine operations currently in heightened monitoring. *See* Exhibit E (Shaw Declaration), at ¶¶ 38-39. HHSC has also being involved in communicating with staff and operations regarding the new heightened monitoring process. *See* Exhibit E (Shaw Declaration), at ¶¶ 19, 23. Additionally, until it receives the funding necessary to make the required CLASS enhancements to support heightened monitoring, HHSC has worked with DFPS to create a manual process to deal with current CLASS limitations. *See* Exhibit E (Shaw Declaration), at ¶¶ 28-29. HHSC has also posted and continues

to post job positions, including inspectors, training specialists, directors, supervisors, managers, program specialists, and administrative assistants, that will support heightened monitoring. *See* Exhibit E (Shaw Declaration), at ¶¶ 31-38.

As the evidence provided herein shows, Defendants have acted with reasonable diligence in a good faith effort to comply with Remedial Order No. 20, and the Motion and Report contain no factual analysis of the efforts undertaken since the March 18, 2020 Order was issued. Moreover, Defendants have also requested that the Court modify the terms of the March 18, 2020 Order to the extent compliance is not possible within the current parameters of that order. Therefore, Defendants should not be held in contempt under Remedial Order No. 20.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion to Show Cause Why Defendants Should Not Be Held in Contempt. To the extent the Court believes the Motion should be granted and a Show Cause Order issued, Defendants request an evidentiary hearing where, through witnesses and evidence, including that contained in this Response, Defendants will establish they should not be held in contempt or sanctioned.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2020, a true and correct copy of the foregoing document has been filed in accordance with the Electronic Document Filing System of the Southern District of Texas, thus providing service to all participants.

/s/ Kimberly Gdula
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