IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

THE UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NORTH CAROLINA, Defendant.	)))))))))	Case No. 5:12-cv-557-F

NORTH CAROLINA'S RESPONSE IN OPPOSITION TO MOTION TO ENFORCE SETTLEMENT AGREEMENT

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NORTH CAROLINA'S RESPONSE IN OPPOSITION
TO MOTION TO ENFORCE SETTLEMENT AGREEMENT

Defendant, the State of North Carolina, by and through its undersigned counsel, pursuant to Local Rule 7.1(f), responds to the *Motion to Enforce the Settlement Agreement* (D.E. 15).

NATURE OF THE CASE

On November 17, 2010, the United States' Civil Rights Division notified the State of North Carolina that it was commencing an investigation into the State's mental health system pursuant to Title II of the Americans with Disabilities Act ("ADA") and the State's use of Adult Care Homes in its mental health service system. In July 2011, the United States issued a Findings Letter alleging various issues with the State's operation of its mental health system in violation of the ADA and under the United States Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176 (1999). *See* U.S. Ex. A.

After extensive negotiations, on August 23, 2012, North Carolina voluntarily entered into a Settlement Agreement ("Agreement") with the United States, which was filed with the Court. (D.E. 2-2.). Since signing the Agreement, North Carolina consistently has honored its commitment and affirmed its dedication to provide critical community support services and

housing to its citizens with mental health illnesses. As demonstrated below, between 2012 and today, North Carolina's implementation of the Agreement has been an overwhelming success.

On January 9, 2017, the United States filed a Motion to Enforce the Agreement. On January 25, 2017, the Court granted the parties' consent motion to extend the State's response deadline to March 1, 2017. North Carolina now responds to the Motion, opposing it, and asks the Court to deny the Motion.

STATEMENT OF FACTS

In 2012, the State made a conscious commitment to achieving sustainable system change by July 1, 2020 by entering into an Agreement with the United States. Following the 2012 Settlement, the State moved with all due haste to implement and exceed the expectations of the Agreement. The State's collective efforts have been implemented through the Transitions to Community Living Initiative ("TCLI") – North Carolina's ongoing effort to implement the Agreement and effect long-term and sustainable systems changes to promote the well-being of its citizens.

The State's commitment to achieving and exceeding the expectations of the Settlement Agreement is most evident in the "people investment" it has made. First, it has compiled a team of high-level, respected and knowledgeable subject matter experts to oversee the work of the Agreement. The State has also created and appointed a permanent position, Special Advisor on the Americans with Disabilities Act, to dedicate all working hours to the successful implementation of the Agreement. *See* Ex. 9 (Declaration of Jessica Keith), ¶¶ 2, 16(a). Despite changes in administration, successive NC Health and Human Services Secretaries have each been personally involved in the success of the Agreement and have met with stakeholders across the State to promote the objectives of the Agreement. *See, e.g.,* Ex. 1 (Letter from Secretary Brajer to Vanita Gupta, 10/15/2015).

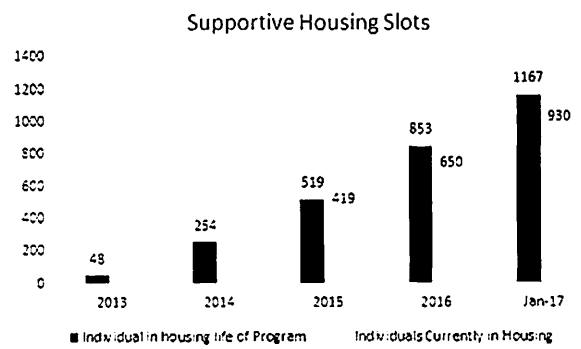
The State has also carefully and deliberately made fiscal policy a cornerstone of its plan to meet the Agreement's terms. Starting in 2012, the Legislature appropriated approximately $10.3 million for TCLI. *Id.*, ¶ 16(b). Over the course of the Agreement, the Legislature has substantially increased the total amount of funds expended towards the TCLI population. For instance, it increased expenditures for the TCLI program by over $3 million in the second year of the Agreement. In the third year of the Agreement, it appropriated $19 million for TCLI. For 2017, the amount is $35 million, more than triple the amount appropriated at the beginning of the Agreement. *Id.*

Another significant improvement in the State's delivery of service has come through its important partnership with Local Management Entities and Managed Care Organizations ("LME/MCOs"). In 2011, the State had only one LME-MCO. Today it has seven. *Id.*, ¶ 16(c). LME/MCOs have been significantly involved with changes in the State's mental health care delivery system. The LME-MCOs are making substantial investments to enhance mental health infrastructure, services and supports to the State's citizens. In addition, all of the State's seven LME/MCOs have trained their intake staffs on TCLI so that individuals who call in can be referred and directly connected to services. Because of this partnership, the State has been able to divert individuals with mental health issues from going into Adult Care Homes. That was an important goal of the Agreement. *Id.*

The State has made tremendous strides in addressing housing for individuals with mental illness. In 2016 alone, the State moved 1,011 individuals with disabilities into community housing, with at least thirty percent of that number being TCLI members. *Id.*, ¶ 16(d). Additionally, the State has raised the maximum subsidy to assist individuals to transition into community housing from $360 in 2012 to $600 today. *Id.* This has dramatically expanded opportunities for individuals to find suitable community housing.

The State also has expanded the reach of its supported employment services. Per the Agreement, North Carolina now uses the Individual Placement and Supported Employment ("IPS-SE") model to provide supported employment services in conjunction with the Division of Vocational Rehabilitation. Although it takes a minimum of one year to establish an IPS-SE Team to provide employment services to individuals, *id.*, ¶ 12, North Carolina has grown quicker than every other State. Currently, the State has thirty teams across North Carolina serving 2,484 individuals. *Id.*, ¶ 16(e).

North Carolina's efforts have resulted in a seismic transformation of relationships and roles between various State agencies and in furtherance of the Agreement. For instance, the Division of Mental Health, Developmental Disabilities and Substance Abuse Services has partnered with the Division of Vocational Rehabilitation Services to create a referral process for individuals seeking employment. *Id.*, ¶ 16(f). This partnership is rare across the United States, but has provided dividends already. Further, NC DHHS has partnered with the NC Housing Finance Agency to make housing a priority. *Id.* This partnership has resulted in increased units available for TCLI participants. For example, the first individual moved into a supported housing slot in February 2013; since then, the State's efforts continue to foster an upward trajectory:



See U.S. Ex. T (NC Year One Summary), at 4, 7; Ex. 2 (January 2017 monthly report, 2/28/2016), at 2, 6. The State continues to meet and exceed major aspects of the Agreement.

BURDEN OF PROOF

On its motion to enforce the Agreement, the United States has the burden of proof. "If the parties fail to reach agreement on a plan for curative action, the United States may seek an appropriate judicial remedy, and shall have the burden of proving such alleged noncompliance, other than as described in Section V(C)." *See* Agreement, § V(G).[1] The United States must prove that North Carolina is not in "substantial compliance" with the Settlement Agreement. "Substantial compliance is achieved if any violations of the Agreement are minor and occasional and are not systemic." *See id.* § V(B).

ARGUMENT

At its core, the United States' motion is a dramatic example of federal government overreach, and an attempt to override the State's inherent right to administer programs to serve its own citizens. First, the United States has failed to comply with its black-and-white obligation to work cooperatively with North Carolina, as its partner, to resolve disputes informally and collaboratively through Corrective Action Plans. The Court should require the United States to fully comply with the mandatory dispute resolution procedures in Sections V(F) and V(G) of the Agreement, and deny the motion.

Additionally, the United States has asserted an artificial and overly expansive interpretation that finds no support in the Agreement, which would impose additional obligations upon North Carolina that it never agreed to undertake, and would lead to absurd results. In

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[1] Section V(C) applies only at the end of the Agreement, not during its implementation.

contrast, North Carolina's interpretation is consistent with, and compelled by, the unambiguous terms of the Agreement. For these reasons, the Motion should be denied.

I. The United States' Motion is Premature and Violates the Agreement's Mandatory Procedure for Collaborative Dispute Resolution.

The Settlement Agreement incorporates a clear preference for collaborative, non-judicial resolution of disagreements about interpretation of the Agreement and the State's compliance with the Agreement. In addition, the Agreement contains specific and exclusive procedures that the United States must follow in the event that it seeks judicial enforcement of the Agreement based on alleged noncompliance by the State. In bringing its motion to enforce, the United States has both violated the collaborative spirit of the Agreement and also failed to follow the Agreement's mandatory prerequisites for seeking judicial intervention and enforcement. Furthermore, the United States' premature motion risks a diversion of resources from the ongoing progress that the State is making to create the systemic changes necessary to fully meet all of its obligations under the Agreement.

A. The mandatory provisions of the Agreement require cooperation prior to seeking judicial intervention.

The terms of the Agreement clearly indicate the intention of the parties that disagreements over construction of the Agreement or alleged noncompliance are to be resolved through good faith attempts at informal resolution by the parties rather than through unnecessary and premature court intervention. Section V(E) of the Agreement provides for a "problem-solving approach" to dispute resolution: "[i]n the event of any dispute over the language or construction of this Agreement or its requirements, the parties agree to meet and confer in an effort to achieve a mutually agreeable resolution prior to terminating the Agreement." *Id.* This requirement is not merely aspirational or precatory. It demonstrates the parties' agreement that

premature judicial intervention is likely to divert energy from achieving the goals of the Agreement.

In furtherance of the collaborative approach incorporated into the Agreement, the terms of the Agreement require the United States to take specific steps to resolve disagreements and alleged noncompliance by the State prior to seeking court intervention. These steps are detailed in sections V(F) and V(G), which provide, in relevant part:

> F. . . . [I]f the United States believes the State has failed to fulfill any obligation under this Agreement, the United States shall, prior to initiating any court proceeding, notify the State in writing of any alleged non-compliance with the Agreement and request that the State take action to correct such alleged noncompliance. . . . [T]he State shall have 45 days from the date of such written notice to respond to the United States in writing by denying that noncompliance has occurred, or by accepting (without necessarily admitting) the allegation of noncompliance and proposing steps that the State will take, and by when, to cure the noncompliance. If the State fails to respond within 45 days or denies that noncompliance has occurred, the United States may seek an appropriate judicial remedy.
>
> G. If the State responds by proposing a curative action by a specified date, the United States may accept the State's proposal or offer a counterproposal for a different curative action or deadline. If the Parties reach an agreement that varies from the provisions of this Settlement Agreement, the new agreement shall be in writing, signed and filed with the Court. If the Parties fail to reach agreement on a plan for curative action, the United States may seek an appropriate judicial remedy, and shall have the burden of proving such alleged noncompliance, other than as described in Section V(C). The Parties will not seek to have the Court enforce implementation of this Agreement other than through the process set forth in Sections V(F) and (G).

By their express terms, these provisions are mandatory and provide the sole means for a party to seek court intervention to enforce any terms of the Agreement. *See, e.g.*, *Tattoo Art, Inc. v. TAT Int'l, LLC*, 711 F. Supp. 2d 645 (E.D. Va. 2010) (dismissing complaint where pre-litigation mediation was a condition precedent to filing suit).

B. The United States has failed to comply with its pre-litigation obligations.

Prior to the United States filing its motion, the State was in substantial compliance with the Agreement, was undertaking significant steps to address concerns raised by the United States and the Independent Reviewer, and was engaged in a good faith effort to resolve the United States' allegations of noncompliance. In light of these facts, in bringing its motion to enforce, the United States has violated the collaborative spirit of the Agreement and the mandatory and exclusive procedures for judicial enforcement contained in Sections V(F) and V(G) of the Agreement.

On October 14, 2015, the Independent Reviewer produced an annual report detailing the status of the State's ongoing efforts to achieve the goals of the Agreement. *See* Ex. 3 (2015 Annual Report, 10/14/2015). The overwhelming conclusion of the 2015 Annual Report was that North Carolina is in compliance with the large majority of the terms of the Agreement. For example, out of 103 measurements of compliance, the Independent Reviewer rated the State as fully or partially compliant[2] with nearly all measurements, finding the State only noncompliant with a single measurement. *See id.*, App. A, pp. 45-61.

On November 6, 2015, less than a month after the issuance of the Reviewer's report, the United States sent a letter to the State alleging "ongoing noncompliance with the Agreement" and formally requesting, pursuant to section V(F) of the Agreement, that the State develop a Corrective Action Plan to address the alleged noncompliance. *See* U.S. Ex. M (letter from N. Lee to Roy Cooper and Richard Brajer, 11/6/2015). The letter cites to and relies upon the Independent Reviewer's 2015 Annual Report to support its claims of noncompliance with the

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[2] Although partial compliance is not defined in the Reviewer's 2015 Report, her 2016 Report explains that "[a] partial compliance finding is made when there is evidence the State will likely come into full compliance at a future point." Ex. 8 (2016 Annual Report, p. 9).

Supported Housing and Supported Employment Provisions of the Agreement. *Id.* However, the report does not support the position taken by the United States in its letter. With respect to Supported Housing, the Independent Reviewer's 2015 Annual Report rated the State on 16 different measurements, finding the State to be fully or partially compliant with all of these measurements. *See* Ex. 3 (2015 Annual Rpt., App. A, pp. 45-46). With respect to Supported Employment, the 2015 Annual Report rated the State on 3 different measurements, finding the State to be fully compliant with one of these measurements, partially compliant with one measurement, and noncompliant with one measurement. *Id.*, pp. 50-51.

Although the United States' allegations of noncompliance were disputed by the State and not supported by the Reviewer's 2015 Annual Report, the State nevertheless responded to the United States' letter within the 45-day timeframe specified in section V(F) of the Agreement. North Carolina proposed a comprehensive Corrective Action Plan detailing over 150 specific actions that the State would undertake to continue its progress toward achieving substantial compliance by the July 1, 2020 target date of the Agreement. *See* U.S. Ex. N (letter from Richard Brajer to N. Lee, 12/22/2015); Ex. 4 (Corrective Action Plan, 12/22/15). For each item in the Corrective Action Plan, the State listed the specific task to be achieved, the responsible agency, the specific responsible person, the target date for full implementation, and the current completion rate. *Id.*

Under section V(G) of the Agreement, when the State timely responds to the United States by proposing a Corrective Action Plan, there are only two options: the United States "may accept the State's proposal or offer a counterproposal for a different curative action or deadline." *Id.* Here, the United States did neither. Instead, by letter dated March 24, 2016, a full 3 months after receipt of the Plan, the United States contended that the State's action plan was inadequate, and demanded that the State produce an amended plan. *See* U.S. Ex. O (letter

from N. Lee to Roy Cooper and Richard Brajer, 3/24/2016). This did not comply with Section V(G) (requirement to accept the Corrective Action Plan or make a counterproposal). Additionally, in contrast to the State's detailed, 150-point Corrective Action Plan, the response from the United States was almost completely devoid of any actionable steps. Rather than presenting a meaningful counterproposal, as required, the March 24, 2016 USDOJ Letter presented inflexible demands for the State to (1) accept the United States' preferred interpretation of the disputed terms of the Agreement, (2) produce a new plan incorporating vaguely identified "missing elements described above," and (3) provide documentation with the "names, addresses, and phone numbers for all individuals who are no longer in Housing Slots." *Id.*, at 7. The United States' decision to impose vague and onerous demands upon the State is an unreasonable requirement on the State as it makes good faith efforts to comply with the Agreement. It is also contrary to the mandatory provisions in sections V(F) and V(G) of the Agreement.

Although the State strongly believed that its original Corrective Action Plan (Dec. 22, 2015) would allow the State to continue its progress and achieve substantial compliance by July 1, 2020, and despite the United States' failure to offer a counterproposal, the State nevertheless complied with the United States' demand for a revised Corrective Action Plan. Thus, on June 3, 2016, North Carolina produced three revised Corrective Action Plans addressing supported housing, supported employment, and mental health services and supports. *See* Ex. 5 (Supportive Housing Corrective Action Plan, 6/3/2016); Ex. 6 (Supported Employment Corrective Action Plan, 6/3/2016), Ex. 7 (Services and Supports Corrective Action Plan, 6/3/2016).

The United States did not respond to the State's revised Corrective Action Plans during June, July, August or September 2016. That left North Carolina without any further guidance from its federal partner for more than four months.

On October 1, 2016, the Independent Reviewer issued her 2016 Annual Report. *See* Ex. 8 (2016 Annual Report, 10/1/2016). As in the 2015 report, the Independent Reviewer assessed the State's compliance on 103 separate measurements. Again, the review found the State to be fully or partially compliant with the vast majority of measurements, only finding noncompliance on 10 out of 103 measurements. *Id.*, pp. 79-96. With respect to Supported Housing, the Independent Reviewer's 2016 Report rated the State on 16 different measurements, only finding the State to be noncompliant with a single measurement. *Id.*, pp. 79-81. With respect to supported employment, the 2016 Annual Report rated the State on 3 different measurements, finding the State to be noncompliant with one. *Id.*, p. 85. On the single Supported Employment measurement that the Reviewer rated as noncompliant, the Reviewer commented that "[t]he State is making significant progress to develop and implement IPS-SE; at the rate of progress will be in partial compliance in a short period of time and potentially in compliance by June 30, 2019." *Id.*, p. 85. The Independent Reviewer also favorably reviewed the State's revised Corrective Action Plans of June 3, 2016. *Id.*, p. 19 (the State has a "focused, strategic approach" on Supported Housing); *id.*, pp. 49-50 (the plan for Supported Employment is "strikingly consistent" with her recommendations).

It was not until October 21, 2016 that the United States responded to the State's revised Corrective Action Plans of June 3, 2016. *See* U.S. Ex. P (letter from T. Yeh to Roy Cooper and Richard Brajer, 10/21/2016). Despite the Independent Reviewer's finding that the State remained fully or partially compliant with the large majority of the Agreement's provisions, *see* Ex. 8 at 79-96, the United States asserted that the revised Corrective Action Plans were inadequate. However, as with its earlier communications, the United States failed to provide a specific counterproposal to North Carolina's proposed plans, as required by Section V(G). Instead, the United States made only vague suggestions that the State should "partner closely

with the Independent Reviewer to implement the recommendations she identified in her 2016 Annual Report, and [] operationalize the recommendations in the forthcoming strategic housing plan from the Technical Assistance Collaborative." U.S. Ex. P, at 2. This did not satisfy the United States' counterproposal obligation in Section V(G).[3]

Despite the fact that the United States did not satisfy the mandatory provisions of Section V(G), and did not offer any meaningful counterproposal to the State's original and revised Corrective Action Plans, the United States filed its Motion to Enforce on January 9, 2017, less than three months after issuing its October 21, 2016 letter. The United States' motion is thus contrary to its obligations under the Agreement.

II. North Carolina's Housing Slots Interpretation is Consistent with the Plain Meaning of the Agreement.

The parties' dispute is about the correct way to count the number of Housing Slots that North Carolina has made available to the targeted population per the terms of the Agreement. North Carolina's interpretation of its Housing Slots commitment is consistent with, and compelled by, the plain language in the Agreement. The State's position is straightforward: North Carolina receives "credit" under the Agreement when North Carolina's efforts enable a qualifying individual to move out of an institution (mental health facility or hospital) and into a qualifying residence, located in the community, with ongoing tenancy, transition and rental support from North Carolina. Under the plain terms of the Agreement, North Carolina gets to count this successful placement toward its commitment to "provide access to 3,000 Housing Slots" by July 1, 2020. Agreement, § III(B)(3). Compliance is to be measured by reference to

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[3] Notably, the "strategic housing plan from the Technical Assistance Collaborative" had not yet been published by October 21, 2016, when the United States made this suggestion. As of the date this Memorandum is being filed, a final version still has not been published. *See* Ex. 9 Decl. of J. Keith, ¶ 15. The United States' premature filing thus deprived North Carolina of the opportunity to implement the changes it recommended.

the running, cumulative total number of individuals the State has transitioned to Housing Slots over time. *Id.*

A. Legal standards.

"[S]ettlement agreements are treated as contracts subject to the general principles of contract interpretation." *Campbell v. Geren*, 353 F. App'x 879, 882 (4th Cir. 2009) (citation omitted). The parties' 2012 Agreement is a fully-integrated agreement that constitutes the parties' entire agreement. *See* Agreement, § I(H). Both North Carolina and the United States agree, and the law compels, that the Agreement be interpreted in accordance with its plain meaning. *See Silicon Image, Inc. v. Genesis Microchip, Inc.*, 271 F. Supp. 2d 840, 850 (E.D. Va. 2003) ("[t]he clearest manifestation of intent is the contract's plain language"). Both parties also assert and agree that the terms of the Agreement are clear and unambiguous, and can be interpreted by the Court as a matter of law without resort to extrinsic evidence. *Campbell*, 353 F. App'x at 882 ("Where a contract is clear and unambiguous on its face, courts must interpret the contract according to the plain meaning of its terms.") (citation omitted).

B. North Carolina is correctly interpreting the "Housing Slots" provisions in Section III(B)(3) in accordance with its plain meaning.

The substantive terms of the Agreement are straightforward. Section III(B) addresses North Carolina's commitment to provide community-based Supported Housing Slots to qualifying individuals. Subsection 1 reflects the State's commitment to "develop and implement measures" to provide targeted individuals with "access to community-based supported housing." Section III (B). Subsection 3 specifies the numeric goals, establishing North Carolina's commitment "to provide access to 3,000 Housing Slots" by reference to a graduated schedule between 2013 and 2020. Section III(B)(3) provides the following operative language:

3. The State will provide access to 3,000 Housing Slots in accordance with the following schedule:

   a. By July 1, 2013 the State will provide Housing Slots to at least 100 and up to 300 individuals....

   d. By July 1, 2016 the State will provide Housing Slots to at least 1,166 individuals....

   h. By July 1, 2020 the State will provide Housing Slots to at least 3,000 individuals.

Agreement, § III(B)(3).

The Agreement defines "Housing Slots" as "State or federal housing vouchers and/or rental subsidies for community-based supported housing." *Id.*, § II(A). The Agreement further explains that "[e]ach Housing Slot includes a package of tenancy support, transition support and rental support." *Id.*, § II(A).

The requirements of Section III(B) are clear and unambiguous. The "State" is the subject, which has agreed to take certain action. The verb "will provide" is connected to the direct object of the provision, "access to ... Housing Slots." Under this provision, pursuant to its plain and ordinary meaning, the State has made two commitments: (1) to find or establish available "State or federal housing vouchers and/or rental subsidies for community-based supported housing [*i.e.*, Housing Slots]," and (2) to "provide access to" these Housing Slots (i.e., make them available) to at least 3000 individuals by July 1, 2020. *Id.* As long as the State provides access to the required number of Housing Slots by the specified end date, the State will have substantially complied with its commitment.[4]

North Carolina is interpreting the "Housing Slots" language in accordance with its plain, unambiguous meaning, and consistent with common sense. Under Section III(B)(3), North

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[4] North Carolina only takes credit for a Housing Slot after an individual has become a tenant living in the community, with required supports provided by the State.

Carolina gets credit for enabling an individual to move into an available Housing Slot – meaning, as a direct result of North Carolina's efforts, a person with Serious Mental Illness or Severe Persistent Mental Illness, exercising his or her free choice, moves away from an institution and transitions into a residence, as a tenant, with supports. Once this successful placement is completed, *i.e.*, the individual would be living as a tenant in a community, North Carolina gets credit toward the Agreement's graduated schedule and ultimate requirement of providing Housing Slots to at least 3000 individuals. *See* Agreement, § III(B)(3)(a-h). In other words, the Agreement measures compliance by reference to the total number of individuals whom the State has transitioned into a Housing Slot over time. Measurement by reference to a cumulative, running total is the logical, plain meaning, and correct interpretation of Section III(B).

1. The United States' interpretation is not supported by the Agreement.

The United States disagrees with the plain meaning of the Agreement, which specifies the way North Carolina counts the numbers. Instead, the United States argues that compliance with the Section III(B) Housing Slots commitment is measured by the number of people who currently occupy a Housing Slot at a point in time (*i.e.*, a specific date). *See* U.S. Mem. at 14. The United States contends that North Carolina should receive zero credit for a successfully-transitioned tenant in a Housing Slot who, prior to the point in time, dies or moves out (regardless of the reason the tenancy ended). *Id.* These arguments must be rejected. They are not supported by the plain language or spirit of the Agreement.

First, and significantly, neither the words "occupied" nor "occupancy" appear in the Agreement. This squarely undermines the interpretation of the United States. Nor does the Agreement set any minimum required duration, or tenancy retention requirement, for an individual in a Housing Slot. The United States correctly notes that the Agreement requires post-placement tenancy support services to "enable residents to attain and maintain integrated,

affordable housing." *See* U.S. Mem. at 15 (citing Sec. III(B)(7)(a)-(b) (emphasis added)). However, the word "maintain" does not convey or establish any specific minimum duration. Nor does the concept of maintaining a tenancy, for an unspecified duration, support the United States' argument that only currently occupied slots count toward the Section III(B)(3) requirement. Under the United States' interpretation, an individual who transitions into a housing slot and lives there for five years (for example), but then dies, will not be counted. This must be rejected.

Second, the United States references "permanent housing," attempting to imply that the Agreement imposes some sort of long-term duration requirement for a tenant to remain in a Housing Slot. *See* U.S. Mem. at 15. This argument is misplaced. The phrase "permanent housing" only appears once in the Agreement, Section III(B)(7)(a), to describe a required attribute of the housing itself (*i.e.*, housing that is not transient or temporary, as a homeless shelter would be). "Permanent housing" is in no way a substantive statement about how long the individual must stay in a Housing Slot for North Carolina to get credit for a successful placement. It is disingenuous of the United States to try to turn this phrase into a substantive term modifying the Housing Slot provision in Section III(B)(3).

Similarly, several times in its Memorandum, the United States uses the phrase "vacant housing slot." *See* U.S. Mem. at 16. This phrase also does not appear in the Agreement. Moreover, because North Carolina made a commitment to "provide access to 3,000 Housing Slots," § III(B)(3), the concepts of vacancy and "current occupancy on a specified date" simply do not apply. Once North Carolina provides a qualified individual with access to a slot and assists him or her to become a tenant in community housing (with supports), the State has fulfilled its obligation.

The Agreement's omission of any time-based tenancy requirement squarely undercuts the United States' interpretation. For example, the parties could have included – but did not include – a time-based provision giving North Carolina credit for a Housing Slot placement only after the individual has resided in the community for 6 months. Or the parties could have stated that, by July 1, 2016, "the State will provide Housing Slots to at least 1,166 individuals" who are currently residing in an occupied Housing Slot on this date. The underlined clause is not part of the Agreement, although the United States is interpreting it as though this hypothetical extra language existed.

Third, the United States' interpretation ignores the "free choice" provisions that run throughout the Agreement. *See* Agreement § II(B) (individual preferences control), III(A) (person-centered planning), III(B)(9) (individuals have free choice to decide housing options), III(E)(11) (individual choice to remain in Adult Care Home or hospital).[5] These "free choice" provisions guarantee that an individual's choice (sometimes expressed through his or her legal guardian) must be respected. Indeed, an individual with a disability has no fewer rights to choose where to live than a non-disabled individual. If a person residing in a Housing Slot decides to move out-of-state, that individual's choice must be respected. The interpretation offered by the United States, however, ignores the "free choice" guarantees, unfairly punishing North Carolina (by taking credit away) after the State has successfully transitioned the individual to community housing.

Fourth, the United States' interpretation, if accepted, would unfairly and dramatically expand North Carolina's obligation far beyond its commitment to "provide access to 3,000

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[5] Tenant attrition is closely related to the "free choice" provisions. The parties understood and recognized that tenants, including tenants in supported Housing Slots, sometimes will move out. *See* Agreement, § III(G)(3) (NC DHHS to monitor "community tenure"), § III(G)(7) (State to collect data on intended outcomes of increased integration and "stable integrated housing").

Housing Slots." Agreement, § III(B)(3). North Carolina's experience and data show that 81.6 percent of people remain in supported housing for one year, and 79.6 percent have remained for the life of the program. *See* Ex. 2 (January 2017 monthly report, 2/28/2017), at 6. Even with that high retention rate, the Independent Reviewer determined that "the State would have to fill at a minimum three thousand and nine hundred (3,900) slots by June 2020 for 3,000 slots to actually be filled on that date." *See* Ex. 8 (2016 Report of Independent Reviewer), at 24. In no way does the Agreement support an interpretation that would require North Carolina to provide "access to" Housing Slots for **3,900** individuals – thirty percent more than the 3,000 Housing Slots specified in the Agreement's Housing Slot provision. This absurd result cannot be supported by the plain meaning of the Agreement.

2. The United States' interpretation cannot be reconciled with Section III(C) – which counts numbers in a different way.

The United States' interpretation of Section III(B)(3), on Housing Slots, is undermined by Section III(C), on Community-Based Mental Health Services. Both sections require compliance by reference to a number and a date. However, the sections provide two very different methodologies to count the number. The United States is pretending that this difference does not exist.

Section III(B)(d) provides as follows for Housing Slots: "By July 1, 2016 the State will provide Housing Slots to at least 1,166 individuals." In contrast, Section III(C)(9)(d), addressing Assertive Community Treatment ("ACT") teams and individuals served by ACT teams, uses different language to count the numbers toward compliance: "By July 1, 2016, the State will increase the number of individuals served by ACT teams to 40 teams serving 4,006 individuals **at any one time,** using the DACT or TMACT model." *Id.* (emphasis added).

Compliance with the ACT team obligation is measured by a number of individuals at a specified point in time. In other words, the relevant question is, on July 1, 2016, were 40 ACT teams currently serving 4,006 individuals on that date. This is a point-in-time measurement, under which only the number of individuals getting ACT services on the specified date may count toward compliance. A person who received ACT services in the past does not count toward compliance.

Section III(B)(3), on Housing Slots, is quite different. It does not count the numbers the same way as Section III(C), measured "at any one time." Instead, Section III(B)(3) contemplates a cumulative total number of individuals who have been provided with access to Housing Slots.

Put simply, the United States cannot be allowed to interpret Section III(B)(3) as though it includes the "at any one time" modifying language appearing only in Section III(C). The two sections use different language to measure compliance. Each section must be interpreted in accordance with its plain meaning, and the contract must be read as a whole "so as to harmonize and give reasonable meaning to all of its parts." *Silicon Image, Inc.*, 271 F. Supp. 2d at 853; *see also Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) ("The Court, under the guise of construction, cannot reject what the parties inserted . . . or insert what the parties elected to omit.") (citations omitted).

3. Specific examples of successful placements underscore the absurdity of the United States' interpretation.

The following specific examples, with names withheld for privacy, demonstrate that the interpretation offered by the United States would lead to absurd results, and would fail to give proper credit to North Carolina for successful placements into community-based housing.

- Don[6] was admitted to a hospital in April 2013. He received a PASRR in the hospital and the LME/MCO prepared his community integration plan on May 15, 2013. After he was discharged from the hospital, Don moved to a retirement facility. In May of 2013, North Carolina provided Don with access to a Housing Slot per the Agreement. Don, in consultation with his family, accepted the Housing Slot. The transition coordinator made the necessary arrangements. Prior to moving he was connected with Hospice, and behavioral health services. In July 2013, Don moved into community housing – his own apartment. He was a very private man who enjoyed watching television. He loved televisions so much he had three televisions donated to him. He also loved watching John Wayne movies and reading his Bible. After residing in his apartment for 4.5 months, Don died from a terminal illness. It was extremely important to him that he was able to pass in his own apartment. *Under USDOJ's interpretation, Don's successful placement does not count toward the Housing Slot obligation.*

- Janie lived at a facility between 2013-2014. In August 2014, after the State provided Janie with access to a Housing Slot, and after receiving assistance from the LME/MCO's transition team, Janie moved into her own apartment. She lived in this apartment for 23 months. In July 2016, Janie moved to another state. *Under USDOJ's interpretation, Janie's successful placement does not count toward the Housing Slot obligation.*

- Between May 2011 and April 2014, Jimmy resided in a facility. In November 2013, the State provided Jimmy with access to a Housing Slot. Jimmy accepted. The transition coordinator made the necessary arrangements. In April 2014, Jimmy moved into his apartment. He resided there for 17 months, until September 2015. After that date, Jimmy's condition improved dramatically, and he decided to move to a different apartment of his choice. *Under USDOJ's interpretation, Jimmy's successful placement does not count toward the Housing Slot obligation.*

- Sue Beth was a long-time resident of one of our more rural counties. In September 2013, North Carolina provided Sue Beth with access to a Housing Slot, which she accepted. In October 2013, Sue Beth moved into her own apartment. She resided there for 30 months. Unfortunately, beginning about April 2016, Sue Beth's medical condition got worse. She and her legal guardian decided that the best place for Sue Beth was a return to a facility that could provide the necessary around-the-clock supports. *Under USDOJ's interpretation, Sue Beth's successful placement does not count toward the Housing Slot obligation.*

USDOJ's interpretation must be rejected because it would give no credit to North Carolina for its successful efforts providing access to Housing Slots, and actual community-

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[6] The names in this section are fictitious to preserve each individual's anonymity. The details of each successful placement into community housing are real.

based residences, to these individuals. It leads to artificial, absurd results that do not accurately reflect North Carolina's overwhelming compliance with its commitments. *See Management Sys. Assoc., Inc. v. McDonnell Douglas Corp.*, 762 F.2d 1161, 1172 (4th Cir. 1985) (courts must reject interpretations that lead to absurd consequences or unjust results). The Agreement simply cannot be interpreted in the manner suggested by USDOJ.

4. Extrinsic evidence, including course of conduct, supports North Carolina's interpretation of its Housing Slot obligation.

The parties both agree and assert that the Agreement is unambiguous and can be interpreted in accordance with its plain meaning without resort to extrinsic evidence. Moreover, as the Agreement is fully-integrated and constitutes the parties' entire agreement, Section I(H), the parties agree that this Court need not consider extrinsic evidence to interpret its meaning. *Id.* To the extent that the Court considers extrinsic evidence, however, it favors North Carolina's interpretation and rebuts the United States' position.

a. Affidavits from North Carolina's negotiating team show the State's interpretation has been consistent.

Attached hereto and incorporated herein are Affidavits executed by three previous representatives of the North Carolina Department of Health and Human Services ("DHHS") who were directly involved in the negotiation of the Agreement. Albert A. Delia was Acting Secretary of DHHS. *See* Ex. 10, ¶ 3. Tara R. Larson was Chief Clinical Operations Officer, Senior Deputy of the Division of Medical Assistance, with DHHS. *See* Ex. 11, ¶ 2. Dr. Beth Melcher was Chief Deputy Secretary for Health Services and Assistant Secretary for Mental Health/Development Disabilities/Substance Abuse Services at DHHS. *See* Ex. 12, ¶ 3. Each of these individuals participated in the negotiations. Each was aware of North Carolina's intentions, understandings and interpretations of the Agreement when it was signed in 2012. Ex. 10, ¶ 6;

Ex. 11, ¶ 5; Ex. 12, ¶ 6. *See Crowder Constr. Co. v. Kiser*, 134 N.C. App. 190, 201, 517 S.E.2d 178, 186 (1999) (courts must look to the intent of the parties when the contract was entered).

On the Section III(B)(3) obligation to provide access to at least 3000 Community-Based Supported Housing Slots to individuals by July 1, 2020, the North Carolina representatives support the interpretation that North Carolina has consistently asserted. Specifically, the representatives affirm that North Carolina believed in 2012 that compliance with the Housing Slot commitment would be measured by reference to a running, cumulative total number of individuals who were transitioned to community-based housing, with ongoing tenancy, transition and rent supports. *See* Ex. 11, ¶ 7 ("My understanding is that North Carolina would receive credit for each successful placement in community-based housing, even if the tenant eventually moved out or died."); *see also* Ex. 10, ¶ 8.

In short, this evidence shows that North Carolina interpreted the Housing Slots requirement in Section III(B)(3) in 2011-2012 in the same way it now interprets the provision – to mean a running, cumulative total number of successful placements over time.

b. The course of conduct shows that North Carolina's interpretation has been consistent.

The United States devotes 6 pages of its Memorandum (17-20, 23-24) arguing that North Carolina's course of conduct, evidenced by its monthly reports, supports the United States' interpretation. This argument is false and should be rejected. To the contrary, the manner in which North Carolina reported its numbers is fully consistent with North Carolina's interpretation of the Housing Slots language in Section III(B)(3).

First, the course of conduct argument is directly rebutted by the parties' communications starting in March 2015. *See* U.S. Ex. H (USDOJ letter of 3/17/2015); *see also* U.S. Ex. I (NC letter of 6/29/15). In meetings and back-and-forth letters, the parties discussed North Carolina's

interpretation of the Section III(B)(3) Housing Slot requirement. The United States understood and acknowledged North Carolina's interpretation. *See* U.S. Ex. H, at 2 ("The [United States] understands the State's position to be as follows: Compliance with the supported housing obligations should be measured against the gross number of people who have ever transitioned into supported housing under the Settlement Agreement, regardless of whether they left supported housing, when they left ... or why they left"). Accordingly, it does not make sense to assert that North Carolina's conduct or reports since March 2015 are inconsistent with the interpretation it asserts today, or the interpretation it had when the Agreement was signed in 2012. *See supra* at 22-23 (citing affidavits from North Carolina's negotiating team).

Second, even before March 2015, North Carolina's conduct does not prove a belatedly-asserted new interpretation of the Agreement, as the United States suggests. As the United States correctly notes, at the start of North Carolina's implementation of this 8-year Agreement, the State generated monthly reports showing the number of occupied Housing Slots on a specified date. *See* U.S. Mem. at 18. The reporting of occupied slots at this early phase of implementation is neither remarkable nor dispositive of either party's interpretation. Unsurprisingly, as individuals were starting to transition into communities, there were few tenants who had died or moved out. Later, beginning with the report for August 2014, North Carolina began reporting both sets of numbers – the number of individuals currently residing in Housing Slots, and also a running total number of individuals who had occupied a Housing Slot at any time. *See* U.S. Ex. F (August Monthly Report) at 2 (table listing 263 individuals currently housed and a total of 303 individuals who had housed cumulatively). Similarly, the report for January 2015 listed both the number of people currently in housing slots on January 31, 2015 and the "403 individuals that have been housed to date ...." *See* Ex. G, at 7, table 3; *see also id.* at 6, table 2 ("The first person to be housed by TCLI [pursuant to the Agreement] was placed on

February 1, 2013. The State has since placed four hundred and three (403) people into a housing slot"). Additionally, in the January 2015 report, North Carolina included data showing "housing tenure," showing that "97 percent of individuals that have been placed have remained in their housing placement for a minimum of three (3) months," with 80 percent of tenants remaining for 2 years. *Id.*, at 7, table 3.

By reporting both sets of numbers, and the retention data, North Carolina was fully and candidly updating its federal partner of the ongoing success of the program. In no way does this demonstrate a change of position by North Carolina, or an interpretation that differs from the one North Carolina now asserts, based on the unambiguous meaning of Section III(B)(3).

The United States' "course of conduct" argument also fails because the Independent Reviewer asked North Carolina to change its reporting of the Housing Slot numbers, to show both currently-occupied slots and a running total of all Housing Slot placements. *See* Ex. 9 (Decl. of J. Keith), ¶ 7. North Carolina's accommodation of this request does not prove that the United States' interpretation has merit.

5. North Carolina's actual numbers demonstrate substantial compliance.

By July 1, 2016, North Carolina transitioned a cumulative total of 853 individuals into supported housing. *See* U.S. Ex. Q, at 5. This includes individuals who were currently occupying a Housing Slot on this date plus the number of individuals who had occupied a Housing Slot but, based on personal choice or other factors outside the control of North Carolina, including natural tenancy attrition, vacated the Housing Slot.

Since the summer of 2016, North Carolina has continued to make significant and substantial progress toward its numeric commitments. Data show that North Carolina's systems and structures continue to expand, providing greater capacity for its citizens with mental health

disabilities. The most recent monthly compliance report, dated February 28, 2017, shows continued compliance: a total of 1167 individuals have been placed into Supported Housing over the life of the program. *See* Ex. 13 (January Monthly report, 2/28/2017), at 6. Plainly, North Carolina is making great progress toward its commitments. It has been, and remains, in substantial compliance with the Agreement because any shortfall below the interim benchmark numbers in Section III(b)(3) are minor and occasional and not systemic under Section V(B) (defining substantial compliance). The Independent Reviewer has acknowledged North Carolina's continuing upward trajectory. *Id.*, p. 4 (noting that DHHS's senior leadership "demonstrate[ed] a strong commitment to meeting the Settlement terms in a manner that strengthens the public health and human services system and assures the target populations in this matter will be fully served in the most integrated setting possible").

C. North Carolina's Interpretation of the Supported Employment Services Provision is Consistent with the Plain Meaning of the Agreement.

"Supported Employment Services" refer to an all-encompassing service for "individuals in preparing for, identifying, and maintaining integrated paid, competitive employment." *See* Section III(D). These services include, but are not limited to "job coaching, transportation, assistive technology assistance, specialized job training, and individually-tailored supervision." *Id.*

1. North Carolina has substantially complied with Section III(D).

The State's commitment to implement and provide Supported Employment Services is addressed in three distinct paragraphs in Section III(D) of the Agreement. Each subsection in the supported employment section of the Agreement has a plain and unambiguous meaning. As demonstrated below, North Carolina is interpreting each section in accordance with its plain language.

Under Section III(D)(1), the State "will develop and implement measures to provide Supported Employment Services to individuals with SMI, who are in or at risk of entry to an adult care home, that meet their individualized needs." *Id.* North Carolina's obligation under Subsection 1 is plain and clear. It must "develop and implement" certain measurements that will be used to provide these services to a specified target population, defined in this subsection as "individuals with [severe mental illness], who are in or at risk of entry to an adult care home." *Id.* No quantity is defined – just "individuals," plural, falling within the target population. There is no dispute, and the United States has acknowledged, that North Carolina has substantially complied with subsection (1). *See* U.S. Mem. at 25 (as of June 30, 2016, "708 individuals in the target population received Supported Employment Services").

The second requirement, under Section III(D)(2), establishes a minimum standard of quality for the Supported Employment Services that will be provided. The United States has not challenged North Carolina's compliance with Section III(D)(2).

The third requirement is in Section III(D)(3). It provides in full:

> By July 1, 2013, the State will provide Supported Employment Services to a total of 100 individuals; by July 2, 2014, the State will provide Supported Employment Services to a total of 250 individuals; by July 1, 2015, the State will provide Supported Employment Services to a total of 708 individuals; by July 1, 2016, the State will provide Supported Employment Services to a total of 1166 individuals; by July 1, 2017, the State will provide Supported Employment Services to a total of 1624 individuals; by July 1, 2018, the State will provide Supported Employment Services to a total of 2082 individuals; and by July 1, 2019, the State will provide Supported Employment Services to a total of 2500 individuals.

Id.

The language in subsection (3) is straightforward. Each clause specifies a date by which the State must "provide Supported Employment Services" to a specified total number of "individuals." *Id.* North Carolina committed to provide the services to "a total of 100 individuals" by July 1, 2013, ramping up to "a total of 2500 individuals" by July 1, 2019. *Id.*

North Carolina's commitment is to serve the specified number of individuals. The term "individuals" in subsection (3) stands alone as a concept; it is not further defined or limited by other language in this section, or with reference to any subgroup or subset of "all individuals." Therefore, pursuant to the rules of contract interpretation, the word "individuals" must be interpreted in accordance with its plain language. The plain meaning of "individuals" is consistent with North Carolina's interpretation.

The three clauses of Section III(D) each have independent meaning, and all must be read in the context of the Agreement as a whole. *See Silicon Image, Inc.*, 271 F. Supp. 2d at 853 (must give reasonable meaning to all parts of the contract).

The United States is misinterpreting subsection (D)(3). Fatal to its position is that no language in subsection (3) expressly or implicitly limits the term "individuals" to mean only the subset of individuals who fall within some (unspecified) defined group. Put simply, nothing in subsection (3) redefines the term "individual" to narrow its meaning or application only to "individuals who have a serious mental illness and are at risk of entry into an adult care home," as the United States suggests. There is no legitimate basis to lift a phrase used only in subsection (1) to specify a targeted population for that section ("individuals with SMI, who are in or at risk of entry to an adult care home") and, through imaginative interpretation, insert that modifying language into subsection (3). This Court should reject the argument that the term "individuals" in subsection (3) must be interpreted as a silent cross-reference or implicit call-back to subsection (1). That interpretation is entirely inconsistent with the rules of contract interpretation, and with common sense.

2. Extrinsic evidence confirms North Carolina's interpretation.

To the extent this Court looks to extrinsic evidence, it supports North Carolina's interpretation of its Supported Employment Services commitment. First, the former North

Carolina DHHS representatives who negotiated the Agreement understood that North Carolina would provide Supported Employment Services to at least 2500 "individuals" by July 1, 2020. *See* Ex. 10, ¶ 9; Ex. 11, ¶8; Ex. 12, ¶ 5 (affidavits from A. Delia, T. Larson and B. Melcher). To these DHHS representatives, "individuals" did not mean what the United States suggests in its Motion, *i.e.* only individuals "with SMI who are in or at risk of entry to an adult care home." *Id.*

Second, the manner in which North Carolina reported its numbers has been fully consistent with North Carolina's interpretation of Section III(D). As early as November 25, 2014, the State reported both the total number of individuals who received supported employment services, and the number of individuals from the "at risk" subpopulation. *See* U.S. Ex. Z, at 2; *see also* U.S. Ex. W, at 2 (reporting both numbers). This reporting does not undermine North Carolina's interpretation. In fact, as shown by letters exchanged on March 17, 2015 and June 29, 2015, the United States was on full notice of North Carolina's interpretation of the Supported Employment provisions in Section III(D). *See* U.S. Ex. H (USDOJ letter of 3/17/15), at 3-4; U.S. Ex. I (NC letter of 6/29/2015), at 3-4. Because the parties' interpretation had been expressed and understood, the Court should reject the argument that the monthly reports were inconsistent with the State's interpretation.

3. North Carolina's actual numbers demonstrate substantial compliance.

As of July 1, 2016, North Carolina had provided Supported Employment Services to 1,755 individuals. *See* U.S. Ex. Q (June 2016 monthly report, at 2). This included 708 from the subpopulation defined in Section III(D)(1) plus 1,047 from other populations. *Id.* Since then, North Carolina has continued to make important progress toward its 2020 commitments. The most recent data shows that North Carolina has served 2,747 individuals, including 1,012 in the priority subpopulation. *See* Ex. 2 (January Monthly Report, 2/28/2017), at 2.

The data shows that North Carolina is making meaningful progress toward its numeric commitments. It has been, and remains, in substantial compliance with the Agreement because any shortfall below the interim benchmark numbers in Section III(D)(3) is minor and occasional and not systemic as defined in Section V(B) (substantial compliance). By focusing on the interim numbers at the exclusion of the State's strides made over the course of the Agreement, the United States is overlooking the substantial good faith efforts North Carolina has undertaken for sustainable system-wide changes to benefit all of its citizens, not just those in a defined subpopulation.

III. The United States Seeks Remedies that are Impermissible Because They Go Beyond "Enforcement" of the Written Terms of the Settlement Agreement.

As demonstrated above, the United States is asserting an interpretation that, if accepted, would dramatically expand North Carolina's obligations as expressed in the Agreement. The Agreement itself prohibits the kind of expanded re-interpretation the United States is offering here. Section I(H) provides that, "[n]either third parties, nor the Court, shall have the ability to modify the terms set out in this Agreement without consent of the parties, subject to the enforcement provisions set forth in Sections V(F) and (G), below." Under Section V(H), the Agreement may not be modified without express, written consent of the parties, submission to the Court, and entry by the Court of the modified agreement with retained jurisdiction to enforce it. *Id.*, § V(H); *see also* § I(I) (entire agreement provision; any amendment must be in writing and signed by the parties).

North Carolina takes its commitments seriously. Unquestionably, the State has devoted tremendous resources to comply with the Americans with Disabilities Act, the *Olmstead* decision, and the Agreement, with the ultimate goal of creating effective and sustainable systems changes for all of its citizens with mental health issues. The United States should not be

permitted to refuse to work as North Carolina's partner, to brush aside North Carolina's Corrective Action Plans, and instead unilaterally re-write the Agreement. The United States' artificially expansive interpretations of the Agreement cannot be reconciled with its plain language or with the testimony from North Carolina's negotiating team in 2011-2012. The Court should reject this attempt to force North Carolina to meet elevated obligations beyond those specified in the Agreement. The Court should deny the motion.

CONCLUSION

For the reasons demonstrated above, the Court should deny the motion.

Respectfully submitted, this the 1st day of March, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he electronically filed a copy of the foregoing NORTH CAROLINA'S RESPONSE IN OPPOSITION TO MOTION TO ENFORCE SETTLEMENT AGREEMENT with the Court through the Court's CM/ECF system and thereby served this document upon the counsel of record who are registered with that system. I further certify that I have mailed the document to the following non CM/ECF participates: none.

Dated this the 1st day of March, 2017.

MTWood

Michael T. Wood
Special Deputy Attorney General