

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

**UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO
ENFORCE THE SETTLEMENT AGREEMENT**

In response to the United States' Motion to Enforce the Settlement Agreement, D.E. 15, North Carolina urges the Court to adopt interpretations of the Agreement at odds with its text and purpose. Def.'s Opp'n, D.E. 23. The State's interpretations would dilute its supported housing and supported employment obligations and contravene the Agreement's purpose of achieving community integration for individuals with serious mental illness in or at risk of entry to adult care homes. For the reasons stated in the United States' Memorandum in Support of its Motion, and as set forth below, the Court should uphold the parties' manifest intent to measure compliance by counting only occupied Housing Slots and individuals in the target population and grant the United States' request for declaratory and injunctive relief.

I. THE UNITED STATES HAS PLAINLY SATISFIED THE AGREEMENT'S DISPUTE RESOLUTION REQUIREMENTS.

The State wrongly contends that the Motion is not ripe because the United States has not met the Agreement's procedural prerequisites. The United States has not only satisfied the Agreement's dispute resolution requirements, but also has engaged with the State for nearly two years to resolve the disputed issues.

The Agreement requires the United States, before seeking judicial enforcement, to notify North Carolina in writing of alleged noncompliance and request corrective action. Settlement Agreement § V(F), D.E. 2-2 ["S.A."]. The State has 45 days to respond. *Id.* If the United States deems the proposed corrective action insufficient, it "may . . . offer a counterproposal for a different curative action." *Id.* § V(G). The Agreement imposes no deadline for submitting the counterproposal and no requirement to respond to any revised plan. The United States may seek a judicial remedy "[i]f the Parties fail to reach an agreement on a plan for curative action." *Id.*

North Carolina has been on notice that the United States disagrees with its interpretation of the Agreement's housing and employment services requirements since March 2015. Letter from

U.S. DOJ to State, Mar. 17, 2015, D.E. 15-10. After months of frustrated negotiations, the United States triggered the Agreement's dispute resolution requirements by formally requesting a corrective action plan under section V(F). Letter from U.S. DOJ to State, Nov. 6, 2015, D.E. 15-15. The State produced a plan in response. Because the proposed plan contained no specific steps tied to satisfying the requirements of sections III(B)(3) and III(D)(3), the United States counterproposed a different curative action. Letter from U.S. DOJ to State, Mar. 24, 2016, D.E. 15-17. The United States' counterproposal met section V(G)'s minimal requirements.

After several communications and meetings with the State and the Independent Reviewer in 2015 and 2016, the United States reasonably concluded that the parties would not reach agreement on a curative action and sought a judicial remedy under section V(G).

II. THE STATE MISCONSTRUES THE AGREEMENT'S SUPPORTED HOUSING REQUIREMENTS.

North Carolina argues that individuals who have vacated their Housing Slots—including those who have returned to adult care homes or other segregated settings—count toward satisfying the State's supported housing obligation. If adopted, this interpretation would undermine a core purpose of the Agreement: to provide community integration by expanding the State's systemic capacity to provide permanent supported housing. The United States' interpretation, that only occupied Housing Slots count toward compliance, effectuates this purpose. The State's reliance on section III(C)(9) to rebut this interpretation is unavailing. And, even assuming that the Agreement is ambiguous, which it is not, the Court should disregard the State's conclusory, post-hoc affidavits. The most persuasive extrinsic evidence—the State's own prior conduct—supports counting only occupied Housing Slots.

A. The Agreement is Unambiguous that Only Occupied Housing Slots Count Toward Compliance.

1. Including Individuals Who Have Vacated Their Housing Slots in Measuring Compliance Undermines the Agreement's Purpose.

The State argues that including individuals who have vacated their Housing Slots in measuring compliance with section III(B)(3) is consistent with the Agreement's plain meaning. Def.'s Opp'n 12–15. The Court should reject this interpretation because, “taken to its logical extreme, it could defeat the express purpose of the [Agreement].” *See State v. Phillip Morris USA Inc.*, 359 N.C. 763, 779, 618 S.E.2d 219, 229 (2005).

The Agreement resolved the United States' finding that thousands of North Carolinians with mental illness were unnecessarily institutionalized in adult care homes in violation of title II of the ADA. S.A. § I(B); Letter of Findings 1–2, 5, D.E. 15-3. The findings included in part that the State had failed to develop sufficient capacity to provide supported housing to individuals with mental illness in or at risk of entry to adult care homes. Letter of Findings 2, 11, 13–14.

To effectuate the Agreement's purpose of achieving community integration, consistent with the ADA, the State agreed to expand its capacity to provide permanent supported housing as a meaningful alternative to adult care homes. *See* S.A. §§ I(C), III(B), III(G)(1), III(G)(7). Section III(B)(3)'s progressive schedule reflects the State's commitment to sustainable, systemic growth, *see* Def.'s Opp'n 2, 6, requiring the State to build on the foundation of prior years until its system simultaneously supports 3,000 individuals. By now seeking “credit” for each individual who cycles through supported housing, however short-lived and regardless of the number of Housing Slots actually occupied by aggrieved individuals on the specified compliance dates, the State's interpretation would defeat the Agreement's requirements and purpose.

Taken to its logical extreme, North Carolina's position could result in a “compliant” system in which no one resides in supported housing by the Agreement's end. Indeed, a large percentage

of individuals who vacate Housing Slots move to segregated settings, with adult care homes as their most likely destination. Jan. 2017 Monthly Rep. 7, D.E. 23-3.

In contrast, counting only the number of occupied Housing Slots—i.e., the number of individuals the system can support on the annual compliance dates—effectuates the Agreement’s purpose of achieving community integration. Only by developing the capacity to serve 3,000 individuals in supported housing simultaneously can North Carolina “effect [the] long-term and sustainable systems change” necessary to offer meaningful community-based alternatives to segregated adult care homes. *See* Def.’s Opp’n 2.

The State contends that this approach is unreasonable because the Agreement imposes no durational residency requirements on Housing Slots. Def.’s Opp’n 15–17, 19–21. But individuals may freely choose to vacate their Housing Slots at any time; the State must simply provide them to other aggrieved individuals in the Agreement’s target population. *See* Letter of Findings 5 (finding approximately 5,800 individuals with mental illness institutionalized in adult care homes); *N.C. Supported Housing Corrective Action Plan* 3, D.E. 15-20 (reporting that as of May 2016, at least 354 individuals were interested in, but had not transitioned into, a Housing Slot).

2. The Text of Section III(C)(9) is Irrelevant to the Interpretation of Section III(B)(3).

North Carolina argues that the Court should not measure the State’s compliance with section III(B)(3) by counting only occupied Housing Slots on the annual compliance dates because this provision does not include the phrase “at any one time,” which appears in section III(C)(9). Def.’s Opp’n 18–19. The State essentially urges the Court to apply the *expressio unius est exclusio alterius* canon of construction, i.e., that to express one thing implies the exclusion of another. But the Court need not rely on canons of construction because the parties’ intent is clear from the Agreement’s purpose and context.

When the parties' intent is discernible with the aid of standard contract interpretation principles, courts will not apply secondary tools of construction to undermine their intent. *See Pilgrim Laundry & Dry Cleaning Co. v. Fed. Ins. Co.*, 140 F.2d 191, 193 (4th Cir. 1944) ("Irrespective of any other rules of construction the real intent . . . is what must govern the court . . ."); 11 Williston on Contracts § 30:2 (4th ed.) ("The rules for the construction of contracts are all subordinate to the cardinal principle that the intention of the parties . . . must prevail . . .").¹ Courts resort to canons of construction only to construe terms that remain ambiguous after considering the agreement as a whole and interpreting it to effectuate its purpose. *See* 17A C.J.S. Contracts § 392; *Jones v. Casstevens*, 222 N.C. 411, 413, 23 S.E. 2d 303, 305 (1942) ("If there be no dispute as to the terms, and they are plain and unambiguous, there is no room for construction."); *see also Fried v. N. River Ins. Co.*, 710 F.2d 1022, 1025, 1027 (4th Cir. 1983) (relying on canons of construction only when contract language was ambiguous).

Here, subsidiary interpretive tools are unnecessary because section III(B)(3), interpreted in light of the Agreement's purpose and context, is unambiguous: the parties intended to measure compliance by counting only occupied Housing Slots. *See supra* Part II(A)(1); U.S.'s Mem. in Supp. of Mot. 14–17, D.E. 15-1 ["U.S.'s Br."].

¹ *See also Kaiser Motors Corp. v. Savage*, 229 F.2d 525, 533–34 (8th Cir. 1956) (declining to apply *expressio unius est exclusio alterius* when "other clearer indications" of the parties' intent were available); *Metro. Life Ins. Co. v. Strand*, 255 Kan. 657, 662, 876 P.2d 1362, 1366 (1994) (explaining that canons of construction such as *expressio unius* are "used in the interpretation and construction of a contract when the intention of the parties is not clear"); *Bd. of Transp. v. Pelletier*, 38 N.C. App. 533, 537, 248 S.E. 2d 413, 415 (1978) (noting that "if the intent is not apparent from the deed, resort may be had to the general rules of construction"); *Checker Oil Co. of Del. v. Harold H. Hogg, Inc.*, 251 Pa. Super. 351, 356, 380 A.2d 815, 817–18 (1977) (declining to apply canon of construction "when an examination of the entire transaction reveals that the parties had a different or more inclusive intention").

B. Even Assuming that the Agreement is Ambiguous, Extrinsic Evidence Shows that Only Occupied Housing Slots Count Toward Compliance.

1. Albert Delia and Tara Larson's Affidavits Do Not Reveal the Parties' Mutual Intent.

Albert Delia and Tara Larson's affidavits, which the State proffers as evidence of its intent when negotiating section III(B)(3), present nothing more than the affiants' subjective, post hoc understanding of the Agreement. *See* Delia Aff. ¶ 8, D.E. 23-11 ("I understood the Agreement to mean . . ."); Larson Aff. ¶ 7, D.E. 23-12 ("my understanding is that . . .").

These statements of former State employees' subjective intent are irrelevant to determining the parties' mutual intent. *See VCA Cenvet, Inc. v. Chadwell Animal Hosp., LLC*, No. JKB-11-1763, 2011 WL 6257190, at *3 (D. Md. Nov. 29, 2011) ("One party's subjective and undisclosed intent is simply irrelevant to contract interpretation." (citations omitted)); *Wilson v. Wilson*, 214 N.C. App. 541, 545, 714 S.E. 2d 793, 796 (2011) ("The effect of the agreement is not controlled by what one of the parties intended or understood." (quotations omitted)) (rejecting testimony regarding defendant's understanding of contractual term); *see also Wash. Square Secs., Inc. v. Aune*, 385 F.3d 432, 439 (4th Cir. 2004) (explaining that "declarations made . . . during the course of litigation are much less reliable evidence of [a party's] intent"). In short, "[l]ooking at the parties' subjective intentions alone accomplishes no more than restating their conflicting positions." *N.A.P.P. Realty Tr. v. CC Enters.*, 147 N.H. 137, 140, 784 A.2d 1166, 1169 (2001).

2. The State's Attempts to Explain its Prior Conduct are Unavailing.

The State advances several arguments to try to harmonize its prior conduct of reporting only occupied Housing Slots with its current position that vacant Housing Slots also count toward compliance. None are persuasive.

First, the State argues that its conduct after the United States raised the interpretation dispute in March 2015 is consistent with its current legal position. Def.'s Opp'n 23. The United

States does not dispute this; rather, the State’s evolving reporting practices *prior to that date* reveal the State’s attempt to reframe its legal obligation, as the likelihood of noncompliance became clear. U.S.’s Br. 7–9, 18–20 (tracing evolution from Agreement’s inception through March 2015). When the parties’ pre-dispute conduct reveals a practical interpretation of their contract, as it does here, courts “will ordinarily adopt the construction the parties have given the contract” before the dispute arose. *See Lynn v. Lynn*, 202 N.C. App. 423, 432, 689 S.E.2d 198, 205 (2010).

Second, the State asserts that its prior reporting included only occupied Housing Slots because “few tenants [] had died or moved out” in the early implementation phase, leaving no turnover of consequence to report. Def.’s Opp’n 23. But the State does not substantiate its assertion that turnover during that time was negligible. Also, the State began providing monthly reports in April 2014—nearly two years into implementation. Earlier State reports indicate that from August 2013 to January 2014, between 77 and 169 individuals occupied Housing Slots.² Thus, it is unlikely that turnover was negligible, especially given that at least 17 individuals vacated their Housing Slots from April through August 2014.³

Lastly, based on a vague and uncorroborated affidavit from a State employee, the State claims that it changed the summary table of its monthly reports to present the “running total” of

² These figures account for turnover, reflecting only occupied Housing Slots. *Year One Summary* 5, D.E. 15-22 (reporting 77 individuals were “in housing”); *Transitions to Community Living Update as of January 6, 2014* 1, D.E. 15-23 (reporting 169 individuals “confirmed as in housing”).

³ Minimum turnover was determined by counting net decreases in the reported number of housed individuals in each section III(B)(2) priority category in each placement as compared to the previous month’s total in that same category and placement. For example, at least two individuals left their Housing Slots between April and May 2014, as the net decrease in individuals housed in the totals for two priority categories indicates. *Compare* April 2014 Monthly Rep., D.E. 15-7, *with* May 2014 Monthly Rep., D.E. 15-6 (“Category 4” individuals at Partners Behavioral Health decreased from 3 to 2, “Category 5” individuals at Sandhills Center decreased from 9 to 8). Actual turnover may have been greater because the calculation of minimum turnover does not account for any turnover offset by net total gains.

occupied and vacant Housing Slots at the Independent Reviewer’s request. Def.’s Opp’n 24. The State seems to argue that its “accommodation” of the Reviewer’s alleged request undermines the significance of the State’s early reporting of only occupied Housing Slots. *See id.* Regardless of whether the State later changed its reporting at the Reviewer’s request, the State’s prior conduct reflects its early interpretation that only occupied Housing Slots satisfy section III(B)(3).

3. The Independent Reviewer Measures Compliance by Counting Only Occupied Housing Slots.

The Independent Reviewer measures the State’s compliance with section III(B)(3) as the number of occupied Housing Slots on the annual compliance dates.⁴ 2016 Annual Rep. 24, 28 (Fig. 6), D.E. 23-9 (reporting that 650 individuals had “retained their rental unit” and that the State was 516 slots shy of meeting “the 2016 Housing filled unit obligation” of 1,166); 2015 Annual Rep. 8, D.E. 23-4. Notably, the Independent Reviewer explains that “[f]illing the exact number of slots as required in this Agreement or in any housing program requires refilling a substantial number of Housing Slots that are vacated over the course of eight years.” 2016 Annual Rep. 24; *see* 2016 Annual Rep. 13, 24–30, 33 (describing Housing Slots as “occupied (filled)” or “refilled”), 23 (“Central to the State’s taking effective measures to meet its Supported Housing compliance requirements is maintaining a low turnover rate.”).

III. THE STATE HAS NOT SUBSTANTIALLY COMPLIED WITH SECTIONS III(B)(3) AND III(D)(3).

The State argues that it has substantially complied with provisions not at issue in the Motion. Def.’s Opp’n 8, 11. The status of compliance with other provisions is not relevant here. The United States moves to enforce two provisions that are major requirements of the Agreement:

⁴ The Independent Reviewer also measures the State’s compliance with section III(D)(3) as the number of individuals in the target population receiving Supported Employment Services on the annual compliance dates. 2016 Annual Rep. 56.

sections III(B)(3) and III(D)(3).⁵ The Independent Reviewer has consistently found the State noncompliant with both provisions. 2016 Annual Rep. 79 (“noncompliance” rating for S.A. § III(B)(3)) (“The State has not met this obligation for two consecutive annual reporting periods.”), 85 (“noncompliance” rating for S.A. § III(D)(3)).

On July 1, 2016, the State was providing Housing Slots to only 650 of the required 1,166 individuals. *Id.* at 24, 28 (Fig. 6). In other words, the State’s supported housing program operated at 56 percent of its expected capacity, which represents a systemic failure, rather than the “minor and occasional” violations the Agreement tolerates.⁶ *See* S.A. § V(B). The Independent Reviewer predicts that “[b]ased on FY 2016 data, 66% of the required Housing Slots will be filled on June 30, 2020.” 2016 Annual Rep. 28.

On July 1, 2016, only 708 individuals from the target population of the required 1,166 received Supported Employment Services. *Id.* at 56 (noting that to serve 2,500 individuals by 2019, “[t]he State will need to serve an additional 1,792 individuals” beyond the 708 target population members served). In other words, the State’s supported employment program operated at 61 percent of its expected capacity, which constitutes a failure to comply substantially.⁷

⁵ Contrary to the State’s assertions, the United States does not seek to modify the Agreement. Thus, the Motion does not implicate section V(H).

⁶ Even applying the State’s numbers, its supported housing program operated at only 73 percent of expected capacity by July 1, 2016. *See* Def.’s Opp’n 24 (reporting that the State had served 853 individuals in Housing Slots for some amount of time). That seven months later, 1,167 individuals had cycled through Housing Slots is of no consequence; by that time, the system needed to be moving much closer to its July 1, 2017 benchmark of serving 1,624 individuals.

⁷ Jessica Keith and Beth Melcher’s affidavits misstate the United States’ position on supported employment as barring North Carolina from providing the service to individuals outside the target population. *See* Keith Decl. ¶¶ 11, 13, D.E. 23-10; Melcher Aff. ¶¶ 5–6, D.E. 23-13. The State may provide Supported Employment Services to whomever it wants, but only services provided to target population members satisfy the State’s section III(D)(3) obligation. *See also* U.S.’s Br. 20–25 (replying to State’s arguments on the interpretation of section III(D)(3)).

With respect to the status of compliance with provisions not at issue here, ratings of partial compliance encompass a wide range of progress or lack thereof. 2016 Annual Rep. 9. Indeed, the Independent Reviewer describes the State’s progress toward compliance as “slow and still somewhat uneven . . . across most threshold provisions in the Settlement Agreement.” *Id.* at 76.

IV. CONCLUSION

For the foregoing reasons and for the reasons set forth in the moving brief, the United States respectfully requests that the Court grant the Motion to Enforce the Settlement Agreement.

Dated: March 22, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March 2017, I electronically filed the attached Reply using the CM/ECF system, which will automatically send email notification of such filing to all attorneys of record.

/s/ Teresa Yeh _____
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