IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CLINTON L., et al., Plaintiffs, vs. LANIER CANSLER, et al., Defendants.	Civil Action No. 1:10-cv-123-JAB **DEFENDANT COUGHLIN'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant Dan Coughlin ("Coughlin"), by and through his undersigned attorneys, and pursuant to Local Rule 56.1 (MDNC), respectfully submits this memorandum in support of his Motion for Summary Judgment [D.E. 88].

CASE SUMMARY

Defendant Coughlin adopts the "Case Summary" set forth in Defendant Cansler's Memorandum in Support of his Motion for Summary Judgment [D.E. 87, pp. 1-4].

FACTS

A. PBH

PBH is a multi-county area mental health, developmental disabilities, and substance abuse authority ("area authority") established pursuant to N.C. Gen. Stat. § 122C-115(c) by the Boards of Commissioners of Alamance, Cabarrus, Caswell, Davidson, Rowan, Stanly and Union Counties.[1] PBH is a "local political subdivision of the State," N.C. Gen. Stat. § 122C-116, and is also referred to as a "local management

[1] When this lawsuit began, PBH served 5 counties – Cabarrus, Davidson, Rowan, Stanly and Union. Effective October 1, 2011, Alamance and Caswell counties are now also a part of PBH's catchment area, although none of the Plaintiffs reside in either of these counties.

entity" ("LME"). N.C. Gen. Stat. § 122C-3(20b). *See* Coughlin Decl. [D.E. 10-3] ¶ 3. Upon Defendant Coughlin retirement, Pamela Shipman became the CEO of PBH effective July 1, 2011. *Id.* ¶ 1.

LMEs are local political subdivisions that provide oversight of private mental health care providers by planning and coordinating certain behavioral health services in a defined area. *See* N.C. Gen. Stat. § 122C-115.4. PBH does not provide health care services itself, but instead is a local manager of care provided by a network of providers who provide services to consumers. Coughlin Decl. [D.E. 10-3] ¶ 4.

Pursuant to an agreement between PBH, the federal Centers for Medicare and Medicaid Services ("CMS"), and the North Carolina Department of Health and Human Services (the "Department"), PBH operates under Federal waivers pursuant to Sections 1915(b) and (c) of the Social Security Act (42 U.S.C. § 1396n(b) and (c)). These waivers establish PBH as a Prepaid Inpatient Health Plan ("PIHP"), and it also outline the benefits for developmental disabilities, mental health and substance abuse consumers in PBH's catchment area. *See* Coughlin Decl. [D.E. 10-3] ¶ 5.

PBH's operation as a PIHP means that PBH is pre-paid by the State to provide care, and that it accepts the financial risk of providing that care. This arrangement intentionally creates an incentive for PBH to provide the most efficient and cost-effective care. However, PBH is not a for-profit entity; any cost savings generated by PBH as a result of providing efficient and cost-effective care are required to be used to provide additional medical care for Medicaid beneficiaries enrolled in the plan. *See* 42 C.F.R. § 431.55(e); Coughlin Decl [D.E. 10-3] ¶ 6.

PBH also has an agreement with the Department's Division of Mental Health, Developmental Disabilities and Substance Abuse Services ("DMH") to serve as the LME for the seven counties. Pursuant to this agreement, PBH receives state funds (*i.e.*, non-Medicaid funds) to provide mental health, developmental disabilities, and substance abuse services to indigent consumers. PBH's agreement with DMH imposes a number of responsibilities on PBH, including that PBH will "[e]stablish rates for services" with its contractors. *See* DMH Contract § 10.0(7). [2] *See also* 42 C.F.R. § 438.12 (PIHPs are authorized to use "different reimbursement amounts" and to establish "measures that are designed to . . . control costs."); Coughlin Decl. [D.E. 10-3] ¶ 8. Pursuant to its agreements with the Department, PBH has a finite amount of funds to provide all of the necessary behavioral health services to eligible consumers in this seven-county area. [3]

B. The February 2010 Reduction in Reimbursement Rates to Providers for Certain Supervised Living Billing Codes.

As a result of the State's economic condition and the budget pressures faced by the General Assembly, PBH's allocation of state funds has been significantly reduced in recent years. In FY 2006-2007, PBH was allocated $35,645,918 in state service funds. PBH's allocation was reduced by $3.6 million in FY2007-08, and as of the filing of the Complaint, by an additional $4.3 million in FY2009-10. *See* Snipes Decl. [D.E. 10-4] ¶ 3. While PBH's funds for providing services were drastically reduced, its responsibilities

[2] The Contract between the DMH and PBH can be found at D.E. 88-7, with the amendment extending the contract through June 2013 filed at D.E. 88-8.

[3] The 2010 U.S. Census reflects that the population of PBH's seven-county catchment area is 916,044 people. *See* http://quickfacts.census.gov/qfd/states/37000.html (accessed January 17, 2012).

remained the same. PBH is still required to manage and pay for all of the necessary mental health, developmental disabilities, and substance abuse services for eligible consumers in its catchment area.

Faced with significantly less funding from the State, PBH took steps to rein in costs in order to continue to be able to provide appropriate services for eligible consumers. One of PBH's responses to the reductions in its funding was to exercise its authority to establish rates for services. Snipes Decl. [D.E. 10-4] ¶ 4. At issue in this litigation is PBH's change of two specific service billing codes – Supervised Living – 1 resident (YM811) and Supervised Living – 2 Residents (YM812). Prior to February 15, 2010, PBH reimbursed providers at a rate of $161.99/day for Supervised Living services provided in a 2-resident placement, and reimbursed providers at a negotiated rate for Supervised Living services provided in a single-resident placement. Yon Dep. 72:5-7. Effective February 15, 2010, PBH reduced the reimbursement rate for Supervised Living services billed under the YM811 and YM812 service codes to $116.15/day, which is the rate at which PBH reimburses providers for Supervised Living services provide in 3-resident placements and is billed under the YM813 service code. Snipes Decl. [D.E. 10-4] ¶ 4; January 11, 2010 PBH Finance Communication Bulletin [D.E. 1-1].

C. <u>Plaintiffs</u>

All of the Plaintiffs are dually-diagnosed with a developmental or intellectual disability *and* a mental illness. Prior to the February 2010 reduction in the reimbursement rates for two specific billing codes for Supervised Living services, each of the Plaintiffs was living in the community, as opposed to in an institutional placement.

Nearly two years later, all of the Plaintiffs continue to live in community-based placements where they continue to receive 24-hour supervision. Since the February 2010 rate reduction, none of the Plaintiffs has been forced from their community-based placement into an institutional placement.

1. Clinton L.

Clinton L. is a 48 year-old man who is diagnosed with Moderate Mental Retardation, Schizoaffective Disorder, Bipolar Disorder, and Intermittent Explosive Disorder. 2d Am. Compl. ¶¶ 1, 30. Prior to the February 2010 rate reduction, Clinton L. lived alone in a 2-bed group home in Davidson County operated by Easter Seals UCP North Carolina, where he was supervised 24 hours per day. *Id.* ¶ 32; Yon Decl. [D.E. 88-1] ¶ 5. Clinton L. received a number of services from Easter Seals, including Supervised Living services. Yon Decl. [D.E. 88-1] ¶ 5. Clinton L. continues to live in this same community placement, where he continues to receive Supervised Living services from Easter Seals at the reduced rate of $116.15/day. *Id.* ¶ 6. Since the February 2010 rate reduction, Clinton L. has not been institutionalized.

2. Vernon W.

Vernon W. is a 49 year-old man who is diagnosed with Severe Mental Retardation, Depressive Disorder, and Epilepsy. 2d Am. Compl. ¶¶ 3, 52. Prior to the February 2010 rate reduction, Vernon W. lived in a single-person placement in a house in Davidson County owned by his father and guardian, Vernon D.W., where he was supervised 24 hours per day by his provider, Youth Adult Care Management. Yon Decl. [D.E. 88-1] ¶ 27. Vernon W. received a number of services from YACM, including

Supervised Living services. *Id.* In April 2010, Omni Visions, Inc. replaced YACM as Vernon's provider, and began providing Supervised Living services for Vernon at the reduced rate of $116.15/day. *Id.* ¶ 28. Effective February 1, 2012, Monarch, Inc. will replace OmniVisions as Vernon's provider, and will continue to provide Supervised Living services for Vernon at the reduced rate of $116.15/day. *Id.* ¶ 29; Shaver Decl. [D.E. 88-4] ¶ 9. Since the February 2010 rate reduction, Vernon W. has not been institutionalized.

3. Steven C.

Steven C. is a 34 year-old man who is diagnosed with Mild Mental Retardation and Depressive Disorder. 2d Am. Compl. ¶¶ 4, 43. Prior to the February 2010 rate reduction, Steven C. lived in a single-person placement in Davidson County operated by Monarch, Inc., where he was supervised 24 hours per day. Yon Decl. [D.E. 88-1] ¶ 16. In April 2010, Steven C. moved into a licensed 3-bed group home operated by YACM where he lived with one other housemate, and where YACM provided Supervised Living services for Steven C. at the reduced rate of $116.15/day. *Id.* ¶¶ 16, 22. In December 2010, Steven C. moved into a 2-bed Alternative Family Living ("AFL") placement in Cabarrus County where he lived with one other housemate, and where he received Supervised Living services at the $116.15/day rate. *Id.* ¶¶ 18, 22. In August 2011, at Steven's request to move closer to his parents in Davidson County, Steven moved into a single-person AFL placement in Thomasville, NC, where he received Supervised Living services through his new provider, Building Bridges. *Id.* ¶¶ 19, 20. In December 2011, Steven C. and his staff persons changed providers, and moved into a single-person AFL

placement in Lexington operated by Alberta Home Care. *Id.* ¶ 21. Since the February 2010 rate reduction, Steven C. has not been institutionalized.

4. Jason A.

Jason A. is a 37 year-old man who is diagnosed with Moderate Mental Retardation, Mood Disorder with Aggression, Obsessive-Compulsive Disorder, Attention Deficit Hyperactivity Disorder, and Autism. 2d Am. Compl. ¶¶ 5, 61; Yon Decl. [D.E. 66-1] ¶ 22. Prior to the February 2010 rate reduction, Jason A. lived with one other housemate in a licensed 3-bed group home in Rowan County operated by RHA, where he received 24-hour supervision. Yon Decl. [D.E. 88-1] ¶ 23; Earl Decl. [D.E. 88-3] ¶ 3. In this placement, Jason A.'s provider, RHA, provided a number of services for Jason A., including Supervised Living services. Yon Decl. [D.E. 88-1] ¶ 23; Earl Decl. [D.E. 88-3] ¶ 4. In March 2010, a third resident moved into the vacant bedroom in the licensed 3-bed group home. Yon Decl. [D.E. 88-1] ¶ 24. At all times during this lawsuit, Jason A. has continued to receive Supervised Living services in the same 3-bed group home operated by RHA at the reduced rate of $116.15/day. *Id.* ¶ 26.

In April 2010, Jason spent one week at the NC START crisis respite center due to a cycle of behaviors, as he has done in the past. Earl Decl. [D.E. 88-3] ¶ 6. Since returning to the 3-bed group home in April 2010, Jason has not had to return to the crisis respite center due to his behaviors. *Id.* ¶ 7. Since the February 2010 rate reduction, Jason A. has not been institutionalized.

5. Timothy B.

Timothy B. is a 46 year-old man who is diagnosed with Severe Mental Retardation, Intermittent Explosive Disorder, Major Depressive Disorder, and Epilepsy. 2d Am. Compl. ¶¶ 2, 35. Timothy B. is also deaf. *Id.* ¶ 35. Prior to the February 2010 rate reduction, Timothy B. lived in a single-person apartment in Wake County operated by his provider, Community Alternatives, where he received 24-hour supervision. In April 2010, Timothy B.'s guardian, his mother Rose B., moved Timothy B. back to her home in Davidson County. Although PBH made numerous community-based placements available for Timothy, his guardian chose to care for Timothy at her home until June 2010. On June 23, 2010, Timothy B. moved into a licensed 2-bed group home in Davidson County operated by Ambleside, Inc., where he received 24-hour supervision. Yon Decl. [D.E. 88-1] ¶ 10. Although it was available for Timothy B., his provider did not bill PBH for Supervised Living services for Timothy from June 2010 until April 2011, with the provider indicating that it was able to provide 24-hour supervision for Timothy B. without the supplemental Supervised Living funding. *Id.* ¶ 11. In April 2011, Ambleside requested that PBH authorized reimbursement for Supervised Living services for Timothy, which PBH did at the reduced rate of $116.15/day. *Id.* ¶¶ 12, 15. Timothy B. continues to live in the 2-bed group home operated by Ambleside, where he continues to receive Supervised Living services. *Id.* ¶ 10, 15. Since the February 2010 rate reduction, Timothy B. has not been institutionalized.

6. Diane D.

Diane D. is a 38 year-old woman who is diagnosed with Mild Mental Retardation, Intermittent Explosive Disorder, Scoliosis, and Cohen Syndrome, a rare genetic disorder characterized by low muscle tone. 2d Am. Compl. ¶¶ 6, 73. Prior to the February 2010 rate reduction, Diane lived in a single-person placement in Davidson County operated by Monarch, Inc., where she received 24-hour supervision. Yon Decl. [D.E. 88-1] ¶ 31. On May 1, 2010, Diane's guardian, her brother Thomas S., moved Diane into a licensed 3-bed group home with two other housemates in Davidson County operated by Monarch, where she receives 24-hour supervision from staff (including many of her staff from her single-person placement). *Id.* ¶ 32; Shaver Decl. [D.E. 88-4] ¶ 4. Diane continues to live in this 3-bed group home with 2 other housemates, and continues to receive Supervised Living services from Monarch. Shaver Decl. [D.E. 88-4] ¶ 4.

Beginning in May 2010 and continuing to the present, Monarch has requested that PBH approve an enhanced reimbursement rate for Supervised Living services for Diane. Yon Decl. [D.E. 88-1] ¶ 34; Shaver Decl [D.E. 88-4] ¶ 6. PBH has approved each of these requests. *Ids.* From May 11, 2010 through May 31, 2011, PBH reimbursed Monarch for Supervised Living services for Diane D. at the rate of $250.00/day. Yon Decl. [D.E. 88-1] ¶ 35; Shaver Decl. [D.E. 88-4] ¶ 7. From June 1, 2011 to the present, PBH has reimbursed Monarch for Supervised Living services for Diane D. at the rate of $391.15/day. *Ids.*

In January 2011, as has occurred in Diane's past, Diane was arrested for assaulting one of her housemates and spent a few nights in jail. Assault charges against Diane were

later dropped. In March/April 2011, Diane spent several days in the psychiatric ward of a local hospital following her refusal to take her medication for her mental illnesses for several days, as she has in the past. Since returning from the hospital in April 2011, Diane has remained in the 3-bed group home and has not required any further hospitalization. Since the February 2010 rate reduction, Diane D. has not been institutionalized.

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On a motion for summary judgment, the Court reviews the facts and draws reasonable inferences there from in the light most favorable to the non-moving party. *Bonds v. Leavitt*, 629 F.3d 369, 380 (4th Cir. 2011). "However, summary judgment is appropriate 'where the facts and the law will reasonably support only one conclusion.'" *PSINet, Inc. v. Chapman*, 362 F.3d 227, 233 (4th Cir. 2004) (*quoting Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000)). If the movant meets its burden, then the non-moving party must provide the Court with specific facts demonstrating a genuine issue for trial in order to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party is not permitted to rest on conclusory allegations or denials, and a mere "scintilla of evidence' will not be considered sufficient to defeat a summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *see also Scott v. Harris*, 550 U.S. 372, 380 (2007)

("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." (internal quotation marks omitted)).

II. THE PROPER STANDARD FOR JUDGING A REVERSE-*OLMSTEAD* CLAIM ON THE MERITS.

Plaintiffs bring their claim under Title II of the Americans with Disabilities Act ("ADA"), which provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Plaintiffs' Second Claim for Relief is brought under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), and is substantively identical to their First Claim. The Fourth Circuit has explained: "The elements of a cause of action under Title II of the ADA or § 504 of the Rehabilitation Act are: the plaintiff has a disability; the plaintiff is otherwise qualified for the employment or benefit in question; and the plaintiff was excluded from the employment or benefit because of discrimination based solely on her disability." *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264-1265 (4th Cir. 1995).[4]

In this case, Plaintiffs have presented a specific type of ADA claim, commonly referred to as an *Olmstead* claim, that the unjustified segregation of disabled persons in institutions is a form a discrimination prohibited by the ADA. The seminal case on this issue is *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), in which two mentally

[4] Because the Fourth Circuit and other Courts of Appeals have held that the requirements for showing a violation of Title II of the ADA and Section 504 of the Rehabilitation Act are the same, Defendant Coughlin hereinafter refers to both of these claims as Plaintiffs' "ADA claim."

disabled persons who were institutionalized brought an action claiming that Title II of the ADA required the State of Georgia to provide them with a community placement to integrate them into the community rather than placement in an institution.

As explained by the Court: "In the ADA, Congress for the first time referred expressly to 'segregation' of persons with disabilities as a 'for[m] of discrimination,' and to discrimination that persists in the area of 'institutionalization.'" *Id.* at 589, n. 1. The Court explained: "Unjustified isolation, we hold, is properly regarded as discrimination based on disability." *Id.* at 597.

The *Olmstead* Court held that under Title II of the ADA:

> States are required to provide community-based treatment for persons with mental disabilities when the States treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Id. at 607.

A significant difference between the present case and the situation in *Olmstead* is that none of the Plaintiffs in this case are currently residing in an institution. All live and receive their services in the community. Thus, the instant case presents what may be called a "reverse-*Olmstead*" claim. That is, Plaintiffs have asserted that Defendants' actions will result in them being removed from the community and placed into institutions, in violation of the ADA and Rehabilitation Act.

It is, therefore, critical that this Court determine at the outset what the proper standard is for judging a reverse-*Olmstead* claim on the merits. To prevail on their

reverse-*Olmstead* claim, do Plaintiffs need to show that there are services Plaintiffs need that are not available in the community, but only in an institutional setting? Do they need to show that they face a "serious risk" of institutionalization? Or, does some other standard apply? Although this question of the appropriate reverse-*Olmstead* standard has not yet been addressed by the Fourth Circuit or by the Middle District of North Carolina, several other federal courts have addressed this issue, some more fully than others.

In many of the reported reverse-*Olmstead* cases, there has not been a great deal of analysis regarding what is the correct standard that should be applied when considering the claim on the merits. In several cases, the primary issue addressed was whether a plaintiff who resided in the community even had standing to bring an *Olmstead* claim. These courts generally found that a plaintiff need not submit to institutionalization before having standing to bring such a claim. *See*, *e.g.*, *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1181 (10th Cir. 2003) ("[N]othing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements."). Many other reported cases arise at the preliminary injunction stage and, therefore, address issues apart from the merits, such as the likelihood of irreparable harm. Consequently, a lack of clarity exists among the reported cases regarding the proper standard for judging a reverse-*Olmstead* claim on the merits.

A review of these decisions shows that federal courts have generally used one of two different standards for judging a reverse-*Olmstead* claim on the merits. For purposes of the discussion below, they can be described as the "only in an institution" standard and

the "serious risk" standard. Under either standard, the record demonstrates that summary judgment is appropriate for Defendant Coughlin.

A. The "Only In An Institution" Standard.

This standard requires a plaintiff to show that she is qualified to receive a needed service or benefit, but that the service or benefit is only provided in an institution, when it could be reasonably provided in the community. As a result, she is faced with a situation where she must choose between residing in an institution and receiving the service or benefit, or residing in the community and not receiving the service or benefit for which she is qualified.

Although the *Olmstead* Court did not expressly address the situation of a plaintiff who is in the community and is seeking to avoid institutionalization due to State action, the Court did describe the problem as one in which a disabled person is forced to seek care in an institution because needed services are only provided in the institution and not in the community. As described by the Court:

> In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.

Id. at 601.

In one of the earliest reverse-*Olmstead* cases, the Tenth Circuit addressed this type of situation in *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003). In *Fisher*, the State changed its Medicaid benefits such that unlimited

prescriptions were provided to patients in nursing facilities, but patients residing in the community could only receive a maximum of five prescriptions per month. *Id.* at 1178. As part of its analysis reversing summary judgment in favor of the defendants, the Tenth Circuit explained:

> Because [defendant] *does not allow the plaintiffs to receive services for which they are qualified unless they agree to enter a nursing home*, the plaintiffs have presented a genuine issue of material fact as to whether they can prove that the defendants have violated the integration requirement of Title II of the ADA.

Id. at 1182 (emphasis added).

Similarly, in another early reverse-*Olmstead* case, the Ninth Circuit focused on whether the State was only providing needed services in an institutional setting as opposed to the community. *See Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003). The Ninth Circuit reasoned as follows:

> [W]here the issue is the *location* of services, not *whether* services will be provided, *Olmstead* controls.
>
> Here, the precise issue is not whether the state must provide the long term care services sought by Mr. Townsend and the class members -- the state is already providing these services -- but in what location these services will be provided. Mr. Townsend simply requests that the services he is already eligible to receive under an existing state program (assistance in dressing, bathing, preparing meals, taking medications, and so on) be provided in the community-based adult home where he lives, rather than the nursing home setting the state requires.

Id. at 517 (emphasis in original).

Likewise, there are several federal district court decisions that, for purposes of a reverse-*Olmstead* claim, have focused on whether services were only being provided in an institution. The District of Hawaii addressed a reverse-*Olmstead* case just a few months after the *Olmstead* decision came down. *See Makin v. Hawaii*, 114 F.Supp.2d 1017 (D. Hawaii 1999). *Makin* involved a class of developmentally disabled persons living at home who were on a wait list for community-based services. *Id.* at 1020. The Court explained as follows:

> It is important to note that the services sought by Plaintiffs are available in institutions. However, Plaintiffs do not want to avail themselves to this option because they wish to continue to live in the community.
>
> * * *
>
> [T]he only alternative for Plaintiffs presently is institutionalization if they seek treatment under the statute.
>
> * * *
>
> Other cases hold that denying disabled individuals a choice between institutional and home-based care violates the ADA non-discrimination policy since it unnecessarily segregates the individuals.

Id. at 1023, 1033-1034.[5]

---

[5] *See also M.A.C. v. Betit*, 284 F.Supp.2d 1298, 1309 (D. Utah 2003) ("[T]he placement of Plaintiffs on the HCBS waiver waiting list threatens Plaintiffs with institutionalization because *it forces Plaintiffs to choose between staying in the community without any services or entering an institution in order to receive services*. Thus, Plaintiffs have properly stated a claim for violating the integration mandates of ADA and § 504.") (emphasis added); *Gaines v. Hadi*, 2006 WL 6035742, p. *28 (S.D. Fla. Jan. 30, 2006) ("What remains to be shown is that the requested reductions will afford such inadequate services that it will likely force Plaintiffs to drop from the community-based program in order to seek proper care in an institutional setting. In other words, *Plaintiffs need to show that the only way they can get needed services is to submit to an institutional facility*.") (emphasis added); *Hiltibran v. Levy*, 793 F. Supp 2d 1108, 1116 (W.D.

This standard for judging reverse-*Olmstead* claims also readily fits with the Fourth Circuit's existing jurisprudence regarding claims under Title II of the ADA. As noted above, the Fourth Circuit has explained that there are three elements to a cause of action under Title II of the ADA:

1. The plaintiff has a disability;

2. The plaintiff is otherwise qualified for the employment or benefit in question; and

3. The plaintiff was excluded from the employment or benefit because of discrimination based solely on her disability.

Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1264-1265 (4th Cir. 1995).

This three-prong analysis can easily be modified to take into account the nature of a reverse-*Olmstead* claim. Rather than being "excluded" from the benefit because of the disability, the plaintiff would show that he was required to enter an institution to obtain these services. Thus, the elements that would be required for a reverse-*Olmstead* claim can be summarized as follows:

1. The plaintiff has a disability that can be treated in a community-based placement;

2. The plaintiff is otherwise qualified for the services or benefit in question; and

3. The plaintiff can only obtain the services or benefit in question by leaving the community and entering an institution.

The "Only In An Institution" standard is most consistent with the Court's ruling in *Olmstead* and *Fisher*, and most consistent with the Fourth Circuit's existing

---

Mo. 2011) (Plaintiffs " *must be institutionalized* in order to obtain Medicaid coverage of their medically necessary incontinence briefs.") (emphasis added).

jurisprudence regarding claims under Title II of the ADA, and should be adopted by this Court here.

B. Plaintiffs Cannot Satisfy the "Only In An Institution" Standard.

In this case, there is no evidence that there is any service or benefit that any Plaintiff requires, but that is only available in an institution. Rather, the Supervised Living service that is the subject of Plaintiffs' claims is available only in the community, and would not be available to the Plaintiffs in an institutional setting. Supervised Living is a "*residential service* . . . for one individual who needs 24-hour supervision; *and for whom care in a more intensive treatment setting is considered unnecessary* on a daily basis." 2d Am. Compl. ¶ 91; MH/DD/SA Service Definitions at 165 (emphases added).

The record shows that each of the Plaintiffs have received and continue to receive 24-hour supervision in their respective community placements, notwithstanding the reduction in the reimbursement rate for certain Supervised Living billing codes in February 2010. *See* Lockhart Dep. 24:14-26:14 (Clinton L. receives 24-hour supervision); Brock Decl. ¶ 3 (Timothy B. receives 24-hour supervision); Brenda A. Dep. 126:10-21 (Jason A. receives 24-hour supervision); Yon Decl. [D.E. 88-1] ¶¶ 21, 28, 33 (Steven C., Vernon W., and Diane D. all receive 24-hour supervision).

Indeed, Plaintiffs' expert witness testified that he was not aware of any service that the Plaintiffs needed, but which were only available to them if they left the community and entered an institution. Bodfish Dep. 146: 21-147:1 (Q. Are there services that Diane presently needs – services or resources that she currently needs that she would be able to get in an institutional setting that she cannot get in a community setting? A. I'm not

aware of any.); 181:9-14. Under the applicable "only in an institution" standard set out in *Olmstead*, *Fisher*, and their progeny, the record clearly shows that none of the Plaintiffs can meet their burden of proof, rendering summary judgment appropriate.

C. The "Serious Risk" Standard.

While Defendants contend that the standard discussed above is the appropriate standard for reverse-*Olmstead* cases, several courts have applied a different standard that focuses on the "risk" of institutionalization caused by defendants' actions. Several of these cases even cite to *Fisher* and other cases discussed above in support of this "risk" standard. However, the analysis of several of these cases appears flawed for at least three reasons.

First, some courts have conflated a plaintiff's *standing* to bring a reverse-*Olmstead* claim with the standard that must be met to prevail on the merits of such a claim. While *Fisher* held that a plaintiff need not wait to become institutionalized to have standing to bring an *Olmstead* claim, this does not mean that the mere risk of institutionalization is sufficient to prevail on the merits of such a claim. *See Fisher*, 335 F.3d at 1181. Understandably, the risk of institutionalization a plaintiff must show to survive an inquiry into the plaintiff's standing is much lower than the risk of institutionalization a plaintiff must prove to survive summary judgment and prevail at trial.

Second, some courts have confused the analysis regarding likelihood of irreparable harm at the preliminary injunction stage with the standard to be applied when judging the merits of a reverse-*Olmstead* claim at the final disposition stage. For example, the court in *Fisher* considered the question of whether plaintiffs had made a

sufficient showing of irreparable harm at the preliminary injunction stage and, solely in this context, noted that "the five-prescription cap places them at 'high risk for premature entry into a nursing home.'" *Id.* at 1184. Some courts have erroneously cited this portion of *Fisher* as support for a reverse-*Olmstead* merits standard that considers the "risk" of institutionalization. *See, e.g.*, *Brantley v. Maxwell-Jolly*, 656 F. Supp 2d 1161, 1170 (N.D. Cal. 2009) (quoting the "high risk" language from *Fisher* for the proposition that "the risk of institutionalization is sufficient to demonstrate a violation of Title II.").

Third, a standard that is based on the mere "risk" of institutionalization would prove too much. Individuals with mental illness and developmental disabilities, such as the Plaintiffs in this case, are always at some risk of institutionalization. Even the *Olmstead* Court recognized that "[s]ome individuals . . . may need institutional care from time to time 'to stabilize acute psychiatric symptoms.'" 527 U. S. at 605. Moreover, potentially any change in the status quo for this population could increase their risk of institutionalization. For some individuals with these disabilities, something as simple as not providing their favorite soft drink could cause them to exhibit aggressive behaviors, thus, increasing by some measure their risk of institutionalization.[6] It simply cannot be the standard that any change in the status quo amounts to a violation of the ADA.

[6] *See, e.g.*, Rose B. Dep. 159:5-161:17 (describing that one of the known triggers for Timothy B.'s aggressive behaviors is when "he don't get his way," and that the only example of when Timothy B. acts aggressively when he does not get his way that she could recall is when Timothy B. wants to drink Mountain Dew and is not allowed to do so. Rose B. further testified that she has asked Timothy B.'s staff not to give him Mountain Dew out of concern for his teeth, notwithstanding that she knows when he does not get Mountain Dew he gets "very, very mad.").

To the extent that the Court is persuaded that the correct standard to employ in judging the merits of a reverse-*Olmstead* claim is one that considers the risk of institutionalization, then this standard must include a component of materiality. The risk must be quantified to some reasonable, material level, or the standard is meaningless. Various courts have used language indicating that the risk of institutionalization caused by the state defendants' actions must be "serious," "severe," "substantial," or "likely."[7]

It does not so much matter what exact qualifying language is employed; it could be substantial, significant, serious, severe, likely, etc. What matters is that there must be a materiality component included if the Court is going to judge Plaintiffs' reverse-*Olmstead* claim based on whether defendants have created a "risk" of institutionalization. To show a violation of Title II of the ADA, the risk of institutionalization causally created by Defendants' actions must be real, serious, and material.

---

[7] *See*, *e.g.*, *M.R. v. Dreyfus*, 663 F.3d 1100, 1116 (9th Cir. 2011) ("[A] plaintiff need only show that the challenged state action creates a *serious risk of institutionalization.*") (emphasis added); *Brantley v. Maxwell-Jolly*, 656 F. Supp 2d 1161, 1171 (N.D. Cal 2009) ("Plaintiffs have sufficiently demonstrated for purposes of the instant motion that the proposed reduction in ADHC services will place them at *serious risk of institutionalization*") (emphasis added); *V.L. v. Wagner*, 669 F. Supp 2d 1106, 1119 (N.D. Cal. 2009) ("Plaintiffs have submitted substantial evidence . . . showing that class members face a *severe risk of institutionalization* . . . ") (emphasis added); *Marlo M. v. Cansler*, 679 F. Supp. 2d 635, 638 (E.D.N.C. 2010) ("It appears that if forced from their present settings, both Plaintiffs face a *substantial risk of institutionalization*.") (emphasis added); *G. v. Hawaii*, 676 F. Supp 2d 1046, 1057 (D. Haw. 2009) ("A state's reduction in services may violate the integration mandate where it unjustifiably *forces or will likely force* beneficiaries from an integrated environment into institutional care.") (emphasis added); *Peter B. v. Sanford*, 2011 U.S. Dist. LEXIS 22790 (D.S.C. March 7, 2011) ("The court finds that this evidence demonstrates that *institutionalization is sufficiently likely*; and therefore, the issuance of a preliminary injunction is warranted.").

D. The Plaintiffs Do Not Satisfy the "Serious Risk" Standard.

Assuming *arguendo* that the Court should decide that the proper standard for judging a reverse-*Olmstead* claim on the merits is whether the Defendants' action created a "serious risk" of institutionalization, Plaintiffs do not meet this standard. Pursuant to this "serious risk" standard, the central question would be whether PBH's February 2010 reduction of the rate that it pays to non-party service providers has created a serious risk of institutionalization for any of these Plaintiffs. The record developed in discovery in this case contains no credible evidence that any of the Plaintiffs is presently at a serious risk of institutionalization. Even assuming that the Court were to find any of the Plaintiffs to be at a serious risk of institutionalization, there is no credible evidence that such a condition is the result of the February 2010 rate reduction, and not as the result of other factors outside of Defendants' control.

1. None of the Plaintiffs Are at Serious Risk of Institutionalization.

Plaintiffs' case is premised on the theory that if the February 2010 rate reduction went into effect, all of the Plaintiffs would no longer be able to be served in the community and all would be forced into institutional placements. The fact that two years have now elapsed since the PBH's February 2010 rate reduction and *none* of the Plaintiffs have been institutionalized speaks volumes about whether the rate reduction caused them to be at serious risk of institutionalization.[8] It has not. In addition, the

[8] As used in this context, "institutionalization" refers to a long-term placement in a State institutional setting, and does not include short-term stays in a respite crisis center or the psychiatric ward of a local hospital. *See* Covert Dep. 133:7-22 ("Institutionalization is long-term

evidence that was revealed through discovery in this case shows that none of the Plaintiffs is at serious (or significant) risk of institutionalization. Each plaintiff is addressed in turn.

a. Clinton L.

Plaintiff Clinton L. continues to live by himself in the same licensed 2-bed group home in which he was living, with 24-hour supervision provided by Easter Seals, as he was before the reimbursement rate changed effective February 15, 2010. Yon Decl. [D.E. 88-1] ¶ 6. Clinton's guardian (his mother, Lillian) testified that all of Clinton's needs are presently being met in his current placement, and that no one has indicated to her that Clinton is likely to be institutionalized. Lockhart Dep. 107:16-21. Additionally, all of the expert witnesses who have submitted reports in this case agree that notwithstanding the change in reimbursement rate for Supervised Living services, Clinton is not at significant risk of institutionalization. *See* Bodfish Dep. 291: 20-24; Forrest Expert Report [D.E. 88-5] pp. 29-32; Hummel Expert Report [D.E. 88-6] p. 2 ¶ 3.

b. Vernon W.

Plaintiff Vernon W. continues to live by himself in the same single-person placement in which he was living with 24-hour supervision as he was before the reimbursement rate changed effective February 15, 2010. When the lawsuit was filed, Vernon received Supervised Living services from Youth Adult Care Management. From April 2010 through January 31, 2012, OmniVisions has provided these services to

---

placement, somewhere where someone goes to live because they cannot be maintained in the community.").

Vernon, and beginning February 1, 2012, Monarch, Inc. will begin to provide Supervised Living services for Vernon, all in the same placement in which he has lived for many years. Yon Decl. [D.E. 88-1] ¶¶ 27-29; Shaver Decl. [D.E. 88-4] ¶ 9. All of the expert witnesses who have submitted reports in this case agree that notwithstanding the change in reimbursement for Supervised Living services, Vernon presently is not at significant risk of institutionalization. *See* Bodfish Dep. 260:24-262:4; Forrest Expert Report [D.E. 88-5] pp. 52-56 ; Hummel Expert Report [D.E. 88-6] p. 3 ¶ 9.

c. Steven C.

Plaintiff Steven C. presently lives in a single-person AFL placement with 24-hour supervision provided by Alberta Care. Yon Decl. [D.E. 88-1] ¶ 21. Since this lawsuit was filed, Steven has lived in a licensed 2-bed group home with one other housemate, and has lived in a 2-person AFL placement with a different housemate. *Id*. ¶¶ 16-18. In August 2011, in response to Steven's expressed desire to live closer to his family in Davidson County, Steven has lived in a single-person AFL placement with 24-hour supervision provided either through Building Bridges or Alberta Home Care. *Id*. ¶¶ 19-20. At all times since the February 2010 rate reduction, Steven C. has lived in a clinically-appropriate community placement with 24-hour supervision. *Id.* ¶ 22.

Steven C., who is his own guardian, testified that he is not at *any* risk of institutionalization, and that anyone who suggested he was at such a risk was wrong. Steven C. Dep. 58:24-59: 3; 61:4-7. Additionally, expert witnesses Drs. Forrest and Hummel both concluded that Steven C. is not at risk of institutionalization, much less at a "serious risk." *See* Forrest Expert Report [D.E. 88-5] pp. 41-46 ("Steven is not felt to be

currently at risk for harm or out-of-home placement"); Hummel Expert Report [D.E. 88-6] p. 3, ¶ 12 ("[T] here is no evidence that Plaintiff Steven C. is presently at risk for institutionalization.").

d. Jason A.

Jason A. presently lives in the same licensed 3-bed group home in which he lived prior to the February 2010 rate reduction. Earl Decl. [D.E. 88-3] ¶ 3. Prior to the rate reduction, there were two residents in the 3-bed group home; in March 2010, the provider, RHA, moved a third resident into the vacant bedroom. Yon Decl. [D.E. 88-1] ¶ 23. At all times since the February 2010 rate reduction, Jason A. has received and continues to receive 24-hour supervision. *Id.* ¶ 26; Earl Decl. [D.E. 88-3] ¶¶ 3-5. Following a cycle of behaviors in April 2010, Jason A. did spend a week at a respite care center, which was a part of the Crisis Prevention Plan in place for Jason A. at the time. Earl Decl. [D.E. 88-3] ¶ 6. Jason returned to the 3-bed group home on April 20, 2010, and has not had any behavioral episode which has required him to go back to a respite care center since. *Id.* ¶ 7.

Jason's guardian, his mother Brenda A., testified that she does not believe that Jason is presently at risk of institutionalization, and that she would fight to keep him out of an institutional placement. Brenda A. Dep. 138:16-139:3. Jason's provider, RHA, states that it is not aware of any reason why Jason A. cannot continue to be safely served in the community and would need to be placed in an institutional setting. Earl Decl. [D.E. 88-3] ¶ 8. Additionally, expert witnesses Drs. Forrest and Hummel both concluded that Jason A. is not at risk of institutionalization, much less at a "serious risk." *See*

Forrest Report [D.E. 88-5] pp. 38-40 ("Jason is not felt to be currently at risk for harm or out-of-home placement."); Hummel Report [D.E. 88-6] p. 3, ¶ 15 ("[T]here is no evidence that Plaintiff Jason A. is presently at risk for institutionalization.").

e. Timothy B.

When this case was initiated, Plaintiff Timothy B. was living in a single-person placement in Raleigh, NC, with 24-hour supervision provide by his provider, Community Alternatives. Yon Decl. [D.E. 45-1] ¶ 8. Independent of the February 2010 rate reduction at issue in this litigation, a change in an unrelated North Carolina Medicaid regulation made it so that Timothy B. would either have to leave Raleigh and move to one of the then-five (5) counties in PBH's catchment area, or Wake County would become his Medicaid "county of residence" effective May 1, 2010 and Timothy B. would no longer be a PBH consumer. *Id.* ¶ 11. Timothy B.'s guardian, his mother Rose B., elected to bring Timothy back to Davidson County on April 30, 2010. *Id.* ¶ 13. Although PBH had arranged for Timothy B. to spend up to 30 days in a respite care facility while his guardian explored potential community placements, Timothy's guardian opted to care for Timothy at her home. *Id.* ¶¶ 12-13. PBH authorized respite services to assist Timothy's guardian care for Timothy in her home. *Id.* ¶ 15.

Between late April and mid June 2010, PBH offered numerous clinically-appropriate potential community placements with 24-hour supervision for Timothy to his guardian, all of which Rose B. rejected. *Id.* ¶¶ 11, 14, 16, 17. In mid-June 2010, Rose B. identified an opening in a licensed 2-bed group home, and on June 23, 2010, Timothy B. moved into this group home operated by Ambleside, Inc. Yon Decl. [D.E. 88-1] ¶ 10.

Timothy B. has lived in this group home continuously since that date, and has received 24-hour supervision throughout. *Id.*

Donna Brock, the regional director for Timothy's provider, Ambleside, states in her Declaration that "[a]s long as Timothy B. remains on an appropriate regimen of medications as prescribed by his psychiatrist for his mental illness issues, Ambleside is not aware of any reason why Timothy B. cannot continue to be safely and appropriately served in the community and would need to be placed in an institutional setting." Brock Decl. [D.E. 88-2] ¶ 7. [9] Expert witness Dr. Forrest concluded that Timothy B. "is not currently at risk for harm or out-of-home placement." *See* Forrest Report [D.E. 88-5] pp. 47-51. Expert witness Dr. Hummel concluded that Timothy B. "is capable of being safely maintained in the community in his current placement with his current level of services," but echoing the concern of Ms. Brock, opined that "Timothy should be treated with appropriate medication for his diagnoses, including appropriate psychotropic medication." *See* Hummel Report [D.E. 88-6] p. 3, ¶¶ 7-8.

f. Diane D.

When this case was initiated, Diane D. lived in a single-person placement with 24-hour supervision provided by Monarch. Yon Decl. [D.E. 88-1] ¶ 31. On May 1, 2010, Diane's guardian, her brother Thomas S., placed Diane in a licensed 3-bed group home operated by Monarch, where Diane received 24-hour supervision from staff, many of

[9] In August 2011, Timothy's guardian, Rose B., removed Timothy from all of his medication, including medication prescribed to treat his mental illness issues. Having been removed from his medication, Timothy had an aggressive incident in which law enforcement had to be involved. Since that incident, Timothy B. has changed psychiatrists, and his new psychiatrist has put Timothy back on medication for his mental illness issues. Brock Decl. ¶ 6.

whom were the same staff who had worked with Diane for many years. *Id.* ¶ 32. Diane has lived in this 3-bed group home since May 1, 2010, and continues to live there presently, with 24-hour supervision. *Id.*

In January 2011, Diane spent a few nights in jail following her arrest for assaulting one of her housemates; the housemate dropped all charges. In March/April 2011, after she had refused her medication for several days, Diane spent several days in the psychiatric ward at a local hospital to be stabilized and to have her medication adjusted. Covert Decl. [D.E. 62-2] ¶ 8. Following her discharge from the local hospital and her return to the 3-bed group home, Diane's treatment team made several changes in an effort to address some of the triggers for Diane's behaviors. At that time, Diane's provider, Monarch, requested an additional enhanced funding level for Supervised Living services for Diane, which was approved by PBH. Covert Dep. 89:10-93:22[10] Additional services were requested and authorized, including reimbursement for Monarch's medical director to visit Diane at her group home placement if she was refusing to take her medication. *Id.* at 92:1-93:9. Further, Diane changed medication for her mental illness issues, and her guardian permitted Diane to receive one of her medications via injection rather than in pill form. *Id.* at 90:8-21. These changes have resulted in fewer behaviors by Diane. *Id.* at 131:15-24.

[10] Ms. Covert testified that Diane D. is not the only PBH consumer for whom PBH has approved a provider's request for an enhanced reimbursement rate. *See* Covert Dep. 34:21-37:8. Ms. Covert further testified that Diane D. was not receiving special or unique treatment with PBH's approval of her provider's request for an enhanced reimbursement rate because she is a plaintiff in this action. *Id.* 132:3-23.

Christy Shaver, the Regional Director for Diane's provider, Monarch, testified that "Monarch is not aware of any reason why Diane D. cannot continue to be safely and appropriately served in the community and would need to be placed in an institutional setting." Shaver Decl. [D.E. 88-4] ¶ 8. Expert witness Dr. Forrest concluded that "Diane is not felt to be currently at risk for harm or out-of-home placement." *See* Forrest Report [D.E. 88-5] pp. 33-37. Dr. Hummel concluded that presently, Diane is actually "at a decreased level of risk for institutionalization than she was prior to February 15, 2010." *See* Hummel Report [D.E. 88-6] p. 4, ¶ 18.

2. Assuming *Arguendo* that a Plaintiff is at Serious Risk of Institutionalization, Plaintiffs Cannot Show that Serious Risk was Caused by the February 2010 Rate Reduction.

Even if an individual Plaintiff were able to show that he or she is presently at significant risk of institutionalization (which they cannot), there is a fundamental causation problem with Plaintiffs' claims in this case. The action taken by PBH that is at issue is the reduction of the rate it reimburses non-party service providers for Supervised Living services under the billing codes YM811 and YM812. All of these service providers are currently providing services to five of the Plaintiffs at the reduced rate. *See* Yon Decl. [D.E. 88-1] ¶¶ 6, 9, 12, 15, 21, 22, 26, 30, 35, 36; Brock Decl. [D.E. 88-2] ¶ 5; Earl Decl. [D.E. 88-3] ¶ 5; Shaver Decl. [D.E. 88-4] ¶¶ 6-7, 9. Since May 2010, Diane D.'s provider has requested, and PBH has continued to approve, a higher, enhanced reimbursement rate to meet Diane's specific needs. Yon Decl. [D.E. 88-1] ¶¶ 34-35; Shaver Decl. [D.E. 88-4] ¶¶ 6-7. None of the Plaintiffs have been institutionalized, almost two years after the February 2010 rate reduction.

Moreover, there is no evidence that an increased rate of any amount will guarantee or even reduce any risk of institutionalization. Bald assertions in the Plaintiffs' pleading that they may be at risk of institutionalization due to the rate reduction may have been sufficient to withstand a motion to dismiss, but they are insufficient to withstand summary judgment and prevail at trial.

CONCLUSION

As set out above, there are no issues of material fact in dispute, and Defendant Coughlin is entitled to summary judgment on Plaintiffs' claims. The proper standard of review for Plaintiffs' reverse-*Olmstead* claim is the "only in an institution" standard set forth in *Olmstead*, *Fisher*, and recognized by numerous other courts. There is no evidence that there is a needed service for which any of the Plaintiffs is eligible that is not available in the community, but only available if they were to enter an institutional setting. As such, Plaintiffs fail to show a violation of Title II of the ADA or Section 504 of the Rehabilitation Act. Alternatively, if the Court finds that the "serious risk of institutionalization" standard is the proper standard, there is no credible evidence that any of the Plaintiffs meets this standard. Assuming *arguendo* that any of the Plaintiffs is able to raise a question of fact as to whether he or she is at serious risk of institutionalization, there is no credible evidence that their level of risk is causally (as opposed to coincidentally) related to the February 2010 reduction in reimbursement rates for certain Supervised Living service billing codes. Therefore, Defendant Coughlin is entitled to summary judgment under either standard.

Respectfully submitted, this the 17th day of January, 2012.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: */s/ Stephen D. Martin*

Wallace C. Hollowell III
N.C. State Bar No. 24304
Stephen D. Martin
N.C. State Bar No. 28658
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
Telephone: (919) 877-3800
Facsimile: (919) 877-3799
E-Mail Address: chuck.hollowell@nelsonmullins.com
E-Mail Address: steve.martin@nelsonmullins.com

Counsel for Defendant Dan Coughlin

CERTIFICATE OF SERVICE

I, the undersigned attorney of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendant Dan Coughlin do hereby certify that on January 17, 2012, I electronically filed the foregoing DEFENDANT COUGHLIN'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

- John R. Rittelmeyer (john.rittelmeyer@disabilityrightsnc.org)
- Jennifer L. Bills (jennifer.bills@disabilityrightsnc.org)
- Andrew B. Strickland (andrew.strickland@disabilityrights.org)

Attorneys for the Plaintiffs

- Lisa G. Corbett (lcorbett@ncdoj.gov)

Attorney for Defendant Lanier Cansler

/s/ Stephen D. Martin
Stephen D. Martin
N.C. State Bar No. 28658
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
Telephone: (919) 877-3800
Facsimile: (919) 877-3799

E-Mail Address: steve.martin@nelsonmullins.com

Counsel for Defendant Dan Coughlin