**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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| COALITION FOR EQUITY AND EXCELLENCE IN MARYLAND HIGHER EDUCATION, *et al*.,<br><br>Plaintiffs<br><br>v.<br><br>MARYLAND HIGHER EDUCATION COMMISSION, *et al*.,<br><br>Defendants. | Civil Action No.: 1:06-cv-02773-CCB |

**DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT**

Defendants move to alter or amend the final judgment entered on November 8, 2017 (ECF 642), pursuant to Fed. R. Civ. P. 59. This Court's injunctive remedy incorporates, and its validity depends upon, the Court's prior determination that Defendants violated the Equal Protection Clause of the Fourteenth Amendment by failing to eradicate a policy of "unnecessary program duplication" traceable to the pre-*Brown* era of *de jure* segregation in Maryland's system of public higher education. ECF 382. Because evidence adduced at the recent remedies trial discredits the basis for that liability determination, by showing that the definition of "unnecessary program duplication" on which the Court relied is arbitrary, this Court should vacate the judgment and enter a judgment of dismissal.

**The Legal Standard Under Rule 59**

In its February 2016 order setting a trial on remedies, the Court admonished the parties that it would not consider any testimony offered for the purpose of "relitigating conclusions reached in the Court's liability opinion." ECF 460 at 2 n.1. The Court likewise granted Plaintiffs' motion to exclude Dr. Lichtman's testimony "insofar as it seeks to prevent relitigating the liability findings." ECF 537. The State has abided by the Court's directive during the remedy trial—prompted by Plaintiffs' objection—not to contest the Court's prior liability ruling (ECF 382). *See* ECF 527 at 2. Nonetheless, the Court was free to modify its own interlocutory order in light of evidence adduced at the remedies trial. *See* Fed. R. Civ. P. 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."); *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1472 (4th Cir. 1991); *June v. Thomasson*, 2017 WL 3642944, *4 (D. Md. Aug. 24, 2017).

The Court's liability ruling was a non-final order that is incorporated in, and appealable as part of, the Court's final judgment (ECF 642). The State now asks the Court to reconsider its 2013 liability ruling in light of evidence presented at the remedies trial, principally in the form of cross-examination of Dr. Conrad, that discredits the foundation of that ruling. By correcting its erroneous liability

ruling, the Court would spare Maryland's system of public higher education the disruption of implementing an unjustified remedial injunction.

Rule 59 provides several avenues for relief here. To begin with, Rule 59(e) directs that a judgment should be altered or amended "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *E.E.O.C. v. Lockheed Martin Corp.*, No. CCB-95-2995, 1996 WL 48528, at *1 (D. Md. Jan. 26, 1996), *on reconsideration* (May 10, 1996), *aff'd sub nom. E.E.O.C. v. Lockheed Martin Corp., Aero & Naval Sys*., 116 F.3d 110 (4th Cir. 1997) (citing *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993)).

Because a Rule 59(e) motion must be filed immediately after judgment, the motion (unlike its Rule 60 counterpart) may be based on facts that are "not newly discovered . . . in the ordinary sense." *Steigerwald v. Bradley*, 229 F. Supp. 2d 445, 447 (D. Md. 2002) (internal quotation marks omitted) (quoting *Small v. Hunt*, 98 F.3d 789, 797-98 (4th Cir. 1996)). New evidence includes facts that may have been known previously but are needed "to correct manifest errors of . . . fact upon which the judgment is based" or to contradict information underlying the order. *Steigerwald*, 229 F. Supp. 2d at 447 (granting Rule 59(e) motion to reconsider order denying consequential damages where "new evidence" was previously known but not presented for a "legitimate justification"). New evidence for a Rule 59(e) motion also includes facts that may have been known previously but are needed to address an expressed concern of the court underlying the judgment.

*E.E.O.C. v. Lockheed Martin Corp.*, 1996 WL 48528, at *1 (granting Rule 59(e) motion to reconsider order denying enforcement of subpoena based on additional evidence provided regarding the relevance of the information sought in response to the court's articulated concern); *Small*, 98 F.3d at 798 ("The state had a 'legitimate justification for not presenting' the reconfiguration plan earlier because until the court expressed its concern about a center row of bunks, the state had no reason to present an alternative proposal for the court's consideration.").

Similarly, relief is available under Rule 59(a)(1)(B), which allows relief "after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." Likewise, relief is available under Rule 59(a)(2), which permits the court after a nonjury trial to "open the judgment if one has been entered, . . . amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment."

## ARGUMENT

### I. THE JUDGMENT IN THIS CASE DEPENDS ENTIRELY ON UNNECESSARY PROGRAM DUPLICATION AS DEFINED BY DR. CONRAD.

To prove a violation of the Equal Protection Clause, Plaintiffs were required to show that the State steers students to, or away from, racially identifiable institutions by means of a policy traceable to *de jure* segregation. Put differently, Plaintiffs had to show that the reason Maryland's HBIs (but not its non-HBIs) remain racially identifiable is a traceable state policy, as opposed to some other reason. *See Fordice*, 505 U.S. 717, 728 (1992) (observing that the

Court has "consistently asked whether existing racial identifiability is attributable to the State"); *id.* at 729 (explaining that unlike public schools, students are not assigned to public universities); *id.* at 731 (distinguishing *Bazemore v. Friday*, 478 U.S. 385 (1986), on the ground that "any racial imbalance resulted from the wholly voluntary and unfettered choice of private individuals"). Justice White's opinion in *Fordice* disagreed with the lower courts about whether "the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system," *id.* at 729, but it did not overrule *Bazemore*'s holding that continuing to offer two similar programs (4-H clubs)—*i.e.*, offering duplicative programs—is not in itself an Equal Protection violation, even though the programs were previously *de jure* segregated and remained racially identifiable white and black programs. *Bazemore*, 478 U.S. at 408 (concurring opinion of Justice White for a majority of the Court).

In *Fordice*, and in the other public-higher-education cases in which courts have granted relief, the relevant state action has always included more than the mere existence of duplicative programs. In *Fordice*, in addition to Mississippi's duplicative institutions and programs, the Court discussed admission standards adopted "for discriminatory purpose" after *Brown*, as well as mission designations that "interfere[d] with student choice and tend[ed] to perpetuate the segregated system." 505 U.S. at 733-38, 741. The Court did not determine that the unnecessary program duplication evidence presented to the district court was a free-standing Equal Protection violation; rather, it rejected the district court's

rationale for concluding that there was no violation in the context of the whole case, including for considering program duplication "in isolation." 505 U.S. at 739. Indeed, in light of this statement in *Fordice*, Plaintiffs argued in the liability phase of this case that unnecessary program duplication "does not stand alone," but should be considered in conjunction with other funding and mission policies they contended perpetuated a segregated system. ECF 367 ¶ 262. In light of the Court's rejection of all of Plaintiffs' Equal Protection claims in this case, except for unnecessary program duplication, duplication now "stand[s] alone" as the basis for holding the State liable and for conferring on a special master the power to create new programs and impose other remedial measures.

This unique outcome raises the question whether simply offering a choice between two universities that provide similar programs violates the Equal Protection Clause. But in contrast to cases in which states continued to maintain parallel racially identifiable majority-white and majority-black universities long after *Brown*, it is undisputed that in Maryland today the universities that historically served white students are desegregated. The Maryland universities the Court has labeled "TWIs" include majority-minority institutions, an institution that was *never* segregated, and a national leader in STEM education for minority students. ECF 641 at 30-31 & n.15. Today, qualified students of all races who want to enroll in a Maryland public university with a diverse student population can do so, and there are no discriminatory standards traceable to *de jure* segregation driving student admissions. Thus, Maryland students have free choice

between a program at an HBI or at an already-diverse non-HBI—not, as in 1980s Mississippi, between a white school and a black school, influenced by discriminatory admissions policies.

## II. "UNNECESSARY PROGRAM DUPLICATION" AS DR. CONRAD DEFINES IT DOES NOT IMPLY DUPLICATION THAT LACKS EDUCATIONAL JUSTIFICATION.

In *Fordice*, the Court observed that "implicit in the District Court's finding of 'unnecessary' duplication is the absence of any educational justification and the fact that some, if not all, duplication may be practicably eliminated." 505 U.S. at 739. The premise of Plaintiffs' liability theory in the present action is that any duplication of Maryland HBI programs classified by Dr. Conrad as "unnecessary" should be presumed to perpetuate a policy of racial segregation. The validity of that premise depends on whether the scheme that Dr. Conrad urges this Court to use in classifying program duplication as "unnecessary" is a reliable and coherent analytical framework with a basis in sound educational practices.

The parties do not dispute that program duplication is common in public university systems, just as it is among private institutions. Thus, the existence of program duplication in higher education is not the result solely of formerly segregated dual systems. Public institutions duplicate programs for many reasons including the need to develop an adequately trained workforce. 2/7/17 Tr. 81, 158, 160-61. To illustrate the point that duplication is not inherently connected to segregative policies, at the time of liability trial, one-third of what Dr. Conrad described as unnecessary program duplication involved HBI duplication of a non-

HBI program. *See* ECF 367 ¶ 319. That is, the HBIs chose to invest their resources in duplicating programs, rather than in new programs not offered by a non-HBI. Although Plaintiffs include this HBI-initiated duplication in their count of duplicative programs, they do not contend that the HBIs were pursuing a policy of segregation in doing so. The Court, citing statistics about the number of new and unique programs offered at HBIs, determined in its 2013 liability opinion that "duplication in the State far more significantly affects the HBIs, even if duplication is also a problem for other institutions." ECF 382 at 47. But this Court did not find that different policies were driving duplication at the HBIs and the non-HBIs or among the non-HBIs, or that the extent of duplication between HBIs and non-HBIs was greater than the extent of duplication in the Maryland system as a whole, particularly taking into consideration the relative sizes of the different institutions.

Because there is nothing inherently illegal or sinister about two public universities offering similar programs, Plaintiffs' equal protection theory necessarily leans heavily on the pejorative implication of the word "unnecessary" in the term unnecessary program duplication. However, plaintiffs have offered no evidence that "unnecessary program duplication" is a recognized term of art in educational policy or administration. Rather, it is a term Dr. Conrad developed as a witness for plaintiffs in public higher education cases like this one. Dr. Conrad testified that his definitions had been used in the *Fordice* litigation (where he relied on them in his testimony) and in the Maryland Partnership Agreement with

the Department of Education (as to which he advised the federal agency) and his work consulting for the Department of Education. 1/10/12 Tr. 53-54.

Recognizing that program duplication is common among university systems and not itself indicative of a segregated system, Dr. Conrad differentiates between duplication of what he calls "core" programs and non-core programs. 1/24/17 Tr. 130; 1/10/12 Tr. 50 (defining "core" in liability phase trial). Only duplication of non-core programs is "unnecessary" in Dr. Conrad's scheme. Non-core programs in Dr. Conrad's construct include bachelor's level "nonbasic liberal arts and sciences course work and all education at the master's level and above." *See* ECF 382 at 45 (quoting *Fordice*, 505 U.S. at 738). "Core" and "non-core" are not terms with widely accepted meaning in educational administration and policy. Indeed, even Dr. Allen defined "core" in a way that differs from Dr. Conrad's definition; in fact, Dr. Allen defined "core" in *two* different ways, in his remedies trial and deposition testimony. 1/19/17 Tr. 61-62.

The Court in *Fordice* recited Dr. Conrad's formula as a description of the record in the case before it. 505 U.S. at 738 ("'Unnecessary' duplication refers, under the District Court's definition…."). But the Supreme Court has never adopted Dr. Conrad's test as a generally applicable legal rule to determine whether a given instance of program duplication is or is not a vestige of *de jure* segregation or is educationally justified.

In a lengthy section of its opinion, headed "Dr. Conrad's Program Duplication Testimony is Unpersuasive," the district court in *Knight v. Alabama*,

787 F. Supp. 1030, 1317 (N.D. Ala. 1991), explained why Dr. Conrad's classification of programs as core or non-core "is so disassociated from the realities of higher education in Alabama as to be of minimal assistance." *Id.*

> 1644. Undoubtedly there is a considerable amount of duplication between all institutions of higher learning in Alabama. A myriad of factors, most of which were not considered by Dr. Conrad, are directly responsible for much of what he determined was unnecessary duplication among curricula offerings.
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> 1645. For instance, the mission designation, student clientele, service area and size of many of the institutions in Alabama directly impacts the nature of the offerings available at any particular college or university.[135] Dr. Conrad seems to concede this point when he utilizes mission designation when examining the state's two land grant colleges; but then, he completely ignores mission differentiation when considering the remaining institutions. Moreover, the definitions and classifications which Dr. Conrad uses in determining what constituted "core" studies in the undergraduate curriculum lead to extreme results when considered in terms of actual student demand for particular programs. As the doctor indicated, the determination that a particular program should be classified as core is not affected by levels of student demand for the particular course.[136] Conrad (12/18/91) II-390, 529.
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> 1646. Under the doctor's definition Portuguese and electron particle physics are core programs while elementary education and business are not. Id. II-390, II-532-33. This in the face of the fact that every four year public college or university in Alabama has a program in business, management, or administrative science. SOF ¶ 471. Moreover, all four year schools in the state have a teacher education program. SOF ¶ 483. A substantial number of Alabama's undergraduate students are enrolled in one of these programs.[137]
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> 1647. Dr. Conrad's definition of "core programs" is based upon educational antecedents that have their origins in the classical educational model. In defense of his definition of "core," Dr. Conrad testified eloquently about the individual and role of a liberal arts education in refining and developing the individual's mind and character. Dr. Conrad's words are worth repeating since they resonate with some truth.

1648. Prompted by a question that implied that his definition of "core" curriculum is rooted in social elitism since it failed to reflect current enrollment patterns Dr. Conrad responded:

There are those who will argue that the liberal arts and sciences are fundamentally elitist. I have never been among them. I have found the liberal arts to be the most freeing of subjects, which is certainly consistent with the very conception of [a] liberal education....
. . . . .
[A liberal arts education] ... is freeing for people and to deny people the opportunity to study with ... the ancient poets, or the great writers whether it's Octavio Paz or the poetry of Jose Martie ... [is wrong].... [Such studies are] not mere idle pursuits as they were to some extent in ancient Greece, but to the contrary. It is through the study of literature and history that ... individuals ... define and refine those qualities of mind and character that will serve them well in any occupation.
Q. [W]hat would be the harm, Doctor, in recognizing after these two and half millennia that many people in modern day society find it essential to work for a living in the fields of business or education and hence those fields particularly ought to be included in the core, the heart of any academic institution....
A. I think that ... the professional fields ought to be offered and I think that ten or fifteen years from now, we'll know [*sic*] longer pit the liberal arts versus the vocational/professional arts....
. . . . .
But in the interim, I think above all our colleges and universities ought to be informed by some larger vision, certainly it includes professional training but above all, [they should] emphasizes education as the very term itself suggests.
Conrad (12/19/90) II-631-34.

1649. The Court appreciates and accepts Dr. Conrad's observations. Nevertheless, it must examine the educational system in Alabama in its current form and not based on the postulation of an idealized curricula structure. In Dr. Conrad's definition of "core" there is no appreciation for the educational rational[e] for a particular program's existence. Dr. Conrad's definition of a "core academic program" is, for purposes of this litigation, overly restricted when considered in relation to actual student program enrollments and the functioning of curricular development at the state's institutions. This judgment is warranted given the conclusions which Dr. Conrad reaches

> concerning an alleged dual curricular system of education predicated on race.
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> 1650. Dr. Conrad concedes that there is considerably less unnecessary duplication if education and business courses are considered core. Discarding a major category of programs because they do not satisfy a traditional notion of liberal arts education is problematic, irrespective of Dr. Conrad's notions concerning meaningful program uniqueness. Conrad (12/19/91) II-532-33.
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> 1651. The evidence proffered by the Government through the testimony of Dr. Conrad does not mandate a finding that Alabama is currently operating a dual curricula system of education. This does not mean of course that vestiges of the former dual curricular system do not continue to exist. Yet, with the end of de jure segregation, Alabama's officially sanctioned dual system of education was eradicated within a short time by the opening of all public colleges and universities to students regardless of race. Therefore, the issue for determination is whether there are vestiges of the dual curricular system which impede the desegregation of ASU and AAMU.
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> 1652. Analyzing two programs to determine whether duplication exists and whether that duplication impermissibly perpetuates a dual system requires consideration of the total learning package, which includes the mission, the curriculum structure and design, the student clientele, and instructional methods. Simply looking at program labels is not adequate.

787 F. Supp. at 1317-19.

A few examples illustrate the problem with Dr. Conrad's approach. Under Dr. Conrad's definition, *all* teacher education programs are non-core, and so offering them at non-HBIs and HBIs alike constitutes unnecessary program duplication, no matter how many students want to pursue education degrees and no matter how many future teachers the State needs to educate. Likewise, nursing programs are non-core, even if there is a pressing shortage of nurses. The same is true of business and accounting programs. Indeed, regardless of the growing

significance of information technology and STEM education to every sector of the contemporary economy, Dr. Conrad deems engineering or computer-science programs to be non-core. *See* 1/24/17 Tr. 134. In short, there is no relationship between what Dr. Conrad classifies as "core" and the reasons a State may want to offer a program at multiple public universities—*i.e.*, whether duplication is educationally justified.

## III. DR. CONRAD'S TESTIMONY IN THE REMEDIES TRIAL SHOWS THAT HIS DEFINITION OF "UNNECESSARY" PROGRAM DUPLICATION IS ARBITRARY AND CANNOT BE THE BASIS FOR INFERRING A DISCRIMINATORY POLICY.

When the Court found the State liable on the basis of Dr. Conrad's classification scheme, the Court was not aware that the scheme was completely arbitrary. The classification scheme Dr. Conrad presented in his Maryland testimony was very different from the one the Supreme Court had supposedly adopted in *Fordice*. These truths about Dr. Conrad's scheme emerged during his testimony at the remedies trial.

In the remedies proceeding, Dr. Conrad testified that his Maryland classification treated engineering and computer science as non-core programs. 1/24/17 Tr. 132. He agreed with Dr. Allen, who had likewise described computer science as non-core in testimony the preceding day. 1/24/17 Tr. 133. Asked if he had *ever* "classified computer science and related programs as being core programs," Dr. Conrad testified, "[N]o, I have not." 1/24/17 Tr. 134. He said the same about engineering ("I have never classified engineering as a core program"),

although he recalled that the question had been brought up before. 1/24/17 Tr. 134.

But then Dr. Conrad was confronted with his testimony in the *Knight* case in Alabama back in 1990. Dr. Conrad admitted that he had classified computer science as a core program in 1990, in the early days of the information technology revolution. 1/24/17 Tr. 137; 1/24/17 Tr. 142. His list of core programs for the *Knight* case also included "five different computer and data-related or information-related courses as being core programs." 1/24/17 Tr. 138. Dr. Conrad admitted that "the number of core programs" on his list had shrunk over 27 years "[p]robably about 60 percent." 1/24/17 Tr. 140.

Pressed about whether today's list should include more STEM programs than his 1990 *Knight* list, Dr. Conrad allowed that "we may begin to see a few more STEM courses—STEM programs included. And computer science would be one of the—one of those that would potentially be included." 1/24/17 Tr. 141. But Dr. Conrad never explained how computer science could be (a) merely a "potential" core program-in-waiting in 2017, but (b) an actual core program more than a quarter century before (*see* 1/24/17 Tr. 142), or in 1998 when he listed computer science and other computer-related disciplines as "core" in a Texas case, 1/24/17 Tr. 143. As for data processing technology, Dr. Conrad listed it as a core program in 1998, but "[n]ot today." 1/24/17 Tr. 145-46.

Dr. Conrad also admitted that he listed engineering as a core program in the 1998 report. 1/24/17 Tr. 146. He did the same thing in a 2001 report concerning

Virginia. 1/24/17 Tr. 147. Dr. Conrad later suggested that engineering might be "core" but only for land-grant institutions. 1/24/17 Tr. 151. But then he explained that engineering is not "core" because "[e]ngineering is classified—and I can't emphasize this enough—as a professional field. It's not classified as a field in the liberal arts and sciences that form the foundation for general education." 1/24/17 Tr. 152.

Dr. Conrad further explained during the remedies trial that he was "continually sifting and winnowing" his classification scheme. 1/24/17 Tr. 148. He has added programs such as Environmental Studies, Environmental Science, and Women & Gender Studies to his list. PRX 312, Ex. 9. A striking illustration of the mutability of "core" programs is the difference *in this case alone* between Dr. Conrad's list in his 2010 liability-phase report (PTX 71, Ex. 4) and his 2016 remedies-phase list (PRX 312, Ex. 9). The earlier list includes Latin American Studies and African America/Black Studies, Kinesiology and Exercise Science, but those programs are omitted from the 2016 list. Dr. Conrad's 2010 list also *includes* "Computer and Information Sciences, General" as a core program. Yet like Dr. Conrad, Dr. Allen testified in the remedies trial that, "by my—by our definition of core programs, computer science is not a core program." 1/23/17 Tr. 9. Drs. Conrad & Allen's 2016 list of core programs does not include computer science, an omission that enables them to treat computer-science programs as "unique" (*i.e.*, unduplicated non-core) programs in their proposed remedy. *See*

1/18/12 Tr. 91 (Dr. Allen's rationale for niches built around unique computer-science programs).

There is no logic or method to this history of fluctuating definitions. Nor is there any external standard or empirical point of reference to determine whether a program should be classified as core or non-core. At all times, including the liability trial in this case, the classification of core and non-core, and hence of unnecessary program duplication, has been a matter of Dr. Conrad's purely subjective and inconsistent notions.

## IV. In Light of this New Evidence, the Court's Final Judgment Lacks a Stable Foundation and Must Be Vacated.

Rule 59 authorizes the Court to correct its erroneous liability ruling on the basis of evidence presented in the remedies phase trial. This is evidence that was not available to the Court when it ruled in 2013, and reconsideration will also prevent manifest injustice from implementation of the Court's remedial order, including the development and implementation of programmatic initiatives that may not best advance the State's higher education policies.

Dr. Conrad himself admitted that "if engineering and computer-related programs were considered to be core and thus couldn't become part of a niche, then a certain portion of [his] remedial proposal would have to be carved away." 1/24/17 Tr. 149. But his testimony about core programs in the remedies phase bears on more than just whether specific programs should be included in remedial niches. It also means that the Court cannot rely on Dr. Conrad's classification of

core programs to calculate the extent of program duplication in Maryland (for example in comparing Maryland to Mississippi at the time of *Fordice*, see ECF 382 at 46), or as a basis for an inference that there is *any* state policy of program duplication that is not educationally justified.

The point is not that Dr. Conrad should have used for Maryland in 2011 the 60% longer list of core programs he used in Alabama in 1990, but that neither list (nor any of the intervening lists) carries any authority. All of them amount only to lists of programs that seem to have suited Dr. Conrad at the particular time he created them. None of the lists supports an inference that duplicating non-core programs is presumptively unjustified by legitimate educational objectives and therefore based on a policy traceable to *de jure* segregation.

The judgment in this case rests on the determination that a policy of unnecessary program duplication, as Dr. Conrad defines it, is a presumptive equal protection violation. Neither a civil rights liability ruling nor a remedial edifice with the scope and impact of the Court's November 8, 2017 order should be constructed on the unstable and shifting sands of Dr. Conrad's idiosyncratic notion of core programs.

## CONCLUSION

In light of the manifest infirmities of the concepts of core programs and unnecessary program duplication, Defendants respectfully request that the Court vacate the judgment and enter a judgment of dismissal in favor of Defendants.

Dated: December 6, 2017

Respectfully submitted,

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