

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 88-2406-CIV-MORENO

MICHAEL POTTINGER, PETER  
CARTER AND BERRY YOUNG,

Plaintiffs,

vs.

CITY OF MIAMI,

Defendant.

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**DEFENDANT, CITY OF MIAMI'S, MOTION FOR LIMITED  
MODIFICATION OF THE POTTINGER SETTLEMENT AGREEMENT**

The Defendant, CITY OF MIAMI (the "City"), by and through its undersigned counsel, and pursuant to Rule 60(b), Fed.R.Civ.P., and Paragraph 30 of the Settlement Agreement [D.E. 382], approved by Order of the Court, dated October 1, 1998 [D.E. 398] and based upon numerous and varied "significant change[s] of circumstances," hereby moves this Court to modify the terms of the Agreement as requested herein. In support of this Motion, the City states as follows:<sup>1</sup>

**I. INTRODUCTION: RELIEF SOUGHT BY THIS MOTION**

On October 1, 1998, this Court approved a Settlement Agreement ("Agreement") between the parties which outlined the manner in which the City of Miami and its Police Department interact with those unfortunate individuals who found themselves homeless

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<sup>1</sup> The numerous statistics cited in this Motion change frequently. The City will provide the Court with the support for these statistics, and the most accurate information it has at every step of the process in addressing this Motion, and the relief sought herein.

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in the City.<sup>2</sup> For nearly fifteen years, both the Plaintiffs and the City have operated under the Agreement, without complaint. Remarkably, to date, there has not been a single issue that has arisen between the parties that necessitated court intervention, continued litigation, mediation, or even a discussion. The City attributes this fact to its compliance with both the letter and the spirit of the Agreement, and the vast increase in programs and services that were created to assist the homeless since this lawsuit was filed in 1988. Both the Eleventh Circuit and this Court have recognized that there have been a multitude of new services offered to the homeless in our community over the past 25 years. The Eleventh Circuit noted, in its December 7, 1994 opinion that “it became clear that the facts of this case have materially changed since the issuance of the district court’s 1992 order.” This Court also pointed out on page 8 of the October 1, 1998 Order that “[s]ince this lawsuit was initiated, the Dade County Homeless Trust was created” which, “in conjunction with the Community Partnership for the Homeless, has established a Homeless Assistance Center in the City of Miami.”

The new programs and services offered to the homeless, include, but are not limited to, the following:

- The establishment of the Miami-Dade County Homeless Trust in 1993 (annual operating budget is \$42 million plus \$12.9 million in reserves.)<sup>3</sup>
- The establishment of the Community Partnership for Homeless in 1993 (now known as the Chapman Partnership), which operates two Homeless Assistance Centers in downtown Miami (1995) and the City of Homestead (1998).

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<sup>2</sup> A copy of the Agreement is attached as Exhibit 1 and a copy of the October 1, 1998 Order is attached as Exhibit 2.

<sup>3</sup> Miami-Dade County Proposed Budget 2013-14 and Multi-Year Capital Plan.

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- An increase in the number of beds available to the homeless in Miami-Dade County (now over 4,000). Of the 4,000 beds available for emergency shelter, transitional housing and permanent housing, approximately 1,200 are emergency shelter beds.
  
- The establishment of a Homeless Assistance Program in 1991 by the City of Miami. This Assistance program provides outreach, assessment, placement, information, referral and transportation services to the homeless.
  
- The establishment of a street feeding project to coordinate the agencies who feed the homeless on City streets in 2000. This project attempted to coordinate street feeding by identifying the specific sites, establishing feeding schedules, and ensuring that toilets and trash receptacles were provided to insure a clean and dignified environment, not only for the homeless but other resident and visitors to the City.<sup>4</sup>
  
- The establishment of an Indoor Meal program with feeding sites around the City to ensure food is available to the homeless in 2005. Since 2005, over 750,000 meals have been served.
  
- The establishment of a Donation Meter Program in 2009 to allow the public to donate money into specially marked parking meters to fund additional shelter beds, and expand the number of indoor meal programs for the homeless. This fund now brings in approximately \$50,000 per year for the homeless.
  
- The establishment of the new Camillus House campus (located at 1603 N.W. 7th Avenue) established in May, 2012. This campus cost \$84 million to build.<sup>5</sup> The campus consists of three buildings and offers short and long term housing, mental health facilities, food service facilities, property storage, retail space, a multi-level garage, and even a kennel for dogs.

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<sup>4</sup> This program is no longer in existence due to the creation of numerous shelters for the homeless.

<sup>5</sup> The City, through its Community Redevelopment Agency ("CRA"), contributed \$10 million to the Camillus House for the building of its new campus.

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The City of Miami and Miami-Dade County must now be viewed as positive examples of how governments should address their homeless population.<sup>6</sup>

However, despite the numerous and varied programs and services now offered to the homeless in Miami-Dade County and the City of Miami, circumstances regarding specific homeless persons have changed, in material and significant respects, which impacts the City's ability to provide food, clothing, shelter, beds and medical treatment to this specific group of homeless persons and to enforce its police powers for the safety and well-being of the homeless themselves, City and County residents, business owners and tourists. As a result, the City comes before this Court to ask for a very limited modification of the Agreement to reflect the significant changes which have occurred. The City is not currently seeking an Order to have the entire Agreement set aside. The City is merely asking this Court to recognize that the vast improvements in programs and services for the homeless have not reached two specific groups, the chronically homeless and sexual predators, and the Agreement needs to be modified so needs of these groups and the public at large can be met.

Those areas contained within the Agreement, which the City now seeks to modify on a limited basis, include the following areas, which are more specifically set forth below:

1. *Chronically Homeless*: The City seeks to modify the Agreement on a limited basis to address chronically homeless individuals located throughout the City in

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<sup>6</sup> Contrast this with a recent pronouncement by the City of Columbia, South Carolina, which announced it is taking steps to evict all 1,500 of its homeless from downtown. [http://www.nytimes.com/2013/08/26/us/south-carolina-city-takes-steps-to-evict-homeless-from-downtown.html?\\_r=0](http://www.nytimes.com/2013/08/26/us/south-carolina-city-takes-steps-to-evict-homeless-from-downtown.html?_r=0)

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areas where food, clothing, shelter, beds and medical treatment are available (or can be made available upon certain modifications by this Court and the assistance of the Homeless Trust) which now house tens of thousands of new residents, businesses, and public places of gathering far different than what existed on October 1, 1998. These chronically homeless individuals refuse services on a continuous basis or accept services only to immediately and repeatedly drop out of the continuum of care thereby depriving others of valuable shelter space and crucial services;<sup>7</sup>

2. *Law Enforcement Protocol:* The City seeks limited modifications to the Law Enforcement Protocol so that the safety and needs of the homeless can be delivered in a more efficient manner and the City Police Department can focus its limited resources on protecting and serving the homeless and the public at large; and,

3. *Sexual Predators:* The City seeks limited modification of the Agreement to address homeless individuals identified as convicted sexual predators by virtue of new laws which did not exist on October 1, 1998, when this Court approved the Agreement.<sup>8</sup>

The City respectfully submits that none of the modifications will alter the spirit or intent of the Agreement. However, the City's ability to protect and serve the public and

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<sup>7</sup> The City is not seeking to criminalize the homeless. Rather, as made clear by the City's 15-year adherence to the Agreement and the very limited modifications sought in this Motion, the City is seeking to have the tools necessary to get the most difficult groups of homeless into a continuum of care and provide them the food, shelter, clothing, beds and medical attention they need.

<sup>8</sup> Please see s.794.065, F.S. (2004), later renumbered s. 775.215, F.S. (2010). This also includes those who have been identified as sexual offenders by virtue of s. 775.21, F.S. (2010). For the sake of brevity, any reference to sexual predators under s. 794.065, F.S. (2004), later renumbered s. 775.215, F.S. (2010) also includes sexual offenders under s. 775.21.

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the homeless is being severely impacted due to the significant changes in circumstances as more fully set forth in the Motion. It is for these reasons, and the significant changes in circumstances that have occurred since the Pottinger lawsuit was filed, that modification is warranted.

**II. THIS COURT HAS THE AUTHORITY TO MODIFY THE AGREEMENT**

This Court entered its Final Order Approving Settlement Agreement and Dismissing Case on October 1, 1998. Since that time, the Agreement has governed the manner in which the City, and the City Police Department, have been interacting with homeless individuals who either reside in the City or relocate to the City (voluntarily or otherwise).

To date, over the nearly 15-year time period since this Court's Order ratifying the Agreement, the Plaintiffs have not sought to enforce any aspect of the Agreement, and the City has not sought to rescind or modify the Agreement. However, when a party to the Agreement demonstrates that significant changes in factual conditions or the law have occurred, as have occurred here, the Court has the inherent authority to modify the Agreement upon motion by one of the parties. Rule 60, Fed. R. Civ. P. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992); *Horne v. Flores*, 557 U.S. 433, 447, 129 S. Ct. 2579, 2593, 174 L.Ed.2d 406 (2009).

**III. CHANGED CIRCUMSTANCES WARRANT MODIFICATION  
OF THE POTTINGER CONSENT DECREE**

**A. The Pottinger Lawsuit Timeline**

To assist the Court in having a brief background of this matter, the applicable time line for the Pottinger lawsuit is as follows:

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- December 23, 1988: The Pottinger Plaintiffs file their initial Complaint against the City of Miami.
- July 21, 1989: Judge Atkins grants Pottinger's motion for class certification, and certifies the class.
- September 8, 1989: A Second Amended Complaint is filed by Pottinger against the City of Miami.
- November 16, 1992: Judge Atkins enters his Findings of Fact and Conclusions of Law on Plaintiffs' Request for Declaratory and Injunctive Relief.
- December 7, 1994: The Eleventh Circuit finds several provisions in the Court's Order unclear and remands the case on a limited basis for the district court to address these concerns. The Eleventh Circuit also asked whether Judge Atkins should modify the injunction "in light of recent events."
- On April 17, 1995: Judge Atkins complied with the Eleventh Circuit mandate but concluded that "[t]hrough improvement in the overall situation is occurring via the [Dade County Homeless] Trust," "the salient facts of this case have not changed substantially."
- February 7, 1996: The Eleventh Circuit states that "the panel is of the opinion that this case can be and should be settled" and referred the case to the Chief Circuit Mediator for settlement negotiations.
- December 9, 1997: The City of Miami Commission approves the Settlement Agreement.
- February 12, 1998: The oversight committee appointed by then Governor Lawton Chiles ratifies the Settlement Agreement. And,
- October 1, 1998: This Court enters its Final Order Approving Settlement Agreement and Dismissing Case.

**B. New Services For The Homeless Since The Pottinger Lawsuit Was Filed**

As briefly mentioned in Section I, Introduction, above, there have been significant changes in this community in the past 25 years which have alleviated almost all of the homeless issues that necessitated the filing of the Pottinger lawsuit. Since the lawsuit was filed, the Miami-Dade County Homeless Trust was established in 1993. The Trust's

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annual operating budget is approximately \$42 million. About \$20 million comes from a competitive process via U.S. HUD, \$19 million through the food and beverage tax, and the remainder through State funding and private sector contributions. Of the \$19 million collected in fiscal year 2011-2012, businesses in the City of Miami contributed about 29% of the total.

The Trust's work on behalf of the homeless is conducted in accordance with its Community Homeless Plan. This Plan provides a three stage "Continuum of Care" approach to assisting the homeless through emergency, transitional and permanent housing. The Trust also conducts a semi-annual survey of homeless persons and operates a toll-free "Homeless Helpline" (which provides referrals for housing and other related services).

On October 1, 2004, the Trust began outreach efforts known as "Coordinated Outreach" in an attempt to reach Miami-Dade County's most chronic homeless individuals.

The City has passed a Resolution requesting that the Homeless Trust use some of the vast surplus that it has presented in the FY2013-14 Proposed Budget - **\$12.9 million** – to provide an additional 98 emergency "Pottinger beds" for the homeless within downtown Miami. The Trust has issued a request for quotation to purchase additional beds, but has not yet committed to providing 98 exclusive Pottinger beds for the use of the City. The City has also requested that the Trust increase this number to 350 beds, which is the approximate number of identified chronically homeless in the Downtown Miami. **In recent conversations with officials at the Camillus House, undersigned counsel learned that the annual cost of 350 overnight emergency Pottinger beds at**

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**the Camillus House would be \$3,832,500 or about 29.7% of the Trust's current \$12.9 million surplus (other public or private facilities may charge more or less than this). Each person occupying an overnight emergency Pottinger bed would then be able to access the vast resources of the Camillus House, including food, shelter, clothing, property storage and medical treatment. If mats were purchased instead of beds, the cost would be \$2,550,000 or about 19.8% of the Trust's current \$12.9 million surplus, and the same services would be available. As of the date of this Motion, the Trust has not committed to fund these additional Pottinger beds.**

In addition, also in 1993, a private, non-profit organization which partners with the Trust, the Community Partnership for Homeless (now known as the Chapman Partnership), was created. This organization has as its mission to encourage private sector involvement and investment in implementing the Trust's Community Homeless Plan. It also operates Homeless Assistance Centers providing short term residency to the homeless and their families who need a place to live. These centers are in downtown Miami (established in 1995) and Homestead (established in 1998). These shelters provide for immediate and short term emergency needs such as food, clothing, showers and residence. Long term needs are also addressed as the shelters also provide a case plan for the homeless including counseling, job training, placement, child care, primary health care and legal aid.

The total number of available beds for the homeless has also increased dramatically since the Pottinger lawsuit was filed. Currently, there are over 4,000 available beds in Miami-Dade County for the homeless (this includes emergency shelter, transitional housing and permanent housing). Of this total, more than half are located in

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the City of Miami. More importantly, of the approximate 1,200 emergency shelter beds available for the homeless county-wide, about 65% are located in downtown or within one-half mile of downtown Miami.<sup>9</sup>

In 1988, when the Pottinger lawsuit was originally filed, there was not a single public emergency shelter bed in Miami-Dade County.

The City of Miami also established a Homeless Assistance Program in 1991. This program provides outreach, assessment, placement, information, referral and transportation services to the homeless. Former homeless persons (known as “Green Shirts”) are employed as Community Outreach Specialists who conduct street outreach, coordinate discharge procedures with Jackson Memorial Hospital, and the Miami-Dade County Jail, provide transportation and provide emergency assistance during weather and other emergencies.

In 2005, the city established an Indoor Meal program with four feeding sites around the City to ensure food is available to the homeless. Since 2005, over 750,000 meals have been served.

Most recently, on May 18, 2012, the Camillus House opened a new campus a 1603 N.W. 7th Avenue. This campus, called the Norwegian Cruise Lines Campus, cost \$84 million (of which, as aforementioned, the City contributed \$10 million through its CRA. The campus consists of three buildings and offers short and long term housing, mental health facilities, food service facilities, storage for property, retail space, a multi-level garage, and even a kennel for dogs.

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<sup>9</sup> Though there is no firm definition of “emergency shelter beds” as there is for “Pottinger eligible beds” the Trust ordinarily requires treatment which disqualifies these beds for use under Pottinger.

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In addition to the new and extensive outreach, shelter, and food issues that have been addressed, in 2009, the Trust also established a Donation Meter Program so the public could drop money into specially marked parking meters to fund additional shelter beds, and expand the number of indoor meal programs for people experiencing homelessness. This fund now brings in approximately \$50,000 per year for the homeless.

New programs have also been implemented to attempt to assist those homeless who unfortunately end up in the criminal justice system.

Moreover, in 2000, the Eleventh Judicial Circuit instituted a Jail Diversion program to divert nonviolent misdemeanor defendants with serious mental health issues from the criminal justice system into community-based treatment and support services.<sup>10</sup> This helps provide participants with transitional services, housing assistance, assistance securing identification and entitlements, and funding for housing and medical needs. In addition, a Discharge Policies Memorandum of Agreement (“MOA”) was executed in 2008 between the Homeless Trust, Miami-Dade County Corrections and Rehabilitation Department, Florida Department of Corrections, Florida Department of Children and Families, Florida 11th Judicial Circuit, Jackson Memorial Hospital/Public Health Trust, Our Kids, Inc., and community mental health facilities to aid homeless persons in accessing needed services.

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<sup>10</sup> Recent statistics show that Miami-Dade County has the highest percentage of people with serious mental illnesses of any urban community in the United States, at 9%. Fewer than 14% of these individuals receive care in the public mental health system, thus the County jail serves as the largest psychiatric facility in the State of Florida. Approximately 17% of the total County inmate population has serious mental illnesses, which costs taxpayers more than \$50 million annually.

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None of the above services or programs was available to the homeless when the Pottinger lawsuit was filed in 1988. However, despite these changes, there are still two main groups of homeless persons that the Agreement prevents the City from fully helping, and from fully offering them the opportunity to obtain the food, shelter, clothing, beds and medical services they need.<sup>11</sup>

**C. Material And Significant Demographic Changes In The City Of Miami**

In addition to the numerous programs outlined above that have been established since the Pottinger lawsuit was filed, the City of Miami has undergone drastic demographic changes in the same time period. The City is now a densely populated urban center where residents live and work.

First, the 2000 census showed that approximately 39,000 persons lived in downtown Miami. Currently, over 65,000 persons now live in Downtown Miami, an increase of 80%. Moreover, studies show that the downtown population will increase to at least 85,000 by 2014. Finally, over 22,000 condominium units have been built between 2003 and 2008 of which approximately 95% of these are occupied with primary full time residents. Currently there are 3,000 residential units that are under construction.

Second, downtown Miami is one of the State of Florida's largest employment centers, with just under 200,000 people coming to downtown to work, attend classes and visit each day. Over 3 million feet of new office space has been developed in the past 10 years.

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<sup>11</sup> In addition, if a homeless person has a child or children with them, hotel rooms will be purchased for the homeless and the child or children so there are no children on the streets.

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Third, in addition to the increase in population and businesses, over 200 new restaurants and retail shops have opened in downtown Miami in the past 5 years. This growth is expected to continue.

Fourth, downtown Miami has seen the development of numerous new cultural and entertainment venues, attracting more visitors and tourists to the downtown areas, including the American Airlines Arena, the Adrienne Arsht Center for the Performing Arts, and the Live Nation Amphitheater at Bayfront Park. These are in addition to the Miami Art Museum and the Gusman Center for the Performing Arts. This does not include the Miami Marlins Park, opened in 2012 which is located about a mile from downtown.

Finally, to accommodate all of the tourists who visit downtown Miami each year, numerous hotels have been constructed in the past few years including the JW Marriott Marquis, Mandarin Oriental, Epic Hotel, Four Seasons, Viceroy and Hampton Inn. Downtown Miami now contains 31 hotels featuring over 6,800 rooms and 132,000 square feet of meeting space.

**D. New Safety And Security Concerns Since The Pottinger Lawsuit Was Filed**

In addition to the above significant changes set forth in A-C above, the terrorist attacks of September 11, 2001 and April 15, 2013 (in Boston) have impacted how police departments investigate and dispose of suspicious items, such as the interior of tents, bundles of clothes, and backpacks. Because of the Agreement, however, the City Police Department's ability to carry out security-related investigations of what may or may not be homeless property is extremely limited, endangering the public at large.

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**E. Legislative Changes Since The Pottinger Lawsuit Was Filed**

The most significant legislative change occurred in 2004 when s. 794.065, F.S. was enacted. This statute, later renumbered s. 775.215, F.S. (2010) imposes residency restrictions on persons convicted of certain sex offenses. The statute states, in pertinent part, as follows:

775.215 Residency restriction for persons convicted of certain sex offenses.—

(2)(a) A person who has been convicted of a violation of s. 794.011, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, regardless of whether adjudication has been withheld, in which the victim of the offense was less than 16 years of age, may not reside within 1,000 feet of any school, child care facility, park, or playground. However, a person does not violate this subsection and may not be forced to relocate if he or she is living in a residence that meets the requirements of this subsection and a school, child care facility, park, or playground is subsequently established within 1,000 feet of his or her residence.

(3)(a) A person who has been convicted of an offense in another jurisdiction that is similar to a violation of s. 794.011, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, regardless of whether adjudication has been withheld, in which the victim of the offense was less than 16 years of age, may not reside within 1,000 feet of any school, child care facility, park, or playground. However, a person does not violate this subsection and may not be forced to relocate if he or she is living in a residence that meets the requirements of this subsection and a school, child care facility, park, or playground is subsequently established within 1,000 feet of his or her residence.

Moreover, in 2005, Miami-Dade County passed ARTICLE XVII, entitled “The Lauren Book Child Safety Ordinance.” This ordinance, found at Section 21-277 deems it unlawful for any person that has established residency on or after November 25, 2005, and has been convicted of a sexual battery, lewd and lascivious act on/in the presence of persons under age 16, sexual performance by a child, sexual acts transmitted over computer, or selling or buying of minors for portrayal in sexually explicit conduct, in

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which the victim of the offense was less than 16 years of age, or similar law of another jurisdiction, to reside within 2,500 feet of any school. "School" is designated as a public or private kindergarten, elementary, middle or secondary (high) school.

The statute and the ordinance have led to sexual predators being released into the City of Miami where encampments have been established. A few years ago, over 100 sexual predators camped under the Julia Tuttle Causeway for nearly 3 years, with the support of the Florida Department of Corrections. More recently, dozens of homeless sexual predators were camping at a City owned vacant lot on the corner of NE 79th Street and NE 10th Avenue. These homeless sexual predator camps were without beds, bathrooms or other facilities, security, or any types of services for these homeless persons, thereby creating safety and health issues for the homeless and public at large.

Studies have shown that residency restrictions such as those found in s. 775.215 and the Lauren Book Child Safety Ordinance make it difficult, if not impossible, for sexual predators to find housing. It therefore results in sexual predators becoming homeless, which makes it more difficult to track them as they will go underground or report a false address.<sup>12</sup>

**IV. THE STATUS OF THE HOMELESS IN THE CITY  
OF MIAMI AND MIAMI-DADE COUNTY**

The dramatic increase in services available to the homeless has had a positive impact on the homeless issues throughout Miami-Dade County.

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<sup>12</sup> Per state statute, sexual offenders are required to carry identification but their identification frequently identifies a street, and not a proper address, as their home address.

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According to the Trust's Life-to-Date Census Report, there were approximately 8,000 homeless persons in Miami-Dade County prior to the first formal census conducted in 1997.

In April, 2003, there were 7,420 homeless with an estimated 4,422 living on County streets.

In January, 2013, the number of homeless county-wide decreased by 50%, to 3,954 persons, with only 839 of them living on the streets.

Unfortunately, the success seen county-wide has not translated to the City of Miami. The City is a magnet for the homeless because of the unique circumstances present in Miami-Dade County. The City contains most of the County's homeless service facilities, including Jackson Memorial Hospital, 3 of the 5 major shelters that serve the homeless, and 60-75% of the treatment facilities. Therefore, unlike any other area in the County, the homeless enter into the City's geographic area for significant periods of time.<sup>13</sup>

A January 2013 homeless census supports this conclusion. According to this census data, of the 839 homeless persons living on the streets of Miami-Dade County, 351 live in the small area that makes up downtown Miami. This is a significant increase from just four years ago, as another census taken in January, 2009 showed only 192 homeless persons lived in downtown Miami.

Thus, in a few years, the number of homeless living on the streets of downtown Miami has increased 83%.

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<sup>13</sup> Moreover, several other municipalities in Miami-Dade County who offer shelter to their homeless house them in the City of Miami, not within their own borders.

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The downtown Miami area is also unique in other alarming areas. Of those who live on the streets in downtown, it is estimated that about 90% are chronically homeless. These individuals are often afflicted with serious mental illness, are substance abusers, or a co-occurrence of the two, thus, they are resistant to enter the continuum of care when approached by outreach workers or City of Miami Police Officers.

Downtown Miami is also a magnet for street feeding.<sup>14</sup> Despite the availability of indoor meal services and opportunities to donate food and serve meals at homeless shelters, many individuals and organizations (some of whom come from outside Miami-Dade County) provide food to the homeless in an *ad hoc*, degrading and unsanitary manner. Indeed, food is frequently distributed out of the trunks of cars or vans, in areas where there are no facilities for the homeless to wash their hands, use toilets after eating, or to appropriately dispose of leftover food and utensils. Most importantly, those organizations who engage in street feeding do not provide direct access to services or through the continuum of care.

Quality of life crimes are also associated with chronic homelessness. These crimes include aggressive panhandling, trespassing, and inappropriate public behavior, including going to the bathroom in plain view. These crimes tax the resources of downtown Miami and discourage economic development, business and job creation.

**V. THE CITY'S REQUESTED MODIFICATION  
OF THE POTTINGER CONSENT DECREE**

Although this Court clearly has the authority to terminate (or partially terminate) the Agreement, the City is currently only requesting limited, specific and necessary

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<sup>14</sup> A 2011 list of outdoor street feeders is attached as Exhibit 3.

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modifications to the Agreement suitably tailored to the changes in circumstances at this time. These modifications fall into three general issues:

1. *Chronically Homeless*: The City seeks to modify the Agreement on a limited basis to address chronically homeless individuals located throughout the City in areas where food, clothing, shelter and beds and medical treatment are available (or can be made available upon certain modifications by this Court) which now house thousands of new residents, businesses, and public places of gathering far different than what existed on October 1, 1998. These chronically homeless individuals are treatment-resistant and refuse services on a continuous basis or accept services only to repeatedly drop out of the continuum of care thereby depriving others of valuable shelter space and crucial services;

2. *Law Enforcement Protocol*: The City seeks limited modifications to the Law Enforcement Protocol so the safety and needs of the homeless can be delivered in a more efficient manner and the City Police Department can focus its limited resources on protecting and serving the homeless and the public at large; and,

3. *Sexual Predators*: The City seeks limited modification of the Agreement to address homeless individuals identified as convicted sexual predators by virtue of new law which did not exist on October 1, 1998 when this Court approved the Agreement.

**A. Modifications For Those Deemed Chronically Homeless.**

The City respectfully requests that this Court modify the Agreement to address the plight of the chronically homeless in the City. The individuals who have been identified as chronically homeless, are those who are approached by City Police Officers (or outreach workers) on a continuous basis and who either 1) refuse services, 2) accept

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services only to repeatedly drop out of the continuum of care thereby depriving others of valuable shelter space or services, or 3) dissipate the limited resources of City Police Officers (or outreach workers) as they repeatedly encounter the chronically homeless. Moreover, the chronically homeless use the Agreement against City Police Officers as they know enforcement of the City's police powers is impossible given the restrictive language of the Agreement.

Pursuant to Paragraph 14(a) of the Agreement, if a chronically homeless person is not engaging in criminal conduct, there can be no arrest or detention; the officer, social worker or outreach worker can only "approach the homeless person and advise him or her of shelter, services, or assistance which are then currently available." Thus, City Police Officers cannot enforce their police powers, nor do anything to help those homeless persons who are afflicted by mental health issues or who are suffering from drug addiction. This restriction precludes City Police Officers from assisting the chronically homeless which not only affects the health safety and welfare of the public at large but the homeless themselves.

Moreover, pursuant to Paragraph 14(c) of the Agreement, if a chronic homeless person is engaging in a "Life Sustaining Conduct Misdemeanor," and there is no available shelter bed, then no warning shall be given. If there is an available shelter bed, the law enforcement officer may arrest the chronically homeless person only if the shelter bed is offered and refused.

Therefore, if a homeless person is, for example, fully nude and going to the bathroom on a crowded public street, and no Pottinger beds are available, there is nothing a City Police Officer can do.

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The difficulty City Police Officers have with in dealing with the chronically homeless is that when this Court entered its Order approving the Agreement on October 1, 1998, none of the parties anticipated those who would simply refuse services, or accept services like a revolving door thereby not allowing themselves to go through the continuum of care or taking up valuable and limited space of those homeless persons who want to get off the streets and take advantage of the numerous services available to them.<sup>15</sup>

The City therefore requests that chronically homeless persons be exempt from the provisions of the Pottinger Agreement by adding the following proposed sentences to Paragraph 10 as follows:

An individual is not covered by the provisions of the Pottinger Agreement if the individual is a chronically homeless person. A chronically homeless person is one who refuses services on three separate occasions within a 180-day period; however, multiple refusals in a 24-hour period shall only serve as a single refusal.

**B. Modifications To The Law Enforcement Protocol**<sup>16</sup>

The effect of the Agreement and the limited number of emergency shelter beds available to City Police Officers (without a commitment from the Homeless Trust – which obtains 29% of its food and beverage revenues from businesses in the City) has allowed homeless persons throughout the City to engage in what have now been

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<sup>15</sup> City Police Officers frequently report that it is not uncommon for chronically homeless persons to accept shelter space when their welfare checks run out, or to accept a shelter space to avoid arrest, only to leave when arrest is no longer imminent.

<sup>16</sup> Additions to the protocol language are underscored, deletions are stricken through.

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identified as conduct dangerous to the health, safety and welfare to the public at large, including the homeless.

First, as set forth above, there are now essentially no emergency shelter beds available to the City of Miami Police Officer at any given time, due to the Trust's co-opting of the beds and the Green Shirts who control access to them. This is for approximately 500 chronically homeless persons City-wide, including approximately 350 downtown, and other unknown numbers of homeless who are transported into the City to the hospital, jail or to obtain other service. Therefore, the City would request that Paragraph 11 be modified as follows:

VII. Law Enforcement Protocol

11. "Definition of Available Shelter". An "available shelter" means a shelter, for a period of at least 24 but not to exceed 48 hours, with a bed or a mat at no cost to a homeless person, within the territorial boundaries of the City or within one mile thereof, that treats homeless persons with dignity and respect, imposes no religious requirements, ~~and does not impose involuntary substance abuse or mental health treatment.~~

The benefits to this proposed modification are self-evident. By adding mats to the definition of an available shelter, up to 150 additional spaces in shelters can accommodate the homeless in the City. This will allow up to 150 additional homeless persons to obtain shelter, have access to medical care, food, toilet facilities, counselors, and other treatment. This modification is consistent with the current cold weather emergency shelter policy which allows for temporary placement of the homeless (on mats) when the weather is 50 degrees or below.

Moreover, if a homeless person committed a criminal act at a shelter, such as disorderly conduct or assault and battery, they would not be eligible for placement but

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would be eligible to be placed temporarily on a mat. The addition of the 24-48 hour period ensures that the homeless person is not using the shelter bed or mat on a revolving door basis but is rather being exposed to the continuum of care for at least a minimum of 24-48 hours.

Second, the City requests that Paragraph 11 be modified as follows:

VII. Law Enforcement Protocol

11. Definition of "Available Shelter". An "available shelter" means a shelter, for a period of at least 24 but not to exceed 48 hours, with a bed or a mat at no cost to the homeless person, within the territorial boundaries of Miami-Dade County ~~the CITY or within one mile thereof~~, that treats homeless persons with dignity and respect, imposes no religious requirements, ~~and does not impose involuntary substance abuse or mental health treatment.~~

This proposed provision will allow the City to place homeless persons throughout the County, which in many cases will be closer to the area of the County where they originated from, and who only passed through the City because they were in jail, in court, at Jackson Memorial Hospital, or taking advantage of homeless services only offered in the City. It also will not restrict the City from offering services to the homeless when a bed (or mat) is not available within the territorial limits of the City. This benefits the homeless person as well as the City in that it once again increases the number of emergency shelter beds available to the homeless, such as the 300 emergency shelter beds available in the City of Homestead. The City will provide appropriate transportation to the homeless to other shelters located outside of the City but within Miami-Dade County.

The involuntary substance abuse or mental treatment language is deleted because this is the root cause of much of the issues related to the chronically homeless, and this group of homeless needs this treatment (for at least a minimum of 24-48 hours).

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Third, the City requests that this Court amend paragraph 14.C.2. of the Law Enforcement Protocol as follows:

C. Homeless Person Observed Violating a "Life Sustaining Conduct" Misdemeanor:

1. "Life sustaining conduct" misdemeanors are those which a homeless individual commits by the mere fact that he or she is without shelter, and must conduct life sustaining activities, such as eating, sleeping, sitting, congregating, or walking in public.

2. If the homeless person described above is observed committing one of the below listed "life sustaining conduct" misdemeanors, the law enforcement officer may warn the homeless person to stop the unlawful conduct. If there is no "available shelter," no warning shall be given. If there is an "available shelter," the law enforcement officer may advise the homeless person of its availability. If there is an "available shelter" and the shelter has been offered to the homeless person, and that person accepts this assistance, no arrest shall take place and arrangements shall be made to transport the homeless person to the shelter. Only if there is an "available shelter" and the homeless person refuses to accept the shelter, may the law enforcement officer arrest the homeless person for a "life sustaining conduct" misdemeanor. Required Records: (1) If a homeless person is transported to an "available shelter," the law enforcement officer shall complete a Field Information Card; (2) If an arrest is made, an Arrest Affidavit shall be completed. Records Filing: A copy of all required records shall be filed with the appropriate unit within the Miami Police Department. However, if the homeless person described above is observed committing one of the below listed "life sustaining conduct" misdemeanors, and the life sustaining conduct misdemeanor endangers the health, safety or welfare of the homeless person or the public, the law enforcement officer must warn the homeless person to stop, and, if they refuse to do so, may arrest them regardless of the availability of shelter space.

This proposed modification removes extreme health and safety hazards to the public at large committed by the homeless who routinely refuse services even when other aspects of the Agreement are met. These activities endanger the homeless, the public at large, community outreach specialists and Police Officers, and are not necessary at this time given the significant increase in available beds, shelters, food, clothing, toilet

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facilities, mental health services, outreach services and other services for the homeless as outlined in this Motion.

Fourth, the City also requests that this Court amend the definition of "homeless person" as found in Paragraph 10 as follows:

10. Definition of "homeless person". An individual is considered a "homeless person" if he or she "lacks a fixed, regular, and adequate night-time residence and has a primary night-time residency that is (a) a supervised publicly or privately operated shelter designed to provide temporary living accommodations; (b) an institution that provides a temporary residence for individuals intended to be institutionalized; or (c) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings. The term 'homeless person' does not include any person imprisoned or otherwise detained pursuant to an Act of Congress or state law." 42 U.S.C. s. 11301, et seq. (1994). An officer is allowed to make reasonable inquiry to make this determination. The term "homeless person" does not include any person identified as a sexual predator as a result of s. 775.215, F.S. or Section 21-277 to 21-21285, Miami-Dade County Code. The term "homeless person" also does not include any person who is made homeless by his or her own actions, criminal or otherwise, occurring at a shelter that causes the person to be ineligible for placement at a shelter facility..

This proposed modification would exempt those homeless who cannot be placed in a shelter due to their own inappropriate or illegal actions at the shelter.

Fifth, the City requests that certain life sustaining conduct misdemeanors be eliminated from the Agreement. These actions, are no longer necessary given the significant increase in available beds, shelters, food, clothing, toilet facilities, mental

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health services, outreach services and other services for the homeless.<sup>17</sup> The City requests the following proposed modifications:

C. Homeless Person Observed Violating a "Life Sustaining Conduct" Misdemeanor:

1. "Life sustaining conduct" misdemeanors are those which a homeless individual commits by the mere fact that he or she is without shelter, and must conduct life sustaining activities, such as eating, sleeping, sitting, congregating, or walking in public.

2. If the homeless person described above is observed committing one of the below listed "life sustaining conduct" misdemeanors, the law enforcement officer may warn the homeless person to stop the unlawful conduct. If there is no "available shelter," no warning shall be given. If there is an "available shelter," the law enforcement officer may advise the homeless person of its availability. If there is an "available shelter" and the shelter has been offered to the homeless person, and that person accepts this assistance, no arrest shall take place and arrangements shall be made to transport the homeless person to the shelter. Only if there is an "available shelter" and the homeless person refuses to accept the shelter, may the law enforcement officer arrest the homeless person for a "life sustaining conduct" misdemeanor. Required Records: (1) If a homeless person is transported to an "available shelter," the law enforcement officer shall complete a Field Information Card; (2) If an arrest is made, an Arrest Affidavit shall be completed. Records Filing: A copy of all required records shall be filed with the appropriate unit within the Miami Police Department.

3. The "life sustaining conduct" misdemeanors referenced above are as follows:

b. Public nudity where necessary to carry on the daily necessities of life, such as bathing or responding to a call of nature. Current provisions: 800.03, F.S. (1994), 38-62, CMC except if any act of public nudity to carry on necessities of life is intentional in plain view. However, in no circumstances shall public nudity be allowed for the call of nature if there exists a public restroom within one mile of the homeless person performing a call of nature.

e. ~~Fires in parks. Current provisions: 38-53 & 1-13, CMC; 162.22, F.S. (1994).~~

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<sup>17</sup> A map of public facilities which are available to the homeless is attached as Exhibit 4.

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~~d. Obstructing passage on sidewalks. Obstructing a street, road, or highway shall not be construed to be a "life sustaining conduct" misdemeanor within the meaning of this protocol. Current provisions: 54-1 to 54-3, 37-3, CMC; 316.2045, F.S. (1994)~~

~~g. Littering. Current Provisions: 403.314, Fla. Stat.; 22-6, 38-17, 38-63 CMC; and~~

~~j. Temporary structures in park. Current Provisions: 35-52, CMC~~

4. Nothing in this paragraph discussing "life sustaining conduct" misdemeanors shall prevent an immediate arrest under s. 800.04, F.S., entitled "Lewd, lascivious, or indecent assault or act upon or in the presence of a" person ~~child~~ if a law enforcement officer has probable cause to make such an arrest.

These proposed modifications remove extreme health and safety hazards to the public at large committed by the homeless who routinely refuse services even when other aspects of the Agreement are met. These activities endanger the homeless, the public at large, community outreach specialists and Police Officers, and are not necessary at this time given the significant increase in available beds, shelters, food, clothing, toilet facilities, mental health services, outreach services and other services for the homeless as outlined in this Motion.

The City requests the following proposed modifications:

D. Homeless Person Observed Violating a Misdemeanor (which is not classified above as "Life Sustaining Conduct"):

2 If the homeless person described above is observed violating a misdemeanor (which is not classified in this Protocol as "life sustaining conduct"), the law enforcement officer may warn the homeless person to stop the unlawful conduct, or, if the officer deems it appropriate, the officer may detain or arrest the homeless person. A law enforcement officer may, in his or her discretion, approach the homeless person and advise him or her of shelter, services or assistance which is then currently available. If the law enforcement officer deems it appropriate, he or she may also offer to call ~~an outreach worker~~ to the scene so that the homeless person can be transported to an "available shelter" that is appropriate for

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the homeless person's needs at that time. Records required: (1) If a homeless person is transported to an available shelter, the law enforcement officer shall complete a Field Information Card; (2) If an arrest is made, an Arrest Affidavit shall be completed; (3) If the law enforcement officer warns the homeless person to stop the unlawful conduct, but no arrest is made, then the law enforcement officer shall complete a Field Information Card; (4) If an approach and advice concerning shelter, services or assistance occurs by a law enforcement officer, or if ~~an outreach worker~~ a community outreach specialist is called, the law enforcement officer shall complete a Field Information Card, [except if the homeless person is routinely encountered]. Records Filing: A copy of all required records shall be filed with the appropriate unit within the Miami Police Department.

14. Law Enforcement Protocol: The City hereby adopts a protocol to further protect the rights of homeless persons, by limiting the circumstances under which arrests can be made, including the handling of their personal property:

A. Homeless Person Observed Not Engaging in Any Criminal Conduct:

There can be no arrest or detention. A law enforcement officer, social worker, or ~~CITY outreach worker~~ a community outreach specialist may approach the homeless person and advise him or of shelter, services, or assistance which are then currently available. When the contact with the homeless person has been initiated by a "citizen's complaint," the law enforcement officer may, whenever appropriate, call for the assistance of ~~an outreach worker~~ a community outreach specialist who, if available, may begin the process of engaging the homeless person in a dialogue which is intended to advise the homeless person of shelter, services or assistance that is/are available. Required Records: (1) If such an approach and advice concerning shelter, services, or assistance occurs by a law enforcement officer, the law enforcement officer shall complete a Field Information Card. Field Information Cards are not required to be completed for each encounter if the homeless person routinely refuses assistance. Records Filing: A copy of all required records shall be filed with the appropriate unit within the Miami Police Department.

The proposed modifications in this paragraph expand those who may approach and assist homeless person from City workers only to community outreach specialists from the Trust. The modification related to Field Information Cards will free up Police Officers from filling out cards on the same person on multiple occasions when the

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homeless person repeatedly and routinely refuses services and they are in the system on multiple occasions.

B. Homeless Person Reasonably Believed to be Mentally Ill: Where a homeless person meets the criteria for involuntary examination under Florida Law (currently section 394.463, F.S.), "Baker Act," a law enforcement officer may, in his or her discretion, take the homeless person to ~~a receiving~~ the nearest facility for involuntary examination. Required Records: If the homeless person is taken to a receiving facility for involuntary examination, a copy of the forms required by section 394.463 (hereinafter "Baker Act Forms"), shall be filed with the Mental Health Crisis Center at Jackson Memorial Hospital ~~and an Incident Report shall be completed.~~ ~~Records Filing: A copy of all required records shall be filed with the appropriate unit within the Miami Police Department.~~

The proposed modifications in this paragraph allow the City to take homeless persons to an appropriate mental health facility within Miami-Dade County and not necessarily Jackson Memorial Hospital, which may have overcrowding or not be in a position to treat the homeless person as efficiently as another facility.

These proposed modifications simply set forth that a community outreach specialist, as opposed to an outreach worker, can serve the homeless in the City of Miami, many of whom are temporarily located there because of the proximity of the jail, Jackson Memorial Hospital, or the concentration of other services for the homeless in the City's geographic boundaries.

F. Disposition of Personal Property Belonging to a Homeless Person who is Arrested.

1. The CITY shall respect the personal property of all homeless people. The Miami Police Department (and all other Departments including but not limited to Parks and Recreation and Solid Waste) shall follow their own internal procedures for taking custody of personal property. In no event shall any city official or worker destroy any personal property known to belong to a homeless person, or readily recognizable as property of a homeless person (i.e., bedding or clothing and other belongings organized or packaged together in a way indicating it has not

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been abandoned), except as permissible by law and in accordance with the department's operating procedure, or if the property is contaminated or otherwise poses a health hazard [or safety issue] to CITY workers or to members of the public. Any items that have been left for more than 12 hours in the same location will be considered abandoned and may be removed and discarded. Notwithstanding any language in this Settlement Agreement to the contrary, the CITY is not responsible for taking custody of mattresses.

2. The disposition of personal property shall never prevent a law enforcement officer from effectuating an arrest authorized under the previous sections of this protocol. However, the following safeguards shall be undertaken by the arresting officer or any other CITY agent or official to preserve the property of the homeless person, to the extent feasible.

b. The arresting officer shall ensure that large or bulky items (which are not contaminated or otherwise pose a health hazard or safety issue to CITY officers or workers or to members of the public) are not abandoned at the point of arrest, but rather secured by an outreach worker and maintained in accordance with existing outreach procedures, or, if an outreach worker is unavailable, secured by the arresting officer until an outreach worker becomes available to assume its maintenance in accordance with existing outreach procedures. A police officer may have large and bulky items, which are not contaminated or otherwise pose a health hazard or safety issue, and that are not abandoned, secured by an outreach worker and maintained in accordance with existing outreach procedures when a homeless person is placed in a shelter.

These proposed modifications would allow the City of Miami Police Department and community outreach specialists, as well as other professionals who address the needs of the homeless on a daily basis, the leeway to dispose of belongings that are not only a health hazard but a safety issue. These include materials for starting fires, belongings that obstruct sidewalks, food waste left in public areas which attract disease and vermin and expose the public at large to safety and health issues, and unsanitary conditions caused by encampments at the Julia Tuttle Causeway or the City vacant lot on the corner of N.E. 79th Street and N.E. 10th Avenue.

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**C. Modifications For Those Deemed Homeless As A Result Of Being  
Identified As Convicted Sexual Predators.**

The City requests that this Court modify the Agreement as it relates to homeless persons who are identified as convicted predators by virtue of s. 794.065, F.S. (2004), later renumbered s. 775.215, F.S. (2010), a significant legislative change which occurred well after this Court approved the Settlement Agreement on October 1, 1998.

A party may rely on a significant change in factual conditions to establish a significant change in circumstances. *Rufo*, 502 U.S. at 384. Changed factual conditions that may warrant the modification of a consent decree are those that make the decree: (1) substantially more onerous to comply with, (2) unworkable because of unforeseen obstacles, or (3) detrimental to the public interest. *Rufo*, 502 U.S. at 384.

In the case of those homeless who are identified as sexual predators, modification of the Agreement is warranted for several reasons.

First, these issues were not contemplated by the Agreement as they did not arise until 2004, when the State of Florida passed s. 794.065, F.S. (later renumbered s. 775.215, F.S.) imposing residency restrictions on persons convicted of certain sex offenses; and in 2005 when Miami-Dade County passed "The Lauren Book Child Safety Ordinance." These legislative enactments impose residency restrictions over those convicted of certain sex offenses.

The state statute makes it illegal for a sexual predator to "reside within 1,000 feet of any school, child care facility, park, or playground" unless "he or she is living in a residence that meets the requirements of this subsection and a school, child care facility, park, or playground is subsequently established within 1,000 feet of his or her residence."

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The Miami-Dade County Ordinance makes it illegal for a sexual predator “to reside within 2,500 feet of any school. Section 21-277 to 21285, Miami-Dade County Code. “School” is designated as “a public or private kindergarten, elementary, middle or secondary (high) school.” Section 21-280(9), Miami-Dade County Code.

Second, as to those homeless who are defined as sexual predators either by statute or code, it is literally impossible for the City to comply with the Agreement as written. Pursuant to Paragraph 14(a) of the Agreement, if a homeless person is not engaging in criminal conduct, there can be no arrest or detention; the officer, social worker or outreach worker can only “approach the homeless person and advise him or her of shelter, services, or assistance which are then currently available.”

Moreover, pursuant to paragraph 14(c) of the Agreement, if the homeless sexual predator is engaging in a “Life Sustaining Conduct Misdemeanor,”<sup>18</sup> and there is no available shelter, then no warning shall be given. If there is an available shelter, the law enforcement officer may arrest the homeless sexual predator only if the shelter is offered and refused.

Finally, if the homeless registered sexual predator is observed violating a non-life sustaining conduct misdemeanor, then the law enforcement officer does not have the

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<sup>18</sup> “‘Life sustaining conduct’ misdemeanors are those which a homeless individual commits by the mere fact that he or she is without shelter, and must conduct life sustaining activities, such as eating, sleeping, sitting, congregating, or walking in public.” Please see the Agreement, Paragraph 14(c) and Paragraph 14(c)3, listing misdemeanors and prohibited conduct including being in a park after hours, public nudity, a fire in a park, obstructing passage on a sidewalk, living or sleeping in a vehicle, loitering in a restroom, littering, using a facility for other than its intended purpose (e.g., sleeping on a park bench), and a temporary structure in a park.

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option of offering them an available shelter, and instead must ignore it or arrest the individual homeless person.

The obvious flaw in the Agreement as it relates to sexual predators – which did not exist when it was negotiated, approved by the City Commission or ratified by this Court – is that those who are deemed homeless by operation of the sexual predator statute or ordinance can never be offered an available shelter in Miami-Dade County as there is no shelter in the County that currently accepts sexual predators. Therefore, homeless sexual predators cannot be approached and offered shelter nor can they be warned (or subsequently arrested) if engaging in a life sustaining conduct misdemeanor. Shelter also cannot be offered to homeless sexual predators that are observed committing a non-life sustaining misdemeanor.

The effect of the sexual predator statute and ordinance and the restrictions imposed by the Agreement has allowed homeless sexual predators to set up camps around the City, including more recently under the Julia Tuttle Causeway (where over 100 sexual predators resided for nearly 3 years) and N.E. 79th Street and N.E. 10th Avenue (where 24 sexual predators once listed as their home address on an FDLE website). Indeed, according to recent FDLE records, over 100 sexual predators were previously living within one mile of the N.E. 79th Street location.

These sexual predator camps around the City cannot be policed by law enforcement because of the Agreement. This is problematic for numerous reasons including the lack of options available to law enforcement to deal with these homeless persons, the lack of appropriate access to food, shelter, or toilet facilities, and the difficulty created in tracking these sexual predators because they have no fixed address

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which defeats the very purpose of the statute and ordinance, to protect children from convicted sexual predators.

The City therefore requests that this Court grant its motion to modify the Agreement and add the following sentence to the definition of a homeless person found in paragraph 10 as follows:

The term "homeless person" does not include any person identified as a sexual predator as a result of s. 775.215, F.S. or Section 21-277 to 21-21285, Miami-Dade County Code.

**IX. CONCLUSION**

Through years of dedicated effort of Miami-Dade County, the City, and scores of community, business and educational leaders, the plight of the homeless in our community has improved dramatically. However, work remains to be done. The City therefore requests that this Court modify the Agreement consistent with the positions set forth in this Motion, so the City and Miami-Dade County can assist those homeless who have been the most difficult to reach.

**WHEREFORE**, the CITY OF MIAMI moves this Court for an Order Modifying the Pottinger Settlement Agreement as more fully set forth above.

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