

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

JOAQUÍN CARCAÑO, *et al.*,  
*Plaintiffs,*

v.

ROY A. COOPER, *et al.*,  
*Defendants,*

v.

PHIL BERGER, *et al.*,  
*Intervenor-Defendants*

No. 1:16-cv-00236-TDS-JEP

**INTERVENOR-DEFENDANTS’  
RESPONSE IN OPPOSITION TO  
EXECUTIVE BRANCH DEFENDANTS’  
MOTION FOR EXTENSION OF TIME  
TO ANSWER OR OTHERWISE  
RESPOND TO PLAINTIFFS’ FOURTH  
AMENDED COMPLAINT**

Intervenor-Defendants Senator Phil Berger and Speaker Tim Moore (“Intervenors”) oppose the Executive Branch Defendants’ Motion for Extension of Time to Answer or Otherwise Respond to Plaintiffs’ Fourth Amended Complaint. *See* Doc. 219. There is no good cause for an extension as required by Fed. R. Civ. P. 6(b)(1). In opposition, Intervenors would show as follows:

1. Intervenors will file their Motion to Dismiss Plaintiffs’ Fourth Amended Complaint on the current due date, Monday, October 23, 2017. If granted, Intervenors’ motion would dispose of most or all of Plaintiffs’ claims. Among other grounds for dismissal, Intervenors’ motion will establish that this Court lacks subject matter jurisdiction under Article III of the United States Constitution because Plaintiffs lack standing and because their claims are unripe. Plaintiffs have failed to plead that HB 142 causes them any concrete harm. Plaintiffs have also failed to state claims under their constitutional and statutory theories.

2. The Executive Branch Defendants’ sole grounds for seeking an extension are (1) that the Court’s consideration of dismissal arguments should be postponed pending resolution of the Executive Branch Defendants’ and Plaintiffs’ motion for a consent decree, and (2) that if

this Court denies entry of the consent decree, the Executive Branch Defendants will require additional time to respond to Plaintiffs' complaint. Doc. 219, ¶¶ 6–7.

3. The Court's authority to enter a consent decree "depend[s] on its having subject matter jurisdiction over the case." *Bragg v. W. Virginia Coal Ass'n*, 248 F.3d 275, 299 (4th Cir. 2001); *Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986). Consent decrees represent not only a contract between the parties, but also a judgment enforceable by citation for contempt of court. *See Firefighters*, 478 U.S. at 519–22.

4. In the absence of subject matter jurisdiction—including the absence of any evident justiciable injury that HB 142 might have caused Plaintiffs—this Court has no power to enter or enforce such a judgment, and so may not enter a consent decree. It would be inappropriate for the Court to consider entry of a consent decree *before* considering its own jurisdiction. The Court therefore should continue to require that all parties file responsive pleadings as scheduled, rather than postponing the deadline for such pleadings until after it considers the consent decree.

5. Intervenors intend to oppose the proposed consent decree on the grounds that the Court lacks subject matter jurisdiction to enter it, that it violates North Carolina law, and that it exceeds the authority of the Executive Branch Defendants. Ultimately, the proposed consent decree appears to reflect a collusive effort to obtain by court decree what Plaintiffs have been unable to obtain by litigation and the Executive Branch Defendants could not obtain legislatively. *See Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986) ("A court must be alert to the possibility that the consent decree is a ploy in some other struggle."). As a result, even if the proposed consent decree would resolve all claims against the Executive Branch Defendants, Doc. 219, ¶ 6, there is no reason to delay arguments for dismissal while the Court considers arguments

against the proposed consent decree. At a minimum, judicial economy would be better served by considering responsive pleadings alongside the proposed consent decree, given that the arguments surrounding the decree and Intervenor's motion will address overlapping legal issues such as whether the Court has subject matter jurisdiction over Plaintiffs' operative complaint.

6. This Court has already granted an extension of time to respond to Plaintiffs' complaint. Doc. 209. Indeed, the Executive Branch Defendants joined with the other Defendants consenting to that extension, *see* Doc. 208, and have now unaccountably waited until three days before responsive pleadings are due to request an additional extension. The Executive Branch Defendants should be required to file their answers or other responsive pleadings as scheduled.

Respectfully submitted,

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\*appearing pursuant to Local Rule 83.1(d)

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

This the 20th day of October, 2017.

/s/ S. Kyle Duncan  
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