

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 5:17-CV-25-FL**

PHIL BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; and TIM MOORE, in his official capacity as Speaker of the North Carolina House of Representatives ,

Plaintiffs,

v.

SYLVIA BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services; THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ANDREW SLAVITT, in his official capacity as Acting Administrator for the Centers for Medicare and Medicaid Services; THE CENTERS FOR MEDICARE AND MEDICAID SERVICES; RENARD MURRAY, in his official capacity as Regional Administrator for the Office of the Assistant Secretary for Health, U.S. Department of Health and Human Services, Region IV; DEMPSEY BENTON, in his official capacity as Interim Secretary of the North Carolina Department of Health and Human Services; and THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

**STATE DEFENDANTS' EMERGENCY
MOTION TO DISSOLVE OR VACATE
TEMPORARY RESTRAINING ORDER**

Defendants Dempsey Benton, in his official capacity as Interim Secretary of the North Carolina Department of Health and Human Services, and The North Carolina Department of Health and Human Services (collectively, the "State Defendants"), hereby move under Federal Rule of Civil Procedure 65(b)(4) to dissolve the Temporary Restraining Order ("TRO") entered without hearing on January 14, 2017 and, alternatively, to vacate the TRO under this Court's

plenary authority to modify and vacate its interlocutory rulings. In support of this motion, the State Defendants submit the accompanying Brief and supporting Declarations referenced therein.

The State Defendants respectfully ask the Court to dissolve the TRO **immediately** for the reasons set forth in this motion and the Brief. If the Court prefers to convene a hearing to address this matter, the State Defendants respectfully ask the Court to set the hearing for a date and time as soon as possible, and no later than Tuesday, January 17, 2017. The State Defendants can be available for a telephonic hearing upon immediate notice from the Court.

Expedited proceedings to dissolve a TRO are authorized by Federal Rule of Civil Procedure 65(b)(4) and are warranted in this case. So long as the TRO remains in effect, it prohibits the State Defendants from exercising their authority to submit to the federal government an amendment to North Carolina's Medicaid plan. Yet, as explained in the State Defendants' accompanying Brief, the TRO is invalid on its face because it does not comply with the requirements of Federal Rule of Civil Procedure 65(b) for temporary restraining orders that are issued without notice to the adverse party. Those requirements apply here in light of the deficient notice Plaintiffs gave the State Defendants, which denied the State Defendants a reasonable opportunity to prepare a defense and advance reasons why the injunction should not issue.

More basic than that, however, the arguments Plaintiffs presented to this Court when seeking the TRO suffer from numerous flaws, any one of which is fatal to their request. Among other things, Plaintiffs' papers did not disclose to the Court that the state plan amendment at issue in this case will not—indeed cannot—go into effect until January 1, **2018**—nearly one year from now. That fact, alone, negates the irreparable harm that Plaintiffs were required to show to obtain the TRO. Nor did Plaintiffs disclose that, if the expansion were to be funded from

taxpayer sources, it could proceed only following affirmative action by the North Carolina General Assembly. Thus, Plaintiffs' assertion that submission and approval of the amendment would irrevocably commit the state to expending taxpayer funds has no foundation.

Plaintiffs' request is deficient for more reasons. As set out in the Brief, (1) Plaintiffs lack Article III standing (and fail even to acknowledge—let alone reckon with—the U.S. Supreme Court decision that is most closely on point); (2) their claim against the State Defendants rests solely on alleged state-law violations and therefore is barred by the Eleventh Amendment; (3) this Court should abstain from hearing Plaintiffs' claim against the State Defendants because that claim should be brought, if anywhere, in state court; (4) Plaintiffs have no cause of action to bring the sole claim they assert against the State Defendants; (5) Plaintiffs' claim against the State Defendants is not yet ripe; and (6) Plaintiffs have no likelihood of succeeding on the merits of their claim against the State Defendants because those defendants are acting properly pursuant to the powers conferred on North Carolina's Executive Branch by the North Carolina Constitution.

Respectfully submitted,

This 16th day of January, 2017.

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[†] Local Civil Rule 83.1(e) Special Appearance
Forthcoming

*Attorneys for Defendants Dempsey Benton and The
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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send electronic notification to the following counsel of record:

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This 16th day of January, 2017.

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