

2011 WL 7047039  
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United States District Court,  
S.D. Texas,  
Corpus Christi Division.

M.D.; bnf Stukenberg, et al, Plaintiffs,  
v.  
Rick PERRY, et al, Defendants.

Civil Action No. C-11-84.

|  
July 21, 2011.

#### Attorneys and Law Firms

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#### ORDER

JANIS GRAHAM JACK, Senior District Judge.

\*1 On this day came on to be considered Defendants' Motion to Stay Proceedings. (D.E.59.)

Pursuant to Federal Rule of Civil Procedure 23(f), Defendants have sought permission from the U.S. Court of Appeals for the Fifth Circuit to appeal this Court's class action certification order. (D.E. 48, 49, 59, 60-4.)<sup>1</sup> Because "[a]n appeal does not stay proceedings in the district court unless the district judge or the court of

appeals so orders," Fed.R.Civ.P. 23(f), Defendants now request that this Court "stay all proceedings in this case if the United States Court of Appeals for the Fifth Circuit grants Defendants' petition for permission to appeal the Court's class certification orders." (D.E. 59 at 1.)<sup>2</sup> Defendants argue that Plaintiffs have not met their burden under Rule 23 (particularly the commonality and typicality requirements), and claim that they will prevail on interlocutory appeal in light of the recently released Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*, — U.S. —, 131 S.Ct. 2541, 180 L.Ed.2d 374, 2011 WL 2437013 (U.S. June 20, 2011). (D.E. 59 at 3-4.) They also argue that equitable considerations favor a stay, focusing primarily upon the probable costs of discovery in this action. (D.E. 59 at 4-7.) Plaintiffs respond that a stay is not warranted because Defendants are not likely to succeed on appeal, and the various equitable considerations do not favor a stay. (D.E.60.)

Stays issued pursuant to Rule 23(f) are discretionary and "extremely rare." *In re Mounce*, 2008 WL 2714423, \*6 (Bankr.W.D.Tex. July 10, 2008). In ruling on a motion to stay, a court must consider the following factors: "(1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant has made a showing of irreparable injury if the stay is not granted; (3) whether the granting of the stay would substantially harm the other parties; and (4) whether the granting of the stay would serve the public interest." *In re First South Sav. Ass'n*, 820 F.2d 700, 704 (5th Cir.1987). As the Fifth Circuit has explained, "[w]hile each part must be met, the appellant need not always show a probability of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." *Arnold v. Garlock, Inc.*, 278 F.3d 426, 438-39 (5th Cir.2001).

The Court concludes that Defendants have not met their heavy burden. The Court need not rehash its substantive ruling on class certification, but merely notes that the overwhelming majority of cases support certification of a class similar to that present here. (*See* D.E. 49.) The Court does not believe that the recently released Supreme Court decision in *Wal-Mart* would alter the outcome, as there are important distinctions between *Wal-Mart* and the case presently before the Court. Whereas "the respondents [in *Wal-Mart*] wish[ed] to sue about literally millions of employment decisions at once," which occurred all around the nation, — U.S. —, at —, 131 S.Ct. 2541, 180 L.Ed.2d 374, 2011 WL 2437013, at \*7, here Plaintiffs' claimed injuries result from the common

alleged deficiencies in the Texas foster care system. Those alleged deficiencies are the “glue” holding the claims together here. *Id.*<sup>3</sup> Plaintiffs have much more in common then did the million-plus, nationwide class at issue in *Wal-Mart*. While *Wal-Mart* has only recently been decided and has not yet been subject to further analysis, its existence alone does not satisfy Defendants’ burden to demonstrate “a substantial case on the merits.” *Arnold*, 278 F.3d at 438–39.

\*2 The other considerations also do not weigh in favor of a stay. The prospect of burdensome or expensive discovery alone is not sufficient to demonstrate “irreparable injury,” and the Court will certainly be available to help manage discovery if it becomes overly burdensome or costly. Additionally, any benefit that Defendants may gain through a stay would appear to be at least equally injurious to Plaintiffs, who seek a timely

resolution to their constitutional claims, and meaningful improvements to the state foster care system. Defendants have not demonstrated that “the balance of the equities weighs heavily in favor of granting the stay.” *Arnold*, 278 F.3d at 438–39.

In light of the above, the Court hereby DENIES Defendants’ Motion to Stay Proceedings. (D.E.59.)

SIGNED and ORDERED.

#### All Citations

Not Reported in F.Supp.2d, 2011 WL 7047039

#### Footnotes

<sup>1</sup> The Fifth Circuit granted this permission on July 19, 2011.

<sup>2</sup> Defendants seek inconsistent relief, later requesting that the Court “stay all proceedings *pending* a ruling on the petition for permission to appeal to the Fifth Circuit, and, if the petition is granted, a resolution of the appeal.” (D.E. 59 at 7 (emphasis added)). As noted, the Fifth Circuit has granted Defendant’s petition for leave to appeal, and thus any inconsistencies in the requests for relief are no longer relevant.

<sup>3</sup> The Court also notes that the plaintiffs in *Wal-Mart* sought monetary relief, in addition to injunctive and declaratory relief. — U.S. —, at —, 131 S.Ct. 2541, 180 L.Ed.2d 374, 2011 WL 2437013, at \*3.