UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

MATTHEW DICKSON and JENNIFER DICKSON, individually and on behalf of all others similarly situated,	§	
PLAINTIFFS,	§	
v.	§	CASE NO. 5:16-cv-05027-PKH
GOSPEL FOR ASIA, INC., GOSPEL FOR ASIA-INTERNATIONAL, K.P. YOHANNAN, GISELA PUNNOSE, DANIEL PUNNOSE, DAVID CARROLL, and PAT EMERICK,	§	
DEFENDANTS.	§	

Plaintiffs' Opposition to Defendants' Motion for Stay of Proceedings Pending Appeal

Defendants ask the Court to use its discretion to grant them a stay, delaying all proceedings in this case for however long it takes the Eighth Circuit to dispose of their appeal of the Court's carefully reasoned Order denying their motion to compel arbitration. Under a straightforward application of the four-factor analysis that governs the disposition of such requests, Defendants fail to carry their burden. And Defendants' alternate argument for a "mandatory stay" is neither supported by Eighth Circuit law nor otherwise warranted. This important case potentially affects the rights of tens of thousands of donors across the country, and it should not be delayed a day longer. The Court should deny Defendants' request.

Applicable legal standards

The Court is familiar with the legal standard that governs motions to stay proceedings pending appeal. In *Smith v. Am. Bankers Ins. Co. of Fla.*, 2011 WL 6399526, *1 (W.D. Ark. Dec. 21, 2011), Your Honor summarized it as follows:

> When deciding a motion for stay pending appellate review, a court considers the following four factors: (1) the likelihood of success on appeal; (2) the threat of irreparable harm to the moving party absent a stay; (3) the prospect of harm to opposing parties if the stay is granted; and (4) the public interest in granting the stay. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 423 (8th Cir.1996). "Ultimately [the court] must consider the relative strength of the four factors, 'balancing them all.'" *Brady v. NFL*, 640 F.3d 785, 789 (quoting *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 538 (8th Cir.1994). A stay is granted when the appeal presents "serious" legal issues, and the balance of equities favors the stay applicant. *James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 545 (8th Cir.1982).

Smith, 2011 WL 6399526, *1 (citations and quotations in original).

And, as another court within this district has noted:

> "The applicant bears the burden of establishing the propriety of a stay." *Id*. at 1060. "A stay is an 'intrusion into the ordinary processes of administration and judicial review' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal citations omitted). Because a stay is discretionary and not a matter of right, the applicant bears the heavy burden of showing that the circumstances warrant an exercise of that discretion. *Id*. at 433–434.

McKinney v. Southern Bakeries, LLC, 2015 WL 1886860, *1 (W.D. Ark. April 24, 2015) (citations and quotations in original).

Defendants concede the Eighth Circuit has *never* held that an interlocutory appeal from the denial of a motion to compel arbitration divests the district court of jurisdiction over the case or requires a stay of proceedings pending appeal; circuit courts throughout the country and district courts within this circuit have not reached a consensus, leaving the issue open for this Court. Motion [Doc. 42] at 3-6.

Argument and Authorities

The Court should decline to exercise its discretion to stay all proceedings pending appeal. In their Motion, Defendants fail even to articulate the four controlling factors, much less to explain how they weigh in favor of their request. Under a straightforward application of these standards, it is quickly apparent that Defendants fail to show entitlement to a stay, requiring denial of their request. Neither should the Court find that a "mandatory stay" is warranted, as there is no controlling authority dictating such a result, and the more just and fair course of action counsels strongly in favor of proceeding with this case forthwith.

1. Defendants are not likely to succeed on appeal

The Court carefully considered Defendants' motion to compel arbitration, and ultimately denied it. Opinion and Order [Doc. 39] at 2-5. The Court found there was no mutual agreement to arbitrate, and was "not convinced that it would be reasonable to read this arbitration agreement as imposing any obligation at all on Gospel for Asia." *Id*. at 4. The Court also held "[t]he dispute in this case is not even ancillary to the parties' relationship as memorialized in the statements of agreement, but is entirely unrelated to that agreement." *Id*. at 5.

In their latest motion, Defendants do not meaningfully dispute these holdings, nor do they claim they are likely to succeed in appealing them. Motion [Doc. 42] at 7-8. Rather, Defendants all but implicitly concede the opposite, insisting only that the "issues are subject to substantive debate" and "[t]he appeal in this case is not frivolous." *Id*. at 8.

In *Smith*, Your Honor found that the movant failed to show a likelihood of success on appeal. 2011 WL 6399526, *1 ("Beginning with the first factor, it appears to the Court that the Defendant's appeal of the Court's remand order has little to no likelihood of success. The Court's opinion ordering remand was made after careful consideration of the parties' briefing of

the issues and a thorough review of the relevant precedent…."). Given the Court's thorough analysis of the issues in Defendants' motion to compel arbitration and Defendants' *de facto* concession of the propriety of the Court's holdings, the Court should summarily find Defendants fail to show they are likely to succeed on appeal, and it should weigh the first factor very heavily against them and in favor of Plaintiffs.

2. Defendants fail to show irreparable harm absent a stay

Defendants do not argue they will suffer any harm at all if proceedings are not stayed immediately, much less irreparable harm. *See generally* Motion [Doc. 42]. This is a showing Defendants likely could not make in any event. The Court need go no further with its analysis of this factor; it should weigh it against Defendants and in favor of Plaintiffs.

3. Plaintiffs will suffer harm if the stay is granted

In *Smith*, Your Honor reasoned:

> The third factor also militates against a stay. Plaintiffs are likely to suffer a risk of harm if a stay is granted, and thus, there is no cause to delay this matter further. Plaintiffs filed their Complaint in state court in May 2011. Only now, seven months later, is the case returning to the court in which it was originally filed following the removal process. There is no justification for delaying Plaintiffs' opportunity to obtain relief from the damages they are alleged to have suffered.

Smith, 2011 WL 6399526, *2. Plaintiffs filed their Complaint on February 8, 2016—almost one year ago. As in *Smith*, there is also no justification for further delaying Plaintiffs' opportunity to get relief, and Defendants do not argue to the contrary. The Court should weigh this factor heavily against Defendants and in favor of Plaintiffs.

4. The public interest lies in favor of this case proceeding forthwith

This case is a proposed class action potentially affecting tens of thousands of donors across the country. Complaint [Doc. 1] ¶¶ 1, 15, 49. It has generated considerable attention in the press. *See, e.g.*, WORLD's Top 25 articles for 2016, No. 7, "Gospel for Asia sued for fraud,"

https://world.wng.org/2016/12/world_s_top_25_articles_for_2016 (accessed Jan. 27, 2017). As well, since the filing of lawsuit, dozens of putative class members have contacted Plaintiffs' counsel seeking information about how they may join the case.[1]

Particularly in the absence of any assertion by Defendants that the public interest is served by further delay of this case, the Court should find the public is better served if this case proceeds. The Court should weigh this factor heavily against Defendants and very heavily in favor of Plaintiffs.

5. No controlling law mandates a stay, and the Court should not hold otherwise

Defendants make much of opinions from other jurisdictions in which, for differing reasons, courts have stayed proceedings pending the appeal of orders denying arbitration. Motion [Doc. 42] at 3-6. But Defendants concede, as they must, that no controlling law of the Eighth Circuit mandates the imposition of a stay in these circumstances. *Id*. They candidly note that several decisions of circuit courts and district courts within the Eighth Circuit hold to the contrary. *Id*. at 4-5

Defendants claim the Supreme Court's decision in *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56 (1982), supports their claim that a stay is "mandatory." Motion [Doc. 42] at 3-5. This argument falls flat. As the Fifth Circuit explains:

> In *Griggs*, a party moved to amend a judgment in the district court and then appealed while that motion was pending. The Court was concerned with the simultaneous exercise of jurisdiction by a district court and a court of appeals,

[1] Despite their burden, Defendants make no argument in their motion about the public interest factor, and Plaintiffs therefore do not proffer evidence to refute an argument Defendants fail to make in the first instance. If the Court nevertheless desires evidence of this assertion, Plaintiffs' counsel is prepared to submit a supporting declaration. Crucially, many of these putative class members are donors who never signed any "Statement of Agreement" (or any other "arbitration agreement") such that their joinder as proposed class representatives would comprehensively dispose of any conceivable ground for a stay pending appeal of the Court's ruling on Defendants' arbitration motion.

> because that could lead to both courts' deciding the same issue—in that case, the judgment. Appeals deprive the district court of jurisdiction, solving this problem. The key is that both courts would be simultaneously trying to answer the same question: whether the judgment was valid.
>
> …
>
> An appeal of a denial of a motion to compel arbitration does not involve the merits of the claims pending in the district court. The Supreme Court made it plain in *Moses H. Cone* [*Mem. Hosp. v. Mercury Const. Corp.*], 460 U.S. [1,] 21, 103 S.Ct. 927 [(1983)], that the merits were "easily severable" from the dispute over the arbitrability of those claims. The Court thus declared that because of that severability, the issue of arbitrability could be litigated in federal court while the merits were determined in state court. *Id.* An issue is generally an aspect of the case on appeal if it results in the district court's deciding an issue that the appellate court is deciding at the same time. By this reasoning, the merits are not an aspect of arbitrability. A determination on the arbitrability of a claim has an impact on what arbiter—judge or arbitrator—will decide the merits, but that determination does not itself decide the merits.

Weingarten Realty Investors v. Miller, 661 F.3d 904, 908-09 (5th Cir. 2011) (quotation and citation in original). The Fifth Circuit thus determined there is no automatic stay despite an appeal from an order denying arbitration, explaining that other circuit courts read *Griggs* too broadly and inaptly analogize arbitrability to other legal issues: "There is no public policy favoring arbitration agreements that is as powerful as that public interest in freeing officials from the fear of unwarranted litigation. Therefore, qualified immunity, like double jeopardy and sovereign immunity, is not a sufficient analog." *Weingarten*, 661 F.3d at 910.

And at least one district court in the Eighth Circuit has followed this reasoning in determining that no controlling authority supports a "mandatory stay" when a denial of arbitration is appealed:

> The Eighth Circuit, however, has yet to weigh in. The Court does not doubt that it is prohibited from relitigating the literal question on appeal, nor does it doubt that the appeal of certain constitutional first-order jurisdictional questions automatically halts further district court litigation—questions of double jeopardy and sovereign immunity, for example. *Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 907-910 (5th Cir. 2011). But there is no reason to suggest that

> arbitration clauses—matters of private contract—are of the same significance as the Constitution's limitations involving double jeopardy and sovereign immunity.

McLeod v. General Mills, Inc., 2015 WL 7428548, * 2 (D. Minn. Nov. 20, 2015) (citation in original).[2]

Especially in light of Defendants' comprehensive failure to carry their burden of showing why the Court should exercise its discretion in their favor, the Court should decline to find that it is obligated to stay all proceedings pending Defendants' appeal. Controlling law does not support this proposition, well-reasoned opinions of other courts counsel against this Court reaching such a decision, and all of the factors governing the issuance of a stay weigh against Defendants and in favor of Plaintiffs.

Conclusion

After a year since its filing, this case should go forward at once. Under controlling law and the most basic notions of justice and fairness, there isn't a single reason for even a day of additional delay. The Court should deny Defendants' motion in its entirety.

[2] Defendants note that the Eighth Circuit (in a one-sentence order with no reasoning) granted a stay in *McLeod* after the district court denied one. Motion [Doc. 42] at 7 (citing "Order dated Dec. 2, 2015 in *McLeod v. General Mills, Inc.*, No. 15-3540"). In stark contrast to Defendants here, however, the appellants in *McLeod* filed an emergency motion for stay with the Eighth Circuit, extensively briefed each of the four controlling factors, and supported their arguments with evidence. *See generally* Appellant's Emergency Motion for A Stay Pending Appeal And A Temporary Administrative Stay Pending Decision on This Motion, filed Nov. 20, 2015 (Entry ID: 4338801) in *McLeod*, Eighth Cir. No. 15-3540 (pp. 9-18 & Declaration of Aaron D. Van Oort in Support).

DATED this 30th day of January, 2017.

Respectfully submitted,

/s/ Marc R. Stanley

Marc R. Stanley (admitted *pro hac vice*)
marcstanley@mac.com
Martin Woodward (admitted *pro hac vice*)
mwoodward@stanleylawgroup.com
STANLEY LAW GROUP
6116 N. Central Expressway, Suite 1500
Dallas, Texas 75206
214.443.4300
214.443.0358 (fax)

Woodson W. Bassett III
Arkansas Bar No. 77006
wbassett@bassettlawfirm.com
James Graves
Arkansas Bar No. 95172
jgraves@bassettlawfirm.com
BASSETT LAW FIRM LLP
221 North College Avenue
P.O. Box 3618
Fayetteville, Arkansas 72702
479.521.9996
479.521.9600 (fax)

Tom Mills (admitted *pro hac vice*)
tmills@millsandwilliams.com
MILLS AND WILLIAMS, LLP
5910 N. Central Expressway, Suite 980
DALLAS, TEXAS 75206
214.265.9265
214.361.3167 (FAX)

Counsel for Plaintiffs and the Class

Certificate of Service

The undersigned hereby certifies that on January 30th, 2017, the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system and by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Marc R. Stanley
Marc R. Stanley