

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
CENTRAL DIVISION**

**NICHOLAS FRAZIER, *et al.***

**PLAINTIFFS**

**v.**

**CASE NO. 4:20-CV-00434-KGB-JJV**

**WENDY KELLEY, *et al.***

**DEFENDANTS**

---

**DEFENDANTS' MOTION TO STAY DISCOVERY**

---

Defendants, for their motion to stay the Rule 26(f) conference deadline and all discovery pending a final decision on their forthcoming motion to dismiss pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and Local Rule 7.2, state:

1. At Plaintiffs' request, Defendants waived service of process in this case (DE 4 & 7), and their responsive pleading is not due until June 22, 2020.
2. The Court has already entered two orders finding that Plaintiffs are unlikely to succeed on the merits of their claims. (DE 42 & 68).
3. Defendants intend to file a motion to dismiss asserting the defense of sovereign immunity on behalf of Governor Hutchinson as to all claims and as to all Defendants with respect to Plaintiffs' request for declaratory judgment. In addition, Plaintiffs' Complaint fails to state any claim upon which relief can be granted as to all Defendants. Defendants believe that dismissal of the entire case will be appropriate under the Eleventh Amendment and Fed. R. Civ. P. 12(b).
4. Despite the lack of a responsive pleading or initial scheduling order on file, Plaintiffs maintain that a Rule 26(f) conference is required no later than June 1, 2020, under Rules 16(b)(2) and 26(f)(1) of the Federal Rules of Civil Procedure. Plaintiffs insist on holding

the discovery planning conference and moving forward with discovery despite Defendants' forthcoming motion to dismiss and the possibility of an interlocutory appeal of any adverse ruling on that motion.

5. It is well established that discovery should not be allowed until threshold jurisdictional issues are finally resolved. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In addition, courts have broad discretion and inherent power to stay discovery until preliminary questions that may dispose of a case on its merits are determined, and the exercise of that discretion will not be reversed absent gross abuse that is prejudicial to the appealing party. Fed. R. Civ. P. 26(c); see *SDI Operating P'ship, L.P. v. Neuwirth*, 973 F.2d 652, 655 (8th Cir. 1992) ("Our review of questions concerning discovery matters is very deferential . . . . We will not reverse such a determination absent a gross abuse of discretion resulting in fundamental unfairness in the trial of the case.") (quotations omitted)).

6. A stay of discovery in this case would promote the interests of judicial economy and efficiency until this Court has ruled on the forthcoming motion to dismiss and that decision becomes final.

7. A stay would best preserve the parties' resources and maintain the status quo until the Court decides whether this case may proceed on the merits at all and, if so, the nature and scope of such claims. It would be premature for the parties to confer and develop a detailed discovery plan when the pleadings are not closed and the Court has not yet ruled on the propriety of Plaintiffs' claims. This is particularly important in this putative class-action case given the nature of the claims and the extraordinarily broad scope of discovery Plaintiffs are seeking from the Defendants. (*See* DE 37, *Plaintiffs' Motion for Discovery*).

8. A stay would also preserve the Defendants' immunity from suit, which would effectively be lost if discovery were permitted to proceed at this time. *See Johnson v. Hay*, 931 F.2d 456, 459 (8th Cir. 1991); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Plaintiffs' Complaint fails to state any factual allegations against the Governor that give rise to any plausible claim against him for violation of the Eighth Amendment or the ADA. *See Church v. Missouri*, 913 F.3d 736, 748-53 (8th Cir. 2019) (holding that Missouri governor's general enforcement authority and ability to appoint members to the Missouri State Public Defender Commission were inadequate bases for an *Ex parte Young* action against governor in putative class action alleging that Missouri failed to meet its constitutional obligation to provide indigent criminal defendants with meaningful representation). In addition, the Complaint should be dismissed as to all Defendants to the extent Plaintiffs seek a declaratory judgment that they failed to implement appropriate policies and take appropriate actions to mitigate the risk posed by COVID-19. *See Justice Network Inc. v. Craighead County*, 931 F.3d 753, 764 (8th Cir. 2019) (affirming dismissal of a lawsuit against two state-court judges seeking a declaratory judgment that defendants' policies, and actions they took in the past pursuant to those policies, violated plaintiff's constitutional rights as barred by the Eleventh Amendment).

9. Plaintiffs will suffer no prejudice if a stay is entered. Plaintiffs have obtained thousands of documents relevant to the issues in this case from the Arkansas Department of Corrections and other state agencies under the Arkansas Freedom of Information Act, both before and during the pendency of this lawsuit. There is nothing preventing them from continuing to do so despite a stay of discovery here. Defendants simply object to being required to participate in formal discovery under the Federal Rules of Civil Procedure until their motion to dismiss is finally decided.

10. Defendants have in good faith conferred with Plaintiffs in an attempt to resolve this dispute without Court intervention.

11. For the foregoing reasons, and for good cause shown, the Court should enter an order staying the Rule 26(f) conference deadline and all other discovery in this matter pending a final decision on Defendants' forthcoming motion to dismiss.

WHEREFORE, Defendants pray that the Court grant their motion, enter an order staying discovery in this case, and for all other relief to which they may be entitled.

Respectfully submitted,

LESLIE RUTLEDGE

Arkansas Attorney General

NICHOLAS J. BRONNI (2016097)

Arkansas Solicitor General

VINCENT M. WAGNER (2019071)

Deputy Solicitor General

ASHER STEINBERG (2019058)

Assistant Solicitor General

JENNIFER L. MERRITT (2002148)

Senior Assistant Attorney General

JERRY GARNER (2014134)

Assistant Attorney General

OFFICE OF THE ARKANSAS

ATTORNEY GENERAL

323 Center St., Suite 200

Little Rock, AR 72201

By: Jennifer.Merritt@ArkansasAG.gov