

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division

CASE NO. 07-21256-CIV-JORDAN

JOHN B. THOMPSON,

Plaintiff,

vs.

THE FLORIDA BAR and DAVA J. TUNIS,

Defendants.

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**DEFENDANT JUDGE TUNIS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S  
EXPEDITED VERIFIED MOTION FOR PRELIMINARY INJUNCTION AND MOTION  
TO ACCEPT**

The Honorable Dava J. Tunis, Judge of the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida (hereafter, "Judge Tunis"), through her undersigned attorneys, in both her official and individual capacities, pursuant to Rule 7, Fed. R. Civ.P. and L.R. 7.1 for her Memorandum in Opposition to Plaintiff's Expedited Verified Motion for Preliminary Injunction and Motion to Accept hereby submits:

**PROCEDURAL AND FACTUAL SUMMARY**

Plaintiff, in Plaintiff's Expedited Verified Motion for Preliminary Injunction With Notice to Both Defendants (hereafter, "Motion") moves this Court for an entry of a preliminary injunction to halt all [Florida] Bar proceedings until there can be a final decision on a permanent injunction prohibiting the Florida Bar from allegedly misusing its function to prosecute unethical practices for the end of infringing the Plaintiff's First Amendment right to speak out against the harmful,

predatory marketing of adult entertainment to children. (Motion, 8). Although the Motion does not specifically request an injunction against Judge Tunis, the practical effect of such an injunction would be to preclude her and the Florida Supreme Court from proceeding with the Florida Bar proceedings currently pending against the Plaintiff.

### **MEMORANDUM IN SUPPORT**

The first problem the Plaintiff has is that there is currently a motion to dismiss pending against him on jurisdictional and other grounds which should be ruled upon prior to granting a preliminary injunction which this Court may well not have jurisdiction to enter. Defendant Judge Tunis' motion to dismiss is hereby readopted, realleged and incorporated by reference as though fully set forth herein.

### **STANDARD FOR PRELIMINARY INJUNCTION**

In this Circuit, “[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the ‘burden of persuasion’ as to each of the four prerequisites . See, Siegel v. Lepore, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc) (per curiam), quoting, McDonald’s Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998), citing, All Care Nursing Serv., Inc. v. Bethesda Mem’l Hosp., Inc., 887 F.2d 1535, 1537 (11th Cir. 1989). A showing of irreparable injury is “the *sine qua non* of injunctive relief.” Siegel v. Lepore, 234 F.3d at 1176 (citations omitted).

### **PLAINTIFF’S BURDEN OF PROOF**

To obtain a preliminary injunction, Plaintiff must show:

- i) he has a substantial likelihood of success on the merits;
- ii) irreparable injury will be suffered unless the injunction issues;

- iii) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the opposing party; and
- iv) if issued, the injunction would not be adverse to the public interest.

Siegel v. Lepore, 234 F.3d 1163, 1176 (11th Cir. 2000).

Defendant respectfully submits that Plaintiff's Motion should be denied because he has not met his burden of persuasion with respect to any of the four required elements to establish his entitlement to the extraordinary and drastic relief sought in his motion, as more fully discussed herein.

**A. Plaintiff Is Unlikely To Prevail On The Merits.**

First, of course, it is extraordinarily unlikely, given the allegations of the motions to dismiss, that the Plaintiff can prevail on the merits of his action.

There are, for example, a number of applicable abstention doctrines, which are jurisdictional, one of which is abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The Supreme Court, in Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982), determined that a three-part test should be applied to determine if Younger abstention is appropriate: (1) if state proceedings are ongoing, (2) if the state proceedings implicate important state interests, and (3) if the state proceedings afford adequate opportunity to raise federal questions. Once these elements are met, the federal court must abstain, except in the most extraordinary circumstances. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 n. 22, 47 L.Ed.2d 483, 96 S.Ct. 1236 (1976); Old Republic Union Ins. Co. v. Tillis Trucking Co., 124 F.3d 1258, 1261 (11th Cir. 1997). We know this can be applied to Bar Disciplinary Proceedings where indeed, Middlesex, itself, involved attorney

disciplinary proceedings. Rooker-Feldman. All that is required under the Younger abstention doctrine is “the opportunity to present their federal claim in the state proceedings.” Judice v. Vail, 430 U.S. 327, 337 (1977).

Therefore, to the extent that Florida Bar disciplinary proceedings against the Plaintiff are ongoing, Younger abstention applies. “Federal courts should abstain from exercising their jurisdiction if doing so would ‘disregard the comity between the States and the National Government.’” Wexler v. Lepore, 385 F.3d 1336, 1339 (11th Cir. 2004). “We interpret the Younger doctrine as preventing federal courts from being the grand overseers of state courts and court-like administration.” Id. at 1341. The Plaintiff is intimately familiar with its applicability to proceedings of The Florida Bar where it was the grounds for dismissal of his action in Thompson v. Rogers, Case No. 06-22477-CIV-HUCK/SIMONTON, 2006 U.S. Dist. LEXIS 95477 (S.D. Fla. 2006):

It is clear that Florida bar disciplinary procedures are judicial in nature. See In the Matter of Calvo, 88 F.3d 962, 965 (11th Cir. 1996). Likewise, the Supreme Court recognized in Middlesex that Younger abstention applies to pending bar disciplinary proceedings because a state “has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses.” 457 U.S. at 434; see also The Florida Bar v. Went For It, 515 U.S. 618, 625, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (“we have little trouble crediting the [Florida] Bar’s interest [in regulating its lawyers] as substantial”). Having satisfied the first two elements of Middlesex, the remaining question is whether Florida bar disciplinary proceedings provide an adequate opportunity to raise constitutional issues. Thompson contends that it is “a joke” that the Florida Supreme Court would “skewer its own Bar” for unconstitutional acts. Pl.’s Resp. to Mot. To Dismiss at 4. “[U]nless state law clearly bars the interposition of the constitutional claims,” the Court must abstain. Middlesex, 457 at 424. The burden is upon the person claiming that abstention is inapplicable to show that state law clearly bars the interposition of constitutional claims. Butler v. Alabama Judicial Inquiry Comm’n, 245 F.3d 1257, 1262 (11th Cir. 2001). Thompson has not met this burden. “Florida Bar rules and state law do not clearly bar the interposition of Mason’s constitutional claims. To the contrary, there is abundant opportunity for a lawyer facing disciplinary charges to raise constitutional issues at almost every stage of the Florida proceedings.” Mason v. Florida Bar, 2005 U.S. Dist. LEXIS 40029, 2005 WL 3747383 at \*5 (M.D. Fla. Dec.

16, 2005) (citing Ch. 3-7, R. Regulating the Fla. Bar) (additional citations omitted).

Id. at 8-9.

What the Plaintiff appears to be requesting is that this Court examine each ruling of Judge Tunis during the Bar proceeding concerned to determine if it comports with all federal constitutional and statutory requirements before permitting the Bar proceeding to proceed. In other words, he wishes this Court to oversee each decision made during a state attorney disciplinary proceeding. It is respectfully submitted that this is not the function of the federal courts.

Another example of a dispositive issue which would prevent Plaintiff from prevailing against Judge Tunis is the prohibition in 42 U.S.C. § 1983 against such injunctions. Since 1996, § 1983 provides for an action against persons who deprive citizens of federal constitutional rights, "...except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." As a federal circuit has held, "42 U.S.C. § 1983, as amended in 1996 by the Federal Courts Improvement Act, explicitly immunizes judicial officers against suits for injunctive relief." Roth v. King, 449 F. 3d 1272, 1286 (D.C. Cir. 2006). Such injunctive relief is precisely what the Plaintiff is requesting.

There is no substantial likelihood of Plaintiff prevailing on the merits.

**B. There Is No Irreparable Injury.**

As Judge Huck noted in Plaintiff's prior action, he has ample opportunity to have constitutional issues ruled upon during bar disciplinary proceedings:

To the contrary, there is abundant opportunity for a lawyer facing disciplinary charges to raise constitutional issues at almost every stage of the Florida proceedings." Mason v. Florida Bar, 2005 U.S. Dist. LEXIS 40029, 2005 WL

3747383 at \*5 (M.D. Fla. Dec. 16, 2005) (citing Ch. 3-7, R. Regulating the Fla. Bar; Tindall v. The Florida Bar, No. 97-387-Civ-T-17C, 1997 U.S. Dist. LEXIS 17399, 1997 WL 689636 (M.D. Fla.1997), aff'd, 163 F.3d 1358 (11th Cir. 1998); The Florida Bar v. Brown, 905 So.2d 76 (Fla. 2005); The Florida Bar v. Ray, 797 So.2d 556 (Fla. 2001), cert. denied, 535 U.S. 930, 122 S. Ct. 1302, 152 L. Ed. 2d 214 (2002); The Florida Bar v. Saylor, 721 So.2d 1152 (Fla. 1998); The Florida Bar v. Daniel, 626 So.2d 178 (Fla. 1993); The Florida Bar v. Herrick, 571 So.2d 1303 (Fla. 1990), cert. denied, 501 U.S. 1205, 111 S. Ct. 2798, 115 L. Ed. 2d 972 (1991); State ex rel. Florida Bar v. Grant, 85 So.2d 232 (Fla. 1956)). In Mason, the court articulated the myriad procedures available to a person who believes that the Bar is acting unconstitutionally. Id. at \*6.

Id. at 9-10.

Therefore, the Plaintiff has the opportunity to redress the injuries complained of within the disciplinary system of the Florida Bar and there is no irreparable injury should this Court deny his injunction request.

### **C. The Public Interest Is Not Served By Preventing Attorney Discipline.**

Judge Tunis has attempted to accommodate the Plaintiff who, it appears, believes that he may ignore her with impunity because he has filed this action in this Court. For example, Plaintiff, on August 7, 2007, filed an emergency motion for continuance of the August 9 status conference. (See Ex. A hereto.) The following day, it was granted by Judge Tunis. (See Ex. B hereto.) Nevertheless, Plaintiff sent a letter to Judge Tunis informing her that she was the “target” of his federal action, that he wouldn’t be in her courtroom for the scheduled conference and that this Court was scheduling a hearing on his preliminary injunction motion. (See, Ex. C hereto.)

It is respectfully submitted that encouraging the respondents in Florida Bar disciplinary proceedings to believe that they may ignore the orders of the referees in such proceedings with impunity by filing a federal action against the Florida Bar and the presiding referee is contrary to the public interest.

THEREFORE, Judge Tunis requests this Court to deny the Plaintiff's Expedited Verified Motion for Preliminary Injunction.

**MOTION TO ACCEPT MEMORANDUM IN OPPOSITION AND  
MEMORANDUM IN SUPPORT**

Defendant, Judge Tunis, hereby moves this Court to accept the above memorandum in opposition as timely filed, on the following grounds:

Plaintiff filed the motion concerned herein on July 23, 2007, prior to the time that Judge Tunis had appeared in the action concerned. Although the motion contains a certificate of service stating that a copy thereof had been served on Judge Tunis through her counsel, identified as the Attorney General of Florida, no copy has ever been received by the undersigned from the Plaintiff and no address is given for the location where the motion was served, in violation of Local Rule 5.1. The undersigned was unaware of any motion for injunction which had not been ruled upon until August 9, 2007, upon receiving a call from the Court's clerk, informing him that a hearing would be scheduled on the outstanding motion for an injunction. Therefore, although Local Rule 7.1 requires an opposing memorandum to be served within ten days after service of the motion, and the motion concerned bears a certificate of service of July 23, 2007 (which would require an opposing memorandum to be served by August 6, 1007), Judge Tunis hereby moves this Court to accept this motion as timely filed. No prejudice to the Plaintiff exists where the hearing is set for August 23, 2007.

**CONCLUSION**

Based upon the above arguments and authorities, this Court should grant Judge Tunis'

motion to

accept memorandum in opposition to Plaintiff's motion for preliminary injunction.

Dated: August 13, 2007  
Fort Lauderdale, FL

Respectfully submitted,

BILL McCOLLUM  
ATTORNEY GENERAL

/s/ Charles M. Fahlbusch

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**NOTICE OF COMPLIANCE WITH LOCAL RULE 7.1(A)(3)**

Pursuant to local rule 7.1(A)(3), counsel for Defendant Judge Tunis conferred with John B. Thompson on August 10, 2007, who stated that he objects to this Motion to Accept.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of August, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.



/s/ Charles M. Fahlbusch  
Charles M. Fahlbusch  
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**SERVICE LIST**

Thompson v. The Florida Bar  
Case No.: 07-21256-CIV-JORDAN  
United States District Court, Southern District of Florida

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