**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

Glenn Feagan, *et al*.,

Plaintiffs, Case No. 1:21cv399

v. Judge Michael R. Barrett

The Office of the Ohio Disciplinary
Counsel for the Supreme Court
of the State of Ohio, *et al*.,

Defendants.

**OPINION & ORDER**

This matter is before the Court upon the Motion to Dismiss filed by Defendants the Ohio Office of Disciplinary Counsel, Disciplinary Counsel Joseph Caligiuri, Assistant Disciplinary Counsel Kelli C. Schmidt, and Donald Holtz, Investigator for the Office of Disciplinary Counsel. (Doc. 9). Plaintiffs filed a Response in Opposition (Doc. 12) and Defendants filed Reply (Doc. 13).

## I. BACKGROUND

Plaintiffs represent hundreds of former patients of Abubakar Atiq Durrani, M.D. who have filed medical malpractice actions against him and his practice group, Center for Advanced Spine Technologies, Inc. ("CAST"). It is no secret that Plaintiffs are dissatisfied with the way in which these malpractice claims have been handled in the Ohio court system. Plaintiffs have filed several federal lawsuits claiming bias, discrimination and unfair treatment by the state court judges and the state courts. *See*, *e.g*., *Aaron v. O'Connor*, 914 F.3d 1010, 1013 (6th Cir. 2019) (claims brought by Plaintiffs on behalf of former patients of Durrani alleging that the judge presiding over their case, Judge Mark

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R. Schweikert, and Chief Justice Maureen O'Connor of the Ohio Supreme Court were biased against their claims).

In this case, Plaintiffs allege that Defendants are retaliating against Plaintiffs for filing these federal actions against the Ohio Supreme Court and Chief Justice Maureen O'Connor. (Doc. 6, PAGEID 63). Plaintiffs further allege that "Defendants have illegally engaged in selective prosecution of the Plaintiffs, retaliated against Plaintiffs for exercising First Amendment Rights, and colluded with others to interfere with and obstruct the Plaintiffs' exercise of Constitutional rights on behalf of the Durrani Victims." (Doc. 6, PAGEID 65). As an example, Plaintiffs cite to the subpoena Defendants issued for the financial records of Deters Law. Plaintiffs claim that the subpoena was issued without notice; and an "inference of illegal discriminatory and/or retaliatory conduct can be inferred from the actions of government agencies when they substantially 'depart from procedural norms.'" (Doc. 6, PAGEID 62) (quoting *Johnson v. City of Saginaw*, 2017 WL 6512451, at *8 (E.D. Mich. Dec. 20, 2017)). Plaintiffs explain these financial records later served as the basis of a Letter of Inquiry Defendants sent to Glenn Feagan on June 2, 2021. (Doc. 6, PAGEID 69). Plaintiffs point out that while bar complaints have been filed against counsel representing Durrani and CAST, those complaints have been effectively stayed until the conclusion of the medical malpractices cases.

Plaintiffs also cite calls made by Defendants to Plaintiffs' new clients. (Doc. 6, PAGEID 70). Plaintiffs explain that the intent of these calls was "to disrupt and destroy the attorney-client relationships and to interfere with the attorney-client contract between Plaintiffs and their new clients." (Doc. 6, PAGEID 70).

In their Amended Complaint, Plaintiffs bring claims pursuant to 42 U.S.C. § 1983

for violation due process and equal protection under the Fourteenth Amendment (Count I); and violations of the First Amendment (Count II). Plaintiffs also bring claims for a violation of their privacy rights under the Federal Right to Financial Privacy Act, 12 U.S.C. §§3402 and 3405 (Count III); and tortious interference with contracts (Count IV).[1] Plaintiffs ask this Court to enjoin Defendants from further investigation or prosecution of the pending investigations and Bar Complaints while the Durrani litigation is pending.[2]

Defendants move to dismiss Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Defendants argue that this Court should abstain from reviewing any of Plaintiffs' claims under *Younger v. Harris*, 401 U.S. 37 (1971). Alternatively, Defendants maintain that Plaintiffs' claims are barred by immunity, or fail on the merits.

## II. ANALYSIS

### A. Standard of Review

"Where subject matter jurisdiction is challenged pursuant to 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Michigan S. R.R. Co. v. Branch & St. Joseph Cntys. Rail Users Ass'n., Inc.*, 287 F.3d 568, 573 (6th Cir. 2002). "Challenges to subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) 'come in two varieties: a facial attack or a factual attack.'" C*arrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012) (quoting *Gentek Bldg. Prods., Inc. v.*

[1]However, in their Response to Defendants' Motion to Dismiss, Plaintiffs state that they no longer seek to pursue their Federal Right to Financial Privacy Act claim or their tortious interference claim. (Doc. 12, PAGEID 142).

[2]In seeking injunctive relief, Plaintiffs failed to follow Local Rule 65.1, which requires a separate pleading requesting such relief. *See* S.D. Ohio Civ. R. 65.1(b) ("Motions for temporary restraining orders or preliminary injunctions shall be made in pleadings separate from the complaint and in accordance with this Rule.").

*Sherwin–Williams Co*., 491 F.3d 320, 330 (6th Cir. 2007)). Here, Defendants raise a facial attack which "questions merely the sufficiency of the pleading." *Gentek Bldg. Prods., Inc.*, 491 F.3d at 330 (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)). "When reviewing a facial attack, a district court takes the allegations in the complaint as true," just as it would in analyzing a Rule 12(b)(6) motion. *Id*.

However, "[m]otions to dismiss under 12(b)(6) for failure to state a claim generally are distinct, procedurally and substantively, from motions to dismiss under 12(b)(1)." *Ohio Nat. Life Ins. Co.*, 922 F.2d at 325. In reviewing a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true and draw all reasonable inferences in favor of the plaintiff." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) (quoting *Directv, Inc. v Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). When presented with motions to dismiss under 12(b)(1) and 12(b)(6), this Court is "bound to consider the 12(b)(1) motion first, since the rule 12(b)(6) challenge becomes moot if this court lacks subject matter jurisdiction." *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

**B. *Younger* abstention doctrine**

Defendants maintain that this Court should abstain from reviewing Plaintiffs' claims pursuant to the *Younger* abstention doctrine.

"[G]enerally federal courts should not abstain from exercising jurisdiction on abstention grounds, for abstention 'is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'" *Loch v. Watkins*, 337

F.3d 574, 578 (6th Cir. 2003) (quoting *County of Allegheny v. Frank Mashuda Co*., 360 U.S. 185, 188–89, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959)). However, one of these exceptions is the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)).

As the Sixth Circuit has explained: "*Younger* abstention requires a federal court to abstain from granting injunctive or declaratory relief that would interfere with pending state judicial proceedings." *O'Neill v. Coughlan*, 511 F.3d 638, 643 (6th Cir. 2008) (citing *Younger*, 401 U.S. at 40-41). The Supreme Court has limited *Younger* abstention to "three exceptional categories" of cases: (1) "parallel, pending state criminal proceeding[s]"; (2) "state civil proceedings that are akin to criminal prosecutions"; and (3) state civil proceedings that "implicate a State's interest in enforcing the orders and judgments of its courts." *New Orleans Public Service, Inc. v. Council of New Orleans ("NOPSI")*, 491 U.S. 350, 368, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989); *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72–73 134 S.Ct. 584, 187 L.Ed.2d 505 (2013). The Supreme Court has found that attorney disciplinary proceedings fall within the category of state civil proceedings that are akin to criminal prosecutions. *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 434-35, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (explaining that *Younger* abstention is appropriate where "noncriminal proceedings bear a close relationship to proceedings criminal in nature"); *see also Berger v. Cuyahoga Cty. Bar Ass'n*, 983 F.2d 718, 723 (6th Cir. 1993) (concluding that Ohio disciplinary proceedings are judicial in nature and subject to *Younger* abstention). Therefore, this case falls into one of the three exceptional categories identified by the Supreme Court.

Once a court determines that a case falls into a category in which *Younger* abstention may be proper, the court should then analyze the case using the following test: If "(1) state proceedings are currently pending; (2) the proceedings involve an important state interest; and (3) the state proceedings will provide the federal plaintiff with an adequate opportunity to raise his constitutional claims," a court may abstain from hearing the federal claim. *Aaron v. O'Connor*, 914 F.3d 1010, 1018 (6th Cir. 2019) (quoting *Doe*, 860 F.3d at 369).

Plaintiffs argue that the first and third factors are absent here. As to the first factor, Plaintiffs explain that state proceedings are not currently pending because Defendants have only begun an investigation and no formal complaint has issued.

However, as a factual matter, Defendants explain that they are not permitted to either confirm or deny the existence of a grievance or investigation. (Doc. 9, PAGEID 101). Regardless, Plaintiffs themselves allege in their Amended Complaint that: "The Plaintiffs each have pending Disciplinary Counsel investigations and Bar Complaints pending against them." (Doc. 6, PAGEID 80). Absent any information on the status of the proceedings from Plaintiffs, the Court must conclude that the disciplinary proceedings are ongoing.

Moreover, as part of a legal analysis under *Younger*, state law controls the determination of when the state proceedings began. *James v. Hampton*, 513 F. App'x 471, 474 (6th Cir. 2013) (citing *O'Neill*, 511 F.3d at 643). For that reason, Plaintiffs' reliance on *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016) is in error, because in that case, the Sixth Circuit was presented with a question of Kentucky law. More directly applicable is the Sixth Circuit's analysis of the grievance procedure under the Ohio Code

of Judicial Conduct:

> the Ohio Supreme Court has held that the filing of a grievance is the beginning of the judicial process. *Hecht v. Levin*, 66 Ohio St.3d 458, 613 N.E.2d 585, 588 (1993). *Hecht*, the court was asked to decide whether the filing of a grievance under Gov. Bar R. V3 is part of a judicial proceeding in the context of a libel and slander lawsuit. If the filing of a grievance is part of a judicial proceeding, then the griever is immune from libel and slander charges. The court concluded that the filing of a grievance is part of a "judicial proceeding" because "such a filing initiates the purely judicial disciplinary procedure created by this court pursuant to Article IV of the Ohio Constitution." *Id*. The court recognized that a grievance is subject to investigation and independent review in order to "separate the wheat from the chaff" before the filing of a formal complaint by the appropriate state authorities. *Id*. at 589. Nevertheless, the court held that the filing and investigation of a grievance was part of a state "judicial proceeding."

*O'Neill*, 511 F.3d 643-44. Because the Ohio Supreme Court has held that the filing and investigation of a grievance under the Ohio Code of Judicial Conduct is part of a judicial proceeding, this Court concludes that an administrative proceeding had begun for the purposes of *Younger* when a grievance was filed against Plaintiffs. Therefore, under the first factor, state proceedings are currently pending.

As to the third factor, Plaintiffs argue the state proceedings will not provide an adequate opportunity to raise their constitutional claims because the proceedings will not be fair and impartial. Plaintiffs bear the burden of showing 'that the state procedural law barred presentation of [their] claims.'" *Aaron*, 914 F.3d at 1018 (quoting *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 14, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987)). This Court has previously found in a related case that similar claims of bias do not carry this burden. *Maraan v. Off. of Ohio Disciplinary Couns. for Supreme Ct. of Ohio*, No. 1:18CV645, 2021 WL 3173311, at *2 (S.D. Ohio July 27, 2021). Therefore, the Court concludes that under the third factor, Plaintiffs have the opportunity to present their constitutional claims in their answer to the disciplinary complaint against them. *Accord Squire v. Coughlan*, 469 F.3d

551, 557 (6th Cir. 2006) (citing *Berger*, 983 F.2d at 723) (holding that *Younger* abstention was appropriate because the "plaintiffs had the opportunity to present their constitutional claims in their answer to the [disciplinary] complaint against them").

Plaintiffs maintain that one of the exceptions to the *Younger* doctrine applies: bad faith and harassment. *See Doe v. Univ. of Kentucky*, 860 F.3d at 371 (citing *Fieger v. Thomas*, 74 F.3d 740, 750 (6th Cir. 1996)). However, on the current record, Plaintiffs have not shown a pattern of bad faith prosecution and harassment. As this Court has noted, cases where bad-faith prosecution of an individual may serve as a proper exception to the *Younger* abstention doctrine "are exceedingly rare, particularly where a plaintiff seeking to defeat an abstention argument has failed to avail himself first of state appellate processes before seeking relief in federal court." *Kalniz v. Ohio State Dental Bd.*, 699 F. Supp. 2d 966, 973 (S.D. Ohio 2010). This Court has cited two examples where this exception was applicable: "a Texas city police investigation in which officers repeatedly engaged in searches and seizures which they knew to be unlawful and beyond the scope of statutory authority, and a Southern District of Ohio case in which the county prosecutors had filed twelve separate actions against the federal plaintiffs in order to harass the plaintiffs and drain them of all of their financial resources." *Id*. at 973-74 (citing *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82 (5th Cir.1992); *Video Store, Inc. v. Holcomb*, 729 F.Supp. 579, 580 (S.D.Ohio 1990)). As another example of this harassment exception, the Sixth Circuit has cited a case discussed in *Younger* itself: *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). *Doe v. Univ. of Kentucky*, 860 F.3d at 371. As the Sixth Circuit explained, *Dombrowski* involved repeated threats by prosecutors which were designed to discourage individuals from

asserting their constitutional rights. *Id*. (citing *Younger*, 401 U.S. at 48). Those types of repeated threats, or other similar actions, are not alleged here. Therefore, *Younger* abstention is warranted in this case.

While the Court finds that *Younger* abstention is proper, the Court also finds that this matter should be stayed until the conclusion of the state disciplinary proceedings, rather than be dismissed. *See Kalniz*, 699 F. Supp. 2d at 975 (explaining that where a plaintiff is bringing constitutional civil rights claims in a federal court case in which *Younger* abstention was proper, the stay protects against the possibility that the statute of limitations could deprived the plaintiff of the opportunity to present the merits of her damages claims); *see also Meyers v. Franklin Cty. Court of Common Pleas*, 23 F. App'x 201, 206 (6th Cir. 2001) (and cases cited therein).

## III. CONCLUSION

Based on the foregoing, the Motion to Dismiss filed by Defendants the Ohio Office of Disciplinary Counsel, Disciplinary Counsel Joseph Caligiuri, Assistant Disciplinary Counsel Kelli C. Schmidt, and Donald Holtz, Investigator for the Office of Disciplinary Counsel (Doc. 9) is **GRANTED** to the extent that Defendants seek a stay of this matter under *Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). This matter is hereby **STAYED** until further order of the Court. The parties are **ORDERED** to provide the Court with a status report within **ten (10) days** of the conclusion of any disciplinary proceedings involving Plaintiff Glenn Feagan.

However, because the Court does not reach Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court **DENIES AS MOOT** Defendants' Motion to Dismiss to the extent it argues that Plaintiffs have failed to state a

claim for relief.

**IT IS SO ORDERED.**

*/s/ Michael R. Barrett*
JUDGE MICHAEL R. BARRETT