SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

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YOURAS ZIANKOVICH,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 159601/2019
Mot. Seq. Nos. 001, 002, 003

KIMBERLY BENNETT, JENNIFER HOWARD, and BRYON M. LARGE,

Defendants.

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Hon. James E. d'Auguste

Motion Sequence Nos. 001, 002, and 003 are hereby consolidated for disposition.

In Motion Sequence No. 001, defendant Bryon M. Large ("Large") moves for an order (1), pursuant to CPLR 3211(a)(1), (a)(7), and (a)(8), dismissing plaintiff Youras Ziankovich's ("Ziankovich") complaint[1] as against him for a lack of both personal and subject matter jurisdiction over him, dismissing Ziankovich's claims for malicious prosecution and a violation of the RICO Act, or, in the alternative, dismissing the complaint on forum non conveniens grounds; and (2), pursuant to 22 NYCRR 130-1.1, seeking sanctions and costs, or, in the alternative, for an order, pursuant to CPLR 8501, staying this action until Ziankovich posts security costs in an amount determined by this Court.

In Motion Sequence No. 002, defendant Kimberly Bennett ("Bennett"), appearing *pro se*, moves for an order, pursuant to CPLR 3211(a)(1), (a)(7), and (a)(8), dismissing the complaint as

[1] Although the complaint is purported to be a "Verified Complaint," Ziankovich, as a party to an action, cannot use the form of an affirmation for this purpose and is deemed to be unverified. *See id.* at 21; *LaRusso v. Katz*, 30 A.D.3d 240, 243 (1st Dep't 2006) ("Although an attorney is authorized to submit an affirmation in lieu of an affidavit in most situations (CPLR 2106), 'even those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action.'" (quoting *Slavenburg Corp. v. Opus Apparel*, 53 N.Y.2d 799, 801 n. (1981))); *Banks v. Jablonski*, 2017 WL 4217276, at *2 (Sup. Ct. N.Y. County Sept. 18, 2017) (Bannon, J.) ("Although the complaint was purportedly verified by counsel, the verification was unnotarized . . . , is deemed to be unverified [and] is thus without evidentiary value.").

against her for failure to state a valid cause of action, that the documentary evidence provides a complete defense to Ziankovich's claims, and that this Court does not have jurisdiction over Bennett.[2]

In Motion Sequence No. 003, defendant Jennifer Howard ("Howard"), moves for an order (1), pursuant to CPLR 3211(a)(1), (a)(7), and (a)(8), dismissing the complaint as against her for failure to state a cause of action, a defense founded upon documentary evidence, and a lack of personal or general jurisdiction; and (2), pursuant to 22 NYCRR 130-1.1, seeking attorneys' fees, costs, and sanctions against Ziankovich, or, in the alternative, for an order, pursuant to CPLR 8501, staying this action until Ziankovich posts security costs in an amount determined by this Court.

For the reasons stated herein, defendants' motions seeking dismissal of the complaint and the imposition of sanctions are granted.

Factual and Procedural History

On October 2, 2019, Ziankovich, proceeding *pro se*, commenced the instant action. NYSCEF Doc. No. 1. Ziankovich is a domiciliary of Texas. NYSCEF Doc. No. 47, at 2. Ziankovich allegedly maintained law offices in New York and Colorado—Ziankovich was admitted to the New York bar and was authorized to practice before the United States Department of Homeland Security, but was not admitted to the Colorado bar. NYSCEF Doc. Nos. 1, ¶¶ 1, 2, 6, 7, 10; 6, ¶ 13; 8, at 50. In Colorado, Ziankovich practiced immigration law before the United States District Court for the District of Colorado, the Executive Office of

[2] Bennett joins in, adopts, and incorporates by reference the reasons set forth in Large's motion to dismiss (Mot. Seq. No. 001) and the exhibits his attorney's supporting affirmation, exhibits, and memorandum of law, as well as, Howard's motion to dismiss (Mot. Seq. No. 003), supporting affidavits/affirmations, exhibits, and memorandum of law. NYSCEF Doc. No. 13, ¶ 2.

Immigration Review, and the Department of Homeland Security. NYSCEF Doc. No. 8, at 50. All three defendants reside in Colorado. NYSCEF Doc. No. 1, ¶¶ 11, 17, 21.

The gravamen of this lawsuit is Ziankovich's contention that defendants wrongfully conspired with each other to destroy his business and well-being, thereby causing him damages. *See id.* In particular, Ziankovich claims that defendants engaged in several "acts of coercion, blackmailing, extortion, collection of unlawful debt, malicious prosecution." *Id.*, ¶ 96. The alleged mechanism used to carry out the wrongful conduct directed at Ziankovich has been disciplinary proceedings commenced in Colorado that were guided by defendants' improper motives and threats. It is these disciplinary proceedings that form the basis for Ziankovich's suit against Large, an attorney at Colorado's Office of Attorney Regulation Counsel ("OARC"); Bennett, his former client; and Howard, his former client's new attorney. *See id.*, ¶¶ 14, 16, 18, 22, 24, 37-38; NYSCEF Doc. No. 13, ¶ 3.

In particular, Ziankovich takes issue with the efforts by OARC to address disciplinary complaints filed against him for alleged acts of professional misconduct he committed in Colorado. NYSCEF Doc. No. 1, ¶ 25. OARC conducts investigations and disciplinary proceedings against attorneys who have allegedly violated the Colorado Rules of Professional Conduct ("Colo. RPC"). C.R.C.P. 251.3(c)(3)-(4), 251.10.[3] OARC's jurisdiction for such regulatory actions consists of attorneys licensed to practice law in Colorado, as well as attorneys licensed to practice law in other states who appear before federal courts and regulatory agencies in Colorado. Colo. RPC 8.5(a).[4] Ziankovich alleges that his license to practice law was wrongly

[3] "C.R.C.P." references the Colorado Rules of Civil Procedure.

[4] An impartial hearing board ("Hearing Board") that includes the Colorado Supreme Court's presiding disciplinary judge ("PDJ"), presides over OARC's cases. C.R.C.P. 251.16-18. The Hearing Board's disciplinary actions can be appealed to the Colorado Supreme Court. C.R.C.P. 251.27(a).

suspended as a result of a disciplinary proceeding in Colorado (NYSCEF Doc. No. 1, ¶ 28) that was prosecuted by Large in violation of his "limited authority" granted by the OARC (*id.*, ¶ 29).

The complaint references "several civil litigations" between Ziankovich and Large. *Id.*, ¶ 23. These alleged litigations refer to the Colorado disciplinary proceedings, which were based upon complaints made to OARC about Ziankovich's purportedly unethical practice of law in Colorado, and his subsequent efforts to either transfer or collaterally attack those proceedings. *See* NYSCEF Doc. No. 8.

I. The First Disciplinary Proceeding in Colorado

The first disciplinary proceeding against Ziankovich in Colorado was captioned *People v. Ziankovich*, No. 17PDJ037, 2018 WL 6061422 (Colo. O.P.D.J. June 20, 2018).[5] *Id.* at 6. In the underlying disciplinary proceeding, Ziankovich filed a motion to dismiss the proceeding "on the grounds that OARC lacked jurisdiction to investigate and sanction attorneys with law licenses from other states and with practices limited to federal court matters." *Id.* at 51. The motion to dismiss was ultimately denied on July 13, 2017, and "the PDJ concluded that the Office of the Presiding Disciplinary Judge of the Colorado Supreme Court had jurisdiction over [Ziankovich] and could adjudicate the OARC claims brought against him." *Id.* Ziankovich's interlocutory appeal was denied by the Colorado Supreme Court, and the disciplinary proceeding continued against him. *Id.* "On March 5, 2018, [the d]efendants [in the disciplinary proceeding] moved for summary judgment on all eight claims asserted against [Ziankovich], and the PDJ granted in part that motion . . . , entering judgment in [d]efendants' favor on six claims." *Id.* (citations omitted).

On April 10 and 11, 2018, a hearing took place on the remaining two claims before the Hearing Board, "which consisted of the PDJ, an attorney, and a lay member." *Id.* One of the

[5] The facts of the first disciplinary proceeding are discussed *infra* at Part VI.

two remaining claims were withdrawn, and Ziankovich contested the remaining claim on the grounds that, *inter alia*, OARC lacked personal and subject matter jurisdiction. *Id.* "On May 31, 2018, the Hearing Board issued its Opinion and Decision Imposing Sanctions under Colo. R. Civ. P. 251.19(b)." *Id.* at 52.[6] Ziankovich was ultimately suspended from practicing law in the state of Colorado for one year and one day, "with [three months] to be served and the remainder to be stayed upon the successful completion of a [two-year] period of probation, with the conditions" that he submit to practice and client trust account monitoring. *Id.* at 21-23, ¶¶ 1, 9(a)-(c). This included any practice before the Board of Immigration Appeals, the Immigration Courts, and the Department of Homeland Security by order of the United States Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals dated March 21, 2019. *See id.* at 39-42.[7] Ziankovich was also directed to pay the costs of the first disciplinary proceeding and to "make restitution of $1,500.00 to Iuliia Vyshniavska and $1,000.00 to Hennadiy Zhakyavichyus" and he "may not seek reinstatement to practice law in Colorado unless he has complied with this requirement." *Id.* at 29, ¶¶ 6-7.

II. The State Action in Colorado

On July 9, 2018, Ziankovich appealed the outcome of the first disciplinary proceeding to the Colorado Supreme Court, captioned *In re Ziankovich*, Case No. 2018SA168. *Id.* at 43, 52.

[6] Ziankovich filed a post-trial motion in which he raised previously asserted defenses, including jurisdiction. *Id.* Although the Hearing Board issued and Amended Opinion and Decision on June 20, 2018, having granted Ziankovich's request to strike two sentences, its underling substantive analysis remained unchanged, rejecting Ziankovich's jurisdictional challenge "and argument that the disciplinary action violated the Commerce Clause and his due process, constitutional, and statutory rights." *Id.*

[7] On January 29, 2019, after Ziankovich was suspended from practicing law in Colorado by the Colorado Supreme Court, the Disciplinary Counsel for the Executive Office of Immigration Review petitioned for Ziankovich's "immediate suspension from practice before the Board of Immigration Appeals and the Immigration Courts," captioned *In re Ziankovich*, File No. D2018-0327. *Id.* at 39. The petition was granted and Ziankovich was immediately suspended from the practice of law before these entities, with a specific order to "promptly notify, in writing, any clients with cases currently pending before the Board, the Immigration Courts, or the DHS that [he] has been suspended from practicing before [those] bodies." *Id.* at 40.

In his brief, Ziankovich again "raised his previously asserted objection to the OARC's jurisdiction to discipline him and that such disciplinary action constituted a violation of due process of law." *Id.* at 52. On February 1, 2019, the Colorado Supreme Court issued an Order and Mandate that affirmed the Amended Order of the Hearing Board, which suspended Ziankovich's license to practice law in Colorado and returned jurisdiction of the matter to the Office of the Presiding Disciplinary Judge. *Id.* at 43; *see id.* at 52.

Next, Ziankovich petitioned the Supreme Court of the United States for a writ of certiorari to review the Colorado Supreme Court's decision. *Ziankovich v. Colorado*, 140 S. Ct. 133 (2019). Ziankovich's petition was denied by order dated October 7, 2019. *Id.*

III. The First Federal Action in Colorado

Ziankovich's efforts to attack the first disciplinary proceeding in Colorado included filing a federal lawsuit, *pro se*, on August 24, 2017, in the United States District Court for the District of Colorado, captioned *Ziankovich v. Large et al.*,[8] Civil Action No. 17-cv-02039-CMA-NYW, seeking to enjoin the first disciplinary proceeding while it was still pending. *See* NYSCEF Doc. No. 8, at 1. Specifically, Ziankovich sought a declaratory judgment that the underlying defendants "did not have jurisdiction to initiate the [disciplinary proceeding] against him because he has never been licensed to practice law by Colorado and does not practice before Colorado state courts or agencies, rather, he practice[d] federal immigration law in the federal courts in Colorado." *Id.* at 52.

On August 31, 2017, Ziankovich filed his first motion for a temporary restraining order, which was denied as moot, on September 12, 2017, in light of the claims asserted in his amended

[8] When Ziankovich initiated the federal district court action, James C. Coyle was Colorado's Attorney Regulation Counsel. *Id.* at 50 n.1. "On July 1, 2018, Defendant Jessica E. Yates became Colorado's Attorney Regulation Counsel and was automatically substituted as a Defendant in this action for Mr. Coyle." *Id.*

complaint filed in that action and the magistrate judge essentially found that there was federal question jurisdiction. *Id.* On September 14, 2017, Ziankovich filed a second motion for a temporary restraining order, which was identical to his prior motion. *Id.* While Ziankovich's motion was pending, the underlying defendants argued, *inter alia*, that the district court should dismiss the case "for lack of subject matter jurisdiction because the requirements of the *Younger* abstention doctrine were satisfied." *Id.* By order dated October 21, 2017, the federal district court dismissed Ziankovich's amended complaint in that action, without prejudice, on the grounds that there was no "subject matter jurisdiction pursuant to the *Younger* abstention doctrine . . . and the Clerk of the Court entered Final Judgment against [Ziankovich]." *Id.* at 1. An order dated December 11, 2017 denied Ziankovich's motion, pursuant to Federal Rule of Civil Procedure 60(b), seeking relief from the final judgment and for reconsideration of the final judgment, which was originally filed on November 3, 2017. *Id.* The motion was denied "[b]ecause [Ziankovich did] not establish exception[al] circumstances that warrant[ed] vacating the Court's Order and Final Judgment pursuant to Federal Rule of Civil Procedure 60 (b)." *Id.* (citation omitted).

On January 8, 2018, Ziankovich appealed "the district court's order dismissing his case without prejudice pursuant to *Younger v. Harris*, 401 U.S. 37 (1971)" to the Tenth Circuit of the United States Court of Appeals, captioned *Ziankovich v. Large et al.*, No. 18-1016. *Id.* at 5 (emphasis omitted); *see id.* at 53. In a decision dated December 26, 2018, the Tenth Circuit "vacate[d] the order of dismissal and remand[ed the case] to the district court for consideration of [Ziankovich's] claim for declaratory judgment" (*id.* at 6) based upon the *Younger* abstention doctrine because the underlying disciplinary proceeding had concluded during the pendency of the appeal (*see id.* at 7). The Tenth Circuit decided to vacate the dismissal, in part, because

otherwise Ziankovich could file a new action since the district court dismissed the action without prejudice. *Id.* The Tenth Circuit, in so holding, specifically "stress[ed] that [it] express[es] no opinion on the merits of [Ziankovich's] claim." *Id.*

Motion practice continued in that Ziankovich had filed two additional motions for a temporary restraining order seeking to enjoin the disciplinary proceeding in state court—his third application was struck by the district court because the Tenth Circuit had yet to issue its mandate, which occurred on January 23, 2019, and the fourth application was denied by the district court on the grounds that it was moot because the state disciplinary proceedings had concluded and, irrespective, Ziankovich's complaint failed "to state a plausible claim for relief." *Id.* at 47; *see id.* at 44-49. On February 6, 2019, the underlying defendants moved to dismiss that action on the grounds that "as a matter of law, the OARC and PDJ had the authority to discipline [Ziankovich] for his provision of legal services to Colorado residents," that Ziankovich "failed to state plausible claims for all five counts," and that the "doctrines of issue and claim preclusion barred [Ziankovich's] [f]ederal [a]ction." *Id.* at 53; *see also Ziankovich v. Large*, No. 17-cv-02039-CMA-NYW, 2020 WL 502956, at *2 (D. Colo. Jan. 31, 2020).

Ziankovich argued to Magistrate Judge Nina Y. Wang that the underlying defendants lacked "jurisdiction to regulate his practice of federal law within Colorado because he is a New York attorney who does not practice in Colorado state courts." *Ziankovich v. Large*, No. 17-cv-02039-CMA-NYW, 2019 WL 4640803, at *5 (D. Colo. May 31, 2019). He further argued that the underlying defendants violated various sections of the Colorado Rules of Civil Procedure and "abused their limited authority granted them by state law . . . because they violated their authority to maintain [a disciplinary] action in strict compliance" with state law. *Id.* at *6. Additionally, Ziankovich argued that:

> Defendants sought to suspend his New York law license, which they lacked authority and jurisdiction to do, and Defendants generally lacked authority to regulate his conduct because he is an out-of-state attorney and does not practice in Colorado state courts. In his supplemental filing with the court, [Ziankovich] argues that he never agreed to follow the Colorado Rules of Professional Conduct as he did with the New York Rules of Professional Conduct; that there are no grievances against him in New York; and that the dissenting opinion in his Board of Immigration Appeals suspension confirms that Defendants lacked jurisdiction to regulate his conduct.

Id. (citation omitted). In her report with recommendations, Magistrate Judge Wang sets forth her reasoning as follows:

> [T]hroughout his various filings Mr. Ziankovich has relied on the Supreme Court of the United States' decision in *Sperry v. State of Fla. ex rel. Florida Bar*, 373 U.S. 379 (1963), to argue that Colorado lacks jurisdiction to discipline him. *E.g.*, [#5-1 at 4-5 & nn. 1, 3; #14-1 at 4-6 & nn. 1, 3, 10; #22 at 4; #25 at 4; #28 at 2-3; #38; #48]. In *Sperry*, the Supreme Court considered whether the Florida Bar could enjoin a nonlawyer from practicing before the United States Patent Office even though federal law permitted the nonlawyer to do so. *See Sperry*, 373 U.S. at 381-82. While acknowledging that prosecution and preparation of patent applications for others constituted the practice of law and that Florida had "a substantial interest in regulating the practice of law within the State," *id.* at 383, the Supreme Court invalidated the Florida law, because Florida could not "enforce licensing requirements which, though valid in the absence of federal regulation," imposed "additional conditions not contemplated by Congress." *Id.* at 384-85.
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> Mr. Ziankovich likens his situation to that in *Sperry*. But as Judge Arguello has already held, [Ziankovich's] reliance on *Sperry* is inapposite. *See* [#29 at 6-7]. [Ziankovich] argues that 8 C.F.R. § 292.1(a)(1) governs the practice of immigration law, with 8 C.F.R. § 1003.102 governing attorney conduct, and thus Colorado cannot regulate his ability to practice immigration law in federal court. *See* [#48 at ¶¶ 19-29]. Judge Arguello explained,
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> > 8 C.F.R. § 292.1(a)(1) is an immigration regulation from the Department of Homeland Security which provides that "[a] person entitled to representation may be represented by ... [a]ttorneys in the United States. Any attorney as defined in [8 C.F.R. § 1.2]." "Attorney" is in turn defined in 8 C.F.R. § 1.2 as "any person who is eligible to practice law in, and is a member in good standing of

> the bar of, the highest court of any State ... of the United States, ... and is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law." (Emphasis added.) This regulation, unlike the ones in *Sperry* (37 C.F.R. §§ 1.31, 1.341 (1963)), therefore expressly contemplates state regulation of attorneys practicing immigration law in federal courts. By its own terms, the regulation implies that states have "important state interests" in regulating such attorneys.
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> [#29 at 7-8 (emphasis in original) (footnote and case citation omitted)]. This court sees no reason to diverge from Judge Arguello's prior analysis.

Id. at *6-7 (fourth through seventh alterations in original). Moreover, because "it is undisputed that Mr. Ziankovich maintained an office in Colorado and provided legal services in Colorado, [this] subject[ed] him to discipline in Colorado." *Id.* at *8. Magistrate Judge Wang concluded that the Colorado Supreme Court "had proper authority and jurisdiction over [Ziankovich]" (*id.* at *6) even though he is an out-of-state attorney practicing solely before federal courts and agencies" (*id.* at *8). Magistrate Judge Wang also concluded that "issue preclusion bars [Ziankovich's] claims in this matter" because he

> had a full and fair opportunity to litigate [these] issues in the disciplinary proceedings, as he filed a response to the disciplinary complaint and Defendants' Motion for Summary Judgment, he participated in the two-day hearing before the Hearing Board by testifying and submitting evidence, he challenged the Hearing Board's decision in a post-trial motion, and he appealed the Hearing Board's Amended Opinion and Decision to the Colorado Supreme Court and submitted an opening brief on the matter.

Id. at *16.

Upon review of Magistrate Judge Wang's May 31, 2019 recommendation, the district court converted the motion to dismiss to a motion for summary judgment and agreed that "the Colorado Supreme Court decision affirming the Hearing Board's Amended Opinion barred [Ziankovich's] [f]ederal [a]ction under the doctrine of issue preclusion." 2020 WL 502956, at

*2. As a result, by decision dated September 18, 2019, the district court entered summary judgment against Ziankovich (*id.*) and his federal action was dismissed with prejudice. NYSCEF Doc. No. 8, at 50.

On September 20, 2019, Ziankovich again filed a motion pursuant to Federal Rule of Civil Procedure 60(b), seeking relief from the underlying order that dismissed his case. 2020 WL 502956, at *2. Ziankovich argued that the district court made several mistakes of law and fact. *Id.* The district court held that "[i]t did not err in its determination that the Hearing Board and Colorado Supreme Court's decisions operate as a bar on [Ziankovich's] [f]ederal [a]ction under the doctrine of issue preclusion." *Id.* Additionally, the district court found "that it committed no error with respect to relying on the Colorado Rules of Professional Conduct and Colorado Rules of Civil Procedure for determining that the OARC's regulatory jurisdiction includes attorneys licensed by other states who practice before federal courts and regulatory agencies in Colorado." *Id.* at *3. The district court also explained, with respect to issue preclusion, that, in its prior decision, it "articulated that the Colorado Supreme Court extended the United States Supreme Court's application of res judicata principles on the question of subject matter jurisdiction to its own issue preclusion jurisprudence on the question of subject matter jurisdiction." *Id.* at *4. The district court ultimately denied Ziankovich's motion, pursuant to Federal Rule of Civil Procedure 60(b), for relief from the underlying order. *Id.* at *5. On February 3, 2020, Ziankovich appealed the district court's January 31, 2020 decision to the Tenth Circuit, captioned *Ziankovich v. Large, et al.*, Case No. 20-1030, which is currently pending.

IV. The Second Disciplinary Proceeding in Colorado

On October 7, 2019, a second disciplinary proceeding in Colorado was commenced against Ziankovich, captioned *People v. Ziankovich*, Case No. 19PDJ068. NYSCEF Doc. No. 8, at 65-72. It is this second disciplinary proceeding that is the subject of the instant action. Ziankovich filed a notice of removal in the United States District Court for the District of Colorado, captioned *People v. Ziankovich*, Civil Action No. 19-cv-03087-RM, to remove the second disciplinary proceeding from the Colorado Supreme Court to the Colorado District Court. *Id.* at 73-114.[9] Upon removal to the Colorado District Court, it questioned, *sua sponte*, whether it had subject matter jurisdiction. In an order dated November 4, 2019, upon the district court's *sua sponte* review of the matter, it found that Ziankovich failed to show the existence of subject matter jurisdiction and further found that the *Younger* abstention doctrine applied. *Id.* at 115. The district court stated the following with respect to jurisdiction in its November 4th order:

> Specifically, [Ziankovich's] notice of removal relies on federal question jurisdiction (28 U.S.C. § 1331) but the Court's review of the complaint upon which removal is based shows no federal question has been raised. [Ziankovich's] reliance on diversity jurisdiction (28 U.S.C. § 1332(a)) fares no better. Here, [Ziankovich] relies on the citizenship of the *attorneys* who represent the party - the State of Colorado. But, it is the citizenship of the parties which determines whether diversity jurisdiction may exist. Further, even if subject matter exists, which the record does not show, this case would nonetheless be subject to dismissal based on *Younger*.

Id. at 115-16 (emphasis in original) (footnotes omitted). The district court also notes that Ziankovich "listed the attorneys [upon whose citizenship he relies for the purpose of diversity jurisdiction] in the caption of his notice of removal as if they are named parties but, of course,

[9] The notice of removal Ziankovich filed bears the following caption: *Yates, et al. v. Ziankovich*, Case No. 19-3087 (*id.* at 75); however, the case continues in the Colorado District Court under the above caption and Civil Action Number.

they are not." *Id.* at 115 n.3. The November 4th order further directed Ziankovich to show cause as to "why this case should not be remanded to the court from which it was removed" (*id.* at 115) due to "the lack of subject matter jurisdiction or *Younger* abstention" (*People v. Ziankovich*, No. 19-cv-03087-RM, 2019 WL 6907460, at *1 (D. Colo. Dec. 19, 2019) (footnote omitted)). After the issue was briefed, in a decision dated December 19, 2019, the district court held that Colorado could impose disciplinary sanctions upon Ziankovich:

> [Ziankovich] appears to be arguing by analogy that Colorado cannot regulate (or discipline) his conduct because he was authorized by federal law to practice before the immigration authorities, e.g., U.S. Citizenship and Immigration Services and the Immigration Court [based upon *Sperry*]. *Sperry's* holding, however, is inapposite here.
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> In this case, the Board of Immigration Appeals (the "Board") may impose disciplinary sanctions against attorneys who practice immigration law under the Board's standards. *See* 8 C.F.R. §§ 1003.101 & 1003.102. That discipline may *also* be imposed under Colorado's rules governing the conduct of attorneys, however, does not render them incompatible with federal immigration regulations governing practice before the immigration authorities. Unlike the case in *Sperry*, the Colorado regulations do not conflict with and are not an obstacle to enforcing federal law. Instead, the Colorado rules are consistent with and expressly contemplated by the federal regulations.

2019 WL 6907460, at *2-3 (emphasis in original). The district court further stated:

> Section 1003.103 explicitly states the Executive Office of Immigration Review disciplinary counsel "shall" file a petition with the Board to suspend immediately from practice before the Board and Immigration Court "any practitioner who has been suspended or disbarred by, or while a disciplinary investigation or proceeding is pending has resigned from, the highest court of any State...or who has been placed on an interim suspension pending a final resolution of the underlying disciplinary matter." Thus, the regulations "expressly contemplate[ ] state regulation of attorneys practicing immigration law in federal courts." *Ziankovich v. Large*, No. 17-CV-02039-CMA-NYW, 2017 WL 6311470, at *4 (D. Colo. Dec. 11, 2017). Therefore, state regulations of an attorney's conduct are not preempted.

Id. at *3 (alterations in original) (footnote omitted). The district court found that Ziankovich failed to show the existence of subject matter jurisdiction and remanded the disciplinary proceeding to the PDJ in the Colorado Supreme Court, from which it was removed, and ordered the federal case closed. *Id.* at *4-5.

The facts underlying and leading up to the second disciplinary proceeding are as follows: On or about May 3, 2017, Bennett and her husband, Aliaksandr Hancharou, retained Ziankovich to perform immigration services. *See* NYSCEF Doc. Nos. 1, ¶¶ 12, 14; 13, ¶ 3. The representation involved two clients, Bennett as petitioner, and Hancharou as the person seeking a change in immigration status. NYSCEF Doc. No. 13, ¶ 3. Hancharou signed the retainer agreement (NYSCEF Doc. No. 14), and Ziankovich was paid a flat fee of $1,500 from a joint checking account maintained by Bennett and Hancharou (NYSCEF Doc. No. 13, ¶ 3). There appeared to be no issue with Ziankovich's legal services up until Ziankovich allegedly postponed and rescheduled immigration interviews multiple times without providing any reason other than he was unavailable. *Id.* At some point after Ziankovich had been suspended from practice, on or about April 3, 2019, Bennett and her husband retained Howard, a Colorado attorney, as new counsel for the immigration proceedings. NYSCEF Doc. Nos. 1, ¶¶ 18-20, 28, 37-38; 13, ¶ 3.

On or about April 1, 2019, Bennett, via email, sent a written demand to Ziankovich for a return of her $1,500 payment on the grounds that he provided ineffective legal services, which constituted a breach of contract. NYSCEF Doc. No. 1, ¶ 30-31.[10] Ziankovich alleges that Bennett threatened to "submit a grievance complaint and make other public statements against [him], unless her demand [was complied with] in full" (NYSCEF Doc. No. 1, ¶ 32); however, Bennett's email contained no such threat (*see* NYSCEF Doc. No. 15, at 28). In fact, what

[10] Bennett's letter states the following: "I am demanding that you return our money of this contract, as your office has been ineffective in this case for us and is a breach of contract." NYSCEF Doc. No. 15, at 28.

Bennett actually complained about was that Ziankovich failed to disclose that he was suspended from practicing law in the state of Colorado. *See id.* At the time of the letter, Ziankovich was not permitted to represent either Bennett or her husband in any immigration proceedings. However, Ziankovich did not return the $1,500 to Bennett because he claimed that he never owed her that amount and it was a properly earned legal fee under the retainer agreement. NYSCEF Doc. No. 1, ¶¶ 33-36.

After Bennett retained Howard to replace Ziankovich as her attorney in the immigration proceedings, Howard apparently communicated with the Colorado disciplinary authorities about Ziankovich's refusal to return Bennett's $1,500 retainer fee. *Id.*, ¶¶ 42-43, 70-71. Thereafter, OARC initiated a new disciplinary proceeding against Ziankovich. *Id.*, ¶ 46.

V. The Second Federal Action in Colorado

On February 10, 2020, Ziankovich sued "the individual members of the Colorado Supreme Court in their individual and official capacities and Presiding Disciplinary Judge William Lucero, also in his individual and official capacity . . . , for due process and equal protection violations." *Ziankovich v. Members of Colo. Supreme Court*, No. 20-cv-0158-WJM-SKC, 2020 WL 730318, at *1 (D. Colo. Feb. 13, 2020). Again, "Ziankovich contends that the Colorado Supreme Court lacks jurisdiction to discipline him because its rules governing attorney practice exceed its authority under the Colorado Constitution and Colorado statutes to promulgate rules for the courts of record in Colorado. He also argues that certain disciplinary rules are void for vagueness." *Id.* (citation omitted). In this second federal action, Ziankovich filed a temporary restraining order seeking a preliminary injunction enjoining the underlying defendants "from prosecuting and sanctioning [Ziankovich] under certain Colorado Rules of Civil Procedure ('C.R.C.P.') or Colorado Rule of Professional Conduct ('Colo. RPC') 8.5(a)."

Id. The district court denied Ziankovich's motion for a temporary restraining order because he failed to show a likelihood of success on the merits. *Id.* at *1-2. The district court summarized Ziankovich's argument and held as follows:

> Ziankovich argues that C.R.C.P. § 202.1, C.R.C.P. §§ 251.1–.34, and Colo. RPC 8.5(a) go beyond the scope of the Colorado Supreme Court's authority to promulgate rules for the Colorado courts of record. In doing so, he makes a textual argument that the Colorado Supreme Court may only make rules of practice and procedure for the Colorado courts of record, not for all attorneys practicing with the territorial boundaries of the state. However, the Colorado Supreme Court's ability to "institute rules of practice" under Colo. Rev. Stat. § 13-2-110 is not limited to practice *in courts of record* in Colorado. *Compare* Colo. Rev. Stat. § 13-2-110 *to id.* § 13-2-108 (granting the power to prescribe practice and procedure in civil actions "for the courts of record in the state of Colorado") *and id.* § 13-2-109 (granting power to determining the rules of pleading, practice, and procedure for criminal cases "in all courts of the state of Colorado"). Thus, it appears that the Colorado Supreme Court may "institute rules of practice" not limited Colorado courts, and "exercise[ ] jurisdiction over all matters involving the licensing and regulation of those persons who practice law in Colorado." C.R.C.P. § 202.1.
>
> U.S. District Court Magistrate Judge Nina Y. Wang recently considered the precise question present here, namely, whether the Colorado rules of attorney discipline apply to an attorney who maintains an exclusive federal practice in Colorado and who is not a member of the Colorado bar. *Ziankovich v. Large*, 2019 WL 4640803 (D. Colo. May 31, 2019) (report and recommendation). Judge Wang concluded that the Colorado Supreme Court has "exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado to protect the public." *Id.* at *6.
>
> Given the plain language of the statute and persuasive authority of the *Ziankovich* decision of Judge Wang, the Court finds that Ziankovich has not shown a likelihood of success, let alone a substantial likelihood of success, on the merits of his claim that the C.R.C.P. and Colo. RPC exceed the scope of the Colorado Supreme Court's authority.

Id. at *2. Although the district court denied Ziankovich's motion for a temporary restraining order, his claims remained pending before that court.

On February 14, 2020, the day after the district court's decision, Ziankovich filed a second motion for a temporary restraining order and for reconsideration of the previous order. *Ziankovich v. Members of Colo. Supreme Court*, No. 20-cv-0158-WJM-SKC, 2020 WL 2747745, at *1 (D. Colo. May 27, 2020). In that motion, Ziankovich sought to enjoin the underlying defendants "from prosecuting and sanctioning [him] under the C.R.C.P. and Colo. RPC, and to reconsider its Prior Order denying the TRO 'due to clear error.'" *Id.* Since a motion to reconsider bears a very similar standard to a motion to renew or reargue, pursuant to CPLR 2221, it was not merely an opportunity for Ziankovich to make the same argument again to this court. *See id.* at *2. The district court stated the following:

> In this Motion, Ziankovich does not claim there has been any intervening change in the controlling law, nor does he come forward with any new evidence previously unavailable to him at the time he filed his first application for a TRO. Instead, all of the arguments and contentions set forth in the Motion were available to Ziankovich previously and were fully considered and addressed by the Court in its Prior Order. Moreover, Ziankovich has failed to show that the Court fundamentally misunderstood any of his arguments, or that the Prior Order was so clearly erroneous that he would suffer a manifest injustice without the reconsidered relief requested in the Motion. Because Ziankovich has not shown that there was an intervening change in the law, newly discovered evidence, or the need to correct clear error or manifest injustice, [his] Motion must be denied.
>
> The Court notes that this is Ziankovich's sixth attempt to obtain a TRO or preliminary injunction in connection with his state attorney discipline proceeding. These motions—which continue to advance arguments that have already been rejected—serve only to congest the Court docket and waste resources. Under 28 U.S.C. § 1927, "[a]ny attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." *See Hamilton v. Boise Cascade*

> *Exp.*, 519 F.3d 1197, 1203 (10th Cir. 2008) ("Where, 'pure heart' notwithstanding, an attorney's momentarily 'empty head' results in an objectively vexatious and unreasonable multiplication of proceedings at expense to his opponent, the court may hold the attorney personally responsible.").
>
> Similarly, Rule 11(b) of the Federal Rules of Civil Procedure requires a party who signs a pleading filed with the court to certify that, to the best of that person's knowledge, the legal contentions made therein "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," and that the filing "is not being presented for any improper purpose." If the Court determines that Rule 11(b) has been violated, the Court may impose an appropriate sanction upon the responsible party. *See* Fed. R. Civ. P. 11(c).
>
> **Plaintiff is hereby on notice that if he files further motions which lack legal or factual justification, he may be subject to personal monetary sanctions.**

Id. (alterations and emphasis in original) (footnote omitted). The district court then denied Ziankovich's second motion for a temporary restraining order and reconsideration. *Id.* at 3. On May 28, 2020, Ziankovich appealed the district court's February 13th decision denying his first motion for a temporary restraining order and its May 27th decision denying his second motion for a temporary restraining order and reconsideration to the Tenth Circuit, captioned *Ziankovich v. Members of Colo. Supreme Court, et al.*, Case No. 20-1195, which is currently pending.

VI. Reciprocal Disciplinary Proceedings in New York

Based upon defendants' actions, disciplinary proceedings were instituted against Ziankovich in the Appellate Division, First Department. *See In re Ziankovich*, 180 A.D.3d 140 (1st Dep't 2020). The Attorney Grievance Committee sought an order, pursuant to 22 NYCRR 1240.13 and the doctrine of reciprocal discipline, "finding that the conduct underlying [Ziankovich's] discipline in Colorado would constitute misconduct in New York." *Id.* at 141. In

brief, as relevant herein, the First Department recited the following factual and judicial findings, as related to the first disciplinary proceeding that was commenced in Colorado:

> On June 30, 2016, Hennadiy Zhakyavichyus and Iuliia Vyshniavska retained [Ziankovich] to apply for adjustments of their respective immigration statuses, for which they paid him the full agreed upon fee of $6,000 to handle both matters, but they discharged him on August 4 and August 9, 2016, respectively, because both of them were dissatisfied with the pace at which their matters were being handled. At the time of his August 9 termination, [Ziankovich] told Zhakyavichyus that he had filed his citizenship application on August 4, however, records showed that the earliest date it could have been filed was August 9. Further, [Ziankovich], who did not keep contemporaneous time records for his work, billed the couple a total of over $5,000 for their joint, initial two-hour meeting with him. He claimed that the fee was justified under the terms of their retainer agreements.
>
> The PDJ granted the OARC partial summary judgment finding that the fees [Ziankovich] charged violated Colorado RPC rule 1.5 (a) (a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses); he failed to deposit $5,000 of the advance fee paid to him by Zhakyavichyus into an attorney trust account in violation of Colorado RPC rules 1.5 (f) (advances of unearned fees are the property of the client and shall be deposited in the lawyer's trust account) and 1.15 (a) (a lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property); by including a nonrefundable "case evaluation fee" of $1,000 in his retainer agreements he violated Colorado RPC rule 1.5 (g) (nonrefundable fees and nonrefundable retainers are prohibited and any agreement that purports to restrict a client's right to terminate the representation, or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees, is prohibited); upon termination of his services by the clients, he failed to promptly return unearned fees and thereby failed to take steps reasonably practicable to protect the clients' interests in violation of Colorado RPC rule 1.16 (d); and by misrepresenting the filing date of Zhakyavichyus's application he engaged in dishonest conduct in violation of Colorado RPC rule 8.4 (c).

Id. at 142. The First Department noted that Ziankovich "asserted [a] due process defense under 22 NYCRR 1240.13 (b) (1)" and "argues that he is not subject to the Colorado Supreme Court's

disciplinary jurisdiction as he is not a member of the Colorado Bar." *Id.* at 145. The First Department also noted that Ziankovich further argued the following:

> As to Colorado RPC rule 8.5 (a), under which Colorado disciplinary authorities asserted jurisdiction over him based on his practice of immigration law within that state, he argues that it is only a "general rule" and is thereby trumped by Colorado Rules of Civil Procedure rule 251.1 (b) which provides that attorneys licensed to practice in Colorado are subject to the disciplinary jurisdiction of the Colorado Supreme Court. Additionally, he argues that the Colorado Supreme Court's imposition of discipline in an immigration matter violates federal law and the United States Supreme Court's holding in *Sperry v Florida ex rel. Florida Bar* (373 US 379 [1963]).

Id. The First Department found that "[c]ontrary to [Ziankovich's] arguments, none of the defenses to reciprocal discipline apply herein" because Ziankovich "received notice of the charges against him and vigorously defended himself at the trial (disciplinary hearing) and appellate levels which, as noted, included a federal lawsuit against the OARC" (*id.*); also "the record amply supports the Colorado Supreme Court's misconduct findings" (*id.* at 146); Ziankovich's "misconduct in Colorado would constitute misconduct in New York in violation of the Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.5 (a) and (d), 1.16 (e), and 8.4 (c)" (*id.*); and Ziankovich failed to demonstrate "that it would be unjust under 22 NYCRR 1240.13 (c) for this Court to impose reciprocal discipline" (*id.*). As a result, the First Department granted the motion for reciprocal discipline "to the extent of suspending respondent from the practice of law for a period of six months, and until further order of this Court." *Id.*

The instant action was filed on October 2, 2019. All three defendants now separately move to dismiss the action on similar grounds—pursuant to CPLR 3211(a)(1), (a)(7), and (a)(8), for failure to properly state certain causes of action, defenses founded upon the documentary evidence, and lack of personal and subject matter jurisdiction over defendants—and seek sanctions, pursuant to 12 NYCRR 130-1.1.

Discussion

I. Personal Jurisdiction

As an initial matter, this Court notes that Ziankovich has failed to establish any basis for personal jurisdiction over any defendant. First, Ziankovich has failed to establish that this Court has general jurisdiction over defendants pursuant to CPLR 301. "New York courts may not exercise general jurisdiction against a defendant under the United States Constitution or under CPLR 301 unless the defendant is domiciled in the state or in an exceptional case where 'an individual's contacts with a forum [are] so extensive as to support general jurisdiction notwithstanding domicile elsewhere.'" *IMAX Corp. v. Essel Grp.*, 154 A.D.3d 464, 465-66 (1st Dep't 2017) (alteration in original) (citing *Daimler AG v. Bauman*, 571 U.S. 117, 136-38 (2014); *Magdalena v. Lins*, 123 A.D.3d 600, 601 (1st Dep't 2014)) (quoting *Reich v. Lopez*, 858 F.3d 55, 63 (2d Cir. 2017)). In the instant case, Ziankovich has admitted that all three defendants are Colorado domiciliaries. NYSCEF Doc. No. 1, ¶¶ 11, 17, 21. As such, this Court does not have personal jurisdiction under defendants' domicile. Ziankovich, however, also fails to prove that any of defendants' contacts with New York were so extensive as to support general jurisdiction.

With respect to Large, Ziankovich fails to plead any connection between Large and New York State aside from the fact that he mailed documents in connection with the Colorado disciplinary proceedings to Ziankovich's New York address. This is insufficient to support a finding of general jurisdiction. Additionally, even this one action by Large was performed in his professional capacity as an attorney for OARC, which is also insufficient to support a finding of general jurisdiction. *See id.*

With respect to Bennett, since she is not a New York domiciliary and Ziankovich has failed to plead any connection between Bennett and New York State, with the exception of email

communications allegedly sent to his New York office, this Court finds that general jurisdiction has not been established under CPLR 301.

With respect to Howard, she is also not a New York domiciliary and the only connection Ziankovich has plead to attempt to establish a connection between Howard and New York State is that she allegedly mailed a grievance complaint against him to New York, which appears to have actually been filed in Colorado. Again, Ziankovich has failed to prove that Howard's contacts with New York were so extensive so as to support a finding of general jurisdiction under CPLR 301.

Additionally, there is no basis for personal jurisdiction over any defendant under New York's long arm statute, CPLR 302. CPLR 302(a) provides that personal jurisdiction over a non-domiciliary exists when that individual, or their agent, commits one of the following acts, as relevant herein:

> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
> 2. commits a tortious act within the state . . . ; or
> 3. commits a tortious act without the state causing injury to person or property within the state . . . , if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state or derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state.

CPLR 302(a)(1)-(4). "[T]he exercise of jurisdiction [must] comport[ ] with due process" such that "[i]f either the statutory or constitutional prerequisite is lacking, the action may not

proceed." *Williams v. Beemiller, Inc.*, 33 N.Y.3d 523, 528 (2019). Specifically, "[d]ue process requires that a nondomiciliary have 'certain minimum contacts' with the forum and 'that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "With respect to due process, '[a] non-domiciliary tortfeasor has minimum contacts with the forum State … if it purposefully avails itself of the privilege of conducting activities within the forum State.'" *Id.* (alterations in original) (quoting *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 216 (2000)). More importantly, "it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction." *Id.* at 529 (quoting *Walden v. Fiore*, 571 U.S. 277, 285 (2014)). As such, the United States Supreme Court has clarified "that the relationship between defendant and the forum state must arise out of defendant's own contacts with the forum and not 'contacts between the plaintiff (or third parties) and the forum State.'" *Id.* (quoting *Walden*, 571 U.S. at 284).

Here, Ziankovich fails to allege facts sufficient to establish long arm jurisdiction over Large under CPLR 302(a). The harm or tortious conduct alleged by Ziankovich is that he was suspended from practicing law in Colorado as a result of Large's actions, thus, the situs of the injury is Colorado. *See IMAX Corp.*, 154 A.D.3d at 465. As discussed above, Large's only interaction with New York State was that he mailed documents in connection with the Colorado disciplinary proceedings to Ziankovich's New York address. This is hardly sufficient to establish that Large "regularly does or solicits business" with the State of New York or that he sought to transact business within the State of New York. *See* CPLR 302(a)(1), (a)(3)(i); *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 509 (2007) ("And in none of his letters to plaintiff did defendant seek to consummate a New York transaction or to invoke our State's laws.");

Liberatore v. Calvino, 293 A.D.2d 217, 220 (1st Dep't 2002) ("Telephone calls and written communications, which generally are held not to provide a sufficient basis for personal jurisdiction under the long-arm statute, must be shown to have been 'used by the defendant to actively participate in business transactions in New York.'" (quoting *Levisohn, Lerner, Berger & Langsam v. Med. Taping Sys.*, 10 F. Supp. 2d 334, 340 (S.D.N.Y. 1998))). Ziankovich also fails to submit any other indicia of evidence to support a finding that Large has the type of minimum contacts with New York required to establish long arm jurisdiction in this instance. *See* CPLR 302(a)(3)(i)-(ii).

Similarly, Bennett has no connection to New York—she only visited the state once with her family approximately fifteen years ago. NYSCEF Doc. No. 13, ¶ 4. She never lived in New York, transacted business in New York, hired employees in New York, entered into contracts in New York, attended school in New York, or owned property in New York. *Id.* As such, it would offend the traditional notions of fair play and substantial justice to hale her before this Court as she has no contacts with the state of New York.

Again, Ziankovich has failed to plead any allegations to establish long-arm jurisdiction over Howard to satisfy any of the requirements of CPLR 302. Howard has never transacted business in New York or contracted to supply goods or services in the state. NYSCEF Doc. No. 29, at 9. She is an attorney admitted to practice law in Colorado and is not admitted to practice law in New York, nor does she have an office, employees, or other agents acting on her behalf in the state. *Id.* Further, Howard neither owns, uses, or possess any real property in New York. *Id.* at 13. The only interaction Ziankovich alleges that Howard had with New York was that she mailed a grievance complaint against him to the State of New York, but it appears that this complaint was actually filed in Colorado. NYSCEF Doc. No. 20, ¶ 3. This is insufficient to

establish that Howard "regularly does or solicits business" with the State of New York or sought to transact business within the state. *See* CPLR 302(a)(1), (a)(3)(i)-(ii); *Ehrenfeld*, 9 N.Y.3d at 509. In any event, "plaintiff's vague, conclusory and unsubstantiated allegations do not suffice to establish long arm jurisdiction." *Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 487 (1st Dep't 2017).

While the standard clearly emphasizes that the appropriate measure for evaluating the existence of long arm jurisdiction are the defendant's contacts with the state, this Court would like to dispel any notion that the fact that Ziankovich is licensed to practice law in New York is a sufficient basis to assert personal jurisdiction over defendants. Additionally, that Ziankovich purportedly has an office in New York, which is merely a well-known virtual office that provides mail forwarding services, is not "a sufficient predicate for jurisdiction" in New York. *IMAX Corp.*, 154 A.D.3d at 465.

II. Subject Matter Jurisdiction

As a secondary matter, this Court lacks subject matter jurisdiction over all three defendants. This Court will first address the lack of subject matter jurisdiction with respect to the doctrine of sovereign immunity, which bars the instant action against Large. This Court will next address the lack of subject matter jurisdiction with respect to the application of absolute privilege as a bar to suit against Bennett and Howard.

First, Large is being sued for performing acts in his official capacity as an attorney for OARC. In particular, Ziankovich takes issue with charges of misconduct with respect to legal services he performed in Colorado federal courts, which resulted in his suspension from the practice of law in Colorado. Yet, it has long been held that states have sovereign immunity from suits brought by private parties and cannot be sued in any court without a waiver of this

immunity except in certain limited circumstances permitted by the Constitution for suit in federal court. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493-95 (2019); *id.* at 1496 (citing cases barring various different actions). While "[t]he founding generation thus took it as given that States could not be haled involuntarily before each other's courts" (*id.* at 1494), the Eleventh Amendment was later ratified to preserve the sovereign immunity of the states because the ratification of the Constitution caused the states to surrender a portion of their sovereign immunity to be subject to suit in federal court (*id.* at 1495-96). Because the ratification of the Constitution "affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns," "[e]ach State's equal dignity and sovereignty under the Constitution implies certain constitutional 'limitation[s] on the sovereignty of all of its sister States.'" *Id.* at 1497 (second alteration in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)). Accordingly, "[o]ne such limitation is the inability of one State to hale another into its courts without the latter's consent. The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design." *Id.* This "[i]nterstate sovereign immunity is . . . integral to the structure of the Constitution" (*id.* at 1498) and "a historically rooted principle embedded in the text and structure of the Constitution" (*id.* at 1499), "which [the States] retain today" (*Regents of Univ. of Minn. v. LSI Corp.*, 926 F.3d 1327, 1337 (Fed. Cir. 2019). Thus, "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment" and, therefore, sovereign immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984), *superseded by statute on other grounds*, 28 U.S.C. § 1367. For this reason alone, this

Court lacks subject matter jurisdiction over Large and the action should be dismissed as against him on this ground.[11]

As it relates to Ziankovich, the charges of misconduct were reviewed by an impartial Hearing Board established by the Colorado Supreme Court to exclusively hear OARC cases consisting of disciplinary proceedings against attorneys who have allegedly violated the Colorado Rules of Professional Conduct. C.R.C.P. 251.3(c)(3)-(4), 251.10, 251.16-18, 251.27(a). This includes jurisdiction over attorneys licensed to practice law in other states who appear before federal courts and regulatory agencies in Colorado. Colo. RPC 8.5(a). "The Colorado Supreme Court, as part of its inherent and plenary powers, has exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado to protect the public." *Colorado Supreme Court Grievance Comm. v. District Court, City & Cty. of Denver, Colo.*, 850 P.2d 150, 152 (Colo. 1993); *see also In re Wollrab*, 420 P.3d 960, 964 (Colo. 2018) (same; stating that district courts have no jurisdiction over disciplinary proceedings); *In re Kleinsmith*, 409 P.3d 305, 308 (Colo. 2017) (same). The reasoning behind this grant of exclusive subject matter jurisdiction is that attorney disciplinary proceedings "are not strictly civil or criminal cases," but are instead characterized as "unique, or *sui generis*, having been designed for the precise, and sole, purpose of exercising this exclusive jurisdiction and fulfilling this responsibility of the supreme court." *Chessin v. Office of Attorney Regulation Counsel*, 458 P.3d 888, 891 (Colo. 2020) (internal quotation marks and citations omitted).[12]

[11] Additionally, Large makes the procedural argument that in certain enumerated areas under the Colorado Governmental Immunity Act wherein claims can be brought against state agencies and employees, Ziankovich would have had to timely file a Notice of Claim, pursuant to Colorado Revised Statutes Section 24-10-109. Ziankovich failed to comply with the Colorado statute.

[12] New York has a corresponding jurisdictional exclusivity over attorney disciplinary proceedings: "only the Appellate Division of the Supreme Court and not an IAS, special, trial, or other term of the Supreme Court has jurisdiction over attorney disciplinary matters." *Taylor v. Adler*, 73 A.D.3d 937, 938 (2d Dep't 2010) (citing New York Judiciary Law § 90).

Further, the Colorado Supreme Court has already rejected Ziankovich's argument that OARC lacks jurisdiction over him in Colorado, and he was found to be precluded from raising it in the Colorado District Court. *See generally* NYSCEF Doc. No. 8. Because Large operated within this framework when he investigated or prosecuted Ziankovich for professional misconduct, he has sovereign immunity and the action is dismissed as against him.

As an aside, had Ziankovich timely filed a Notice of Claim and filed suit against Large in a proper forum, absolute immunity would apply to bar suit against Large because he was acting within a quasi-judicial function. *See Hoffler v. Colorado Dep't of Corrections*, 27 P.3d 371, 374 (Colo. 2001) (en banc) ("In Colorado, absolute immunity has been extended to judges, prosecutors, witnesses, and other persons who perform official functions in the judicial process. We have also recognized that administrative officials, acting in a quasi-judicial role, are entitled to absolute immunity." (citations omitted)) (citing cases recognizing immunity in various situations); *Klapper v. Guria*, 153 Misc. 2d 726, 730-31 (Sup. Ct. N.Y. County 1992) (Tom, J.) ("It is clear that the State defendants acted under authority of, and in full compliance with, governing statutes and regulations in investigating and prosecuting the alleged acts of misconduct attributed to the plaintiff and that their actions constituted discretionary conduct of a quasi-judicial nature for which they have absolute immunity."). Finally, Large is also immune from suit based upon rules promulgated by the Colorado Supreme Court that protect employees of attorney disciplinary branches of the State of Colorado. *See* C.R.C.P. 251.32(e).

Further, Bennett and Howard are also entitled to dismissal of the instant action on the grounds that they are immune from liability based upon the absolute privilege afforded to those individuals involved in attorney disciplinary proceedings. Colorado Rule of Civil Procedure Section 251.32(e) states, in relevant part, as follows:

> **(e) Immunity.** Testimony given in disciplinary proceedings or communications relating to attorney misconduct, lack of professionalism or disability made to the Supreme Court, the committee, the Regulation Counsel, the Presiding Disciplinary Judge, members of the Hearing Board, mediators acting pursuant to C.R.C.P. 251.3(c)(11), or monitors enlisted to assist with probation or diversion, as authorized by C.R.C.P. 251.13, shall be absolutely privileged and no lawsuit shall be predicated thereon. . . . Persons performing official duties under the provisions of this Chapter, including but not limited to the Presiding Disciplinary Judge and staff; members of the Hearing Board; the committee; the Regulation Counsel and staff; mediators appointed by the Supreme Court pursuant to C.R.C.P. 251.3(c)(11); monitors enlisted to assist with diversion as authorized by C.R.C.P. 251.13; members of the Bar working in connection with disciplinary proceedings or under the direction of the Presiding Disciplinary Judge, or the committee; and health care professionals working in connection with disciplinary proceedings shall be immune from suit for all conduct in the course of their official duties.

In Colorado, "[t]he public policy of encouraging people to report lawyer misconduct has been consistently favored over the right of a lawyer who has been falsely accused to obtain judicial relief." *In re Smith*, 989 P.2d 165, 172 (Colo. 1999) (en banc). This principle applies equally to both witnesses of alleged misconduct and their attorneys. *See In re Stepanek*, 940 P.2d 364, 368 (Colo. 1997) (en banc) (holding that absolute immunity permits key participants in the judicial process to perform their respective functions without intimidation or harassment); *Hoffler*, 27 P.3d at 373-74 ("Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. . . . Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury.").

The same is true under New York law. In New York, while there is not a reciprocal statute, the Court of Appeals has stated the following with respect to absolute privilege:

> Assuredly, it is in the public interest to encourage those who have knowledge of dishonest or unethical conduct on the part of lawyers to impart that knowledge to a Grievance Committee or some other body designated for investigation. If a complainant were to be

> subject to a libel action by the accused attorney, the effect in many instances might well be to deter the filing of legitimate charges. We may assume that on occasion false and malicious complaints will be made. But, whatever the hardship on a particular attorney, the necessity of maintaining the high standards of our bar—indeed, the proper administration of justice—requires that there be a forum in which clients or other persons, unlearned in the law, may state their complaints, have them examined and, if necessary, judicially determined.

Weiner v. Weintraub, 22 N.Y.2d 330, 332 (1968). Further, the Court of Appeals explained that in *Weiner*, *supra*, it

> indicated that the absolute privilege can extend to preliminary or investigative stages of the process, particularly where compelling public interests are at stake. In *Wiener*, we held that a complaint letter accusing an attorney of misconduct that had been sent to the grievance committee of a bar association was absolutely privileged. We observed that the grievance committee functions as a quasi-judicial body through its investigation of complaints and administration of disciplinary proceedings. We also emphasized the strong public policy reasons warranting the extension of an absolute privilege to such complaints[.]

Rosenberg v. Metlife, Inc., 8 N.Y.3d 359, 365-66 (2007) (citations omitted). Thus, the complained of communications—those between an individual and an attorney disciplinary committee—are also absolutely privileged under New York law. *Weiner*, 22 N.Y.2d at 332. As such, it is irrelevant whether the complaint filed by Bennett and Howard was filed with either the Colorado or New York bar, as the underlying actions taken with regard to the filing of this complaint are subject to absolute privilege. *See, e.g.*, *In re Smith*, 989 P.2d at 172-73 ("We therefore find that the filing of a complaint with an ethics and grievance committee is privileged and that an attorney cannot predicate a malicious prosecution action or similar suit upon it." (internal quotation marks and citation omitted)); *Sinrod v. Stone*, 20 A.D.3d 560, 562 (2d Dep't 2005) ("[C]laims challenging the complaints of misconduct filed with the Grievance Committee

by the defendants were absolutely privileged."). Thus, the instant action is also dismissed as against Bennett and Howard, respectively, based upon the application of absolute privilege.

III. Sanctions

The standard to impose sanctions is set forth in 22 NYCRR 130-1.1, which permits an award of sanctions against a party or an attorney who engages in frivolous conduct. *See* 22 NYCRR 130-1.1(a). Conduct is defined as frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

Id. § 130-1.1(c). In making a determination as to whether the conduct at issue was frivolous, "the court shall consider . . . the circumstances under which the conduct took place . . . and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party." *Id.* Sanctions may consist of "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" as well as financial sanctions. *Id.* § 130-1.1(a).

All of the defendants seek to have sanctions imposed upon Ziankovich for having prosecuted frivolous litigation. Although Ziankovich did not provide any meaningful opposition to this branch of defendants' motions, this Court has conducted its own evaluation of the issue and finds that sanctions are warranted as a penalty for filing "frivolous litigation [that] causes a substantial waste of judicial resources to the detriment of those litigants who come to the court with real grievances." *Weinstock v. Weinstock*, 253 A.D.2d 873, 874 (2d Dep't 1998).

As an initial matter, Ziankovich should have been aware that there is no New York nexus to his dispute with defendants. Indeed, the only apparent reason he is suing in this Court is because the Colorado courts, both state and federal, have rejected his argument that Colorado was wrongfully disciplining him. In this instance, it is apparent that Ziankovich, at the very least, should have known that his continued conduct, including filing the instant lawsuit, lacked any legal or factual basis and, therefore, constitutes frivolous conduct. *See Cardinal Holdings, Ltd. v. Indotronix Int'l Corp.*, 73 A.D.3d 960, 963 (2d Dep't 2010) ("The record supports the Supreme Court's finding that the commencement of this action by [plaintiff] was frivolous and was undertaken primarily to harass the defendants. The continuation of the same meritless arguments on appeal would appear to constitute frivolous conduct." (citation omitted)). Nonetheless, Ziankovich filed the instant lawsuit reasserting the same argument that he has made countless times, but this time under the guise of a violation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, pursuant to 18 U.S.C. § 1964(c). Further, it is frivolous to claim a RICO violation when, upon Ziankovich's failure to return a $1,500 retainer payment, the former client and her new lawyer file a misconduct complaint with attorney disciplinary authorities that then commence proceedings. *See Klapper*, 153 Misc. 2d at 730-31.

Accordingly, the applications seeking to impose sanctions are granted and a Special Referee will hear and report with recommendations as to the amount of reasonable attorneys' fees, costs, and disbursements incurred by defendants in opposing this frivolous lawsuit.

Based upon the foregoing, it is hereby

ORDERED that the branch of Motion Sequence No. 001 seeking to dismiss the action, pursuant to CPLR 3211(a)(1), (a)(7), and (a)(8), as against defendant Bryon M. Large is granted; and it is further

ORDERED that the branch of Motion Sequence No. 002 seeking to dismiss the action, pursuant to CPLR 3211(a)(1), (a)(7), and (a)(8), as against defendant Kimberly Bennett is granted; and it is further

ORDERED that the branch of Motion Sequence No. 003 seeking to dismiss the action, pursuant to CPLR 3211(a)(1), (a)(7), and (a)(8), as against defendant Jennifer Howard is granted; and

This Court having determined that plaintiff Youras Ziankovich has engaged in frivolous conduct as defined in Section 130-1.1(c) of the Rules of the Chief Administrative Judge as set forth above and that costs should be awarded, it is therefore

ORDERED that the branches of Motion Sequence Nos. 001, 002, and 003 seeking sanctions, pursuant to 22 NYCRR 130-1.1, are granted, and the issue of the reasonable value of attorneys' fees, costs, and disbursements incurred by defendants in defending against this action to be recovered from plaintiff Youras Ziankovich is severed and referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that one of defendants' counsel shall, within thirty (30) days from the date of this order, serve a copy of this order with notice of entry, together with a completed information sheet,[13] upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of this Court.

Dated: June 1, 2020

Hon. James E. d'Auguste, J.S.C.

[13] Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link.