IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARSHA W. MIGNOTT, **Plaintiff,** **v.** **THE STATE BAR OF GEORGIA FOUNDATION, INC.; STATE BAR OF GEORGIA OFFICE OF GENERAL COUNSEL; WILLIAM VAN HEARNBURG, JR.** **Defendants.**	**CIVIL ACTION FILE** **NO.: 1:23-CV-1834-ELR**

DEFENDANTS' MOTION TO DISMISS AND
BRIEF IN SUPPORT THEREOF

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STATEMENT OF THE ISSUES

1. Should Mignott's claims be dismissed on any of the following grounds:

    a. Younger abstention

    b. Lack of subject-matter jurisdiction

    c. Immunity

    d. Failure to State a Claim

I. FACTUAL BACKGROUND

Introduction

Mignott is a lawyer and a member of the State Bar of Georgia. She is the subject of an ongoing disciplinary action based on Rules 1.8(b) and 1.9(c)(2), which pertain to conflict of interest. The *Formal Complaint* filed in the disciplinary action asserts that Mignott improperly used information she received during a consultation with a prospective client against that prospective client in a subsequent proceeding. [**Dkt.** 1, p. 12] The Georgia Supreme Court appointed a Special Master to conduct a hearing regarding the allegations against Mignott. After the hearing, the Special Master recommended that Mignott be suspended for two years from the practice of law. [**Id.**, p. 14] Mignott has exercised her right to seek review from the State Disciplinary Review Board. Ga. Bar Rules 4-215-216. In addition to the right of review from the State Disciplinary Review Board, Mignott will have a chance to raise objections to the Georgia Supreme Court before any public discipline is imposed. Ga. Bar Rule 4-218 As of the date of this *Motion*, the disciplinary process is ongoing, but no discipline has been imposed on Mignott.

In the instant suit, Mignott sues two entities associated with the State Bar of Georgia[1] and William Hearnburg, who is the State Bar Assistant General Counsel assigned to Mignott's case.

Mignott's Allegations

Mignott initiated this action on April 23, 2023. [**Dkt. 1**] Mignott alleges that Defendants violated her civil and constitutional rights pursuant to 42 U.S.C. § 1981 due to their involvement in the disciplinary action against her. [**Id.**, pp. 2-3] Mignott asks for, among other things, money damages, a declaration that Defendants' conduct violated U.S. and Georgia law, and "[a]n award of injunctive relief necessary to cure Defendants' discriminatory policies and practices[.]" [**Id. 1**, p 25] Mignott also asks for class certification pursuant to Rule 23 based on her claim that there are other similarly-situated attorneys who have been discriminated against in the disciplinary process. [**Id.**, p. 19]

[1] As discussed below, Mignott sued the incorrect parties. The Foundation does not do anything relating to attorney discipline and the Office of General Counsel is not a separate entity capable of being sued.

II. ARGUMENT

A. This Court Must Abstain from Intervening Pursuant to the *Younger* Doctrine.

Mignott's request for injunctive and declaratory relief in this action is a request for this Court to intervene in the ongoing disciplinary proceedings currently pending in the Georgia Supreme Court against Mignott. As the United States Supreme Court has held, "since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. 37, 43, 91 S. Ct. 746, 750, 27 L. Ed. 2d 669 (1971).

The United States Supreme Court held that the *Younger* doctrine applies in three categories of cases: (1) State criminal proceedings, (2) certain civil enforcement proceedings, and (3) civil proceedings involving certain orders "uniquely in furtherance of the state courts' ability to perform their judicial functions. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78, 134 S. Ct. 584, 591, 187 L. Ed. 2d 505 (2013).

A State Bar disciplinary proceeding falls into the second category.[2] The Court held that "[s]uch enforcement actions are characteristically initiated to sanction the federal plaintiff, i.e., the party challenging the state action, for some wrongful act[.]" The Supreme Court held that attorney discipline proceedings are an example of such a civil enforcement proceeding that would give rise to *Younger* abstention. *Id.*, referencing *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982).

Once it is determined that a case falls into one of the three categories outlined in the *Sprint* case, as this case does, the Court must then apply three additional factors from the *Middlesex* case. This Court should abstain if the following criteria are met: If (1) state proceedings are currently pending; (2) the proceedings involve an important state interest; and (3) the state proceedings will provide the plaintiff with an adequate opportunity to raise his or her constitutional claims. *Id.* at 432.

If a federal court lawsuit seeks relief that would effectively enjoin a state proceeding, then the first factor of the *Younger* doctrine is met. *See Old Republic Union Ins. Co. v. Tillis Trucking Co.*, 124 F.3d 1258, 1261–62 (11th Cir. 1997). The first factor is satisfied in this case, since there is a disciplinary action currently

[2] To the extent Mignott's disciplinary action generates an order, it will implicate the third category as well.

pending against Mignott in the Georgia Supreme Court[3] that Mignott seeks to terminate. In the instant case, Mignott seeks a declaration that the disciplinary action violates state and federal law. Mignott also seeks an injunction that would "cure" Defendants' allegedly discriminatory conduct and to award her damages. [**Dkt. 1**, p. 24] Clearly, Mignott is asking this Court to terminate the disciplinary action against her.

The relief Mignott seeks in the instant suit is similar to the relief sought by a litigant in a recent case against the Georgia State Bar. In that case, the lawyer was also the subject of an ongoing disciplinary action. He filed suit in federal court, seeking a declaratory judgment that the Bar violated his constitutional rights. He also sought injunctive relief to restrain the Bar from alleged constitutional violations. The 11th Circuit held that the "[i]n our view, this relief would clearly 'interfere' with the State Bar's investigation into [the lawyer]." *Wood v. Frederick*, No. 21-12238, 2022 WL 1742953, at *6 (11th Cir. May 31, 2022). As such, the Court found that the first *Younger* factor was satisfied and abstention was appropriate. *See also, Henry v. Fla. Bar*, 701 F. App'x 878, 882 (11th Cir. 2017). As the *Henry* decision states, "[t]he first factor is met when a state proceeding is ongoing and the relief sought by the plaintiff would interfere with the state proceeding. The plaintiff's requested relief

[3] *In the Matter of Marsha Williams Mignott*, S21B0411.

can interfere with the state proceeding if it would disrupt the normal course of action in the state proceeding, even if the relief sought would not terminate an ongoing proceeding." *Id.*

The second factor is also satisfied. Georgia has an important state interest in regulating the conduct of its attorneys, "since lawyers are essential to the primary governmental function of administering justice and have historically been 'officers of the courts.'" *Cohran v. State Bar of Georgia*, 790 F. Supp. 1568, 1571 (N.D. Ga. 1992). The United States Supreme Court held that a state has an "extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435, 102 S. Ct. 2515, 2523, 73 L. Ed. 2d 116 (1982).

Finally, the third factor is also met. The State Bar grievance proceedings involve a hearing before a special master, a right to State Disciplinary Board review, and final consideration by the Georgia Supreme Court, *See* Ga. Bar Rules 4-202-218. In the disciplinary proceedings, the State Bar must prove by clear and convincing evidence that an attorney violated an ethical Rule, except for cases in which an attorney is convicted of a serious crime. Ga. Bar Rule 4-221.2. Mignott has ample opportunity to raise and preserve her constitutional concerns before public discipline is imposed. The State Bar's procedures clearly satisfy the third factor.

This Court was faced with a nearly identical fact pattern in 1992 in the matter of *Cohran v. State Bar of Georgia*. In that case, as in the instant case, Cohran filed an action in the Federal District Court for the Northern District of Georgia seeking an injunction to enjoin the State Bar and its employees from continuing disciplinary proceedings against him. The District Court refused to grant injunctive relief, holding that federal courts should abstain from interfering with a state bar's ongoing disciplinary actions against its attorneys. *See also Wood v. Frederick*, No. 21-12238, 2022 WL 1742953, at *6 (11th Cir. May 31, 2022).

The reasoning behind the *Cohran* decision is equally applicable to the instant case. It is important to note that Cohran, like Mignott in the instant case, raised constitutional claims in an attempt to invoke the federal court's jurisdiction. The federal court held that, since attorneys have a chance to raise constitutional claims with the Georgia Supreme Court before discipline is imposed, the federal court had no need to intervene to stop the disciplinary proceedings. *Cohran*, at 1571 (N.D. Ga. 1992).

The United State Supreme Court has held that "it is perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Younger*, at 45 (1971). This case presents no reason to make an

exception to this general rule. The Court should decline Mignott's request that it interfere in the pending disciplinary action in the Georgia Supreme Court. The Court should dismiss Mignott's *Complaint*.

B. This Court Lacks Subject Matter Jurisdiction Over Mignott's Claims

Subject-matter jurisdiction can never be waived or conferred by the consent of the parties. This Court is "duty-bound" to determine the basis for subject-matter jurisdiction in this Court and "to dismiss for lack of jurisdiction any case in which it is found to be wanting." *Latin Am. Prop. & Cas. Ins. Co. v. Hi-Lift Marina, Inc.*, 887 F.2d 1477, 1479 (11th Cir. 1989). *See also*, Federal Rule of Civil Procedure 12(b)(1). If faced with factual disputes regarding subject matter jurisdiction, the Court acts as the fact-finder and may weigh the evidence, provided that the challenge to subject-matter jurisdiction does not implicate an element of the cause of action. *Scarfo v. Ginsberg*, 175 F.3d 957, 961 (11th Cir. 1999).

The Supreme Court of Georgia is the only Court with subject-matter jurisdiction over "a cause of action whereby a party seeks to challenge the action or inaction of the State Bar or any person in connection with a disciplinary proceeding." *Wallace v. State Bar of Georgia*, 268 Ga. 166, 167, 486 S.E.2d 165, 167

(1997)(citing Rule 4–225)[4]. This is because "[t]he regulation of the practice of law is a judicial function…**The Supreme Court of Georgia is endowed with the inherent and exclusive authority to govern the practice of law in Georgia**." *Id*. (emphasis added). Since Mignott's action clearly relates to the actions of Defendants in connection with her disciplinary proceedings, this Court lacks subject-matter jurisdiction over Mignott's claims and must dismiss the instant action.

In the *Cohran* case, the Court held that "[O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar **may be reviewed only by the Supreme Court of the United States on certiorari to the state court**, and not by means of an original action in a lower federal court." *Cohran*, at, 1572 (N.D. Ga. 1992)(emphasis added).

Again, the fact that Mignott invokes the constitution and other federal law does not change this analysis. Last year, the 11th Circuit approvingly cited the *Wallace* holding, noting that Georgia State Bar Rule 4-218 provides a lawyer the opportunity to raise constitutional arguments with the Georgia Supreme Court before discipline is meted out. As such, the rule granting exclusive jurisdiction to the Georgia Supreme Court does not raise constitutional concerns. *See Wood v. Frederick*, No.

[4] The State Bar of Georgia is the administrative arm of the Georgia Supreme Court. *See* O.C.G.A. § 15-19-30 and *Wallace v. Wallace*, 225 Ga. 102, 113, 166 S.E.2d 718, 725 (1969).

21-12238, 2022 WL 1742953, at *6 (11th Cir. May 31, 2022). *See also*, *Cohran v. State Bar of Ga.*, 790 F. Supp. 1568, 1571 (N.D. Ga. 1992) ("[P]laintiff had opportunity to, and in fact did, raise his constitutional challenges to the state proceeding before the Georgia Supreme Court.") This Court lacks subject matter jurisdiction over Mignott's claims and must dismiss them.

C. Mignott Fails to State a Claim

1. Constitutional Claims

In order to survive a motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face…The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Mignott's constitutional and civil rights claims fail to meet this standard.

Mignott brings her action under Title 42 U.S.C. § 1981, which creates a federal right of action for victims of certain types of racial discrimination relating to employment relationships and the right to enter into contracts. *Baltimore-Clark v. Kinko's Inc.*, 270 F. Supp. 2d 695, 700 (D. Md. 2003). To state a claim for non-employment discrimination under § 1981, a plaintiff must allege (1) she is a member of a racial minority, (2) the defendant intended to racially discriminate against her,

and (3) the discrimination concerned one or more of the activities enumerated in the statute. *Rutstein v. Avis Rent–A–Car Sys., Inc.*, 211 F.3d 1228, 1235 (11th Cir.2000).

In order to make a *prima facie* case for a §1981 claim, Mignott must allege not only that she was discriminated against, but she must also identify a similarly situated person of a different race (the "apt comparator") who was not subject to the same treatment. *Benton v. Cousins Properties, Inc.*, 230 F. Supp. 2d 1351, 1370 (N.D. Ga. 2002), aff'd, 97 F. App'x 904 (11th Cir. 2004).

Mignott fails to allege that there was an apt comparator who had similar allegations against her and was treated differently. Mignott refers only to an attorney who allegedly failed to return an unearned retainer and another attorney who had a grievance dismissed. The details of the latter attorney's alleged rules violation are not included in Mignott's *Complaint*. [**Dkt. 1**, pp. 5-7] Mignott cannot point to any lawyer who was not disciplined after using information about a prospective client in a future proceeding against that prospective client. Mignott's failure to identify one person whose conduct was similar to Mignott's and who was treated differently is fatal to her claims, regardless of the code section under which they are raised. *Arrington v. Dickerson*, 915 F. Supp. 1503, 1509 (M.D. Ala. 1995).

Mignott's claims against Defendant Hearnburg are particularly deficient. The only action alleged in the *Complaint* against Defendant Hearnburg within the statute

of limitations period is that he somehow engaged in racial discrimination by providing the Special Master the standard for defining a prospective client under Georgia Bar Rules.[5] [**Dkt. 1**, p. 13] Mignott does not state what she believes was incorrect or discriminatory about the statement made by Defendant Hearnburg. These vague allegations of discrimination are wholly insufficient to state a claim.

Finally, Mignott's claims fail in their entirety because none of the Defendants actually imposed any discipline against Mignott or against any other attorney referenced in the *Complaint*. The Georgia Supreme Court is the entity that imposes discipline. Defendants may have investigated Mignott, prosecuted her disciplinary action, or recommended discipline, but none of them imposed any discipline on her, so none of them deprived Mignott of any property right. While Mignott may claim a property right in her license to practice law, there is no right to be immune from investigation. *See In re Henley*, 271 Ga. 21, 22, 518 S.E.2d 418, 420 (1999). Defendants are not responsible for depriving Mignott of any property right.

[5] Mignott's constitutional claims are brought pursuant to 42 U.S.C. § 1981. [**Doc. 14**, p. 3] Such claims are subject to the statute of limitations period governing personal injury actions in the state where the action is brought. In Georgia, this period is two years. *See Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1263 (11th Cir. 2014)

2. Mignott Sued the Incorrect Parties

Mignott sued the State Bar of Georgia Foundation, Inc., which is the non-profit arm of the State Bar of Georgia. The State Bar of Georgia Foundation, Inc. is not involved at all in attorney discipline. Only the State Bar of Georgia can investigate and recommend[6] discipline in Georgia. The Supreme Court of Georgia, in *Scanlon v. State Bar of Georgia*, 264 Ga. 251,252, 443 S.E.2d 830 (1994), held:

> The State Bar is authorized to maintain and enforce standards of conduct to be observed by members of the State Bar and those authorized to practice law in Georgia. State Bar Rule 4-101. Through enactment of State Bar Rule 4-202, this court has empowered the Office of the General Counsel of the State Bar to receive and screen grievances filed against members of the State Bar, and to investigate and collect evidence and information concerning the grievances.

Plaintiff also sued the State Bar of Georgia Office of the General Counsel, which is also an improper entity. If Mignott had viable and meritorious claims regarding her disciplinary procedure, which she does not, the proper defendant would be the State Bar of Georgia.[7] *See* Ga. Bar Rule 1-102.

[6] Only the Supreme Court of Georgia can impose public discipline on a lawyer in Georgia; however, the Supreme Court allows the State Bar of Georgia Disciplinary Board to impose private discipline for lesser infractions pursuant to Rule 4-203.
[7] As stated above, the sole proper venue for such an action would be the Georgia Supreme Court.

D. Immunity Defenses Bar Mignott's Claims

In addition to the independent grounds for dismissal stated above, Mignott's claims are subject to dismissal on the following grounds:

1. Judicial Immunity- The exercise of discretion to discipline an attorney is analogous to the decisions of a judicial officer. As such, judicial immunity bars suits based on these decisions. *Emory v. Peeler*, 756 F.2d 1547, 1553 (11th Cir. 1985). See also Ga. Bar Rule 4-226 ("[M]embers of the State Disciplinary Boards, the Coordinating Special Master, Special Masters, Bar counsel, special prosecutors, investigators, and staff are entitled to those immunities customarily afforded to persons so participating in judicial and quasi-judicial proceedings or engaged in such regulatory activities.")
2. Prosecutorial Immunity- State Bar personnel are also entitled to prosecutorial immunity, which bars claims against them relating to their prosecution of disciplinary actions. *Scanlon v. State Bar of Georgia*, 264 Ga. 251, 252-253; 443 S.E.2d 830 (1994).
3. Qualified Immunity- As the administrative arm of the Georgia Supreme Court, Defendants are entitled to qualified immunity. This doctrine states

that there is no liability for a discretionary act that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982).

E. Class Certification Is Not Appropriate

As discussed above, Mignott fails to show that there is a cognizable class of lawyers who have been discriminated against by Defendants. Mignott only makes vague reference to a certain number of lawyers who were allegedly discriminated against, although Mignott does not provide any details regarding the substance of the grievances against the lawyers or the discipline imposed against the lawyers.

Further, Mignott may not seek class certification since her own claim fails as a matter of law. *See Fisher v. Ciba Specialty Chemicals Corp.*, 238 F.R.D. 273, 298 (S.D. Ala. 2006). Finally, the requirement that the putative class members share common questions of law and fact cannot be satisfied, given that the attorney discipline process is highly individualized. The severity of discipline sought or imposed depends on numerous idiosyncratic factors, such as a lawyer's previous disciplinary history, his remorse, or his attempts at restitution. Mignott's unsupported claim that there are other minority lawyers who have been discriminated against in the disciplinary process is not sufficient to support class

certification. *See Garcia v. Veneman*, 224 F.R.D. 8, 11 (D.D.C. 2004)("Anecdotal proof of discrimination against Hispanic farmers, and even statistical proof that Hispanic farmers have received proportionally less assistance than others, will not be enough to support class certification.")

F. Mignott is Not Entitled to An Injunction

Mignott asks the Court to enjoin Defendants and various other people and entities from several categories of actions relating to the disciplinary process. [**Dkt. 1**, p. 24] To the extent that these requests ask the Court to overturn discipline already meted out, they are barred by the *Rooker-Feldman* doctrine.[8] To the extent that these requests ask the Court to intervene in ongoing disciplinary actions, they are barred by the *Younger* doctrine. To the extent these requests ask the Court to order Defendants to refrain from discriminating in future disciplinary actions, they fail on the grounds that a Court is "incapable of enforcing" a broad and vague injunction that does no more than instruct a party to "obey the law." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999). Mignott's claim for an injunction fails.

[8] Pursuant to this doctrine, a federal court may not review judgment of a state's supreme court. Any such review must be had pursuant to certiorari to the United States Supreme Court. *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 476, 103 S. Ct. 1303, 1311, 75 L. Ed. 2d 206 (1983).

III. CONCLUSION

Mignott's claims are without merit, and this Court lacks jurisdiction to consider them. For the reasons stated above, Plaintiff's *Complaint* should be dismissed in its entirety.

Respectfully submitted this 11th day of May, 2023.

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CERTIFICATE OF SERVICE AND OF COMPLIANCE WITH LOCAL RULE 5.1

I hereby certify that on May 11, 2023 a true and correct copy of this document was filed with the Court via the CM/ECF system. All attorneys identified with the Court for electronic service on record in this case were served by electronic transmission in accordance with the CM/ECF system, including the following counsel of record:

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I further certify that I have prepared this document in 14 point Times New Roman font.

/s/ Patrick N. Arndt