Case No. 17-17136

In the

United States Court of Appeals

For the

Ninth Circuit

TY CLEVENGER,

Plaintiff-Appellant,

v.

STEVEN MOAWAD, STACIA L. JOHNS, KIMBERLY DRESSER, AND THE STATE BAR OF CALIFORNIA

Defendants-Appellees.

Appeal from a Decision of the United States District Court
for the Central District of California, Case No. 3:17-cv-02798-WHA,
Honorable William H. Alsup, District Judge Presiding

STATE BAR APPELLEES' ANSWER BRIEF

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II. INTRODUCTION

Plaintiff-Appellant Ty Clevenger ("Clevenger") appeals the district court's Order of Dismissal, as well as a prior Order Denying Motion for Temporary Restraining Order and Preliminary Injunction. For the reasons set forth below, Defendant-Appellees Seven Moawad, Stacia L. Johns, Kimberly Kasreliovich[1], and the State Bar of California (collectively, the "State Bar") respectfully submit that the district court's Order of Dismissal should be affirmed.

III. STATEMENT OF JURISDICTION

Appellees take no issue with Clevenger's Statement of Jurisdiction.

IV. STATEMENT OF ISSUES PRESENTED

1. Whether the District Court correctly dismissed Clevenger's complaint under the abstention doctrine first articulated in *Younger v. Harris*, 401 U.S. 37 (1971)?

2. Whether the District Court's denial of Clevenger's application for a preliminary injunction is moot?

3. Whether the District Court acted within its discretion when it crafted a sanction against Appellee?

4. Whether the Honorable William H. Alsup can faithfully and impartially discharge and perform his duties should this case be remanded to the district court?

[1] Erroneously named as "Kimberly Dresser."

V. APPLICABLE STANDARD OF REVIEW

This Court reviews a district court's decision to abstain under *Younger* de novo. *Nationwide Biweekly Administration, Inc. v. Owen*, 873 F.3d 716, 727 (9th Cir,. 2017); *Baffert v. California Horse Racing Bd.*, 332 F.3d 613, 617 (9th Cir. 2003). A district court's denial of an application for a preliminary injunction is reviewed for abuse of discretion. *Nationwide*, 873 F.3d at 727. A district court abuses its discretion when it makes an error of law. *Id.* The analysis is substantially identical for a preliminary injunction and a temporary restraining order, and therefore the latter need not be addressed separately. *See Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 839, n.7 (9th Cir. 2001). Finally, a district court's order imposing sanctions is reviewed for abuse of discretion. *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162, 1169 (9th Cir. 2012).

VI. STATEMENT OF THE CASE

A. The Nature of the State Bar of California and California Supreme Court Review.

The State Bar of California is a constitutional entity, established by Article VI, section 9 of the California Constitution, and expressly acknowledged as an integral part of the judicial function. *See* Cal. Const., art. VI, § 9; Cal. Bus. & Prof. Code, § 6001; *In re Rose*, 22 Cal.4th 430, 438 (2000). It is a public corporation created as an administrative arm of the California Supreme Court for

the purpose of assisting in matters of admission and discipline of attorneys. *See In re Attorney Discipline Sys.*, 19 Cal. 4th 582, 598-99 (1998). Although the State Bar conducts its disciplinary proceedings under statutory authority, the California Supreme Court retains inherent power to control all matters related to attorney discipline. *Id*.

Attorneys subject to disciplinary proceedings are afforded constitutionally sufficient procedural due process. *Rosenthal v. Justices of the Supreme Court of California*, 910 F.2d 561, 564-65 (9th Cir. 1990). The State Bar Court independently hears matters concerning attorney discipline. Cal. Bus. & Prof. Code §§ 6086.5, 6086.65. The State Bar Court includes a Hearing Department, which conducts formal trial proceedings, and a Review Department, which functions as an appellate body in independently reviewing determinations of the Hearing Department on a *de novo* basis. Cal. R. Ct. 9.12; Cal. Bus. & Prof. Code §§ 6079.1, 6086.65. State Bar Court decisions are only recommendations to the California Supreme Court, which undertakes an independent determination as to whether the attorney should be disciplined as recommended. *In re Rose*, 22 Cal. 4th at 439. An attorney may seek review of a State Bar Court decision recommending suspension or disbarment in the California Supreme Court. Cal. R. Ct. 9.13(a). Denial of review of a decision of the State Bar Court is a final judicial

determination on the merits that may then be appealed to the United States Supreme Court. *In re Rose*, 22 Cal. 4th at 443-45.

B. The Individual State Bar Defendant-Appellees.

Defendant-Appellee Steven Moawad is the Chief Trial Counsel for the State Bar. The Office of the Chief Trial Counsel ("OCTC") has primary responsibility for carrying out the prosecutorial functions of the State Bar. Defendant-Appellee Stacia Johns is an OCTC Deputy Trial Counsel. She is the attorney assigned to Clevenger's disciplinary proceeding. Defendant-Appellee Kimberly Kasreliovich is an OCTC Senior Trial Counsel and is supervising Ms. Johns in connection with Clevenger's disciplinary proceeding.

C. Background Facts and Procedural History.

1. State Bar Disciplinary Proceedings Against Clevenger.

On February 11, 2013, the State Bar sent Clevenger a letter informing him that the Bar was aware of numerous sanctions imposed against him by various federal courts, none of which he reported to the State Bar. *See* Excerpts of Record ("E.R.") 316. Clevenger responded to the allegations and requested that the State Bar defer its investigation until the Texas Bar completed disciplinary proceedings against Clevenger. *See* E.R. 323. On August, 26, 2014 the Texas Commission for Lawyer Discipline filed an Agreed Judgment of Public Reprimand, imposing a public reprimand on Clevenger for a violation of the Texas Disciplinary Rules of Professional Conduct. *See* E.R. 326.

Then, on November 30, 2016, the United States District Court for the District of Columbia entered an Order memorializing the terms of a settlement agreement between Clevenger and the Committee of Grievances in response to charges of various violations of the District of Columbia Rules of Professional Conduct. *See* E.R. 300-303. As part of the settlement, Clevenger resigned from the federal bar of the District of Columbia. E.R. 303. In addition, Clevenger was suspended from practicing law in the United States District Court for the District of Columbia for 120 days and was fined in the amount of $5,000. *Id*. Rather than informing the State Bar of the terms of the Order, Plaintiff sent a letter to Bill Stephens, a State Bar investigator, stating only that he had been suspended from the federal bar, and attaching a letter he wrote to the Texas Board of Disciplinary Appeals, also dated December 28, 2016. *See* E.R. 304-07.

The attached letter to the Texas Board of Disciplinary Appeals also did not mention that Clevenger irrevocably resigned from the federal Bar of the District of Columbia. E.R. 305-07. Instead, the letter stated Clevenger had been suspended, and included a lengthy explanation for why he disagreed with the imposed disciplined. *Id*. He also included a copy of his 2014 settlement agreement with the *Texas* bar which dealt with his filings in a RICO case, unrelated to the acts he was disciplined for in D.C. *Id*., *see also* E.R. 122 (settlement agreement with Texas Bar).

Thus, in his letter to the State Bar—which is identical in substance to the letters Clevenger sent to the other nine jurisdictions he is admitted in, *see* E.R. 26, ¶ 9— Clevenger entirely omitted the fact he ***irrevocably resigned*** from the D.C. Bar in lieu of potential disbarment.

Additionally, Clevenger summarily stated in his letter to the State Bar that it "had already considered his case in 2013, in Case Number 13-O-10168." E.R. 304. This is a gross misstatement of the fact. While the State Bar was aware of the facts underlying the D.C. discipline in 2013, Clevenger had actually requested that the State Bar wait to proceed in its disciplinary investigation until after the proceedings in Texas concluded. *See* E.R. 323 ("I ask the California Bar to defer any action until the Texas Bar has completed its case."). Not only did the State Bar wait until the Texas matter concluded, it also waited until the D.C. case concluded. *See* E.R. 325-32.

Although Clevenger chose not to present a full and accurate description of his prior discipline to the State Bar, the State Bar duly investigated Clevenger's prior disciplinary proceedings in Texas and D.C. Thereafter, on April 5, 2017 Defendant Johns sent Clevenger a Notice of Intent to File Notice of Disciplinary Charges based on his past disciplinary actions. *See* E.R. 116. Plaintiff chose to participate in an Early Neutral Evaluation Conference ("ENEC") prior to formal disciplinary charges being filed. *Id*. On April 19, 2017, Defendant Johns

submitted the State Bar's ENEC Statement and a draft Notice of Disciplinary Charges. E.R. 325. These documents summarized the findings of the Texas and D.C. disciplinary proceedings, which included years of filing frivolous, bad faith pleadings in federal courts. The ENEC Statement concluded with a disbarment recommendation. E.R. 332.

On June 9, 2017, formal charges were filed against Clevenger. *See* Appellant's Opening Brief ("AOB"), p. 3, ECF No. 8 at 13. As of an order entered on November 27, 2017, the State Bar Court Hearing Department has ordered the discipline action abated pending resolution of this appeal. AOB, add. 27, ECF No. 8 at 81.

2. Relevant Procedural History in the District Court.

Clevenger filed his complaint in the district court on May 15, 2017. *See* District Court Civil Docket, at E.R. vi. On the same day, Clevenger also requested a temporary restraining order ("TRO") and preliminary injunction. E.R. 10. The next day, the district court ordered an expedited hearing on Clevenger's motion for injunctive relief. The hearing was held on June 1, 2017. Supplemental Excerpts of Record ("S.E.R.") 001. Meanwhile, the State Bar moved to dismiss the case on May 30, 2017, arguing Eleventh Amendment immunity, *Younger* abstention, and failure to state a claim. E.R. 342-62 The district court denied Clevenger's motion for injunctive relief at the hearing, S.E.R. 022, and entered an order to that effect

the next day. E.R. 363. On June 12, 2017, Clevenger filed a motion for discovery. E.R. 383. After a hearing held on July 20, 2017, the district court entered an order granting in part and denying in part Clevenger's motion for discovery. *See* E.R. 436. Specifically, Clevenger was granted a two-hour deposition of Gregory Dresser. *Id.* Clevenger deposed Mr. Dresser on July 28, 2018, after which the parties submitted a Joint Status Report as ordered by the district court. *See* E.R. 437-559. On October 19, 2017, the district court entered its order dismissing the case on *Younger* abstention grounds. E.R. 567-70. This appeal followed. E.R. 571.

VII. SUMMARY OF ARGUMENT

After receiving notice from the State Bar that it would initiate disciplinary proceedings against him for misconduct he had committed in other jurisdictions, Plaintiff-Appellant Ty Clevenger ("Clevenger") came to the district court seeking injunctive relief to avoid suffering further consequences of his actions. In less than six months' time, the district court disposed of Clevenger's case on the basis that abstention was proper under *Younger*. Clevenger appeals the district court's decision to abstain and its denial of injunctive relief. He also complains that sanctions imposed on the State Bar were not the same ones he sought, and finally argues that based on these adverse decisions it is clear that the judge is biased and he needs a new one.

Contrary to Clevenger's first issue on appeal, the district court correctly found that the four-part test articulated in *Younger* is satisfied in this case. State proceedings are currently ongoing, and Clevenger's concerns about his opportunity to litigate federal claims are squarely refuted by recent, binding precedent. Furthermore, Clevenger failed to show that a bad faith exception apply because he his complaint fails to allege sufficient facts, and despite being given the opportunity to take limited discovery, Clevenger was unable to improve the record in his favor.

Clevenger's second issue on appeal essentially repeats the arguments in his motion for injunctive relief. However, the issue is irrelevant because the district court's ruling denying injunctive relief was rendered moot by the subsequent decision to abstain. Moreover, because Clevenger's complaint purports to allege unconstitutional motivations behind the State Bar's decisions to impose discipline, the district court's findings under *Younger* regarding bad faith strongly suggest that there is little likelihood of Clevenger's success on the merits. However, because the preliminary injunction was denied on non-merits grounds, that issue is not properly before this Court.

Clevenger's third issue on appeal, that the district court abused its discretion when it sanctioned the State Bar, ignores the breadth of that discretion. Clevenger

fails to cite any authority to support his complaint that he didn't get the precise sanctions he asked for.

As summarized here and based on the arguments below, the State Bar respectfully suggests that there is no basis for this Court to remand the case for further proceedings. However, if the case is remanded, the State Bar categorically rejects the idea that any reason exists to reassign the case. Clevenger cites no facts or authority to support his request.

VIII. ARGUMENT

A. The district court correctly dismissed Clevenger's complaint under the abstention doctrine articulated in *Younger*.

The district court dismissed Clevenger's case because it found abstention was proper under *Younger*. E.R. 567 ("This order now turns to the fully-briefed motion to dismiss, and specifically to its *Younger* abstention argument."). *Younger* requires federal courts to abstain from exercising jurisdiction where "(1) a state-initiated proceeding is ongoing; (2) the proceeding implicates important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action would enjoin the proceeding or have the practical effect of doing so." *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1091–92 (9th Cir. 2008) (citations omitted). An exception exists if there is a "showing of bad faith, harassment, or some other extraordinary circumstance that

would make abstention inappropriate." *Id.* at 1092 (quoting *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982)).

The district court found that all four requirements for *Younger* abstention exist, E.R. 568-69, and the no exception applies. E.R. 569-70. Clevenger appeals the district court's decision to abstain on three grounds: that the federal litigation had proceeded too far to warrant abstention; that the district court erred when it concluded that no bad faith exception exists; and that State Bar disciplinary proceedings do not provide adequate judicial review to address Clevenger's federal constitutional issues. Clevenger's arguments lack merit. This Court should affirm the district court's ruling.

1. A state-initiated proceeding is ongoing.

When Clevenger instigated the case below, the State Bar had not yet filed formal charges against him. However, those charges were filed less than one month later, and only one week after the district court denied Clevenger's motion for a TRO. *See* E.R. 375 (June 2, 2017 Order denying TRO) and AOB, p. 3 (State Bar's Notice of Disciplinary Charges ("NDC") filed on June 9, 2017).[2]

[2] Notably, a primary reason the NDC was filed after Clevenger's federal suit is that the Rules of Procedure of the State Bar of California allow an attorney subject to discipline to delay the filing in State Bar Court. Rule 5.30 provides:

> Prior to the filing of disciplinary charges, the Office of the Chief Trial Counsel will notify the member in writing of the right to request an Early Neutral Evaluation Conference. Either party may request an

On appeal, Clevenger does not deny that State Bar proceedings are currently ongoing.

Rather, Clevenger argues that, by the time the State Bar filed the NDC, his federal case already constituted "a substantive proceeding on the merits" such that abstention no longer was appropriate. *See* AOB, pp. 23-25. Clevenger's argument relies on a misreading of *Nationwide Biweekly Administration, Inc. v. Owen*, 873 F.3d 716 (9th Cir. 2017), and a misapplication of the principles that case announces. Clevenger attempts to turn what he admits should be a "fact-specific inquiry" into a bright line rule that every denial of a motion for preliminary injunction is a substantive proceeding on the merits *per se* because it is appealable. *Nationwide* is clear that a bright line rule ***does not apply*** to denial of a preliminary

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> Early Neutral Evaluation Conference. A party will have 10 days from the date of service of notice to request a conference. . . . If proper notice is provided, failure to hold a conference will not be a basis for dismissal of a proceeding. A State Bar Court hearing judge will conduct the conference within 15 days of the request.

Cal. St. Bar R. 5.30(a). When Clevenger received the notice of intent to file disciplinary charges on April 5, 2017, he elected to request an ENEC, which did not occur until April 24. *See* AOB, pp. 10-11. The State Bar does not suggest that Clevenger did anything untoward by requested an ENEC, and only raises the issue to show that in any "race to the courthouse," the State Bar's own rules give aggrieved attorneys an insurmountable head start.

injunction. 873 F.3d at 728.[3] Instead, this Court "must conduct a fact-specific assessment of the circumstances" of the case before it. *Id.*

When conducting this fact-specific assessment, "[t]he relevant inquiry, in examining the history of the case, is the extent of the district court's involvement in the merits." *Id.* This Court has considered factors such as "the time that the district court has spent considering the case, any motions ruled on, any discovery, the number of conferences held, and any change in the parties' positions as a result of the federal litigation." *Id.* at 728-29. Such an assessment in this case shows that when the NDC was filed, the federal case had not moved beyond the "embryonic stage."

First, the record shows that the district court did not devote significant time or judicial resources to considering the merits of Clevenger's claims. In *Nationwide*, *Younger* abstention was inappropriate in that case because, "[f]irst, and most important, the district court spent a substantial amount of time evaluating the merits of the cases in considering and denying (in a detailed and reasoned order) Nationwide's motions for preliminary injunctions." *Id.* at 729. As evidence of the time spent, the Ninth Circuit pointed to the district court's twenty-nine and

[3] Clevenger cites in support of his argument the Ninth Circuit's comment that "[i]t would be at least odd to label a case 'embryonic' when it has already progressed to a second level of the federal judiciary." AOB, pp. 24-25 (citing *Nationwide*, 873 F.3d at 730. The Ninth Circuit specifically stated that fact of the appeals had been filed before state proceedings began "does not affect our decisions." *Nationwide*, 873 F.3d at 730.

twenty page opinions denying the preliminary injunctions, the hundreds of pages of submissions the district court weighed when it made those rulings, and the fact that the district court also ruled on a non-*Younger*-related motion to dismiss. *Id.* at 729-30.

There are no similar facts in the instant case. The district court's denial of Clevenger's application for injunctive relief was delivered from the bench at the hearing. *See* S.E.R. 022. And, although Clevenger attached hundreds of pages of exhibits purporting to support his application for injunctive relief, *see* E.R. 10-341, the district court did not cite any of it in denying Clevenger's motion, instead relying on the single factor that it understood State Bar Court proceedings would provide Clevenger with an opportunity to take discovery. *See* S.E.R. 022.

Indeed, the district court had little opportunity to spend any time considering Clevenger's case before the State Bar Court proceedings began. As noted above, it is undisputed that the NDC was filed in State Bar Court less than one month after Clevenger filed his federal complaint and appealed for injunctive relief. By contrast, in *Nationwide* the Ninth Circuit found *Younger* abstention improper because the state proceedings were initiated approximately seven months after the first of two federal complaints was filed. *See Nationwide*, 873 F.3d at 730. During that month, the only non-procedural issue before the district court was Clevenger's application for injunctive relief. *See* E.R. *vi-vii*. No discovery was conducted

before the NDC was filed, no conferences were held, and there was no change in the parties' positions.[4] *See Nationwide*, 873 F.3d at 728-29.

Indeed, Clevenger admits elsewhere in his brief that his federal case had not proceeded beyond the embryonic stage. To bolster his (erroneous) argument that the case should be reassigned if it is remanded, Clevenger asserts, "reassignment would not create ***any waste or duplication*** at this stage in the proceedings." AOB, p. 41 (emphasis added). This statement is at odds with the notion that the district court already had conducted substantive proceedings on the merits, and as such Clevenger's self-serving inconsistency refutes his own argument.

Based on the foregoing, the State Bar respectfully submits that the district court correctly determined that all four of the *Younger* factors were present.

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[44] In contrast to the instant case, the Ninth Circuit has found that *Younger* abstention is inappropriate where the federal proceedings had begun nearly six months before the commencement of criminal proceedings in state court, the district court had denied a motion for a temporary restraining order, four status conferences and hearings had been held, and the Oakland City Council had amended the ordinance at issue in the case in response to the district court's expression of its deep reservations about the ordinance's constitutionality. *Hoye v. City of Oakland*, 653 F.3d 835, 844 (9th Cir. 2011). Here, Clevenger claims that he changed his position because he did not make an interlocutory appeal of the district court's denial of his motion for preliminary injunction. AOB, p. 27. First, the decision not to appeal is not the same as a change of position, such as the one illustrated in *Hoye*. Second, there is no way to verify Clevenger's account, since he filed a motion for discovery within the time period to appeal the June 1 decision. *See* E.R.371. That is, the record indicates that notwithstanding the district court's ruling, Clevenger has never waivered from his position that he is entitled to injunctive relief.

2. Clevenger admits that binding precedent holds that California Supreme Court judicial review is adequate.

The district court considered Clevenger's claim that he would have no opportunity to present his federal claims in State Bar proceedings, and held "[u]nder binding precedent, plaintiff is wrong." E.R. 569. Clevenger admits that this is the state of the law in the Ninth Circuit, but nevertheless asks this Court to overrule binding precedent. Clevenger erroneously argues that "there has been a substantial change in relevant circumstances" warranting such an extraordinary act by this Court. AOB, p. 28. Bizarrely, Clevenger bases this argument on the ***dissenting*** opinions in *In re Rose*, 22 Cal.4th 430, notwithstanding that (1) these are the dissents, and therefore not the opinions adopted by the California Supreme Court, and (2) the Ninth Circuit re-affirmed the constitutionality of California's attorney discipline system only two years ago:

> Although California has altered its attorney discipline procedures since *Rosenthal* to make the Supreme Court of California's review discretionary, this change is not so significant as to create a due process violation. Scheer was still afforded notice, a hearing, a written decision, and an opportunity for judicial review.

Scheer v. Kelly, 817 F.3d 1183, 1189 (9th Cir. 2016).

Moreover, Clevenger's distinction between the *Scheer* decision upholding California's attorney discipline system on a facial challenge and Clevenger's as-applied challenge is an irrelevant one for these purposes. That is because the district court addressed the adequacy of Clevenger's opportunities to litigate

federal constitutional claims in the context of the third prong of the *Younger* analysis, and not with respect to Clevenger's bad faith arguments. *See* E.R. 569.

Clevenger does not allege that the disciplinary system will be applied to him in a procedurally deficient way, but that the choice to impose discipline is itself improper. As such, Clevenger's as applied challenge simply does not implicate the question of whether the structure of California's attorney discipline system affords due process. Put another way, Clevenger does not allege he will not be afforded "notice, a hearing, a written decision, and an opportunity for judicial review." *Id.* He simply thinks he shouldn't have to be subjected to discipline at all.

Based on the foregoing, Clevenger has identified no basis for this Court to overturn what Clevenger admits is controlling precedent.

3. Clevenger failed to show bad faith.

On the record before it, the district court found that Clevenger failed to show "bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate." E.R. 570 (quoting *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose,* 546 F.3d 1087, 1092 (9th Cir. 2008)). On appeal, Clevenger argues alternatively that the district court applied the wrong standard when it relied on the evidence before it—and either should have ruled based on the allegations in the complaint or else permitted

further discovery—or that the district court should have found bad faith based on the record before it. Both arguments fail, as shown below.

a) **The District Court applied the correct standard when it abstained under *Younger*.**

Clevenger wrongly assumes that the district court dismissed his complaint pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6). The district court dismissed Clevenger's claims based on *Younger* abstention. The State Bar raised *Younger* as a jurisdictional issue in its motion to dismiss. *See* E.R. 343. The Ninth Circuit never has held that *Younger* abstention must be considered pursuant to Rule 12(b)(6). *See Courthouse News Serv. V. Planet*, 750 F.3d 776, 779, n.2 (9th Cir. 2014). On the contrary, and consistent with the State Bar's framing of the issue below, the Ninth Circuit has treated *Younger* abstention as "similar to a dismissal under Rule 12(b)(1) for lack of subject-matte jurisdiction." *Washington v. Los Angeles Cty. Sheriff's Dept.*, 833 F.3d 1048, 1058 (9th Cir. 2016). In *Washington*, the issue was whether dismissal due to *Younger* abstention counts as a "strike" under the Prison Litigation Reform Act of 1995 ("PLRA") for purposes of determining whether a prisoner may proceed in forma pauperis in subsequent civil actions after previous cases were dismissed as frivolous, malicious, or for failure to state a claim. *See id.* at 1054. However, the court held that dismissals for *Younger* abstention do not constitute PLRA strikes. *Id.* at 1058. That is, in the Ninth

Circuit dismissal under *Younger* is not akin to a dismissal for failure to state a claim.

Based on the foregoing, Clevenger's complaint that the district court either should have taken as true all of the allegations in the complaint or else converted the State Bar's motion to dismiss into a summary judgment motion, *see* AOB, p. 16, is irrelevant since the district court never was required to apply the standards under Rule 12(b)(6) to the *Younger* abstention portion of the State Bar's in the first place.

In fact, the district court acted in a manner consistent with every case Clevenger cites in which the plaintiff sought a preliminary injunction; it considered evidence to determine whether *Younger* abstention was appropriate.[5] *Lewellen v. Raff*, 843, F.2d 1103, 1110-11 (8th Cir. 1988) (relying on multiple-witness testimony of racial animus to enjoin criminal prosecution); *Wightman v. Texas Supreme Court*, 84 F.3d 188, 190-91 (5th Cir. 1996) (For allegation that the Texas

[5] As the district court held:

> This order finds that plaintiff has not shown "bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate" based on the evidentiary record here. Even when given an extra opportunity to make that showing by taking a deposition of his choosing, plaintiff squandered that opportunity and failed to improve the evidentiary record in his favor. It is time for him to return to state court, where this controversy concerning the disciplinary proceeding against him belongs.

E.R. 570.

State Bar has acted in bad faith and harassed the plaintiff, "more than his allegation is required. He must offer some ***proof***." (emphasis original)); *Cullen v. Fliegner*, 18 F.3d 96, 101 (2nd Cir. 1994) (district court ruling based on stipulated facts); *Wilson v. Thompson*, 593 F.2d 1375, 1377 (5th Cir. 1979) ("Our summary of the facts thus reflects the testimony adduced at the hearing for a preliminary injunction.").[6]

b) **Neither the pleadings nor the evidence support a finding of retaliatory motive.**

The district court found that Clevenger failed to show the requisite bad faith that would make abstention inappropriate. E.R. 570. Nothing in Clevenger's Opening Brief merits a reversal of that finding.

Clevenger's complaint fails to allege facts sufficient to state a claim for First Amendment retaliation, instead relying solely on a *post hoc ergo propter hoc* fallacy. Clevenger fails to allege any facts connecting his supposedly critical blog post to the initiation of disciplinary proceedings against him. Instead, he argues that the mere fact that the discipline came after the blog post and his complaint against State Bar attorneys entitles him to an inference of bad faith. However, Clevenger's argument ignores the first step in the burden-shifting test he presumes

[6] Clevenger also cites *Miofsky v. Superior Court of State of Cal., In and For Sacramento Cty.*, 703 F.2d 332 (9th Cir. 1983); however, he materially misstates the relevant holding. The Ninth Circuit did not find *Younger* abstention improper because of the plaintiff's bad faith allegations, but because the court declined to extend *Younger* to a purely civil state proceeding. *Id.* at 338.

to impose on the State Bar. With specific regard to a First Amendment retaliation claim, the Ninth Circuit recognizes a three-element test:

> [A] plaintiff must show that (1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct.

O'Brien v. Welty, 818 F.3d 920, 932 (9th Cir. 2016) (quotation omitted). If a plaintiff can make this showing, ***then*** "the burden shifts to the government to show that it 'would have taken the same action even in the absence of the protected conduct.'" *Id.* (quoting *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755 (9th Cir.2006)).

Clevenger implicitly admits that the evidence he provided is insufficient to meet his burden as to the third prong when he asks this Court to direct the district court to allow further discovery. *See* AOB, p. 30 ("If, for example, the Plaintiff is going to prove retaliatory animus, then he needs to know who made the decision to file disciplinary charges, and he needs to know ***why*** the decision was made."). Clevenger cannot on the one hand tell this Court he needs discovery to ascertain the State Bar's motive for bringing disciplinary charges against him while on the other hand argue that said motive was already clear in the record before the district court.

On the contrary, the only evidence Clevenger was able to obtain shows that Clevenger's theory is wrong. As Gregory Dresser testified, he was not aware of Clevenger's blogging activity during the relevant time period. E.R. , 486. As such, the district court cannot be said to have erred when it discounted Clevenger's bare allegations as sufficient.

c) **Neither the pleadings nor the evidence support a finding of selective prosecution.**

If it were possible, Clevenger's arguments regarding alleged selective prosecution may be even weaker. That is because Clevenger completely ignores the actual test for selective prosecution, which requires that he show both (1) that others similarly situated have not been prosecuted, and (2) that the prosecution is based on an impermissible motive, *i.e.*, discriminatory purpose or intent. *United States v. Davis*, 36 F.3d 1424, 1432 (9th Cir.1994), *cert. denied*, 513 U.S. 1171 (1995).

Clevenger purports to meet the first prong with his allegations that the State Bar failed to discipline former State Bar employee Cydney Batchelor for allegedly withholding exculpatory evidence. *See* AOB, pp. 22-23. However, Clevenger fails to explain how Ms. Batchelor can conceivably be in a "similar situation" as him. Ms. Batchelor was accused (by Clevenger) of withholding exculpatory evidence during a State Bar disciplinary proceeding against Clevenger's client. This allegation was investigated by the State Bar and dismissed as without merit.

See E.R. 108-10. Clevenger, on the other hand, is being disciplined for years of egregious abuse of the judicial system in other jurisdictions. *See* E.R. 325-29. Clevenger at no time explains what the similarities in the two situations supposedly are.

Clevenger also argues that he is being treated differently than others similarly situated because the State Bar seeks disbarment, despite the fact he is an inactive member of the bar and other jurisdictions chose not to pursue disciplinary action. *See* AOB, at p. 23. Clevenger has never once made a showing that others have been treated differently; instead he simply insists that he already has shifted the burden of proof to the State Bar, even though he has no proof that he has been treated differently.

d) **Clevenger is not entitled to further discovery.**

Citing general principles, Clevenger claims he should have been permitted further discovery. Clevenger ignores other general principles, such as the limitation that "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order." Rule 26(d)(1).

There is no dispute that a Rule 26(f) conference never took place in the case below, nor is there any dispute that the only court-ordered discovery was Mr.

Dresser's deposition. Clevenger also admits that district courts have broad discretion in determining the limits of discovery. *See* AOB, pp.31-32 (quoting *Surfvivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005)). The only reason Clevenger gives for why the district court should have granted him further discovery is his contention that Mr. Dresser testified in bad faith. However, the district court was provided a transcript of the deposition—by Clevenger, *see* E.R.. 438, and specifically found that Clevenger had "squandered that opportunity failed to improve the evidentiary record in his favor." E.R. 570. Clevenger provides no response to this finding, and only reiterates the same criticisms to this Court that the district court found unpersuasive.

B. The district court's denial of Clevenger's application for a preliminary injunction is moot and irrelevant.

The Ninth Circuit has held that when a district court denies a preliminary injunction and also dismisses an action under the *Rooker-Feldman* doctrine and alternatively abstains under *Younger*, "the dismissal renders [the] appeal from the district court's denial of preliminary injunctive relief moot." *Doe & Associates Law Offices v. Napolitano*, 252 F.3d 1026. For this reason alone, this Court should reject Clevenger's challenge to the district court's order denying him injunctive relief.

Such a rule makes sense, because the first factor a court must consider when deciding on a preliminary injunction is the plaintiff's likelihood of success on the

merits. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). However, once the case is dismissed, that is a fairly strong indication that the plaintiff did not, in fact, succeed on the merits. This is especially so, here, where the merits of Clevenger's claims go to the allegedly unconstitutional motivations behind the State Bar's decisions to impose discipline as well as to whether those claims fall into the bad faith exception to *Younger*. That is, the district court ruled on issues that go to the heart of the merits of Clevenger's claims when it found no support for his bad faith claims.

Moreover, the stated grounds for the district court's ruling on the preliminary injunction were expressly ***not*** geared towards the merits of Clevenger's claims or any of the other *Winter* factors, and were obviated by later events in the case. The district court specifically held that its decision was based on the single factor that it understood State Bar Court proceedings would provide Clevenger with an opportunity to take discovery. *See* S.E.R. 022. The district court further held, "And if it turns out not to be true, you may come back and see me and maybe we will give a preliminary injunction at that point." *Id.* That is, the district court set the merits issue aside pending further developments in the case. However, those developments led to the district court abstaining rather than re-visiting Clevenger's preliminary injunction motion. As such, the State Bar respectfully submits that there is no decision to appeal.

C. The district court acted within its discretion when it crafted a sanction against Appellee.

Clevenger complains that the sanction imposed on the State Bar was not harsh enough. He correctly recognizes that authority to craft and impose sanctions is within the sound discretion of the district court. *See*, *e.g.*, *Fink v. Gomez*, 239 F.3d 989 (9th Cir. 2001). Clevenger cites no authority to substantiate a claim that the district court abused its discretion, nor any to suggest that he is even permitted to appeal the issue since he sought sanctions and they were awarded. The State Bar respectfully submits that there is no basis to order the district court to revisit this exercise of its inherent powers.

D. If this case were remanded, there is no reason the Honorable William H. Alsup cannot faithfully and impartially discharge and perform his duties.

Clevenger's request for reassignment on remand is based on the flawed assumption that because the district court did not rule in his favor, that is evidence of hostility towards Clevenger. The undisputed facts are that: (1) Judge Alsup timely notified the parties of his prior professional relationship to individual defendant Gregory Dresser; (2) Clevenger declined to seek Judge Alsup's disqualification despite being invited to do so by the Judge; and, (3) Clevenger's change of heart is evidenced solely by unfavorable rulings and a single allegedly sarcastic comment by Judge Alsup. AOB, pp. 39-40. None of the foregoing suggests an "unusual circumstance" requiring reassignment on remand.

The State Bar has set forth above all the reasons why the district court's ruling should be affirmed. However, should this Court see fit to remand any portion of the matter for further proceedings in the district court, the State Bar has the utmost confidence that Judge Alsup will faithfully and impartially discharge and perform his duties in all respects. Accordingly, even if the case were to be remanded, Clevenger's request for reassignment should be denied.

IX. CONCLUSION

For the foregoing reasons, the State Bar Appellees respectfully request that this Court affirm the district court's decision.

DATED: April 13, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

Undersigned counsel is not aware of any related cases pending in this Court or any other Court.

DATED: April 13, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief is proportionally spaced, has a typeface of 14 points, and contains 6,346 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

DATED: April 13, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed **STATE BAR APPELLEES' ANSWER BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 14, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California this 13th day of April, 2018.

/s/
Marc A. Shapp

ADDENDUM

West's Annotated California Codes
Rules of the State Bar of California (Refs & Annos)
Title 5. Discipline (Refs & Annos)
Rules of Procedure of the State Bar of California (Refs & Annos)
Division 2. Case Proceedings
Chapter 1. Commencement of Proceedings

State Bar Rule 5.30

Rule 5.30. Prefiling, Early Neutral Evaluation Conference

Currentness

(A) Early Neutral Evaluation Conference. Prior to the filing of disciplinary charges, the Office of the Chief Trial Counsel will notify the member in writing of the right to request an Early Neutral Evaluation Conference. Either party may request an Early Neutral Evaluation Conference. A party will have 10 days from the date of service of notice to request a conference. The time is not extended by the method of computing time set forth in Rule 5.28(A). Failure to request a conference within that time is deemed a waiver of the right to request a conference. If proper notice is provided, failure to hold a conference will not be a basis for dismissal of a proceeding. A State Bar Court hearing judge will conduct the conference within 15 days of the request.

(B) Judicial Evaluation. At the conference, the judge must give the parties an oral evaluation of the facts and charges and the potential for imposing discipline. If the parties then resolve the matter in a way that requires Court approval, the Office of the Chief Trial Counsel must document the resolution and submit it to the Evaluation judge for approval or rejection.

(C) Evidence. The Office of the Chief Trial Counsel must submit a copy of the draft notice of disciplinary charges, or other written summary to the judge prior to the conference. The documentation must include the rules and statutes alleged to have been violated by the member, a summary of the facts supporting each violation, and the Office of the Chief Trial Counsel's settlement position. Each party may submit documents and information to supports its position.

(D) Confidentiality. The conference is confidential. A party may designate any document it submits for in camera inspection only.

(E) Trial Judge. Unless otherwise stipulated by the parties, the Early Neutral Evaluation judge cannot be the trial judge in a later proceeding involving the same facts.

Credits
(Adopted, eff. Jan. 1, 2011. As amended, eff. Dec. 21, 2011.)

State Bar Rule 5.30, CA ST RULES OF STATE BAR Rule 5.30
California Rules of Court, California Rules of Professional Conduct, and California Code of Judicial Ethics are current with amendments received through January 1, 2018. California Supreme Court, California Courts of Appeal, Guidelines

for the Commission of Judicial Appointments, Commission on Judicial Performance, and all other Rules of the State Bar of California are current with amendments received through January 1, 2018.

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