DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

ATTORNEY DOE, **Petitioner,** **v.** **OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF THE VIRGIN ISLANDS, and KATHRYN DONNELLY, in her Capacity as Special Designated Disciplinary Counsel,** **Respondents.**	**1:24-cv-00020-WAL-EAH**

TO: Attorney Doe, *Pro Se*
H. Marc Tepper, Esq.
Paul I. Gimenez, Esq.

ORDER

THIS MATTER comes before the Court on a "Joint Motion to Stay All Discovery and Other Substantive Action Pending a Determination of Immunity by the Court and for Postponement of the January 10, 202[5] Conference," filed on November 22, 2024 by Respondents Office of Disciplinary Counsel of the Supreme Court of the Virgin Islands ("ODC") and Kathryn Donnelly, Special Designated Disciplinary Counsel (together, "Respondents"). Dkt. No. 41. The Respondents also filed a Motion for Stay on November 27, 2024, Dkt. No. 43, seeking to stay this Court's October 23, 2024 Order, Dkt. No. 27, that addressed the motion filed by Plaintiff, Attorney Doe, to issue certain summonses. In addition, Respondents filed an "Objection to Ruling of the Magistrate Judge and Motion for Stay and Notice of Jurisdictional Defect," on November 27, 2024, objecting to this Court's October 23, 2024 Order, and seeking a stay of all proceedings that was directed to the District Judge. Dkt. No. 44. Attorney Doe filed a response to the Motion for a Stay, and the Objection to Ruling of Magistrate Judge and Motion for Stay and Notice of Jurisdictional Defect on December 5, 2024. Dkt. No. 52. On December 16,

2024, the Respondents filed "Supplemental Authority in Support of Respondents' Motion for Stay." Dkt. No. 66.

For the reasons that follow, the Court will grant the Respondents' Joint Motion to Stay All Discovery, Dkt. No. 41. This matter will be stayed until the District Judge rules on the Respondents' Motion to Dismiss and for Abstention, that they filed on November 19, 2024. Dkt. No. 35. The Motion for Stay, Dkt. No. 43, will be denied as moot.

BACKGROUND

On September 5, 2024, Attorney Doe, appearing pro se, filed a complaint in this court—styled as a "Petition for Writ Pursuant to 28 U.S.C. § 1651"[1]—against the Respondents. Dkt. No. 1. At issue were three confidential cases currently pending before the ODC[2] involving Attorney Doe (Confidential Case Nos. 2023-13, 2023-18, and 2023-23—the "ODC Cases"). Respondent Donnelly is investigating and administering the ODC Cases as Special Designated Disciplinary Counsel. *Id.* at ¶¶ 1-2.

Attorney Doe alleges that he is a citizen and resident of Texas and, upon information and belief, Respondent Donnelly is not a regularly-admitted member of the Virgin Islands Bar but is acting under a special admission, and is a citizen and resident of New York. *Id.* ¶¶ 1, 2. Attorney Doe asserts that, as a result of Respondents' actions, he has been denied his Fourteenth Amendment due process rights and has suffered damages in excess of $75,000.[3] *Id.* ¶ 4. The court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332 (federal

[1] Title 28, Section 1651 is known as the All Writs Act, and grants courts the power to "issue all writs necessary or appropriate in aid of [our . . . jurisdiction] and agreeable to the usages and principles of law. The remedy is a drastic one, to be invoked only in extraordinary situations." *In re Lall*, No. 24-2538, 2024 WL 4751200, at *1 (3d Cir. Nov. 12, 2024) (internal quotation marks and citation omitted).
[2] The Office of Disciplinary Counsel of the Supreme Court of the Virgin Islands "is a division of the judicial branch of the Government of the Virgin Islands located at St. Croix, United States Virgin Islands." Dkt. No. 1 ¶ 3.
[3] This is the only point in the Petition that Attorney Doe mentions damages. He does not seek damages in his "Wherefore" section. Dkt. No. 1 at pp. 14-15.

question and diversity jurisdiction); 42 U.S.C. § 1983; 48 U.S.C. § 1561, the Revised Organic Act; and "relevant provisions of the Virgin Islands Code." *Id.* ¶ 5. Further, the Court has personal jurisdiction over the Defendants. *Id.* ¶ 7.

With regard to the facts and "underlying proceedings," Attorney Doe alleges that two July 19, 2023 letters from ODC signed by Respondent Donnelly notified him of an April 3, 2023 complaint (case 2023-13) and a May 10, 2023 complaint (case 2023-18), naming him (an Attorney admitted to practice law in the Virgin Islands) as a respondent. An August 8, 2023 letter notified him of a May 17, 2023 complaint (case 2023-23) that also named him as a respondent. *Id*. ¶¶ 10-13. The complainants were all current or former residential neighbors of Attorney Doe in Texas; the complaints concern social conduct that occurred in Texas, and did not suggest any misconduct in the Virgin Islands or connection to the practice of law in the Virgin Islands. *Id*. ¶¶ 15-18. Attorney Doe asserts that the ODC Cases do not support the jurisdiction of the ODC since they did not concern the practice of law in the Virgin Islands but concerned social conduct, unrelated to his legal or ethical conduct. *Id.* ¶¶ 19-21.

The Petition further provides that Attorney Doe's former counsel had spoken to Respondent Donnelly in November 2023 concerning some "additional information" ODC received about a "PPP loan" Attorney Doe allegedly received in connection with his law practice at his Texas residence. Attorney Doe's former counsel responded that none of the complaints filed with ODC involved a PPP loan, the request for further information by the ODC was improper, and the ODC cases should be dismissed. *Id.* ¶¶ 23-25. Attorney Doe's counsel explained that Doe was accredited by the U.S. Department of Veterans Affairs to represent veterans before federal agencies, and could do so from any location in the United States and the Territories; Doe was not a regularly admitted attorney in Texas. *Id.* ¶ 26. Respondent Donnelly thereafter filed a written complaint to the Texas Unauthorized Practice of Law ("UPL") Committee that Doe was practicing law in Texas but was unauthorized to do so—a

communication that was intentionally inaccurate. *Id.* ¶¶ 27-28. In April 2024, the Texas UPL Committee closed its investigation without any action taken. *Id*. ¶ 35. On November 29, 2023, Attorney Doe's counsel submitted a motion for a protective order to the V.I. Board on Professional Responsibility to protect him from the "improper demand for PPP information" by Respondent Donnelly. *Id*. ¶ 29. The motion was granted in part, protecting Doe from compelled disclosure of information about the PPP loan. *Id.* ¶ 32.

As a result of the ODC and Donnelly failing to properly investigate and administer the ODC Cases, Attorney Doe filed in the Supreme Court of the Virgin Islands a Petition in May 2024 to Disqualify the V.I. Disciplinary Counsel, an Amended Petition in June 2024, and a motion for a ruling since neither ODC nor Donnelly had responded. *Id*. ¶¶ 36-38. The ODC, Donnelly, and the Supreme Court have not taken any action to process the ODC Cases. *Id.* ¶¶ 39-40. The ODC and Donnelly's actions constitute bad faith. *Id*. ¶ 41.

As relief, Attorney Doe asks that the district court direct that: all proceedings in this matter be confidential, including the identity of Attorney Doe; that the ODC dismiss the ODC Cases for lack of jurisdiction or, in the alternative, direct that Donnelly be disqualified from investigating and prosecuting the cases; direct that the ODC properly screen and evaluate the complaints and issue a written determination under seal as to whether they include sufficient allegations to raise a reasonable inference of misconduct: if not, that the complaints be dismissed; if the complaints are not dismissed, they should be processed timely and be concluded within three months of the date of the writ. *Id.* p. 14. Finally, the ODC and Donnelly shall provide a copy of all documents received or generated in connection with the ODC Cases within 30 days of the issuance of the writ. *Id.* p. 15.

Eventually, a summons was issued to Gordon Rhea, the Virgin Islands Attorney General and to the ODC. Dkt. Nos. 18, 22. Attorney Doe filed a motion seeing the issuance of summonses to the Administrator of Courts and Governor Albert Bryan, Jr. Dkt. No. 25. On October 23, 2024,

this Court granted the motion in part, directing that summonses issue to the Administrator of Courts on behalf of both the ODC and Respondent Donnelly, but not the Governor. Dkt. No. 27. The summonses were then issued. Dkt. Nos. 28, 29. The Court denied Attorney Doe's motion for reconsideration. Dkt. No. 32.

Attorneys H. Marc Tepper and Paul L. Gimenez filed notices of appearance on behalf of the Respondents, Dkt. Nos. 34, 37.

A. Motion to Dismiss and for Abstention

On November 19, the Respondents filed a Motion to Dismiss and for Abstention, seeking dismissal under Fed. R. Civ. P. 12(b)(1), (2), (4), (5), and (6) or, in the alternative, abstention under the *Younger* doctrine. Dkt. No. 35. They argue that federal question jurisdiction over state law causes of action did not exist because Attorney Doe did not explain what rights conferred by the Constitution or Organic Act were violated. *Id.* at 5-6. Diversity jurisdiction was not applicable because the petition was an attempt to remove the action from the purview of the V.I. Supreme Court and Doe did not meet the burden for such removal. *Id*. at 6.

As to failure to state a claim, Respondents contend that this Court does not have jurisdiction to issue a writ of prohibition or mandamus in this matter, as federal courts lack jurisdiction to direct a state court to perform its duty. *Id.* at 7-8. Further, federal courts lack jurisdiction to compel the actions of judges and judicial employees, and do not sit in review of the Supreme Court of the Virgin Islands. *Id*. at 8, 9. Moreover, the Petition failed to allege a cognizable claim under § 1983 because the relief sought was against the judicial branch. *Id*. at 10. Both Respondents were immune from damages and liability based on quasi-judicial immunity[4] and quasi-prosecutorial immunity. *Id*. at 10-11. In addition, a § 1983 action may be brought against an appropriate officer in his/her official capacity only for prospective

[4] They also argue that the petition is frivolous and should be dismissed on the ground of quasi-judicial immunity. Dkt. No. 35 at 14-15.

injunctive relief; sovereign immunity bars lawsuits seeking damages against Government employees acting in their official capacities; and the ODC and its employees are exempt from injunctive relief because they are not persons under § 1983. *Id.* at 11-13. The V.I. Rules of Professional Conduct also provide immunity from civil suit against any member of the ODC, including the Special Disciplinary Counsel, and those rules have the force of law. *Id*. at 13-14.

The Respondents further contend that the petition should be dismissed for insufficient service of process. *Id.* at 16-17.

Finally, the Respondents assert that, beyond the various immunities prohibiting a ruling against them, the *Younger* abstention doctrine—which provides that federal courts should abstain from addressing ongoing state proceedings that implicate important state interests, where those proceedings afford an adequate opportunity to raise federal claims—should apply. *Id.* at 17-18, citing *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* abstention doctrine pertainss to state criminal prosecutions, civil enforcement proceedings, and civil proceedings involving orders that are uniquely in furtherance of state courts' abilities to perform judicial functions. This case falls into the second and third category and possibly the first, depending on how the quasi-criminal nature of disciplinary actions is viewed. *Id.* at 18. The matter concerns regulating the practice of law in the Territory, which has been the subject of multiple filings in the V.I. Professional Review Committee and Supreme Court. While the *Younger* abstention applies unless there is a showing of bad faith or harassment, the petitioner provides "no evidence of being targeted for unequal or unfair treatment," and does not show that the Virgin Islands Courts could not address his concerns. *Id*. at 19. Respondents seek dismissal with prejudice plus an award of attorney's fees. *Id.* at 20-21.

In his Response to the Motion to Dismiss, Attorney Doe argues that federal question subject matter jurisdiction over the Petition exists, which is in accord with the holding in *Lynch v. Atty. Kathryn Donnelly & Atty. Tanisha Bailey-Roka*, No. 3:24-cv-0043-MAK-GAT, 2024 WL

4819452 (D.V.I. Nov. 18, 2024) (the "*Lynch* Case"); diversity jurisdiction has also been pleaded; the Petition states a claim under Fed. R. Civ. P. 12(b)(6) based on its numerous factual allegations that satisfy the plausibility standard and alleged a cognizable due process claim under 42 U.S.C. § 1983; the Respondents do not enjoy quasi-judicial immunity; and personal jurisdiction exists in accord with the Court's October 23, 2024 Order. Dkt. No. 73 at 1-18. As to whether the district court should abstain on *Younger* grounds, Attorney Doe asserts that Respondents' investigation was "taken without any jurisdiction and without an objective chance of success" as a means to harass him "in retaliation for ongoing challenges by Petitioner to the claimed authority" of the ODC. *Id.* at 19, 21. Those challenges are presently pending "in other courts of this jurisdiction." *Id.* at 21. Further, since the "complained of conduct does not, on its face, implicate any laws of the Virgin Islands or rules of professional conduct," the ODC does not have jurisdiction to investigate his private social conduct, and the investigation has no chance of success. Thus the *Younger* abstention is inapplicable. *Id*. at 21-22.

B. Motion to Stay

In their initial motion to stay, filed on November 22, 2024, in which they also seek to postpone the January 10, 2025 initial conference, the Respondents cite the *Lynch* Case as holding that ODC's Disciplinary Counsel was protected by quasi-judicial immunity, which prompted the district judge to dismiss the claims in their entirety without considering the other defenses raised. Dkt. No. 42 at 2. They note that their immunity defenses have not yet been ruled on in this matter. However, "absolute" immunity is a question of law, and immunity questions should be decided as a threshold matter, prior to taking other actions. *Id*. at 3-4. Thus, they are entitled to dismissal before the commencement of discovery, quoting *Acierno v. Cloutier*, 40 F.3d 597, 604-05 (3d Cir. 1994), that discussed qualified immunity in relation to appellate jurisdiction, and citing *Bennett v. Murphy*, 274 F.3d 133, 136 (3d Cir. 2001), ruling

that qualified immunity questions must be resolved at the earliest possible stage of litigation. *Id*. at 4-5.

Respondents further assert that, in addition to absolute immunity, which serves to protect officials from the potential consequences of a lawsuit, they raised the defense of qualified immunity. *Id*. at 5. In this context, they complain about the "very short" schedule set forth in the Court's November 20, 2024 Order that set an initial discovery schedule and a January 10, 2025 initial conference that will require discovery to begin before the motion to dismiss briefing period ends. *Id.* at 5-6.

The Respondents contend that Attorney Doe's claims are more precarious than those of the plaintiff in *Lynch,* as there is a serious question of jurisdiction under the All Writs Act which should be decided immediately as well. This is because bypassing a decision on immunity or jurisdiction would contravene the admonitions of the Supreme Court and Third Circuit and require the Respondents to engage in "costly and disruptive conduct prior to a decision on the issue of immunity." *Id.* at 6. Thus, continued litigation pursuant to the Court's Order, "would be an implied denial of immunity and is subject to appeal" and would subject the parties to the harm immunity is intended to prevent. *Id*. at 7. In the interest of judicial immunity and in the preservation of Respondents' rights, the January 10, 2025 hearing should be postponed and all related discovery should be stayed. *Id.* at 8.

Attorney Doe filed a "Comprehensive Response to Jurisdiction and Immunity Issues Raised by Respondents re: Joint Motion to Stay All Discovery and Other Substantive Action (Dkt. No. 41, 42), Motion for Stay (Dkt. No. 43), and Motion to Stay (Dkt. No. 44)" on December 16, 2024. Dkt. No. 69. He essentially reiterated his arguments that subject matter and personal jurisdiction existed over this case and that Respondents were not cloaked with immunity because the ODC never had jurisdiction to conduct an investigation of him. Thus, the Motions to Stay should be denied. *Id.*

Also on December 16, 2024, the Respondents filed a "Supplemental Authority in Support of Respondents' Motion for Stay." Dkt. No. 66. They complained that the November 20, 2024 Order setting deadlines for initial discovery disclosures did not comport with Fed. R. Civ. P. 26(a)(1)(C) or 16(b)(1). *Id.* Given that the Court issued that order twelve days after they filed their motion to dismiss, and a Scheduling Order should be issued 60 days after a defendant has appeared, they were not provided with adequate time to file responsive pleadings, which raises issues of due process and fundamental fairness. They were denied an opportunity to raise objections to the propriety of the initial disclosures, particularly since discovery in this matter is "banned by U.S. Supreme Court and Third Circuit precedent pending determination of immunity defenses." *Id.* at 2 (providing no citation to case law).[5] *Id.*

[5] The Court will here address some of the numerous misstatements of the law set forth in Respondents' Supplemental Authority filing. Dkt. No. 66. First, Respondents mischaracterize Fed. R. Civ. P. 26(a)(1)(C), "Time for Initial Disclosure," by stating that the rule "requires initial disclosures be made in conjunction with or 14 days after a Rule 26(f) conference." *Id*. at 1. The Rule actually provides that "[a] party must make the initial disclosures at or within 14 days after the parties' Rule26(f) conference *unless a different time is set by . . . court order*" (emphasis added). In other words, the Court's November 20, 2024 Order setting the deadline for initial disclosures—the Order this Court issues in all civil cases—was permitted by the Rule. Second, the Respondents mischaracterized the November 20, 2024 Order as a Scheduling Order under Rule 16(b)(1) when nothing in that Order could have prompted a conclusion that it was a Scheduling Order. The November 20th Order explicitly stated that the parties should include in their discovery memorandum "*any other issues that the party deems relevant or helpful in considering and establishing the Scheduling Order*." Dkt. No. 36 at 4 (emphasis added). In other words, the Court was soliciting the parties' input for the deadlines to be included in the Scheduling Order, which the Court issues after the initial conference. As to not having an opportunity to object to the "propriety of the initial disclosures," Dkt. No. 66 at 2, Rule 26(a)(1)(C) provides that a party may object during the initial conference that "initial disclosures are not appropriate in this action and state the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosures." In other words, the Rule provides a timeline for objections, which does not comport with Respondents' view of the Rule. Finally, as shown *supra* at page 17, Respondents' statement that "proceeding with discovery in this matter is banned" by governing case law, *id*., overstates the law.

C. Subsequent Filings

On November 27, 2024, the Respondents filed a "Motion for Stay," without supporting memorandum of law, that specifically sought a stay of the October 23, 2024 Order, Dkt. No. 27 (that granted in part and denied in part Attorney Doe's motion for the Court to issue summonses), subject to the "impending Objections of the Judicial Parties and decision of the District Court Judge." Dkt. No. 43. The Respondents did not explain how their initial motion for a stay would not encompass the October 23, 2024 Order that was the apparent subject of this latter motion.

Also on November 27, the Respondents filed an Objection to Ruling of Magistrate Judge and Motion for Stay and Notice of Jurisdictional Ruling," Dkt. No. 44 that, inter alia, requested that the District Judge, "in addition to their earlier request for a Stay. . . [,] direct the Magistrate to Stay the Order or issue a stay itself of the October 23, 2024 Order and all subsequent Orders." *Id*. at 5-6.

The Respondents also filed a Notice of Interlocutory Appeal to the Third Circuit Court of Appeals on December 4, 2024, attempting to appeal the November 20, 2024 Order setting the initial conference and initial discovery deadlines. Dkt. No. 49. They claimed that that Order "implicitly and effectively denied the ODC's and Attorney Donnelly's Motion to Dismiss" based on their various immunity defenses and directed them to participate in the discovery process. Dkt. No. 49.

On December 13, 2024, the Respondents filed a "Motion for Expedited Rulings on Motions to Stay Discovery and the Magistrate's Order Pending a Determination of Immunity." Dkt. No. 63, 64, in which they repeated their immunity arguments and added that their filing of an interlocutory appeal gives the appellate court jurisdiction over this matter. Therefore, "proceeding with discovery and other pre-trial preparations would not only defeat the benefits of immunity but run afoul of that jurisdiction." *Id.* at 3.

DISCUSSION

I. Relevant Standards and Case Law

The Federal Rules of Civil Procedure do not expressly provide for a stay of proceedings. Rule 26 does, however, provide that "[a] party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" Fed. R. Civ. P. 26(c). It is well settled, though, that "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North Am. Co.*, 299 U.S. 248, 254-55 (1936). Matters of docket control and the conduct of discovery have long been "committed to the sound discretion of the district court," *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817 (3d Cir. 1982), including whether to stay discovery, *Ferguson v. USAA Gen. Indem. Co*., 334 F.R.D. 407, 409 (M.D. Pa. 2019) (citing, inter alia, *In re Orthopedic Bone Screw Prod. Liab. Litig*., 264 F.3d 344, 365 (3d Cir. 2001)). That discretion extends to decisions by U.S. Magistrate Judges. *See Harman v. Datte*, 427 F. App'x 240, 243 (3d Cir. 2011) (finding that magistrate judge did not abuse his discretion in staying discovery pending review of motions to dismiss the complaint).

Still, motions to stay discovery "are not favored because when discovery is delayed or prolonged it can create case management problems which impede the court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems." *Worldcom Techs., Inc. v. Intelnet Int'l, Inc.,* 2002 WL 1971256, at *6 (E.D. Pa. Aug. 22, 2002) (internal quotation marks omitted). In addition, a stay of discovery "is not appropriate solely because a motion to dismiss is pending." *Pennsylvania v. Navient Corp.*, 348 F. Supp. 3d 394, 401 (M.D. Pa. 2018)

(internal quotation marks omitted); *see also* LRCi 26.6 (discovery not automatically stayed upon filing of a Rule 12 motion to dismiss).

In this Circuit, when deciding whether to exercise their discretion to grant a stay of discovery after a dispositive motion has been filed, courts weigh four considerations:

> (1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (2) whether denial of the stay would create a clear case of hardship or inequity for the moving party; (3) whether a stay would simplify the issues and the trial of the case; and (4) whether discovery is complete and/or a trial date has been set.

Clarity Sports Int'l LLC v. Redland Sports, 400 F. Supp. 3d 161, 182 (M.D. Pa. 2019) (internal quotation marks omitted); *see also In re Revel Ac, Inc.,* 802 F.3d 558, 565 (3d Cir. 2015); *Vitalis v. Crowley Caribbean Servs., LLC*, No. 20-cv-00020, 2021 WL 4494192, at *1 (D.V.I. Sept. 30, 2021).

In *Ainger v. Great American Assurance Company*, No. 1:20-cv-00005, 2022 WL 3139079, at *7 (D.V.I. Aug. 4, 2022), this Court adopted a "preliminary peek" approach in deciding whether to stay a case pending resolution of a dispositive motion. This involves a preliminary consideration of the potential merits of the dispositive motion and an assessment of whether the motion to dismiss is likely to be granted. Therefore, in assessing the third prong of the stay test, this Court will follow its preliminary peek cases that conclude a stay is warranted only when the defendant makes a "clear and convincing" showing that the motion to dismiss will likely be granted. In the Court's view, this concise articulation emphasizes the high bar a movant needs to overcome in order for its stay motion to be successful. *See Warden v. Tschetter Sultzer, P.C.*, 2022 WL 1487576, at *4-5 (D. Colo. May 11, 2022). The Court subsequently issued numerous orders regarding the factors required for a stay of discovery. *See, e.g., Codrington v. Steadfast Ins. Co.*, No. 19-cv-0022, 2023 WL 2329440 (D.V.I. Mar. 2, 2023); *Mosler v. Cairns*, 19-cv-0007, 2022 WL 3370731 (D.V.I. Aug. 16, 2022); *Rodriguez-Simmiolkjier v. United States*, No. 21-cv-0257, 2022 WL 3226354 (D.V.I. Aug. 10, 2022).

II. Application

A. Preliminary Issues

Respondents purportedly filed an interlocutory appeal from this Court's November 20, 2024 Order, and have argued (not in any of the documents involving the Motion to Stay) that proceeding in this case with an interlocutory appeal outstanding would "run afoul" of appellate jurisdiction." Dkt. No. 64 at 3. They are mistaken.

The statute governing interlocutory appeals, 28 U.S.C. § 1292, sets forth the limited instances in which an otherwise unappealable order may be appealed. Section 1292(a) provides that the Courts of Appeals have jurisdiction over interlocutory orders by district courts that grant or deny injunctions, appoint receivers, or issue decrees in admiralty cases. 28 U.S.C. § 1292(a). As to orders that are not immediately appealable, this court opined in *Smith v. Ostrander*, No. 3:21-cv-0010, 2023 WL 2497859 (D.V.I. Mar. 14, 2023):

> While generally only final judgments are subject to appellate review absent a specific statutory exception, Congress determined that such a rigid rule in all cases might inflict irreparable harm upon litigants in certain instances. Therefore, Congress enacted the narrow exception under 28 U.S.C. § 1292(b) to relieve the harsh consequences of the finality rule. Under Section 1292(b), when an order is otherwise unappealable, a party may still potentially obtain immediate appellate review by seeking a certificate of appealability from the district court. *See id.* Pursuant to Section 1292(b), a district court may certify a non-final order for interlocutory appeal if the order (1) involves a controlling question of law, (2) offers substantial ground for difference of opinion as to its correctness, and (3) if appealed immediately materially advances the ultimate termination of the litigation.
>
> Given that federal law expresses a strong policy against piecemeal appeals, the purpose of 1292(b) was to create a *limited* procedural mechanism for determining the proper governing law where there is a legitimate disagreement among courts with regard to the correct legal principle to apply. Accordingly, the Third Circuit has cautioned that certifications of appealability should be issued sparingly and only in exceptional cases.

Id. at *4 (internal quotation marks, citations, and alterations omitted). The statute further provides that the Court of Appeals, in its discretion, may permit such an appeal if the application is made to it within ten days after the entry of the order. 28 U.S.C. § 1292(b). The statute goes on to say that *"[t]he application for an appeal hereunder shall not stay proceedings*

in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." Id. (emphasis added).

Here, the Respondents did not file a motion either with this Court or the district judge to certify the November 20, 2024 Order for interlocutory appeal. *See United States v. Alsol Corp*., No. 13-cv-0380, 2017 WL 11634556, at * n.4 (D.N.J. Jan. 17, 2017) ("[A] request for permission to file an interlocutory appeal is considered by a magistrate on a report and recommendation unless the parties have consented to magistrate jurisdiction; citing cases that magistrate lacks power to certify order for interlocutory appeal). They did not seek any certification within ten days of the November 20, 2024 Order being issued and, most importantly for purposes of this case, their purported interlocutory appeal does not stay the case, as explicitly provided by the text of § 1292(b). Therefore, this Court rejects their contentions that their interlocutory appeal somehow divests it of jurisdiction to address the Motion to Stay.

Secondly, the Court notes that, in spite of the ample case law from the Third Circuit as well as this Court setting forth the factors that a party must address when seeking a stay of discovery, Respondents' motion contained none of that case law and no argument based on that case law. Rather, they took the opportunity to, once again, set forth their contentions that various kinds of immunity should be given effect (absolute immunity, sovereign immunity, qualified immunity[6]) such that they should be entitled to not only a stay but to dismissal of the petition before the commencement of discovery. Dkt. No. 42 at 4.

Their stay motion also relied on the *Lynch v. Atty. Donnelly* case, where an attorney involved in ongoing disciplinary proceedings before the ODC asked the district court to step

[6] Oddly, despite their statement in their Motion to Stay that they also raised the defense of qualified immunity, Dkt. No. 42 at 5, any mention or argument on the applicability of the qualified immunity defense is nowhere to be found in Respondents' Motion to Dismiss. Dkt. No. 35. Rather, they argued quasi-judicial immunity, quasi-prosecutorial immunity, sovereign immunity, and immunity under the V.I. Rules of Professional Conduct. *Id.* at 10-15.

into ongoing disciplinary proceedings concerning the attorney's alleged violation of the rules of professional conduct. Visiting Judge Kearney issued an Order dismissing that case with prejudice on November 18, 2024 on the ground that quasi-judicial immunity barred any claim for damages and the *Younger* abstention applied such that the court would abstain from entering equitable relief. *Lynch v. Atty. Donnelly*, No. 3:24-cv-0043, 2024 WL 4819452 (D.V.I. Nov. 18, 2024). However, and quite curiously, in their motion to stay in this case, the Respondents did not mention, much less argue, that the court should apply the *Younger* abstention as grounds for granting the motion to stay, despite the *Lynch* Court's reliance on it. The Petitioner's opposition to the motion to stay did not mention the *Younger* abstention either. Attorney Doe simply responded to the immunity arguments, and also argued that subject matter and personal jurisdiction existed such that the Petition should not be dismissed on those grounds.

In the usual case, this Court would deny the Motion to Stay without prejudice based on the Respondents' failure to set forth and apply the governing case law. But, because motions to stay are, at bottom, discretionary determinations based on a court's inherent power to control the disposition of the cause on its docket, *Tyler v. Diamond State Port Corp*., 816 F. App'x 729, 731 (3d Cir. 2020), and because the Court concludes that case law points so unequivocally to the district court abstaining in this case, such that it would be a waste of resources for both the Court and the parties to proceed with discovery, the Court will exercise its discretion and sua sponte address the four stay factors. The parties have sufficiently argued for or against the application of the *Younger* abstention in their Motion to Dismiss filings, such that the Court can properly take a "preliminary peek" as to the positions of the parties on the merits to determine whether the Motion for Stay should be granted, and can assess the other stay factors as well.

B. Whether a Stay Would Unduly Prejudice or Present a Clear Tactical Disadvantage to the Non-Moving Party

This case, filed in September 2024, has barely begun. After Respondents filed a motion to dismiss in November 2024, the Court entered an Order setting deadlines for initial discovery in December 2024, with an Initial Conference in January 2025. Dkt. No. 36. The facts cited by Attorney Doe in his Petition concern relatively recent events, spanning from 2022 to 2024. In *Udeen v. Subaru of America, Inc.*, 378 F. Supp. 3d 330, 333 (D.N.J. 2019), the district court opined that a delay in discovery can be prejudicial to plaintiffs because memories fade and evidence can be lost. But because the underlying events occurred recently, it is unlikely that those problems would impact this case. In addition, a stay of discovery in this Court would have no effect on the speed with which the ODC (or the Supreme Court of the Virgin Islands) may resolve Attorney Doe's proceedings before those bodies. The Court therefore concludes that Attorney Doe would not be unduly prejudiced by a stay and that this factor favors a stay.

C. Whether Denial of a Stay Would Create a Clear Case of Hardship or Inequity for the Moving Party

The Respondents have made it crystal clear, in their motion for a stay as well as in numerous other filings that they believe they should not have to participate in discovery and the case should be stayed pending the district judge ruling on their motion to dismiss because the case law is clear that they are immune from suit. They refer to the burden discovery would impose when various immunity defenses dictate that they should not have to participate in discovery in the first instance. *See, e.g.,* Dkt. No. 42 at 9.

It is important to reiterate that a motion to dismiss does not stay a case. *Navient Corp.*, 348 F. Supp. 3d at 401; LRCi 26.6. A case is not stayed until a motion to stay is granted; until then, discovery proceeds as it would in any other civil case. The fact that a party asserts immunity defenses does not as a matter of course absolve them from having to participate in discovery. *See, e.g., Galarza v. Szalczyk*, No. 10-cv-6815, 11-cv-4988, 2012 WL 627917, at *3

(E.D. Pa. Feb. 28, 2012) (noting that trial courts retain broad discretion in shaping discovery in order to protect against undue burdens of litigation, and finding little risk of undue burden on federal official defendants who asserted qualified immunity defenses in allowing discovery to proceed). Immunity defenses do not necessarily "ban" discovery, as Respondents claim. Dkt. No. 66 at 2. Moreover, defendants (or respondents) "are always burdened when they are sued, and the ordinary burdens associated with litigating a case do not constitute undue burdens." *Warden*, 2022 WL 1487576, at *5 (internal quotation marks, alterations, and citations omitted); *cf. Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) (opining that "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning," do not satisfy burden on movant seeking a protective order).

However, balanced against that point is the fact that, if the Court concludes that the Respondents have made a "clear and convincing showing" on the next stay prong—whether a stay would simplify the issues and trial—such that the motion to dismiss would likely be granted, it would be unfair to subject them to discovery. And given that the Court concludes that the next prong heavily weighs in favor of a stay, this factor does as well.

D. Whether a Stay Would Simplify the Issues and the Trial of the Case

As indicated above, the Respondents' choice of focusing on their immunity defenses as supporting their motion to dismiss and warranting a stay is curious because the *Lynch* case that they heavily rely on ignored those same immunity defenses (except quasi-judicial immunity that would bar damages claims) and instead relied on the *Younger* abstention to provide grounds for dismissing the plaintiff's injunctive relief claims against the ODC's Chief Disciplinary Counsel and Special Disciplinary Counsel. Here, while Attorney Doe mentioned in passing that damages exceeded $75,000, he never sought damages but only sought injunctive relief in his "wherefore clause." Dkt. No. 1 at pp. 14-15. As a result, quasi-judicial immunity (that applies to claims for damages against certain officials) would likely not apply here. But,

upon taking a "preliminary peek" at the merits, the Court holds that, similar to *Lynch*, which parallels this case in many ways, it would be likely that the district court would also rely on the *Younger* abstention to dismiss this case. With the case dismissed, the issues and the trial would not only be simplified, but they would disappear altogether, and this factor weighs heavily in favor of a stay.

In *Lynch*, the district court observed that, despite federal courts' "virtually unflagging obligation" to hear and decide cases within their jurisdiction, pursuant to the guidance provided by *Younger*, such courts should abstain from deciding cases that would "interfere with certain ongoing state proceedings [in order] to promote comity between federal and state governments. And one of those important state interests is maintaining and assuring the professional conduct of attorneys it licenses." *Lynch*, 2024 WL 4819452, at *9. In assessing the applicability of the *Younger* abstention, a district should first determine whether the underlying state court litigation falls within three "exceptional circumstances" as set forth in *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982): "(1) the state proceedings are ongoing in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims." *Lynch,* 2024 WL 4819452, at *9. The Respondents argue that the second and third categories apply, and possibly even the first, depending on how broadly the disciplinary proceedings are construed. Dkt. No. 35 at 19. While Attorney Doe acknowledges that the first two factors apply, he disputes the application of the third category, arguing that the proceedings before the ODC and the Supreme Court of the Virgin Islands "raise serious questions as to whether those proceedings afford Petitioner an adequate opportunity to raise federal claims." Dkt. No. 73 at 20.

The burden is on Attorney Doe to show that "state procedural law barred presentation of [his] claims." *Id.* at *10. But similar to Attorney Lynch, Attorney Doe "offers only conclusory

allegations" and argument. *Id.* In a footnote, Attorney Doe contends that the ODC proceedings were limited to the jurisdiction granted by the Supreme Court of the Virgin Islands, which in turn includes "only violations of the laws of the Virgin Islands and rules of professional conduct," and does not include challenges under the U.S. Constitution. Dkt. No. 73 at 20 n.13. He provides no support in case law or rule for this statement. In any event, the Supreme Court of the Virgin Islands has held in *Matter of Moorhead*, No. 2022-005, 2022 WL 17249670, at *3 (V.I. Nov. 28, 2022) that "i]n the context of ordinary attorney disciplinary proceedings, this Court has held that attorneys subject to disciplinary action are afforded the full measure of procedural due process required under the constitution so that we do not unjustly deprive them of their reputation and livelihood" including notice and an opportunity to respond) (internal quotation marks omitted); *see id.* at * 5 ("Because attorney discipline proceedings, while nominally civil, are quasi-criminal in nature, a lawyer accused of ethical misconduct is entitled to considerable due process protections.") (internal quotation marks omitted); *see also Middlesex*, 457 U.S. at 431 (comity precludes "any presumption that the state courts will not safeguard federal constitutional rights."). Given this case law, it is likely that the district judge would hold that Attorney Doe did not meet his burden to show that state procedural law would bar presentation of his constitutional claims when being adjudicated before the ODC and V.I. Supreme Court.

Attorney Doe argues that, in *Perez v. Ledesma*, the companion case to *Younger*, the U.S. Supreme Court held that federal courts should limit intervention to "cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction." Dkt. No. 73 at 20 (quoting *Ledesma*, 401 U.S. 82, 85 (1971)); *see also Lynch*, 2024 WL 4819452, at *10 ("abstention under *Younger* is appropriate so long as the constitutional claims of respondents can be determined in the state proceedings and so long as there is no showing of bad faith, harassment, or some other extraordinary circumstance that

would make abstention inappropriate."). Here too, Attorney Doe bears the burden of showing bad faith or harassment. *Lynch*, 2024 WL 4819452, at *10.

Attorney Doe contends that abstention is not appropriate because Respondents undertook the investigation and prosecution as a means to harass him "in retaliation for ongoing challenges" he made to the "claimed authority of the disciplinary counsel" that are pending in "other courts of this jurisdiction." Dkt. No. 73 at 21. Specifically, he asserts that the alleged conduct for which he is being investigated concerns "barking dogs" and "slamming trash cans." As such, the prosecution is "without hope of obtaining a valid conviction" because such conduct does not implicate any laws of the Virgin Islands or rules of professional conduct, and therefore ODC does not have jurisdiction to investigate his private social life. *Id.* He goes on to argue that since the content of the ODC complaints does not support ODC jurisdiction, the investigation/prosecution has no chance of success and the federal court should intervene to correct this wrong that cannot be corrected within the Virgin Islands judiciary. *Id*. at 21-22. In his Petition, he also alleged that Respondents' actions constituted bad faith. Dkt. No. 1 ¶ 41. Attorney Doe's position is conclusory, and merely a reiteration of his arguments before the ODC and Supreme Court. He has made no showing that the ODC/V.I. Supreme Court lacks jurisdiction over the complaints filed against him or that they have proceeded in "bad faith." Similar to Attorney Lynch, his claim of harassment and bias is based on his disagreement with the investigation ODC and Attorney Donnelly have been conducting and their refusal to dismiss it "simply because he disagrees with it." *Lynch,* 2024 WL 4819452 at *11.

And similar to the holding in *Lynch* that the injunctive relief sought there ran afoul of *Younger*, this Court concludes that a preliminary peek at the merits of this case leads to the clear conclusion that the district judge would likely rule that the *Younger* abstention applies to Attorney Doe's claims for injunctive relief and would grant Respondents' Motion to Dismiss and For Abstention, Dkt. No. 41. See also Feingold v. Off. Of Disciplinary Counsel, 487 F. App'x

843 (3d Cir. 2012) (affirming lower court's application of Younger to abstain from hearing case against Pennsylvania Office of Disciplinary Counsel); *Silverberg v. DuPont de Nemours Inc.*, No. 23-cv-1868, 2024 WL 1442164, at *8 (E.D. Pa. Apr. 2, 2024) (holding that Younger precludes relief in district court and quoting *Koresko v. Off. of Disciplinary Coun. of the Disciplinary Bd. of the Sup. Ct. of Pa. ex rel. Killion*, No. 14-1154, 2015 WL 1312269, at *3 (E.D. Pa. Mar. 24, 2015) that stated that the U.S. Supreme Court has recognized that "state attorney disciplinary proceedings are exactly the type of proceedings envisioned by *Younger* since they affect 'vital state interests' and 'bear a close relationship to proceedings criminal in nature.' ")(in turn quoting *Middlesex*, 457 U.S. at 432); Abbott v. Mette, No. 20-131, 2021 WL 327375 (D.N.J. Jan. 31, 2021) (magistrate judge recommending motion to dismiss filed by judges and Office of Disciplinary Counsel members). Accordingly, the third factor heavily weighs in favor of a stay of discovery.

D. Whether Discovery is Complete and/or a Trial Date Has Been Set

As indicated above, this Court issued an Order in November 2024 providing deadlines for the parties to exchange initial discovery and setting an initial conference for January 2025. Dkt. No. 36. Because discovery has only barely begun, this factor weighs in favor of a stay. *See Ainger*, 2022 WL 3139079, at *10 (minimal discovery in a case weighs in favor of granting a stay on this stay prong).

CONCLUSION

In sum, all four factors weigh in favor of granting a stay of discovery. The Court therefore concludes that a stay of discovery is warranted pending the district court's adjudication of the Respondents' Motion to Dismiss and for Abstention. Dkt. No. 35.

Accordingly, it is hereby **ORDERED:**

1. The Respondents' "Joint Motion to Stay All Discovery and Other Substantive Action Pending a Determination of Immunity by the Court and for Postponement of the January 10, 2024 (sic) Conference," Dkt. No. 41, is **GRANTED**.

2. Discovery is therefore **STAYED** in this matter pending resolution of the Motion to Dismiss and for Abstention by the District Judge, Dkt. No. 35.

3. The parties are not required to comply with the remaining deadlines in the November 20, 2024 Order concerning initial discovery, and the January 10, 2025 initial conference is **CANCELLED**.

4. The Motion to Stay, Dkt. No. 43, is **DENIED AS MOOT**.

ENTER:

Dated: December 19, 2024

/s/ Emile A. Henderson III
EMILE A. HENDERSON III
U.S. MAGISTRATE JUDGE