IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSEPH MERCOLA, D.O.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05 C 4400
	)	
DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION of the State of Illinois; DANIEL E. BLUTHARDT, Acting Director of the Division of Professional Regulation; and FERNANDO E. GRILLO, Secretary of the Illinois Department of Financial and Professional Regulation,	)	Honorable Judge Holderman
	)	
Defendants.		

DEFENDANTS' RESPONSE TO PLAINTIFF'S PETITION
FOR A TEMPORARY RESTRAINING ORDER AND INJUNCTION

NOW COME Defendants, the DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION of the State of Illinois, DANIEL E. BLUTHARDT ("Bluthardt"), as Acting Director of the Division of Professional Regulation; and FERNANDO E. GRILLO ("Grillo"), as former Secretary of the Illinois Department of Financial and Professional Regulation ("IDFPR"), by and through their attorney, LISA MADIGAN, Attorney General of Illinois, and in Response to Plaintiff's Motion for Temporary Restraining Order state as follows:

INTRODUCTION

The Plaintiff, Joseph M. Mercola ("Dr. Mercola"), is a doctor of osteopathy ("D.O.") and is licensed by IDFPR to practice medicine in Illinois. (Exh. A, p.4). On June 9, 2004, IDFPR

filed an administrative complaint ("Case No. 2001-4904-1") against Dr. Mercola seeking to discipline his license for alleged violations of various provisions of the Medical Practice Act of 1987 ("MPA") based on "the publication of false and potentially harmful medical advice on the web cite [sic] entitled www.mercola.com."[1] (Exh. A, p. 4). More specifically, the administrative complaint alleges that Dr. Mercola published information and/or advertisements on his commercial website making claims of superior care, overstated benefits of treatments, and made claims regarding hair analysis that are refuted by medical studies. (Exh. A, pp. 4-7). On the same day that the Case No. 2001-4904-1 was filed, IDFPR sent notice of a preliminary hearing with a copy of the administrative complaint to Dr. Mercola. (Exh. A, pp. 1-3).

On June 18, 2004, Dr. Mercola's attorney entered an appearance on his behalf in Case No. 2001-4904-1 and filed a motion for extension of time to answer or respond to the administrative complaint. (Exh. A, pp. 8-11). In an order dated June 22, 2004, IDFPR's Chief Administrative Law Judge ("ALJ"), Bettina Gembala, granted Dr. Mercola's motion for an extension of time. (Exh. A, p. 12). Prior to the filing of Dr. Mercola's answer or other responsive pleading, IDFPR filed a three-count amended administrative complaint on August 6, 2004, adding new factual allegations in support of additional violations of the same provisions of the MPA stated in the original administrative complaint. (Exh. A, pp. 13-33). On September 17, 2004, Dr. Mercola filed a "Motion to Dismiss Amended Complaint Based on Affirmative Matters that Avoid the Claims" arguing that (1) IDFPR lacks jurisdiction to assert the claims in the amended administrative complaint, and (2) that IDFPR's administrative proceeding against

[1] Specifically, the administrative complaint alleges violations of Sections 60/22(A)(5) and (10) and 60/26(2-3) of the MPA. (Exh. A, pp. 4-7).

Dr. Mercola "attempts to discipline Dr. Mercola for the exercise of free speech...."[2] (Exh. A, pp. 53-68, at p. 58).

Pursuant to a briefing schedule set by the ALJ in an order dated October 8, 2004, IDFPR filed its response to the motion to dismiss on October 14, 2004, and Dr. Mercola filed a reply to IDFPR's response on December 10, 2004, in which the parties fully briefed the jurisdictional and constitutional arguments asserted in Dr. Mercola's motion to dismiss. (Exh. A, p.69; pp. 70-76, and pp. 77-95). Thereafter, in an order dated January 4, 2005, the ALJ denied Dr. Mercola's motion to dismiss the amended administrative complaint. (Exh. A, pp. 96-87). On February 3, 2005, Dr. Mercola filed a "Motion to Reconsider Order Denying Motion to Dismiss Amended Complaint," which was also denied by the ALJ in an order dated February 18, 2005.[3] (Exh. A, pp. 98-104; 105).

At a status hearing on March 14, 2005, the ALJ ordered Dr. Mercola to answer the amended administrative complaint by April 28, 2005, set a discovery deadline for IDFPR, and continued the matter for status until June 13, 2005. (Exh. A, p. 121). On April 29, 2005–the day after Dr. Mercola's answer was due–Dr. Mercola filed a "Motion for Extension of Time to Answer or Otherwise Plead" that asserted the following as the reason for the necessity of an extension: "[Dr. Mercola] has now decided to explore the possibility of bringing a lawsuit

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[2] Prior to filing the motion to dismiss the amended administrative complaint, Dr. Mercola filed a "Motion to Dismiss Complaint" in response to the original administrative complaint on August 10, 2004, and filed a "Second Motion for Additional Time to Answer or Otherwise Plead" on August 18, 2004, after receiving IDFPR's amended administrative complaint. (Exh. A, pp. 34-48; 49-51). The ALJ granted Dr. Mercola's second request for an extension of time in an order dated August 23, 2004. (Exh. A, p. 52).

[3] Despite the fact that the ALJ's order dismissing Dr. Mercola's motion to reconsider was entered on February 18, 2005, IDFPR filed a response to the motion to reconsider on February 18, 2005, and Dr. Mercola filed a reply to IDFPR's response on March 7, 2005. (Exh. A, pp. 106-112; 113-120).

against IDFPR with respect to its prosecution of this issue, and his attorneys will require additional time to prepare and file the appropriate complaint." (Exh. A, pp. 122-124). The ALJ granted Dr. Mercola's motion for an extension of time in an order dated May 4, 2005, and ordered Dr. Mercola to answer or otherwise plead by June 6, 2005. (Exh. A, p. 125). On June 6, 2005–the day Dr. Mercola's answer was due–Dr. Mercola filed another "Motion for Extension of Time to Answer or Otherwise Plead" that asserted the following as the reason for the necessity of an extension of time: "[Dr. Mercola] is preparing a complaint to be filed in federal court pertaining to this matter, and requires one further extension of time to answer or otherwise plead to the Amended Complaint." (Exh. A, p. 126-127). The ALJ granted Dr. Mercola's second motion for an extension of time in an order dated June 13, 2005, and ordered Dr. Mercola to answer or otherwise plead by July 18, 2005. (Exh. A, p. 128). On July 18, 2005, Dr. Mercola filed a "Request for Bill of Particulars" stating that he "finds the allegations of your Amended Complaint in the above-named cause so wanting in certain details that he is entitled to a bill of particulars...." (Exh. A, pp. 129-135).

Shortly thereafter, Dr. Mercola filed a "Complaint for Injunctive, Declaratory, and Other Relief" ("Complaint"), as well as a "Petition for Temporary Restraining Order and Injunction" and a "Memorandum in Support of Petition for Temporary Restraining Order, Injunction, and Other Relief" (collectively referred to as "TRO Petition") with this Court on August 1, 2005. The Complaint alleges that IDFPR lacks jurisdiction over the content of Dr. Mercola's website, and that IDFPR is violating his First Amendment right to free speech by selectively prosecuting Dr. Mercola based on the content of the speech uttered on his website. (*Complaint,* ¶¶ 30-31; 32-36). The Complaint requests that this Court grant Dr. Mercola declaratory relief, permanent

injunctive relief, compensatory damages (under 42 U.S.C. §1983) in the amount of $75,000, punitive damages in the amount of $100,000, and attorney's fees and costs for both this action and the underlying administrative action. (*Complaint*, ¶¶ A-F). The TRO Petition acknowledges that "IDFPR is the administrative agency...responsible for licensing...physicians pursuant to and in accordance with the Illinois Medical Practice Act..., [and] is also responsible for enforcing state licensing laws...including investigating physicians suspected of having violated the MPA, and conducting disciplinary proceedings against those physicians who are charged by IDFPR with violations of the MPA." (*TRO Petition*, ¶¶ 3-4). Nevertheless, the TRO Petition requests that this Court grant Dr. Mercola "a stay...to prevent the administrative proceedings at IDFPR from going forward until this court has had an opportunity to review the issues of constitutional dimension implicated by said agency action," and to enjoin IDFPR, Defendant Bluthardt, and Defendant Grillo from "all activities relating to the prosecution of Dr. Mercola...," the "[d]issemination of such information, regarding him or the Amended Complaint," and from taking any "[d]isciplinary action revoking, suspending or in any way disciplining Dr. Mercola for any issue or matter related in any way to the underlying action herein, pending the outcome of these federal proceedings." (*TRO Petition*, ¶¶ A-B(1-3)).

STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy that is only granted where there is a clear showing of need. Cooper v. Salazar, 196 F.3d 809, 813 (7th Cir.1999) (citations omitted). As a threshold matter, the movant must show 1) a likelihood of success on the merits, 2)irreparable harm if the preliminary injunction is denied, and 3) the inadequacy of any remedy at law. Id. Once this threshold showing is made, the court balances 4) the harm to plaintiffs if the

preliminary injunction were wrongfully denied against the harm to the defendant if the injunction were wrongfully granted, and 5) the impact on persons not directly concerned in the dispute (the "public interest"). Id.

ARGUMENT

I. PLAINTIFF FAILS TO PLEAD THE REQUISITE ELEMENTS FOR A TEMPORARY RESTRAINING ORDER

1) Plaintiff Does Not Have a Likelihood of Success on the Merits.

All of the claims asserted in the Complaint arise from the underlying IDFPR administrative proceeding against Dr. Mercola, namely Case No. 2001-4904-1. Specifically, the Complaint alleges that IDFPR lacks jurisdiction over the content of Dr. Mercola's website, and that IDFPR is violating his First Amendment right to free speech by selectively prosecuting Dr. Mercola based on the content of the speech uttered on his website. (*Complaint,* ¶¶ 30-31; 32-36). These allegations are identical to the arguments raised in the motion to dismiss and motion to reconsider that Dr. Mercola filed in Case No. 2001-4904-1. Having been thus far unsuccessful in his attempts to have IDFPR's amended administrative complaint against him dismissed, Dr. Mercola now enters the federal arena and asks this Court to preempt the ongoing state administrative proceedings in Case No. 2001-4904-1. Dr. Mercola's claims against IDFPR, Defendant Bluthardt, and Defendant Grillo will not succeed on the merits because the Younger abstention doctrine bars this Court from enjoining the ongoing state administrative proceeding in Case No. 2001-4904-1. Younger v. Harris, 401 U.S. 37 (1971); Barichello v. McDonald, 98 F.3d 948, 954 (7th Cir. 1996).

Younger applies to both state criminal and civil proceedings and may apply where the state is a party to the proceeding. Moore v. Sims, 442 U.S. 415, 423 (1979) *citing* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). "The *Younger* abstention doctrine requires federal courts to abstain from enjoining ongoing state proceedings that are (1) judicial in nature, (2) implicate important state interests, and (3) offer an adequate opportunity for review of constitutional claims, (4) so long as no extraordinary circumstances exist which would make abstention inappropriate." Green v. Benden, 281 F.3d 661, 666 (7th Cir. 2002); citing Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); Majors v. Engelbrect, 149 F.3d 709, 711 (7th Cir. 1998). Here, the Younger factors are all met.

First, the IDFPR's disciplinary proceeding against the Plaintiff judicial in nature. Administrative agency proceedings seeking to discipline individuals or corporations doing business in Illinois are considered judicial in nature under Younger. In Green, the Seventh Circuit found that an ongoing administrative review action in state court challenging an administrative decision to discipline a clinical psychologist satisfied the first criteria for Younger. Green, 281 F.3d at 666. Administrative proceedings have all the attributes of trials, i.e., use of witnesses, right to cross-examination and other procedural guarantees before an impartial hearing officer. And in Pincham v. Judicial Inquiry Board, 872 F.2d 1341, 1346 (7th Cir. 1989) the Court found that a disciplinary action against a judge in the Judicial Inquiry Board and the Courts Commission was sufficiently judicial in nature "as it is a duly constituted entity that exercises the coercive responsibility of ruling upon alleged violations of Illinois Supreme Court rules subject to procedural limitations like those found in courts." The Court based its finding on the fact that the Judicial Inquiry Board conducted an investigation and filed a complaint against Justice

Pincham with the Courts Commission and looked to Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619 (1986) for authority. Id. In Dayton Christian Schools, an administrative agency conducted an investigation into personnel practices and filed a complaint initiating a formal administrative proceeding against the school. In both cases, the proceedings were coercive, not remedial and had the potential to result in disciplinary action taken against the respondents. Id. See Majors v. Engelbrect, 149 F.3d 709, 713 (7th Cir. 1998) (finding administrative proceedings seeking to revoke a nurse's license were sufficiently judicial in nature for application of Younger abstention doctrine.) In the present case, there is no dispute that the disciplinary proceeding is ongoing and it is judicial in nature in that it is coercive and the IDFPR seeks to discipline the Plaintiff's license.

Second, the disciplinary proceeding implicates an important state interest to regulate the medical profession. The nature and the purpose of the Medical Practices Act, 225 ILCS 60/1 et seq., is intended to protect the public welfare, not merely the public health by regulating medical professionals. See People v. Cully, 128 Ill.App.3d 155 at 162 (2ndDist.1997, See also Potts v. IDPR, 128 Ill.2d 322 (1989), where the Illinois Supreme Court said, in considering the Medical Practices Act, that the Act was intended to the protect the public welfare. Younger requires a federal court to abstain when an important state interest is affected in order for the dispute to be decided in the state's preferred tribunal. Nelson v. Murphy, 44 F.3d 497, 501 (7th Cir. 1995) (Citations omitted). The core of the Younger doctrine is to preserve the state's right to litigate completely matters traditionally delegated to states and their respective courts and administrative agencies. It is well established that administrative agency proceedings may be the state's method for protecting an important state interest. See Pincham, 872 F.2d at

1347 (recognizing "the important state interest of preserving a fair and impartial judiciary" through administrative disciplinary action against a judge); Majors, 149 F.3d at 713 (noting "that the regulation and licensing of health care professionals is an important matter of state concern is beyond dispute"); and Green, 281 F.3d at 666 (upholding Younger abstention in part because, "the [Department of Professional Regulation] proceedings implicate important state interests in the regulation and licensing of mental health-care professionals.")

To satisfy the third Younger criteria, "[s]ubsequent judicial review is a sufficient opportunity." Majors, 149 F.3d at 713 *citing* Dayton Christian Schools, 477 U.S. at 629. As in *Green*, where "state-court review of the DPR proceedings constitutes an adequate opportunity for Dr. Green to raise his due process and equal protection challenges," the Plaintiff can raise his First Amendment arguments in the disciplinary proceeding and in the circuit court if he seeks administrative review. Green, 281 F.3d at 666. The Plaintiff cannot choose to litigate some issues before the administrative proceeding and on review and others in distinct federal court litigation. "'When a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that the state procedures will afford an adequate remedy.'" Id. at 667 *quoting* Penzoil Co. v. Texaco, Inc. 481 U.S.1, 15 (1987). A litigant cannot "avoid *Younger* by withholding defenses from the state court proceeding and commencing the federal suit as soon as the state case ends." Nelson, 44 F.3d at 502 *quoting* Huffman v. Pursue, Ltd., 420 U.S. 592, 607-11 (1975).

2) Plaintiff Will Not Suffer Irreparable Harm if the Temporary Restraining Order is Denied.

The Plaintiff speculates that he will be harmed if the underlying administrative disciplinary proceeding is allowed to continue. Most, if not all of the Plaintiff's statements refer to possible outcomes if the Plaintiff is actually disciplined. As of this point in time, the IDFPR has not suspended the Plaintiff, has not ordered the Plaintiff to remove the alleged offending material, nor has there been any actual hearing on the merits on the underlying amended administrative complaint. Setting aside the Plaintiff's speculation of irreparable harm, the Plaintiff will not be irreparably harmed because he has an adequate remedy at law. If the underlying administrative proceeding results in a final administrative decision against the Plaintiff, the Plaintiff will have the option of pursuing administrative review in the circuit court.

3) Plaintiff's Remedy At Law Is Adequate.

The Plaintiff's remedy at law is adequate because state law provides for administrative review in the circuit courts, including Plaintiff's constitutional claims. 225 ILCS 60/41, See also Snell, infra. First, Illinois State law provides the Plaintiff with an adequate judicial review process on administrative review. The underlying action in this case is an administrative disciplinary proceeding filed pursuant to the Illinois Medical Practice Act, Section 225 ILCS 60/22. The Act provides that all final administrative decision are subject to administrative review pursuant to the Illinois Administrative Review Law, 225 ILCS 60/41, which allows the Plaintiff to request administrative review in the circuit court. 735 ILCS 5/3-101 et seq. The Plaintiff thereafter also has an option of seeking appellate review. The Plaintiff cites Ardt v. State, 292 Ill.App.3d 1059 (1st Dist.1997), for the purpose of supporting his claim under the

irreparable harm element. Ardt, however, does not support granting a TRO pending an administrative hearing. Ardt stands for the proposition that the circuit court may issue a stay of administrative discipline imposed after a full hearing on the merits at the administrative level pending the outcome of the circuit court's administrative review of the final administrative decision. Ardt at 1061. If anything, Ardt stands for the proposition that there is no need for federal intervention as the state courts can grant the Plaintiff relief.

Secondly, the nexus of the Plaintiff's complaint and TRO stems from his concern that the IDFPR is constraining his constitutional right of free speech. The Plaintiff is not precluded from raising any constitutional issues in the underlying administrative proceeding. For example in Snell v. IDPR, 318 Ill.App.3d 972 (4thDist.2001), the appellate court found that the Department's prohibition of chiropractor's use of booklet with patient's testimonials constituted a violation of chiropractor's First Amendment rights. In Howard v. Lawton, 22 Ill.2d 331, 333 (1961), the Illinois Supreme Court allowed a direct appeal from the trial court's affirmal of an administrative decision and the constitutionality of a zoning ordinance, thereby avoiding piecemeal litigation. In CBA v. Dept. of Revenue, 163 Ill.2d 290, 297 (1994), the Illinois Supreme Court followed its prior ruling in Howard when it stated the court had long recognized that constitutional issues may be raised in the context of a complaint for administrative review. Finally, the ALJ specifically stated in the February 18, 2005 order that the Plaintiff's freedom of speech issues "go to the defense of the matter at the hearing." Exhibit A, p. 105.

4) The Balance of Harms Weighs in Favor of the Public Interest.

The balance of the harms weights in favor of denying the Plaintiff's request for a TRO. As previously argued, the Plaintiff is entitled to an administrative process that includes judicial

review of the matter. This case, like Snell, supra, and Majors, supra, fits squarely within the Younger principle. Federal injunctive relief on a pending state administrative prosecution is simply not permitted under Younger. Plaintiff will have a full and fair opportunity to raise his federal claims on administrative review in the state court if he is aggrieved at the administrative level. Simply, denying injunctive relief will not harm the Plaintiff as he will have the opportunity to raise his Constitutional issues at the administrative level and, if so aggrieved, in the state courts. The state's interest in prosecuting alleged misconduct at the administrative level would be vitiated where aggrieved plaintiffs rush to the Federal courts at every suggestion of a Constitutional issue.

WHEREFORE, the Defendants respectfully requests that this Honorable Court deny the Plaintiff's motion for temporary restraining order.

Respectfully submitted,

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